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## The Political Puzzle of the Civil Jury

Jason M. Solomon

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# THE POLITICAL PUZZLE OF THE CIVIL JURY

Jason M. Solomon\*

## ABSTRACT

*At the root of many contemporary debates over the civil justice or tort system—debates over punitive damages, preemption, and tort reform more broadly—are underlying questions about the justification for the civil jury. The United States is the only country that still uses a jury in civil cases, and most civil jury trials are tort trials. The jury has more power to decide questions of law in tort than in any other area of law, so any serious discussion of tort law must have the civil jury at its center.*

*The debate over the jury—in both the academic literature and the public domain—tends to focus on how good or bad it is as an adjudicative institution. But its justification has often been based on its value as a political institution.*

*In this Article, I look at the theory, concepts, and empirical evidence behind four principal justifications for the civil jury as a political institution: (1) acting as a check on government and corporate power, (2) injecting community norms into the legal system, (3) providing legitimacy for the civil justice system, and (4) fostering political and civic engagement among citizens.*

*I tentatively conclude that the benefits of the civil jury as a political institution are overstated and provide suggestions for improving the functioning of the jury as a political institution and for further empirical research.*

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## INTRODUCTION

*The jury is . . . above all a political institution, and it is from that point of view that it must always be judged.*

—Alexis de Tocqueville<sup>1</sup>

In the last four Supreme Court terms, some of the most important cases involved tort lawsuits, rooted in common law or statute, that resulted in multimillion-dollar verdicts. On the face of it, each of these cases involved very different issues—the First Amendment in *Snyder v. Phelps*,<sup>2</sup> preemption in *Wyeth v. Levine*,<sup>3</sup> punitive damages in *Exxon Shipping Co. v. Baker*,<sup>4</sup> and the standard for class certification in *Wal-Mart Stores, Inc. v. Dukes*.<sup>5</sup> But a common theme ran through each of the cases: suspicion of the civil jury. In three of the four cases, the side arguing that the civil jury could not be trusted won the case, losing the fourth by just two votes.

The precise basis for the concern about the civil jury varied in each case. In *Snyder*, it was a concern that the jury could use a malleable tort standard of “outrageousness” to punish disfavored speech.<sup>6</sup> In *Wyeth*, it was that the jury would unfairly second-guess the Food and Drug Administration’s judgment on what warnings should go on a particular drug.<sup>7</sup> In *Exxon Shipping*, it was that the civil jury’s damage awards were unpredictable, leading to concerns about

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<sup>1</sup> 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 272 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835).

<sup>2</sup> 131 S. Ct. 1207, 1216–17 (2011) (holding that the First Amendment protected the free speech of church members who picketed near the funeral of a military service member).

<sup>3</sup> 555 U.S. 555, 581 (2009) (holding that a state failure-to-warn claim was not preempted by the FDA’s approval of the warning).

<sup>4</sup> 554 U.S. 471, 515 (2008) (holding that punitive damages were excessive and could not exceed a 1:1 ratio with compensatory damages).

<sup>5</sup> 131 S. Ct. 2541, 2551 (2011) (holding that class certification was not warranted under Federal Rule of Civil Procedure 23(a)’s commonality requirement). This lawsuit did not actually result in a multimillion-dollar verdict because it never made it to trial, but it was the fear of such a verdict that drove the dynamics around class certification.

<sup>6</sup> 131 S. Ct. at 1219 (noting that the outrageousness standard is “highly malleable,” and a jury is likely to be biased based on “jurors’ tastes or views,” making the jury dangerous in that it could become “an instrument for the suppression of . . . expression” (alteration in original) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510 (1984))).

<sup>7</sup> 555 U.S. at 563–64 (discussing the defendant’s argument that a “lay jury’s decision” should not trump “the expert judgment of the FDA”); *id.* at 626 (Alito, J., dissenting) (“By their very nature, juries are ill equipped to perform the FDA’s cost-benefit-balancing function. . . . [J]uries tend to focus on the risk of a particular product’s design or warning label that arguably contributed to a particular plaintiff’s injury, not on the overall benefits of that design or label . . .”).

fairness to and consistency across defendants.<sup>8</sup> In *Dukes*, it was the fear of massive jury verdicts in class actions that would force corporate defendants like Wal-Mart to settle, regardless of the merits of the case.<sup>9</sup>

The public debate and academic literature on the civil jury tend to focus on how well it performs as an adjudicative institution.<sup>10</sup> Can it handle complex cases? Is it biased against defendants with deep pockets? The task for the defenders of the jury, then, has been simply to show that the jury does about as well as (or not much different than) the judge in adjudicating, and in that, they have largely succeeded.<sup>11</sup>

But the justification for the civil jury has often been about its benefits as a political institution. By “political institution,” I mean the jury’s role in our democracy, other than deciding cases. Leading constitutional law scholar Akhil Amar, for example, calls the jury the idea “more central” than any other to “America’s distinctive regime of government of the people, by the people, and for the people.”<sup>12</sup> For Amar, the jury is the institution that best instantiates

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<sup>8</sup> 554 U.S. at 472–73 (“The real problem is the stark unpredictability of punitive awards. Courts are concerned with fairness as consistency, and the available data suggest that the spread between high and low individual awards is unacceptable. The spread in state civil trials is great, and the outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories. The distribution of judge-assessed awards is narrower, but still remarkable.”).

<sup>9</sup> See Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 16, *Dukes*, 131 S. Ct. 2541 (No. 10-277) (“It has long been recognized that loose certification standards have serious repercussions for American business because they present a risk of gargantuan verdicts . . .”).

<sup>10</sup> See, e.g., VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 20 (1986); Robert E. Litan, *Introduction to VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 1, 2 (Robert E. Litan ed., 1993); Symposium, *Is the Jury Competent?*, *LAW & CONTEMP. PROBS.*, Autumn 1989, at 1; Symposium, *The Role of the Jury in Civil Dispute Resolution*, 1990 U. CHI. LEGAL F. 1.

<sup>11</sup> Valerie P. Hans & Theodore Eisenberg, *The Predictability of Juries*, 60 *DEPAUL L. REV.* 375, 379 (2011) (“[W]hen scholars have compared the decision making of juries, judges, and other decision makers, the overall patterns appear more similar than different.”); Valerie P. Hans & Neil Vidmar, *The Verdict on Juries*, 91 *JUDICATURE* 226, 227 (2008) (“[J]udges agree with jury verdicts in most cases.”); Jennifer K. Robbenolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 *FLA. ST. U. L. REV.* 469, 509 (2005) (concluding that research shows “striking similarities in the decisionmaking of judges and jurors”).

<sup>12</sup> Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 *U.C. DAVIS L. REV.* 1169, 1169 (1995). Amar explores this claim in greatest detail in his book, AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* ch. 5 (1998). Amar is clear both that his claim applies to juries in the civil and criminal contexts, see Amar, *supra*, at 1170–71, 1191–92, and that, to the extent the jury today does not have the central role envisioned by both the Founders and the architects of Reconstruction, that state of affairs ought be changed, *id.* at 1191–94.

popular sovereignty, which he views as essential to our republican form of government.<sup>13</sup>

Despite such claims, there has been little focus on how well the civil jury actually performs the political functions that are ascribed to it. To be sure, a jury is always acting as *both* an adjudicative and a political institution, and these functions cannot be so neatly separated. But the merits and value of the civil jury in the political sense—in providing legitimacy, incorporating community norms, and improving democratic citizenship—are often taken for granted, without an adequate theoretical and empirical basis. The task of this Article is to begin to address this gap in the literature.

In discussing these issues, I return frequently to the particular issue that led me here: the role of the contemporary civil jury in tort cases, the very issue that has occupied the Supreme Court.<sup>14</sup> An estimated 90% of civil jury trials every year take place in state courts,<sup>15</sup> and in many state courts, the civil jury is “overwhelmingly a tort institution.”<sup>16</sup> Despite the consensus that judges decide issues of law and juries decide issues of fact,<sup>17</sup> in tort cases, the civil jury’s power is unusually high.<sup>18</sup> Here, the jury is deciding law-like questions about

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<sup>13</sup> See Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749–50 (1994).

<sup>14</sup> I use the term “tort” here to refer broadly to civil claims not arising out of contract or property rights where one party claims that another has wronged him. This includes traditional common law torts, statutory torts like employment discrimination or consumer fraud, and constitutional torts against government officials under 42 U.S.C. § 1983 (2006). See DAN B. DOBBS, *THE LAW OF TORTS I* (2000) (defining a tort as “conduct that amounts to a legal wrong and that causes harm for which courts will impose civil liability”).

<sup>15</sup> Marc Galanter, *The Regulatory Function of the Civil Jury*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM*, *supra* note 10, at 61, 69. In 2009, there were 2138 civil jury trials in federal district court. STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, 2009 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 16 (2010), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinesspdfversion.pdf>. 2005 is the most recent year for which state-court data is readily available. In that year, there were 18,404 jury trials in state court. LYNN LANGTON & THOMAS H. COHEN, U.S. DEP’T OF JUSTICE, NCJ 223851, *CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005*, at 3 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cbjtsc05.pdf>. Although from different years, these numbers would seem to indicate that Galanter’s figure of 90% has not changed significantly.

<sup>16</sup> Galanter, *supra* note 15, at 66; see also Robert C. LaFountain & Neal B. Kauder, *An Empirical Overview of Civil Trial Litigation*, CASELOAD HIGHLIGHTS, (Nat’l Ctr. for State Courts, Williamsburg, Va.) Feb. 2005, available at <http://ncsc.contentdm.oclc.org/cgi-bin/showfile.exe?CISOROOT=/civil&CISOPTR=24&filename=25.pdf> (listing more recent data supporting Galanter’s assertion).

