

THE JURY AS FACT FINDER AND COMMUNITY PRESENCE

*Report of the 2001 Forum for
State Appellate Court Judges*



ROSCOE POUND
INSTITUTE

~FORUM ENDOWED BY HABUSH HABUSH & ROTTIER S.C.~

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In Memory of

James H. Ackerman (1917-2004)
Secretary and Trustee of the Roscoe Pound Institute
A Staunch Supporter of the Civil Justice System

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Executive Summary

On July 14, 2001 in Montreal, Canada, 100 judges representing 31 states, took part in the Roscoe Pound Institute's Forum for State Appellate Court Judges. Paper writers, panelists, and judges examined the role of the civil jury in America.

Academic Papers

Two legal scholars presented papers addressing different facets of this institution.

- Professor Neil Vidmar, Ph.D. of Duke University Law School, presented a paper titled “Juries, Judges, and Civil Justice.” He began by illustrating criticisms of the reliability of juries, taking as a starting point a celebrated nineteenth century New York criminal case which included the testimony of a medical doctor who had conducted research on the poison suspected of being used in the crime. In part, this testimony led to questions about the reliability of the jury, who were suspected of having been swayed by a polished presentation of “junk science.” Professor Vidmar pointed out that criticism of jury trials is nothing new, and that numerous criticisms continue across a range of issues. He next reviewed a number of empirical studies of jury performance. In addition to considering the jury’s decision-making process in general, he looked particularly at medical malpractice cases and those involving expert witnesses with scientific evidence and concluded that there is ample evidence juries carry out their duties well. Professor Vidmar then reviewed at length the current debate over whether judges are better than juries at reaching rational verdicts, and concluded the evidence indicates both jurors and judges generally reach legitimate conclusions. Finally, Professor Vidmar discussed a number of mechanisms used in recent years to assist jurors in reaching their conclusions, including trial bifurcation, note-taking, and improvements in both preliminary and final jury instructions. These innovations have engendered considerable debate, with some believing they promote accuracy of fact finding, and others seeing them as compromising the adversary system and risking premature jury judgments.
- Professor Stephan Landsman, of DePaul University College of Law, presented a paper titled “Appellate Courts and Civil Juries.” Professor Landsman started by discussing the civil jury’s remarkable longevity as an institution that has come to represent not only good judicial decision making but also participatory democracy itself. Briefly reviewing British and American history, he identified a number of incursions (both attempted and successful) into the jury’s realm, and also acknowledged reforms since the mid-twentieth century that have made modern civil juries far more representative than their predecessors. He then considered why the jury has survived so long and so well. He cited: (a) contributions made by the jury institution to democracy; (b) the importance of a “neutral and passive” fact finder in the traditional American adversarial approach to adjudication; (c) the critical legitimacy that citizen participation confers on judicial decision making; and (d) a number of practical benefits of jury trial. Professor Landsman next analyzed recent trends in the review of civil jury verdicts by both trial

and appellate courts, and identified legal mechanisms that can encroach on the jury trial as an institution. Landsman proposed that appellate review of jury decisions should be “reoriented” so that jury verdicts are presumed to be legitimate. According to Landsman, judgments as a matter of law (JMOLs) should be disfavored, appellate courts should exercise restraint in reviewing verdicts, and courts should protect jury verdicts, as was done by the U.S. Supreme Court in a line of decisions from 1938 to 1968. Finally, Professor Landsman considered several possible future approaches to trial by jury in the United States. The first is to stay on the current course, further diminishing the jury’s role, influence, and significance. The second is to make jurors more “judicial” by bifurcating trials and/or compelling juries to complete extensive verdict forms or lists of interrogatories. A third, and more benign, approach would be to assist jurors in their important work by simplifying courtroom presentations, improving jury instructions, allowing additional proof and argument to help break deadlocks, and inviting jurors to ask questions during trial in open court.

Following the authors’ presentations, the papers were scrutinized by panels consisting of both judges and trial attorneys. After the panelists’ commentaries and responses by the paper presenters, the judges divided into discussion groups to give their own responses to the papers and discuss a number of standardized questions under a guarantee of confidentiality.

Points of Agreement

At the closing plenary session, the discussion group moderators reported that agreement emerged from the dialogue within individual groups, along the following lines:

- More often than not, judges and juries reach the same conclusion about who should prevail in a specific case;
- Juries can understand and evaluate scientific and other expert testimony without giving unwarranted deference to witnesses who demonstrate specialized education and training;
- Juries can and do handle complex cases well;
- Juries generally award punitive damages in appropriate amounts;
- There are numerous practical benefits of jury trials, including better quality decisions, better citizen understanding and appreciation of the workings of the legal system, and community involvement in decisions which support judicial independence;
- Judicial review of jury verdicts in state courts is rare, and overturning of jury verdicts is rarer still;
- The jury trial system works well, but there is always room for innovations like giving early jury instructions, providing jurors with written jury instructions, allowing jurors to ask questions during trial by submitting written queries through the judge, and allowing jurors to discuss the case with each other while it is underway. But such innovations should be

developed by the judiciary, not by the legislative branch of government;

- Mandatory arbitration, mediation, and other mechanisms for non-jury dispute resolution may encroach on the jury trial system;
- The increasing cost of jury trials threatens the institution of trial by jury; and
- Judges respect the jury system both as a vital part of the legal system and as a fundamental institution of democratic government.

Foreword

The Roscoe Pound Institute's ninth annual Forum for State Appellate Court Judges was held in July 2001, in Montreal, Canada. In the tradition of our past Forums, it featured outstanding scholars and panelists who expressed informative insights about the jury system. During the program, judges engaged with these panelists and each other in a thought-provoking and spirited discussion about the role and importance of the jury in our civil justice system.

We recognize that the state courts have the principal role in the administration of justice in the United States, and that they carry by far the heaviest of our judicial workloads. We try to support them in their work by offering our annual Forums as a venue where judges, academics, and practitioners can have a brief, pertinent dialogue in a single day. These discussions sometimes lead to consensus, but even when they do not the exercise is bound to be very fruitful. Our attendees bring with them different points of view, and we make additional efforts to include panelists with outlooks that differ from those of most of the Pound Institute's Fellows. The diversity of viewpoints always emerges in our Forum reports.

Our previous eight Forums for State Appellate Court Judges have examined such important topics such as judicial independence, the scientific evidence controversy, secrecy in the courts, the controversy surrounding discovery, the American Law Institute's Restatement on products liability, the impact of the budget crisis on judicial functions, and the impact on state courts of the Long Range Plan for the Federal Courts. We are proud of our Forums and are gratified by the increasing registrations we have experienced since their inception, as well as the very positive feedback from judges who have attended in the past.

The Pound Institute is indebted to many people for the success of the 2001 Forum for State Court Judges:

- Professor Neil Vidmar, of Duke University Law School, and Professor Stephan Landsman, of DePaul University College of Law, who wrote the papers that started our discussions;
- Our panelists: Honorable John M. Greaney, Honorable Melvin L. Rothman, Honorable Joette Katz, Honorable John C. Bouck, Sharon Arkin, Arthur E. Vertlieb, Wayne D. Parsons, and Gordon Kugler;
- The moderators of our small-group discussions for helping us to arrive at the essence of the Forum, which is what experienced state court judges think about the issues we discussed;
- Meghan Donohoe, former Director of the Roscoe Pound Institute, and her staff for the early development of this program, and the current Pound staff—Marlene Cohen, Kimberly Kornegay, LaJuan Campbell—under the leadership of Dr. Richard H. Marshall, the Institute's Academic Director, who were responsible for the publication and distribution of this report. Thanks also to the Pound law student intern Jeffrey

Rowe for his assistance in preparing the report; and

- Jim Rooks, the Forum Reporter, for his important work in developing the 2001 Forum and co-editing this Forum report with Dr. Marshall.

It goes without saying that we appreciated the attendance of the distinguished group of judges, who took time from their busy schedules so that we might all learn from each other.

We hope you enjoy reviewing this Report of the Forum, and that you will find it useful when considering the vital role that the jury plays in our society.

Larry S. Stewart

President

Roscoe Pound Institute

1999-2001

Richard H. Middleton Jr.

President

Roscoe Pound Institute

2003-05

Introduction

One hundred judges, representing 31 states, took part in the Roscoe Pound Institute's 2001 Forum for State Appellate Court Judges, held on July 14, 2001, in Montreal, Canada. Their deliberations were based on original papers written for the Forum by Professor Neil Vidmar of the Duke University Law School ("Juries, Judges, and Civil Justice") and Professor Stephan Landsman of the DePaul University College of Law ("Appellate Courts and Civil Juries"). The papers were distributed to participants in advance of the meeting, and the authors delivered oral presentations of their papers to the judges. Each presentation was followed by a panel discussion with distinguished commentators, and a break between the morning and afternoon sessions provided time for lunch and a talk conducted jointly by Honorable John C. Bouck, a justice of the Supreme Court of British Columbia, and Honorable Melvin L. Rothman, a justice of the Court of Appeal of Quebec, the highest court of the Province of Quebec.

Responding to Professor Vidmar's paper were Sharon Arkin, a plaintiff lawyer based in Santa Monica, California; Arthur E. Vertlieb, an attorney from Vancouver, British Columbia; the Honorable John M. Greaney, an Associate Justice on the Massachusetts Supreme Judicial Court; and the Honorable Melvin L. Rothman.

Responding to Professor Landsman's paper were Wayne D. Parsons, a plaintiff attorney from Honolulu, Hawaii; Gordon Kugler, an attorney from Montreal, Canada; the Honorable Joette Katz, an Associate Justice on the Connecticut Supreme Court; and the Honorable John C. Bouck.

After each paper presentation and commentary, the judges separated into small groups to discuss the issues raised in the papers, with Fellows of the Roscoe Pound Institute serving as group moderators. The paper presenters and commentators visited the groups to share in the discussion and respond to questions. The discussions were recorded on audio tape and transcribed by court reporters, but, under ground rules set in advance of the discussions, comments by the judges were not made for attribution in the published report of the Forum. A selection of the judges' comments appears later in this Report.

At the concluding plenary session, the moderators summarized the judges' views of the issues under discussion, and all participants in the Forum had a final opportunity to make comments and ask questions.

This report is based on the papers written and presented by Professors Vidmar and Professor Landsman and on transcripts of the plenary sessions and group discussions.

James E. Rooks Jr.
Forum Reporter

Richard H. Marshall
Academic Director
Roscoe Pound Institute

Papers, Oral Remarks, and Comments

JURIES, JUDGES, AND CIVIL JUSTICE

Neil Vidmar

Professor Vidmar's paper is divided into four parts. In Part I, he examines criticisms of the reliability of juries, taking as a starting point a celebrated nineteenth century New York criminal case in which a man was charged with poisoning his wife, stood trial, was found guilty, and ultimately was hanged. The testimony against the defendant included the opinion of a medical doctor who had conducted research on the poison suspected of being used (aconitine) and claimed to be the first person who had been able to detect it in a murder victim after it had entered body tissues. The doctor's testimony led to a major examination of the scientific question by leading U.S. experts, and an unsuccessful campaign to have the sentence reversed on the basis of unreliable evidence. It also led to questions about the reliability of the jury, who were suspected by some of having been swayed by a polished presentation of "junk science" for the prosecution. Professor Vidmar points out that criticism of jury trials is nothing new, and that numerous critiques continue across a range of issues.

In Part II, Professor Vidmar reviews a number of empirical studies of jury performance. In addition to considering the jury's decision-making process in general, he looks particularly at medical malpractice cases and at cases involving expert witnesses with scientific evidence. He concludes that there is ample evidence that juries carry out their duties well.

Part III discusses at length the current debate over whether judges are better than juries at reaching rational verdicts. Professor Vidmar tests the opponents' positions against available empirical evidence on questions of scientific evidence, juror bias, compensatory damages and the collateral source rule and, finally, punitive damages (by contrasting the results of jury simulations and actual jury verdicts). The evidence indicates that jurors and judges generally reach legitimate conclusions.

Finally, in Part IV, Professor Vidmar discusses a number of mechanisms used in recent years to assist jurors in reaching their conclusions, including trial bifurcation, note-taking, and improvements in both preliminary and final jury instructions. These innovations have engendered considerable debate, with some believing that they promote accuracy of fact finding, with others seeing them as compromising the adversary system and risking premature judgments.

I. Questioning Jury Reliability

A Toxicology Case and Jury Performance in the Nineteenth Century: *People v. Hendrickson*

The great toxicology trial of the nineteenth century took place in Albany County, New York in 1853.¹ John Hendrickson was accused of poisoning his wife, Maria, with aconitine, also known as “wolfbane.” The circumstantial evidence was pretty damning. Hendrickson had had numerous liaisons with prostitutes and other women, both before and after his marriage to Maria, and had seriously assaulted one of them, causing him to flee Albany County for many months. The Hendrickson marriage was on the skids. Maria had left him once before because of domestic abuse, and the reconciliation was not working out. She had made arrangements to leave him again and live with her widowed mother. Witnesses testified to his unsavory character. In hindsight, the earlier death of their infant son also appeared suspicious. Albany druggists made tentative identification of the defendant as a purchaser of aconitine and testified that he had inquired about prussic acid, another poison. Additional evidence contradicted Hendrickson’s claim that he woke in the middle of the night to find Maria dead.

The circumstantial evidence, however, was possibly insufficient to gain a conviction, and thus the case turned on a medical expert for the prosecution. James H. Salisbury was only 28 years of age. He held a medical degree, had a medical practice, and had previously testified in two trials involving poisoning. Most important of all, he had conducted research on aconitine. Salisbury testified that the deceased’s intestines contained that poison. Since prior research on aconitine and similar substances in scientific laboratories in the United States and Europe had been unable to detect aconitine once it had entered body tissues, Salisbury was providing novel scientific evidence. Salisbury, however, asserted that he had extracted aconitine from Maria’s intestines and had tasted it and tested it. To double check on his conclusion he fed the remainder of the sample to one of his laboratory cats. (Strikingly, the cat did not die—as it should have under Salisbury’s theory—but that did not change Salisbury’s opinion.) Two other medical experts, including Dr. John Swineburn, also gave evidence in support of Salisbury. Defense experts disputed the findings but, for several reasons, were poor witnesses.

In closing arguments to the jury, a lead member of the prosecution team drew attention to the fact that many prominent members of the Albany medical profession had attended the trial as observers when Salisbury’s controversial testimony was presented in court. None had come forward to refute the prosecution witnesses, thus strongly implying that the findings were generally accepted by the medical and scientific communities. Hendrickson was convicted and was sentenced to hang by the trial judge, Richard P. Marvin. His lawyer appealed.

A Blessing Or a Curse?

The publicity generated by the trial and its verdict soon led to a major examination of Salisbury’s testimony by the scientific community. A leader in this critical analysis was Charles A. Lee, a prominent and influential professor of pathology. In a March 1853 article in the *American Journal of the Medical Sciences*, Lee reviewed the evidence as reported in the trial transcript. He concluded that aconitine could not be detected in the way that Salisbury claimed in his testimony. He also drew attention to the “confident and positive” demeanor of Salisbury and Swineburn as witnesses, in marked contrast to the defense experts who disputed their claims. Lee asserted that it

was probable that their testimony had a greater influence on the jury than “the more careful and judicious testimony . . . of men of age, professional skill and enlarged experience” who testified for the defense. In the final line of his article Lee concluded that the *Hendrickson* case “makes us question, at times, whether the boasted right and privilege of trial by jury be, indeed, a blessing or a curse.”

Through the efforts of Lee and others, the case became a cause celeb among scientists and medical professionals in the United States. Articles challenging Salisbury’s testimony were published in the *New York Medical Journal* and the *New York Medical Times*. By early 1854, an overwhelming majority opinion in the scientific community had developed about the case: (1) Salisbury’s failure to preserve a sample of the key evidence was unforgivable, (2) his methodology was flawed, (3) there were alternative explanations for his findings, and (4) his conclusions were inconsistent with or contradicted by findings of other researchers. In short, the prosecution’s evidence lacked what modern courts would call “scientific reliability”; in fact, it was probably what we would today call “junk science.”

But it was too late. Appellate courts refused to reopen the case. Protests from prominent members of the medical community failed to persuade the governor to grant clemency, and public opinion was strongly against Hendrickson. A last-minute newspaper campaign to sway public opinion failed, and Hendrickson was hanged in the courtyard of the Albany County jail on May 5, 1854.

Civil juries are accused of being pro-plaintiff, anti-defendant, biased against businesses that have deep pockets, and irresponsible and erratic in awarding both compensatory and punitive damages.

Contemporary Criticisms of the Jury

We will return to the *Hendrickson* case shortly, but I want to first use it to draw attention to the fact that criticisms of the jury are not new. The jury in Hendrickson’s trial was accused by Professor Lee of relying on superficial characteristics of the expert witnesses rather than on the substance of the evidence. Lee’s complaint is consistent with contemporary allegations made against juries in amicus briefs submitted in *Kumho Tire Co., Ltd., v. Carmichael* and elsewhere. This argument runs, essentially, “because experts often deal with esoteric matters of great complexity,” and jurors frequently are incapable of “critically evaluating the basis of the expert’s testimony” and too often give “unquestioning deference to expert opinion.”²

Inability to deal with experts is only part of the criticism. Civil juries are also accused of being pro-plaintiff, anti-defendant, biased against businesses that have deep pockets, and irresponsible and erratic in awarding both compensatory and punitive damages. Unfortunately, the arguments used to support these charges are based on anecdotes, cavalier uses of statistics, and appeals to authority or “common sense.” But there is better evidence.

Over the past two decades or so, a group of researchers has gathered systematic data on the performance of the civil jury, through field research, jury interviews, and experiments.

Recently, with my colleague Shari Diamond from the American Bar Foundation and Northwestern University Law School, I have gone even further.³ We have been engaged in a unique project involving videotaping the actual deliberations of 50 civil juries in Tucson, Arizona, in order to examine the effects of some of Arizona's jury reforms. Looking at our research, plus the findings of other researchers, let us see how the anecdote and innuendo involved in claims against the jury stack up against carefully collected empirical evidence.

II. General Evaluations of Jury Performance Regarding Liability

In *The American Jury*,⁴ the classic study of criminal and civil juries, Kalven and Zeisel asked presiding judges in more than 4,000 civil trials to give their professional view of the appropriate verdict in the cases they had heard. Kalven and Zeisel then compared the judges' opinions with the juries' verdicts. They found that judge and jury agreed on the issue of liability 78 percent of the time, an agreement rate that was similar to that found for criminal juries. In the cases where there was judge-jury disagreement, the verdicts were about evenly split between plaintiffs and defendants, contradicting the claim that juries tend to favor plaintiffs. When plaintiffs prevailed, the juries' damage awards were, on average, about 20 percent higher than what the judge would have awarded. In most instances of disagreement, the judges indicated that, even though they would have decided the case differently, the jury's alternative verdict was reasonable.

Of course, the Kalven and Zeisel findings are dated by a half century. In the intervening decades, civil lawsuits and trial evidence may have become more complex, and jury attitudes may have changed. However, there are up-to-date studies whose findings that are consistent with the *American Jury* research. Using a method similar to Kalven and Zeisel, Heuer and Penrod persuaded judges from 33 states to provide them with responses for 67 civil trials, some of which were rated by the judges as complex trials. The judges were asked to provide information about the complexity of the evidence and other information, rate their satisfaction with the jury verdicts and indicate what their own verdict would have been. The rates of judge and jury agreement were similar to those found by Kalven and Zeisel. Disagreements between judge and jury were not related to how complex the judge perceived the evidence to be. Heuer and Penrod concluded that "our data do not support the proposition that judges and juries decide cases differently [or that trial] complexity affects the rationality of jury decision making. . . ."⁵

Another study of 153 civil cases in Arizona by Hannaford et al.⁶ also obtained detailed evaluations of the jury verdicts from the trial judges who heard the same cases. The judges reported that the juries understood the key issues in almost all trials, and that they were generally satisfied with the jury's decisions. Again, the judges' agreement or disagreement with jury verdicts was unaffected by the complexity of the trial or by the number of experts.

Are Medical Malpractice Trials Different?

Medical malpractice trials constitute another category of cases deemed too complex for juries. Doctors in particular have been highly critical of juries. Malpractice trials do have at least two unique aspects. First, the jurors must understand something about the medical condition that brought the patient to the physician in the first place and about the medical procedures used by the doctor. Second, the actions of the doctor or hospital must be judged by a standard of medical care.

In 1992, a committee of the American Medical Association stated that “physicians probably apply the standard [of medical negligence] differently than do juries.”⁷

Taragin et al.⁸ put the AMA assertion to an empirical test. The researchers obtained access to liability insurer files for malpractice claims filed in New Jersey between 1977 and 1992. In each case, whenever a medical “incident” that might constitute malpractice was reported to the insurance company, the insurance company assigned one or more physicians to assess the case for negligence in order to determine if attempts should be made to settle the case or if it should be defended in a trial. Of 8,231 cases in the study, 988 were eventually tried before a jury. Taragin and the other researchers compared the jury verdicts with the consulting doctors’ negligence ratings. The data lend no support to the assertion that juries apply negligence

The data lend no support to the assertion that juries apply negligence standards differently than doctors do.

standards differently than doctors do. Plaintiffs won 24 percent of the cases that went to trial, but the verdicts tended to be consistent with the physician ratings of negligence. That is, in cases in which plaintiffs won, the consultants’ negligence ratings tended to favor negligence or were ambiguous, and in

cases in which the plaintiffs lost, the consultants’ had indicated no negligence had occurred or negligence was uncertain. Severity of plaintiff injury was unrelated to case outcomes—a finding inconsistent with the claim that juries decide malpractice cases out of sympathy rather than legal standards.

Juries and Experts

Although the above findings appear to vindicate the jury in general, they do not directly address the competence of juries faced with complex expert testimony. In a 1973 criminal case, *United States v. Amaral*,⁹ involving an eyewitness identification expert, the Ninth Circuit asserted a belief that jurors may be unduly prejudiced, confused, or misled by expert testimony because of “its aura of special reliability.” That assertion is frequently quoted regarding all kinds of scientific testimony, along with variations:¹⁰

- the jury has an “inclination to give great (and sometimes undue) deference to expert testimony”;
- “an expert frequently ends up ‘confusing’ the jury and effectively ‘take[s] the jury’s place’ if they believe him”;
- “jurors often ‘abdicate their fact-finding obligation’ and simply ‘adopt’ the expert’s opinion”; and
- “[because of the ‘aura of infallibility’] even when jurors have a basis for questioning the expert’s reliability [they] may be disinclined to do so.”

Research findings do not support these assertions. As I reported in my book, *Medical*

Malpractice and the American Jury,¹¹ I conducted interviews with jurors who had just finished serving on juries that had decided medical malpractice cases. The cases involved surgery for urinary incontinence, a brain-damaged baby, a woman who died from a ruptured bowel, a woman who became blind, and a death involving an allergic reaction to a contrast dye. All of the cases involved expert testimony about causation, and all involved battles of experts. In three of the five cases, the verdicts favored the defendants. My interviews with the jurors indicated that the most influential jurors had a basic grasp of the main medical issues and understood the basic points of disagreement between the opposing experts.

In another study of experts, Hans and Ivkovich¹² conducted tape-recorded interviews with 55 jurors who served in civil trials that included medical malpractice, workplace injury, product liability, asbestos, and motor vehicle accidents. The number of experts averaged more than four for each case, and the majority were physicians. Ivkovich and Hans found that, rather than uncritically accepting expert opinion, most jurors appeared aware that the experts were called as part of the adversary process, and, from the outset of the trial, they carefully scrutinized their testimony. The interviews showed that jurors tended to evaluate experts on the basis of credentials, motives, general impressions, and the content and presentation of their testimony. The importance accorded these factors varied from juror to juror, expert to expert, and case to case. The jurors offered their views on what constituted good and bad witnesses. “Good” witnesses were described as good teachers with sound credentials and acceptable motives for offering their testimony. In contrast, there was less agreement as to who made bad witnesses, but the jurors who were interviewed did not ignore or uncritically accept the testimony of experts. Ivkovich and Hans concluded that,

when jurors are faced with the difficult task of evaluating evidence that is outside their common knowledge, they rely on sensible techniques: assessing the completeness and consistency of the testimony and evaluating it against their knowledge of related factors. For especially complex topics, the jury relies on its members who possess greater familiarity with the subject matter of the expert testimony.¹³

These interview studies are generally supported by jury simulation experiments that control variables such as the degree to which the testimony speaks to the ultimate issues, the effects of opposing experts, and cross-examination.¹⁴ While occasionally juries appear to get it wrong, the overwhelming corpus of research findings lead to the conclusion that, at minimum, juries attempt to assess the content of the expert testimony and place it in the context of other trial evidence, as they are instructed to do by the judge.

III. “Let Judges Do It”: The Judge *Versus* Jury Debate

In *Science on Trial*, a book about the breast implant litigation of the last decade, Marcia Angell, who was at that time the executive editor of the *New England Journal of Medicine*, asserted that, in tort cases, verdicts by judges

would certainly be sounder than those made by juries because judges are educated to be dispassionate and to evaluate evidence. Many tort cases involve expert witnesses, who speak to fairly technical matters. To evaluate whether a product has

caused a disease is difficult for nearly anyone. For a jury it is especially difficult, because members usually have no competence in the area. They are often left to make judgments largely on the basis of the emotional appeals of the lawyers and their expert witnesses.¹⁵

The Supreme Court's recent decisions on expert witnesses, starting with the well-known *Daubert* case,¹⁶ have focused on the rules of evidence, and the Court never said directly that it was concerned about the ability of juries to evaluate expert evidence. However, a 1999 decision by the 11th Circuit in *Allison v. McGhan Medical Corp.* asserted that,

[w]hile meticulous *Daubert* inquiries may bring judges under criticism for donning white coats and making determinations that are outside their field of expertise, the Supreme Court has obviously deemed this less objectionable than dumping a barrage of questionable scientific evidence on a jury, who would be even less equipped than the judge to make reliability and relevance determinations and more likely than the judge to be awestruck by the expert's mystique.¹⁷

Daubert, you will recall, was based on a case involving whether the morning sickness drug Bendectin was a teratogen. It was a mass tort and numerous cases had gone to trial. While many juries returned defense verdicts, there were several plaintiff verdicts. We now know that a substantial majority of experts in the scientific community have concluded that Bendectin is not a teratogen.¹⁸ The juries who returned verdicts for plaintiffs have been blamed for their gullibility and confusion in evaluating the expert testimony. In this light, it is useful to return briefly to the *Hendrickson* case.

Judges and Jurors in Agreement: The *Hendrickson* Case Revisited

Hendrickson's trial drew medical and scientific attention to the state of knowledge of aconitine. The opinions of the leading experts that Salisbury was egregiously wrong were developed after the jury's verdict was rendered. The expert evidence, while probably central in this case, was situated in the midst of other evidence bearing on the defendant's guilt. Professor Charles Lee's criticism of the jury ignored the likelihood that if the trial had been conducted by judge alone, the outcome would likely have been the same! In lengthy remarks at the sentencing hearing, Judge Richard Marvin waxed on advances in science generated by the trial: "science advances—as it unfolds to the student the great storehouse of knowledge, and lets man penetrate into the very arcana of nature."¹⁹ He further asserted that science had detected a previously undetectable poison and that it was science that "unerringly" pointed Hendrickson out as the guilty individual. He hoped that the trial would have a salutary effect on public opinion and cut down on the number of murders. "In this day of light," he said, no one could commit murder "without leaving the evidence of guilt."²⁰ "The practitioners and processes of medical jurisprudence would find them out."²¹

A strikingly similar failure to consider how judges might have decided some of the breast implant cases is also evident in Angell's condemnation of the jury in *Science on Trial*. In introducing Chapter 6 on "Science in the Courtroom," Angell utilized a quote from Judge

Procter Hug Jr., of the United States Court of Appeals for the Ninth Circuit, who presided over a three-judge panel in an early breast implant case, *Hopkins v. Dow Corning Corporation*:

Dow's conduct in exposing thousands of women to a painful and debilitating disease, and the evidence that Dow gained financially from its conduct, may properly be considered in imposing an award of punitive damages.²²

The three judges on the panel accepted the testimony of all three expert witnesses who testified on behalf of the plaintiff. Angell's claim, like Professor Lee's in *Hendrickson*, therefore, conveniently ignored the fact that the presiding judge and two other appeal court judges were also swayed by the experts.

There are also interesting parallels between the *Hendrickson* case and the Bendectin cases. At the time of the first Bendectin cases, scientists did not know whether Bendectin was a teratogen or not. Although juries sided with the defendant in many trials, there were some plaintiff verdicts that were endorsed by the judge. However, even after the majority of scientists eventually decided that there was no basis for concluding Bendectin had teratogenic effects, trial judges allowed cases to go to trial.

Scientific Evidence

The claimed superiority of trial judges over juries is at least challenged by a recently completed study by Gatowski et al.²³ The study involved a representative sample of 400 state court trial judges from all 50 states who had dockets likely to include the types of evidence raised by *Daubert*. An important part of the survey was directed toward assessing the judges' understanding of the criteria the *Daubert* court enunciated for evaluating scientific testimony (specifically (a) testing and falsifiability; (b) error rate; (c) peer review and publication; and (d) general acceptance in the scientific community). The judges who were surveyed overwhelmingly endorsed a gatekeeping role for the judge regardless of whether their state followed *Daubert* or the widely-accepted guidelines of the earlier *Frye* case. Sixty-three percent of the judges reported that they had received CLE training about the use of specific types of evidence, but fully 96 percent reported that they had not received instruction about general scientific methods and principles. These findings, however, need to be viewed in the context of how well the judges actually understood the scientific criteria enunciated in *Daubert*.

The claimed superiority of trial judges over juries is at least challenged by a recently completed study.

The *Daubert* Criteria

The first criterion listed by the *Daubert* court was falsifiability—that is, the ability of the expert's theory to be empirically tested against plausible alternative explanations. Eighty-eight percent of the judges asserted that falsifiability was a useful decision-making tool. Nevertheless, when the judges attempted to explain falsifiability, their answers revealed that only 4 percent showed a clear understanding. In fact, 35 percent of the judges gave answers that were unequivocally wrong!

The second *Daubert* criterion was error rate, and 91 percent of the judges surveyed indicated that error rate was a useful criterion. Yet, similar to the falsifiability findings, only 4 percent demonstrated a clear understanding of the concept, while 86 percent gave answers that can be classed at best as equivocal, and 10 percent gave answers that were inaccurate. Judges participating in the survey did much better with the peer review and general acceptance criteria from *Daubert*.

The U.S. Supreme Court has dictated that falsifiability and error rate are often critical to understanding the processes underlying an expert's scientific opinion, but the Gatowski et al. study raises important questions about the ability of judges to evaluate the validity of the expert's methodology. It may be that, when the expert testifies in person and the methodology is placed in its specific context, the judges might exhibit better understanding. But that may be true for jurors as well.²⁴ In any event, the findings offer a challenge to facile assumptions about the competence of judges, relative to juries, to evaluate science.

Two Studies of Juror Bias

Hans Study. Professor Valerie Hans conducted extensive research involving suits against corporations and other business defendants.²⁵ Posttrial interviews with jurors and survey data showed that more than 80 percent believed that there are too many frivolous lawsuits, and only about a third of people were willing to endorse the view that plaintiffs have legitimate grievances. The jurors indicated that their deliberations often centered around the behavior of the plaintiff and speculation about his or her possible motives in bringing the suit, rather than on the behavior of the defendant. In an earlier study, Hans and Lofquist had concluded:

Jurors often penalized plaintiffs who did not meet high standards of credibility and behavior, including those who did not act or appear as injured as they claimed, those who did not appear deserving due to their already high standard of living, those with preexisting medical conditions, and those who did not do enough to help themselves recover from their injuries.²⁶

Vidmar Study. In interviews with jurors who decided medical malpractice cases I found similar attitudes regarding suspicions about plaintiffs and their motives, as well as pro-doctor sympathies. And public opinion polls routinely find that a majority of the public believes that many plaintiffs bring frivolous and illegitimate lawsuits.

It is important in this context, however, to note that, while studies have found no support for the widely held view of critics in favor of tort reform that juries are hostile to corporate or physicians and other health care defendants,²⁷ jurors do appear to respond to corporate litigants somewhat differently than individual defendants. The differential treatment appears to be grounded in jurors seeing distinctive aspects of corporate harm-doing. Jurors appear to judge corporate responsibility by a "reasonable corporation" standard. They assess the resources and abilities of corporations to anticipate and prevent harms as being greater than that of individuals, and they are suspicious of the pecuniary motives that drive business behavior.²⁸

Compensatory Damages and the Collateral Source Rule in Personal Injury Cases

Research has also been conducted on the claim that juries are capricious, unreliable, and overgenerous in awarding damages, especially for pain and suffering. Systematic studies lend little support to these claims. Generally, the amount awarded by juries in personal injury cases is positively related to the severity of the plaintiff's injury. Within categories of injury seriousness, there is often considerable variability. However, a study of a sample of medical malpractice cases in Florida²⁹ assessed other factors that could account for the variability. These included the amount of lost income, the age of the plaintiff, and other factors. The actual economic damages in the sampled cases were estimated by a team of economists. The finding of the study was that when these other variables were taken into account, the jury awards were, on average, consistent with economic losses.

I, too, conducted some experiments³⁰ involving awards for pain and suffering in medical malpractice cases. In these experiments, groups of jurors awaiting jury duty were given a fairly extensive synopsis of the injuries suffered by plaintiffs in actual malpractice cases and were asked to indicate the amount of damages that the plaintiff should receive for pain and suffering. Exactly the same materials were also given to samples of senior lawyers, including some who had been judges.

In short, most jurors reject the collateral source rule (even though almost none of them have ever heard of it).

Lawyers and jurors did not differ in the average award, but the lawyers showed less variability, that is the range of their awards was smaller than the range of the awards given by the individual jurors. However, the difference was only relative: the lawyers differed considerably in their estimates of appropriate awards. Moreover, it must be remembered that jury verdicts are based on

the collective judgment of 12 or six jurors. When I modeled the likely impact of the combined juror preferences, the data showed that, on average, juries would be more likely to have less variability than a single judge deciding alone.

Just-completed analyses of jury deliberations that Shari Diamond and I have conducted in our Arizona jury study are generally consistent with the above findings.³¹ No one will be surprised to learn that we found that juries frequently talk about insurance during their deliberations. What is surprising, however, is the fact that much more time is spent discussing the plaintiff's possible insurance coverage than the defendant's insurance. Arizona jurors are hesitant to award medical costs and lost wages if they are covered by an employer or some other source. In short, most jurors reject the collateral source rule (even though almost none of them have ever heard of it).

Of course, we must recognize that some juries do get carried away and render "outlier" awards. In another study, my colleagues and I traced what happened to outlier awards in samples of medical malpractice cases from New York, Florida, and California. We found that, through *remittitur*, appeal, or settlement, most of these outlier awards were drastically reduced, resulting in the plaintiff actually receiving only a fraction of the verdict, often under 10 percent of the award.³²

Punitive Damages, the Exxon Research, and “Real” Jury Verdicts

Jury Simulations. Punitive damage awards also figure prominently in the debate about civil juries. It is claimed that juries award punitive damages frequently, excessively, and unreliably. In the past few years, a number of studies involving jury simulation research were sponsored in part by the Exxon Corporation during the pendency of its appeal of an extraordinarily large jury verdict for punitive damages.³³ The results were published in the *Yale Law Journal*,³⁴ the *Columbia Law Review*,³⁵ and elsewhere.³⁶ The studies concluded that juries are unreliable in making awards of punitive damages. One of these studies was cited by the U.S. Supreme Court in its recent decision in *Cooper Industries v. Leatherman Tool Group*.³⁷ There are serious problems associated with these studies aside from the problems of generalizing to real juries. Well before *Cooper* was decided, I wrote an article that critiqued one of these experiments,³⁸ and Professor Richard Lempert wrote an article that critiqued another of these experiments.³⁹ We each pointed out major conceptual problems and methodological confounds that render those experiments irrelevant to the punitive damages debate.

Real Juries. In contrast, systematic research of actual jury verdicts contradicts the view that juries award punitive damages routinely. A series of studies by researchers from the National Center for State Courts⁴⁰ and Cornell University,⁴¹ from the RAND Corporation,⁴² and from the American Bar Foundation,⁴³ among others, leads to a number of conclusions: (1) punitive damages are awarded infrequently; (2) while much of the judge versus jury debate has involved personal injury cases, punitive damages are awarded most often in business disputes; (3) the awards tend to be given in cases involving allegations of egregious behavior; and (4) on average, the awards amount to a fraction of the compensatory damages.

Apart from asbestos cases and one cigarette case, there were *no* punitive damages awarded in product liability cases!

In a recent study I conducted with my colleague Mary Rose, we examined punitive damage awards in Florida between 1988 and June 2000.⁴⁴ Florida is often described as having a high rate of punitive damage awards. We found a total of 270 cases with punitive damage awards, for an average of 21 cases per year. Apart from asbestos cases and one cigarette case, there were *no* punitive damages awarded in product liability cases! Almost a quarter of the punitive damages awards involved cases of drunken or reckless driving. The next largest category involved business disputes, followed closely by sexual and physical assaults. Premises liability and *respondeat superior* cases accounted for only about 7 percent of cases. The average punitive-to-compensatory ratio was approximately 0.7 to 1, although it varied by category of case.

The findings from our Florida study are quite consistent with results of other studies. Moreover, our findings show that in Florida, on a per capita basis, the rate of punitive damage awards actually declined from a rate of 2.0 awards per 100,000 persons during the first part of the 1990s, to a rate of 1.1 per 100,000 persons in the last part of that decade.

IV. Efforts At Jury Reform

Although the overwhelming body of research data indicates that juries perform their job well, there are instances when juries could use additional help and the rationality of their decision-making performance could be improved. A number of innovations have been offered to assist the jury. These changes include bifurcated or even trifurcated trials, preliminary instructions, permitting note-taking, and psycho-linguistically improved instructions. The Arizona courts have been the leader in recent jury innovations, and two of their rules have evoked considerable debate, namely, a rule instructing jurors of the right to ask witnesses questions⁴⁵ and another rule instructing jurors that they may discuss trial evidence at breaks during the trial, before the judge instructs them on the law.⁴⁶

Debate about these reforms has involved two opposing sets of arguments. The first set contends that the adversary system will be severely compromised by these reforms and that jurors will reach premature judgments. The second set contends that the rules promote accuracy of fact finding and should take precedence over adversary interests.⁴⁷ In summary, the controversy pits legal commentators who have fears that the jurors will draw conclusions too quickly when they are allowed to discuss the evidence before they have heard all issues against those who believe that fact finding will be enhanced if jurors can attempt to understand the details and contradictions or consistency of evidence while it is fresh in their minds.

Professor Diamond and I and our collaborators are in the process of investigating the effects of these reforms by analyzing deliberations of real juries. In my oral remarks at the Forum, I will sketch some tentative findings from our research—with the caution that tentative findings are just that.

ORAL REMARKS OF PROFESSOR VIDMAR⁴⁸

I would like to begin my talk on juries, as well as a number of other topics, with a story. As you probably know, I am not a lawyer. I often bring that up and say, “Gee, I am not a lawyer, but”

I can, however, go back to my psychology roots and talk about a psychiatrist who had a patient who insisted he was made of stone. The psychiatrist tried everything he could do to try to disabuse this delusional system that the patient had. He tried Freudian therapy, he tried Jungian therapy, cognitive therapies, behavioral therapy, primal scream therapy. He even tried aroma therapy. There was no way he could change this man from his beliefs.

Finally, one day, in a fit of exasperation, he looked at the patient and he said, “Look, do stone men bleed?” The patient paused for a moment and thought reflectively and said, “Why, no.” At that point, the psychiatrist grabbed a letter opener on his desk and stabbed the patient right on the hand. The patient was shocked, looked down, looked at the blood dripping off of his hand, pondered for a moment, looked up at the psychiatrist, and said, “My God! Stone men do bleed!”

In an even more controversial reform, the jurors are actually told that they can discuss the evidence during the trial, rather than waiting for the judge to instruct them on the evidence.

I like to tell that story because it does emphasize, I think, our beliefs in a lot of things and how sometimes our prior beliefs influence the way we look at it.

Every time I talk about juries, and in particular civil juries, I run into it. Whether the side is pro or the side is con toward the civil jury, it is often running into some prior beliefs and expectations. That has been one of the joys of the kind of research that I do, that I can approach this as an agnostic, or at least I try very hard to approach it as an agnostic, with empirical evidence.

In the paper that I wrote and presented for this Forum that is in your materials, I have covered a number of topics. I have covered some issues on the jurors and their dealing with expert evidence. I have covered a topic about jury bias. I have covered another topic about juries versus judges on a number of these matters. Then also about punitive damages. The other final topic that I discussed there is the current work we are doing in Arizona, which is a court-initiated project, not a social scientist-initiated project, attempting to assess the jury reforms in Arizona, particularly two.

One of those reforms is that the jurors are told, as of right, that they can ask questions—which is controversial in many states. In an even more controversial reform, the jurors are actually told that they can discuss the evidence during the trial, rather than waiting for the judge to instruct them on the evidence. That is one of the most controversial reforms, which is why the court initiated the research project that we are doing.

My colleague Shari Diamond, who is at the American Bar Foundation and Northwestern University Law School, and I have just completed collecting data on 50 civil juries in Arizona,

in which we have actually videotaped not only the trial, but the discussions and the actual deliberations. Those data are mostly in the process of being analyzed this summer. It will be awhile before we have got them out. I have a few little comments to make about them, but I am going to reserve those because I was told this morning that I have 15 minutes to make a presentation and then I have a little bit of rebuttal time, and maybe I can get to that, unless the panelists raise some additional questions.

The thing I want to spend my time discussing is a paper called *Punitive Damages by Jurors in Florida: In Terrorem and in Reality*.⁴⁹ Mary Rose, my co-author on this paper, and I were both interested in a number of topics in medical malpractice and product liability trials. We learned that, in Florida, in 1999, there was tort reform legislation that put some constraints on juries in a number of ways, one of these dealing with punitive damages. In the legislative history—I am sure you have all heard this before—a number of issues were raised. Among these were assertions that:

- punitive damages are being awarded frequently, particularly in product liability cases;
- punitive damages in the latter part of the 1990s were awarded with greater frequency in proportionately greater amounts than at the beginning of the 1990s;
- they were awarded in amounts that were both large at an absolute level and disproportionate to compensatory awards, especially in product liability cases;
- Florida employers are frequently held vicariously liable for punitive damages for egregious acts of their employees or for criminal acts by third parties that occur on business premises, even if the business owners have taken reasonable cautions; and
- Florida juries are biased against deep-pocket corporate defendants. This punitive damages crisis puts Florida businesses at a comparative disadvantage to their competitors.

The last assertion is actually very much related to the “in terrorem” argument, and that is that juries award punitive damages and this terrifies businesses, even when they are just anticipating the problem.

Well, Mary and I decided to look at punitive damages in Florida. We went to the Westlaw Reporter because it turns out that Florida is a very interesting state. It actually has a pretty comprehensive compilation of the cases. So, one of the first things we did was to take a pretty comprehensive look at punitive damages from 1988 through 2001.

Now, I have written a couple of articles on verdict reporters. When you start messing around with verdict reporters, you find that they are often very biased. That is, they over-report the large awards and under-report the defense verdicts and the low awards. In Florida they appear to be pretty comprehensive, but if there is any sort of a bias in our data, it would appear to be against some low awards in this matter. For our purposes here, even though we looked at some cases, I don't know if it was fully comprehensive, and the data were *not* comprehensive in the latter part of 2000 and 2001.

In this first part, what we have got in **Table One**⁵⁰ is a look at the number of awards in Florida involving punitive damages. It turns out that there are about 23 punitive awards per year in Florida, and that is over this period of time. One of the things you can ask, however, is whether they have actually increased over time.

Table One

Year	Number of Cases	Number with Non-Zero Awards	Median Ratio
1989	32	27 (84%)	0.46:1
1990	27	26 (96%)	0.17:1
1991	28	25 (89%)	0:83:1
1992	22	19 (86%)	0.52:1
1993	21	19 (90%)	0.55:1
1994	27	26 (96%)	0.93:1
1995	15	13 (87%)	0.92:1
1996	17	17 (100%)	1.13:1
1997	21	17 (81%)	0.40:1
1998	22	19 (86%)	0.90:1
As of 1998	23.2/year	20.8/year	0.67:1

One of the things we looked at was the punitive damages relative to the population increase from 1989 up through 1998. It turns out—and I won't go into the details, some of them are reported in the paper—in the early part of the decade, there were about two awards per 100,000 population in Florida. Because Florida's population has increased, at the end of the decade you have 1.1 per 100,000 population of punitive awards. In fact, the data actually suggest that punitive damage awards relative to the population have actually gone down.

Now in **Table Two**,⁵¹ the thing that I have tried to do there is just pull out a couple of examples for you. One of the things that Mary and I did was go through with varying categories. We independently categorized these cases based on the main basis of the claim. What you will find on this slide is that the most frequent use of punitive damages involves reckless or drunken driving cases, 24 percent of the cases. The others are in smaller categories.

The two things I want to point out are that (1) in product liability there were 20 punitive damage awards over the total period of almost 12 years and (2) in premises liability there were 17. This is total. We are not talking about per annum. We are talking about total over 12 years.

Table Two

Category	Number of Cases	Percent of Totals
Motor vehicle accidents/impaired drivers	63	23.3
Fraud, financial losses	47	17.4
Assaults (physical and sexual)	43	15.9
Products liability	20	7.4
Information violations	20	7.4
False imprisonment/false arrest	20	7.4
Premises liability	17	6.4
Discrimination/harassment	13	4.8
Professional negligence (medical care)	12	4.4
Workplace injuries/failure to pay benefits	11	4.1
Improper treatment of dead persons	4	1.5

The other thing that I will tell you about the product liability cases, there was one cigarette case and all the others were asbestos cases. There was not a single product liability case that we uncovered in this data set that dealt with anything other than asbestos or cigarettes. I didn't even believe my data when I first uncovered these, and we went back and did some additional searches to uncover them.

When it comes to premises liability, there are some, but let me just give you a couple of examples. In one case, a manufacturing plant had been illegally dumping toxic chemicals into a trash dumpster on property that was located near a residential neighborhood. The company had previously been cited for this behavior and claimed to have ceased. Then a 9-year-old boy was killed after playing in the dump. He was overcome by the toxic fumes. In another case involving exposure to toxins, the captain of a cargo ship had a dangerous situation. He called firemen. He got his own men out, but one of the firemen was overcome. The captain hadn't warned the firemen about it, and the fireman died.

In a number of other cases that were premises liability, they were the standard ones. You know, we can't tell what the jury saw, we can't tell that from these data, but they seemed pretty reasonable. They threw a party on their horse ranch and served minors alcohol, and so forth. In fact, as we look at all these premises liability cases, what we find is that, at least on the surface, they seem like a jury could at least have drawn a reasonable conclusion that punitive damages were warranted.

Table Three

Type of case	N cases	Median Total Award	Median Punitive Award	Pun:Comp Ratio (median)
Motor vehicle accidents	63	284,736	21,579	0.1:1
Fraud, contract violation, and other financial damage cases	47	392,158	318,055	1.0:1
Assaults	43	221,461	59,832	0.4:1
Products liability	20	2,245,635	666,936	0.8:1
Information violations (privacy, slander, defamation, libel)	20	191,264	108,530	1.1:1
False imprisonment/false arrest	20	234,752	139,814	0.4:1
Premises liability	17	933,660	200,081	0.5:1
Discrimination/harassment	13	1,344,841	1,030,530	2.3:1
Professional negligence	12	3,078,133	1,006,172	2.5:1
Workplace injuries/failure to pay benefits	11	317,260	71,820	0.5:1
Other: Improper treatment of dead persons	4	3,434,572	3,052,075	6.3:1
Overall	270	612,028	151,871	0.7:1

The other part that we want to deal with is to look at the compensatory-to-punitive ratio. Looking at **Table Three**⁵² what you find is that, overall, the compensatory-to-punitive ratio is actually pretty low in almost all these cases. Of course, they vary by category. There is some considerable variation in those. What you find is that these claims about the really excessive cases, if you look at the median awards, they are very modest, actually under one-to-one ratios.

Finally, that is not to say that there are not some very large awards. **Table Four**⁵³ indicates that there were some whopping big awards. But, when we investigated further, we found out that in at least half of those whopping big awards, the defendant was already bankrupt or was unrepresented by a lawyer, and a number of other things. In fact, you have a very small percentage of actual punitive awards that were likely collectible in these instances. Then the others, in fact, we don't know. They are probably going to end up being settled. One of the

Table Four

Plaintiff	Total Award	Punitive Award	Description
Perez	542,650,919	325,590,551	Illegal disposal of toxic chemicals; child died
Chipp	77,097,948	76,018,150	Insurance coverage breach disabling child
Palank	57,855,300	51,526,480	Train accident/tracks not maintained
Intl. Ship Repair	43,676,246	41,221,184	Insurance coverage breach, floating dry dock sunk
Ballard	33,847,745	31,946,417	Asbestos
Read	33,993,252	30,441,718	Crematorium gave back mix of ashes
Scheller	25,621,292	25,489,506	Interference with a doctor's medical practice
Van Dyk	28,615,917	22,892,734	Escaped convict shot patron in bar (award is against shooter only)
Rawson Food	32,996,112	22,370,245	Investment banking negligence
Montenegro	23,073,421	18,215,859	Civil suit following a murder conviction
Dudley	21,495,304	16,740,891	Asbestos
Ferguson	17,683,535	16,150,962	Tortious interference in a van line business
Goldberg	12,509,680	12,123,008	A doctor sexually harassed an employee
Caron	13,596,320	11,789,024	Employee fell to his death during roof installation
Wheeland	20,603,460	11,446,367	A woman infected her husband with HIV
Lowell	13,129,242	10,123,948	Asbestos
Collins	11,641,556	9,683,841	Patient-on-patient assault/sexual abuse in a nursing home
Anderson	7,719,510	7,592,961	Maritime accident/exposure to toxic gas
Montalvo	13,244,682	6,595,706	Horse ranch agreed to party in which minors were served alcohol; plaintiff beaten/died
Cruz	12,950,431	6,475,216	Civil suit following a murder conviction

articles that Mary Rose and I wrote earlier on this topic⁵⁴ showed that a very small percentage of the actual punitive award actually ends up going to the plaintiff.

In fact, in New York, when we were looking at medical malpractice and other cases with the whopper awards, it turns out that usually the plaintiff ended up collecting about 8 to 10 percent of these mega-awards in actual fact. So, we have a number of things that are working in that instance.

This is a very brief overview of some of the data that we have. As I said, that article will be coming out soon. I think at least my conclusion to you overall is that, in many of these claims, as we so often find about product liability and medical malpractice cases—my book on medical malpractice was very consistent with this—the jury actually is, in my view, a victim of slander and defamation, because it just isn't supported by empirical evidence when we begin to look at it.

We hear about the McDonald's coffee cup case⁵⁵ and everybody throws up that anecdote, or when we talk to doctors, after I did my book on medical malpractice the thing would be, "Yes, but I know this doctor . . ." I say, well, you know, maybe there is the one doctor, but let's talk about what juries do overall. Most of the empirical research that has been undertaken ends up suggesting that juries are pretty sensible—even in awarding punitive damages.

COMMENTS BY PANELISTS

Sharon Arkin, Esq.

Arthur E. Vertlieb, Esq.

Honorable John M. Greaney

Honorable Melvin L. Rothman

Larry Stewart (Moderator)

Often, civil justice issues—not just punitive damages, but all the issues surrounding the civil justice system—are debated on the basis of anecdotal stories. We at the Roscoe Pound Institute have long believed in the importance of empirical research to bring clarity to these issues. I think the information that we have just heard is an example of the importance of having the empirical data to see what is really happening.

Sharon Arkin

I want to echo what Larry said, about having the empirical data to back up what the common perception is about the jury system, and all the legal issues that we deal with. It astonishes me that social scientists like Professor Vidmar can take apart an issue and figure out how to get empirical

Jurors bring kind of community common sense to the examination of the question. I think that is the most important service that the justice system can get from the jury—that collective wisdom.

data on it. We are dealing with very amorphous issues, and we are dealing with very emotional, gut-level, common-sense issues, and those, to me, are very hard to validate on a scientific basis. It is refreshing to see that what we, as trial lawyers, see, and what you, as trial judges, see, and appellate judges see, can be parsed and the stereotypes can be examined.

One thing I would like to ask is, how many people in this room have actually served on juries? Would you raise your hands? It appears to be maybe 10 percent. In college—I am dating myself here—I turned 18 just as the law was changed and 18-year-olds were allowed to vote. So, I got to vote right out of high school and, in my second year in college, I got called for jury service. I think actually serving on a jury is an extraordinarily profound experience. It really educates you. It teaches you a lot about what goes on.

I think if you look into it, you find out how seriously jurors take their duties. They really believe in the system. They take their responsibilities extremely seriously. They try really hard to do a good job. Sometimes they struggle with it. I believe that, in the complex cases, they sometimes become overwhelmed. They try to do a good job and they apply a sense of community.

Jurors bring kind of community common sense to the examination of the question. I think that is the most important service that the justice system can get from the jury—that collective wisdom. Both from my own jury service and from trying cases, I have found that juries have remarkable common sense. You can't fool juries very easily. You might be able to fool one or two people on a jury, but as a collective body, you are not going to kid them about anything. I think that is the greatest value they have to the judicial system. They can tell the liars from the truth tellers.

One aspect of Professor Vidmar's paper that, to me, was very valuable, was learning that attacks on the jury system are not new. This is not something that has arisen just in the last decade. There have always been attacks by people who don't want juries.

But think about that question. Who is it who doesn't want a jury, and why don't they want it? Collectively, juries are neutral. They are not biased. Of course each person comes into the jury room with their own private biases, their own prejudices, their own preconceptions. But on a whole, when they get into that room together and they are trying to decide an issue, those get set aside, or at least they get brought up and debated. People talk about, "Well, I think this and I don't think that," and their prejudices get disclosed. Because they get disclosed, they can be addressed by the other people in the room, and that is a really important function. The people who *don't* want juries are the people who don't want the truth to get out. That is the real heart of the jury system.

Another aspect of Professor Vidmar's paper that I thought was very interesting, and part of the analysis that he showed you here today, was that the punitive damages awards, at least in Florida, were in large part, first, for the drunk driving situations, but second, were business disputes. The "in terrorem" concept that businesses don't want punitive damages is not really representative, because businesses *ask* for punitive damages when they sue other businesses. And businesses *get* punitive damages in their lawsuits, *more* than in product liability, *more* than in premises liability, *more* than in malpractice. So that has to be taken into account when the jury system and the punitive damages system is being attacked. I think Professor Vidmar's analysis on that is very important to keep in mind.

Also, I think the whopping big punitive damages awards that Professor Vidmar referenced need to be put into perspective. Not only are they reviewed by appellate justices and supreme court justices, and balance is brought to the system that way, but oftentimes what you have to remember is that the largest awards are made against the richest corporations and the richest defendants. Unless the awards are large enough to make it no longer profitable to engage in that conduct, that conduct won't change, and the purpose of punitive damages will be undermined.

So, when you are looking at these jury awards, you have to keep that perspective in mind.

Arthur E. Vertlieb

I don't want to just echo what Dr. Vidmar said, but the fact is that we in Canada are very much dependent upon the American energy, when it comes to developing the kind of scholarship that we have seen from this paper and other papers.

There is no place in Canada where a civil litigant has an absolute right to trial by jury. There are different procedural approaches in the different provinces, but there is no general right to a jury trial of a civil case. Most of the provinces do not have civil juries at all, and there is really very little of it being done in Ontario, as far as we can tell from where we are, out in British Columbia. We think probably the most aggressive civil jury system in Canada is in British Columbia, where I practice. Because of the work that we have done with juries in British Columbia, and primarily because of the ATLA influence and the work that ATLA members have done to educate lawyers in British Columbia about the advantages of the jury system, we have had to deal with the kinds of criticisms that we have read in Neil Vidmar's paper.

One of the things that happens in British Columbia is that the judges have discretion to decline to allow a case to be tried to a jury if they feel the matter is too complex, involves too much scientific investigation, too many documents, and things of that nature. Part of my practice entails defending my clients' desire to have a jury—for example, in a medical negligence case—when the defendant's insurer always moves to set aside a jury notice. So we have to fight notions such as, "The jury won't have the skills to deal with the complicated matters raised in the medical negligence action."

One of the things that they then say—making it a sort of tag team argument—is that juries just don't have the ability to sift through the expert evidence. This is what we hear regularly. What I find astounding about that is that most of our judges came from the ranks of practicing lawyers. Every judge is a lawyer, after all. And most of us who went to law school went there because we didn't do very well in biology, science, and math! So to decide suddenly that, once we are judges, we now have this terrific skill in the sciences, is absolute nonsense.

I have one friend practicing law who actually has a physics degree from a place called Princeton—and he was smart enough to go into patent work. Doesn't that tell us something? He's the only lawyer I know who could probably understand the science of some of our cases, and he'll never try a case to a jury in his life!

So, as judges, when you think about these arguments about cases being too complex, frankly, it doesn't make any sense for us, with our skills as lawyers, to think that we are going to really understand this much better than the jury does. In fact, my instinct—and I am sure all of us in this room could put this together the same way—is that of the 12 people on a jury (or, as in my province, where there are eight on civil juries), there has got to be at least one person on that jury who understands the technical aspects better than we do.

It also follows that, even where our judges don't understand the sciences, don't understand the math and don't understand some of the scientific intricacies that exist, they do the same thing juries do! They just use their common sense. They try to look at the evidence. They try to listen to the witness, just like we do in our office when we are interviewing someone. We are trying to figure out whether that person says something that we believe, and we are doing it every day of our lives. We do it when the client comes in. We want to figure out if that person is really telling it straight. How credible is that person? I have never been a judge, but I am sure judges do the same thing. They have never met the witness, and they have to go through that same instinctive analysis that you would do if you were going to buy a car. Isn't that really all that a jury does when they are sitting there? The arguments that this is too confusing—for lawyers to

suggest that we have a better understanding of scientific matters—is not supported by our own academic training.

The next thing people will say about juries is that, “Sometimes juries get it wrong,” as though that is a surprise. Well, looking back over 28 years of practicing law, I have got to say that I think sometimes *judges* get it wrong.

The point of it all is, who is to say who is right and who is wrong in any given case? Just because some appellate court judge doesn’t agree with what a trial judge did, that doesn’t mean that the trial judge is actually “wrong.” What it means is that, at that point in time, someone in a superior position of influence and power was able to write an opinion saying that someone lower down the totem pole made a mistake. We can’t even say that our courts as a whole always get it right. Indeed, in every court in North America, judges will take a position today that 30 years later they may decide is the wrong one to take. It doesn’t mean they were “wrong,” and that, therefore, they shouldn’t have decided the way they did originally.

Looking back over 28 years of practicing law, I have got to say that I think sometimes *judges* get it wrong.

Another argument some people make is that the collective view that juries bring is somehow or other not good—that all of this discussion that takes place in a jury room is a bad thing, you know. They say people bring their own biases and prejudices into play. Well, when they enter the jury room they do the very thing that the Supreme Court of Canada or the Supreme Court of the United States would do. In that sense, our supreme court justices are like a jury. In our country, as in your country, there are nine members of our supreme court. Don’t they do exactly what a jury does? They read the material, they listen to the presentations, and then they go into the jury room and discuss it.

Now, interestingly, in that forum, which we all respect, we don’t even demand that they have unanimity. We let our judges off the hook. So long as the majority agree, they can make their decision on that particular subject. We don’t give a jury that out. We say, “You people have to sit here and work until you get a unanimous verdict.”

Luckily, that is the only thing the jury has to work on. Think of the pressure judges are under. Our judges have any number of cases that they have got to get decided and provide written reasons for their decisions—what we call “reserve judgments.” I am sure human nature sometimes means that they say, “I really needed another week to really get this to where I wanted it, but time pressure forced me to get this decision out. I felt the pressure to get it out.”

Juries don’t have that pressure. They have one case, and one case alone. They can focus all of their energy. I think that means they have got a tremendous advantage. They are not distracted. Indeed, it is we lawyers who are distracted. We are in court with a jury today, and when we go back to our office there could be 20 problems we have to deal with.

The concept of the jury was really memorialized through the British tradition. The Brits have lost it almost completely. And Canadians have, in the typical Canadian compromise, not lost it the way the Brits have, but not embraced it the way the Americans have, either. But it is really odd that, in the United States, where they have been so aggressive at protecting the jury system, and where the jury system has been so important to the evolution in the social structure of the country, there would be any desire on the part of judges to restrict it.

The great thing judges should always do is to respect *their own* power, and have enough self confidence in themselves to say, we can share the power. We can share the decision making. I really believe that the strong and wonderful judges are those who don't feel that they have to make every decision. I think it takes a great person to be able to share the load. You can't help but wonder sometimes if the judges who don't like jury trials have a sense that they are losing some of their power in that court—that they don't get to make every decision.

You know, that is not right. You have got a wonderful system in the United States with your civil juries. It really would be unfortunate if, through any kind of judicial legislation, there are restrictions on that. It really brings a tremendous dynamic to your culture and society that is beneficial to your citizens, and it also has impact extraterritorially.

Honorable John M. Greaney

I also join with my colleagues in saying that Professor Vidmar has done a very good job of debunking some of the principal criticisms—many of us would say libels or slanders—that are directed at the alleged inability of the modern civil jury to decide cases fairly and intelligently.

I say that from the point of view of coming to some of these studies with a great deal of skepticism, taking them with a grain of salt. I find many of them to be mainly partisan in nature. Not a month goes by, I am sure with you and me, where a book doesn't land on my desk on one or the other side of this equation. I am talking now of such books as *Judging Science*⁵⁶, *Phantom Risk*,⁵⁷ and *The Litigation Explosion*⁵⁸, all of which expressed differing points of view. When I encounter studies like those I do what Professor Vidmar has done, which is to take—to use an awful term here—the *Daubert* approach, based on statistics, to weed out some of the falsifications and innuendoes that concern juries.

Now, I have to preface my brief comments by saying to you that I am a partisan myself. In Massachusetts, our constitution was written in 1780, before the Federal Constitution, by John Adams. Our civil juries provision says that civil juries should be held “sacred.” The word “sacred” is not used in the federal document, and we take that word very seriously. Whenever the question has arisen about whether the frontiers of the law should be pushed in a new direction in a modern cause of action, we have generally said, under the word “sacred,” that it should.

For example, in 1994 we declared that there shall be jury trials in all manner of discrimination cases under our Maternity Leave Act⁵⁹—failure to pay prevailing wages and things such as that. Some people would say cases like those were totally unknown to the common law. We, however, say they are “sacred”—because really they are basic contests over what a person should be paid.

Now I have a couple of random thoughts about Professor Vidmar's paper and about juries in general. I started as a trial judge 30 years ago, and I find that juries have become much more sophisticated. I think one reason for that is that they are more open. When I started, the average jury was all male and over 50 years of age and, in some cases, not very much "with it." Now you see very diverse juries, ethnically-distributed, gender-distributed, and I think that is important.

I also find juries—and I think my colleagues agree—to be much smarter, in the sense that, while they may not have the academic degrees and all the education that others may have, they have been exposed to the Internet, and they have been exposed to law-related television shows such as "Judge Judy" and "Judge Hatcher" and "Judge Brown" and "Judge Miles." Now you may laugh, but those shows, in my mind, teach them two things. First, they teach that a great deal of what they are going to solve in that jury room is based on credibility, because you see the litigants slugging it out in front of those judges. Secondly, they see the analytic processes of the judge, which is important: the way they go about (and eventually the jury will go about) solving that question.

I think it is fair to say that juries are much less subject now to what I call the bamboozlement factor.

The other thing—and I agree with Professor Vidmar on this, although he discussed it only somewhat tangentially in his punitive damages discussion—that the "outlier" verdicts, or

I find that juries have become much more sophisticated. I think one reason for that is that they are more open.

"sport" verdicts, are really not relevant to any of the critical analysis that is made of the strengths and weaknesses of the jury. There are explanations for the outlier verdicts, as he suggested, and the trial judge takes care of them with remittitur, or on motions for new trial, and if those

verdicts do make it through to our level in the appellate courts, we take care of them by just cutting them down.

It seems to me, too, that in certain areas that Professor Vidmar discussed, juries are getting more of a quality case, because of all the new filtering mechanisms that we have. For example, at least in Massachusetts, and probably elsewhere, most of the medical malpractice cases now have to go through what we call a "tribunal" procedure. A tribunal consists of a lawyer, a doctor or a nurse from the area involving the alleged malpractice, and a judge. The tribunal, using a directed verdict standard, decides whether there is enough of an issue that that case should go to trial. The statistics from our tribunals show that roughly 50 percent of all malpractice cases are washing out at that level, because, if the tribunal's finding is that the case should not go forward, the plaintiff has to post a bond to indemnify the defendant and his counsel for the legal expenses if the case ends in a defense verdict. There are exceptions, of course, for indigents. That filtering mechanism is now getting before juries fairly substantial, legitimate, and bona fide malpractice cases. Similarly, alternative dispute resolution (ADR) techniques are taking some of the other, less desirable, civil cases away from the jury.

Further, with some of the new trial approaches that simplify the law for the jury, it seems to me that juries are much more cognizant of it. My colleague Judge Bob Keaton, who is on the

federal district court in Massachusetts, says that our entire system of tort law can be broken down into three principles: the “fault” principle, the “strict accountability” principle, and the “public policy” principle. The juries, as trial lawyers and judges, and appellate judges are concerned really only with the first principle, which is the fault principle. Our work in dealing with that fault principle has, it seems to me, been streamlined and simplified considerably by new approaches to the normative law, such as the American Law Institute’s *Restatement (Third) of Torts*, which—no matter what you think of certain provisions in it—has done a marvelous job of really breaking down some of our tort law concepts so that they can be understood by the average jury.

Let me conclude by saying that I find the Arizona experiment quite intriguing. They have really gone way ahead of the rest of us, because, as I understand it, they have adopted their jury trial innovations as mandatory rules. The only question I would raise—and we can talk about this a little bit further in our discussion groups—is whether they have gone far enough.

It seems to me—and trial lawyers, I am sure, would agree with this—that a trial is a gigantic didactic experience for all the participants, particularly the jury. So, why should they sit there and be lectured at with a great mist of misunderstanding before them?

We recently had a conference in Massachusetts where we discussed the Arizona principles, and we have taken them to the next level with the following recommendations to trial judges:

- We suggest strongly—this is all discretionary with the judges and I am sure you all have this in your jurisdictions—that the juries be given notebooks and be allowed to take notes;
- We have recommended that in every case—both civil and criminal—the jury be pre-instructed by the judge on the legal principles involved in the case;
- We have recommended tentatively that the lawyers be allowed interim comment on the evidence as the trial progresses. When they finish, for example, the plaintiff with his or her expert witness and initial liability witness, the plaintiff’s lawyer could make an interim comment to the jury about what that evidence amounts to. Similarly, the defendant could do the same as his or her case unfolds;
- We have a procedure in place for jury questioning of witnesses;
- We have a procedure in place for jury discussion of evidence during the trial. (The latter two are two Arizona principles.); and
- We have recommended strongly that the trial judges give their instructions to the jury in writing, or in some reported form, before the final arguments, so that the lawyers can have an opportunity, really, to argue the case based on the law that has been already explained by the judge.

We also have some after-verdict procedures:

- We encourage informal meetings between the judge and the jury. Instead of judges standing up there saying, “Thank you very much,” we suggest that they go in the jury room and talk to jurors;

- In major criminal and civil cases, when there has been a high degree of tension, we now have stress debriefings; and
- Finally, we are beginning to get some of the statistics we need—as they are doing in Arizona—with postverdict interviews conducted by the lawyers and the judges.

I think innovations like these, if seriously considered, will considerably improve the product that we get from our juries. That is my story, and I am sticking to it.

Honorable Melvin L. Rothman

I have practiced law in the Province of Québec, I have been a trial judge and a judge of the Court of Appeal in the Province of Québec.

Québec, some 25 years ago, in 1976, abolished the jury system in civil matters. We still are very enthusiastic about criminal juries, but I have to tell you that following the abolition some 25 years ago, the world did not come to an end. Democracy did not crumble, and justice has been done. I think it has been done as well as it has been done elsewhere—but that is a matter of opinion, of course. Thus my experience with civil juries is very limited. I have done precisely one civil jury trial, and that was a long time ago, and I am probably the last surviving member of the federal judiciary in Québec who has done one. I am going to perhaps tell you a little bit more about that trial at lunch.

I don't want to be a skunk at a garden party, but I do have some reservations and some hesitations with regard to the jury in civil matters.

For now, I want to simply go on to just say a word or two about Professor Vidmar's paper. I start by saying I agree with him entirely, based on my experience with criminal juries. I agree with him entirely that the verdicts of juries in criminal matters, at least, are reliable and, as a general rule, jurors are quite capable of understanding expert evidence as well as ordinary evidence. I agree entirely that they are quite as sophisticated and quite as intelligent and quite as wise, particularly collectively, as any of us are. I have seen juries—and I am sure you have—deal very competently with mountains of evidence in complex fraud trials and sophisticated expert evidence in murder trials where mental competency, for instance, is a serious issue. So I have absolutely no hesitation in agreeing with Professor Vidmar that, in most cases, to suggest that the evidence is too complicated for the jury to understand just doesn't stand up. I have always found that jurors had a collective wisdom and common sense in their conclusions that was truly impressive, and I would trust the reliability of juries, at least in criminal matters, and I have no reason to believe that they are any less reliable in civil trials.

I also agree with Professor Vidmar that the participation of ordinary citizens in the justice system has a value for its own sake. It has an educational value. It gives credibility and transparency to the system, and it reflects our democratic traditions, and lends a great deal to the justice system.

I don't want to be a skunk at a garden party, but I do have some reservations and some

hesitations with regard to the jury in civil matters. Nothing I am going to say now concerns the criminal jury system, which I wouldn't want to relinquish for the world.

Reliability and community involvement are not the only values in the civil justice system. Most western democracies have been attempting in recent years to make civil trials simpler, less cumbersome, and more accessible to ordinary people than they have become in Canada.

We all know the strengths and weaknesses of the adversary system. With the complex procedural rules that most of us have had to live with throughout most of our professional careers, most ordinary people simply cannot afford the cost, the trauma, and the delays of a serious civil trial—say a trial in first instance of two or three weeks, much less the appeals that are going to follow that trial. Contingency fee arrangements may lighten the burden financially, but it isn't really a principled answer to the question of accessibility in the civil justice system. Alternative methods of resolving disputes have been successfully adopted in recent years—judicial mediation and arbitration, to name a few. There is also a trend in most jurisdictions to simplify civil trials and to simplify and make less cumbersome the procedural rules that we have all had to live with. Civil jury trials are not, of course, incompatible with that trend toward less formal procedural rules.

In its present form, as I understand it—and I acknowledge my experience is limited—the civil jury system seems to me unlikely to make civil justice simpler and more accessible to ordinary people, enabling them to resolve their disputes expeditiously and reasonably. That is the issue I want to put before you. I may be wrong, but that is the reservation that I have in the expansion of the civil jury system.

Let me say, and just advance a reason for the decline of the civil jury system—and in Québec for its abolition. The first and most important reason, in my view, is that judges began making awards that were less ridiculous than they had in the early years of my practice, at least, of tort cases—in other words, they gave higher awards. They began doing the job that was theirs to do. Also, counsel improved, and they began bringing evidence as to the true damages that were suffered by their clients.

Perhaps most important in most jurisdictions in Canada, and probably Québec, there have been legislative schemes introduced. In automobile accidents, for instance, there is a no-fault scheme that precludes any civil action against the tortfeasor. In workers' compensation legislation, the employer and co-employees are immune from civil action. This has made a great difference to the number of cases that will go before juries, but more about that in discussions later on today.

For the moment, though, I just want to congratulate Professor Vidmar on an extraordinarily interesting study. I am not sure I agree with the conclusion that I see between the lines of his paper, but I certainly agree with his conclusion as far as the reliability of juries is concerned, and the importance of participation by ordinary people in the justice system.

Response by Professor Vidmar

Let me give you a few little nuggets from our Arizona jury project. Let me tell you what is up there. We have an article that is coming out, I think early this fall, in the *Virginia Law Review* about

jury ruminations on forbidden topics.⁶⁰ Actually, it is two topics. One is insurance, and the other is lawyer fees. These are the first data from the Arizona project that we have done, and Shari Diamond is the lead author on this.

Once again, we have 50 trials. There were a lot of protections in this study in Arizona. The Supreme Court of Arizona ordered us to keep the data under lock and key. We can't show it to the judge, the parties, etc. As social scientists, we have actually instituted additional procedures to protect these data, and that will also be the case when we publish our article. We will disguise them as much as we possibly can.

We have 26 motor vehicle, 17 "other" torts, four medical malpractice cases, and three contract cases.⁶¹ What we have done up to this point, in the *Virginia Law Review* article, is simply to deal with those tort cases—motor vehicle and "other" torts, of which there are 43.

As you know, insurance is a forbidden topic in trials, but it does come up in trials occasionally. The plaintiff says, "Well, the reason I didn't go to the doctor right away is that I didn't have medical insurance," or sometimes the chiropractor says, "Well, the insurance company says, etc., etc. . . ." So, we had a number of those kinds of cases, where insurance was mentioned in some way—14 of them.

Then we looked at whether the jurors discussed insurance during their deliberations. We found that in nine of the 14 cases, where insurance was mentioned obliquely or directly in the trial, the jurors did discuss insurance. What is more important is, in the remaining 26 cases, the insurance was never mentioned at trial. In the total now 40 cases overall, the jurors discussed insurance in 82 percent of them. This is probably not surprising to you. Everybody knows the jurors are going to discuss insurance, and there is a lot of literature on this. Whose insurance do you think they are discussing? The defendant's? Actually, it is the plaintiff's insurance. Far more often, it is the plaintiff's insurance than it is the defendant's insurance.

I can give you a couple of examples, but I will just give you the punch line right away. Jurors as a rule—there are exceptions to this—are really prejudiced against the collateral source rule, even though they have never heard of it. Here are some exchanges among jurors in a few of our cases:

- *Motor vehicle case #18*: Juror number eight: "I am sure he had health insurance. He is a full-time employee." Juror number two: "Well, are these bills paid?" Juror number seven: "That is the thing."
- *Motor vehicle case #22*: The fees to Dr. X and Dr. Y were likely covered by insurance. The plaintiff probably only paid a co-payment of \$10 to \$15 per visit. Juror number two: "Then factor about \$20 for that." Juror eight: "We can't figure in insurance." Then juror three agrees.
- *Motor vehicle case #7*: Juror six: "There was another thing that was not brought up. How much of this medical has been paid?" Juror five: "They never tell us that." Juror three: "Insurance usually covers chiropractic care. Why should we give her above and beyond what she is probably going to get for future medical expenses on her insurance?"

- *Motor vehicle case #1:* Juror two: “. . . And we don’t know, did they have medical insurance? Maybe they didn’t have to pay anything out of pocket.” Juror four: “I thought of that, too.” Juror three: “Yeah.” Juror five: “We are not supposed to worry about that, but I am sure the medical insurance paid. Even if medical insurance paid, the law says if your medical insurance pays \$10,000, then you are entitled to that \$10,000, not the insurance. They pay the \$10,000 because that is what your insurance was. The \$10,000 goes directly to you. They don’t keep it.”

What you find is that, consistently throughout this, in terms of the understanding of the insurance issue, sometimes a jury gets it right, and sometimes a jury gets it very wrong. Sometimes they raise the question but someone says, “The judge isn’t going to tell us anyway.” Sometimes they ask the judge and, not surprisingly, the judge comes back and says, “Well, don’t consider that.”

One of the things we have proposed in our paper—and it may be a controversial thing—is that we have some psychological evidence. In the paper we discuss a potentially modeled instruction that tells the jurors, “Look, there are good reasons for not considering insurance. Sometimes people have insurance, sometimes they don’t, and that is not your consideration. The law doesn’t want you to pay attention to it.” What we find is that, if you really give jurors reasons why they shouldn’t consider it, the jurors are more likely to agree and discuss the damages on their own and maybe overcome some of these things.

As part of our research, we asked the judge at the end of trial, before the judge knew the verdict, to indicate what he or she thought the verdict should be, including the amount of the award, and we compared that to the jury’s verdict. We found that the jury’s discussion of insurance didn’t really change the correlation of their verdicts in any way with the judges’ verdicts. Sometimes when they discussed insurance they went higher than the judge, sometimes they went lower than what the judge would have given, and there are a number of things that I think flow from that. But even when insurance is discussed, that doesn’t keep the jury from discussing the issues of liability. They are very scrupulous.

One of the things we have found in these deliberations is that they really do scrutinize the plaintiff’s motives.

we compared that to the jury’s verdict. We found that the jury’s discussion of insurance didn’t really change the correlation of their verdicts in any way with the judges’ verdicts. Sometimes when they discussed insurance they went higher than the judge, sometimes they went lower than what the judge would

Putting the Plaintiff on Trial

One of the things we have found in these deliberations is that they really do scrutinize the plaintiff’s motives. One of my colleagues actually talked about putting the plaintiff on trial. You have your witness in the witness box up there testifying, and later a juror says, “She claims she has got her right hip problem, but she had high heels on. When she stepped off that witness box, I didn’t see her limping.” This continuously runs through almost every one of these jury trials. Jurors are watching the plaintiffs out in the hallway. They are watching them when they are sitting next to the lawyer during the trial. Someone will say, “She claims she has a bad back, and her doctor is testifying that she has got a bad back. But hell, my back was killing me sitting there in the jury room and she didn’t even squirm.” Jurors are constantly looking at this kind of thing.

Discussion of Attorney Fees

Now I'd like to switch my subject a little bit to a slightly different topic that has come out of this, that is also discussed in this paper, that I want to raise with the judges: attorney fees. The Ninth Circuit model jury instruction includes the following definition of damage awards: "The reasonable value of necessary medical care, treatment, and services received to the present time." That is what it says that the jury is to be instructed. The Illinois pattern jury instruction says, "The jury, in assessing damages, is to include the reasonable expense of necessary medical care, treatment and services rendered, and the present cash value of the reasonable expenses of medical care, treatment and services, reasonably certain to be received in the future." Anybody see an objection to those instructions? You have probably given them or seen them many times.

Well, they sometimes are involved in jurors' fussing about the lawyer fees. We had one case, which we got quite amused with, in which the jury decided that the plaintiff should get \$120,000. Then somebody says, "Yes, but the lawyer is going to get his chunk of that." Then they debate: "So really, we should give \$160,000." Then a big debate went on because *they didn't like the lawyer* and somebody says, "Well, the more we give, the bigger the chunk he is going to get." So, they ended up compromising a little bit and moving down and giving something like \$145,000 hoping that the lawyer would get a portion of it and so forth.

Another of the juries we studied was struggling with this same kind of issue: what the lawyer was going to get. They asked the judge what to do, and the judge came back with this instruction, an instruction that is very similar to what I just read to you. "The reasonable value of necessary medical care or treatment and services received to the present time." The jury in that case said, "Well, you know, 'services rendered.' After all, to collect this money, the plaintiff had to go to a lawyer and required the services of the lawyer in this." So, they built into their award an amount for the legal services, based on the statement, "and services rendered." In fact, if you go back and look at that instruction, it was an absolutely reasonable conclusion for the jury to reach. It says, "services rendered," and it is one of those kinds of ambiguous sorts of statements.

So this question of attorney fees does come up—not with every jury, but occasionally it does come up, and we don't know how to solve this yet. We have a proposal that could be a model instruction about insurance, but we don't know how to solve the problem about lawyer fees. For us, it reinforced one of the things that I have always been on a big kick about: when judges devise these legal instructions, the pattern jury instructions and so forth, they seldom if ever test them. This is the social scientist in me coming out. You know, the judges have investigative panels, but it is usually a collaboration between judges and lawyers. One of the things that you don't realize is that the people out there don't always understand the kind of language that you use. I think the instruction I just read could have been improved quite a bit by using a couple of sentences, and that that would eliminate the problem of lawyer fees that confused this jury.

So I think a little bit of testing whenever these instructions are devised, using groups of citizens, and trying to do it in a systematic way, might uncover an awful lot of

confusion that you might think is very easy to deal with, that is very straightforward but, in fact, is not.

Finally, there's the question of allowing criminal juries to discuss the case during the trial. I am very agnostic about this one in particular; my mind is anything but made up about that, but that is one of the things we have to do. We will have some further information about the effects of discussing the case during criminal trials by the end of September 2001.

So those are just a couple of little gems from the Arizona project. We are working on it very hard, and we are supposed to testify on our study before the Arizona Supreme Court.⁶²

Questions and Comments from the Floor

Larry Stewart: As I was listening to the comments this morning, I remembered back to the first time I heard the concept put forward, many years ago, that jurors should be allowed to ask questions during the course of the trial. I remembered that I had this knee jerk reaction, "My God, we can't let them do that. It will mess up everything as far as a trial is concerned." Then, after thinking about it for just a very short period of time, I thought, "Wow, this could be wonderful." I would be able, as a trial attorney, to find out what the jurors were thinking, what they were concerned about in the course of the trial. I could then tailor my evidence to respond to those concerns or those questions, and I would be able to do a better job for my client.

So I have been a great proponent for some of these innovations, as they are called, to better inform jurors about what is going on with the case, and I think that they will produce better trials. I think that is what you are going to find where the Arizona project is concerned. We are on that path in Florida to do a similar type of thing.

Sharon Arkin: On the videotaping you are doing in the Arizona project, do the jurors know ahead of time that they are being videotaped, and do you think it impacts how they deliberate?

Professor Vidmar: That is a very reasonable question. They are told when they arrive that there is a project going on in which the juries will be videotaped, and if they want to not participate, they don't have to. About 2 percent decline, but the others go forward. The parties and their lawyers must also consent. We have a selection process here of people who have done it, although the data I was giving you actually mirrors what happens in Tucson, where this project is going on. So, we have a pretty close representative function.

Now, with regard to the specific question about videotaping, there are two cameras that are mounted, one in this corner of the jury room and one in this corner of the jury room so that we have a split screen, so that we can see everybody. They are sitting around a normal table in a discussion. They are sometimes sensitive when they first come into the case. Before this study, I had been studying small groups. I have been a social psychologist for over three decades now.

What you find is that, as they become absorbed with the case, they forget totally about the camera. We may be able to pull out a few of these things when we disguise them, but let me tell you, they are brutal. They are brutal on the lawyers. They are brutal on the plaintiffs. They are brutal on the defendants. They don't pull their punches. I would like to be able to show some of these things, but I will never be able to do it—and we will still have our skeptics. Let me tell you, they are there.