<sup>17</sup> See, e.g., *Sparf v. United States*, 156 U.S. 51, 106 (1895); *United States v. Battiste*, 24 F. Cas. 1042, 1043 (D. Mass. 1835) (No. 14,545) (“It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court.”).

<sup>18</sup> See Mark P. Gergen, *The Jury’s Role in Deciding Normative Issues in the American Common Law*, 68 *FORDHAM L. REV.* 407, 424 (1999) (“Negligence law is the logical place to start in mapping the role of the jury in deciding normative issues in the common law for it is here that the jury has the most say.”).

what is right and wrong conduct, questions with a significant normative or evaluative component and not factual questions about whether the traffic light was red or green.<sup>19</sup>

The United States is currently the only country that uses a jury in a large number of civil cases,<sup>20</sup> and the extensive use of the civil jury to decide normative issues has costs. One significant cost is to formal rule-of-law values and principles, such as “treat like cases alike,” that arise from features of the civil jury—the lack of reasons given for decisions and the fact that their decisions have no precedential value—that are unlikely to change.<sup>21</sup>

Mark Gergen has referred to the allocation of power between judge and jury as being determined by “weighing competing values on a scale.”<sup>22</sup> As he puts it:

On one side of this scale are the values of popular judgment. On the other side are the values of satisfying what Lon Fuller described as the demands of the “inner morality of law”—[“]make the law known, make it coherent and clear, see that your decisions as an official are guided by it, etc.”<sup>23</sup>

This paper considers the benefits of using a jury to incorporate the values of popular judgment in light of the harm to rule-of-law values that I describe and explore further in a companion paper.<sup>24</sup> My tentative conclusion here is that the benefits are overstated. In the companion paper, I challenge the conventional wisdom that juries and open-ended standards are really better suited than judges and presumptive rules in identifying and applying social norms. I argue that judges can use heuristics like custom, regulations, and market information to identify social norms and use them to determine reasonableness in negligence. Greater judicial control of the reasonableness inquiry is both

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<sup>19</sup> See *id.* at 424–25 (explaining that juries retain “a great deal of normative discretion in deciding what is reasonably prudent conduct” in negligence cases).

<sup>20</sup> See Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 59 (2001) (“America is now the only country in the world where the jury continues to play both a broad and a central role in the adjudicatory process.”).

<sup>21</sup> See James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 468 (1976) (“We are rapidly approaching the day when liability will be determined routinely on a case by case . . . basis, with decision makers (often juries) guided only by the broadest of general principles. When that day arrives, the retreat from the rule of law will be complete . . .”).

<sup>22</sup> Gergen, *supra* note 18, at 438.

<sup>23</sup> *Id.* (quoting LON L. FULLER, *THE MORALITY OF LAW* 42 (rev. ed. 1969)).

<sup>24</sup> See Jason M. Solomon, *Juries, Social Norms, and the Legitimacy of Civil Justice* (July 2012) (unpublished manuscript) (on file with author).

plausible and desirable, I argue, in part for more accurate determinations of wrongfulness and in part to minimize the number of inconsistent jury verdicts.

One threshold question, though, might be the following: Why talk about *civil* juries at all? Why not just talk about the political function of *juries*, full stop? Sometimes juries hear criminal cases, sometimes civil. But their basic role in our democracy, the argument goes, remains the same.

This is not quite true, though. The clearest example of this is the jury's role in criminal cases in checking the government's role as prosecutor. Though there may be ways in which the civil jury acts to check government power,<sup>25</sup> the justification must rest on a very different basis. On the other hand, in the criminal context, much has been written about the role of the jury in incorporating community norms into the law.<sup>26</sup> Though the application is likely to be somewhat different, this literature may well be useful in the civil context as well.

Relative to the significant literature on the role of criminal juries in democracy, though, the issues around the political or democratic value of the civil jury are less explored.<sup>27</sup> As George Priest put it, "[A]lthough the role of the criminal jury in protecting citizens from the arbitrary exercise of governmental power has received extensive study, the political role of the civil jury has been largely neglected."<sup>28</sup>

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<sup>25</sup> See *infra* Part I.A.

<sup>26</sup> See, e.g., Laurie L. Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 S. CAL. L. REV. 1533, 1551–53 (1993) (articulating the ways that jurors use "community standards" in deciding criminal cases); Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 904 (1999) (arguing that the jury has "room to bring their sense of community norms into the process of applying the law to the facts"); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 473 (1997) (arguing that community norms arise from a complex process that includes the enforcement and prosecution of crimes).

<sup>27</sup> There is, of course, an extensive literature on the role of juries, but most of it either focuses explicitly on criminal juries or simply conflates the function of or justification for the criminal and civil jury. As Lawrence Friedman has put it, "[T]he criminal jury gets the lion's share of the attention and the civil jury sits home among the ashes." Lawrence M. Friedman, *Some Notes on the Civil Jury in Historical Perspective*, 48 DEPAUL L. REV. 201, 201 (1998).

<sup>28</sup> George L. Priest, *The Role of the Civil Jury in a System of Private Litigation*, 1990 U. CHI. LEGAL F. 161, 162 (footnote omitted); see also Victoria A. Farrar-Myers & Jason B. Myers, *Echoes of the Founding: The Jury in Civil Cases as Conferrer of Legitimacy*, 54 SMU L. REV. 1857, 1860 (2001) (noting that contemporary debates about the power of the civil jury ignore "the system's seemingly forgotten political role").

Though there have been important additions, the basic thrust of the literature has not changed much since Priest's remarks twenty years ago. The notable exceptions include JOHN GASTIL ET AL., *THE JURY AND DEMOCRACY* (2010); *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1421–42 (1997); and John T. Nockleby, *What's a Jury Good For?*, VOIR DIRE, Summer 2005, at 6, 6.



There has certainly been important work exploring the theoretical aspects of the civil jury as a political institution. Some of this work has considered political justifications for the civil jury broadly,<sup>29</sup> while others have looked at specific justifications like providing legitimacy,<sup>30</sup> injecting community norms,<sup>31</sup> or instantiating deliberative democracy.<sup>32</sup>

Until recently, there has not been much empirical evidence on how well the civil jury functions as a political institution. For many years, George Priest's research on Cook County, Illinois juries was a primary exception to the lack of this kind of empirical work.<sup>33</sup> And in the last few years, a major empirical effort, *The Jury and Democracy Project*, has made a substantial contribution in remedying this neglect, but more work remains.<sup>34</sup>

Evaluating the civil jury as a political institution depends in part upon how one sees the place of the jury in our overall governmental and political structure. To the extent the literature on the jury addresses this issue, it is with

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<sup>29</sup> See generally RANDOLPH N. JONAKAIT, *THE AMERICAN JURY SYSTEM* (2003) (elaborating upon the role and function of both the criminal and the civil jury); see, e.g., Paul D. Carrington, *The Civil Jury and American Democracy*, 13 DUKE J. COMP. & INT'L L. 79, 80–87 (2003) (explicating the political function of the civil jury in a historical and comparative perspective); Stephan Landsman, *Appellate Courts and Civil Juries*, 70 U. CIN. L. REV. 873, 880–83 (2002) [hereinafter Landsman, *Appellate Courts*] (arguing that the civil jury “contributes to American democracy” in many different ways); Stephan Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. EMPIRICAL LEGAL STUD. 973, 974–76 (2004) (explaining the political benefits of the civil jury); Doug Rendleman, *Chapters of the Civil Jury*, 65 KY. L.J. 769 (1977) (exploring society's ambivalence toward delegating authority to the jury through three case studies).

<sup>30</sup> See, e.g., Farrar-Myers & Myers, *supra* note 28, at 1882–83 (calling for increased recognition of the jury's role in providing legitimacy and participation in government for ordinary citizens); Martin A. Kotler, *Social Norms and Judicial Rulemaking: Commitment to Political Process and the Basis of Tort Law*, 49 U. KAN. L. REV. 65, 90–94 (2000) (discussing the democratic legitimacy of the jury's lawmaking power).

<sup>31</sup> See, e.g., Valerie P. Hans, *Juries as Conduits for Culture?*, in *FAULT LINES: TORT LAW AS CULTURAL PRACTICE* 80 (David M. Engel & Michael McCann eds., 2009) (exploring the ways in which juries can inject cultural norms and how these mechanisms have changed over time); Joseph Sanders, *A Norms Approach to Jury “Nullification”: Interests, Values, and Scripts*, 30 LAW & POL'Y 12 (2008).

<sup>32</sup> See Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 345–50 (2003) (discussing the jury as a “[m]odel [d]eliberative [d]emocratic [b]ody” but noting that “few authors have discussed . . . the extent to which existing legal juries embody deliberative ideals”); see also JEFFREY ABRAMSON, WE, *THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* (1994) (arguing for the superiority of deliberative democracy over representative democracy in the jury, though focusing on the criminal context); Jeffrey Abramson, *Two Ideals of Jury Deliberation*, 1998 U. CHI. LEGAL F. 125, 132–34 (arguing for the importance of diversity on juries, while retaining the “impartiality” ideal for overall jury deliberations).

<sup>33</sup> See Priest, *supra* note 28 (studying the work of Cook County, Illinois civil juries from 1959 to 1979 and finding that the issues addressed by juries rarely implicate the political justifications for the institution).

<sup>34</sup> See GASTIL ET AL., *supra* note 28; JURY & DEMOCRACY PROJECT, <http://www.la1.psu.edu/cas/jurydem/index.html> (last visited Aug. 22, 2012). For a discussion of the project's findings, see *infra* Part IV.B.

two very different conceptions of democratic governance in mind. These two conceptions—pluralist or representative democracy, and deliberative democracy—happen to be the two leading contenders in contemporary democratic theory.<sup>35</sup> Though the jury is used as a model or jumping-off point for many other ideas in democratic theory, the place of the jury itself in democratic theory and practice has received relatively little scrutiny.<sup>36</sup>

The Article will proceed as follows: Part I will explore the idea that the civil jury is justified as a check on government, private power, and the repeat players in the legal system. Part II looks closely at the justification that the civil jury provides democratic legitimacy by exploring the representative and deliberative conceptions of democracy on which the legitimacy justification is based and how well they fit the reality of the contemporary civil jury.

Part III turns to the idea that the civil jury injects community norms into the legal system, considering the theoretical, conceptual, and empirical underpinnings of this claim. In Part IV, I turn to the claim that service on a civil jury produces better democratic citizens.<sup>37</sup> Though this effect has long been assumed, the evidence is mixed. Indeed, attempting to meet the representative-democracy ideal in the civil jury may well impede this function. I conclude in Part V by briefly considering the implications of some of these tentative conclusions for how to improve the civil jury as a political institution.

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<sup>35</sup> See Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 885–87 (2012) (explicating some of the differences between “majoritarian or pluralistic” theories of democracy and deliberative democracy).

<sup>36</sup> For notable exceptions, see ABRAMSON, *supra* note 32, at 8; DAVID M. ESTLUND, *DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK* ch. 8 (2008); GASTIL ET AL., *supra* note 28, at 12–15, 17–25, 191–92; Lisa Kern Griffin, “*The Image We See Is Our Own*”: *Defending the Jury’s Territory at the Heart of the Democratic Process*, 75 NEB. L. REV. 332, 334–36 (1996) (reviewing ABRAMSON, *supra* note 32, and STEPHEN J. ADLER, *THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM* (1994)); Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL RTS. J. 29 (1994); David F. Partlett, *The Republican Model and Punitive Damages*, 41 SAN DIEGO L. REV. 1409, 1421–24 (2004); Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARDOZO L. REV. 1417, 1420–22 (1997).

<sup>37</sup> In a paper called *What’s a Jury Good for?*, civil justice scholar John Nockleby presents three such functions for the jury, all tied to its role as a political institution. Nockleby, *supra* note 28. Nockleby describes these functions as (1) to incorporate a “deliberative democratic body within the third branch of government,” (2) to check and balance the exercise of governmental and corporate power and to instill social norms within the judicial process, and (3) to legitimate “both the process and the outcome of legal judgments.” *Id.* at 6 (emphasis omitted).

My approach in this paper is akin to what Ed Rubin calls microanalysis of institutions<sup>38</sup> and can be seen as an effort at “new legal realism.”<sup>39</sup> That is, this paper examines the justifications for the civil jury—historical and contemporary ones in the academic literature as well as in popular discourse—and subjects them to conceptual and empirical scrutiny.<sup>40</sup> This kind of overall analysis—marrying the theoretical, conceptual, and empirical—is largely missing from the existing literature, and it is a large and ongoing task. This paper is just one small step. In many ways, this paper simply tries to lay out some relevant questions and the data on our existing answers, and then hopes that others will join in exploring these issues.

Always, the inquiry must be relative: To what extent does the jury perform well—not just generally but also better than judges—on its ascribed political functions? After all, as Richard Posner has put it, “The direct cost of jury trials plainly exceeds that of bench trials. Only if a great deal of value is assigned to John Stuart Mill’s ‘education in citizenship’ rationale, or to some other political value of jury trial, are the added costs likely to be offset by greater benefits . . . .”<sup>41</sup>

## I. CHECKING GOVERNMENTAL AND CORPORATE POWER

### A. *Government Power*

Historically, the civil jury in the United States, like the criminal jury, was justified in large part as a check against the abuse of government power.<sup>42</sup> American colonists regularly rejected enforcement of British revenue and other

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<sup>38</sup> Edward L. Rubin, Commentary, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1425 (1996) (describing this approach as being one which focuses on “aspects of social institutions that operate at the particularized level,” making normative premises more likely to converge and generating common understanding and communication, if not complete substantive agreement).

<sup>39</sup> See Howard Erlanger et al., Foreword, *Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 337 (“[N]ew legal realist scholars bring together legal theory and empirical research to build a stronger foundation for understanding law and formulating legal policy.”). For a broader discussion of the new legal realism, see generally Symposium, *New Legal Realism Symposium: Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335.

<sup>40</sup> This paper relies on existing empirical research and, in some areas, points toward the need for additional research.

<sup>41</sup> Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1502 (1999).

<sup>42</sup> Although this brief discussion of the history begins with the Founding of the United States, the institution of the jury goes back at least to the ancient Greeks.

laws and actions by British creditors to collect debts in civil jury trials.<sup>43</sup> At the time, judges were appointed by the king,<sup>44</sup> and Anti-Federalists also voiced the need, in the words of Elbridge Gerry of the Philadelphia Convention, “to guard agst. corrupt Judges.”<sup>45</sup> Citizens could not trust judges to act independently and decide cases without bias toward the British government.<sup>46</sup>

After serving as a check on the power of the British crown, the civil jury was recognized as a necessary safeguard for individuals against the government and an important democratic instrument.<sup>47</sup> When a provision guaranteeing a right to a civil jury trial was left out of the original Constitution, Anti-Federalists vehemently protested the omission in their opposition to ratification.<sup>48</sup> Patrick Henry referred to the jury trial (both civil and criminal) in speeches to the Virginia ratification convention as one of the rights “dear to human nature” and the “best appendage of freedom.”<sup>49</sup>

Besides the concern about judicial bias, a second reason for the civil jury was its role in protecting citizens from oppressive laws.<sup>50</sup> In Virginia, for example, both James Monroe and Patrick Henry expressed concerns that Congress could enact oppressive tax laws that would be enforced without a jury right.<sup>51</sup> Without making it explicit, this kind of Anti-Federalist defense of the civil jury was predicated on the jury’s ability to find for certain defendants while disregarding the law when justice seemed to require.<sup>52</sup> Even though the

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<sup>43</sup> Ellen E. Sward, *Justification and Doctrinal Evolution*, 37 CONN. L. REV. 389, 459–60 & n.382 (2004).

<sup>44</sup> Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1104–05 (1976).

<sup>45</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587 (Max Farrand ed., 1911).

<sup>46</sup> See Smith, *supra* note 44, at 1147 (citing 3 JOHN ADAMS, *Independence of the Judiciary*, in THE WORKS OF JOHN ADAMS 513, 514–15 (Charles Francis Adams ed., Boston, Little, Brown, & Co. 1856)).

<sup>47</sup> Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183 (1991) (“Spanning both civil and criminal proceedings, the key role of the jury was to protect ordinary individuals against governmental overreaching.”); Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 600 (1993) (“It was critical to the Anti-Federalists that the jury serve the interests of democracy by injecting the values of the ‘many’ into judicial proceedings.”); Sward, *supra* note 43, at 461 (“It appears, then, that the most important justification for the civil jury at the country’s founding was the protection it offered to individuals against the government.”).

<sup>48</sup> See Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 670–71 n.85 (1973).

<sup>49</sup> Patrick Henry, *Virginia and Kentucky Resolutions of 1798 and 1799*, reprinted in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 314, 324 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 2d ed. 1891).

<sup>50</sup> See Wolfram, *supra* note 48, at 705–08 (describing the civil jury’s ability to be a defense against oppressive laws).

<sup>51</sup> Henry, *supra* note 49, at 218, 577–78.

<sup>52</sup> Wolfram, *supra* note 48, at 704–05.

Seventh Amendment right to a civil jury was enacted in the Bill of Rights by a Federalist Congress, the Amendment was a reflection of the arguments and efforts of the Anti-Federalists.<sup>53</sup> At the time of the founding, preserving local self-rule was very much on the minds of the Anti-Federalists in arguing for a right to a civil jury.<sup>54</sup>

None of these justifications for the jury as a check on government power appear to exist today. Eighty percent of state trial judges today are elected,<sup>55</sup> whereas at the time the Constitution was ratified and until the mid-nineteenth century, state trial judges were mostly appointed.<sup>56</sup> Judges are also much more professional and less prone to corruption today,<sup>57</sup> though the influence of campaign contributions remains a significant concern.<sup>58</sup> And it remains the case that judges are not beholden to the ruling authority in the same way that they were at the time of the Founding.

If we do still need civil juries as checks on judges, it is not clear how exactly this check quite works. Perhaps the idea is that judges might be less inclined to grant directed verdicts for defendants if the jurors are sitting in the courtroom and, having listened to a trial, are eager to decide it.<sup>59</sup> Or perhaps if

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<sup>53</sup> Landsman, *supra* note 47, at 599–600; Wolfram, *supra* note 48, at 673.

<sup>54</sup> See Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on “Monarchism” to Modern Localism*, 84 NW. U. L. REV. 74, 91 (1990) (“In arguing for the right to civil jury trial, [the Anti-Federalists] said that legal rights should be settled by the jury of the vicinage—a jury which would base its decision on the local knowledge of ordinary people (including information about the parties) rather than on some uniform, homogenous version of the law.”).

<sup>55</sup> See Roy A. Schotland, *New Challenges to States’ Judicial Selection*, 95 GEO. L.J. 1077, 1105 (2007) (finding, based on national data compiled by the National Center for State Courts in 2004, that 41% of state trial judges are elected in nonpartisan elections and 38% are elected in partisan elections); see also LARRY C. BERKSON ET AL., AM. JUDICATURE SOC’Y, JUDICIAL SELECTION IN THE UNITED STATES: A SPECIAL REPORT (2010), available at [http://judicialselection.com/uploads/documents/Berkson\\_1196091951709.pdf](http://judicialselection.com/uploads/documents/Berkson_1196091951709.pdf).