One thing I haven't mentioned is that the Supreme Court of Arizona actually had to set up a special rule for us to allow a control group. Since the rule in Arizona is that jurors can discuss the evidence during breaks,⁶³ we actually have in our group 15 cases where the jurors were instructed that they could not discuss, so we could attempt to do some sort of a comparison. That all seemed very sensible to us. But one of the problems we had with our control groups—and this is interesting to a social scientist, maybe it will be less interesting to you—is that the jurors wait in the jury room during breaks in the trial. What do they do during that time? There is the camera in the room. So, our control groups—believe me, we hadn't even considered this—are a little bit more camera sensitive during their breaks.

Let me tell you, they are brutal. They are brutal on the lawyers. They are brutal on the plaintiffs. They are brutal on the defendants. They don't pull their punches.

By the way, some of them discuss the case anyway, even though they have been told not to, and others do not. One of the problems that we have, which we will put into our paper, is that the reason some didn't discuss the case may be that “Big Brother” is watching.

But the answer to your question in a nutshell is that I don't think they are very influenced during their deliberations. If you could hear what we hear and see what we see, you would agree with me, I believe.

Larry Stewart: Of course, there are all types of discussions. Even when they are instructed not to discuss, when they walk back into the jury room and roll their eyes over the last witness, that is pretty much a death knell.

Comment from floor: I was left hanging a little bit by Professor Vidmar's comment in reference to jurors discussing the case before the end. We had a commission on jury reform in Missouri, and the members of the commission were almost universally aghast at the thought that we would actually sanction juror discussion during the course of the trial. People said, “Well, you know, sometimes they do talk to one another before the verdict,” but they were aghast that we would sanction that process. What were your observations about that?

Professor Vidmar: What I will do is present to you the arguments that went on in Arizona and try to remain, at this point, neutral. Again, what I have to do is put myself in the role of somebody who is going both ways, not in the role of an advocate.

There are a couple of arguments that are made about this. My understanding is that there were a couple of cases in Arizona that came to the attention to the judges, because there was

so much debate about it afterwards, where some of the jurors, in a couple of trials, carpooled in, because they were outside the Tucson or whichever area they were in. They were discussing the case on the way to court, which created an enormous rift between the ones who had discussed and the ones who had not discussed. So that was one of the kinds of arguments that was given: “They are going to do it anyway, and if they are going to do it anyway, let’s tell them do this.” The other question is whether they discuss the case because they find jury duty so boring. Let me tell you, a lot of them just complain bitterly about how boring it is—so they go home and discuss it at night.

The point is, if the jurors are told, “You must all be in the jury room at the same time,” then this will give the outlet to this and reinforce this. That is one argument. A second argument I could make as a social psychologist is that if you let them talk about it among themselves, it may sanction the notion that you can talk about it with anybody, so they can go out and discuss it outside the courthouse as well. We are trying to investigate that, because we do ask the jurors afterwards if they have discussed the case or not.

A third argument that is being made, against the jury reform, is that there is a “primacy” effect. That is, the fear that, once the jurors can discuss these things, their minds will close because they will form an opinion now, and then everything that follows will be in the light of what they already decided. That argument is pretty consistent with research that we have done on the psychology of jurors. There are also some other arguments, and equally interesting psychological data, that say that, especially in a longer trial, “recency” effects are more important. Interestingly enough, I have been going through those debates and I don’t find any reference to the recency effect. As I have delved into it, I can make arguments either way about whether it is good or whether it is bad.

What I can tell you is that we are finding so far—and these are tentative findings—that the jurors spend a lot of time on what we call “rehearsal.” In fact, the majority of their time they are simply saying, “Well, he said this, is that correct?” What we are doing right now, in a very difficult coding process, is to try to find out whether the jurors are seeking information—like, “I missed that point. Can somebody fill me in on what that witness said?”—or making assertions, as when somebody says, “The witness said the truck was going 40 miles an hour,” and two other jurors say, “No, no, you have it all wrong. They were going 30 miles an hour.” So, you get that kind of a correction going on. That constitutes the greatest portion of those conversations.

What we are doing right now is looking for premature judgments on evidence. What we do find—and remember, this is very important, and one of the complex kinds of problems we have—is one juror saying during the trial, “I don’t think they should get anything,” and nobody else endorses this. They are kind of thinking out loud, and this is the way they are leaning—but it doesn’t necessarily tell us that this is the way the jury is going to come out.

Sometimes, when the juror says, “I think we can do that,” they get sanctioned for it, like, “Wait a minute, the judge told us that we are not supposed to reach this conclusion.” So there is that sanctioning process. Sometimes it is *self*-sanctioning. They start thinking out loud and they say, “Oh, wait a minute, I forgot,” and that kind of reinforces it. There are some positive things, but I don’t want to draw the conclusion yet that it has no effect. We do have one instance, out of our 40-some cases, where the jurors sort of seemed to draw a premature conclusion.

The other thing that they do, they spend part of their time discussing the questions they asked and the questions that they need to ask of certain witnesses, and they sometimes collaborate. There are a few cases where they say, let's make up a list of questions, but it is more often the individual juror saying, "Well, I want to ask that question," just like that. "I want to ask that question." Nobody says yes, nobody says no, but what they are really doing is sort of thinking out loud. So, that is one of the possibilities, that it is kind of a thought process.

By the way, there is a study that is earlier than ours, that is going to be very much a complement to it. It was done throughout Arizona by Paula Hannaford and Tom Munsterman, both of the National Center for State courts. I think I have cited it in the paper. It has already been published in *Law and Human Behavior*.⁶⁴ Their study was similar to ours, but they interviewed the jurors only after the trial. In other words, we had the direct window. They have an *indirect* window on this, but we are also collecting those kinds of data.

One final insight I can give you is, I am struck by how much juries are like committees. You have all been in committees, haven't you? Ad nauseam, probably. The jury is like a committee.

One final insight I can give you is, I am struck by how much juries are like committees.

You know, there are side conversations going on with one another, they are talking about the main topic, the foreperson is sitting at the head of the table, but a couple of us carry on a conversation, and a couple more carry on a different conversation. We are finding

cases where, instead of taking a formal vote on a particular part, they discuss the case quite a bit and then what they say is, "Oh, we are agreed on that?" Then they go on. There is no formal vote taken, but it is very clear that everybody agrees on this portion of the liability or this particular issue, that there is consensus, and then they move on. So those are some of the tentative insights.

Larry Stewart: Are you picking up any data on how they use their notes, their notebooks? I assume these jurors are taking notes. Are they using them to fill in gaps on the evidence, to make arguments with each other?

Professor Vidmar: They do refer to notes. Sometimes this is harder to detect, I must say. You are looking and the juror carries a conversation, and they have all got their notes in front of them. Sometimes they say, "Well, according to my notes . . ." But lots of times we can't tell. There is just no way for us to tell whether they are using the notes. Clearly, sometimes they do. Not surprisingly, it is a very complex process that is going on.

Sharon Arkin: How much time, Professor, do you believe the jurors spend reading and understanding the court's instructions?

Larry Stewart: Do the jurors get a copy of the instructions in the jury room?

Professor Vidmar: Yes, they do, and I will tell you, they pay attention to the instructions. They pay attention to the instructions and use them against each other from time to time. Indeed, it is very helpful to have those instructions there. They go back and forth over them and try to understand them.

APPELLATE COURTS AND CIVIL JURIES

Stephan Landsman

Professor Landsman's paper is divided into five parts. In Part I, he discusses the civil jury's remarkable longevity as an institution that has come to represent not only good judicial decision making but also participatory democracy itself. Briefly reviewing British and American history, he identifies a number of incursions (both attempted and successful) into the jury's realm, and also acknowledges reforms since the mid-twentieth century that have made modern civil juries far more representative than their predecessors.

In Part II, Professor Landsman considers why the jury has survived so long and so well. He cites: (a) contributions made by the jury institution to democracy (counterbalancing the sometimes less democratic leanings of professional judges and thereby enhancing the lawmaking and law-canceling powers of judges, neutralizing the power of the government when the state itself is a litigant, and protecting the public from the effects of domination of the legislature by special interests); (b) the importance of a "neutral and passive" fact finder in the traditional American adversarial approach to adjudication; (c) the critical legitimacy that citizen participation confers on judicial decision making; and (d) numerous practical benefits of jury trial (effective decision making, group participation ensuring that alternative points of view will be heard, reduced burdens on trial judges, speedy resolution, and the establishment of benchmark verdicts for the continuing process of negotiation and settlement by which the overwhelming majority of civil disputes are resolved outside the courtroom).

Part III analyzes recent trends in the review of civil jury verdicts by both trial and appellate courts, and identifies legal mechanisms that can encroach on trial by jury as an institution. The first mechanism begins with the trial judge's power to grant a new trial under limited circumstances. It culminates in the federal appellate courts' comparatively recent assumption of power to review jury verdicts and order remittitur solely on the basis of the paper record left by the trial court, without ordering new trials. (These decisions, he argues, may reflect an actual anti-plaintiff bias in federal courts at the appellate level.) The second mechanism is the use of demurrers, directed verdicts, and JNOVs, all of which essentially eliminate the trial in toto. Beyond those, the adoption of Federal Rule 50(a) extends the reach of judgments as a matter of law (JMOLs) from the pleadings stage all the way through—and beyond—the jury's verdict and the entry of judgment. Such actions, he believes, amount to serious encroachments on the Seventh Amendment and continue the current trend toward marginalizing the jury.

In Part IV, Professor Landsman proposes that appellate review of jury decisions should be "reoriented" so that jury verdicts are presumed to be legitimate. JMOLs should be disfavored, appellate courts should exercise restraint in reviewing verdicts, and courts should protect jury verdicts, as was done by the U.S. Supreme Court in a line of decisions from 1938 to 1968. By the same token, he suggests several areas in which "more robust review" of jury verdicts may be appropriate—punitive damages awards so large that they become "civil death sentences" for corporate defendants or discourage vigorous defense against claims, and jury verdicts that can encroach on free-speech rights or validate instances of illegal racial discrimination.

Finally, in Part V, Professor Landsman considers several possible future approaches to trial by jury in the United States. The first is to stay on the recent course described in Part III, further diminishing the jury's role, influence, and significance. That approach is evident in recent reductions in jury size and in the

practice of “blindfolding” jurors so that they will be ignorant of significant matters (like the existence of liability insurance or legal requirements to reduce or increase damage awards under some circumstances). The second is to make jurors more “judicial,” by bifurcating trials or compelling juries to complete extensive verdict forms or lists of interrogatories—both of which, he contends, infringe on the crucial principle of secret jury deliberations. A third and more benign approach would be to assist jurors in their important work by simplifying courtroom presentations, improving jury instructions, allowing additional proof and argument to help break deadlocks, and inviting jurors to ask questions of witnesses, the judge, and counsel during trial, in open court.

I. The Persistence of the Civil Jury

*Plus ça change, plus c'est la même chose.*⁶⁵

The civil jury is virtually the only Anglo-American adjudicatory device to have functioned serviceably for more than 900 years. Its long history reflects not the endurance of a sanctified relic, but the adaptability of a decision-making mechanism that affords society substantial and unique benefits. Civil juries remain, today, a fundamental component of the judicial branch of American government, cemented in place by the United States Constitution and the constitutions of 47 of the 50 states.⁶⁶ They do not operate in isolation but rather in conjunction with trial judges and under the supervision of appellate courts. Judicial control over civil jury activity is, at least in theory, cabined by a series of powerful constraints, foremost among which (at least in federal courts)⁶⁷ is the Seventh Amendment, which provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.⁶⁸

Although there are weighty constitutional and jurisprudential reasons for appellate courts vigorously to uphold and defend the decisions of civil juries, trends over the past 30 years suggest that reviewing judges have come to treat jury verdicts as fair game for the most exacting scrutiny. This approach bodes ill, not only for the civil jury, but for the judiciary, and should, at least in most substantive areas, be curtailed. As has been the case throughout its long history, the jury must and will continue to change. The critical question is whether change, especially that induced by appellate court activity, is used to strengthen the jury or undermine its integrity. What follows is an examination of the jury's history and benefits, a detailing of appellate court relations with civil juries and some thoughts about the future of the jury system.

In its earliest avatar,⁶⁹ the civil jury was used, by the Norman conquerors of England, to gather information essential to the governance of the realm.⁷⁰ It was, in these times, essentially an administrative body that reported facts pertinent to taxation and other governmental functions. Henry II, in the late twelfth century, changed the civil jury's orientation by giving it an adjudicatory role in property-related disputes. The jury proved an attractive alternative to ordeal, battle, and compurgation. From Henry II's time on it grew in popularity and jurisdictional reach. With the 1215 papal ban on ecclesiastical participation in trials by ordeal and combat, the jury became the preeminent method of civil dispute resolution in England.

At first, the jury was conceived as a group of, more or less, knowledgeable neighbors who were called upon to resolve disputes on the basis of what they knew. By the middle of the fourteenth century, however, procedures were adopted that made it clear that the jury was not simply a collection of witnesses, but a deliberative body. The key in this regard was the requirement of a unanimous verdict, which meant that the differing perspectives of the jurors had to be harmonized into a single shared decision. Over the course of the next several hundred years, the jury gradually shifted from reliance on its own knowledge to dependence on the testimony of witnesses in open court. The jury was thus transformed into an evaluator of proofs. By the late seventeenth century, the civil jury was well on its way to becoming the neutral and passive fact finder that is at the heart

of the modern American adversary system.⁷¹ Although, over the course of its history, the jury has changed functions and sources of information, from the thirteenth century on, it has operated as the primary adjudicator of a range of civil disputes, an adjudicator drawn from the citizenry and entrusted with the mission of dispensing justice.

Not only did the civil jury grow into the key courtroom decision maker, it slowly evolved into an instrument of democratic representation and a school for self-governance among Englishmen. Jury service placed substantial responsibility in the hands of local citizens. Jurors took their responsibilities seriously and, over time, came to see it as not only their duty but their *right* to manage their communities and make important decisions. English justice was, thus, decentralized and the obligation to determine it placed in the hands of local men rather than the King's minions. Despite all this, many of England's most powerful citizens, from the very earliest days, sought to avoid the burdens and tedium of jury service.⁷² In their stead citizens of modest means, in other words of the "middling sort,"⁷³ served on a regular basis.

By the 1600s, the jury was the most representative institution available to the English people.⁷⁴ Its attachment to self-governance led to conflicts with the Crown when, at the end of the seventeenth century, the Stuart Kings sought to consolidate power in royal hands. In 1670, a jury refused, despite imprisonment, to convict the Quaker preachers William Penn and William Mead. The overturning of the jurors' jailing, in *Bushell's Case*,⁷⁵ expanded juror independence. That ruling was followed by a series of celebrated jury decisions, the most remarkable of which was the verdict in the case of the *Seven Bishops*,⁷⁶ in which a jury of common Englishmen thwarted the attempt of James II to crush the Bishops and bend the Church of England to his will. Historians have rightly described this as the true beginning of the Glorious Revolution which resulted in the overthrow of absolute monarchy and the establishment of the preeminence of the democratically elected Parliament. Through the 1700s, English juries kept up their resistance to government overreaching and, in the 1760s, decided a pair of cases allowing the recovery of substantial punitive damages in civil cases involving government misbehavior.⁷⁷

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The American colonists embraced the jury. From the earliest days, colonial charters recognized jury trials as an essential facet of government both for purposes of administration and adjudication. American juries eventually became something of a bulwark against government oppression. The 1734 trial of John Peter Zenger⁷⁸ on a charge of seditious libel is but one example of American jurors' willingness to resist the exercise of government power. Though the law was clear and appeared to require Zenger's conviction, a New York jury refused to find the editor guilty, thereby establishing a precedent regarding jury nullification power and independence. In the period between 1750 and the start of the Revolutionary War, juries were in the forefront of resistance to imperial dictates, very much as English juries had been before the Glorious Revolution. Various colonial congresses demanded protection of the right to jury trial and the Declaration of

Independence listed denial of “the benefits of trial by jury” among the grievances warranting the creation of a new nation.⁷⁹

Although the jury had played a heroic part in the Revolution and was one of the most widely utilized elements of colonial governance, when the drafters came to fashion the Constitution they did not include any mention of the right to civil jury trial. This exclusion was defended by the drafters on the grounds that the British judges who had run colonial courts in the interest of imperial masters were gone, democratic legislatures were now responsible for the fashioning of America’s laws, and the post-Revolution anti-creditor decisions of some juries were undermining the stability of the new nation’s financial system. Despite these arguments, the civil jury’s exclusion from the Constitution ignited a firestorm of protest that led at least seven states to insist on an amendment to the Constitution to protect the right of jury trial in civil litigation. That insistence resulted in the adoption of the Seventh Amendment, and the democratic concepts implicit in jury trial came to permeate the Bill of Rights. As Professor Akil Amar has put it: “If we seek a paradigmatic image underlying the Bill of Rights, we cannot go far wrong in picking the jury . . . the jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights.”⁸⁰ The jury had come a long way from its rough-and-tumble beginnings as an administrative entity. It had become the democratic counterbalance to an unelected judiciary and an expression of America’s faith in its citizens.

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The civil jury continued on its protean path throughout the 1800s. In the early part of the century the jury served as an instrument of compromise between contending Federalists and Republicans. In confrontations like that involving the impeachment of Federalist Pennsylvania State Court Judge Alexander Addison and Federalist Supreme Court Justice Samuel Chase, compromise meant that judges would be left in office, no matter their political affiliations, so long as they refrained from overt politicking on the bench and did not seek to override jury prerogatives and opinions. As de Tocqueville observed in the 1830s, the jury had become the quintessential American “political institution,”⁸¹ balancing and accommodating the competing concerns of contending social forces. Because of the jury’s presence, a judiciary made especially potent in the wake of *Marbury v. Madison*⁸² was seen as less threatening than its law-nullifying power might have suggested.

As the century wore on, however, judges sought greater control over juries. This may be seen in the elaboration of the rules of evidence, increased reliance on jury instructions,⁸³ and augmented use of doctrines like contributory negligence to curb jury decision making. These all shifted power away from jurors into the hands of judges. They were, to some degree, limited when a backlash against harsh and meddlesome rules led to changes like the adoption of the rule of comparative negligence, which heightened jury discretion with respect to the apportionment of fault. The jury’s critics were not deterred by such setbacks. In the Progressive Era, the jury was attacked as an inefficient and amateur body that was in need of restraint. Early legal realists like Charles Clark and Harry Shulman took up these views and attempted to support them with empirical data.⁸⁴

Their efforts, however, proved unpersuasive and when, in the 1950s, Harry Kalven and Hans Zeisel turned their attention to the jury as an object of social science study, they developed data they believed demonstrated the particular value of jury trial. Professor George Priest, no great friend of the jury, has said of Kalven and Zeisel's work:

Over the past quarter century . . . support for the civil jury has become nearly unanimous. In large part, the overwhelming modern belief in the importance of the civil jury can be attributed to the influential work of the University of Chicago Jury Project led by Harry Kalven and Hans Zeisel. In its time, the Kalven-Zeisel Jury Project was the most ambitious empirical study of jury decision making that had ever been attempted. As a result of their extensive empirical analysis, the authors claimed that the civil jury was a superior institution for adjudicating disputes involving complex societal values, that the jury served as an important instrument of popular control over law enforcement, and that the jury brought a superior sense of social equity to the decision-making process. Indeed, the authors interpreted their empirical findings to confirm simultaneously each of these assertions.⁸⁵

The civil jury arrived in the second half of the twentieth century with strong empirical support and a long history of adaptation to social needs. Yet, within a fairly brief span, the Supreme Court demonstrated its intention to hack away at the institution. It did so by allowing a diminution in jury size from 12 to six in *Colgrove v. Battin*.⁸⁶ The Court claimed that the civil jury served but a single purpose: "to assure a fair and equitable resolution of factual issues."⁸⁷ This reductionist view ignored the jury's role in perpetuating democracy, in guaranteeing the representativeness of the group adjudicating important social issues, in fixing benchmarks for the appropriate compromise of the vast majority of cases that are settled rather than litigated, and in legitimating the decisions of the judicial branch of government. The Supreme Court conceded in *Ballew v. Georgia*⁸⁸ that its analysis in *Colgrove* was flawed but refused to restore the 12-person jury, thereby perpetuating the damage it had caused.

Despite all this, the jury has endured. Although its size has been shrunk (at least in some places) and its prerogatives narrowed by restrictive evidence rules and jargon-filled legal instructions, the jury remains the adjudicator of hard cases and voice of public sentiment. It has displayed such attributes in recent cases like those involving the claims of Florida smokers against the tobacco industry⁸⁹ and those concerned with the fouling of Alaskan waters by the *Exxon Valdez*.⁹⁰ There are even signs of its reinvigoration including, most particularly, its growth into a far more representative body than it had ever been before. In a series of cases stretching back to the 1880s, the Supreme Court has worked to insure the increased presence of minorities and women on jury panels. Those efforts have, finally, borne fruit and, today, American juries are far more representative than they ever were.⁹¹ Moreover, jury duty has been rationalized, and long and indolent waits to serve have been ended, replaced by efficient one-day-one-trial approaches. Arizona, California, Colorado, New York, and a number of other states have introduced a mass of jury-friendly reforms.⁹² This past year the New York Unified Court System and the National Center for State Courts convened a "Jury Summit 2001" that was attended by more than 400 people and was designed to further the process of improvement in the operation of the jury.⁹³ As on so many other occasions, the jury seems to have been refashioned to meet society's changing needs.

II. Reasons for the Civil Jury's Longevity

*No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time.*⁹⁴

The civil jury, like Churchill's democracy, has persisted. It has done so because of the benefits it renders to the justice system. These benefits, the Supreme Court's reductionism notwithstanding, are many and varied. For convenience sake, they will be gathered here under four exceedingly broad headings: contributions to democracy, adversary system considerations, legitimacy enhancement, and practical benefits. These four are neither mutually exclusive nor exhaustive, but provide a means to set out some of the most significant points in a relatively brief span.

A. Contributions to Democracy

The civil jury contributes to American democracy in a number of different ways. It has long been appreciated that those who occupy the federal bench are armed with the power to thwart legislative objectives and are substantially insulated from democratic influence. Their decisions need not be tempered by or reflect the popular will. By placing juries of common citizens at the heart of the judicial decision-making apparatus, the undemocratic characteristics of the judiciary

By placing juries of common citizens at the heart of the judicial decision-making apparatus, the undemocratic characteristics of the judiciary are counterbalanced by the most immediate and powerful presence of the people.

are counterbalanced by the most immediate and powerful presence of the people. Judicial authority is thus offset by the involvement of representatives of the community. The framers of the Constitution were convinced that the best way to preserve democracy was for there to be a series of checks and balances between branches of government and within the institutions that comprised each branch. The civil jury is the democratic check on the judiciary.

There is, however, an irony in this arrangement. As has been noted by de Tocqueville, among others, the American structure makes it possible for judges to wield powers unmatched in other nations.⁹⁵ Because the democratic voice is present in the form of the jury, it is palatable to cede judges greater authority than would otherwise be the case. Undemocratic excesses are likely to be curtailed by jury decisions. Professor Stephen Yeazell has noted that where judges do not retain great lawmaking and law-canceling power, the civil jury has faded into insignificance.⁹⁶ This has been the case in England, where a once vibrant civil jury system has given way to a judges-only process (with a few modest exceptions),⁹⁷ as English judges have abandoned any claim to co-equal responsibility with Parliament.⁹⁸ Without the presence of some democratic check on the judiciary, there would be a genuine question of the viability of the sweeping judicial power countenanced in the United States.

The jury is democracy-enhancing in other ways too. Jury decisions are not the product of a judicial or legal elite. They come from a randomly-selected cross section of the populace. As such, in the words of the nineteenth century commentator Francis Lieber, the jury trial arrangement

“makes the administration of justice a matter of the people and awakens confidence.”⁹⁹ Casting legal decisions in this framework associates them with the entire community rather than with an isolated and interested group of specialists. Not only are the declarations of the courts thus clothed in a mantle of democracy, but the jurors who make them are exposed to and educated in the running of their society. Historians have noted that jury service was the school that trained the British “middling sort” in the ways of self-governance.¹⁰⁰ The lessons thus taught are critical ones—that the will and beliefs of the people have an important part to play in the legal ordering of society and that the citizenry has a great deal of responsibility for the shape of the community’s law.

Democracy has, as one of its goals, the representation of the entire and diverse body of the citizenry in the operation of government. Over the last hundred years, the civil jury has grown into perhaps the most diverse and representative governmental body in America. African-Americans, women, and other under-represented groups have been incorporated, in increasing numbers, into jury panels.¹⁰¹ While far from perfect, juries do seem to integrate the vast majority of the community into their work. In this way, juries powerfully enhance the democratic character of government. The traditional rules governing deliberations, most particularly those regarding unanimity and unlimited time for deliberation, tend in the same direction. Requiring unanimity means that all points of view must be heard, considered, and negotiated. Ample time is set aside to accomplish this task. In the end, the traditional jury deliberation structure helps insure that each voice is attended to and none can be ignored.

The civil jury is particularly valuable as a democratic foil to the judiciary when the government is a litigant. Both in appearance and reality, a judge is a government official. She draws a salary from the state and is beholden to government officials in a number of ways.¹⁰² As Blackstone has pointed out, it is almost inevitable that judges, consciously or unconsciously, will be drawn to the government’s side:

The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity; it is not to be expected from human nature that *the few* should be always attentive to the interests and good of *the many*.¹⁰³

This is not likely to be the case with jurors. They are not a permanent part of the government. Jurors appear for a single case and return to private life. They are unlikely to develop those pro-government inclinations that come naturally to judges. Hence, they may be expected to help preserve the balance between the people and their government.

Finally, the civil jury may, on occasion, be democracy’s only effective voice. Where the legislature is in thrall of special interests or is imprisoned by gridlock it cannot act in a fashion that reflects the popular will. Legislative co-optation has, all too frequently, been a part of American political experience. This has been recognized in state constitutions that prohibit “special” legislation¹⁰⁴ and is manifest with respect to a number of current problems of national scope. An example is the remarkable failure of both federal and state legislatures to do anything

meaningful about the sale and use of tobacco products.¹⁰⁵ Eventually, those injured by tobacco began to seek court redress. Their claims were, almost without exception, rejected by juries concerned with the question of each smoker's individual decision to smoke. The litigation climate started to change when plaintiffs fashioned theories that emphasized community interests (Medicaid costs and improper suppression of health-related information) and could support their claims with documents uncovered during protracted discovery. Where needful legislation was lacking, courts and juries have, albeit reluctantly, moved to fill the void. They have done so in the wake of the failure of the best equipped organs of democracy to act. In lieu of legislatures serving the popular will on this topic, courts and civil juries (or the threat of resort to them) have been the instruments serving the apparent democratic consensus regarding smoking.

B. Adversary System Considerations

America relies on an adversarial approach to adjudication.¹⁰⁶ What this means is that a neutral and passive fact finder is asked to decide a case after it has been thoroughly aired by the opposing parties in a robustly contested proceeding.

The civil jury significantly enhances the effectiveness of the adversary process. The first point to note is that adversarial methods demand a truly neutral and passive arbiter. If the decision maker is also required to run the process (as a judge is), bias is likely to arise either because the fact finder, early on, forms a theory and pursues it to the exclusion of other information,¹⁰⁷ or because the active judge may come into conflict with one or another of the litigants. In either case, the process is at risk of failing because the fact finder will be unable to develop all the facts or to maintain the appearance of neutrality essential to gaining the respect of the litigants and society. Clearly, the adversary process will be best served by the most neutral and passive decision maker available. That adjudicator is the jury. The jury is not charged with any of the managerial tasks of the judge and will not, generally, be drawn into the fray. The jury is not involved with the parties in any way and hears only previously screened evidence. It is, therefore, less likely to develop feelings or ideas that might jeopardize its indifference between the claimants. Moreover, the jury is constituted of a group of individuals who can be screened for bias before trial. If, even after this screening, a juror manifests animosity toward one side or the other, the remainder of the jury is there to check the biased juror's inclinations. Judges, unlike jurors, cannot be vigorously examined for bias through questioning processes like *voir dire*. Judges sit singly and are likely to be exposed to provocative material that will not be admitted for the jury's examination. In the end, no single judge can provide as much assurance of neutrality as can a properly selected and utilized jury.

Neutrality is not the only benefit jurors bring to the adversary process. Adversarial systems are designed to give litigants, through their counsel, broad latitude in developing and presenting their cases. Because of the judge's experience with similar cases or the same lawyers, she is not as likely as a jury to give each case the fullest and freshest attention. It is only the naive jurors who can treat each case as new and novel. Jurors will not see the patterns that may seem all too familiar to the judge. Hence, it is the jury that is likelier to give each side the sort of careful and respectful hearing upon which the adversary system is premised. Juries help adversarialism in another way as well. They come together for a single continuous hearing. The demands of their regular lives make it virtually impossible for them to participate in dragged out or on-again-off-again hearings. Because jurors expect, and the practicalities of life require, a continuous hearing, the adversarial objective of a sharp and climactic trial are reinforced. The presence of a jury helps set the stage for the dramatic

confrontation of proofs that is the essence of adversarialism. Jurors, far more than judges, demand the sort of short, sharp and efficient confrontations central to the process.

C. Legitimacy Enhancement

Juries powerfully help to legitimate judicial activity. Their decisions are, manifestly, based on the attitudes of the citizens of the community rather than on those of a judicial elite. The jurors are drawn from the ranks of the populace and, at least generally, bring the community's common sense and collective wisdom to bear on the problems before them. These are powerful inducements to persuade onlooking citizens that their courts speak for them and are attuned to their concerns. The jury process not only legitimates court decisions for onlookers, it also fosters a sense of heightened respect for the system among jurors themselves. Social scientists have consistently found that the overwhelming majority of jurors conclude their jury service with an increased appreciation for the process and its decisions.¹⁰⁸

Professor Marc Galanter has pointed out that jurors are, generally, one-time players in the judicial process. They do not take part in so many cases as to see predictable patterns develop or participate in the morally numbing but ubiquitous process of compromise and settlement.¹⁰⁹ For jurors there is only a single case—one they expect to decide in such a way as to declare who is right and who is wrong. This mindset individuates and dignifies decisions. It separates jurors from the routine of the settlement mill. Moreover, it invests each decision they reach with a moral component—the jury is charged with searching for the “right” decision. These considerations invest jury verdicts with heightened integrity and dignify each as special. This is a potent legitimating message and one that only the jury can deliver effectively in case after case in a system like America's.

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The jury seldom brings strong expectations or rigid rules to its decision making. It will often reject antiquated or harshly inflexible principles, as was the case with the doctrine of contributory negligence. In this way it updates and adds pliancy to the law. Such modification adds to the legitimacy of legal decisions. The dead hand of outworn legal doctrine is not allowed to throttle results that will be perceived as just and in conformity with modern sensibilities.¹¹⁰

D. Practical Benefits

Separate and apart from political and social considerations, civil jury trials provide a series of practical benefits. First, there is a vast body of social science research on the jury that has concluded that jurors are good fact finders and generally dispatch their tasks effectively.¹¹¹ This empirical validation of the jury mechanism is borne out by centuries of real-world success. The jury is not an experiment or unknown quantity. It has proven its practical worth over time. Second, the jury's structure enhances adjudicatory quality. The

jury does not rely on a single fact finder but on a group. The jury's collegial nature enhances its ability to observe and recall details of proof. Twelve heads (or even six) are, pretty clearly, better than one when it comes to assessing evidence presented in open court.¹¹² Civil juries are also practically advantageous because they ease the burden on trial judges. It is generally agreed that bench trials are more demanding on judges than their jury counterparts.¹¹³ Furthermore, the verdicts juries deliver are completed far more rapidly than any written, well-supported opinion a judge can prepare.

Jury verdicts provide benchmarks by which the vast system of negotiation and settlement may be calibrated. While that system does not always recognize or effectively use the benchmarks juries provide, they are an invaluable point of departure in the creation of a realistic framework of awards.¹¹⁴ Experience and empirical analysis suggest that no other body of decision makers is better at fixing damages.¹¹⁵

As a final practical point, it should be recalled that the presence of the jury is disciplining both for lawyers and judges. Lawyers know that they must speak to and convince laymen. This means that they must simplify, clarify, and shorten their presentations. Similarly, judges recognize that they must move trials along—delay is a problem that must be managed. The temptation to use discontinuous hearings is thus checked and the need for celerity underscored.

The benefits provided by jury trial are many and valuable. They render the system far more secure and effective than it might otherwise be. It is not surprising, once all this is considered, that the civil jury has endured. When these considerations are coupled with the jury's long history and constitutional status, the presumption ought to be that the jury process deserves the fullest respect and protection. Any step that intrudes upon the civil jury ought to be viewed with suspicion, and the burden ought to be upon those who would intrude to justify the changes they would initiate.

III. Appellate Review of Civil Jury Verdicts

*To innovate is not to reform.*¹¹⁶

In the thirteenth century, a disappointed litigant might have challenged a jury verdict by a procedure known as attaint.¹¹⁷ The attaint process utilized a double-sized jury of presumably knowledgeable local citizens to reconsider the case in which the original decision had been rendered. If the new jury concluded that the original judgment was in error, its results were reversed and the members of the first jury severely punished on the theory that they had, as witnesses, breached their oaths to disclose the truth of which they were assumed to have been aware. Remarkable features of attaint included its emphasis on preserving jury adjudication (there could be no reversal without a super-sized jury's vote), its preoccupation with jurors as witnesses, and its insistence that there was but one proper answer (any other being perjurious and punishable). The attaint process was cumbersome and draconian. It is not surprising that it was used sparingly and that reversals were few. Any other result would have hobbled justice unbearably and chilled the willingness of jurors to serve. Its design was, clearly, to allow for review but to inhibit any great deal of interference with the jury's work.

A. Granting New Trials

As juries gained a significant degree of independence and jurors shed the role of witnesses, judges were inspired to seek other mechanisms to review jury judgments. One of the procedures developed was to authorize trial judges to grant new trials before new juries. While there is a good deal of dispute about when English trial judges were first allowed to order new trials, it appears that by the late seventeenth century such a procedure was recognized, at least in certain situations.¹¹⁸ In 1757, in the case of *Bright v. Eynon*,¹¹⁹ Lord Mansfield, a judge known for his hostility to the jury and for his provocative argumentation, presented a vigorous defense of the new trial mechanism. He argued that it was essential for judges to be able to overturn obviously erroneous verdicts. “Trials by jury in civil cases could not subsist now without a power, somewhere, to grant new trials.”¹²⁰ To accept Mansfield’s view, without reservation, as reflective of English judicial attitudes is probably unwise but, undoubtedly, new trials had a role to play in mid-eighteenth century English courtrooms. Mansfield defended the new trial approach as only a modest intrusion on the jury trial right. It did not deny litigants a jury hearing but rather resulted in “no more than having the causes more deliberately considered by another jury, when there is a reasonable doubt, or perhaps a certainty, that justice has not been done.”¹²¹ Of course, this understates the cost and hardship imposed on an initially successful litigant. Be that as it may, new trials in this era appeared to be justified by their supporters as a means of protecting the adjudicatory system and litigants in England in Mansfield’s day from clear failures of justice by providing a second jury trial at the insistence of the trial judge, while carefully preserving the right to jury trial.

The significance of Mansfield’s view was augmented when it was relied upon by American courts to help determine the scope of the jury trial right provided for in the Seventh Amendment.¹²² The Supreme Court has said that the Seventh Amendment embraces as a guideline the common law of England in 1791—the year the Bill of Rights (including the civil jury trial Amendment) was adopted.¹²³ If new trials were tolerated at English common law in 1791, they might be accepted as an appropriate and constitutional restraint on civil juries in modern American courts. The new trial mechanism thus imported into American practice was one vested in the *trial court* to overturn a clearly unjust decision. It was to be employed to set the stage for the submission of the case to a second jury. The jury trial right was not to be extinguished but cabined by judicial review undertaken by the judge who had heard the case along with the jury. Appellate courts did not figure in this process.

Developments over the last 200 years have followed something of a “zigzag pattern,”¹²⁴ with respect to the trial judge’s power to grant or deny a new trial and the appellate court’s authority to review such a decision. Early in the nineteenth century, American judges began to expand the power to grant a new trial, holding that it authorized them to reject verdicts that were contrary to legal instructions, thereby enhancing the judges’ power in the declaration of law.¹²⁵ This development was paralleled by a growing acceptance of the trial judge’s authority to review a jury’s decision and determine whether it conformed to the weight of the evidence.¹²⁶ Weight of the evidence review had particularly serious implications for the jury trial right when it was used to scrutinize the size of awards and to justify offering an initially victorious litigant the *choice* of a new trial or of remitting that part of the jury’s award the court found excessive.¹²⁷ This approach preserved the appearance of the right to jury trial but put the prevailing litigant in the difficult position of risking all at a second trial or accepting a judgment for an amount fixed by a judge

rather than any jury. Damages review and remittitur tilted ultimate control of the trial process away from the jury and toward judicial second guessing. What kept the process solidly connected to the jury was the generally prevailing ethos of respect for jury verdicts and an insistence that the judge who sat with the jury be the only one allowed to propose changes in its decision.

During the nineteenth century, appellate court judges were not permitted to consider the question of new trials. In 1830, the U.S. Supreme Court held in *Parsons v. Bedford*¹²⁸ that because

The barriers erected by the Supreme Court did not entirely deter the courts of appeals.

of the limitations imposed by the Seventh Amendment's Reexamination Clause, a court of appeals had no right to review a trial court's denial of a new trial regarding an allegedly excessive verdict. On at least 11 occasions between 1879 and 1933, the high court insisted that there was no appellate

authority to review challenges to the size of verdicts.¹²⁹ Even the recognized power of the *trial judge* to grant new trials with respect to excessive verdicts and propose remittiturs was questioned by the Supreme Court, when, in *Dimick v. Schiedt*,¹³⁰ in 1935, it banned the use of additur in federal courts on the theory that such a step sought to impose damages other than those that had been awarded by a jury.¹³¹

The barriers erected by the Supreme Court did not entirely deter the courts of appeals. By 1950, some federal appellate courts were clearly in the business of overturning jury verdicts the circuit judges found unacceptable despite trial judge rulings to the contrary.¹³² The Supreme Court faced the question of the legitimacy of this tactic in cases decided in 1955¹³³ and 1968,¹³⁴ but, in each, it avoided outright condemnation of the practice while overturning the appellate court's decision on other grounds. In the year of the latter of these two decisions, the Supreme Court, without explanation, appeared to abandon its policy of reviewing and overturning circuit court scrutiny of monetary awards upheld by trial courts.¹³⁵ In short order, all the courts of appeals laid claim to the power to review such matters and to utilize remittitur,¹³⁶ despite such action being neither historically justified nor in line with an attitude of respect for the work of juries and trial judges.

B. Demurrers, Directed Verdicts, and JNOVs

New trials were designed, from their earliest days, to address the problem of *unjust* jury terminations. In the new trial context there was no legal objection to the holding of a trial, only to a grossly erroneous outcome. Distinct from such situations were the cases where the trial judge or the court of appeals concluded that *conducting any trial at all* was inappropriate because one of the litigants was entitled to win no matter what proof his opponent offered. Most often, this might be held to be the case because some legal rule settled the question between the litigants without any factual predicate being required. In English common law practice in the late eighteenth century, the need to cut off legally unwarranted trials was met by a procedure known as the demurrer to the evidence. To utilize this mechanism a litigant was required bindingly to admit the truth of all his opponent's factual assertions and ask the court to find, as a matter of law, that he was still entitled to judgment.¹³⁷ If he were correct, he would be granted judgment without a jury trial. If he were wrong, his binding admission would lead, without trial, to a judgment for his opponent. The demurrer was, obviously, a risky step and one only likely to be invoked in the clearest of cases.

The pre-1791 existence at English common law of the demurrer to evidence opened up the possibility of importing a similar procedure into American practice without facing any serious constitutional impediment. Moreover, as long as a litigant was willing to wager all on the demurrer to the evidence, the likelihood of frivolous motions and excessive trial court interference with the jury trial right seemed small. Serious questions arose, however, when American courts sought to move beyond the demurrer and embrace a far more broad-ranging procedure. This new procedure could be invoked during or *after* trial (thus creating a new mechanism of post-trial review) and allowed the trial judge to remove a case from the jury's hands on the basis of anything that could be styled a question of law. Under this new procedure, the moving party was no longer obliged, as he or she had been when invoking the demurrer, to make any sort of binding admission. When such a request was made at the close of an opponent's proof it was called a motion for directed verdict, and when it came after the jury had returned a verdict it was styled a motion for judgment, *non obstante veredicto* (JNOV). In each case it sought to deprive the party against whom it was made of any chance for a jury determination because, it was claimed, the law did not warrant a trial.

What deserves notice is not simply the liberalization of the directed verdict standard but its coming to focus on the strength of the evidence presented at the trial. This clearly carried courts beyond scrutiny of the sorts of legal questions traditionally viewed as within the purview of judges.

Although the Supreme Court was initially concerned about the suspension of access to jury trial that resulted from a directed verdict,¹³⁸ by 1850, it came to recognize its legitimacy.¹³⁹ The early cases were adamant, however, that *appellate courts* were powerless to use the new procedure to review and overturn what amounted to established jury verdicts.¹⁴⁰ Despite such precedents, appellate courts slowly began to extend their authority to review trial court decisions concerning directed verdicts.