<sup>56</sup> See Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1080 (2010) (tracing the “wave of judicial elections” that swept the country from 1846 to 1851).

<sup>57</sup> See Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 450 (1996) (describing early judges as having “little legal knowledge” and noting that the competency of legal professionals has “increased over time”); Wolfram, *supra* note 48, at 681 (discussing corruption of judges as part of the history of the Seventh Amendment). *But see* Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 34–49 (1994) (providing an overview of the types of bias in the judiciary).

<sup>58</sup> Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 73 (2011) (presenting evidence that judges are influenced by campaign contributions).

<sup>59</sup> For example, federal judges give directed verdicts in only .1% of cases. Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 732 (2004). For an idea of how frequently such verdicts are given in state courts, see THOMAS H. COHEN & STEVEN K. SMITH, U.S. DEP’T OF

judges make rulings at trial that favor a particular side that they agree with ideologically—such as plaintiffs and the trial lawyers, or businesses and the defense bar—then the jury can counteract that bias by tilting the other way on liability, damages, or both.<sup>60</sup>

As to the government being a party, the government is only a party in about 7% of cases.<sup>61</sup> Contrast this to India, for example, where the government is a party in 60% of civil cases.<sup>62</sup> To be sure, one important part of the civil justice system is the constitutional torts brought under 42 U.S.C. § 1983 to vindicate individual constitutional rights.<sup>63</sup> Government officials are defendants in these cases, and Akhil Amar has argued that the Fourth Amendment's ban on unreasonable searches and seizures went hand in hand with the Seventh Amendment to provide citizens the power to determine what was reasonable.<sup>64</sup> So we might think, as Amar does, that this is a good area to have a civil jury to check government power.<sup>65</sup>

It is not clear, though, that a jury of lay people would be more inclined to check government power and uphold rights than a judge in this instance. For example, many of these cases are brought by prisoners or others who have

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JUSTICE, NCJ 202803, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 2001, at 3 (2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ctcvlc01.pdf>.

<sup>60</sup> See David C. Vladeck, *Defending Courts: A Brief Rejoinder to Professors Fried and Rosenberg*, 31 SETON HALL L. REV. 631, 641 (2001) (“The interaction between judge and jury is . . . a powerful check on any excess or abuse.”).

<sup>61</sup> In 2007, the federal government was a party in 45,464 civil filings, making it a party in 17.7% of the 257,507 U.S. district court cases that year. STATISTICS DIV., *supra* note 15, at 12 tbl.4. However, federal civil claims are far fewer than state civil claims, of which there were approximately 18 million in 2007, the most recent year for which data is available. NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2007 STATE COURT CASELOADS 1 (2009), available at <http://ncsc.contentdm.oclc.org/cgi-bin/showfile.exe?CISOROOT=/civil&CISOPTR=64&filename=65.pdf>. Evidence shows that state governments are a party in about 7% of state tort cases and about 5% of state contract cases. John A. Goerd et al., *Litigation Dimensions: Torts and Contracts in Large Urban Courts*, 19 ST. CT. J., 1995, at 1, 13, 18. Because of the vast difference in number between state and federal claims, 7% is a rough approximation for total claims in which the government, state or federal, is a party.

<sup>62</sup> Marc Galanter, *The Myth of Litigious India*, 1 JINDAL GLOBAL L. REV. 65, 73 (2009) (citing Letter from Richard Messick, Legal & Policy Analyst for the Pub. Sector Grp., World Bank, to author (Jan. 14, 2002)).

<sup>63</sup> See generally SHELDON H. NAHMOD ET AL., CONSTITUTIONAL TORTS (3d ed. 2009) (surveying and analyzing general principles that form the basis for § 1983 claims involving constitutional torts).

<sup>64</sup> See AMAR, *supra* note 12, at 67–75 (explicating this connection).

<sup>65</sup> See Amar, *supra* note 12, at 1191–92.

been detained by the police, and juries are notoriously sympathetic to law enforcement and disinclined to be supportive of individual rights.<sup>66</sup>

Finally, it seems difficult to understand the theory under which the civil jury would be a check on a legislature in the context of tort law. One can imagine the theory going one of a few ways: First, if it was the case that a particular state legislature was passing laws creating new rights of action—consumer fraud, for example—then one could say that the civil jury might act to limit the scope of such rights of action if too many claims were being brought.<sup>67</sup> From a different direction, if a state legislature were passing laws, whether procedural or substantive, under the banner of tort reform to make it more difficult for plaintiffs to bring tort claims,<sup>68</sup> then the civil jury might act as a check by making it easier for plaintiffs to bring claims, thereby undermining the will of the legislature.

Neither of these theories seem particularly likely. As to the first, with the possible exception of consumer fraud, state legislatures do not appear to be creating causes of action willy-nilly.<sup>69</sup> Even if they were, a jury that does not even hear claims until they get past dispositive motions would not be in the best position to be a gatekeeper.

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<sup>66</sup> See Stephen P. Garvey et al., *Juror First Votes in Criminal Trials*, 1 J. EMPIRICAL LEGAL STUD. 371, 381, 396 (2004) (“Most of the jurors believed the police testimony they heard.”). For an account of pro-police bias and the jury’s focus on the “subjective good faith of the police officer,” see Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 800–06 (1979).

<sup>67</sup> See Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 15 (2005) (discussing the expansion of consumer protection acts by state legislatures).

<sup>68</sup> See F. Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L. REV. 437, 470–79 (2006); David A. Hyman et al., *Estimating the Effect of Damages Caps in Medical Malpractice Cases: Evidence from Texas*, 1 J. LEGAL ANALYSIS 355, 358 (2009) (detailing further the effects of the Texas tort reform legislation); Charles Silver et al., *The Impact of the 2003 Texas Medical Malpractice Damages Cap on Physician Supply and Insurer Payouts: Separating Facts from Rhetoric*, 44 ADVOCATE 25, 25 (2008) (describing the effects of Texas tort reform legislation as making it more difficult for plaintiffs to successfully bring claims); see also Allen Redlich, *Ending the Never-Ending Medical Malpractice Crisis*, 38 ME. L. REV. 283, 316–24 (1986) (describing the adoption of state legislation by forty-nine states from 1974–1976 designed to curb the increased cost of malpractice insurance).

<sup>69</sup> Rather, their efforts have been aimed largely at restricting the ability of plaintiffs to bring suit. Carl T. Bogus, *Introduction: Genuine Tort Reform*, 13 ROGER WILLIAMS U. L. REV. 1, 5 (2008) (observing that, since 2005, a majority of states have enacted medical malpractice tort reform and tort reform measures regarding joint and several liability and the collateral source rule); Hubbard, *supra* note 68, at 524 (“[I]t seems plausible that the various pro-defendant changes have had at least some pro-defendant impact in terms of plaintiffs’ recoveries . . . .”); see also *id.* at 483–524 (offering an overview of tort reform measures that have taken place within state legislatures).

As to the second theory, most evidence shows that citizens are fairly sympathetic to the aims of many tort reforms, with public opinion being in favor of the idea that plaintiffs get too much or are generally unworthy and overly litigious.<sup>70</sup> Moreover, many of the tort reforms are about things like joint and several liability, damage caps, or requirements to get certain kinds of experts in medical malpractice cases, which all tend to be matters of law for the judge and not things that juries can really have any control over.<sup>71</sup>

Without the government as a frequent litigant<sup>72</sup> or judges being controlled by a central governmental authority, it is hard to see how checking government power could serve as a contemporary, functional justification for the civil jury.<sup>73</sup> Ultimately, an argument that combines the distrust of government and judges with the need to “temper” the law is an argument for nullification.

Nullification, though, is not necessary or desirable in the civil context. Unlike in criminal law, there is enough flexibility already built into the standards. In tort law, when a jury assesses whether a defendant’s conduct is reasonable, its members are able to consider whatever factors they choose. It seems unlikely that they would find the defendant’s conduct unreasonable and then feel the need to nullify. They would simply say that the defendant behaved reasonably. Or if they thought that the defendant behaved unreasonably but should not be held liable for the harm, then they could simply find no causation, or no proximate cause. And of course, generally, they need not provide reasons at all but may simply say liable or not liable.

### B. Corporate Power

Perhaps, then, the civil jury can be justified as a check against private power. After all, the Anti-Federalists’ insistence on the Seventh Amendment was driven in significant part by a desire to protect debtors from the creditors

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<sup>70</sup> Edith Greene et al., *Jurors’ Attitudes About Civil Litigation and the Size of Damage Awards*, 40 AM. U. L. REV. 805 (1991); Valerie P. Hans & William S. Lofquist, *Perceptions of Civil Justice: The Litigation Crisis Attitudes of Civil Jurors*, 12 BEHAV. SCI. & L. 181 (1994).

<sup>71</sup> For a discussion of tort reform and medical malpractice, see *supra* note 68.

<sup>72</sup> Kaimipono David Wenger & David A. Hoffman, *Nullificatory Juries*, 2003 WIS. L. REV. 1115, 1150 (“The protective function is less present in civil nullification because most cases are not brought with the aid of government officials.”).

<sup>73</sup> See *Ballard v. Uribe*, 715 P.2d 624, 647–48 (Cal. 1986) (Bird, C.J., concurring and dissenting) (“While jury nullification may be debatable in the criminal trial context, it certainly has no place in a civil trial where neither party has a right to a general verdict and where there is no double jeopardy bar.”). *But see* Landsman, *Appellate Courts*, *supra* note 29, at 880 (arguing that the “civil jury is the democratic check on the judiciary,” which is otherwise shielded from the popular will).



in the big cities.<sup>74</sup> According to this view, the pharmaceutical companies or auto manufacturers of the early twenty-first century are the big-city creditors of the late eighteenth.

The theory of the jury as a check on corporate power takes two main forms: structural and substantive. The structural account focuses on the institutional features of the civil jury that make it unlikely to be unduly influenced by corporate interests. Unlike administrative agencies, where the decision makers may be hopeful of more lucrative jobs down the road,<sup>75</sup> or elected officials, who rely on corporate interests to fund their campaigns,<sup>76</sup> the lay people on the civil jury have no particular reason to curry favor.

Seen more broadly in the context of our democratic institutions, the civil jury serves as a backstop to regulatory agencies, like the FDA, that may be hampered by limited resources or industry capture.<sup>77</sup> This kind of substantive justification for the jury as a check on corporate power—that the jury would bring different values and produce different outcomes—is closely related to the structural account emphasizing popular sovereignty.

Carl Bogus, whose book, *Why Lawsuits Are Good for America*, emphasizes the role of the jury in checking corporate power, puts it this way:

[N]ot only does the products liability system bring into public view decisions balancing the utility and the hazards of the products we use and depend on, but it allows the people to pass judgment on those decisions. . . .

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<sup>74</sup> See William E. Nelson, *Summary Judgment and the Progressive Constitution*, 93 IOWA L. REV. 1653, 1658 (2008) (noting that “back-country Antifederalists” wanted the civil jury as an “instrument for preventing oppression by metropolitan creditors and other metropolitan interests”); Wolfram, *supra* note 48, at 673–703 (relating the Seventh Amendment to concerns about the protection of debtors).

Resistance to a Constitution without a civil jury right was especially potent from Southern states with large numbers of debtors who feared lawsuits from creditors in federal court without a jury. See JOHN H. LANGBEIN ET AL., *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 492–93 (2009); Henry, *supra* note 49, at 170, 289–90 (providing speeches from Anti-Federalists that connect the relief for debtors with the right to a civil jury).

<sup>75</sup> Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251, 267–86 (2009) (arguing that job opportunities function as incentives that can influence agency decision makers).

<sup>76</sup> Campaign finance is likely to be increasingly dominated by corporate funding. See, e.g., Tom Udall, *Amend the Constitution to Restore Public Trust in the Political System: A Practitioner’s Perspective on Campaign Finance Reform*, 29 YALE L. & POL’Y REV. 235, 242 (2010) (describing *Citizens United v. FEC*, 130 S. Ct. 876 (2010), and how the combination of “independent expenditures” and limits on direct campaign contributions have affected campaign finance in California).

<sup>77</sup> THOMAS H. KOENIG & MICHAEL L. RUSTAD, *IN DEFENSE OF TORT LAW* 198 (2001) (“The tort system is the last defense when government standards are weak, outdated, or set by the regulated industry.”).

. . . . We know, as well, that regulatory agencies cannot do the job alone. . . . [I]t is appropriate that people participate in these judgments.<sup>78</sup>

The question, though, is whether the civil jury is the best way for “the people” to participate in these judgments. One-shot juries are ill-equipped to assess the costs and benefits of one design choice versus another, for example.<sup>79</sup> And the way that the people do and ought to participate in product-design decisions is through either the market (as Bogus acknowledges),<sup>80</sup> the regulatory agencies (that may be responsive to consumer groups or public opinion),<sup>81</sup> or the legislators (who can lobby agencies or pass laws on behalf of concerned constituents).<sup>82</sup> One can imagine a way to better incorporate citizen participation into agency deliberations, for example.<sup>83</sup> But that seems a more fitting home for citizen input into product safety.

We must also distinguish here between the very existence of common law actions and the civil jury as the decision maker in such actions. Defenders of tort law, like Bogus, Koenig, and Rustad, primarily defend the existence of the right to recourse against corporations, not the identity of the decision maker, the civil jury.<sup>84</sup> Koenig and Rustad’s book *In Defense of Tort Law*, for example, mentions the jury hardly at all.<sup>85</sup>

Because of the existence of a reasonably robust system of tort law, the argument goes, individuals who are harmed in particular ways can bring a

<sup>78</sup> CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS, AND THE COMMON LAW 219–20 (2001); accord KOENIG & RUSTAD, *supra* note 77, at 187 (arguing that one of the advantages of tort law over regulation is that the public sets a high standard of care for product safety and development).

<sup>79</sup> See *Wyeth v. Levine*, 555 U.S. 555, 626 (2009) (Alito, J., dissenting) (arguing that juries are “ill equipped” to perform cost–benefit analysis); James Wootton, *Comment, in* REGULATION THROUGH LITIGATION 304, 306–07 (W. Kip Viscusi ed., 2002) (describing mock-juror data that shows how the lack of jury expertise leads to poor regulation, saying that “[a]gency evaluation is conducted by people with a high level of expertise in the relevant field” and that “[j]udges usually have little expertise in the area of scrutiny, and juries have even less expertise”).

<sup>80</sup> BOGUS, *supra* note 78, at 219–20.

<sup>81</sup> JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 72–89 (1989).

<sup>82</sup> Barry R. Weingast, *Regulation, Reregulation, and Deregulation: The Political Foundations of Agency Clientele Relationships*, LAW & CONTEMP. PROBS., Winter 1981, at 147, 149–51.

<sup>83</sup> See, e.g., Ronald F. Wright, *Why Not Administrative Grand Juries?*, 44 ADMIN. L. REV. 465, 512–14 (1992).

<sup>84</sup> Koenig and Rustad see tort law as a form of “social control,” which protects a myriad of individual rights, such as dignity, bodily integrity, and enjoyment of property. KOENIG & RUSTAD, *supra* note 77, at 206.

<sup>85</sup> The book contains only a brief discussion of the jury, which focuses primarily on jury verdicts and tort reform. *Id.* at 74–76.

common law action, like a products liability suit, to hold accountable those who have wronged them.<sup>86</sup> We might think, as I do, that this is good for social equality,<sup>87</sup> or we might think that it is good to provide an additional incentive for companies that make mass-market products to take due care in designing their products. We might call this more efficient deterrence of risky activity, or we might see it as greater social justice.<sup>88</sup> Either way, it is the existence of the common law—and the ability of individuals themselves to bring actions—that acts as a check on corporate power, not necessarily the civil jury as the decision maker in such actions.

The substantive account of juries as checks on corporate power is simply that juries are likely to be more willing to hold corporations accountable than judges.<sup>89</sup> There is certainly evidence that juries hold corporate defendants to a higher standard than they do individual defendants.<sup>90</sup> But are they more likely to be tough on corporations than judges? The evidence says no.<sup>91</sup>

To be sure, juries do award higher damage awards than judges.<sup>92</sup> But juries are, if anything, less pro-plaintiff than judges.<sup>93</sup> Juries frequently judge

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<sup>86</sup> Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1790–91 (2009).

<sup>87</sup> For a related discussion of social equality, see Jason M. Solomon, *Civil Recourse as Social Equality*, 39 FLA. ST. U. L. REV. 243, 252–63 (2011).

<sup>88</sup> For a discussion of the relationship of social justice to tort law, see KOENIG & RUSTAD, *supra* note 77, at 9, 175–204; and Anita Bernstein, *Complaints*, 32 MCGEORGE L. REV. 37, 51–53 (2000).

<sup>89</sup> See Kimberly A. Moore, *Populism and Patents*, 82 N.Y.U. L. REV. 69, 76 (2007) (discussing how juries are more likely to be biased against corporations than are judges in patent law suits); Ann M. Scarlett, *Shareholders in the Jury Box: A Populist Check Against Corporate Mismanagement*, 78 U. CIN. L. REV. 127, 158, 172–73 (2009) (discussing judges' deference in business cases and jurors' potential biases against corporate defendants, saying that "juries tend to award larger damages against corporate defendants than individual defendants"). But see Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327, 352–53 (1998) (arguing that, although juries do, in certain instances, treat corporations differently, many of the popular conceptions about juror bias are statistically unfounded).

<sup>90</sup> See *infra* note 106 and accompanying text.

<sup>91</sup> See VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 38–39 (2000); Hans, *supra* 89, at 341.

<sup>92</sup> Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1, 2 (2004) (noting that jury trials are associated with higher levels of compensatory and punitive damages, even after taking into account variables pertaining to the parties involved, case type, and the county location); Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1065 (1964) (finding that, on average, juries' damage awards were 20% higher than judges reported they would have awarded).

<sup>93</sup> Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1157–58 (1992) (finding that plaintiffs won at trial more often before judges in federal cases); Hans & Vidmar, *supra* note 11, at 227 ("The notion of the pro-plaintiff jury is contradicted by many studies that show both actual and mock jurors subject plaintiffs' evidence to strict scrutiny."); Neil Vidmar,

plaintiffs harshly, as, for example, in years of tobacco lawsuits when juries frequently found for the tobacco companies, sometimes on the ground that the plaintiff assumed the risk.<sup>94</sup> And although research has shown minor differences in the outcomes that judges and juries reach on the same evidence, juries do not find in favor of individual defendants any more than they do for business defendants, both generally and relative to judges.<sup>95</sup>

### C. Repeat Players

One justification for the jury that might combine its possible role as a check on governmental and private power is advanced by Marc Galanter, who defends the jury's role not so much at trial as in the pretrial "litigotiation" process that frequently leads to settlement.<sup>96</sup> Were it not for the jury, Galanter argues, the process would be dominated by the values of the repeat players of judges and lawyers.<sup>97</sup>

Considering the "point of view of regulating the litigotiation process," Galanter points to the advantage of the jury as being "a fresh response less mediated by institutional concerns and more resonant with the emerging moral sense of community."<sup>98</sup> It is not clear how the injection of these values affects outcomes, though one might speculate that a jury's willingness to award higher damage awards might increase settlement amounts. Earlier in the piece, though, he indicates that juries decide cases pretty much along the same lines as judges and are not significantly more generous than judges in damage awards.<sup>99</sup>

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*The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 870 (1998). The findings of Clermont and Eisenberg, though, need to be qualified because we don't know what role selection bias may have played in this difference, as they acknowledge.