The early directed verdict standard regarding evidentiary questions (that is, matters not concentrating on straightforward questions of law but examining the proofs presented at the trial) has been described as extremely restrictive, only permitting a directed verdict if there were not a "scintilla" of evidence to support the original judgment.¹⁴¹ This strict standard regarding evidence-related directed verdicts rendered appellate review exceedingly narrow. The standard was liberalized after 1870 and with that liberalization came heightened appellate oversight.¹⁴² The process of expansion was capped in 1943, when the Supreme Court decided *Galloway v. United States*,¹⁴³ in which the court recognized the propriety of appellate review and a standard allowing a directed verdict if the party against whom it was to be entered could not produce satisfactory evidence to support his claims.¹⁴⁴ JNOV development tracked that of directed verdicts. In *Baltimore & Carolina Line v. Redman*,¹⁴⁵ the Supreme Court approved the use of JNOVs despite powerful arguments that the procedure permitted unconstitutional reexamination of jury decisions.

What deserves notice is not simply the liberalization of the directed verdict standard but its coming to focus on the strength of the evidence presented at the trial. This clearly carried

courts beyond scrutiny of the sorts of legal questions traditionally viewed as within the purview of judges. The justification for this approach was that, at some point, a litigant produces so little or so unpersuasive a body of proof that he deserves to lose *as a matter of law*. It should be clear that this formulation is so vague and malleable as to be capable of justifying review in virtually any case.¹⁴⁶ Justice Black saw what was approved in *Galloway* as coming dangerously close to usurping the jury right altogether since the party seeking the directed verdict faced no adverse consequences (by contrast with the common law demurrer procedure), and it became a simple matter for courts to review, and perhaps to reverse, any jury judgment.¹⁴⁷

Despite these developments, the Supreme Court, through much of the twentieth century, vigilantly restricted judicial interference with jury verdicts. This was particularly true with respect to appellate courts. As Eric Schnapper has noted in his seminal study of appellate review: “In the years between 1938 and 1968 the Supreme Court was particularly active and vigilant in protecting the factfinding prerogatives of juries from incursions by appellate judges.”¹⁴⁸ The Supreme Court, in that 30-year span, voted to reinstate jury verdicts in 24 of 25 cases where appellate courts found a lack of evidence to support a jury verdict.¹⁴⁹ It pursued a similar course in 25 out of 27 Federal Employers Liability Act (FELA)¹⁵⁰ cases it reviewed from state appellate courts.¹⁵¹

C. Federal Court Review of Jury Verdicts Today

The current rules regarding appellate review of jury decisions in federal court, at least with respect to new trials and judgments as a matter of law,¹⁵² reflect the “zigzag” history described above and seek a fine balance between permitting oversight and protecting jury prerogatives.

The Federal Rule of Civil Procedure that authorizes the granting of new trials is Rule 59.¹⁵³ The rule regulating judgments as a matter of law (JMOLs) is Rule 50.¹⁵⁴ Rule 59 consciously incorporates past historical developments by allowing new trials in jury cases “for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.”¹⁵⁵ It is generally agreed that there are simply too many reasons justifying new trials to attempt an enumeration, although, at the heart of the rule is a concern for the avoidance of serious injustice and a desire to insure that verdicts bear some reasonable relation to the weight of the evidence.¹⁵⁶ Rule 59 has been interpreted as recognizing that *trial judges* have broad discretion in the granting of new trials. Among the tools at the trial court’s disposal is remittitur as an alternative to a new trial when the presiding judge finds a monetary award excessive.

1. New Trial Orders and *Gasperini*

Appellate review of district court trial decisions has been a topic of vigorous debate in recent years. As one leading treatise has put it:

There are few subjects in the entire field of procedure that have been subject to so much change and controversy in recent years as the proper scope of review of an order granting or denying a motion for a new trial. The trial court has very broad discretion, and the appellate courts will defer a great deal to its exercise of this discretion.¹⁵⁷

The reported tilt toward the exercise of trial court discretion is consistent with the common law’s emphasis on trial judge/jury cooperation and the preservation of the jury trial right. The “change

and controversy” that has arisen involves appellate court challenges to that tradition. Perhaps the best illustration of the nature of the problem that has arisen is provided by *Gasperini v. Center for Humanities, Inc.*¹⁵⁸ There, in a diversity action involving the awarding of damages for the destruction of artistic property (photographic slides), the Court of Appeals for the Second Circuit took it upon itself to closely examine and override a district court’s refusal of a motion for new trial on the question of the excessiveness of the jury’s verdict. The Court of Appeals, using an exacting standard of scrutiny,¹⁵⁹ ordered a new trial or remittitur.¹⁶⁰ The Supreme Court ruled that the Second Circuit had gone too far in its review, encroaching upon the district court’s province and raising questions about the preservation of rights guaranteed by the Seventh Amendment. Writing for the majority, Justice Ginsberg indicated that the appellate court should have gone no further than to determine whether the trial court had abused its discretion in denying the new trial; anything further would be violative of the Reexamination Clause of the Seventh Amendment.¹⁶¹

That the Second Circuit thought it was free to scrutinize carefully the work of the jury as well as the trial judge and, on its own, direct a new trial or remittitur, suggests that, in recent years, appellate courts have arrogated to themselves a great deal more authority regarding new trials than precedent appeared to allow. The problem with the appellate courts’ approach is that it both intrudes on the jury’s fact finding (for example, the setting of damages in *Gasperini*), and seems to evade the common law compromise that vested new trial authority in the trial judge who heard the evidence along with the jury. The traditional arrangement emphasized the importance of witnesses, testimony, trial hearings, jury decisions and trial court participation. Rejecting that arrangement has had the effect of denigrating those considerations in favor of greater authority for a panel informed by nothing more than a cold record.

The Second Circuit’s approach in *Gasperini* was no anomaly. Despite the constitutional and prudential limits that are supposed to restrain appellate review, virtually every federal circuit has pushed well beyond the “abuse of discretion” standard prescribed by Justice Ginsberg.¹⁶² In fact, in a study focusing on decisions rendered by federal appellate panels in 1984-85, only 7 of 68 decisions regarding the size of a verdict used the abuse of discretion standard of review.¹⁶³ The robust character of the reexamination conducted in these cases is indicated by the fact that 34 of the 68 cases resulted in *appellate* reversals of verdicts for excessiveness. In none of those 34 cases was the abuse of discretion standard applied.¹⁶⁴ What Schnapper said he found in these decisions, and in a broad range of other appellate court rulings in 1984-85, is that they were systematically skewed in ways that suggested appellate court bias against plaintiffs, in general, and especially those plaintiffs pursuing constitutional or discrimination claims.¹⁶⁵ This manifest but unremarked appellate approach to jury decisions sweeps aside the work of jurors and trial judges. Despite the stern instructions of *Gasperini*, there are grounds to wonder whether much remains of the Seventh Amendment’s protection against reexamination of jury verdicts.

2. Judgments as a Matter of Law (JMOLs)

Rule 50(a) of the Federal Rules of Civil Procedure corresponds to the traditional directed verdict mechanism and allows the granting of a judgment as a matter of law (JMOL) during a trial once a party “has been fully heard on an issue and there is no legally sufficient evidentiary

basis for a reasonable jury to find for that party on that issue.”¹⁶⁶ The result of the granting of a motion pursuant to Rule 50(a) is the termination of the litigation without a jury decision. Rule 50(b) corresponds to the traditional JNOV and extends the reach of the judgment-as-a-matter-of-law rule to a period after the return of the jury’s verdict and the entry of judgment. Its effect is to permit judges to cancel the jury’s verdict and terminate the litigation. These rules give trial judges very substantial power to resolve litigation despite the decision of a jury. They impose the most serious sort of constraints on access to jury trials and, therefore, deserve the closest scrutiny if we are concerned about the jury trial right. The strongest argument in their favor is that there must be “at least some minimal device for preserving the integrity of the legal rules. . . .”¹⁶⁷ The key question is exactly how to balance the right to jury trial against the need for JMOL intervention. Despite a history of reticence about the use of JMOLs, the way the present federal rule is written seems designed for “curbing inhibitions against granting the motion.”¹⁶⁸

There are a range of conceptual difficulties with Rule 50. The present rule allows a broad examination of jury verdicts to see if they have a “legally sufficient *evidentiary* basis.”¹⁶⁹ This is,

Deliberations overridden by Rule 50(b) serve no purpose other than to allow courts to gamble on not having to take a firm and public stand on what was supposed to be a clear matter of law.

obviously, a far more expansive mandate than one simply focused on legal questions. It allows courts to measure verdicts against their subjective ideal of a “reasonable jury,”¹⁷⁰ thereby diminishing respect for the actual jury. Rule 50(b) preserves a legal fiction¹⁷¹ that, somehow and without articulation, “the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion.”¹⁷² In other words, the trial court can wait and see whether the jury comes in with the

decision the court favors. If the jury does, there is no problem and the judgment is left standing. If not, the court can tardily assert a question of law that, in theory, should have been recognized and should have cut off the case *before* the jury was sent to deliberate. This fiction is convenient for the court but shows no respect for the jury’s deliberative efforts. Deliberations overridden by Rule 50(b) serve no purpose other than to allow courts to gamble on not having to take a firm and public stand on what was supposed to be a clear matter of law. Allowing this sort of subterfuge is troubling, at best, and especially dubious with respect to a motion about which the trial court is supposed to have “no discretion whatsoever.”¹⁷³

The danger of these mechanisms to jury adjudication has not gone unappreciated. It is a common judicial refrain that trial courts are not free to weigh the evidence on their own or to substitute their own judgments, especially those regarding credibility, for those of the jury.¹⁷⁴ The evidence, moreover, is supposed to be viewed in the light most favorable to the party against whom the JMOL motion is made.¹⁷⁵ In the JMOL setting, concerns about respect for jury verdicts led to a series of rules further restricting review, most particularly that by appellate courts. In the nineteenth century, these included a requirement that courts not disturb denials of JMOLs if there were a “scintilla” of support for the verdict. That rule was eventually liberalized but still focused overwhelming attention on the original verdict winner’s proof rather than on what his opponent (the appellant) had offered.¹⁷⁶

3. Encroachments on the Seventh Amendment

Despite the continuing applicability of these precedents, every court of appeals has sanctioned a more broadranging review encompassing “all” the evidence.¹⁷⁷ Moreover, that review has been described as being without deference to the decision of the trial court. “Whether judgment as a matter of law should be granted is a question of law and on questions of that character litigants are entitled to full review by the appellate court without special deference to the views of the trial court.”¹⁷⁸ The predictable result, despite preservation of the rhetoric of restraint, is that courts of appeal grant a great number of JMOLs, overturning both jury verdicts and lower court refusals to act. In 1984-85, there were 175 reported opinions regarding appeals from denials of JNOVs. The appellate courts reversed in 67 of these for a reversal rate of 38 percent.¹⁷⁹ In all these cases the courts of appeal overrode a jury decision and a lower court affirmance by entering a binding judgment on their own—one that dispensed with the determination of a jury. Such rulings sweep even further than those involving appellate use of the new trial/remittitur option. They extinguish jury access without recourse. They may also interfere with the trial court’s consideration of the question of ordering a new trial. In virtually none of the appellate reversals ordered in 1984-85, was there any consideration of the potential applicability of the new trial mechanism.¹⁸⁰ The Supreme Court has been clear about the need to examine this question,¹⁸¹ but the courts of appeal have done virtually nothing to consider this less drastic alternative. In light of the mandate of the Seventh Amendment one would expect that the new trial procedure would be the one to be favored. Yet, the courts of appeals have stood this presumption on its head.¹⁸²

In a wide range of cases, appellate review of jury decisions has been augmented in ways that undermine the right to jury trial. Although the courts have frequently maintained the rhetoric of the right to a jury, and the Supreme Court, in cases like *Gasperini*, has worked to cabin appellate intervention, the reality is one of robust review and frequent reversal. This raises serious questions about the continuing integrity of the Seventh Amendment. The projection of appellate power has been managed by the use of vague standards and outright legal fictions. There has seldom been a candid admission by any appellate court that its aim is to marginalize the jury and substitute the court’s judgments for those of the citizenry. Yet that is exactly what has happened in seeming violation of the Constitution, most particularly the Reexamination Clause of the Seventh Amendment. Evasion of the jury trial right by stealth is not only disturbing, but negates any opportunity for a debate about the wisdom of the new jury-marginalizing approach.

4. Analysis of the Trend to Marginalize the Jury

Any such discussion ought to begin by noting that appellate judges, themselves, seem to be making all the critical decisions. It is appellate judges who have chosen to expand their authority while denigrating that, not only of juries, but of trial judges as well. This assertion of power suggests a lack of humility and limited respect for the checks and balances painfully negotiated in the Constitution and common law. Both history and the Constitution have recognized the particular value of an independent jury’s assessment balanced only by a trial judge’s review based upon the proofs heard in court.

Appellate courts were not intended to be a key part of this equation. Their vigorous entry on the scene has undermined the balance, most particularly because there is no one to “watch

the watchers,” despite the Supreme Court’s fitful efforts in this direction. The tactics of the appellate courts are also disturbing because they seem to be premised on the assumption that juries are emotionally unstable and intellectually enfeebled. There is virtually no empirical basis for these stereotypes, and they are especially suspect in an era when the jury has begun effectively to incorporate a far-broader spectrum of citizens than in former times.¹⁸³ Appellate courts seem to be expressing a lack of faith in the American approach to adjudication. They seem to be saying that the hearing of witnesses and proof is less valuable than the scanning of printed records, and that panels of judges are better decision makers than common law courts and juries. They seem to be inclined to shift our system to an inquisitional model that downplays orality, is suspicious of witnesses, thinks dismissively of cross-examination, and is little influenced by the work of lawyers advocating on each side.

The costs of a shift away from juries and toward appellate courts are many and serious. As already suggested, the adversary approach to adjudication is ever more significantly threatened as appellate courts flex their muscles and insert themselves in the place of juries and trial judges. Of equal importance, all the benefits the jury provides are placed at risk. In the short run, democracy is rebuffed and judicial power augmented. But over the long haul, judicial power itself is threatened because the device that palliated the undemocratic exercise of judicial power—the jury—is being withdrawn from the equation. Elimination of the jury worked in England, where

judges surrendered all law-making power to Parliament. The cost of such a tradeoff, however, might give some American judges pause. Lest one view this as absurd conjecture, it should be recollected that judicial discretion on a number of fronts—most particularly criminal sentencing¹⁸⁴—has come under political scrutiny and been subject to sharp curtailment in recent years. As

The adversary approach to adjudication is ever more significantly threatened as appellate courts flex their muscles and insert themselves in the place of juries and trial judges.

calls for uniformity grow stronger, not only trial judges but also appellate courts will feel the harsh restraint of legislative intervention. Juries have, for centuries, helped lend legitimacy to court decisions. As the responsibility of appellate panels becomes ever clearer, these courts are likely to find themselves the targets of ever more criticism from those upset with judicial rulings. Less and less frequently will a jury decision be available to deflect popular ire. The disappearance of this “safe harbor” for judges is likely to focus more political attention on the courts and generate more pressure for judges to conform to current political attitudes. As juries decline in significance the practical benefits they provide are also likely to be lost. This is already obvious in the area of jury size. Casting away tradition, the Supreme Court in *Colgrove v. Battin*¹⁸⁵ approved of juries as small as six members. The result was juries that were less predictable and representative juries.¹⁸⁶ The Court, more or less, admitted the unsoundness of its approach in *Ballew v. Georgia*,¹⁸⁷ when it rejected a five-person jury. Unfortunately, the damage was done. The federal courts, despite repeated advice to the contrary,¹⁸⁸ have stubbornly clung to six-person juries and, thereby, lost the advantages of the larger, traditional, body.

This all suggests a fairly bleak picture. But there are some grounds for hope. As already noted, the jury mechanism has shown its resilience and adaptability for more than 900 years. There exist, today, proposals for its revival. Some of these will be considered in the last section of this essay. Moreover,

despite present-day intrusion, the jury still has “bite.” Juries have made scores of significant decisions over the past few years and have remained an important source of public input in such cases as those involving toxic torts, spoliation of the environment, and business giants.

IV. A Proposal to Reorient Appellate Review of Jury Verdicts

*If everything is caused by innumerable ‘factors,’ then we had best be very careful in any practical actions we undertake. We must deal with many details, and so it is advisable to proceed to reform this little piece and see what happens before we reform that little piece, too.*¹⁸⁹

In light of the mandate of the Constitution and the risks posed by current policy, there is good reason to consider the restoration of effective limitations on appellate review of jury verdicts. Many of the appropriate restrictions already exist in unenforced precedents. Others may be found in decisions only recently overridden.

The jury’s work should, generally, be treated with a presumption of legitimacy. The stereotype of jury incompetence and emotionality should be replaced by respect. New trials should be ordered only when there is a need to avoid substantial injustice or a truly perverse verdict. New trials should be the product of the trial court’s appraisal rather than appellate reassessment. Remittitur, in particular, should be treated as within the province of the judge who heard the proof. The rule set forth in *Gasperini* requiring appellate court restraint should be enforced and applied—particularly to the remittitur device.¹⁹⁰ JMOLs should be a disfavored remedy in comparison with new trials and should concentrate on legitimate questions of law rather than relying on sophistries and legal fictions to expand review of evidentiary matters. While the “scintilla” rule seems an unwisely restrictive standard for review, those precedents insisting that JMOL decisions give credence to any sound proof adduced by the winner in the trial court ought to be rigorously and expansively applied. There should be a return to the protection of jury verdicts that was demonstrated by the U.S. Supreme Court in the period between 1938 and 1968. Since it may be difficult for the Supreme Court to maintain such a high level of vigilance, stronger prophylactic rules may be needed. These suggestions are not made with the intention of “punishing” wayward courts of appeal but rather in the belief that the path presently being pursued is likely to undermine America’s adversary system, its tradition of the oral presentation of evidence in open court, its allegiance to jury trial, and the co-equal status of the judicial branch of government. The alternative is an “English-style” marginalization of the courts themselves and a “continentalization” of procedure.

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Despite all these concerns, it seems undeniable that there are areas in which more robust review may be warranted. As Professor Edward Cooper has put it in his seminal article on directed verdicts:

Federal courts may legitimately accord greater fact finding and law applying freedom to juries in some areas than in others, depending on the strength of the desire to keep pure the legal rules involved and on the nature of the consequences of jury error.¹⁹¹

Cooper, perhaps, takes the notion of variable review too far by allowing a volume of reversals that might swallow the right to jury trial. Moreover, he stresses concern with “complex” cases and, thereby, seems to buy into the same sort of unreliable stereotype that has posed a threat to jury trials generally.¹⁹² Yet, he is correct that there are a number of situations in which a more robust level of scrutiny is appropriate. It would be difficult within the ambit of an essay like this to detail all of them but, in what follows, several will be considered.

There has been a sustained effort over the past decade or so to exercise greater control over jury decisions regarding punitive damages. In *BMW of North America, Inc. v. Gore*,¹⁹³ the Supreme Court indicated that, at some point, punitive damages can become so grossly excessive as to warrant reduction as a matter of constitutional law. The Court’s approach tracks analysis in other areas where extreme results are viewed not simply as posing questions of fact to be left solely to juries but as posing serious questions of law for judges.¹⁹⁴

One of a number of questions left unanswered by prior punitive damages cases was what role appellate courts are to play in scrutinizing jury decisions, most particularly in light of the restraints emphasized in *Gasperini* on appellate review. That question was answered in the recently concluded Supreme Court term in a case entitled *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*¹⁹⁵ There, the Supreme Court held that the court of appeals should have engaged in *de novo* rather than deferential review of a district court’s refusal to find any constitutional violation in the awarding of \$4.5 million in punitive damages in an unfair competition case where the compensatory damages were \$50,000 and a mistaken judicial instruction had been given to the jury, branding as “wrongful” a critical action by the defendant.¹⁹⁶

Justice Stevens, writing for the court, defended a robust standard of appellate review on the strength of arguments that punitive damages are like criminal penalties,¹⁹⁷ that excessive penalties (an analogy to the death penalty cases) are constitutionally prohibited,¹⁹⁸ that the determination of punitive damages is not simply a question of fact (and hence assigned to the jury under the Seventh Amendment),¹⁹⁹ and that trial judges have little special “institutional competence” to justify deferential review standards.²⁰⁰ The *Leatherman* analysis contains a number of historically and legally dubious propositions, particularly about the status of punitive damage awards as something other than factual determinations²⁰¹ and about the equal institutional competence of appellate courts.²⁰²

There is, however, something to be said for greater appellate involvement in decisions concerning punitive damages. The key in this regard is the court’s reliance on its death penalty rulings including *Furman v. Georgia*,²⁰³ *Enmund v. Florida*,²⁰⁴ and *Coker v. Georgia*.²⁰⁵ In those cases, decisions of unparalleled seriousness and irreversible consequences were before the court. In each, the court found that the special consequences involved warranted far greater scrutiny than might otherwise be the case.

Punitive damages cases pose some of the same risks in the civil arena as death penalty cases do in the criminal context. Because there may be no ceiling on punitives (unlike compensatory

damages which are tied to injuries the plaintiff has personally suffered), it is conceivable that a jury could award punitives that would drive a company out of business.²⁰⁶ In addition, a single punitive award may open the way to other, similar awards that, in the aggregate, amount to a civil “death sentence.”²⁰⁷ The magnitude of the risk imposed by punitive awards has been recognized by many courts and has led to prohibition of awards that would bankrupt a company.²⁰⁸ In a situation where the risk of bankruptcy is considerable, or where multiple punitive awards loom, there may be a place for heightened scrutiny. What is important in such a situation is not the disproportion of the punitive award but its potential to extinguish a company’s existence. In such extreme situations, the added protection of close appellate scrutiny seems justifiable. Death, civil as well as criminal, is different from other punishments, and there are principled reasons to treat it that way.²⁰⁹

A second reason to allow heightened appellate review of punitive damages awards is that the absence of review can have a particularly chilling effect on the willingness of a falsely accused defendant to vigorously defend itself. Such a defendant may be justly concerned about the small but real chance it may lose (and lose big) at trial. If it cannot count on robust appellate review, the extent of the defendant’s exposure may cow it into an unwarranted settlement.²¹⁰ The likelihood of a fear-driven settlement may be further heightened if appeal bond requirements make access to appeal significantly more difficult and expensive.²¹¹ No one

Fairness requires heightened vigilance where the existence of a litigant is legitimately at risk.

should be denied a day in court or opportunity for appeal simply because of the nature of an opponent’s allegations. Fairness requires heightened vigilance where the existence of a litigant is legitimately at risk. Moreover, large bonding requirements which may serve

to deter a meritorious defense should be closely scrutinized, even if that means greater appellate court involvement.

A counter consideration that ought to cut off heightened review of a punitive award arises whenever a punitive judgment may be traced to the particular improvidence of counsel for the losing side. The *Pennzoil* case provides a convenient example. There several serious errors regarding punitives were made by counsel, most particularly the failure to detect a critical omission from the final instructions and a decision to present no evidence on the question of damages.²¹² If the adversary system is to function and the integrity of jury trial is to be maintained, it is difficult to accept the proposition that a jury verdict should be open to heightened appellate scrutiny after the loser’s counsel has erred on punitive-related questions. To accept such an idea is tantamount to saying that the jury and trial process can be overridden by an appellant lawyer’s incompetence. This may be appropriate in the criminal context²¹³ but it has little place in the civil arena. The appropriate remedy, if there should be one, is a malpractice action against errant counsel. Improvident lawyering is a risk of the system and should not be viewed as trumping the results of a jury’s work.

As Professor Cooper has pointed out, there may be a number of other areas that warrant heightened concern for the enforcement of legal rules and amplified desire to avoid jury error. One that comes readily to mind involves the application of the First Amendment right to freedom of speech.²¹⁴ Courts and citizens alike appear to have adopted the view that the most

wide-ranging protection ought to be afforded to speech. Jury decisions that appear to trench on that right ought to be subject to searching appellate review. Similarly, decisions rejecting reasonably supported complaints of racial discrimination in the operation of the judicial system itself ought to be subject to exacting appellate examination. *Batson v. Kentucky*²¹⁵ and its civil analogue, *Edmonson v. Leesville Concrete Co.*,²¹⁶ put trial judges on notice that they must scrutinize jury selection processes and bar racially discriminatory tactics. The seriousness of this question to the integrity of the legal system ought to warrant careful review in the appellate forum. Unfortunately, the Supreme Court, in recent cases, has not seen fit to move in that direction.²¹⁷

V. Future Strategies Regarding the Jury

*La guerre, c'est une chose trop grave pour la confier à des militaires.*²¹⁸

The question of the proper scope of appellate court review of jury decisions is part of a larger debate about who ought to run the “war” of litigation and what parts jurors and judges ought to play in that “war.” There are three approaches presently vying for dominance: one that urges a slow whittling away of the jury, a second that urges juries be forced to behave more like judges in making decisions, and a third that urges the adoption of techniques that help jurors do their unique job more effectively.²¹⁹ These strategies are seldom pursued in unalloyed form but rather are, most frequently, mixed together both in legislative packages and judicial opinions. Teasing them apart, however, may help us identify the implications of a range of proposals and their bearing on the related question of appellate review.

A. Diminishing the Jury Further

The advocates of the dismemberment of the jury have used a variety of approaches to achieve their end. Three steps in particular deserve notice, including reduction in the size of the jury, narrowing of the questions it is allowed to consider, and blindfolding of jurors with respect to a number of categories of information. All three curtail the reach of the jury and interfere with its ability to operate effectively.

As previously noted, the Supreme Court in *Colgrove v. Battin*²²⁰ allowed civil juries to be shrunk from 12 members to six. The argument in favor of this move was premised on the reductionist claim that juries serve no other purpose than “a fair and equitable resolution of factual issues.”²²¹ On the strength of this restricted analysis the court not only cut the jury in half but narrowed the constitutional conception of what jurors do. In both ways, the result of the Supreme Court’s work was to undermine faith in civil juries. *Colgrove* produced smaller juries, less representative of the community and less predictable in their verdicts. This, in turn, has fed arguments that the jury is now so unreliable and insignificant that it should be done away with. The rationale for jury downsizing was finally rejected by the Supreme Court in *Ballew v. Georgia*.²²² Yet, despite the urging of judicial rulemakers²²³ and virtually every lawyers’ group to have studied the question,²²⁴ the courts have refused to return to juries of 12.

In *Markman v. Westview Instruments, Inc.*,²²⁵ the Supreme Court held that although the Seventh Amendment applies in patent-infringement actions, it is not constitutionally mandated that the patent “claim” be construed by a jury rather than a judge. Finding no compelling

historical or precedential answer to the question of the scope of the jury right in such actions, the court addressed itself to “functional considerations.”²²⁶ In its view, judges are superior in analyzing the “construction of written instruments,”²²⁷ most particularly patents. Although expert testimony on the construction of the patent “claim” was presented in *Markman* and there were questions of credibility arising out of that testimony, the Supreme Court concluded that the key task was fixing the meaning of the patent document as a whole and was best left to the judge as a master of documentary exegesis.

Patent cases may be unique and *Markman* may reflect nothing more than the demands of that specialized field. But, implicit in the Supreme Court’s decision is a notion of jury inferiority with documentary material and a willingness to parse lawsuits so that allegedly difficult questions of interpretation are left to judges. Such a view invites the whittling down of other sorts of lawsuits so that juries decide less and less, while judges do more and more.

Another currently popular technique for cabining juries is to “blindfold”²²⁸ them to some potentially critical piece of information regarding the case they are being asked to decide. The blindfolding rules seem to grow out of a paternalistic view of jury weak-mindedness²²⁹ or an overt wish to manipulate the jury to insure a desired outcome while retaining the outward trappings of jury trial. Archetypical blindfold matters include the existence of liability insurance and of rules that require the trebling of damage awards in antitrust cases.²³⁰ As to the former, it

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is feared that jurors hearing of insurance coverage will improperly seek to help sympathetic plaintiffs by finding liability. As to the latter, the concern seems to be that jurors will reduce their award to ameliorate the legislated trebling effect. In both cases, the jury is kept in ignorance and no information about the embargoed issue is allowed to reach them. The problems with this approach are serious. First, advocates of blindfolding seem to assume, without empirical support, that honest and full disclosure will lead jurors astray. Second, blindfolding offers no opportunity to correct misimpressions jurors may bring with them to the courtroom. Third, blindfolding proponents often appear to be engaged in a cynical manipulation to achieve favored extra-legal objectives. Adapting the old legal refrain, blindfolding seeks to treat jurors like mushrooms—to keep them in the dark and feed them plenty of horse manure.²³¹

All of these activities work toward the marginalization of the jury. In each, something *disappears* from the jury trial: jurors, issues or evidence. The new trial and JMOL mechanisms can be used similarly to make whole cases disappear from jury consideration. The end result of such whittling could be the jury’s demise. There is precedent for the jury being phased out in just this way. According to Patrick Devlin, the English jury disappeared incrementally.²³² In 1854, jury trial was the only sort of trial available in English common law courts. Thereafter, “small breach[es]” were permitted including non-jury trial for “matters requiring prolonged examination of documents or accounts or any scientific or local investigation.”²³³ This was

followed in 1883 by the designation of six (later seven) causes of action as warranting jury trial as a matter of course.²³⁴ All other civil actions required a special request for jury trial and procedure was so arranged “as to make trial by judge alone appear to be the general rule and trial by jury the exception.”²³⁵ With the coming of World War I, there was a precipitous decline in the number of men (only men could then serve) available for jury duty. In 1918, emergency legislation was adopted to abolish civil jury trials in all but the previously enumerated seven categories. Although the emergency legislation was eventually repealed (1925), its prohibitions were permanently restored in 1933. This history suggests that the British so altered their legal landscape by a series of modest changes that, in the end, the civil jury disappeared.

It is possible to see, in the downsizing of the jury, the narrowing of jury questions, the blindfolding of jurors, and the growth of appellate intrusion on jury verdicts, steps leading in the same direction as those that resulted in the disappearance of the English civil jury.

There are, however, indications that this result may not be inevitable. Most particularly, the jury’s protection in our Constitution, makes the cavalier British approach less likely. The Supreme Court, despite its many lapses, does not seem bent on the jury’s destruction. Its rulings in *Gasperini* and *Ballew* suggest that there is a line the court is unwilling to cross. Moreover, the jury is being revitalized across America by a host of jury-friendly enactments, by the creation of a new, more representative, jury pool, and by empirical research underscoring the jury’s worth.

The jury still plays a vital part in American civil litigation and retains the support of an experienced and skilled civil jury trial bar (something that disappeared in England by the end of the Great War).²³⁶ The homogeneity of British society in the late nineteenth and early twentieth centuries, Parliament’s absolute supremacy, and the absence of a written constitution all made destruction of the English jury easy. All are absent from the American scene, as is the tradition of deference to one’s “betters” that tends to dampen adversarial ardor.

B. Making Jurors More “Judicial”

A second approach to the future of civil jury trials has been to use a variety of techniques to make jurors behave more like judges in their decision making. One procedural device that has frequently been employed in this way is bifurcation. Either because of concern about the misleading effects of certain information or because of skepticism about the jury’s ability to remain focused on a narrow question, some courts have chosen to divide cases into discreet parts, insisting that the jury address a single, often potentially dispositive, question before moving on to other matters.²³⁷ One situation in which this approach has been used is with respect to punitive damages claims. Juries are, frequently, directed to rule on compensatory relief before hearing any punitive damages proof or considering a punitive award. Research suggests that such bifurcation may focus juries more effectively on the question of liability in relatively clear cases. In less clear cases, however, such an approach seems to increase the likelihood of a large punitive damages judgment.²³⁸ Courts have also been attracted to bifurcation in death penalty cases where the “penalty phase” and its potentially broad-ranging proof thus may be segregated from the question of guilt.²³⁹ Such methods may enhance efficiency and may improve deliberations in relatively clear matters, but they are far more problematic in other contexts. Furthermore, bifurcation has been carried to extremes in some cases, thereby denying the jury any real sense of the nature of the lawsuit.²⁴⁰ In all these

procedures lurk serious risks of confusing and distorting deliberations rather than improving them.

Another popular way to compel juries to behave more like judges is to give them elaborate special verdict forms or long lists of interrogatories to answer pursuant to Rule 49 of the Federal Rules of Civil Procedure. In both cases, the jury is compelled at some point in its deliberations to respond to a judicial mandate. The judicially fashioned questions may help a jury deal with matters, or they may interfere with the jury's own perfectly logical and defensible approach to the case. However, they always interject the court into the deliberation process and always create potentially confusing decisions for jurors whose work will, thereafter, be subject to additional judicial scrutiny, both at the trial and appellate level.

One of the hallmarks of jury practice has been the secrecy of its deliberations. In the absolute privacy of the jury room all points of view may be aired and, especially where

One of the hallmarks of jury practice has been the secrecy of its deliberations. In the absolute privacy of the jury room all points of view may be aired and, especially where unanimity is required, no one may be silenced.

unanimity is required, no one may be silenced. The jury's privacy has been jealously guarded. When it was breached through the use of listening devices during the early days of Kalven and Zeisel's work on their *American Jury* project, there was a firestorm of protest and heightened protection for the jury.²⁴¹ In American society, privacy protection has been extended to the conversations of lawyers and clients, husbands and wives, and priests and penitents. In none of these situations do we tolerate any

high degree of intrusion or seek to dictate the nature and content of the discourse. The jury deserves the same sort of respect. We already sharply limit juror testimony about deliberations under Rule 606(b) of the Federal Rules of Evidence, which prohibits courtroom interrogation about "any matter or statement occurring during the course of the jury's deliberations."²⁴²

The effect of bifurcation, special verdict forms, and interrogatories is to try to make jurors talk and think like judges. These intrusions may sometimes be helpful and warranted, but any high level of intervention will skew jury conversations, invite increased judicial scrutiny of jury verdicts, and provide further justification for use of the new trial and JMOL devices. Intrusion should be handled with the utmost restraint if the jury is to be vouchsafed a private place for its deliberations.

C. Helping Jurors Do Their Work

The third alternative in handling the jury is to carry out those sorts of reforms that make the jury's job easier without diminishing its participation or attempting to turn it into a part of the judiciary. Perhaps foremost on the list of needed steps is heightened emphasis on candor with the jury. Most blindfolding should be avoided, procedural steps should be carefully and completely explained, and instructions of all types should be as forthright as possible. When issues are truthfully presented, the jury is given the opportunity to fashion effective and cogent

verdicts. Subterfuge, obfuscation, and evasion should have no place in the courtroom. Beyond candor, there should be a striving for clarity and simplicity. Lawyers should be expected to make their arguments and proof clear. Their presentation time should be limited and focused on the central questions in the litigation. Instructions to the jury should be clear and simple. Whenever the jury appears confused, additional proof, argument and instructions should be considered. The same steps should be considered when there is a deadlock during deliberations. When there is apparent inconsistency in a jury's verdict, the jurors should be given an opportunity to clarify their decision. New trials and JMOLs should be viewed as a last resort. Jury questions should be solicited and answered. Questions should be allowed not only of the judge and witnesses, but of counsel as well.

The jury has been a critical part of the Anglo-American justice system for more than nine centuries. It provides immense benefits to that system. Procedures that interfere with or undermine the operation of the jury should be used with great restraint. What is lost may not be so easily replaced.

ORAL REMARKS OF PROFESSOR LANDSMAN

I would like to start by recalling something that Mark Twain said some time ago: “If I had had more time, I would have written you a shorter letter.”

I have to apologize for the length of my paper, but once I began to consider the topic of the relationship between appellate courts and civil juries, I found that I had much more to think about than I had originally expected. That is, I think, one of the greatest risks of being a law professor. You probably have too much time to think.

You might be wondering, right about now, how anyone could get particularly excited about, for an example from the paper, the phrasing of the test for the application of Rule 50(a) of the Federal Rules of Civil Procedure. Well, it is okay if you are wondering how anyone could be excited about that. I often find pretty much the same thing when, in my torts class, I launch into the beginning of my explanation of *res ipsa loquitur*. As I look out toward the back of my room, I will see my students’ eyes in the afternoon, right after lunch, often sort of slowly sinking toward being closed.

I would like to try to explain both my enthusiasm and concern with respect to this topic with what I think is an illustrative story. It is a story that begins in Britain in the 1850s. At that time and in that place, if you filed a civil lawsuit, you were pretty surely going to have a trial before a jury if the matter got to the trial stage. In 1854, however, Parliament passed a statute exempting from jury trial, at a judge’s discretion, “matters requiring prolonged examination of documents or accounts or any scientific or local investigation.”

Now, Americans might be tempted to ask, how could Parliament do that? Isn’t it a partial abrogation of the right to a jury trial? I think that it probably is. But in Britain, there is no written constitution, and Parliament has the power to change or even abrogate even the most fundamental of institutions, including trial by jury. The first jury reform statute did no such thing. It didn’t abolish the jury. However, it did open the way to more significant change, and made possible bench trials on a regular basis.

Things did not end there, obviously. Once the courts were started down the road toward bench trials, things seemed to snowball. In the 1880s, Parliament designated six civil actions as warranting jury trial as a matter of course. Most of these were intentional torts or claims arising out of defamations. In all other cases, however, the litigants had to make special application for jury trial. The way this was set up, no one had the blame for doing away with civil jury trials, but it came to appear, according to Sir Patrick Devlin, that jury trial was the exception. As things went along, there were fewer and fewer cases that were tried to a jury.

Then came the calamity of the first world war. By 1918, there were so few men available for jury duty, that emergency legislation was adopted in Britain, suspending jury trials in all civil cases except those previously designated, that is, the intentional torts and defamation cases. In 1925, this legislation was repealed, but the damage to the jury trial in Britain had been done. By 1933, juries in civil actions became a thing of the past in Britain.

What are the lessons from this story? Why get excited about all this? First, a series of procedural restrictions, modest at the start, can, and in Britain did, undermine jury trial. Hence, restrictions of any sort should be taken quite seriously. Second, procedural change can radically reduce the jury trial experience of both the bench and the bar. All of this can lead the legal community to turn its back on jury trials, due either to anxiety about whether one can handle a jury, or a conviction that professional judges do better at finding facts than jurors can.

What happened in Britain might not happen in the United States for a number of reasons, however:

- One, civil juries are protected in 47 of the 50 states' constitutions in the United States, as well as by the Seventh Amendment of the United States Constitution.
- Two, American legislatures are not the pre-eminent branch, but rather, co-equal institutions with the executive and the judiciary.
- Three, America still has an active and skilled civil jury trial bar.
- Four, American juries retain a high degree of legitimacy and public support, at least generally.

However, the British precedent is there and I think needs to be taken seriously.

My assigned topic today is how appellate review of jury verdicts fits into this picture of access to jury trial as contemplated by the Seventh Amendment. Well, several of the key mechanisms used for appellate review, including the authority to order new trials and to propose remittitur and to grant a judgment as a matter of law can result in parties being cut off from obtaining a jury decision in their cases. Through these procedural mechanisms, appellate courts can say that the jury or the parties got it so wrong that we should forget about a jury trial. The question about what to do when a jury gets it wrong, or the law determines that no trial should be available, is an old one. The common law's quite proper answer to that question is that sometimes a determinative jury trial should not be held. The problem is how to balance that outcome against the constitutional right to a trial by jury.

One thing that is clear is that the constitutional right makes it impossible simply to ignore the question or simply to follow the dictates of what seems to be efficiency. Hence, mechanisms like new trials, remittitur, and judgments as a matter of law must be tailored to fit the requirements of the constitutional right to a jury trial. The older cases, British as well as American, sought to protect jury trials in review of appellate situations in at least three ways: limiting access to review; insisting on a second trial when the first one failed for some reason or another, and concentrating review in the trial court rather than in an appellate forum.

Challenging the right to a jury trial was intentionally made difficult in the old cases and in the older procedure. For example, to get a judgment as a matter of law, a party had to make a binding admission pursuant to the procedure called a "demurrer to the evidence." If the party making the demurrer was wrong with respect to his claim, he lost his case. This obviously cut down on the use of such procedures. The demurrer was not cost-free, and its use was reserved for serious and clearly very strongly supported contentions.

New trials originally meant just that. It was only with the addition of the remittitur device that the jury trial might be lost and a judge's decision substituted in its place. When the United States Supreme Court reviewed remittitur procedures in the *Dimick* case²⁴³ in 1930, it expressed its misgivings about this particular mechanism and went so far as to bar the mirror mechanism—that is, additur—from being added to a federal court's arsenal. This was not a sound intellectual decision, but I think it powerfully illustrates the concern that appellate review generates with respect to the infringement of a right to have a jury determine factual questions—particularly questions about damages.

In many procedural situations throughout the nineteenth and early twentieth centuries, appellate courts had no hand in review of jury decisions. All was left to the trial judge who, along with the jury, had heard the evidence, seen the witnesses, and shared the trial experience. These strategies all protected the jury trial right, although they might slow case processing and increase the scope of litigation.

Modernizing and moderating these procedures, I think, made good sense. Over time, as in Britain, the exceptions began to swallow up the right to a jury. The Supreme Court of the United States has only sometimes recognized this particular problem. It has charted something of a zigzag course in responding to the issues, sometimes boosting appellate court review, sometimes protecting the right to trial by jury.

Perhaps the best example of the Supreme Court protecting the right to trial by jury, at least in the last few years, is a case called *Gasperini v. Center for Humanities*.²⁴⁴ There, a photographer named Gasperini gave his photographic negatives to the defendant, the Center for Humanities, as part of an artistic project. The center proceeded to lose all the negatives. Everyone agreed that the photos had been lost due to the negligence of the defendant. The only question in the case was how much the negatives were worth. Gasperini put on evidence of the photo negatives' worth, including expert testimony. The jury accepted that proof, and set damages accordingly. The trial judge affirmed the jury's decision.