<sup>94</sup> See Daniel Givelber, *Cigarette Law*, 73 IND. L.J. 867, 881–82 (1998) (arguing that juries have tended to view tobacco plaintiffs unsympathetically, "given plaintiff[s'] continuation of a habit which millions seem capable of breaking"); see also Frank J. Vandall, *The Legal Theory and the Visionaries that Led to the Proposed \$368.5 Billion Tobacco Settlement*, 27 SW. U. L. REV. 473, 473–74 (1998).

<sup>95</sup> See Hans, *supra* note 31, at 80.

<sup>96</sup> See Galanter, *supra* note 15, at 61 (defining "litigotiation" as the process of "contesting claims in the vicinity of courts, where recourse to the full process of adjudication is an infrequent occurrence but at every stage an important option and threat"). This builds on Galanter's well-known and influential account of the success of repeat players generally in the legal system. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

<sup>97</sup> Galanter, *supra* note 15, at 61.

<sup>98</sup> *Id.* at 90.

<sup>99</sup> *Id.* at 70–72.

A related issue is one of bias. One could argue that judges are more apt to be biased because they owe their office, whether elected or appointed, to particular interest groups or politicians. Indeed, at the state supreme court level, there is evidence that campaign contributions to judges affect the outcomes of cases.<sup>100</sup> State trial judges, however, are more often self-financed,<sup>101</sup> and their campaign contributors tend to be made up largely of local lawyers.<sup>102</sup> Although campaign contributions may not influence state trial judges as much as state supreme court justices, it may be that trial judges favor repeat players, whether or not they are contributors. Indeed, there is some anecdotal evidence to support this.<sup>103</sup>

Part of Galanter's point, then, may be about juries being less susceptible to influence. Because the civil jury is constituted for only one case and then disbands, it would be hard for any interest to gain influence over time.<sup>104</sup>

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<sup>100</sup> See, e.g., Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decisionmaking*, 7 ST. POL. & POL'Y Q. 281 (2007) (finding that campaign contributions are correlated with judges' decisions in a study of decisions by the Supreme Court of Georgia); Kang & Shepherd, *supra* note 58 (finding that the more money judges elected in partisan elections receive from business interests, the more likely they are to decide in their favor); Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623 (2009) (finding evidence that state supreme court judges facing reelection from either Republican or Democratic voters decide cases consistent with their respective preferences and that campaign contributions made judges more likely to support the contributing interest groups' preferences).

<sup>101</sup> See CAL. COMM'N ON CAMPAIGN FINANCING, THE PRICE OF JUSTICE 64, 67 (1995), available at <http://policyarchive.org/handle/10207/bitstreams/216.pdf> (finding in a study of Los Angeles County superior court elections that candidates and their families contributed 46% of campaign dollars, the number jumping to 50% for candidates for open seats and 53% for candidates challenging incumbents); Owen G. Abbe & Paul S. Hermson, *How Judicial Election Campaigns Have Changed*, 85 JUDICATURE 286, 290 (2002) (finding, based on nationwide survey responses, that trial court candidates contribute about 46% of their own campaign funds, a much greater amount than the 27% provided by appellate and supreme court candidates). *But see* Marlene Arnold Nicholson & Norman Nicholson, *Funding Judicial Campaigns in Illinois*, 77 JUDICATURE 294, 298 (1994) (reporting in a study of all levels of judicial election funding in Illinois that the percentage of trial court candidates using self-funding in 1990 amounted to 89% of candidates outside Cook County but only 27% of candidates within Cook County).

<sup>102</sup> See CAL. COMM'N ON CAMPAIGN FINANCING, *supra* note 101, at 67 (providing that 45% of superior court candidates' outside donations came from attorneys, who were especially active in more competitive and uncertain open-seat races); Nicholson & Nicholson, *supra* note 101, at 297 (finding that the largest source of funds for trial judge campaigns in Illinois came from attorneys, who mostly made modest contributions between \$150 and \$300). Meanwhile, Abbe and Hermson's study suggests that outside parties and interest groups, including political parties, labor unions, and business organizations, are about twice as active in higher court elections than in trial court elections. Abbe & Hermson, *supra* note 101, at 294.

<sup>103</sup> For an anecdotal account of the importance of facilitative relationships between a divorce lawyer and judge, see Austin Sarat & William L.F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOC'Y REV. 93, 102 (1986). For an account in the criminal context, see Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2480 (2004).

<sup>104</sup> See Partlett, *supra* note 36, at 1423 ("[The jury's] shifting and impermanent composition restricts the ability of powerful factions and government from suborning the judicial process."). On the other hand, judges

Again, though, Galanter is not talking about what happens at trial, so there has to be an account of how this gets filtered back into the settlement process—an account Galanter does not appear to provide.

Perhaps the idea is that the repeat players have an interest in moving cases along and are therefore too willing to settle. On the plaintiffs' side, perhaps lawyers value the monetary aspects of the litigation to the exclusion of the value of demanding accountability and answers for wrongs—a value that, research shows, many plaintiffs want vindicated in litigation.<sup>105</sup> Indeed, there is evidence from a variety of contexts that repeat players are particularly inclined toward settlement.<sup>106</sup>

But there are other factors that weigh against viewing the jury as a check on repeat players. Recall that the civil jury is not just a lay set of decision makers versus a professional decision maker (the judge), though that is, of course, one major distinction.<sup>107</sup> It is a particular set of decisions—liability or not, and an

may have greater institutional checks to guard against favoritism or the appearance thereof. See Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1426–27 & n. 19 (2004).

<sup>105</sup> See FRANK A. SLOAN & LINDSEY M. CHEPKE, *MEDICAL MALPRACTICE* (2008); Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1 (2000); Gillian K. Hadfield, *The September 11th Victim Compensation Fund: “An Unprecedented Experiment in American Democracy”* 15 (Univ. of S. Cal. Legal Studies Working Paper Series, Paper No. 3, 2005), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1028&context=usclwps>.

<sup>106</sup> See Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1529–45 (2009) (providing an account of how repeat players can collude to settle claims cheaply); see also Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 558–66 (1991) (detailing similar repeat-player effects on settlements in securities litigation); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994) (suggesting that, because of reputational concerns, repeat-player lawyers have incentives to act cooperatively and help clients avoid the prisoner's dilemma in litigation); Jason Scott Johnston & Joel Waldfogel, *Does Repeat Play Elicit Cooperation? Evidence from Federal Civil Litigation*, 31 J. LEGAL STUD. 39 (2002) (finding that, in federal civil cases, attorneys with a history of interaction settle more frequently and have disputes of shorter duration). Analogous accounts in the criminal context can be found in other works. See Bibas, *supra* note 103, at 2480–81 (describing the effects that relationships between prosecutors, judges, and defense counsel have on plea bargaining); Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 913 (2006) (describing the incentives that repeat-player “insiders” possess, which reward cooperation and quick disposition of cases); Allison Orr Larsen, *Bargaining Inside the Black Box*, 99 GEO. L.J. 1567 (2011) (comparing one-shot juries to repeat-player prosecution and defense lawyers who may seek to develop a reputation as cooperative).

<sup>107</sup> See Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 558 (2002) (discussing the value of lay decision making versus professional decision making); see also Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 39–41 (discussing the negative consequences of lay decision making); Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 580 (1987) (“Knowledge of certain topics, therefore, appears not to be common among lay factfinders, and what passes for knowledge in other areas may be bogus.”). But see Joe S. Cecil et al., *Citizen Comprehension of Difficult*

amount in damages—issued in a particular way, through a verdict sheet that does not provide reasons. In contrast, when judges rule on liability after a trial, they will often provide reasons.<sup>108</sup>

The difference is important. For one, a decision from a judge on a mixed question of law and fact is more vulnerable on appeal than a decision from a jury. Part of this is simply greater deference to the jury, but one of the justifications for such deference is the desire to treat the “black box” of the jury as sacred. For another, decisions by judges, whether published or not, are more susceptible to being used by litigants and lawyers going forward as precedent, even if the decisions of trial judges do not have stare decisis weight in other courts.<sup>109</sup> To be sure, jury verdicts are reported on as well and can serve as a kind of precedent for how other juries might rule in the future.<sup>110</sup>

But the decisions and reasons of judges, which can be summarized in local legal newspapers, are a more accessible version of the law to litigants and lawyers who are not repeat players.<sup>111</sup> In other words, the black-box feature of the civil jury gives repeat players an even greater advantage.<sup>112</sup> As people who are regularly in the courtrooms, repeat-player lawyers have a better feel for what has happened with past jury trials—they may have even interviewed jurors in trials of their own—than those who are “one-shotters,” who may even come in from other jurisdictions.<sup>113</sup>

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*Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 773 (1991) (“[J]urors are generally competent and conscientious . . .”).

<sup>108</sup> Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 635 (1995) (“[W]hen judges write opinions, they seek to justify their conclusions, and they do so by offering reasons.”); see also *Rita v. United States*, 551 U.S. 338, 356 (2007) (“[The] requirement [to provide reasons] reflects sound judicial practice. Judicial decisions are reasoned decisions. Confidence in a judge’s use of reason underlies the public’s trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust.”). For another account of the benefits of judicial reasoning, see Chad M. Oldfather, *Defining Judicial Inactivity: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 140 (2005).

<sup>109</sup> Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, LAW & CONTEMP. PROBS., Summer 1998, at 157, 170 (“[A]n important role for the external observer and even the government still exists. In addition, if external monitoring is negligible or minimal, we should not be surprised to see internal norms of behavior evolve away from externally stated rules.” (footnote omitted)).