The Second Circuit Court of Appeals did not agree with the jury or the trial judge. It took a fresh look at the award and ordered a new trial—or, in the alternative, a remittitur. That seemed a powerful intervention to negate the work of a jury, and Gasperini appealed the decision to the Supreme Court of the United States. (It should be noted, I think, in defense of the Second Circuit, that the circuit was not acting in a bizarre fashion. In fact, under New York law, appellate courts were authorized by statute to closely review awards and overturn those that “deviate materially from reasonable compensation.”) The U.S. Supreme Court said the Second Circuit had gone too far. New York's robust review of jury decisions was for the trial judge, not a Court of Appeals. The appellate court should only have asked if the trial judge had abused his discretion in upholding the award. This was a powerful declaration of the constitutional significance of the work of the jury and the trial judge in tandem together.

The point was that the judge and the jury were charged under the Seventh Amendment with setting of damages, and that an appellate court, working from a cold record, without having seen the witnesses, heard cross-examination, or been at the trial, was not in nearly as good a constitutional position to make the decision as were the jury and the trial judge.

Appellate court behavior, at least in the federal system—and I should emphasize that all of what I have been talking about is just in the federal system, not in the state systems—was not, and is not, following the dictates or the spirit of the *Gasperini* case, of protecting jury decisions. By the middle of the 1980s, in fact, the federal courts of appeals had pretty much abandoned what *Gasperini* had suggested. In other words, they were not holding to the abuse-of-discretion standard, and were robustly reviewing jury verdicts and damages assessments. Although *Gasperini* said “stop,” it is pretty clear there has been no halt to such rigorous review.

The story has been similar with respect to the use of judgments as a matter of law. Again, courts were given the power to override verdicts and, again, there were traditional restraints on appellate courts using that particular power. With time, these restraints, too, were overridden, and appellate courts have come to exercise wide-ranging review that results regularly in the undercutting of jury decisions.

In both the new trial and judgment as a matter of law areas, appellate courts have gone beyond standards designed to protect jury work. This intrusion, as suggested by *Gasperini*, interferes with the right to a jury trial. Their interference is analogous to the steps taken in Britain that narrowed access to jury trial. This despite the existence in the United States of the Seventh Amendment.

The danger is that jury trials will be progressively undermined. What is likely to be lost is the benefit that jury trials bring to the legal system. If jurors are puppets whose work can be discarded, then it is easy to question whether the jury’s contribution of a democratic element in the judicial process is at all real. If it is not real, then it is possible to conclude that the judicial branch must be more tightly controlled. There is already evidence of efforts at heightened control of the federal courts by such means as the congressionally-imposed criminal sentencing guidelines, which have drastically reduced trial court discretion in the criminal context.

In the end, undermining the real independence of the jury hurts not only that particular institution, but the entire judiciary. Democracy, too, is disserved.

In the end, undermining the real independence of the jury hurts not only that particular institution, but the entire judiciary. Democracy, too, is disserved. The legitimacy of judgments is called into question. The adversary system, with its emphasis on a neutral and passive fact finder, is undercut.

It should not be thought that I see no role for appellate courts in their review of jury decisions. Rather, what I am advocating is the sort of restraint that respects the work of the jury, presumes its integrity, and respects the fruits of the trial process generally. Having said all that, I should emphasize that there are places where I think more robust review is needed. Perhaps the most significant area for such review is with respect to punitive damages.

Punitive Damages

Punitive damages raise special constitutional questions that warrant heightened scrutiny. This is a conclusion reached recently by the Supreme Court of the United States in a case called *Cooper*

Industries v. Leatherman Tool Group.²⁴⁵ Although I think the reasoning in that case is unsound, I think the results are correct.

The same may be said with respect to a number of other questions besides punitive damages, particularly those involving other sorts of serious constitutional claims, First Amendment claims arising out of freedom of speech, or claims regarding discriminatory conduct, especially within the courts themselves. In these areas, the Seventh Amendment concerns—that is, the right to jury trial—may be balanced by other grave constitutional considerations. In the last analysis, what is needed is a balanced and nuanced assessment of competing interests and concerns. An important part of that balancing must be respect for the right to trial by jury in civil cases.

We live in a time of ferment about jury reform. The question of the scope of appellate review is but one of many questions regarding how we ought to deal with jurors. There seem to me to be three roads that we might follow.

- The first is to keep whittling away at the jury trial right. This, it seems to me, falls afoul of the Seventh Amendment and ought to be rejected in all of its forms—including any reduction in the size of the jury, any serious narrowing of the issues that the jury can see, or any appellate practices that seriously reduce access to jury trials;
- The second is to try to make juries perform more like judges. This seems to me a serious intrusion into the jury's work, in an attempt to force or guarantee that jurors will act like judges. This, I think, invades the privacy of the jury room and the spirit of the right to jury trial; and
- The third is to try to help juries perform their unique job in a more effective manner—including giving jurors more and better information, as well as a larger role at trial. That seems to me to be the way in which we ought to strive to move.

COMMENTS BY PANELISTS

Wayne Parsons, Esq.

Gordon Kugler, Esq.

Honorable Joette Katz

Honorable John Bouck

Wayne Parsons

I am a trial lawyer. I have tried cases for 25 years and have always seen this discussion of juries from that position.

As I read the papers and listened to this morning's presentations, I wondered who really has the answer. As a trial lawyer, I have been in court with judges, opposing counsel, and jurors. There is a lot of concern expressed about the jurors as we conduct the trial. Are they getting it? A lot of these discussions are about the jurors. I know that is a concern, and I know the judges and lawyers have strong opinions on that as we go through a case. As I have read from the appellate decisions, appellate courts also have those concerns.

The question is, who really knows? When you come down to the question of damages, that is a particularly interesting question. When I first started practicing law, I heard a talk from a very famous California lawyer who said that, in 1960 in California, the value for the death of an infant was \$3,000. Everybody knew that, and they settled the cases regularly for it. If you went to a settlement conference with a judge and you said you wanted \$50,000 or \$100,000 for the case, the judge would say, "Are you crazy? The death of an infant is worth \$3,000." Everybody knew that. This very famous California lawyer spoke of a certain young lawyer who had just graduated from Boalt Hall and didn't know quite what he wanted to do. His best friend and his friend's wife had an infant who died. They went to lawyers who said, "Your case is worth \$3,000." This young lawyer took their case. He had never tried a case before. He got \$150,000. From that point on, people in California said, "The death of an infant is worth \$150,000."

An historian from Yale University came to Hawaii 20 years ago at the invitation of our judiciary and gave a talk about the value of a jury verdict, and he talked about it from a position completely outside of the law—as a point of information for society. In other words, this is what 12 people who don't have anything to do with anybody in the case say, in terms of who is right, and who is wrong, and what is it worth. The jury provides that information for society, and sometimes it surprises lawyers and judges, who are prone to stay with the status quo.

In Hawaii over the last 10 years, two or three insurance companies, State Farm being the most prominent of them, took every auto accident case that involved connective tissue injuries to trial, regardless of the injuries, regardless of the medical bills. They went to trial on the cases. They tried perhaps as many as 50 cases within a two-year period. The verdicts came in low. Before this happened, we had been settling these cases for anywhere from \$35,000 to

\$100,000. During that two-year period, the juries came in with verdicts that ranged from zero to \$20,000—and that’s in the face of \$10,000 or \$15,000 in medical bills.

Of course, the plaintiff lawyers were very upset with that. We got mad at State Farm. But the juries had given us some important information: that they didn’t put the same values on these cases that we were putting on them. Prior to that experience, the judges would have beaten a defense attorney over the head who refused to pay \$50,000 in a case. After these cases went to trial, the judges were telling us in settlement conferences, “You know, that case is not worth that much. We have had all these cases go to trial and they have been coming in with very low results.”

Now, what happened there? Did the jury get it wrong? Were we, the lawyers, and the judges who had been settling these cases right? I don’t think that there is a simple answer to that, but I think that respect for the jury system, and respect for the verdict of the jury, is very important. It is important for lawyers and judges to be humble about exactly how sophisticated the jury is.

Reading the *Leatherman* and *Gasperini* cases that Professor Landsman mentioned, it was interesting to me that, in *Leatherman*, Justice Stevens said—without any explanation—that “It is clear that juries do not normally engage in . . . a finely tuned exercise of deterrence calibration when awarding punitive damages,” and that somehow judges or lawyers would be better equipped to do that.²⁴⁶ I think there are very serious questions, in listening to and reading what Professor Vidmar and Valerie Hans have discovered, about exactly how good judges are in doing that, in comparison to juries. The punitive damages instruction is very simple for the jury, and the proof is simple. General damages, on the other hand, are very difficult both for the jury and for lawyers.

Gordon Kugler

I am a trial lawyer in Montreal. We have no civil jury system. I have never pleaded before a jury, and I just learned how to pronounce the word *remittitur*. In our system of law, when an expert is going to testify, he is questioned in order to be qualified as a witness. I would not pass that test to address you today about trial by jury. However, since I have been asked, and I was told that my thoughts as an outsider might be of some benefit, please bear with me.

I read Professor Landsman’s paper carefully and found it very interesting. At issue, it seems, is whether appellate review of jury decisions will somehow erode or hurt the jury system and democratic values in the United States. Being someone who has not been brought up with the jury system, it seems to me, rightly or wrongly, that I don’t see anything wrong with appellate review of the jury decision. I also noted in his paper that the appellate courts overturn the lower courts 38 percent of the time. In our system, where we do not have jury trials, it is still a rule that the court of appeal is reluctant to interfere with a finding of fact of a trial judge absent manifest error—and the statistics show that the court of appeal reverses the lower court here in Montreal 35 percent of the time! So the statistics are pretty similar. I have always felt that appellate review of any decision is necessary and is useful.

It seems to me that there is an overwhelming consensus in this audience, from the discussion groups and from the papers, that everyone here favors the jury system in civil cases,

and that it ought to be maintained. I agree with that assessment. I don't see anything wrong with the jury system. You seem fearful that someone—tort reformists or legislators or defense people—are trying to do away with the jury system.

It seems that your focus has to be with the legislators who will enact the laws that will limit jury trial. If that be the case, I think you have to make a more convincing case about the absolute necessity of the jury system in civil cases, and I think you have to point out the merits of those cases. I think you have strong arguments, and I think you should make them and try to make them, but make sure that your focus is not on the already-converted believers in the jury system but on those who appear to be trying to change your jury system.

Lastly, Professor Landsman, I have to compliment you on how well you wrote your paper and how well you spoke about the paper this afternoon. It was a pleasure to listen to you.

Honorable Joette Katz

Let me begin by saying that I agreed with Parts I and II of Professor Landsman's paper on "Juries: Why We Love Them and Why We Need Them." With all due respect—and I am sure we have all heard this phrase several times—I have some fundamental disagreements with the paper as it unfolds. I think perhaps that is because, as Professor Landsman has readily acknowledged, it is dealing with the federal system. My experience on both sides of the bench has been confined to the state system. If I am qualified to speak on anything, it is in that regard.

I don't see the problem. I don't agree with the notion that the sky is falling, quite frankly. I understand the concerns, and I understand the notion that, if you start to whittle away, there is a slippery slope. But I don't see the problem. I think both appellate courts, trial courts, and juries can

coexist and serve separate independent functions—and, in fact, balance one another and keep one another on board.

I think both appellate courts, trial courts, and juries can coexist and serve separate independent functions—and, in fact, balance one another and keep one another on board.

Professor Landsman protests appellate review as being unjustified and attacks it as, in fact, undermining the juries. I think what is not really being properly attended to in Professor Landsman's paper is why directed verdicts, judgments notwithstanding the verdict, etc., might be

legitimate tools. I don't view them as unconstitutional reexaminations of a jury decision; I don't view them as being premised on outright legal fictions; and I don't view them as marginalizing the jury. On the contrary, I think that, as a matter of supervision of the trial process, the appellate courts, when called upon to do so, must examine the factual determinations of a jury to assure that they are supported by the evidence. This is a review that I deem to be a question of law—that is, whether or not the verdict was supported by evidence that a reasonable juror could believe. That is an issue of law, to my way of thinking, and it is one that, when we are called upon to decide it, we are duty bound to do so. Professor Landsman clearly recognizes that legal questions are appropriate for appellate review, and I would put that question into that particular category.

Another problem I have is with a trial court issue that Professor Landsman takes up. It is sort of a “damned if you do and damned if you don’t” matter. You have an opportunity to direct a verdict from the bench. You choose not to. You decide to let it go to the jury. You hope that the jury is going to do the “right” thing. So you let it go to the jury and, lo and behold, the jury does the “wrong” thing. At that point, sure, you could let it go—or you could step up to the plate. I don’t believe that, when you step up to the plate and make that call, that it is a convenient fiction. I don’t view it as a subterfuge. I view it as correcting something that was improper.

When I was on the trial bench, it was interesting, because one of my first trials, I didn’t do that. I took the case away from the jury. I was affirmed on appeal, but when it went up to the appellate settlement conference, one of our more senior judges heard that I had done that and said, “Hmmm. New judge.”

I think that clearly, the reason you do that—and those of us who have sat on the trial bench all know this—is because, if you are wrong—and there is certainly that possibility—then it is not a waste of judicial resources. If you are wrong when you do that, the verdict can be reinstated. The costs are minimized, and you are not starting from scratch. I don’t view it as a cop-out. I don’t regret what I did in that particular case, not simply because I was affirmed and I thought it was the right thing to do. I think clearly either way is appropriate. (If truth be told, the reason I took that case that I mentioned away from the jury is that, when I sat down to write the jury charge, I couldn’t do it. I finally concluded that if I can’t explain it to a jury, then the case has no basis for going to that jury. It was a difficult call for me to make but, either way, I think it was appropriate.)

I *don’t* think that punitive damages awards require unique treatment. I think that unless you can honestly say there has been a clear, manifest injustice, then I don’t think the review in those cases should be any different than it is in any other situation.

As to the notion that the U.S. Supreme Court exhibits fitful efforts, if you will, to curb appellate review, again, perhaps it’s my own bias, but I don’t view it as a fitful effort. I assume that perhaps they are doing that which is necessary, no more, no less. Again, speaking from a state court perspective, I don’t see the problem. When the appellate courts review these verdicts—again, looking at these as a question of law, and confining myself for the moment to that—when we make those decisions, I don’t think they are based on an assumption that juries are emotionally unstable or intellectually enfeebled. I agree with Professor Landsman that there is absolutely no basis for those assumptions, but I disagree that our decisions are premised on those assumptions.

I think Professor Landsman shifts gears, and he acknowledged that to you this afternoon when he discussed punitive damages awards. This is a situation where he thinks that appellate review is appropriate. Well, surprise! Once again, I disagree. I *don’t* think that punitive damages awards require unique treatment. I think that unless you can honestly say there has been a clear,

manifest injustice, then I don't think the review in those cases should be any different than it is in any other situation.

Two additional points of disagreement. He suggests that we have been “blindfolding” the juries. I think that is obviously a pejorative term and it is used intentionally—when do we let certain things get to juries, when do we not; when do we allow them to hear certain kind of evidence, when do we not. Again, I think that is our function. I think we can coexist. I think Professor Landsman wants us to coexist, and I think there has to be a healthy respect for the different functions of the players.

In fact, if we are concerned about juries' incorrect assumptions or impressions, voir dire is a place when that can be exposed—not by allowing juries to hear what we deem to be irrelevant and prejudicial evidence.

Finally, I disagree that interrogatories and special verdicts somehow impeach the deliberative process. I think, for example, that if that is the case, then the entire debate about allowing juries to ask questions, to the extent that it gives us a window into what they are thinking, would be equally valuable—but I don't think it is.

I do agree with Professor Landsman that no decision overturning a verdict should be based on poor lawyering—obviously criminal cases aside.

Last, and I really do mean “with *all* due respect,” I thought Professor Landsman's paper was incredibly well-written and was brilliantly delivered. I just disagree with some of the assumptions underlying it.

Honorable John Bouck

I am not so sure which of the other panelists I agree with and which I don't. I do want to congratulate Stephan for an excellent paper. That is the first point.

My second point, which hasn't been articulated as far as I have heard, is that *I believe that juries are better fact finders than judges*. When I am hearing the evidence, I only have to convince myself as to who I believe and who I don't believe. Juries all have to convince one another. It has been my experience that a jury verdict is much better received in the community than a decision by a judge alone.

The third point—and the last one, you will be happy to hear—is something that goes unexpressed in our jurisdiction. I don't know whether it does in yours, but it is talked about in coffee rooms and that sort of thing with appeal court judges. That is the intolerable delay that can occur if an appeal court sends a case back for a new trial because they don't believe the jury has made the right finding of fact when they found the amount of damages that they did. In Vancouver, it takes from three to five years from filing to verdict at the trial level, and it takes another one to two years for an appeal decision. To send it back for another trial, a new trial, takes another one to two years to sit around and wait for the second trial. That is seven to nine years that they wait from writ to getting a verdict. “Maybe,” they say, “it is better for everybody concerned to have an appellate court change the verdict and just not send it back for a new trial.” I know those

things are expressed privately but they are never talked about publicly, and I don't know whether they are talked about in the United States at all.

Response by Professor Landsman

Well, I do feel like the appellant. I got my first go, got roughed up, and now I get what is nicely set up to be the final word—sort of. I would like to follow the tradition established this morning by Neil and talk about something totally different!

The book I am working on concerns a number of Holocaust-related trials, crimes of the most horrible imaginable sort.²⁴⁷ The first two of the trials that I study are the Nuremberg trials and the trial of Adolph Eichmann. Both of those cases were extradition cases—unlike any that judges had handled in those jurisdictions. In fact, there was no jurisdiction until Nuremberg was created. In both of those cases, what made justice happen was the extraordinary effort of an individual judge.

At Nuremberg, it was the chief judge at the trial, a man named Geoffrey Lawrence, a senior British law lord. He singlehandedly pushed the trial from one that could have been clearly considered unfair to one that we almost all celebrate as a victory of justice.

When Eichmann was tried, some 15 or 16 years later, the problem for the court was the same: how to do justice in an extraordinary case, unlike any that Israel had ever dealt with before. Again, there was an extraordinary judge. Judge Moshe Landau²⁴⁸ stepped forward, forced the prosecution to behave in a fair way, and forced the case into a just approach to a terrible man and a terrible problem.

These were extraordinary cases, but the problem of justice, it seems to me, is always the same: When the courts are called upon, how do we leave the impression in our societies that we have done justice?

What I think is at the base of my feelings about this paper is that justice is done and is seen to be done most effectively, most of the time, when a jury is seen to preside over the case. Whatever leaves the jury intact, when it can be done in good conscience, seems to me to be the right thing for a justice system to do. It is there that I really begin. It is really that that drives almost everything that you have got in this particular paper.

I would like to thank Wayne Parsons for pointing out something that I think is very important about juries: not only are they the symbol of justice for us—and this is peculiarly American, perhaps—but they are also the engine and the instrument of change. The infant's death verdict goes from \$3,000 to \$150,000. Products liability law changes. Contributory negligence is abolished and comparative negligence is put into its place. All of these are victories by juries, and by judges listening to juries. It seems to me that the listening end is very important. When we start to drift away from the listening end, then we have got a problem. That, too, is what motivates the paper.

Gordon Kugler asked, what the big deal is about appellate review when the reversal rate for juries in the U.S. is 38 percent and for judges in Québec it is 35 percent? That is not exactly

what it is all about. The *Gasperini* case shows us how easy it is for an appellate court to overturn a trial court decision. *Gasperini* says, “The Seventh Amendment says you should not go there.” But the point is that, even if the results were the same, the appearance of justice is important. To do it in a way that we have come culturally to expect is critically important, along with this wonderful artifact of enlivening, creating new law, law that is responsive.

Justice Katz gives me a good kick in the pants and says, “Wait a minute. There is a whole lot of this that doesn’t seem right.” Well, as long as we can agree on Parts I and II, we are okay, because that is the real stuff. That is the stuff about why juries are valuable, and don’t forget it. Like the American Express card, “Don’t leave home without Parts I and II of my paper,” and everything will be fine. Beyond that, I think I would agree that federal and state courts are different. You all are doing the real work, the heavy lifting in the real majority of the cases, and I think you are doing it in a way that does credit to our justice system.

I have to say that, when I look at statutes like the one from New York that said that review is really the place where we are going to make a decision, that is troubling to me. That says that in some states juries are being denigrated—denigrated by the legislature, who wants a quick fix, who wants tort reform, who wants whatever.

It seems to me that there is a problem, and it is a problem of emphasis. Are jurors important? Do they count? Do we respect them? Or are they something of an impediment—okay if they get it

Either the jury counts, and we listen to it, or it doesn’t.

right, but to be disregarded if they get it wrong. From my perspective, to suggest that just about anything can be turned into a question of law goes too far. Either the jury counts, and we listen to it, or it doesn’t. If everything is reviewable, if everything is up for grabs in the same way, it seems to me that

the jury right is very likely to erode. That is the point of my paper; that is the point of the argument. I think that is the point that Justice Katz and I really disagree about.

I do think, however, that punitive damages awards are unique. They are not like anything else. They are potentially like a civil death sentence. And as in a death case, we ought to be particularly concerned. It’s similar with the First Amendment, but not everywhere. Not everything is the same. There are things that judges need to worry about more. There are places where judges need to be a counterbalance to the majority. That is where I think heightened review is important.

I agree with just about everything that Justice Bouck said—when he said it this morning, when he said it at lunch, when he said it just now. I think, in some ways, that is the kind of judge and the kind of sympathy for the jury that I think my whole paper is designed to argue for.

Questions and Discussion

Participant: We have been talking all day about juries. I have an overall question—that is, what is a jury? We’ve heard references to the shrinking of the size of the jury, which was done in federal court, and I understand British Columbia has eight-person juries, six-person juries. Twelve-person juries, it seems to me that is the one I like. In our civil cases in our Midwestern state, nine votes gets

you the verdict, instead of 12. There is another piece of that, and that is the peremptory challenges and the voir dire process. If it goes on for a long time and you give people lots of peremptory challenges, then it seems to me it starts looking less like a jury and more like a process of decision-maker manipulation.

I wonder if the paper presenters or any of the panelists have any thoughts about that. I think the thrust of the jury system is that it is a representative group from the community, big enough to speak the community's values, if you will. Has anybody explored that in terms of its legitimacy? I think there are attacks on legitimacy from both ends.

Professor Landsman: There has been a lot of discussion about this matter, and it is very interesting. In Scotland, a jury is 15 members, and a decision can be made by majority vote, eight-to-seven. So, we can say that in Scotland you can win with anywhere from 8 to 15 jurors. In a number of states, and California, before the twentieth century, they had already decided that civil juries would be smaller. There is a real range here in the number. The traditional number was obviously 12. That was the number that was thought to be required by the Constitution.

Trial lawyers are not tremendously thrilled with judge-conducted voir dire, and we would prefer to have the lawyer who is representing the client have an opportunity to question jurors and remove jurors who they feel may have a bias in the case.

Why is 12 a good number? Well, there are 12 tribes of Israel. There are 12 months to the year. The Zodiac has 12 principal signs. There were 12 Apostles. It seems to me, however, that whatever you accept as tradition, whatever you think of as signifying seriousness and value and our shared system, is what you probably want to stay with unless there is a damned good reason to change. What disturbed me was that, over the last 20 or 30 years in the United States, there arose a sense that a “damned good reason” to change was that we might have to pay a couple more jurors. That doesn't seem to me to be worth it.

Now, in terms of social science data, Neil could answer much better, but two things. With 12, you have a much better chance at a representative jury, at getting a better approximation of the cross section of your community. With six, it is very likely that you are going to lose minorities, especially if they are not more than 15 or 20 percent of the population. So a goal of “representativeness” argues for a slightly larger jury. Second, accuracy, too, it seems to me to be enhanced when you have more heads thinking. Twelve is not a magic number, but it seems to me to be one that we have become traditionally or culturally comfortable with. My concern has always been that we went away from 12 without any really good reason.

Wayne Parsons: I have just one comment. I attended the first-ever Jury Summit in New York in February of 2001. Some of you may have been there. There were about 400 judges, court administrators, lawyers, and jurors. There was an overwhelming sentiment among the judges and the court administrators that peremptory challenges should be abolished!

Trial lawyers are not tremendously thrilled with judge-conducted voir dire, and we would

prefer to have the lawyer who is representing the client have an opportunity to question jurors and remove jurors who they feel may have a bias in the case.

Larry Stewart: Of course, I would be in favor of abolishing peremptories if I always had a fair-minded, non-arbitrary judge. Unfortunately, present company excluded, not all judges are as fair-minded and as non-arbitrary as you all are, and the peremptories are one thing that gives us protection against a judge who, for whatever reason, wants to move the process along and doesn't really give you much of a strike zone as far as the challenges are concerned. In Florida we get three peremptory strikes per party.

To go to the latter part of your question about peremptory challenges, and at what point we no longer have a jury that is representative of the community but rather have selected our decision maker, I always think that there are people who are representative of the community and there are people who are not representative of the community. If somebody brings to the jury box a prejudice or a bias—a prejudice against or a bias in favor of somebody—that is of the magnitude that it will deter them from listening to the evidence and deciding the case, that removes the community aspect and puts a personal imprint on their decision. Speaking for myself as a trial lawyer, we need to have some protection against that.

The Judges' Comments

In the discussion groups, judges were invited to consider a number of issues raised by the group moderators related to the papers and oral remarks. The judges devoted more time to some issues than to others, and they raised other interesting points as well.

Remarks made by judges during the discussions are excerpted below, arranged by topic, and summarized in the italicized sections at the beginning of each new topic. These remarks are edited for clarity only, and the editors did not alter the substance or intent of any comments. The comments of different participants are separated into offset paragraphs. Although some comments may appear to be responses to those immediately above them, they usually are not.

The excerpts are individual remarks, not statements of consensus. No attempt has been made to replicate precisely the proportion of participants holding particular points of view, but all of the viewpoints expressed in the discussion groups are represented in the following discussion excerpts.

Judges and Juries

In response to the question of how often judges and juries reach the same conclusions about a case at the end of the trial, many of the attending trial judges found frequent agreement between judge and jury.

I would say about 50-50. Fifty percent of the time, I probably would have come up with the same conclusion, and 50 percent of the time, they completely surprise me.

I was a trial judge for 12 years, so in answer to your question from that perspective, I found myself more often than not agreeing with the jury's verdict.

I have to say for the most part that the juries and I agree. But there have been times when I have had the same response, which is, my God, how did they get there?

In our southern state, about 80, 85 percent.

I would agree with that in our Midwestern state. I think that judges and juries come to the same resolution.

The truth of the matter is, most of the time, I think the civil juries come back with the right decision.

In our southern state, in my jurisdiction, probably 90 percent of the time, the jury and judge agree.

In our southeastern state, as to the issue of liability, overwhelming.

I generally agree with the jury's decision. Sometimes I have thought they just made a terrible mistake, but that is very rare.

Several of the attending appellate judges also noted a general agreement between the trial judge, juries, and even themselves when it came to the conclusions drawn from a trial.

My experience has been that most of the time, the overwhelming majority of the time, I guess, I think the jury reaches a correct result. As an appellate judge, we tend to have more problems with fact finding by judges than we do by juries.

Speaking from the standpoint of the appellate level, I have found in the civil arena that from what I review and the verdict that is rendered, normally I am in agreement, and it has been rare that I would have a different view.

From my perspective, we do see cases where for the most part, the judges and the juries are in agreement.

I am on the appellate level. We have 10 judges. You were commenting, I think it was you that said you didn't understand sometimes the line of reasoning of how jurors reached their decision. I can confess, a couple of times, I am amazed—maybe it is on a different level—how my colleagues reached a decision. How did they come to this conclusion? It seems completely bizarre.

I disagreed with juries sometimes, but for the most part, I could find a rational reason for what they did.

Our experience on my court has been that we have problems with fact finding by judges much more frequently than we do with fact finding by juries.

Of course there are instances when judges disagree with the verdict of the jury, but when that happens, some judges will also try to ascertain the reasoning behind the jury's decision making, and they occasionally find themselves surprised.

There were a number of times when I disagreed with the jury's verdict. Sometimes I would speak to them later on to try to find out where they came from. But a lot of times, I found juries reasonable, that they considered the right conclusion, but maybe for the wrong reasons. But there were quite a number of times when I disagreed.

Judges sometimes get annoyed with jurors because they disagree with their verdict. I heard it particularly in cases where there have been acquittals, but the judge thought there should have been a conviction. That in itself is reason enough to keep the jury system.

I sat on the trial court for six years. I thought back, and there were only two times that the jury came to decisions that I disagreed with.

What I have found most troubling with juries isn't so much their verdicts, because I can usually find a rational basis for it within the appropriate box for the decision.

I disagreed with juries sometimes, but for the most part, I could find a rational reason for what they did. A case where they surprised the hell out of me, on reflection I think it was probably not too bad a verdict. So I have rarely set aside a verdict.

I was often surprised, but like many of you said, there is a reason for what the jury does, and I think it was my own lack of understanding of human nature and perceptions and peoples' backgrounds that made me surprised. But when they came back and they explained what they did, I could understand where they were coming from. I just wish I understood it before the trial started.

After a couple of years on the bench, I started the practice of going in and talking to the jury after the trial was over, because before I started doing that, I was mystified as to how they would get to where they made it. After I went back and started doing that, I realized that while I have been busy ruling on the evidence, or I have been anticipating where a problem is going to be or doing something else, they have been paying better attention to the evidence. And sure enough, they have picked up on things that I haven't picked up on. It might be a credibility problem, it might be a very subtle inconsistency in the testimony between two witnesses or within the same witness, and they always have—what I have found is that they had an excellent explanation for their conclusion, and they weren't at all squeamish about the conclusion.

Several judges noted that their disagreements with the jury's decision depended on whether they were dealing with a criminal trial or a civil trial.

In the civil trials, I suspect I would have agreed almost always with a jury, at least the ones I remember. But in the criminal cases, I was surprised how many times I would have acquitted, and the jury convicted.

I would say that I probably would agree with the jury in a criminal case, in terms of, I would have come out with the same result probably about 70 percent of the time. In civil cases it is probably more like 90 percent of the time.

In three years of presiding over almost exclusively felony trials, there were only three instances in which in my view, the jury verdict was simply indefensible. One resulted in an acquittal. In one there was a hung jury, but it was 11 to one for conviction, in a case in which I thought that the defendant had proved beyond a reasonable doubt that she was not guilty. In the third, I thought a conviction was a product of xenophobia.

I rarely disagreed on the criminal cases. I think that sometimes, I would feel that they were wrong, but I understood that they had a reason to find a reasonable doubt. So no, I didn't disagree there. But the civil cases, I often disagreed.

In probably 350 or more criminal trials, I have only disagreed with the jury three times. I think they do a good job. I think they can separate out charges. I think that jurors are greatly underrated, and I think the idea that they can't handle complex, two and a half or three week murder cases with multiple defendants isn't true; they do. So I really think that it is important to say that, because there is such a move to think that jurors can't handle things, and I think that they can.

Judges who had actually served on juries came away with a very positive impression of the experience and of their fellow jurors.

I had the unique experience of serving as the foreperson of a jury while I was on the Court of Appeal of my mid-Atlantic state. As the foreperson, I was able to preside and therefore I was able to get the lay people's input. You would be amazed at how seriously they take the job. So I am, from firsthand experience, very confident that jurors are able to do it and do a good job.

I'm from a Midwestern state, and I had a similar experience a couple of years ago. It was an insurance case, and the counsel for both sides allowed me to stay on the jury. Because you were identified as a judge, they want you to be the foreperson. And I just said "I don't think that's the way we should do it. And as a matter of fact, if nobody is offended, I would just as soon reserve my comments until everyone else has had a chance." I didn't want to try to control the process. I came away from that experience again, after having been a trial lawyer for a number of years and talked with juries after verdicts, and then now being an appellate judge, having even more faith in the jury system.

My Midwestern state not too long ago lifted all the exemptions from jury service virtually, and so we find judges and lawyers who are subject to jury calls. And as a result of that, I served on a jury last year. And that was a fascinating experience for me as a judge. Those jurors who grouse about jury service, but if they see you

being called up and serving on a jury, they might think, "Well, if a judge can do it, maybe I can find the time too." And I thought it was a very valuable experience. I learned a whole lot more about juries than I would ever have otherwise known.

I served on a jury last year. And that was a fascinating experience for me as a judge. I learned a whole lot more about juries than I would ever have otherwise known.

I had firsthand experience too, being on a jury when I was an attorney. I thought the jury was excellent. The sense of responsibility and consciousness and thoroughness had by the jury I was on was extraordinary.

I went into the jury room in a criminal trial, and the straw poll of the jurors suggested that most of them were of the same mind I was. Three members of the jury, who were probably the most streetwise of the group, turned the other nine, including myself, around. So had this been a jury-waived trial I would have acquitted as to one count, convicted as to the other. But because of this group decision-making process, my bottom line was different than it otherwise would have been.

I don't leave aside my lawyer training when I go into the jury room. And of course the lawyers who allowed me to serve on that jury are aware of that. So if somebody gets a little confused on, for example, the burden of proof in a civil case, I don't think that it's wrong to say, well, the judge instructed us that the plaintiff has to prove that it's more likely than not that his or her version of the facts is correct.

The Competence of Juries in Understanding Complex Testimony

Some legal commentators complain that juries are incapable of understanding complex testimony, whether it be scientific, medical, economic, etc. Many of the attending judges said

that they found juries to be more than able to assess the merits of such testimony competently, especially when compared to the judges themselves.

I think in the overwhelming majority of cases, the jury can do as well as the judge. There are exceptions.

I think it is almost insulting to some of the jurors that sit on some of this complex litigation involving scientific evidence to say that they can't fully deal with it and render a decision based on it. We sit around in our court conference on a review of some of this and look at each other in the same fashion I'm sure they do.

I am from a Midwestern appellate court. I think juries handle it as well as judges do, as well as any lay people do. I think that they listen to the evidence, and I think they judge credibility, and put the testimony in context. The extent to which they deal with the scientific evidence, I have found proportional to the skill by which it is brought out in direct examination and possibly challenged or clarified in cross-examination.

This has changed in just over two decades, where there may have been people who would say, that person has got a lot of degrees and is wearing a nice suit, so I have to believe him. But there is a skepticism abroad now that an expert now has to sell his or her opinion to the jury just the same way everybody does.

It is cases with complex accounting principles and things like that, where I feel that really we should not have a jury in that set of circumstances. But they are so few and far between that they are the exception rather than the rule. But I can count on my hands in 25 years maybe one that I felt like it was a little bit too complex.

I think the people who can get on the stand and educate the jury are the ones that they listen to. Again, I presided over a lot of complex trials, business, med mal, product liability, breast implant cases, and I was always amazed at the sophistication of the jury. I was always amazed at what they were able to do, given the tools, allowed to take notes, given notebooks.

My experience has been that juries are just as capable of determining credibility of expert witnesses as they are of fact witnesses. They can see who they are shooting straight with, as they say, and they are able to sort that out.

I think juries generally are able to listen as well as judges to technical information and either understand it or not understand it equally well.

I think I can sit there and say, gee whiz, I've got a background that is better than most jurors, but it is up to the witness to explain to the jurors what they are talking about. And frankly, I think the jurors can understand as well as we can.

Jurors are becoming—especially younger jurors—a lot more sophisticated. When you present computer-generated evidence, I think they pick up on it a lot more. They have

grown up with the toys, so to speak. I think as a result of it, you have jurors that are able to comprehend a lot of the technology that is presented.

I am, from firsthand experience, very confident that jurors are able to do it and do a good job.

I have come to learn that I need to butt out as a judge because they are doing a much better job at finding the facts and assessing what is going on than I could do, because I am busy doing other things as well.

I think they deserve the credit for doing what they do well, and that we should acknowledge the fact that they do deal with scientific evidence well, and to review it and somehow toy with it is insulting to the jury process.

Several judges expressed the thought that the problem with juries and scientific testimony has less to do with the quality of the jury than it does with the quality of the expert and his or her presentation of the issue at hand.

Given good instructions by a good judge, good presentations by two good lawyers, and a group of citizens, I think the result will always be a good and proper result. Somebody has to win and somebody has to lose, but I would not wish myself to substitute the jury in a case like that.

I don't think judges have any better understanding of complex scientific theory than juries do. But it is an education process. The good attorneys and the good experts are able to educate the jury, and the bad attorneys and the bad experts aren't.

The problem lies in when the witness has not been very clear and then the lawyers have not done their job to break it open. I think jurors probably do what I would do, and probably ignore that testimony and make a decision based on what I did understand.

The expert's opinion is only as good as the explanation. If they don't get the explanation, my experience is, they don't give much credibility to the expert, notwithstanding the credentials.

I think there is a capacity among most sensible juries to distinguish between the objective expert and the expert who is advocating. If you get the plaintiff's whore or the defense whore on the stand who is just spouting what he has been paid to say, as opposed to an expert who can really objectively explain what the technical question happens to be, that they will go with the technically adept explanation and discount largely what the advocate has to say.

I think the jury can understand it if both sides do a good job. If one side does a poor job and the other one does a good job in explaining, that is the lawyer's problem, not the juror's problem.

I always encourage the attorneys to have solid, demonstrative evidence to avoid the perception that they are playing games. Put something right up in front at the outset of the trial so that the jury can examine it and discuss it in their deliberations.

We had a commission that was appointed by the chief justice to look at the jury issue. One of the recommendations in dealing with expert testimony is to have to have both experts testifying at

the same time, modifying the jury instructions so that the jurors are told what an expert is. The lawyers are able to give a mini-opening about what area the experts are going to be dealing with, talk a little bit about the qualifications and not get into this battle of the credibility of the experts, and then have the plaintiff's expert testify, followed immediately by the defense expert. There are some discussions going on now to see if that is a possibility of doing that with testimony.

Some judges disagreed on the role of the judge as a “gatekeeper” in the manner suggested by Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), with some judges recognizing the need to act as such and with others more comfortable leaving evaluation of expert testimony up to the jury.

My perspective is that there is very little role the court should play in restricting the use and the effect of scientific evidence.

The idea that *Daubert* should operate in some semi-rigorous or rigorous way troubles me a lot, because I think the juries are as capable as anyone else to figure out whether to give credit to scientific evidence, no matter how marginal.

I am a true believer in the jury system. But I respectfully dissent from the suggestion that judges necessarily bring some bias into the process and will in a biased way be improper gatekeepers.

I do believe judges play an important role in the gatekeeping function, be it demurrer, be it summary judgment, be it nonsuit or whatever. I have seen very few problems in the manner in which judges have handled those particular gatekeeper functions. So I vigorously disagree with the suggestion that judges necessarily bring lots of bias and prejudgment to these cases. In my experience, it has been to the contrary.

I respectfully dissent from the suggestion that judges necessarily bring some bias into the process and will in a biased way be improper gatekeepers.

I think the problem of dueling experts has simply shifted a bigger burden onto the shoulders of the plaintiff's lawyers to not only try the facts, but try the credibility of the experts as well at a much more intensive level.

The whole question of *Daubert*, and striking expert witnesses, is another encroachment that we see on the right to a jury trial and the right to get to a jury.

The original intent of *Daubert* is not really the practical application of it. Particularly in federal courts, it's been used as a tool to limit the plaintiff from putting on evidence.

Several judges discussed the issue of neutral experts, an idea that has been advocated by some commentators as a way of improving the quality of scientific testimony, albeit an idea that has been disputed by other commentators.

I think there are a lot of cases, if we are honest with ourselves, where neither the jurors nor the judges nor the appellate judges have a clue what the expert evidence is showing. I think one of the unfortunate things about our system is that we don't have a neutral person who truly does understand technical questions.

The beauty of that idea is that this person is not the hired gun, and therefore has the mantle of the cloak of authority of this judge.

I can see employing a court-appointed expert in a non-jury trial. We have the discretion as well in my mid-Atlantic state. I wouldn't be as comfortable doing that in a jury trial. It is telling the jury that I don't think you should listen to these two guys. You should listen to the person that I have appointed.

The reality is, once the expert is appointed by the court, there is no way the jury would go against whatever that person says. So you have by your selection decided the case, whether you intended to do that or not. So I think it is a heck of an exercise of power. The other experts may as well go home. Nobody will listen to a word they say. So it is a tremendous, awesome exercise of power.

Have you ever found somebody who is really an independent expert that you could pass around to the rest of us? The problem is that no one could ever agree that the court-appointed expert is really independent. Everybody comes at it from one place or another.

There is a role for filtering mechanisms, like screening malpractice tribunals, that do eliminate, at least in our northeastern state, 50 percent or so of the cases. That doesn't take away anybody's right to a jury trial, unless you consider it a non-meritorious case. Every meritorious case has to be tried, and it has had a profound effect on keeping the whole malpractice insurance crisis under control and been readily accepted by both lawyers and doctors.

About 25 years ago in the first medical malpractice crisis, our legislature enacted a statute that set up a panel to screen malpractice cases. About two years later, the supreme court put this thing out of its misery on "open court" and "access to justice" grounds.

I think a specialized court would be terrible. We want courts to adjudicate matters, taking in an entire picture, which includes certain specialized areas, but has to come up with a generalized verdict that covers an entire area beyond the area of specialty.

Bias and Juries

A substantial number of legal commentators have complained about juries coming to the courthouse with a bias against corporations and favoring the individual litigant as against "deep pocket" corporate defendants. Research by academics such as Professor Valerie Hans of the University of Delaware suggests that, if anything, jurors come with a bias against plaintiffs. The attending judges discussed the biases, if any, that jurors might bring to the courthouse.

In my experience, at least in our western state, which is probably more ethnically diverse than any other state, you just can't generalize about what an individual juror's propensities are based on ethnicity.