<sup>110</sup> See, e.g., Ben Depoorter, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 CORNELL L. REV. 957, 967 (2010) (discussing how there is a market among trial lawyers for publications of jury verdicts).

<sup>111</sup> See Joel B. Grossman et al., *Do the “Haves” Still Come Out Ahead?*, 33 LAW & SOC’Y REV. 803 (1999).

<sup>112</sup> See *infra* note 213 and accompanying text.

<sup>113</sup> See *supra* note 106; see also Grossman et al., *supra* note 111, at 803–04 (summarizing some of the advantages that repeat players have in the civil justice system).

The argument here is not that the civil jury clearly benefits repeat players. One can certainly counter that repeat-player lawyers who have relationships with judges might have an advantage in a bench trial. My claim is simply that it is not so clear that the civil jury is the great check on repeat-player influence that Galanter suggests.

On the whole, it is not clear that the function of the jury as a check on governmental and private power, and repeat players generally, can bear very much weight.

## II. LEGITIMACY AND COMPETING CONCEPTIONS OF DEMOCRACY

Perhaps the most pervasive theme in justifying the civil jury is that it provides democratic legitimacy.<sup>114</sup> How exactly this argument works, though, is often unclear in the literature. In this Part, I try to break down the argument into its component parts and evaluate it based on the existing evidence.

This Part will require a brief excursion into democratic theory. As leading democratic theorist Jane Mansbridge has explained, “When empirical political scientists want to answer the question of how well a political system meets democratic norms, they need a democratic theory that will clarify those norms in ways that make it easier to tell when real-world situations conform to or violate them.”<sup>115</sup> The theoretical discussion, though, will remain heavily grounded in the civil jury’s contemporary functions and practices.

Political legitimacy is generally analyzed as two distinct concepts: normative legitimacy and sociological legitimacy.<sup>116</sup> The sociological-legitimacy claim is an empirical claim that citizens perceive the civil justice system as more legitimate and more fair than a system without a civil jury.

We will start, though, with the normative-legitimacy claim. The normative-legitimacy claim is that the outcome of a particular case, or the system as a whole, is worthy of being followed and ought be considered fair because of (a) the identity and selection of the decision maker, (b) the nature of the process

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<sup>114</sup> See Royal Furgeson, *Civil Jury Trials R.I.P.? Can It Actually Happen in America?*, 40 ST. MARY’S L.J. 795, 803 (2009); Nathan Seth Chapman, Note, *Punishment by the People: Rethinking the Jury’s Political Role in Assigning Punitive Damages*, 56 DUKE L.J. 1119, 1121 (2007) (recognizing the “jury’s important political role in the republic as a democratic source of morality”).

<sup>115</sup> Jane Mansbridge, *Rethinking Representation*, 97 AM. POL. SCI. REV. 515, 525 (2003).

<sup>116</sup> For an account of the distinction between normative and sociological legitimacy, see Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT’L L. 596, 601 (1999).



that led to the outcome, or (c) the fact that both are consistent with democratic norms. This is the political component of the normative-legitimacy claim.

This argument is essentially an “ascending” theory of legitimacy emanating from the will or agreement of the people.<sup>117</sup> In contrast to medieval government structures that were given legitimacy through the “divine right of kings” (that is, the idea that legitimacy *descended* from the divine), the jury of lay people—either through its deliberation or its representativeness—*ascends* to give legitimacy.<sup>118</sup>

There is also frequently an epistemic component to the legitimacy claim. The idea is that the normative legitimacy of the civil jury is derived in part from the belief that the decision-making process is likely to get the “right” or “best” answer.<sup>119</sup> Combined, let us say that the political and epistemic components make up a claim about the strength of the jury’s “democratic pedigree.”<sup>120</sup>

Let us also pause on how these normative-legitimacy and sociological-legitimacy claims both relate to one another and cash out for a real-world analysis of the civil jury as a political institution. As to normative legitimacy, the claim is that elites—legal scholars, judges, political scientists, and elected officials—rely on the belief that the civil jury has a stronger democratic pedigree than judges to support the idea that an important political function of the civil jury is to provide something called legitimacy or the perception of

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<sup>117</sup> EDWARD L. RUBIN, *BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE* 146 (2005); WALTER ULLMANN, *LAW AND POLITICS IN THE MIDDLE AGES* 30 (1975).

<sup>118</sup> RUBIN, *supra* note 117, at 147, 157–60 (describing and criticizing the theory of legitimacy behind deliberative democracy).

<sup>119</sup> The political theorist David Estlund has written about the concept of “epistemic proceduralism” as a justification for democracy more broadly. *See* ESTLUND, *supra* note 36, ch. 6. Indeed, he uses a discussion of the criminal jury to help illustrate his broader theory. *See id.* at 136–44. It is essentially a normative-legitimacy claim: a political system is worthy of being obeyed by the citizens who are subject to it because of the virtue of its process.

This epistemic component clearly overlaps with evaluating the civil jury as an adjudicative institution. However, it is necessary to consider it here, at least to a certain extent, because it is part of the basis for the legitimacy claim underlying the civil jury’s value as a political institution.

<sup>120</sup> *See* Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV. 1, 6 (2010) (“Collectively, a policy’s political authority and epistemic authority comprise what I call that policy’s ‘democratic pedigree.’”).

fairness—what we are referring to as sociological legitimacy—to the system.<sup>121</sup>

As to the sociological-legitimacy claim, the idea is that broad and deep support for the civil justice system is a desideratum for a number of possible reasons, including cooperation with the civil justice system itself and, perhaps, compliance with the underlying norms or rights that the civil justice system seeks to protect or promote.<sup>122</sup> The discussion here, though, does not rely on any particular claim about the relationship between normative legitimacy and sociological legitimacy—it may well be that elites are wrong that democratic pedigree has anything to do with sociological legitimacy.<sup>123</sup> But the precise relationship is not necessary to lay out the basic arguments for the normative and sociological legitimacy of the civil jury and begin to evaluate them based on the available empirical evidence.

### A. Normative Legitimacy

The claims about the normative legitimacy of the civil jury trade on two distinct democratic ideals, representative democracy and deliberative democracy,<sup>124</sup> and two distinct democratic processes to reach an outcome in a case, an aggregative account for the representative-democracy model and a

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<sup>121</sup> See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 7 (1966); *Developments in the Law—The Civil Jury*, *supra* note 28, at 1433–36; see also Charles P. Curtis, *The Trial Judge and the Jury*, 5 *VAND. L. REV.* 150, 157–59 (1952).

<sup>122</sup> Craig A. McEwen & Richard J. Mainman, *In Search of Legitimacy: Toward an Empirical Analysis*, 8 *LAW & POL'Y* 257, 258 (1986) (“[V]oluntary compliance is the fundamental observable indicator of legitimacy.”).

<sup>123</sup> The sociological legitimacy of the civil jury among average citizens may have to do more with movies like *Twelve Angry Men*, TV shows like *Law & Order*, and other aspects of popular or legal culture. (I recognize my examples are examples of criminal juries, but I am not sure how many citizens make the distinction.) Or it may mostly have to do with individual citizens’ experiences with jury duty and the experiences of their friends and family. These are important questions, but I do not consider them in any detail here.

<sup>124</sup> These two ideals are not necessarily in tension, but they tend to be in much of democratic theory, and I believe they are best conceived that way here. See, e.g., Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *COLUM. L. REV.* 267, 281–82 (1998) (outlining the fight over “the Madisonian heritage” between pluralists and civic republicans). One could also argue for a third conception: that it is direct democracy at work with the civil jury. Citizens themselves, not representatives, are making the laws to govern their rights and responsibilities. But as Richard Primus has pointed out in the criminal context, it is not direct democracy because the jury is actually not making any rules to govern its own conduct. See Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 *CARDOZO L. REV.* 1417, 1422–23 (1997). To be sure, the jury verdicts act as “precedent” in a loose sense, a signal of what a future jury might do. Even then, though, I think the jury is better thought of as doing the law-applying function, not law making.

“pure” deliberative account as part of the deliberative-democracy model.<sup>125</sup> I consider reference to the ideals as the political component and reference to the processes as the epistemic component of the normative-legitimacy claim. Note that I am not claiming that the civil jury is best described as either an institution of representative democracy or an institution of deliberative democracy. I am claiming that the legitimacy claims for the civil jury trade on or invoke ideals associated with these competing conceptions and rely upon related models of the decision-making process that are also in tension.

## 1. *Representative Democracy*

### a. *The Political Ideal(s)*

The concept of representation generally, and in political theory specifically, is used in a variety of ways.<sup>126</sup> In the context of the civil jury, normative-legitimacy claims appeal to representation in at least three distinct ways: (1) descriptive representation, (2) symbolic representation, and (3) substantive representation.<sup>127</sup> The normative force of the first, though, drives the other two, and so I will focus on it here. Later, I consider whether judges come closer to some kind of ideal of representative democracy.<sup>128</sup>

Descriptive representation is simply the claim that the civil jury looks like the community from which it was drawn. To the extent that twelve people can represent a cross section of the community on things like gender, race, and ethnic background, we say that the jury represents the community.<sup>129</sup> Other

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<sup>125</sup> The literature in democratic theory frequently refers to aggregative and deliberative accounts as competing conceptions or norms of democracy. *See, e.g.*, IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 10 (2003) (describing these as competing conceptions of how to get to the “common good”).

<sup>126</sup> *See* Suzanne Dovi, *Political Representation*, STANFORD ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/archives/fall2011/entries/political-representation> (last modified June 24, 2011) (“The concept of political representation is misleadingly simple: everyone seems to know what it is, yet few can agree on any particular definition. In fact, there is an extensive literature that offers many different definitions of this elusive concept.”).