I have a large geographic district, four very distinct, separate counties. Two of them are as different as daylight and dark. You take the same set of facts in a criminal case, and, as a practical matter, in one county you'd never get a conviction and in another county they almost always convict. It's the same thing with civil cases. Should justice be that different depending on the community?

It may make a difference because of the area of the state, too. I feel that the verdicts in our area of the state generally are pretty low. Jurors, when I go back and talk with them, will be one hundred percent behind someone, but the amount they give them very rarely is much more than what the medical expense is, and for pain and suffering, not very much at all.

There are a lot of people that have this hostility toward government. I think it is not only condemnation cases, but you get other cases where governments are defendants—we just had an \$18 million verdict in our Midwestern city on a police situation. I think there is this antagonism that a lot of people have toward the government.

Having spent 18 years as a plaintiff personal injury lawyer before I became a judge, I think that over the last 30 years we have seen a considerable shift in public sentiment, which I think leads to some bias. I think that the general public has bought into the concept of frivolous lawsuits. So I think some of that is going on, and I think the people that make up the jury come with that general feeling. I also think that there is just a normal feeling by jurors also, probably some bias, against insurance companies and big corporations.

In civil cases, and I'd say for the last five, six years, there has been a media blitz of tort reform and high verdicts and frivolous claims. I think that there tends to be a bias on the part of the jurors against plaintiffs because of this media blitz.

I have seen in 20 years a real shift toward defense verdicts, at least in my state and particularly in my county—a very wealthy, well-read county. It is very hard to get any kind of a large verdict. In fact, they are losing on liability in a good percentage of the cases. This is a growing phenomenon.

In the smaller cases, the auto accident cases with smaller injuries, both in our neck of the woods and I think nationally, the jury verdicts are pathetically small, sometimes not awarding hospital expenses, sometimes not awarding doctors' bills. Certainly, very, very skeptical about pain and suffering, that kind of thing.

I think a lot of that view, if that is the case, and I tend to agree it is, comes as the result of lawyer advertising. You open up your telephone book and all you see is, "Are you hurt? I am here 24 hours a day," and you see it on television. People hear that and see that. So they go to court as a juror, and they may well look and say, "Here is one of these guys that answered the ad; he's not really hurt."

In our state it is the defense now that wants jury trials as much as the plaintiffs, because the propaganda or whatever you call it has had an effect, and juries all over the state are coming in with not only defendants' verdicts in rear-end collision cases, but sometimes they don't even award special damages. They give nothing for pain and suffering.

I think jurors may go in saying, “I would like not to see a doctor be negligent. So I hope that the result is that the doc didn’t do anything wrong, because for the sake of luck, I could be in that situation as well.”

I think doctors are doing a much better PR job than lawyers. The American Medical Association works very hard in keeping this image that the doctor is sacred.

Those Marcus Welby images have been lost now. The kindly doctor who is dropping out to the house to check you out is no longer around, and he is not in a close personal relationship generally. So the doctor goes in with an even slate, I think. But once there is some evidence, the jury is going to buy it, that there was malpractice.

In malpractice cases I am familiar with, if a plaintiff would waive the jury, the defendant probably for the same reason would not.

I believe jurors are biased in favor of physicians. I think I don’t buy at all the notion that when a medical provider gets socked with a significant verdict, it is because some slick claimant lawyer came in there. I think the jury really believes in the doctors and likes to give them every benefit of the doubt. Otherwise, I think they are fairly evenhanded with the other parties that have come in.

I think doctors are doing a much better PR job than lawyers. The American Medical Association works very hard in keeping this image that the doctor is sacred.

My impression is that it is rather balanced.

I think there is an awful lot of negative publicity about physicians and managed care things that has come along recently. I really think jurors are just about equally plaintiff- and defense-oriented.

There is hardly a juror in the world that hasn’t had an experience with an insurance company, even if it’s just the process of submitting a claim and going through the paperwork that I think gives them a “little guy *versus* big guy feeling.”

If it is an out-of-state corporation that isn’t well known in our western state, I see some bias there. I see the same thing in federal court. So removing the case wouldn’t have helped the out-of-state corporation in that particular case. It has been quite dramatic.

Whatever biases that jurors might have when they enter the courtroom, judges feel that they are able to put those aside, especially during deliberations.

I personally think jurors really try to be fair. They bring with them to that table all of their prejudice, biases, etc. But when performing the job as a juror, I really think that they take it very seriously and try to perform in an objective way. None of us, not even as judges, can always rid ourselves of ingrained prejudices and biases.

Everybody can point to anecdotal instances of apparent jury bias. I think it is sort of intuitively obvious that everyone is biased with respect to a variety of things. But to me, what is critical is

the capacity of a group of jurors to set preconceptions aside, candidly acknowledging that they have those preconceptions. I think that that is where the trial judge becomes particularly instrumental during the process of jury selection.

I think also it helps with a juror having other people, hearing their discussions. I think that collective discussion is so important, and we don't have that when a judge is making the decision.

I think jurors are capable to a degree of setting aside their prejudices and biases, but they are not completely capable, just as judges are not completely capable of erasing who they are. I say God bless them for it, because it is jurors that bring certain degrees of disgust by behavior of defendants, or suspicion of frivolous litigation by plaintiffs in some cases, that act as their own check and balance on government. We are invested heavily in a system that is probably shot through, to its credit, with the prejudices of the common people, about suspicion of government behavior, about suspicion of power, police behavior, and the like. Thank God, because it probably safeguards us from some of the most extreme kinds of tyranny that appeared over the years.

Several judges noted that tort reform propaganda, along with media coverage of "outrageous" awards, have tilted the playing field against plaintiffs.

I knew back in the tort reform battles of the mid-80s that it was all over when they were able to spend millions of dollars convincing people that it is going to drive their insurance rates up if they awarded large damage sums in jury trials. I think that the pendulum has evened out or maybe even swung back in the other direction. Even back in those days, if you had a truly meritorious case, I think that the jury probably would go ahead and render an adequate award.

It is just the huge verdicts that stand out occasionally that we read about that make people believe that it is the issue.

There are these legendary stories about inappropriate verdicts, like the man who was carrying a refrigerator on his back in a strong-man contest and hurt his back and sued the contest, and the cab driver who pinned the robber up against the wall with his cab to try to keep him there until the cops could get him, and he was sued by the robber.

When they came in and said, "Frivolous lawsuits drive your insurance premiums up," that is when all the verdicts started going down.

I think public relations and advertising of the insurance industry and the defense bar has been incredibly effective.

I would say that the media tends to sensationalize those verdicts that they characterize as outrageous, as opposed to what is happening in the court system day in and day out. The insurance industry has in my opinion capitalized on that, in an effort to paint these outrageous verdicts as standard and run-of-the-mill excesses that are occurring within the legal system. I think that they have been somewhat successful.

Some judges had observed deliberate attempts to sway potential jurors before trial.

In our county in a mid-Atlantic state, we hold our civil jury trials about five or six weeks at a time, then have a break of a few weeks. Just by coincidence, about a week before the jury trial term, the insurance fraud billboards start going up. You can't help but think that they are intended to have an effect on the jury pools.

There was a long trial in our western state recently against Philip Morris, and there was a large verdict. For about a month or two before the verdict, there were Philip Morris ads, Kraft Foods ads on TV, saying "We do all these wonderful things." And in that court, the court imposed some restrictions on advertising from the time the venire was selected and during the course of the trial.

The infamous McDonald's coffee case appears to have had an impact on potential jurors, but several judges expressed concern that the whole story was rarely accurately told.

If one more lawyer gets up in my court and says, "Have you heard about the McDonald's case?" I'm going to strangle him.

Right around the time of the McDonald's brouhaha, sometimes the better plaintiff and defense attorneys would actually start questioning jurors about their reaction to those kinds of verdicts and lawsuits. They would actually agree that a particular juror should be excused for cause.

If one more lawyer gets up in my court and says, "Have you heard about the McDonald's case?" I'm going to strangle him.

I have always railed against people talking to me about McDonald's being an inappropriate result. Well, where were they when they were listening to the evidence? The bottom line is, there were reasons why that jury came up with that result. But people have a hard time getting past the poster child event.

We have got to educate the public. The lawyers have got to do it, the judges have got to do it, about the McDonald's case, and these cases. The public needs to hear the rest of the story.

An important way to understand the biases that jurors have coming into trial is through the voir dire process, and some judges discussed how it worked in their states.

Discussions regarding eliminating peremptory challenges really focus on limiting voir dire. That is where we see some of the abuse, and if any reform is going to come, it will be limiting the lawyers' questions on voir dire.

Based on my 13 years of experience, we should keep peremptory challenges and encourage or require lawyers to participate in the voir dire process. If the lawyers are professional and knowledgeable, they will know much more about the case than the judge. Participating in voir dire is an essential part of trying the case. Otherwise you are going to have perfectly well-meaning, experienced trial judges screwing up the cases.

Peremptories carry several limitations now, but they can still serve as a safety valve for judges and lawyers. If they were eliminated, judges would be under more pressure to eliminate jurors for cause.

Peremptory challenges ensure that the litigants are not forced to be in the very awkward and inappropriate position of being unable to do anything about an issue that the judge is not willing to address. Given the range of discretion allowed to the trial judge, jury selection errors are very difficult to correct on appeal.

An attorney can pick their own jury if they hire a jury consultant and have 13 peremptory challenges at their disposal.

This really causes the public to distrust the jury system in a very detrimental way. A compromise would be to allow one peremptory challenge as a safety valve; however, the appellate court must perform its function of overseeing the trial judge's removal decisions.

The punitive damages I have seen have been very low—surprisingly low to me.

I'm in favor of eliminating peremptory challenges if the amount of information provided to judges is increased and if judges are more willing to use that information to strike prospective jurors for cause. That is not the case in my eastern state.

Punitive Damages

Judges noted that punitive damages were rarely awarded, as juries are reluctant to award them.

We always hear all of the discussion about punitive damages, huge awards. I think juries are reluctant to grant punitive damages. I think they are very wise in the cases that they choose, that they award them when the conduct is so egregious.

It is these large corporate battles where these large awards are being awarded. They are not going to individuals.

Punitives are awarded in cases where those numbers might have some meaning to jurors. If it is Joe Blow suing, \$300 million has no bearing on their life. But if General Motors is suing Ford, they can understand that those numbers are meaningful there.

I think part of it is that the jurors are saying, "If these corporations can do these huge mergers, then they must have this money. If you catch them doing something wrong, how is it going to punish a large corporation when you give them a million dollars in punitives?"

The punitive damages I have seen have been very low—surprisingly low to me. The impression I got was that the jury wanted to send a message that they thought the conduct ought to be punished, but they weren't willing to put a lot of money on it.

I think defendants have been very reluctant to have punitive damages awards go to something that juries would perceive as societally beneficial, because then juries would be more inclined to give them.

Several judges discussed the mechanisms in place in their states that control punitive damage verdicts.

We have a bifurcated process. After the bifurcation and after the jury comes back, then the trial judge must review it and give written comments about several areas of the verdict. So it is rather rare that we get out-of-control punitive damages verdicts.

In the last one I tried, there were very minimal compensatory damages, and our state has a statute limiting the amount of punitive damages to three times the amount of the actual compensatory damages. The verdict was against a huge corporation—for really egregious behavior—but the award probably cost the price of a luncheon for the executives. But the jury was right on the ball.

We have a system where we won't send the question of punitive damages to the jury unless we as judges have determined that the conduct has risen to such a level that it will indeed support awards.

Our state has a legal limit to the amount of damages that can be awarded. There comes a point where the corporation will no longer be able to function economically, so net worth is examined. Damages are awarded based on the amount the jury believes will deter the company, and similar companies, from similar future conduct. When that threshold is reached, the judge must step in and prevent the damages from exceeding that amount.

Our supreme court has never reduced an award of punitive damages. They might have reversed it completely, but they have never reduced it.

Punitive damages should be reviewed under the same standards as compensatory damages. I am troubled by de novo review because it is impossible to observe the demeanor of the witnesses, hear the testimony, and make factual determinations when you are not physically present at the trial. A lot of factual determinations are involved in determining the appropriate amount of damages. It is very, very difficult for an appellate judge to look at a black and white record and read into that.

I don't think there is a real punitive damages problem in terms of the courts, because you can always fix it with the appellate process. The problem faces a defendant when they have a limited amount of coverage. Then they are faced with the punitive damages possibility, and the defendant panics. They often settle cases which they really shouldn't settle because they are forced into it only because they are facing a prospect of a large punitive damages award that may be unjustified, and they are scared to death because of it, and it warps the system. I really don't know the answer.

There is this tendency now for lawyers to say that every case involves punitives. When that happens, you get something in our appellate court that doesn't make a lot of sense. I have to be

like a *Daubert* gatekeeper and say, “This case is pushing the envelope too much, and I just don’t believe it.” I think punitive damages should be reserved for the most egregious conduct, the worst conduct.

In our southern state, in order to even make a claim for punitive damages, you have to establish what amounts to proof of what would be culpable negligence for purposes of the criminal manslaughter statute.

Jury Reforms

A key issue explored by Professors Vidmar and Landsman was various jury reforms that have been proposed to make juries perform more effectively. The reforms include allowing jurors to ask questions, take notes, or discuss the case before deliberations. The attending judges, many of whom have adopted some of these reforms, had differing views on the subject, but many who have allowed their juries to do these tasks had very positive experiences.

ALLOWING JURORS TO ASK QUESTIONS

Several judges were very positive toward letting jurors ask questions.

I think the Arizona rule to allow jurors to ask questions is excellent. So many times, when you talk to a jury after you have tried a case, you find that they decided something on a bizarre issue just because they didn’t understand it.

The Arizona rule has been in effect almost 10 years ago now, and we haven’t heard one peep of problem in any case, either from lawyers or judges, where judges have permitted jurors to ask questions. It is not on the radar screen.

One of our state’s very best trial judges, in our largest county, who does nothing but medical malpractice cases day in and day out—with a great deal of approval by both the plaintiff and defense bars—allows the questions to come out at any time, orally. He has had absolutely no negative experiences, and it has never been an issue on appeal.

I became a trial judge 22 years ago. I always allow a process for asking questions. That has never been a big deal so far as I am concerned.

As a trial judge, I think I had two trials in which jurors wanted to ask questions. Asking questions is not authorized in our middle-Atlantic state, but by my reading the fact that it is not authorized doesn’t mean it is prohibited.

We judges ask questions at any point in the trial that we think would be appropriate. I think allowing jurors to ask questions is a good thing, because it brings understanding to the overall process. So I would be very much supportive of having jurors to ask questions.

Other judges were less disposed to letting jurors ask questions.

I think it is just absolutely one of the more appalling things I have ever heard of, to allow a juror to ask a question during the course of trial. How would you control that?

I don't know if it is something in the water in our northeastern state, but the lawyers don't want it, and we don't allow it.

I personally have not allowed jurors to ask questions. I decided two years ago I was going to do it, but I have given deference to the attorneys, and I have never had attorneys agree to do it. They are petrified of doing it. Other judges have done it regularly, and they don't have any problem with it.

I am not in favor of allowing jurors to ask questions.

There was one jurisdiction in our state where they permitted it, and they had both written and oral questions. And frequently, there were bombshells that came from the jury in criminal cases in ways that we could not remedy afterwards. I did not like the practice. It seemed a lot better when we had the questions screened by the judges. But when we were at the bench, the jurors wondered whether or not the question was going to be asked and answered. I prefer the old-fashioned practice of letting the attorneys try the cases and the jurors sit in judgment.

I think it is just absolutely one of the more appalling things I have ever heard of, to allow a juror to ask a question during the course of trial. How would you control that?

In practice, judges who let jurors ask questions usually had a process in which they would be handled, normally through written submission. Lawyers were allowed to object to the questions. Sometimes those objections were heard in front of the jury and other times outside of the hearing of the panel.

There is no rhyme or reason to it. Some jurors will not ask anything. Other jurors will start on day one and ask a bunch. If it is a little bit more complex, you tend to see them asking more questions.

In voir dire, I explain burdens of proof and affirmative defense, and tell jurors "Questions are not invited, because the attorneys have to meet these burdens, and they will either present enough evidence to do so, or they won't. It is not the jury's job to try the case, it is the attorneys' job. However, if you do have a question that is burning a hole in your pocket, write it out, give it to the bailiff, and I'll look at it, and if it deserves an answer, we will see to it that it gets asked." That pretty well discourages questions, which is what I wanted to do, anyway.

As a trial judge, I always permitted jurors to take notes and ask questions, but they were always in written form, so I had some control over what was being asked and whether or not the question would actually be asked, and would discuss it with the attorneys. I would either let an attorney ask the question if they thought it was proper, if it was not objectionable, or if they wanted me

to ask the question, I would do it. In some cases, the question should not be asked, or I would tell the jury that the question would be answered in the course of the trial. It never created a problem.

I didn't let jurors stand up and willy-nilly ask questions. We had a process.

Some judges are definitely opposed to allowing jurors to ask questions in open court with no screening mechanism. They believe that there is a great chance in a long trial of a mistrial at some point. If I were back as a trial judge now, I would adopt the practice in my courtroom of asking for written questions.

Our jury instruction indicates that they should ask the question at the conclusion of the witness' re-cross-examination. That is the point in time.

I didn't let jurors stand up and willy-nilly ask questions. We had a process.

I advise the jury ahead of time, if they have any questions, to write them out on a sheet of paper and then before I excuse the witness, raise your hand and the clerk will come over and pick up your question, and then I will discuss the question with the attorneys, and if it is an appropriate question, one that is permitted by the rules, we will ask the question. I explain to them that, once the witness is gone, we can't bring the witness back to answer the question.

A few judges commented on the quality of the questions asked by jurors.

Eighty percent of them are salient questions. Twenty percent of them are questions about insurance, collateral sources, questions that are just not relevant. I have found that letting them ask questions is a great tool to keep them interested in the trial, because they will think, "This juror is asking questions, so maybe I should stop sleeping and ask some."

Sometimes they ask questions that frankly are not good questions or can't be answered. And the lawyers have the opportunity to object. The objections are handled in the same way that any objection would be handled.

Very often, my experience has been that the jurors ask questions where there is an obvious hole in the evidence. The obvious hole is usually the result of a motion in limine and they aren't going to be allowed to have that information.

Several judges expressed a concern that the ramifications of allowing jurors to ask questions, such as the possibility of diverting their attention from testimony or disappointment if a question is disallowed, must be considered.

Jurors should be information gatherers and deciders, and not be advocates. I think that when you allow jurors to ask questions, they may become advocates because they are formulating a position as the case is coming out. A juror might ask questions for the purpose of advancing that juror's view of the case.

It can divert the jury's attention from the process. How many times have you been trying a case and you are thinking, I want to ask a question, and suddenly you are tuning out everything that is being said? I think honestly, if jurors are thinking too much about what questions they might ask, they may miss important things.

Sometimes when you allow jurors to ask questions that you can't allow to be answered, they become more frustrated.

I had an automobile case, and somebody suffered a brain injury. Under our state law, you cannot enter into evidence whether somebody is wearing a seat belt. The first witness comes up, all 12 jurors asked the question, "Was she wearing a seat belt?" Of course, the question is never answered, so they didn't hear it. The next witness comes up, and 12 people ask again, "Was she wearing a seat belt?" The question doesn't get answered. Later on in the case, the defendant was testifying that his wife was in the car. Three people asked the question, "Was your wife wearing a seat belt?" They wanted to find out whether there was a legal reason they shouldn't know and not consider it, or whether there was some other reason. When *that* question didn't get answered, the entire jury knew that it was something they weren't supposed to consider. But they didn't know that before.

We want a jury that doesn't do irrational things that the public or the court disagrees with. We want them to make informed, educated decisions. But what education process do you know where the students don't get to ask a question? The longer the trial is, the more it is frustrating for those jurors to be sitting there, wondering "How come they haven't asked about this, and how come they haven't asked about that?"

The question may be irrelevant, it may be impermissible, but if they get to ask a question, you can deal with it. "Mr. Expert Witness, do you suppose it would matter if they put this solution in cold water before they did such and such?" Maybe that doesn't matter because we already found that that won't affect the outcome. I think it is a great idea.

Several appellate judges noted that the issue of allowing jurors to ask questions was not something they usually encountered on appeal, but one who had encountered it noted that their court's review focused on how the trial judge handled the question.

I am from a Midwestern state, and candidly, I don't even know what our rules are, because I have never seen an issue come up in over 13 years on the appellate bench dealing with questions from the jury or note taking, other than in the deliberative process when a question comes forward. I think it makes all the sense in the world.

We have not seen any issues on appeal on this. In our state we would review the substance of the question perhaps as an error of law, but whether the question would be allowed would be reviewed on an abuse-of-discretion standard, and it would be a very unusual case, I would think, where a verdict would be based on that.

It is a procedure fraught with danger, because the trial judge has to be very careful, the way he answers the question. In our southern state, the trial judge cannot comment on the weight of

the evidence. It is very difficult to answer most jurors' questions without making a comment on the weight of the evidence.

In our western state, I'd say at least half of our trial judges permit questions by the jurors. Some of them limit them to written questions, and they take them *in camera*. Others simply allow the jurors to raise their hands and ask the question right out in front of God and everybody. I cannot recall one case where that has been an issue on appeal.

As an appellate judge, I have seen one issue having to do with questions being asked by the jury, and that was just a juror standing up and asking questions in a criminal case. It wasn't a problem. It wasn't a point that was really at issue.

One reason you might not be seeing any appellate issue is because lawyers will be reluctant to stand up and make an objection in front of the juror who has asked the question.

ALLOWING JURORS TO DISCUSS THE CASE WITH EACH OTHER BEFORE DELIBERATIONS

The thought of letting jurors discuss the case among themselves before official deliberation begins was frowned upon by most of the attending judges. Some suspected that some jurors were going to do it anyway and felt that the best course was to try to control it through a structured process. But many judges expressed concern about heading down that path.

It defies common sense to take a group of six or more people who have never met each other before and share nothing in common, other than the fact that they are there together to act as triers of fact in a case, and tell them that they are not to discuss anything regarding that case until it is over. It has always seemed to me that the temptation—which I think is normal for human beings—to discuss the one thing they do share in common would just be overwhelming.

One reason you might not be seeing any appellate issue is because lawyers will be reluctant to stand up and make an objection in front of the juror who has asked the question.

I think jurors ought to be allowed to discuss the case before the trial is over, as long as they are doing it collectively in the jury room.

I always admonish my jurors, under penalty of contempt of court, that if they talked to anybody about anything concerning the trial, the county is offering six months free room and board—"Don't do it." But to my great disillusionment, this is exactly what they do whether you tell them not to or not. They go back and discuss it. I don't know if they go back *home* and discuss it, but in fact, they go back to the jury room and discuss it. So we might as well have that rule and say, look, if you're going to discuss it, here is what the ground rules are.

I am coming around to the conclusion that we are guilty to some extent of being too paternalistic when it comes to juries. By precluding them from discussing anything about

the case, you are precluding them from saying when they go back into that jury room, “What did you hear? I missed that last comment.” You are precluding them from getting something straight at the particular moment when they could get it straight, so it won’t have to be reconstructed two weeks later. I think we are selling juries short a little bit by assuming that if you allow them to discuss cases when they go back into the jury room, they are going to do a lot of improper things.

If there is value to the collective judgment, there is no particular reason to think that the collective judgment at intervals in the process is any more harmed by allowing the group to do the work. Historically, the collective shouldn’t do the work until the end, but I think what we do as an appellate court involves the collective judgment all along the way, and I don’t know why there is any reason to fear that the jury engaging in that collective exercise along the way is more likely to get off track and mess up their understanding of things.

My experience was that the overwhelming bulk of jurors would have rather committed hara-kiri than break those rules if they were properly indoctrinated during the jury selection process.

We need to, I think, accept the reality and give them a charge and an instruction, saying, “Look, we’re going to let you talk about it, but take care not to get invested in conclusions early because you still have to hear the other side of the story, and you know what happens when you pre-decide things, whether you are doing it about what your kid tells you, or your neighbor, or your spouse.”

Anybody who has picked a jury knows that there is going to be a leader, and you want the leader to be leading for you. If you allow the people to discuss the case during the pendency of the trial, cliques are going to form. But if they have to do all of that in the jury room when they are all there, that maybe solves that problem.

If you allow jurors to discuss issues among themselves, and you don’t require them to all be together, then you have the problem of one particular juror having an influence on a weaker juror, who might not get the wisdom of all the jurors, and might start prejudging a case. I think as a matter of human nature, it would essentially, by having a judicial imprimatur, promote prejudging a case. I realize as a practical matter jurors do it, but I have a significant problem with us validating that.

I think to me, the inherent danger in that is that if you let them do that, then they are going to start concreting their decision, they are going to make an early decision.

We know that many jurors do it, but there is little sense in us encouraging it. It is a dangerous proposition for us to put the Good Housekeeping seal of approval on that kind of conduct.

My experience was that the overwhelming bulk of jurors would have rather committed hara-kiri than break those rules, at least consciously, if they were properly indoctrinated during the jury selection process.

Is it a hazard of allowing early discussion that the tyrant on the jury, who says, “This is the way I am going to vote, and everybody else has to vote this way,” can precondition jurors before all the evidence is heard.

Let’s not invade their province. Let’s continue to tell them, “Don’t make that decision until you have heard all of the evidence and you have heard my instructions and you have heard the argument of counsel.” If we fool with it, we are going to really damage the system.

ALLOWING JURORS TO TAKE NOTES

Judges were very familiar with the practice of allowing jurors to take notes, and the issue did not spark the kind of controversy seen in discussions of allowing jurors to ask questions or discuss the case before deliberations.

Jury note taking has been allowed in our Midwestern state for probably the better part of the last 15 years. Giving written instructions to the jury predates me, and I have been licensed for 30 years.

My own feeling has always been that it is lunacy not to permit note taking even in the shortest of trials. If the lawyers didn’t take notes, they would be committing malpractice. If the judge didn’t take notes, the judge would be incompetent. And how jurors are expected to remember the record—and much less apply the record to the law—if they don’t have the opportunity to take notes, is simply beyond me.

I take notes, so why wouldn’t the jury take notes? I have written instructions to refer to refresh my recollection. How could they possibly remember everything I have read to them?

I tell them to use their notes. But when you look at them later, it is all doodling.

Taking notes? I don’t understand what the big deal is. I just explain to them that they shouldn’t fight later on over who is the better note taker.

If the counsel consent, sure we will allow note taking. If the counsel consent, we will allow anything. In a civil case, we allow the attorneys to chart their own course, provided it is by agreement or stipulation.

We have a cautionary instruction which we have to give them, which says “You are not to treat those notes with any more weight than the collective memories of the jurors.” I found note taking useful because you don’t have them coming in every 10 minutes and saying, “We want to watch this witness’s testimony again.” So it really helps.

The only measure of the success of juror note taking that I have is the number of questions coming from the jurors when they were deliberating. I get hardly any questions anymore—very, very few—because they have the written instructions in their hand, they have their own notebooks, and they can ask their questions. There is very little that comes back to us to decide how we are going to respond to them during their deliberations.

Several judges noted that the jurors were required to leave their notes at the court (usually with the bailiff) at the end of each day, and that the notebooks were collected and destroyed at the end of the trial.

We pass out notebooks to the jurors. However, when they go out for lunch or at the end of the day, we collect all notebooks, so that they aren't going in and writing things in there. So I think there is a certain monitoring of the notebooks. Of course, after the trial we tell them, "These are all going to be destroyed, any notes that you might have."

I let my jurors take the notes with them. I sit there and doodle all the time, and I would not want all of you to see what I am doodling. So I don't like the idea that you have to turn it into the court because somebody out of curiosity is going to look at it.

The dumbest thing we did was to make them leave the notes in the courtroom overnight. That didn't make a whole lot of sense, and it still doesn't make a whole lot of sense.

We allow the individual jurors to take notes. The notes are locked away at night, and they are destroyed at the close of the trial. Many of the judges also give the jurors a copy of the instructions to read along while the court reads the instructions. That seems to really help, because at least we know that they have been "instructed."

The dumbest thing we did was to make them leave the notes in the courtroom overnight. That didn't make a whole lot of sense, and it still doesn't make a whole lot of sense. But we did that.

They are collected everyday and returned to them the next day, and they are allowed to take them into the jury room for deliberation.

We throw them away. I mean it is part of the rule that the notes will be destroyed after the conclusion of the trial—in part so that the jury's verdict can't be impeached based on the notes.

A few judges worried about tinkering with the system itself through these reforms and wondered if they might do more harm than good.

I'm a bit of a skeptic about reforms that come along. I worry that most people that are motivated to change things think there is something wrong with what we have now, and I don't necessarily agree.

I think that I am convinced that the system works. I cannot explain it after 30-some years in the law, but it works. I don't want to tinker with it.

I think there are a lot of things that are based on tradition that drive us to do one thing or the other, and I think we should not be afraid to look at them and change them, but the appellate courts are not necessarily the people that can do that.

In my southeastern state, the legislature has taken it upon themselves to tell the court system how it should go about doing things—from allowing juries to ask questions in civil trials, to how the judges will instruct juries and when, and a number of other things that clearly relate to procedure. There is a real question about whether that is a violation of the separation of powers provisions in our constitution.

We are talking about the jury system. I'm going to suggest that in the future, we won't have a jury system. The result is going to come out on the computer, because the more and more we monkey with the jury system, the more danger we have that the adversarial system will disappear, especially with the advancing technology that we have today.

I am concerned with all the tinkering that is going on all over the country in the jury system. I think that we are trying to fix something that is not broken. This system works pretty damn well, and it has become politically correct to start tinkering with it. I think in our northeastern state, the more they tinkered with it, the worse they made it—far worse than it was 20 years ago.

A classic example of tinkering with the system: Why do we need 12 jurors? Couldn't we do the job just as easily with six? So the federal courts went to a six-person jury system, and now we know from studies that there was something kind of important about 12, as opposed to six or as opposed to five or as opposed to three.

Practical Benefits of the Jury

In his paper, Professor Landsman spoke of some of the practical benefits of the jury trial. Some of the attending judges expanded on his point about the jury's structure enhancing adjudicatory quality by noting the importance of the collective wisdom of juries.

I think that the exchange of ideas with people of different backgrounds, different perspectives, and their impressions about things gives a collective decision that is accurate, because you get to throw ideas back and forth, which you don't get to do in a bench trial. Sometimes I'm sure I miss nuances that someone else might have been able to point out to me if they sat there, heard the same trial, and we could discuss it. So I am concerned about bench trials, in making sure that I have taken in all those nuances. I think the job would be easier if someone else was sitting next to me and we could talk about it.

I think also the members of the jury bring with them something different than the judge does—the diversity of background. When they gather together, whether it is eight or 12 people, all of their experiences are shared. I am a strong proponent of the jury system, because of the collective discussions that go on, and the consensus is important.

If I had a personal claim that I personally feel is complex, I'd rather have 12 people who don't know anything about it decide it rather than one person who doesn't know anything about it, just from a practical standpoint. The law has nothing to do with it.

If the doctors can't agree, what is the point? That the jury can't? I think it is really not a question. If the doctors can't agree whether this product or this drug causes these

maladies, then who are we to say that they are any better or any worse than 12 reasonable people? I just don't see that.

The other benefit of having both a jury and a judge is juries and judges don't agree 100 percent of the time. It is for that 10, 15 percent of difference that you have another check on the entire system. You have a judge to step in when the judge and a jury do not agree.

It is for that occasional difference between the judge's conclusion and jury's that you need the collective wisdom of people, more than that of just one fact finder.

There's a real danger here. Efficiency, by its very nature, has nothing to do with justice, and justice has nothing to do with efficiency. Speed is not that great a concern, particularly in this system. When we are talking about "speed" and the judiciary, we are talking about deliberate speed, and deliberation takes time, whether it's a judge doing it, a panel of judges doing it, or a jury doing it.

Several judges noted that the presence of a jury often leads to better work by judges and lawyers.

I think the judges, trial judges, listen a whole lot better and longer and more patiently when there is a jury sitting there. Judges sitting by themselves may say "I have heard that, I already know where you're going with that, let's get this thing going," whereas when there is a jury, the judges are very patient and solicitous and willing to let you put on your case.

So then they hear what the jury hears, and I think that has a lot to do with why they reach the same results.

It is for that occasional difference between the judge's conclusion and jury's that you need the collective wisdom of people, more than that of just one fact finder.

There is one thing that I had never thought of that until it was told to me by a group of Russian visitors, judges, and prosecutors who visited our court in our mid-Atlantic state. They watched a jury trial in a criminal case. When they first arrived, they were not particularly enamored with jury trials, because in Russia they were getting 98 percent conviction rates in the system they had. They knew it would be a lot lower in the U.S. When they watched the trial, they all unanimously agreed that the jury trial was a good thing, but the reason they gave was that it made for better lawyering, that it sharpened advocacy skills. One of the Russian judges, who had tried jury cases in Moscow, said it also required more attention to be paid to the law of evidence. When you try a case before a judge alone, the judge lets a lot of stuff in, thinking "I can take it from this side of the brain and send it out the other." But that when you are trying cases before a jury, you are much more sensitive to what can come in.

The biggest advantage of a jury trial is its effect on lawyers' behavior. Their behavior toward the bench and to one another is vastly improved; accordingly, the bench's behavior toward the attorneys is improved proportionately.

Granting New Trials, Directed Verdicts, JNOV's, etc.

Trial and appellate judges discussed some of the instances where there was disagreement with the jury's verdict, in which they had issued a JNOV, a directed verdict, a summary judgment, or a new trial, as well as the standards in their states for doing so.

We have two separate standards that are closely related for directed verdict and JNOV. The standard for directed verdict is whether the judgment shocks the conscience of an enlightened society. There are different variants of that, but that's basically what it is and that's very subjective. What shocks my conscience might not shock the next person's conscience. The standard for a JNOV, though, is whether a reasonable and fair minded person could have reached that verdict, not whether a judge would have if we had been sitting. We on the appellate court look for any evidence that would lead a reasonable person to reach that verdict. If we find such evidence, we affirm the denial of the JNOV. Only in cases where we do not find such evidence do we grant the motion. I guess that's substituting our judgment for that of the jury.

If there is a motion for a directed verdict at the end of the trial, before you instruct the jury, and you sincerely believe that it should be granted for the grounds stated, and you don't grant the motion, and then the jury comes in the other way, I think you are foreclosed from granting a JNOV. The mistake was not the jury's, and the mistake was not the lawyer's, the mistake was the judge's. And the only thing you can do in that instance is grant a new trial, if anything—but not a JNOV.

The juries are incensed when their verdict is set aside. We had one criminal case in which a judge did that, and there was a firestorm. The public was saying, "Why waste the time? If you knew you were going to do this, why didn't you do it instead of putting us through this dog and pony show of bringing in a verdict?" So there is a sort of efficiency I guess, based on the rule, but it's certainly not good public relations when it's done.

When appellate courts start remitting and granting judgments notwithstanding the verdict on a feeling that perhaps the result wasn't reasonable, or contrary to what they would have done had they presided over this case, then I think you really are directly affecting the right to a jury trial. This isn't a summary judgment where they haven't had a trial at all. This is after the trial is over, and judges have started monkeying around with it.

Trial judges can't judge credibility, but they try. A lot of times they will decide questions like intent in a summary judgment context. As an appellate judge you just have to reverse them and send them back.

Summary dispositions can encroach on the jury process. I know in our state there has been a total cultural climate change on that whole issue over the last 20 years. Twenty years ago it was rare that you would see a trial judge move and grant summary disposition. In fact, our supreme court said in opinion after opinion that it should be rarely granted.

When I first came to the appellate bench in our southern state, we would see frequent grants of summary judgment, but not to the extent that we see now. Now most of our trial courts are

using summary judgment as the primary disposition method.

Our western state is in the vanguard. We treat summary judgments as a favored method of disposing of cases. And we go a step further. Instead of having to find no triable issue of material fact, if you can establish the absence of one essential element in the case, that too is a sufficient ground for granting summary judgment—even though there may be triable issues of fact on other matters in the case.

Several judges discussed other options, such as remittitur or additur, available to them when the jury returns with a verdict they don't believe is proper. Some appellate judges appear to be reluctant to reverse the trial judge's actions when they reduce or add to a jury's verdict.

I don't believe there is such a thing as a runaway verdict. There are enough safeguards in the system. You are not going to get eight to 12 crazy people sitting there, saying, "Why don't we do something stupid?" They are listening to the evidence, and they are responding to it, like anybody else.

I strongly object to this notion that somehow we all have a common understanding of what is a runaway jury. From my standpoint, legal rules control what appellate courts or trial judges can do with a jury's verdict—*legal* rules. Unless there is no evidence to support the verdict, or unless the verdict is against the law, the verdict is the factual determination of the case, and there is a hands-off policy.

I don't believe there is such a thing as a runaway verdict. There are enough safeguards in the system.

Our court almost 20 years ago abolished the power of trial judges to grant remittitur, saying that trial judges were no smarter than juries and no more consistent than juries. Then several years later, as a part of a package of tort reforms, the legislature put remittitur power back in, and actually gave additur as well. I think it has been only mildly used. But I think that there is a good deal of deference to the trial judges.

I have been on our court now for a little over nine years. Unless I am mistaken, in that entire time, we have never been asked to order a remittitur or an additur. Every now and then, there is a motion for remittitur or in the alternative new trial, or additur in the trial court. We may have reviewed that for abuse of discretion, but at the appellate level, I don't think we have ever ordered remittitur directly.

I am interested in the experiences in the states where, at the appellate level, you can, in effect, grant remittiturs. In our mid-Atlantic state, it is not permissible for an appellate court to change in any way the amount of a verdict, with two exceptions. The first is for punitive damage verdicts. That is one area that we have carved out, where we can review the amount of the verdict against standards, but we can't change it. The most we can do is send it back for a new trial and punitive damages if we find that the amount was too great; never if it was too low. The other exception is where the jury has returned a special verdict indicating a discrete amount for a

certain thing, and the court concludes as a matter of law that that was not properly before the jury for some reason.

Standards of Review

Many of the appellate judges discussed their review of trial court verdicts.

I don't want to offend anybody, but I used to have something I called the "Jesus Christ" rule, which meant that when a jury came back and they announced a decision, I would only grant a new trial if I found myself saying under my breath, "Jesus Christ!" Otherwise, I would let it stand.

In our appellate court, when we are reviewing a bench trial verdict, a transcript typically will cover a number of days, sometimes a number of months. Then, after the conclusion of the evidence, the parties want time to file briefs. So this trial process could stretch out over a number of months. I think it's a definite advantage to start and conclude a trial with a jury simply because it's a more continuous process. It's part of our local legal culture; the lawyers engaged in a bench trial are pretty assured that they can accommodate other matters, so you get piecemeal trials.

As chief justice of our state's court, I see trial courts being reversed because of attempts by judges to take the cases away from juries in an early stage. It is not a question of whether to sustain the verdict, it is a question of whether or not to just let the jury hear the case. I think that more often is a result of some sort of political prejudice that exists with regard to philosophies as they relate to what goes on in the trial court. I think that the jury system is the best system ever devised, and attempts by courts and judges and legislatures to take that away are just simply attempts to let the arrogance of education take over where democracy has really been a better gauge. I like the jury system.

Another one of my concerns is that precedent won't mean much anymore. You may be going down a slippery slope to where you just eyeball a case to decide what it is worth.

About 10 years ago our supreme court faced the issue directly. We concluded that our power to reexamine the evidence, and to reverse the verdict did not conflict with the right to trial by jury. One reason perhaps that they ruled that way is because our constitution, while it guarantees the right of trial by jury, also gives the appellate courts the right to review the sufficiency of the evidence in the cases. So you have constitutional provisions supporting both views.

I have been on the bench for 18 years, and I can count literally on the fingers of one hand the times that we have reversed for insufficiency of evidence.

In our court we reverse judgments NOV and instructed or directed verdicts more than we affirm them, because it is very difficult in our southern state to sustain one of those. It's strictly a "no evidence" thing. But we also have the authority to review the sufficiency of the evidence to support the jury's verdict. If we find that it is insufficient, or is against the great weight or preponderance of the evidence, we reverse the judgment and remand it for a new

trial. If we find there is *no* evidence, we reverse and render.

One reason in our state why you would get a lot more reversals in criminal cases than in civil cases is that, in civil cases, you don't reverse because of incompetent lawyering. That may be grounds for a malpractice action, but if it was just lawyer error—if evidence didn't get in that should have gotten in, or whatever—that would not be a cause to set aside a jury verdict. Of course in criminal cases we do take into account incompetence of counsel. And if it turns out that a miscarriage of justice resulted because of incompetent lawyering, well, obviously that criminal defendant is going to get a new trial.

Nothing would be more destructive to the jury system than not having some reasonable judicial review of verdicts. If there weren't, these so-called “McDonald's” verdicts wouldn't be subject to any review. If you want to see the people lose confidence in the jury system, eliminate appellate review.

I think it is human nature to look at a verdict and think, “I wouldn't have done that.” I think that is part of human nature, and I think that is why that standard is so firmly in place, and people have to be mindful of it, because it cuts against what we do. We are trained as lawyers to

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analyze, we are trained as judges to judge. I think our instinct is to do that. I greatly admired the appellate and supreme court justices who have to set that human nature aside and look at very narrow issues they are allowed to examine. I think it must be very difficult at times.

Many judges felt that it was very important for the appellate judges to give the trial courts, judges, and juries proper deference when reviewing verdicts.

With respect to deference, we are not only talking about the facts that are presented to a trier of fact. We are also talking about the reasonable inferences that they can glean from those facts. And somebody is then going to have to go through this exercise weighing all the reasonable inferences—or weighing the reasonable inferences *again*. What you are saying is that the trier of fact drew reasonable inferences, and you have to defer to the inferences they drew.

In our southeastern state, it doesn't matter whether it's the worker's comp judge or the trial judge, the appellate court is going to give the same amount of deference. Unless *no* reasonable person sitting in the position of that judge could have reached the result that he or she reached, it's an affirmance under our law.

What's the difference in deference that you give to an administrative trial judge, or trier of fact in a worker's comp case, and a trial judge in a common law action? To me, I'm looking at the same type of deference. I think you should leave it alone.

On our appellate court we make a conscious effort to defer to the jury on factual issues.

In our southern state, we are fond of saying that the credibility of the witnesses is solely within the

province of the jury or the trial judge and that we have no right to judge the credibility. But as a practical effect, that is not true. When we reexamine a judge's fact finding, or a jury's fact finding, many times that involves the credibility of the witnesses that have testified. Sometimes the appellate court feels that some evidence is simply so incredible that it doesn't amount to evidence at all. Really what you are doing there is substituting your judgment of the credibility of the witnesses for that of the trial court or jury.

I think there is a tendency for judges to think they know better than the 12 ordinary people who decided the case at the trial level, and that's very dangerous.

In my northwestern state, if there is any evidence that a competent person could believe, then that verdict is going to be sustained. Whether the appellate court agrees with the verdict is not an issue. The fact that there is evidence that contradicts the jury's verdict is not relevant if evidence was presented that a competent person would believe.

My biggest concern since joining the appellate bench has not been jury verdicts, but trial judges who, out of their ideological bent or whatever, make clear that they feel the jury verdict was unfair. That bothers me. In our state we have a number of judges that will grant summary judgment for a business party in a minute, notwithstanding a clear mandate of our supreme court that there is almost no case where summary judgment is appropriate. But we get a number of cases where summary judgment has been granted, and then we've got to reverse and remand. So my biggest concern is the fact that we're reexamining the trial judge's decision. Personally, I don't think I ought to be giving much deference to his decision, particularly when he has reversed a jury verdict.

In our western state, in terms of appellate review, we are really zealous in protecting the prerogative of the jury as trier of fact—to assess the weight and effect of evidence, the credibility of witnesses, and generally to find facts including the amount of damage. We don't second guess the jury in that respect. But parties are not entitled to judgments based on verdicts when the jury has been erroneously instructed. A verdict resulting from erroneous instructions isn't the fault of the jury. It is the fault, ultimately, of the judge, and of the parties to whatever degree they may be responsible for invited error.

In our southeastern state, the standard of review is abuse of discretion, so whatever the trial judge does is almost always going to be affirmed, unless it is something just really outrageous. I can't remember ever reading an appellate opinion in our state where a judge's action was so outrageous that it constituted reversible error.

I cannot remember a case where our court has held that a new trial should have been granted on the basis that the verdict was against the manifest weight of the evidence. I mean, if there is substantial evidence supporting the result—and “substantial evidence” isn't synonymous with “the preponderance of the evidence”—then a motion for a new trial is properly denied. Discretion isn't abused in that instance.

A couple of years ago our state moved to the one day/one trial system. One of our judges used to have double juries. If there were two defendants, he would have two juries in the courtroom. He even did one trial where there were *three* juries in the courtroom at one

time. So the judge has a lot of discretion. I think the appellate court seems to feel the judges do have discretion, as long as they don't do something abusive like let jurors stand up and ask questions from the jury box.

As one might expect, with judges expressing the need for deference to the trial courts, there was considerable concern about second-guessing the behavior of judges and juries.

Our southeastern state passed a statute requiring the appellate court to handle workers' compensation appeals, but we gave up on second-guessing the trier of fact. From a policy standpoint, we concluded that was not a good thing to do because, among other things, it encourages more appeals.

My observation is that as an appellate judge, I often look at something and say, "If I had been there, I would not have done that," or "I wonder how they got there." But frankly, I usually do that with a judge rather than with the jury. We rarely second-guess a jury. But trial judges who set forth their rationale expose themselves to criticisms, and often our fact-finding concerns are with trial judges rather than jurors.

Some judges discussed whether the backgrounds of the judges on the courts affect their reviewing process.

Is there a marked difference between the judges on my court who are former trial judges and those of us who are not? There is a very slight difference. It was articulated very nicely by one of my former colleagues, who said that he considered it his duty to protect the public from bureaucrats and trial judges.

The lawyer who comes off the street elected as a trial judge at some point becomes a part of the culture and that is because of the policy decisions that are made from the appellate system. It's the same no matter who the judges are. So, it is a question of the culture. I don't think it has to do with career or anything else.

In my state, you can't tell the difference between the elected judge and the appointed judge. I mean, in theory you can. When the election is in process, you think you can.

I haven't seen that difference myself between elected and appointed judges. I am very honest about it. I have not seen a difference.

I know it is a real difference for judges who have practiced law and litigated. They know what it is like to be a lawyer. They know what it is like to try a case. And they know what it is like to be shafted by a trial judge.

Video review of trials by appellate judges is a relatively new phenomenon, and one that some judges have embraced but that others view with more skepticism.

Video technology is advancing so that in the future you won't have to do it in real time. But right now the way our system is set up, with the pilot projects we have around the state—and there are several courts that are doing this—that's all you have. It's come up to our court. From time

to time we have actually ordered the trial transcript, which is an extra cost, but there isn't any way around it unless somebody sits there and watches the tape. It may be not everybody, but somebody has to watch the tape.

A number of our trials in our Mid-western state are videotaped, and in 13 years I have never yet had an occasion where I have had to review the videotape. I'm just curious what other states have done. I can see situations where you might need to review it, but I can't imagine that that occurs very often.

We have done some research with videotaping, and certainly it's true that it dramatically increases the amount of time necessary to review a record if you are going to look at videotapes.

But judges, like anyone else, being human, I think it's inevitable that the urge to start second-guessing the triers of fact is going to creep in, even if it's just subconscious. If you're watching what went on, and listening to what went on, you are going to think you're in as good a position as the triers of fact were to determine whether they reached the correct result. And I think that's the most dangerous potential of video taping trials.

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Changes in the Jury Trial Process

Judges discussed a number of issues revolving around changes in the jury system. For instance, several judges noted the increasing diversity in jury pools and the benefits that has provided the system.

One of the primary advantages of the jury system is the diversity of the decision makers, which is different from what it was originally. The founding fathers had a very good reason for wanting juries. Jurors then were the same as they were—white males, property owners, not diverse at all. But today the diversity of the jury pool is much greater, and I feel that a higher quality of justice is achieved as a result.

In my northern state, I observed an immediate increase in diversity when we started using the driver's license registry to call prospective jurors, not the voter registration rolls. Previously people who did not register to vote were precluded from serving. Using the driver's license registry allows us to incorporate those groups who were statistically underrepresented on the voting lists.

In our southwestern state, we have a constitutional provision that you cannot keep a person from serving on a jury because they can't speak English. Now, dealing with English and Spanish is easy. But in our part of the country, in American Indian dialects alone in you

may have 15 or 20 different languages. And the rule also applies for Thai, Italian, French, etc. It doesn't make any difference. You cannot keep them from serving on a jury. It's the obligation of the state to provide an interpreter for anybody who needs one.

Reducing jury service to one day or one trial appears to produce a better cross section of the community.

For years in our state, in the "Wild, Wild West," we had exemptions and exceptions to who could serve on juries, including morticians, because they were busy planting people and couldn't waste their time. Teachers and lawyers were also exempted. Now we have no restrictions, and have not had for 25 years. I think you would be surprised how the jury pool has improved—a bigger, wider section of people.

Our northeastern state has no exclusion from jury duty, even for judges, doctors, lawyers, and clergy.

Making the jury pool more diverse is a positive thing from the standpoint of preserving the jury system and respect for the jury system.

Expanding the jury pool became politically correct. "Expand the jury pool, put everybody on the jury, put doctors on the jury, lawyers on the jury, put judges on the jury." Sure, it sounded well in the newspaper, but you can wind up putting a doctor on the jury who is worried about his patients or who is worried about paying his malpractice insurance when he is going to be out of the office for two or three days or even a week. I don't see the point to it. I think that the system worked better before. They tinkered with this to be politically correct, and I don't think they have improved the system at all. In my own view, they made it worse. Some judges say that it was a great experience to be on a jury. Well, that is not the purpose of the jury system—giving a judge a great experience once in his lifetime.

Several judges noted difficulties facing jurors and suggested that reforms are needed to make the experiencing of sitting on a jury more favorable.

If we are going to get full cross-section participation by citizens, we have to make it more practical for citizens to serve on juries. That would be my platform for an improvement in the jury system.

The problem I hear about from jurors is the delays. They ask, "Why do we have to sit around so much?"

When I explain to prospective jurors in advance why they have to sit around so much, my experience has been they don't mind it nearly as much. If you tell them at the beginning of the trial when you are going to start, when you are going to take breaks, when you are going to finish, etc., they seem to tolerate it much better. And if you explain that judges and lawyers are discussing legal matters during the various delays, which have no bearing on the jury's fact-finding role, the delays do not become a problem. Jurors have a problem when they don't know *why* they are sitting around.

Lack of compensation has been a problem. We still pay our jurors \$14 a day, and it costs them \$15 for parking! If they have children, they have to pay for day care.

We need to help jurors with every aspect of service, from finding convenient parking to adequately compensating them for their time. Such improvements could be productive in trying to maintain the system.

Standing around the courthouse all day and never getting called to sit on a jury is a terrible experience.

I think there are two concepts you have here. One is jurors want to feel they've been treated fairly. In our Mid-western state, we have the one day/one trial system. If you don't get called that day, you are out of there, and you don't come back for a year. So it's not a case of where some people are getting called three and four times, and other people are never getting called. That gives them the sense that there is fairness in the system, that they are not being picked on. The other thing is that they want to feel that they are not wasting a lot of time. They hate to see sidebar discussions—sitting in the jury room for long periods of time while people are doing things out there that they don't understand. I think you've got to go in and make that thing move. An efficient trial is what those jurors want. They want to be able to sit there and say, "Hey, I'll put in a couple of days here, but I want this whole thing to move." So you can say, right at the outset when you have your array of jurors there, "This trial is going to last not more than four days, or a possibility of four and a half." Then they can then make all the plans they want.

A reform that has been used in several states to ease the burden on jurors as well as speed up the trial process is the one day/one trial policy. Most judges who had experience with this process seemed to favor it.

We have one day/one trial juries, and that has led to a larger participation by the general public in the administration of justice. I think it has raised the community's appreciation of how well it works. Theoretically, their participation won't diminish the rule of law in the United States, because they have to accept the decisions. The jury system gives people a great deal of respect, as evidenced by the questionnaires they fill out when concluding their service, which show, almost universally, high praise for the system.

My western state has begun using the one day/one trial system, and this "fix" is costing us more money in the long run than I think it should. In my jurisdiction, the criminal courts get to choose jurors first, and we get the rejects for civil trials. When we have multiple civil cases being tried on the same day, it's not uncommon for us to waste an entire day because we don't have enough jurors.

In our western state at least, they have pretty much gone to a one day/one trial system, and that makes a lot of difference, obviously, in what you are asking of people. When they don't get on a jury, at least they don't feel they have spent all that time for nothing.

Several judges discussed the "blindfolds" placed on the jury and how their exclusion from knowing certain facts hinders their ability to make proper decisions.

I think ultimately, the more the jury knows and the more ability it has to participate as fully as possible, the better off the system is likely to be. So I think the jury should know a lot and be given the opportunity to do a lot in the process.

To me it is much better to explain why we are doing this in this matter as opposed to actually believing that if they don't hear it, they won't understand it or they won't think about it.

I can't think of more than two or three cases out of the last two or three years of civil cases where insurance hasn't been brought up by the jury, like, "We are just wondering about how much insurance there is?" It comes up in every case that I touch. If it doesn't, that just means that they didn't get to it until the deliberations. That is when they are talking about it. It comes up so often, it is incredible. I don't have to instruct about it anymore; it just rears up, and we let them all talk about it during voir dire.

I feel like that in most cases, the jury could reach a more fair verdict if they knew there was insurance.

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and there are rules for reasons.
Consequently, there are certain things
that jurors should not hear.**

I agree completely with the idea that invariably there is less reason to fear telling juries things about the policies that underlie the things that they are going to worry about and question anyway. You should be able to say, "By the way, there will be no mention of insurance here, and it is not because ultimately it may not make a difference, but the fact is, for policy reasons, we don't tell you that."

You know, you walk into a courtroom and here's a guy sitting at the table. He is the defendant. He is a plumber's helper and sitting next to him is a man or woman with a very nice suit, very well spoken with a good education, representing him. What do you mean the jury doesn't know that that is a lawyer hired by an insurance company? The plaintiff has been hurt with a punch press and is suing the punch press manufacturer on a product liability theory. They don't know he has already been paid workers' compensation, and that the medical bills have been paid? I mean, these jurors have a base of information and sometimes a base of *misinformation* about who has been paid or what has been paid or how the money flows or all that kind of stuff. So, it seems to me that we ought to at least figure out what their baseline information or misinformation is and then give them enough so that they don't make decisions based on bad information.

The jurors—and this may be why Arizona has adopted the juror questioning rule—spend a lot of time wondering why they are not being told things that they think are very relevant. They try to fill in the blanks, and sometimes they fill in the blanks right, and sometimes they fill in the blanks wrong.

The question is, are we hiding the jurors' eyes? I believe that we have rules of law, and there are rules for reasons. Consequently, there are certain things that jurors should not hear. It is not that we are trying to hide their eyes to it. It is just that there has been a policy determination that those matters are not legitimate considerations for a jury's determination and, hence, the

rule of law requires that the jurors not hear those things. I have no problem with that. I think “jury nullification” is a serious threat to democracy. Some people suggest that jury nullification is democratic, but I think it is anarchic and fundamentally undermines the rule of law. So, I don’t agree with the thought that we are improperly hiding things from the jury.

Another change discussed by judges was the move away from trials altogether, toward ADR, including arbitration and mediation.

I can almost assure you we are trying probably 15 to 20 percent fewer cases than the number tried in 1980. If that is the case, then that means that juries are getting fewer opportunities to decide cases. I just wonder if we are pushing ADR because we think it is going to save money. We think it is an expedient way of settling disputes. It is a fair way of doing it. But does anybody share my concern that this is a serious attack on our jury system?

A concern I have had for a long time when somebody says the jury trial system is “too costly” is, “too costly for whom?” And when it becomes a subject of corporate political fund-raising that it’s too costly for them, it has the danger of sort of discounting the whole judiciary and legal third branch of government, and everything that you do and we do that benefits the whole society.

Are there any states that are saying, as a matter of public policy, that those clauses in the standard contracts that require arbitration are unconstitutional and against public policy? Because there’s one in every form contract that now comes through from an insurance company.

I don’t really have too much of a problem with mediation if both parties agree to it.

We have had some mediations where I would have sworn there was no way to settle the case, and we’ve also had the converse.

One of the dangers is that some juicy issues get settled out through ADR that maybe ought to be tried. And also, from the judge’s perspective, a lot of what might be easier cases get settled out, and as a result our workload becomes more complex and more difficult. Instead of two tough cases and one medium case, they are all tough now. But on balance, ADR gets rid of a lot of cases.

In our court we have judges retiring early to get into the arbitration and mediation business, because they make three times the amount of money there.

In our court we have 25 volunteer mediators who have donated their time, completely cost-free. We don’t compel anybody to go to mediation, but if they are desirous of going to mediation, it’s there for them.

Some judges discussed other reforms attempted in their states to change the jury system.

We have adopted a rule that greatly contributes to the preservation of the jury verdict’s sanctity.

We are forbidden from inquiring into the mental processes of the jurors, their deliberations, or anything that occurs in the jury room, unless it involves an external influence. This rule makes it almost impossible to prove jury misconduct. This rule has significantly reduced the number of jury verdicts reversed because of jury misconduct, because the lawyers simply can't prove it anymore.

I think the driving force behind these Arizona projects is the understanding that, if you are going to have a participatory system of jurors making decisions in civil litigation, you ought to recognize the psychological process of decision makers.

I don't know of a current tort reform issue that is alive in our state that would completely eliminate jury trials. I only know that many of the tort reform measures that have been adopted—many of which have been set aside by the courts—would chip away or completely undercut jury trial. But none of them have confessed to a motive of eliminating your trials.

The Importance of the Jury

The attending judges were nearly unanimous in their support of the jury system in America, and they affirmed its importance to the justice system and to democracy.

Is it too self-congratulatory for us in the justice system to say that a citizen jury is an underpinning of continuing faith in the whole democratic process?

I have had a lifetime love affair with the American jury system. I think it is sacrosanct. I think that 12 or fewer jurors can make any decision that is presented to them, and they can do it fairly.

I have had a lifetime love affair with the American jury system. I think it is sacrosanct. I think that 12 or fewer jurors can make any decision that is presented to them, and they can do it fairly.

I think to some extent, all of the judges in this room that believe in the jury system have got to defend it. Maybe it is a little cumbersome, maybe it is a little costly, but that is the price you have to pay for a democratic society.

When jury systems were put in place in this country they were really a system of “popular” justice. The juries were there to do more than decide right and wrong; it was really community involvement in solving whatever problems there were. It seems to me that we really want to continue some concept of popular justice. We need to really continue to keep the strength of the jury as strong as possible.

I think juries are essential to confidence and trust in the system.

The public's perception of the system is more important than whether or not we change corporate behavior from being too profit-oriented and discourage production of defective products. That is one of the big advantages to trial by jury.

Trial by jury contributes to judicial independence. It is an opportunity for private citizens to exercise the functions of government officials, and it ensures, to a certain degree, that the decision in any given case is going to be removed from whatever practices, habits, or predispositions we have as government officers.

The ability of the citizen to participate in government is so, so important. I am picking a jury right now, and I am really selling them on the idea, “You and I are partners in this process of getting a fair trial. You folks are the representatives of government.” That is something that is missing. The jury system is a tremendous institution.

Jury service has added value because it is positive participation, not negative participation, as when people are appearing in a small claims, traffic, or divorce proceeding.

The jury is just another part in our system of checks and balances. It provides a check on arbitrary judges.

When I was a trial judge I would always tell jurors at the end of the case, “There are some questions which are just too important to be left to a judge to decide.” I tell them this not only because it is a nice thing to say, but because it is something I believe, particularly where the liberty of a citizen is involved. Juries—and, theoretically, judges—have a responsibility to prevent the state from overreaching, and they are in an excellent position to do so.

Trial by jury is important for our entire system. We can all agree that there is a great deal of distrust of government. I think there is also a great deal of distrust of how citizens run things. However, attacks on the jury system merely further attacks as to whether people should be part of the system, and they only increase the level of distrust. Sometimes jurors will come in with a little distrust in their minds and at the end of the case some distrust might linger. But in my mid-Atlantic state, people are constantly telling me how happy they were to fulfill their civic duty. The idea of the jury system as a form of participatory democracy cannot be emphasized enough.

Some judges discussed the impact that juries have on the judges’ own role in the justice system, and even on the judges’ electoral fortunes.

There have been times when I was a trial judge when I was very pleased that I didn’t have to make a decision in a case that I viewed as a tough call.

Trial by jury spreads the risks involved in decision making. The jurors come in anonymously, make the decision, and retreat anonymously back into the woods from whence they came. It removes some wear and tear from the judge.

The jury is also important to the public’s perception of the system as it plays out in the press. A trial judge makes a pretrial ruling that is shocking to the public and makes headlines. But a jury verdict is just a part of the story. I think the public feels more attuned to a jury verdict than they do some red-herring pretrial ruling that perhaps dismisses a case or changes venue or does something that the public doesn’t like. They say, “How can they do that?” when they don’t understand. I think they are more accepting of a jury verdict.

The jury system enables us to have what I would refer to as popular justice, because juries are more likely to be attuned to the rule of *justice*, as opposed to the rule of law.

I am thinking philosophically. I think even to suggest removing the civil jury from doing what they are doing in order to achieve “consistent” results would lead to a democratic upheaval, because eventually there would be this huge cynicism and skepticism about what the judges are awarding. But make it a jury verdict and the people will accept it. If it is too small, they will say, “Well, the jury has reached this verdict, so it has got to be fair.” If it is too large, then they say the same thing, and then they say, “The judge will straighten that out later.” So the whole democratic institution itself transcends the notion of doing away with the jury to achieve “consistency.”

As a judge, you are still the master of the courtroom, the master of the proceedings. If the jury has a \$100 million dollar verdict on a very lousy case, the public reaction in many states is, “Well, how did the judge let that happen?” You are ultimately held responsible for what goes on in your courtroom.

I think the community’s willingness to accept the rule of law is tangentially related to judicial elections. The community is much more satisfied, it seems to me, with the decisions that come out of their representatives on a jury, than they would be with decisions made by judges, whether elected or appointed.

Jury trials are also a good way for the trial judge to deal directly with the constituency for reelection.

In our western state, in the metropolitan areas, we run countywide, and nobody ever gets defeated, unless you really committed some terrible gaff. But in the cow counties, where you have one judge and maybe 40,000 citizens, you have to be very careful about the decisions you make if you want to be reelected.

The judges in my southeastern state are elected, and our state has become intensely political lately. Candidates trying to get on the bench use terms like “jackpot justice” and “roulette trial by jury.” I don’t know what they are talking about, because juries render so few verdicts, there is not much to complain about. But if the trial judge, armed with the facts and the law, makes all the decisions, it would make it even *more* intensely political.

Several judges noted that citizens who serve on juries come away with a more respectful and informed view of the justice system.

It is a great experience for people, and they recognize it once they have been through it.

Jury service is an opportunity to expose the community to the civil justice system. In my experience, jurors generally report a favorable reaction. This is one way of getting favorable reaction in the community, which hopefully is reflected in the legislature, which hopefully is reflected in the legislature’s response to our budget requests. It’s part of a public relations approach. In those states such as Arizona that have taken the time to provide appropriate accommodations and appropriate pay, they have fostered the warm, fuzzy feeling that we would like legislatures to have. Certainly, that’s a way of meeting the public.

The individual juror gets a great education that they really won't personally experience in any other way. And then they, in turn, educate those in their sphere of influence. The questionnaires I send them show that 85 percent are satisfied with the jury experience.

I have received nothing but positive feedback from jurors posttrial. It's not uncommon for them to say that they didn't want to serve and tried to get off. But after they sat there, they learned, for the first time, how important the role of the juror is in resolving disputes in the community.

Most of the letters I get back from jurors express the same thing, that they thought that it was a pleasant educational experience and they were happy that they made the commitment. Then in the last paragraph they often say "Oh, by the way, it takes too much time. We are sitting around too much." We are really working on that in our court.

I have received nothing but positive feedback from jurors posttrial.

We command about 2 percent of the resources in state governments, and some of our biggest fans are former jurors. We view it as an important support group.

I think most people would say jury service was a positive experience.

Democratic participation is very important. Most people don't want to serve on juries, and they will ask their employer to give them a good excuse why they don't have to go and serve. But once they serve, they appreciate what they have done. Many former jurors have excitedly told me of their experiences.

I have had jurors tell me how surprised they were at the power that a jury has. They will ask, "Well, what will happen to our decision? Will it be reversed?" And some of them have been very surprised to learn that, in most cases, their decision is the final decision on the controversy. I thought jurors knew that, but apparently it's not so.

Some judges noted that jurors come to the courthouse expecting trials to be like what they see on television.

I have heard anecdotal comments about people coming to court and being a juror in a real trial and then wondering why everyone was so polite and there wasn't theatrics, because of their expectation from TV.

I like the idea of jurors participating in the democratic system, beyond just paying taxes and voting. It is the one time for most people to actively participate in the running of their government, so it is a very valuable civic lesson. I have spent a lot of time talking to prospective jurors about the court system, and have been told again and again how much jurors appreciated learning that the system is not like what they see on "Judge Judy" and similar television shows.

Points of Agreement and Closing Comments

In the discussion groups, the moderators were asked to seek out consensus—to the extent that it was achieved—on the issues raised in the Forum, and to characterize their groups' points of agreement in a few sentences, to be announced at the closing plenary session. The moderators' informal summaries of their groups' discussions follow, edited for clarity.

HOW OFTEN DO JUDGES AND JURIES REACH THE SAME CONCLUSIONS ABOUT THE CASE AT THE END OF THE TRIAL?

The judges in our group found that their opinions closely correlated with what juries return in the way of verdicts.

Our judges felt that there was a good degree of consistency between the types of opinions reached. There are differences, of course, but they felt that, generally speaking, when there are differences, the jurors' decisions still tend to be within bounds. The decisions still tend to be reasonable, even if they are not exactly what the judge would have decided.

The consensus in our group was that, the more representative we make the jury pool, the more consistency there is between what the juries do and what the judges would do, and the better they handle all the cases that are put before them.

In the experience of one of our judges, the consistency of jury verdicts with what the judge would probably have given ranged from 70 percent to as high as 95 percent.

CAN JURIES UNDERSTAND AND EVALUATE SCIENTIFIC AND OTHER EXPERT TESTIMONY WITHOUT GIVING UNWARRANTED DEFERENCE TO THE WITNESSES BECAUSE OF THEIR CREDENTIALS?

Juries are able to understand and evaluate scientific and other expert testimony.

Judges in our group felt that jurors are as able as judges to hear and understand scientific evidence and to weigh the credibility of technical and scientific evidence.

Our group had a broad consensus that jurors do understand technical evidence and scientific evidence.

The judges noted that jurors appear to be increasingly skeptical of experts—that they are not generally deified merely because they have the right tickets.

CAN JURIES HANDLE COMPLEX CASES?

The distinction between complex cases or issues and other kinds of cases was viewed as an artificial distinction, not a reason to distinguish between cases where juries should and should not decide issues.

Our judges felt that the biggest problem with complex cases is a problem of lawyers, not juries, and that if lawyers will actually work to clarify complex cases, jurors will make good use of that work.

DO JURIES TEND TO BE BIASED FOR OR AGAINST ONE CLASS OF LITIGANTS (E.G., PLAINTIFFS, CORPORATIONS, INDIVIDUAL HEALTH CARE PROVIDERS)?

Our group sees judges' bias as more of a problem than juror bias—and jurors, because there are more of them, tend to correct each other.

ARE JURIES RELIABLE IN AWARDING PUNITIVE DAMAGES IN APPROPRIATE AMOUNTS?

Our judges' observation was that punitive damage awards are relatively rare and they seem to be driven by very egregious fact patterns, not by other factors.

Our group had a broad consensus that jurors are capable of evaluating punitive damages. That is not a problem in the system.

PRACTICAL BENEFITS OF JURY TRIAL.

Our judges agreed that jury service provides important civics lessons, and that decisions made by our peers in our society are better-quality decisions.

One of the judges commented that she had talked to the jurors in one case and they told her how impressed they were with the power that jurors had, sitting as a jury.

Jury trials make good public relations for the courts, because most people who serve on juries are favorably impressed with the system.

Jury trials make good public relations for the courts, because most people who serve on juries are favorably impressed with the system. Judges pointed out that it can also help in budget processes to have that constituency that they could point to.

The judges stressed the principle of public participation in government. They also felt that the jury system supports judicial independence. It is easier for judges to be independent when they have support from the jury. They found that juries tended to become allies of the justice system during the course of their jury service, and had a better sense of it and saw its benefits.

Jury trial aids in participatory democracy, in that it provides good civics lessons for jurors in how the process works, and it teaches them something about the law.

The diversity and representative nature of the jury pool was emphasized as an important key to how the jury system benefits our society. Our judges felt that, the more diverse the jury pool, the higher the quality of the justice, the more the community accepts the fairness of our civil justice system, and the more faith the citizens have in our democracy as a result.

JUDICIAL REVIEW OF JURY VERDICTS.

Our judges' experience is that the appellate courts seldom undo what a jury has done, either on the weight or sufficiency of the evidence.

One of our judges mentioned particularly the problem of erroneous instructions, and pointed out that it is important to distinguish between, on one hand, a jury that follows erroneous instructions, and, on the other hand, a jury that you think simply got it wrong. If a bad decision was based on erroneous instructions it is important to correct the results. But a mere difference of opinion about the result reached should be left alone.

Judges said contests over jury verdicts are not coming to them very often, and they don't tend to get into the question of whether the jury does the right thing or the wrong thing. One judge mentioned seeing cases involving reviews of jury verdicts perhaps only once every three or four years; another judge mentioned that in his court they have gone for about nine years without a significant challenge to a jury verdict.

The judges all strongly believed that reversals are extremely rare, that they are only made on very valid legal grounds, and that the potential for new trials, for JNOVs and for reversals is necessary to keep balance in the jury system itself.

The judges tended to ask themselves, "Would any reasonable jury reach that conclusion?" They felt that if any jury could reach the conclusion reasonably, then that was satisfactory.

JURY TRIAL INNOVATIONS.

A lot of people felt we had done things in many jurisdictions lately to improve the representative nature of the jury pool.

Our group believes somewhat strongly that there is nothing wrong with the jury system and that they have some concern about tinkering with it or changing it. They don't like the word "reform," because that seems to indicate that there is something wrong—not that some innovations shouldn't be tried. Many of the states, as a matter of the trial judge's discretion, already use many of the innovations that are being recommended. They are not mandated. The judge can decide which of them to use, and many of them appear to use a lot of them, especially note taking, pre-instruction, and written instructions submitted by the jury.

There was general support of activity in states using early jury instructions and giving the jury written instructions, as long as there is a copy for each juror.

There was no support for the idea of having lawyers reargue to undo deadlocks.

Some states have carried out analyses of the jury system and made recommendations of potential changes. Some of their reports can be found on their state court system Web sites.

We had a substantial majority of people who supported allowing juries to ask questions—*if they are in writing*.

Peremptory challenges, as they increase in number, can produce a less representative jury. But peremptory challenges can also give the judges more leeway in challenges for cause.

There is general agreement that if all twelve jurors are in the jury room, and if they submit written questions to the judge and the judge then allows objections outside the presence of the jury, that that could be done.

Judges have a fundamental belief in the jury system as a democratic institution—that it not only is essential to the system, but also brings legitimacy to the entire judicial system in terms of the public’s view of it.

There is a lot of discussion of jurors discussing the case during the course of the trial—certainly not outside the jury room—unless all 12 of them are together. But even if all 12 were together in the jury room, then there is a danger of prematurely judging cases, balanced against enhanced participation of the jury and increased interest in the case. We had no general agreement on that point.

Our judges’ quickest, most animated, and most uniform response was on the question of who properly should make jury system reforms—the judiciary or the legislature? It should be the judiciary.

ENCROACHMENTS ON JURY TRIAL THROUGH ARBITRATION AND OTHER MECHANISMS.

Our group felt that mandatory arbitration and mediation are threats to the jury system. One comment was that the more arbitration there is, the more the law stagnates, and the less the jury trial process is allowed to stay flexible and to keep informing people what they need to know in our society.

Our group agreed that they couldn’t define encroachment, but they knew it when they saw it—and so far they hadn’t seen it.

COST OF JURY TRIALS.

We had repeated references to the fact that we are “costing” ourselves out of existence—that the cost of jury trials is a threat to what most of us consider our favorite form of justice.

JUDICIAL SUPPORT FOR TRIAL BY JURY.

Our judges believe that jurors are competent and that the jury system works competently.

It was very heartening to see the very strong, very vocal support of our jury system, and what it does and why we need it. Judges believe in juries.

Our judges have a fundamental belief in the jury system as a democratic institution—that it not only is essential to the system, but also brings legitimacy to the entire judicial system in terms of the public’s view of it.

Two of the judges in our group have actually served as jurors. Both of those judges reported that their experience as jurors reinforced their belief in the jury system. I think that may say as much as anything else that we have heard here today.

Our group very strongly supports the jury system.

PANELIST COMMENTS AT CLOSING PLENARY SESSION

Professor Landsman: I have been thinking about a number of things. I must say that, sitting in the discussion groups this morning and this afternoon, the one thing that I was disappointed by was that they were about half as long as I had hoped they would be. I thought the discussions were just terrific and so interesting. There is just so much to learn, from my perspective. So, I want to thank all of you.

You know, the idea about a jury is that the assembled power of a group is much greater than the power of any individuals could be. I think the assembled power of this group at this Forum is far more than the power of any individual judge, and it gave me so many things to think about. That is what strikes you if you move around among the groups—how astonishing and interesting and dedicated this group is.

I've been thinking about Judge Katz's point about the third part of my paper. Why might it be that the federal experience, at least as I read it, is so different from and, in a way provocative to, you all as state court judges? I started to think about what it was that was different about federal judges. Well, they get out of bed on the same side and they put their trousers on one leg at a time, but there are different things. Life tenure, and powerful ideological selection agendas over the last 10 or 15 years, start to suggest to me that what they are doing is pulling away from the more common and accepted and well-grounded roots that most of the state court experience comes out of.

Now, maybe I am wrong about that. Maybe that is a gross generalization and not defensible. But I start to think maybe there is something to that. As federal judges start to move away from juries and toward this idea about judging science and all the rest of it, claiming great expertise and great insight, I do find myself becoming more and more skeptical. You all seem to me to be more grounded than they and have a much better sense of reality about who can figure out what. While I think that analysis of what is happening in the federal court does approximate what they are doing, which is moving away from the jury in ways that I don't think are sound, I don't think that you all are doing the same things, and I think that maybe the forces at work for you are different. So, that is my first cut.

There was a very important idea that we didn't follow up on that was a real challenge and that is: how do we make the jury available for smaller cases? How do we make the right to a jury trial not just something for AT&T and IBM and all the rest of them? That is a real challenge. I think part of it is a judicial challenge, but I think more of it is a lawyer challenge. I think lawyers haven't done what they need to do in this regard. I think the judges can help them. They can say, "You have got a case that we are going to spend three hours on, period, and that is it. You put in there anything you want, but that is it." That kind of economizing, that kind of forcing the case into an appropriate context, thinking outside the box to get back to a place where jury trials really are accessible for a reasonable amount of money seems to me to be something we need to start doing.

We are caring for our jurors in a much more effective way now. Arizona started it, but it is really happening in California, it is happening in New York, it is happening in the District of Columbia, and I know in Colorado, and a number of other states as well. This may be the next step. How do we make the cases, once again, manageable? How do we make justice available? That seems to me to be part of the notion of the right to jury trial as well.

The last thing I want to mention is that, in one of the discussion groups, I noted a really powerful resource—a book called *Jury Trial Innovations*.²⁴⁹ If you don't have it, I think you ought to be able to get it. It could be really useful. It was prepared by the National Center for State Courts, along with the American Bar Association. It reviews almost every imaginable jury reform and tells you what jurisdiction has done it, what their experience has been, what the case law is around it, what the downsides of it are, and what the upsides are.

There is another publication as well, from the American Judicature Society, that describes forming citizen/lawyer/judge groups to create jury reform.²⁵⁰ That piece is awfully good as well, on this other topic of how we can encourage reform. I would leave you with those two suggestions.

Professor Vidmar: I think I have just about said everything that I had to say, probably exhausted my total store of all knowledge today, because I managed to get a lot of things in here.

As federal judges start to move away from juries and toward this idea about judging science and all the rest of it, claiming great expertise and great insight, I do find myself becoming more and more skeptical.

Like Steve, I really feel that I have come away with some insights. I am really at the point this summer of trying to draft at least the first part of the report for our research. We don't even have the data analyzed, but I have already started thinking about this. I certainly got some insights today about things I need to think about, including the reform of allowing the jurors to discuss the

evidence during the trial. My personal jury is still out on whether that idea is good or bad. I think I have to look at the data—and even then, I am not sure what the final outcome would be, but I have got to explain in that report about the implementation of this.

I noticed there was a lot of confusion in people's minds about the practice used in Arizona, in which jurors' questions are written and presented to the judge, and then they bring up the questions in front of the judge and have a sidebar, so that nobody knows which lawyer objected, and so forth. I certainly have not seen any evidence at all at this point that the jurors are saying, "Well, I am sure that was the side that objected," etc. However, I may discover something as we go through additional cases this summer. I think that is a serious concern when you get into this—about one side objecting or the other, and I think that needs to be considered when you are devising jury instructions.

Finally, Shari Diamond and I have that paper coming out in the *Virginia Law Review*, and we would certainly appreciate feedback from you when it comes out. Further down the line, we are already trying to work and devise a way to understand how juries decide damages, how they decide liability, how they handle experts, etc. We have written some articles on other people's research, but we are going to address that question ourselves.

Justice Greaney: I'd like to say that Roscoe Pound, my fellow Massachusettsan, would be very proud and pleased with the discussion here today.

Larry Stewart: My experience with the attitudes of jurors is certainly not a scientific sample. But despite the grumbling that you hear in jury pools in the morning, when they are all pulled down there at 8:00 o'clock in the morning, without any exception that I can think of, every juror that I have ever spoken to about their jury experience has uniformly said that it was one of the better things that they ever went through in their life. When it was all said and done, they really appreciated the opportunity to serve, notwithstanding what their grumbings may have been at the beginning of it.

ENDNOTES

¹The *Hendrickson* case is described in much greater detail in JAMES C. MOHR, *DOCTORS AND THE LAW: MEDICAL JURISPRUDENCE IN NINETEENTH CENTURY AMERICA* 122-139 (Oxford U. Press 1993).

2526 U.S. 137, 199 S. Ct. 1167 (1998). *See also* Brief of Neil Vidmar, et al., as Amici Curiae in Support of Respondents in *Kumho Tire Co. v. Carmichael*, available at 1998 WL 734434. (The quotations appeared in the petitioner Kumho's brief and in amicus briefs filed in the case.)

³An initial report from this project is Shari Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Evidence*, 87 VA. L. REV. 1857 (2001).

⁴HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966).

⁵Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Effects*, 18 L. & HUM. BEHAV. 29 (1994).

⁶Paula Hannaford, Valerie Hans & G. Thomas Munsterman, *Permitting Jury Discussions During Trial: Impact of the Arizona Reform*, 24 L. & HUM. BEHAV. 359 (2000).

⁷AMERICAN MEDICAL ASSOCIATION, PHYSICIAN PAYMENT REVIEW COMMISSION, ANNUAL REPORT TO CONGRESS 186 (1992).

⁸Mark Taragin et al., *The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims*, 117 ANN. INTERNAL MED. 780 (1992).

⁹488 F.2d 1148 (9th Cir. 1973).

¹⁰Quoted in Brief of Neil Vidmar, et al., as Amici Curiae in Support of Respondents in *Kumho Tire Co. v. Carmichael*, available at 1998 WL 734434.

¹¹NEIL VIDMAR, *MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS* (1995).

¹²Valerie P. Hans & Sanja Kutnjak Ivkovich, *Jurors and Experts*, 16 ADVOC. MAG. DEL. TRIAL LAW. 17 (1994).

¹³*Id.* at 19.

¹⁴*See, e.g.*, Neil Vidmar & Shari Diamond, *Juries and Expert Evidence*, 66 BROOKLYN L. REV. 1123 (2000).

¹⁵MARCIA ANGELL, *SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE* 204 (1996).

¹⁶*Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co., Ltd., v. Carmichael*, 526 U.S. 137 (1998).

¹⁷184 F.3d 1300 (11th Cir. 1999).

¹⁸*See generally* JOSEPH SANDERS, *BENEDICTIN ON TRIAL: A STUDY OF MASS TORT LITIGATION* (1998).

19Mohr, *supra* note 1, at 131.

20*Id.* at 131.

21*Id.* at 131.

22Hopkins v. Dow Corning Corp., 33 F.3d 1116, 1127 (9th Cir. 1994).

23Sophia Gatowski et al., *Asking the Gatekeepers: Results of a National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 L. & HUM. BEHAV. 433 (2001).

24See generally Vidmar & Diamond, *Juries and Expert Evidence*, *supra* note 14.

25VALERIE P. HANS, *BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY* (Yale U. Press, 2000).

26Valerie P. Hans & William Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications of the Litigation Explosion Debate*, 26 L. & SOC. REV. 85, 102.

27See generally NEIL VIDMAR, *MEDICAL MALPRACTICE ON TRIAL* (1995); Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849 (1998).

28Hans, *supra* note 25.

29FRANK SLOAN, *SUING FOR MEDICAL MALPRACTICE* (1993).

30NEIL VIDMAR, *MEDICAL MALPRACTICE ON TRIAL* 221 (1995).

31Diamond & Vidmar, *supra* note 3.

32Neil Vidmar, Felicia Gross and Mary Rose, *Jury Awards for Medical Malpractice and Post-Verdict Adjustments to Those Awards*, 48 DEPAUL L. REV. 265 (1998).

33See Elizabeth Amon, *Exxon Bankrolls Critics of Punitives, Then It Cites the Research In Appeal of \$5.3 Billion Valdez Award*, NAT'L. L.J., May 17, 1999, at A1.

34Cass R. Sunstein, Daniel Kahneman, & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071 (1998).

35David Schkade, Cass R. Sunstein, and Daniel Kahneman, *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139 (2000).

36Reid Hastie & W. Kip Viscusi, *What Juries Can't Do Well: The Jury's Performance as a Risk Manager*, 40 ARIZ. L. REV. 901 (1998); Reid Hastie, David A. Schkade & John W. Payne, *A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damage*, 22 L. & HUM. BEHAV. 287 (1998).

37532 U.S. 424, 121 S. Ct. 1678, 1683 n. 5 (2001), citing Sunstein et al., *supra* note 34.

38Neil Vidmar, *Juries Don't Make Legal Decisions! And Other Problems: A Critique of Hastie et al. On Punitive Damages*, 23 L. & HUM. BEHAV. 705 (1999).

³⁹Richard Lempert, *Juries, Hindsight and Punitive Damage Awards: Failures of a Social Science Case for Change*, 48 DEPAUL L. REV. 867 (1999).

⁴⁰Brian Ostrom et al., *A Step Above Anecdote: A Profile of the Civil Jury in the 1990s*, 79 JUDICATURE 233 (1996); C. DeFrances & M. Litras, *Civil Trial Cases & Verdicts In Large Counties, 1996*, BUR. JUST. STAT. BULL. (September 1999, NCJ 173426).

⁴¹Kevin Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124 (1991).

⁴²MARK A. PETERSON, CIVIL JURIES IN THE 1980S (1987).

⁴³STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM (1995).

⁴⁴Neil Vidmar & Mary R. Rose, *Punitive Damages By Juries in Florida: In Terrorem and In Reality*, 38 HARV. J. ON LEGIS. 487 (2001).

⁴⁵ARIZ. R. CIV. P. 39(b):

Order of Trial by Jury; Questions by Jurors to Witnesses or the Court.

* * *

(10) Jurors shall be permitted to submit to the court written questions directed to witnesses or to the court. Opportunity shall be given to counsel to object to such questions out of the presence of the jury. Notwithstanding the foregoing, for good cause the court may prohibit or limit the submission of questions to witnesses.

For a discussion of the debate, see Hannaford et al., *supra* note 6.

⁴⁶ARIZ. R. CIV. P. 39 (f):

Admonition to Jurors; Juror Discussions.

If the jurors are permitted to separate during the trial, they shall be admonished by the court that it is their duty not to converse with or permit themselves to be addressed by any person on any subject connected with the trial; *except that the jurors shall be instructed that they will be permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence. Notwithstanding the foregoing, the jurors' discussion of the evidence among themselves during recesses may be limited or prohibited by the court for good cause.*

(Emphasis added.)

⁴⁷See Hannaford et al., *supra* note 6; Michael B. Dann, "Learning Lessons" and "Speaking Rights": *Creating Educated and Democratic Juries*, 68 IND. L. J. 1229 (1993); G. THOMAS MUNSTERMAN, PAULA HANNAFORD & G. MARC WHITEHEAD, JURY TRIAL INNOVATIONS (1997).

⁴⁸During his oral remarks Professor Vidmar used slides to display the four tables from an article then in press: Vidmar & Rose, *supra* note 44 (hereinafter *Florida*). Footnotes correlate the tables reproduced in this report with the tables published in the article.

⁴⁹*Id.*

⁵⁰*Florida*, Table 1, 38 HARV. J. ON LEGIS. 487, 492 (2001).

⁵¹*Id.* at 495.

⁵²*Id.* at 501.

53*Id.* at 504-05.

54Neil Vidmar, Felicia Gross & Mary Rose, *Jury Awards for Medical Malpractice and Post-Verdict Adjustment of Those Awards*, 48 DEPAUL L. REV. 265 (1998).

55An account of the infamous “McDonald’s coffee case” that provides factual background beyond what is found in many versions of the story appears in *Mythbuster! The “McDonald’s Coffee Case” and Other Fictions*, on the Website of the Center for Justice and Democracy: www.centerjd.org/free/mythbusters-free/MB_Mcdonalds.pdf (visited Mar. 2 2005). (The Center for Justice and Democracy publishes numerous reports and articles questioning the factual basis for tort reform proposals.)

56KENNETH R. FOSTER & PETER W. HUBER, *JUDGING SCIENCE: SCIENTIFIC KNOWLEDGE AND THE FEDERAL COURTS* (1997).

57KENNETH R. FOSTER, DAVID E. BERNSTEIN & PETER W. HUBER, EDs., *PHANTOM RISK: SCIENTIFIC INFERENCE AND THE LAW* (1999).

58WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991).

59Massachusetts Maternity Leave Act, MASS. GEN. LAWS ch. 149, § 105D; *Dalis v. Buyer Advertising, Inc.*, 636 N.E.2d 212 (Mass.1994); 65 Fair Empl.Prac.Cas. (BNA) 801 (plaintiff sued employer under the Maternity Leave Act).

60Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857 (2001)(hereinafter *Ruminations*).

61*Id.* at 1872.

62The results of the Arizona study on discussion effects during trial has since been published. See Shari Seidman Diamond, Neil Vidmar, Mary Rose, Leslie Ellis & Beth Murphy, *Juror Discussions During Trials: Studying an Arizona Innovation*, 45 Ariz. L. Rev. 1 (2003) and Shari Seidman Diamond, Neil Vidmar, Mary Rose, Leslie Ellis & Beth Murphy, *Evaluating Juror Discussions During Trial*, 87 JUDICATURE 54 (Sept.-Oct. 2003).

63Ariz. R. Civ. P. 39(f).

64Paula Hannaford, Valerie Hans & G. Thomas Munsterman, *Permitting Jury Discussions During Trial: Impact of the Arizona Reform*, L. & HUM. BEHAV. 359 (2000).

65Alphonse Karr, *Les Guêpes* (1849), *quoted in* CHAMBERS DICTIONARY OF QUOTATIONS 542 (Allison Jones ed. 1996). (“The more things change the more they remain the same.”)

66For a listing of the 47 states see Paul Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 U. CHI. L. REV. 179, 181 n. 14 (1998).

67For ease of analysis this essay will focus on the federal courts, where a rich body of judicial and scholarly work has been developed regarding the relations between appellate courts and civil juries.

68U.S. CONST., AMEND VII.

69Dawson, among others, has rightly pointed out the existence of Anglo-Saxon antecedents to the Norman jury. See JOHN DAWSON, *A HISTORY OF LAY JUDGES* 118-20 (1960).

⁷⁰For a summary of the early history of the civil jury, see Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579 (1993). Unless otherwise noted, the materials in this section are drawn from the HASTINGS piece.

⁷¹For a detailed examination of the development of the adversary system in English criminal courts, see Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497 (1990).

⁷²Statutes from the reign of Edward I decried the use of impoverished and enfeebled jurors in the place of their rich neighbors. See 13 Edw. 1 (West 2) c. 38 (1285); 21 Edw. 1 (1293).

⁷³P.G. Lawson, *Lawless Juries? The Composition and Behavior of Hertfordshire Juries, 1573-624* in TWELVE GOOD MEN AND TRUE 133 (J.S. Cockburn & Thomas Green eds., 1988) [hereinafter TWELVE GOOD MEN].

⁷⁴See Stephen Roberts, *Juries and the Middling Sort: Recruitment and Performance at Devon Quarter Sessions*, in TWELVE GOOD MEN *supra* note 9, at 182.

⁷⁵124 Eng. Rep. 1006 (C.P. 1670).

⁷⁶For a description of that case see 2 THE WORKS OF LORD MACAULAY 153 (Lady Trevelyan ed., 1866) *reprinted* in STEPHEN PRESSER & JAMIL ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY 12 (2d ed. 1989).

⁷⁷See *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763); *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763).

⁷⁸See JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER PRINTER OF THE NEW YORK WEEKLY JOURNAL (Stanley Katz ed., 2d ed. 1972).

⁷⁹THE DECLARATION OF INDEPENDENCE para. 19 (U.S. 1776).

⁸⁰Akil Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1190 (1991).

⁸¹ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 281 (Alfred A. Knopf, 15th ed. 1985) (1830) [hereinafter DEMOCRACY IN AMERICA].

⁸²5 U.S. (1 Cranch) 137 (1803).

⁸³Lawrence Friedman, *Some Notes on the Civil Jury in Historical Perspective*, 48 DEPAUL L. REV. 201, 204-05 (1998).

⁸⁴See, e.g., Charles Clark & Harry Shulman, *Jury Trial in Civil Cases—A Study in Judicial Administration*, 43 YALE L.J. 867 (1934).

⁸⁵George Priest, *The Role of the Civil Jury in a System of Private Litigation*, 1990 U. CHI. LEGAL F. 161-162.

⁸⁶413 U.S. 149 (1973).

⁸⁷*Id.* at 157.

⁸⁸435 U.S. 223 (1978).

⁸⁹See *Engle v. American Tobacco Co.*, No. 94-08273 CA-3 (Fla. Cir. Ct., Dade Co., Nov. 6, 2000) (Final Judgment & Amended Omnibus Order). For earlier proceedings in the same case see *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39 (Fla. Dist. Ct. App. 1996).

⁹⁰See *In re Exxon Valdez*, 104 F. 3d 1196 (9th Cir. 1997).

⁹¹See Laura Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 355-57 (1995).

⁹²See AMERICAN JUDICATURE SOCIETY, *ENHANCING THE JURY SYSTEM, A GUIDEBOOK FOR JURY REFORM* (1999); NATIONAL CENTER FOR STATE COURTS, *JURY TRIAL INNOVATIONS* (G. Thomas Munsterman et al. eds. 1997); G. Thomas Munsterman & Paula Hannaford, *Reshaping the Bedrock of Democracy: American Jury Reform During the Last 30 Years*, 36 JUDGES' J. 5 (1997).

⁹³See State Justice Institute, *New York UCS, NCSC Convene National Jury Summit*, 12 SJI NEWS No. 1, p. 1 (Spring 2001).

⁹⁴Winston Churchill, Speech in the House of Commons, November 11, 1947, *quoted in* CHAMBERS DICTIONARY OF QUOTATIONS *supra* note 65, at 265.

⁹⁵See *DEMOCRACY IN AMERICA supra* note 81, at 286 (“In no country are judges so powerful as where the people share their privileges.”)

⁹⁶Stephen Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. CHI. LEGAL F. 87, 106-11.

⁹⁷See notes 232-236 *infra* and accompanying text.

⁹⁸Yeazell, *supra* note 96, at 111. It should be noted that with the advent of certain European compacts regarding the rights of citizens, English courts may, albeit reluctantly, be drawn back into situations where they must pass on the propriety of Parliamentary decisions.

⁹⁹FRANCIS LIEBER, *CIVIL LIBERTY AND SELF-GOVERNMENT* 235 (1874) *quoted in* Paul Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 38.

¹⁰⁰See Landsman *supra* note 70, at 588-90.

¹⁰¹For some of the Supreme Court's thinking on this matter, see *Batson v. Kentucky*, 476 U.S. 79 (1986); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

¹⁰²Among other things, judges are dependent on government officials for salary, other resources, promotion and quality of working conditions as well as cooperation in the implement of judicial directives. See Darryl Brown, *Structure and Relationship in the Jurisprudence of Juries: Comparing the Capital Sentencing and Punitive Damages Doctrines*, 47 HASTINGS L. J. 1255, 1281-87 (1996).

¹⁰³WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 682 (1978) (Nourse Publishing Co. 1959).

¹⁰⁴See, e.g., ILL. CONST. art. IV, § 13. Special Legislation (“The General Assembly shall pass no special or local law when a general law is or can be made applicable.”).

¹⁰⁵See Graham Kelder & Richard Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL'Y REV. 63 (1997).

106For a detailed analysis of adversarial justice, see STEPHAN LANDSMAN, AMERICAN BAR ASSOCIATION SECTION OF LITIGATION READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 1-39 (1988). Unless otherwise noted, the next several paragraphs are drawn from this monograph.

107See Lon Fuller, *The Adversary System* in TALKS ON AMERICAN LAW 38-39 (Hal Berman ed., 1961); JOHN TAIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE, A PSYCHOLOGICAL ANALYSIS 77-80, 94-96 (1975).

108See Shari Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors* in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 282 (Robert Litan ed., 1993) [hereinafter VERDICT].

109See Marc Galanter, *The Regulatory Function of the Civil Jury* in VERDICT *supra* note 108, at 61, 88-89.

110See HARRY KALVEN JR., & HANS ZEISEL, THE AMERICAN JURY 8-9 (1966) [hereinafter THE AMERICAN JURY].

111See Neil Vidmar, *The Performance of the American Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849 (1998).

112See THE AMERICAN JURY *supra* note 110, at 8; Harry Kalven Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1067 (1964).

113See Paula Hannaford et al., *How Judges View Civil Juries*, 48 DEPAUL L. REV. 247, 250 (1998).

114See Galanter, *supra* note 109, passim.

115See Peter Schuck, *Mapping the Debate on Jury Reform* in VERDICTS, *supra* note 110, at 306, 315.

116Edmund Burke, *A Letter to a Noble Lord* (1796), quoted in CHAMBERS DICTIONARY OF QUOTATIONS, *supra* note 65, at 208.

117See Landsman, *supra* note 70, at 584-85.

118See *Aetna Cas. & Sur. Co. v. Yeatts*, 122 F.2d 350, 353 (4th Cir. 1943).

1191 Burr. 390 (KB 1757).

120*Id.* at 393.

121*Id.*

122See, e.g., *Aetna Cas. & Sur. Co. v. Yeatts*, *supra* note 118.

123See *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657 (1935). (“The right preserved is the right that existed under English common law when the Amendment was adopted.”)

124Edward Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 906 (1971) (Professor Cooper used the phrase to describe the history of the related matter of judicial power to grant directed verdicts in federal civil jury trials.)

125See *Brown*, *supra* note 102, at 1269-70.

126See Eric Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV.

237, 239 n. 6.

127 *See* Blunt v. Little, 3 F. Cas. 760 (C.C.D. Mass. 1822) (No. 1578) (approving the use of remittitur). This decision was questioned but not overturned in Dimick v. Schiedt, 293 U.S. 474 (1935).

128 28 U.S. (3 Pet.) 433 (1830).

129 *See* Schnapper, *supra* note 126, at 243; Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474 (1933).

130 293 U.S. 474, 483-85 (1935).

131 *Id.* at 482.

132 *See* Schnapper, *supra* note 126, at 243 & note 34.

133 *See* Neese v. Southern Ry., 350 U.S. 77 (1955).

134 *See* Grunenthal v. Long Island R.R., 393 U.S. 156 (1968).

135 *See* Schnapper, *supra* note 126, at 245.

136 *Id.* at 245-46.

137 For a description of the demurrer to the evidence, see Cooper *supra* note 124, at 911.

138 *See, e.g.*, Greenleaf v. Birth, 34 U.S. (9 Pet.) 292 (1835).

139 *See* Parks v. Ross, 52 U.S. (11 How.) 362 (1850).

140 *See* Hepburn v. Peters, 37 U.S. (12 Pet.) 345 (1838).

141 *See* Cooper, *supra* note 124, at 918-19.

142 *See* Galloway v. U.S., 319 U.S. 372, 404 (Black, J., dissenting).

143 319 U.S. 372 (1943).

144 *Id.* at 395.

145 295 U.S. 654 (1935).

146 *See* Dooley, *supra* note 91, at 359.

147 Galloway v. U.S., 319 U.S. at 407 (Black, J., dissenting).

148 Schnapper, *supra* note 126, at 240-41.

149 *Id.* at 241.

150 45 U.S.C. §§ 51-60.

151Schnapper, *supra* note 126, at 241.

152This term was substituted for directed verdicts and JNOVs by the Federal Rules of Civil Procedure in 1991. FED. R. CIV. P. 50.

153FED. R. CIV. P. 59.

154FED. R. CIV. P. 50.

155FED. R. CIV. P. 59(a).

1569A CHARLES WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2805 (2d. ed. 1995).

157*Id.* at § 2818.

158518 U.S. 415 (1996).

159The circuit court applied the underlying New York standard of review requiring the overturning of jury awards that “deviate materially from reasonable compensation.” N.Y. C.P.L.R. 5501(c) (McKinney 1995). This standard was adopted by the New York legislature as part of a package of tort reforms to allow greater judicial scrutiny of jury awards. *See Note, The Supreme Court Sets New Standards of Review for Excessive Verdicts in Federal Court in Gasperini v. Center for Humanities, Inc.*, 50 ARK. L. REV. 591, 595 (1997).

160Gasperini v. Center for Humanities, Inc., 66 F.3d 427 (2d Cir. 1995).

161Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996).

162See 11 CHARLES WRIGHT ET AL. *supra* note 156, at § 2820.

163See Schnapper, *supra* note 126, at 320.

164*Id.*

165See Schnapper, *supra* note 126, 248-53, 354.

166FED. R. CIV. P. 50(a).

167Cooper, *supra* note 124, at 907.

1689A CHARLES WRIGHT *supra* note 156, at § 2521.

169Fed. R. Civ. P. 50(a) (emphasis added).

170*Id.*

171In *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1913), the Supreme Court found that the reversal of judgment after the verdict violated the Seventh Amendment. This ruling was overcome in *Baltimore & Carolina Line v. Redman*, 295 U.S. 654 (1935), where there was a *specific* reservation by the trial judge of a legal issue. Rule 50(b) turns the *Redman* reservation into a legal fiction. *See* 9A CHARLES WRIGHT § 2522.

172Fed. R. Civ. P. 50(b).

1739A CHARLES WRIGHT, *supra* note 156, at § 2531.

174*Id.* at § 2524.

175*Id.*

176*Id.* at § 2529; Schnapper, *supra* note 126, at 293-95.

177Schnapper, *supra* note 126, at 295-96.

178 9A CHARLES WRIGHT, *supra* note 156, at § 2536.

179See Schnapper, *supra* note 126, at 248 & n. 54.

180*Id.* at 301-304. (Consideration of new trial option in only two of more than 40 JNOV reversals in nine circuits.)

181*Id.*; see *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947); *Johnson v. New York, New Haven & Hartford R.R.*, 344 U.S. 48 (1952); *Neely v. Eby Constr. Co., Inc.*, 386 U.S. 317 (1967).

182See Schnapper, *supra* note 126, at 310-11.

183See Dooley, *supra* note 91, *passim*.

184See Sentencing Reform Act of 1984 (Title II of Comprehensive Crime Control Act of 1984), Pub. L. No. 98-473, 98 Stat. 1837, 1784-2034.

185413 U.S. 149 (1973).

186See Michael Saks & Mollie Marti, *A Meta-Analysis of the Effect of Jury Size*, 21 L. & HUM. BEHAV. 451 (1997). [hereinafter *Meta-Analysis*].

187435 U.S. 223 (1978).

188See, e.g., Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (1995). Memos and Minutes. F.R.D. 135-38, 147, 163. (recommending change to Rule 48 of Fed. R. Civ. P. to require federal courts to “seat a jury of twelve numbers”); *Meta-Analysis*, *supra* note 122, at 465.

189C. Wright Mills, *THE SOCIOLOGICAL IMAGINATION* (1959), *quoted in* CHAMBERS DICTIONARY OF QUOTATIONS, *supra* note 65, at 680.

190See *Continental Trend Resources, Inc. v. Oxy USA Inc.*, 101 F.3d 634, 642 (10th Cir. 1996) (suggesting *Gasperini’s* application to remittitur decisions generally but refusing remand on the facts presented).

191Cooper *supra* note 124, at 990.

192*Id.* at 924. For a powerful criticism of the claim that juries cannot manage complex cases see Richard Lempert, *Civil Juries and Complex Cases: Taking Stock after Twelve Years*, *VERDICT*, *supra* note 108, at 181.

193517 U.S. 559 (1996).

194For an extended analysis of this matter in the context of the death penalty, see Brown, *supra* note 102.

195121 S. Ct. 1678 (2001).

196*Id.* at 1688.

197*Id.* at 1683.

198*Id.* at 1684-85.

199*Id.* at 1686-87.

200*Id.* at 1687-88.

201For cases suggesting that the punitive awards are factual determinations to be made by the jury, see Barry v. Edmunds, 116 U.S. 550, 565 (1886); Curtis v. Loether, 415 U.S. 189, 196 (1974).

202See Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 121 S. Ct. 1692-93, dissent of Justice Ginsberg.

203408 U.S. 238 (1972).

204458 U.S. 782 (1982).

205433 U.S. 584 (1977).

206The analysis in this section focuses primarily on corporate defendants, who are, far and away, the most likely to face large punitive damages awards. For a discussion of the dramatic effect of a single punitive award on a major corporation, see THOMAS PETZINGER, JR., OIL AND HONOR: THE TEXACO-PENNZOIL WARS (1987) (describing inter alia, the dramatic effect of a huge punitive damages award on Texaco).

207For the precipitous decline of a major corporation under a barrage of punitive judgments, consider the fate of A.H. Robins Company, the manufacturer of the Dalkon Shield intrauterine device. Its demise is charted in MOODY'S HANDBOOK OF COMMON STOCKS (1974-1989).

208See Note, *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1518 (1997); Note, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 163-64 (1991).

209For a different and extremely thoughtful examination of the links between death penalty and punitive damages cases, see Brown, *supra* note 102.

210See Margaret Fisk, *Punitive Ruling: Cheers and Yawns*, NAT. L. J., May 28, 2001 at A1, A21.

211The \$10 million bond required in the Pennzoil/Texaco case provides a dramatic illustration of the problem. See THOMAS PETZINGER JR., *supra* note 206.

212See Stephen Adler, *How to Lose the Bet-Your-Company Case*, 8 AMER. LAWYER 107 (Jan. - Feb. 1986).

213See Strickland v. Washington, 466 U.S. 668 (1984).

214See Cooper, *supra* note 124, at 967.

215476 U.S. 79 (1986).

216500 U.S. 614 (1991).

217 *See, e.g.*, Purkett v. Elam, 514 U.S. 765 (1995).

218 George Clemenceau, *quoted in* CHAMBERS DICTIONARY OF QUOTATIONS, *supra* note 65, at 268. (“War is too serious a business to be left to generals.”)

219 This taxonomy is borrowed from Paula Hannaford and her colleagues. *See* Hannaford et al., *supra* note 113, at 258-63.

220413 U.S. 149 (1973).

221 *Id.* at 157.

222435 U.S. 223 (1978).

223 *See supra* note 188.

224 *See Meta-Analysis, supra* note 186, at 465.

225517 U.S. 370 (1996).

226 *Id.* at 388.

227 *Id.*

228 According to Diamond and Casper, blindfolding means “denying [the jury] certain types of information.” Shari Diamond & Jonathan Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 L. & SOC’Y. REV. 513, 514 (1992).

229 *See* William Schwarzer & Alan Hirsch, *The Modern American Jury: Reflections on Veneration and Distrust in VERDICT*, *supra* note 108, at 399.

230 *See* Pollack & Riley, Inc. v. Pearl Brewing Co., 498 F.2d 1240 (7th Cir. 1982).

231 There are occasions when blindfolding is appropriate because it has been clearly demonstrated that the embargoed information will have an improperly biasing effect. This has been found to be the case with respect to the use of the prior criminal record of a defendant being prosecuted for a new offense. *See* Valerie Hans & A.N. Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 CRIM. L. Q. 235 (1983).

232 Unless otherwise noted, the description of the decline of the English civil jury is based on PATRICK DEVLIN, TRIAL BY JURY 30-33 (1956).

233 *Id.* at 130.

234 The original six causes of action were: libel, slander, malicious prosecution, false imprisonment, seduction, and breach of promise of marriage. *Id.*

235 *Id.* at 131.

236 See Edson Haines, *The Disappearance of Civil Juries in England, Canada and Australia*, 4 DEF. L. J. 118, 118 (1958).

237 See generally Stephan Landsman et al., *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 WISC. L. REV. 297, 298-300.

238 *Id.*, passim.

239 See Brown, *supra* note 102, at 1303.

240 See Roger Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 80.

241 See VALERIE HANS & NEIL VIDMAR, *JUDGING THE JURY* 99 (1986).

242 FED. R. EVID. 606(b).

243 *Dimick v. Schiedt*, 293 U.S. 474 (1935).

244 *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996).

245 *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

246 *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 439 (Stevens, J., citing Sunstein, Schkade, & Kahneman, *Do People Want Optimal Deterrence?*, 29 J. LEGAL STUDIES 237, 240 (2000)).

247 STEPHAN LANDSMAN, *CRIMES OF THE HOLOCAUST: THE LAW CONFRONTS HARD CASES* (U. Pa. Press 2005).

248 Judge Landau later became Chief Justice of the Supreme Court of Israel.

249 G. THOMAS MUNSTERMAN, PAULA L. HANNAFORD & G. MARC WHITEHEAD, *JURY TRIAL INNOVATIONS* (National Center for State Courts 1997).

250 AMERICAN JUDICATURE SOCIETY, *ENHANCING THE JURY SYSTEM: A GUIDEBOOK FOR JURY REFORM* (1999).

Appendices

PARTICIPANT BIOGRAPHIES

Paper Presenters

Professor Neil Vidmar teaches at the Duke University Law School in Durham, North Carolina. He teaches courses on social science evidence in law, negotiation, the American jury, and the psychology of the litigation process. He received his B.A. from MacMurray College and his M.A. and Ph.D. in social psychology from the University of Illinois. After teaching psychology for a time, he became interested in the empirical study of law and spent a year at Yale Law School as a Russell Sage Fellow in Law. Before moving to Duke, he taught at the law school of the University of Western Ontario and at Osgoode Hall Law School in Toronto. He moved to Duke in 1987 and became Vice President for Research at the university's Private Adjudication Center. He now holds the Russell M. Robinson II chair at the law school and a cross-appointment in Duke's psychology department. He has written numerous articles on criminal and civil juries and is co-author, with Valerie Hans, of *Judging the Jury* (1986). Another book, *World Jury Systems* (2000), examines over 50 contemporary jury systems from a comparative law perspective. Professor Vidmar is a Fellow of the American Psychological Society and has held several elected offices in the Law & Society Association.

Professor Stephan Landsman teaches at DePaul College of Law in Chicago, specializing in torts, evidence, and the psychology of the courtroom. He received his B.A. from Kenyon College and his J.D. from Harvard University. He currently holds the Robert A. Clifford Professorship in Tort Law and Public Policy. Professor Landsman is a nationally recognized expert on the civil jury system. Through his continuing study of the American jury he has become a leader in applying social science methods to legal problems. Among his recent writings are both empirical and historical pieces regarding the jury, as well as an examination of legal responses to human rights abuses. He is presently at work on a book about a series of famous Holocaust trials. He was vice-chair of the Illinois State Justice Commission from 1994 to 1996 and has also served on the governing council of the American Bar Association's Litigation Section and as chair of its subcommittee on the Rules Enabling Act. In 1996, he was a visiting professor at the National Law School of India, in Bangalore.

Panelists

Sharon J. Arkin practices law in Newport Beach, California. She received her B.S. from the University of California, Riverside, and her J.D. from Western State University School of Law. Her practice is concentrated in business torts, insurance litigation (ERISA, HMOs, bad faith actions), and she has written and lectured widely on those subjects. Ms. Arkin is a member of the Association of Trial Lawyers of America, an officer of Consumer Attorneys of California, and a Trustee and Fellow of the Roscoe Pound Institute. She was a contributing author for a major business litigation treatise, *Business Torts* (Matthew Bender, 1991).

Honorable John C. Bouck is a justice of the Supreme Court of British Columbia (a general jurisdiction trial court). He received both his B.A. and LL.B. degrees from the

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Honorable John M. Greaney is an Associate Justice of the Massachusetts Supreme Judicial Court. He received his B.A. from the College of the Holy Cross and his J.D. from New York University School of Law. He spent 10 years in private practice before his first judicial appointment in 1974. He was then appointed to the Supreme Judicial Court in 1989. Justice Greaney has served as Chair of the Appellate Judges Conference of the American Bar Association.

Honorable Joette Katz is an Associate Justice of the Connecticut Supreme Court. She received her B.A. from Brandeis University and her J.D. from the University of Connecticut School of Law. After a public defender career of more than 10 years, she was appointed to the superior court in 1989 and to the supreme court in 1992. She has taught at the University of Connecticut School of Law and currently teaches ethics and criminal law at the Quinnipiac University School of Law in Hamden. She is a co-author of the *Connecticut Criminal Caselaw Handbook: A Practitioner's Guide* and has served on the Connecticut Public Defender Commission, the Law Revision Commission, and the Drug Policy Study Committee. Justice Katz is currently a member of the state Evidence Code Drafting Committee and of the American Law Institute.

Gordon Kugler practices law in Montreal, Quebec, Canada. He received both his undergraduate and law degrees from McGill University. He specializes in medical responsibility cases on behalf of patients, personal injury cases, product liability cases and class-action lawsuits. He also handles professional liability litigation involving chartered accountants, engineers, architects, and dentists and represents insurers of lawyers in the defense of legal malpractice cases. He is a frequent speaker on professional liability subjects and has lectured at McGill University's law and medical schools. He has also addressed medical and hospital associations on matters of medical and hospital liability. He is a Fellow of the Roscoe Pound Institute.

Wayne D. Parsons practices law in Honolulu, Hawaii. He received his B.S., M.S. and J.D. from the University of Michigan. He is a member of the Board of Governors of the Association of Trial Lawyers of America. He is a past president of the Consumer Lawyers of Hawaii and is a director of the Hawaii State Bar Association. In 2000, he represented the Hawaii bar at "Jury Summit 2001," a national conference of over 400 lawyers and judges held by the New York Unified Court System and the National Center for State Courts to consider reforms and improvements in the U.S. system of trial by the jury. He is a Fellow of the Roscoe Pound Institute. He has been active in educating the public about the work of lawyers and the courts and is a founder of the Hawaii Peoples' Law School Program and the Hawaii Appleseed Center for Public Interest Law.

Honorable Melvin L. Rothman is a Justice of the Court of Appeal of Quebec, the highest court of the Province of Quebec. He received both his B.A. and B.C.L. from McGill University and

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Arthur E. Vertlieb practices law with the Vancouver firm of Vertlieb Anderson. He received his B.Sc. from the University of Arizona and his LL.B. from Osgoode Hall Law School, in Toronto. He is a member of the Law Society of British Columbia and Yukon Territory. He is a member of the editorial advisory board for the *Canadian Civil Jury Instructions* and was a founding member and past chair of the B.C. Lawyers Assistance Program. Mr. Vertlieb was the founding Vice President of the Trial Lawyers Association of British Columbia and is a member of the Board of Governors of the Association of Trial Lawyers of America.

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Kathryn Clarke is an appellate lawyer and complex litigation consultant in Portland, Oregon. She specializes in medical negligence, products liability, punitive damages, and constitutional litigation in both state and federal courts. She received a B.A. degree from Whitman College, an M.A. degree from Portland State University, and her J.D. degree from the Northwestern School of Law of Lewis and Clark College. She served as president of the Oregon Trial Lawyers Association in 1995-96, and is a governor of the Association of Trial Lawyers of America and a Fellow of the Roscoe Pound Institute.

William A. Gaylord practices in Portland, Oregon, specializing in major products liability and medical negligence litigation. He received his B.S. degree from Oregon State University and his J.D. degree from the Northwestern School of Law of Lewis and Clark College. Most recently he has been integrally involved in constitutional litigation involving Oregon legislation on damage award limits. He is a member of Trial Lawyers for Public Justice and a past president of the Oregon Trial Lawyers Association.

James A. Lowe practices law in Cleveland, Ohio, specializing in personal injury litigation. He received his B.A. degree from the University of Pennsylvania and his J.D. degree from Cleveland State University. He has written and lectured extensively on products liability litigation, and has served as an adjunct faculty member at the law schools of Cleveland State and Case Western Reserve. He has served as president of the Cleveland Academy of Trial Attorneys, and is a member of the Ohio Academy of Trial Lawyers, the Association of Trial Lawyers of America, the American Board of Trial Advocates (ABOTA), the International Society of Barristers, and the American College of Trial Lawyers. He is a Fellow of the Roscoe Pound Institute.

Gerson Smoger practices law in Oakland, California, and Dallas, Texas, with a concentration in environmental and toxic tort cases. He served as lead counsel in the Times Beach, Missouri, toxic pollution litigation, and represented a group of veterans' service organizations as *amici*, contesting the Agent Orange class action settlement before the U.S.

Supreme Court in 1994. He has lectured on litigation and environmental subjects throughout the United States (including at the National Judicial College in Reno, Nevada) and in Russia, Austria, and Vietnam. He has served as a governor of the Association of Trial Lawyers of America, and is a fellow of the Roscoe Pound Institute and chair of its Environmental Law Essay Contest Committee.

Adam Stein practices law in Chapel Hill, North Carolina, specializing in civil rights and medical malpractice litigation and appellate work. He received his B.A. degree from New York University and his J.D. degree from George Washington University in Washington, D.C. He served as a North Carolina Appellate Defender, 1981-1985, and is a member of the National Association of Criminal Defense Lawyers and the National Legal Aid and Defenders Association. He has served as a Councillor of the North Carolina State Bar, as president of the North Carolina Academy of Trial Lawyers, and is a governor of the Association of Trial Lawyers of America.

Larry A. Tawwater practices law in Oklahoma City, specializing in products liability, aviation, and general negligence litigation. He received both his B.A. and J.D. degrees from the University of Oklahoma. He has served as president of the Oklahoma Trial Lawyers Association and as a governor of the Association of Trial Lawyers of America. He is a member of the American Society of Law, Medicine and Ethics, the American Judicature Society, and the International Society of Barristers, and is a Fellow of the Roscoe Pound Institute.

Martha K. Wivell practices law in Minneapolis, Minnesota, specializing in mass tort cases, products liability, business litigation, and general civil litigation. She received her B.S. degree from the University of Minnesota and her J.D. degree from the William Mitchell College of Law. She is a member of the Minnesota Trial Lawyers Association, the Association of Trial Lawyers of America, Minnesota Women Lawyers, the American Society of Pharmacy Law, and is a Fellow of the Roscoe Pound Institute.

Plenary Session Moderator

Larry S. Stewart practices law in Miami, Florida, specializing in medical malpractice, products liability, and general personal injury and commercial matters litigation. He received both his B.A. and J.D. degrees from the University of Florida. Mr. Stewart is a member of the American Law Institute, a past president of the Association of Trial Lawyers of America, and served as president of the Roscoe Pound Institute from 1999-2001. More recently, he was the President of Trial Lawyers Care, a *pro bono* effort by trial lawyers to help the victims of September 11, and their families, to recover from the Victims' Compensation Fund.

JUDICIAL ATTENDEES

Alabama

Honorable Tennant M. Smallwood, Circuit Judge, Jefferson County Courthouse
Honorable Eugene R. Verin, Circuit Court Judge, 10th Judicial Circuit of Alabama

Arkansas

Honorable Donald L. Corbin, Justice, Supreme Court

California

Honorable Lawrence Crispo, Judge, Superior Court
Honorable Malcolm Mackey, Judge, Los Angeles Superior Court, Dept. 84
Honorable Thomas I. McKnew Jr., Judge, Superior Court
Honorable Arthur G. Scotland, Presiding Judge, Court of Appeals, Third Appellate District
Honorable James M. Sutton Jr., Judge, Superior Court

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Honorable Murray Goldman, Judge, Circuit Court, Eleventh Judicial Circuit
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Honorable Robert L. Shevin, Judge, Court of Appeal, Third District
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About the Roscoe Pound Institute

What is the Roscoe Pound Institute?

The Roscoe Pound Institute is a legal think tank dedicated to the cause of promoting access to the civil justice system through its programs, publications, and research grants. The Institute was established in 1956 to build upon the work of Roscoe Pound, Dean of Harvard Law School from 1916 to 1936 and one of law's greatest educators. The Roscoe Pound Institute promotes open, ongoing dialogue between the academic, judicial, and legal communities, on issues critical to protecting and ensuring the right to trial by jury. At conferences, symposiums, and annual forums, in reports and publications, and through grants and educational awards, the Roscoe Pound Institute initiates and guides the debate that brings positive changes to American jurisprudence and strives to guarantee access to justice.

What Programs Does the Institute Sponsor?

Annual Forum for State Appellate Court Judges—The Annual Forum for State Appellate Court Judges brings together judges from state Supreme Courts and Intermediate Appellate Courts, legal scholars, practicing attorneys, legislators, and the media for an open dialogue about major issues in contemporary jurisprudence. The Forum recognizes the important role of state courts in our system of justice, and deals with issues of responsibility and independence that lie at the heart of a judge's work. Pound Forums have addressed such issues as secrecy in the courts, judicial independence, the jury as a fact-finder, and the use of scientific evidence. The Forum is one of the Institute's most respected programs, and has been called "one of the best seminars available to jurists in the country."

Regional Trial Court Judges Forum—Following the overwhelming success of the Annual Forum for State Appellate Court Judges, the Institute created a program for trial court and other judges conducted at judicial seminars around the country. In order to expand our outreach to the judicial community, this program is held in conjunction with national and regional groups working with judges. These programs feature panels comprised of judges, lawyers, and legal scholars engaging the attendees in a dialogue on important judicial issues. The Pound Institute has held regional Forums in Texas, Hawaii, and South Carolina and examined such topics as judicial independence, scientific evidence, and the secrecy in the courts.

Law Professors Symposium—One of the primary goals of the Roscoe Pound Institute is to provide a well-respected basis for challenging the claims made by entities attempting to limit individual access to the civil justice system. To this end, the Institute inaugurated the Law Professor Symposium, which offers an alternative to the "law and economics" programs being cultivated on law school campuses by tort reformers; it seeks to develop a new school of thought emphasizing the right to trial by jury and to provide a fertile breeding ground for new research supportive of the civil justice system. The Institute held its first Symposium on

the subject of mandatory arbitration in conjunction with Duke University Law School in October, 2002. The papers from the 2002 Symposium appear in a special issue of the Duke law journal, *Law and Contemporary Problems*, 67 LAW & CONTEMPORARY PROBLEMS (2004). The Pound Institute is planning the next Symposium in 2005 on medical malpractice at Vanderbilt Law School.

Research—The Institute actively promotes research through grants to scholars and academic institutions, as well as through in-house scholarship. We have sponsored academic research on soft-tissue injury cases, juror bias, and the contribution that lawyers make to the economy. Our goal is to ensure that first-rate, respected, and useful research is conducted on the civil justice system.

Civil Justice Digest—The *Civil Justice Digest* was created to alert judges and law professors to information and scholarship that supports the utility of the civil justice system or counters negative campaigns against it. Through the *CJD* we seek to provide a sophisticated readership of judges and law professors with information and commentary on current issues affecting the civil justice system, including material that debunks the myths of a jury system run amok. The *CJD* is distributed without charge to more than 10,000 federal and state judges, law professors, and law libraries. If you would like to be on the mailing list for *CJD*, please e-mail us at pound@roscoepound.org.

Law School Awards—The Pound Institute annually presents three law school awards which recognize individuals whose accomplishments serve to further the cause of justice: The **Elaine Osborne Jacobson Award** was established in 1991 to recognize women law students with an aptitude for, and commitment to, a career of advocacy for the health care needs of women, children, the elderly, and disabled persons; the **Richard S. Jacobson Award for Teaching Trial Advocacy** recognizes outstanding law professors who exemplify the best attributes of the trial lawyer: teacher, mentor, and advocate; the **Roscoe Hogan Environmental Law Essay Contest** is designed to develop law student interest and scholarship in environmental law and serves to provide law students with the opportunity to investigate and offer solutions to the multitude of injustices inflicted on the environment.

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PAPERS OF THE ROSCOE POUND INSTITUTE

Reports of the Annual Forums for State Court Judges

2000 • *Open Courts with Sealed Files: Secrecy's Impact on American Justice*. Report of the eighth Forum for State Appellate Court Judges. Discussions include: the effects of secrecy on the rights of individuals; the forms that secrecy takes in the courts; ethical issues affecting lawyers agreeing to secret settlements; the role of the news media in the debate over secrecy; the tension between confidentiality proponents and public access advocates; and the approaches taken by various judges when confronted with secrecy requests. (Price per bound copy-\$40)

1999 • *Controversies Surrounding Discovery and Its Effect on the Courts*. Report of the seventh Forum for State Appellate Court Judges. Discussions include: the existing empirical research on the operation of civil discovery; the contrast between the research findings and the myths about discovery that have circulated; and whether or not the recent changes to the federal courts' discovery rules advance the purpose of discovery. (\$40)

1998 • *Assaults on the Judiciary: Attacking the "Great Bulwark of Public Liberty."* Report of the sixth Forum for State Appellate Court Judges. Discussions include: threats to judicial independence through politically motivated attacks on the courts and on individual judges as well as through legislative action to restrict the courts that may violate constitutional guarantees, and possible responses to these challenges by judges, judicial institutions, the organized bar, and citizen organizations. (\$40)

1997 • *Scientific Evidence in the Courts: Concepts and Controversies*. Report of the fifth Forum for State Appellate Court Judges. Discussions include: the background of the controversy over scientific evidence; issues, assumptions, and models in judging scientific disputes; and the applicability of the *Daubert* decision's "reliability threshold" under state law analogous to Rule 702 of the Federal Rules of Evidence (Only available in electronic format at www.roscoepound.org). (Free)

1996 • *Possible State Court Responses to the American Law Institute's Proposed Restatement of Products Liability*. Report of the fourth Forum for State Appellate Court Judges. Discussions include: the workings of the ALI's Restatement process; a look at several provisions of the proposed Restatement on products liability and academic responses to them; the relationship of ALI's proposals to the law of negligence and warranty; and possible judicial responses to suggestions that the ALI's recommendations be adopted by the state courts. (\$35)

1995 • *Preserving Access to Justice: The Effect on State Courts of the Proposed Long Range Plan for Federal Courts*. Report of the third Forum for State Court Judges. Discussions include the constitutionality of the Federal courts' plan to shift caseloads to state courts without adequate funding support, as well as the impact on access to justice of the proposed plan. (\$35)

1993 • *Preserving the Independence of the Judiciary*. Report of second Forum for State Court Judges. Discussions include the impact on judicial independence of two contemporary issues, judicial selection processes and the resources that are available to the judiciary. (\$35)

1992 • *Protecting Individual Rights: The Role of State Constitutionalism*. Report of the first Forum for State Court Judges in which more than 100 judges of the state supreme and intermediate appellate courts, lawyers, and academics discussed the renewal of state constitutionalism on the issues of privacy, search and seizure, and speech, among others. Also discussed was the role of the trial bar and academics in this renewal. (\$35)

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