<sup>127</sup> These terms are all from Hanna Pitkin’s classic book, HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* (1967). A version of substantive representation is called “gyroscopic representation,” presented and explored by Jane Mansbridge in *Rethinking Representation*. Mansbridge, *supra* note 115, at 521.

<sup>128</sup> *See* Mansbridge, *supra* note 115, at 515 (“Conceiving of democratic legitimacy as a spectrum and not a dichotomy, one might say that the closer a system of representation comes to meeting the normative criteria for democratic aggregation and deliberation, the more that system is normatively legitimate.”).

<sup>129</sup> *See, e.g.*, *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (“We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation.”); Laura Gaston Dooley, *Sounds of Silence on the Civil Jury*, 26 VAL. U. L. REV. 405, 418 (1991) (“The jury does not fully represent a fair-cross-section of the community when its very

arguments depend more on the jury being “a cross section of normative viewpoints.”<sup>130</sup> In either sense, we can think of a jury as akin to a mini-legislature under a pluralist theory of democracy, literally sitting around the table, hashing out differences, and negotiating to reach consensus.<sup>131</sup>

To what extent is the civil jury actually representative either demographically or culturally? Several empirical studies have suggested that juries are not very representative bodies demographically.<sup>132</sup> Much of the difficulty in achieving a representative jury stems from methods of selecting jury pools. Voter-registration lists are commonly employed, but those lists tend to underrepresent minorities, the poor, and the less educated.<sup>133</sup> Empirical evidence has suggested that supplementing voter-registration lists with lists of licensed drivers and other sources may still not be effective in creating

structure silences the voices of perhaps the largest group within it.”); Haddon, *supra* note 36, at 98–103 (arguing for the promotion of “authentic representation of racial and social groups to increase awareness of difference in the ways we approach the world” on juries).

<sup>130</sup> Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2409 (1990) [hereinafter Wells, *Tort Law as Corrective Justice*]. Wells uses this idea to help explain why juries are particularly well-suited to decide torts cases. *Id.* at 2351–52; see also Catharine Pierce Wells, *A Pragmatic Approach to Improving Tort Law*, 54 VAND. L. REV. 1447, 1463–64 (2001) (explaining the usefulness of juries in accident tort cases, in which chaotic disputes involving intense emotions, conflicting testimony, and scattered perceptions can be resolved through reasoned discourse between people who themselves have different sympathies).

<sup>131</sup> The tort scholar Martin Kotler defends the legitimacy of the jury’s role on these grounds in an attempt to argue that the alternative to legislatures doing law making in tort is not necessarily judges (who, he argues, lack democratic legitimacy) but juries, which have an attractive democratic pedigree. See Martin A. Kotler, *Reappraising the Jury’s Role as Finder of Fact*, 20 GA. L. REV. 123, 161 (1985). But see Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.–C.L. L. REV. 407, 445 (2005) (arguing that former Illinois Governor George Ryan’s blanket commutation of death sentences was more democratic than the jury death sentences themselves because a jury is “not strictly speaking a democratic body, nor are they truly an effective cross-section of the political community that passes the laws in their names”).

<sup>132</sup> See, e.g., Jeffrey Fagan et al., *Measuring a Fair Cross-Section of Jury Composition: A Case Study of the Southern District of New York* (March 14, 2008) (unpublished manuscript) (on file with the Emory Law Journal) (finding that African-Americans and Latinos were underrepresented in the jury pool of the Southern District of New York, while whites were overrepresented); Joanna Sobol, Note, *Hardship Excuses and Occupational Exemptions: The Impairment of the “Fair Cross-Section of the Community,”* 69 S. CAL. L. REV. 155, 231 (1995) (arguing that, because of the economic-hardship exemption, “in order to be complete, to produce a real cross-section of America, more must be done to include the working class”). Recently, many states have reduced occupational exemption from jury duty; however, the current state of jury duty is still such that “[c]urrent jury practice renders jury service voluntary through hardship, occupational, and other exemptions.” Richard M. Re, Note, *Re-Justifying the Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury*, 116 YALE L.J. 1568, 1602 (2007) (noting that many occupational exemptions still very much exist and pass the “compelling state interests” standard).

<sup>133</sup> Stephanie Domitrovich, *Jury Source Lists and the Community’s Need to Achieve Racial Balance on the Jury*, 33 DUQ. L. REV. 39, 42 (1994).

representative pools.<sup>134</sup> Even if source lists appropriately reflect a community's diversity, moreover, there are further obstacles to jury representativeness in the selection process. There is evidence that minorities are more likely than whites to have outdated addresses; less likely to respond to mailed questionnaires or summonses; and more likely to be disqualified or excused from jury service because of a criminal record, lack of proficiency in English, financial or transportation difficulties, and child-care obligations.<sup>135</sup>

Besides demographics, research shows that people are increasingly "sorting" themselves according to values and lifestyle. That is, it is not only that we have red and blue states.<sup>136</sup> We have red and blue counties—and, even further down than that, census tracts and zip codes.<sup>137</sup> The sorting is not necessarily based on political views but on values like individualism versus

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<sup>134</sup> See G. Thomas Munsterman & Janice T. Munsterman, *The Search for Jury Representativeness*, 11 JUST. SYS. J. 59, 74 (1986); John P. Bueker, Note, *Jury Source Lists: Does Supplementation Really Work?*, 82 CORNELL L. REV. 390, 421 (1997) ("Taken as a whole, the empirical evidence presented refutes the claim that using multiple source lists improves minority representation, at least when the second list is a list of licensed drivers."). Despite problems of underrepresentation, however, the use of voter-registration lists alone has regularly withstood constitutional scrutiny under the fair-cross-section requirement of the Sixth Amendment. See Domitrovich, *supra* note 133, at 56–64.

<sup>135</sup> See Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 355–56 (1999).

<sup>136</sup> This terminology became popular following the 2000 general election. See, e.g., David Brooks, *One Nation, Slightly Divisible*, ATLANTIC, Dec. 2001, at 53, 53 (observing the 2000 electoral map that featured "big blocks of red" and "brackets of blue").

<sup>137</sup> See BILL BISHOP, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART 129–59 (2008) (discussing the homogenization or balkanization of groups of people at the city, county, or community level); see also Claude S. Fischer et al., *Distinguishing the Geographic Levels and Social Dimensions of U.S. Metropolitan Segregation, 1960–2000*, 41 DEMOGRAPHY 37, 53–54 (2004) (noting that, although the traditional income and class segregation is between cities and suburbs, "differences among suburbs sharpened" as well); Joel Lieske, *Regional Subcultures of the United States*, 55 J. POL. 888 (1993) (arguing that—based on packages of variables such as race, social structure, and religious affiliation—the United States can be divided into a number of homogenous subcultures that vary by geographic region); Douglas S. Massey, *The Age of Extremes: Concentrated Affluence and Poverty in the Twenty-First Century*, 33 DEMOGRAPHY 395, 399, 407 (1996) (arguing that the twenty-first century will be marked by "geographic concentration of affluence and of poverty" and that "the social worlds of the poor and the rich will diverge to yield distinct, opposing subcultures"); Charles R. Tittle & Thomas Rotolo, *Socio-Demographic Homogenizing Trends Within Fixed-Boundary Spatial Areas in the United States*, 39 SOC. SCI. RES. 324, 335–36 (2010) (noting that homogenization at census-tract and county levels is most prevalent for "social rank" variables, such as education, occupation, and income).

Data shows that the recession of the late 2000s has increased homogenization among subcultures, at least with respect to some variables, such as race and income. Daniel T. Lichter et al., *The Geography of Exclusion: Race, Segregation, and Concentrated Poverty* 17 (Nat'l Poverty Ctr. Working Paper Series, Paper No. 11–16, 2011), available at <http://npc.umich.edu/publications/u/2011-16%20NPC%20Working%20Paper.pdf> ("[T]he poor are increasingly sorted into high-poverty cities, small towns, and rural places, while the nonpoor are being redistributed into nonpoor communities.").

communitarianism, the kinds of values that research shows influence decisions in civil justice.<sup>138</sup> So we should be cautious about the extent to which we are expecting diversity of “normative viewpoints” in a randomly selected twelve-person jury drawn from a particular county.

So far, we have been talking about the extent to which a jury is representative in the sense that a range of backgrounds or experiences are accounted for or reflected—what is referred to as descriptive representation. But there is another way of talking about representation in democracy, and that is of “acting for” or on behalf of the community.<sup>139</sup>

The jury is seen as doing this symbolically, but might judges better approximate this norm of representation substantively?<sup>140</sup> After all, most state trial court judges are elected,<sup>141</sup> and this might better fit the norm of representative democracy compared to unelected jurors who in some sense represent their community but know they will never be accountable to anyone. Elections are, after all, the fundamental legitimator of contemporary representative democracy—the link between the people and those who exercise power.<sup>142</sup> One could argue that random selection serves the function of representation as well or better,<sup>143</sup> but without more descriptive representation on actual juries, this claim is hard to make.

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<sup>138</sup> The Cultural Cognition Project has both mapped these values and found that they influence outcomes in civil cases. See Dan M. Kahn et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 871–73, 890–906 (2009) (discussing the possibility of juries either being dominated by or excluding subcultures and noting that the “no reasonable juror” standard must take into account the possibility of a jury populated by “members of [a] subcommunity” who might see things a different way).

<sup>139</sup> See PITKIN, *supra* note 127, at 114–15 (referring to “acting for” as a substantive conception of representation); Mansbridge, *supra* note 115, at 520–22. Mansbridge uses the term in the context of a representative who is chosen by members of the community. *Id.* at 521.

<sup>140</sup> See PITKIN, *supra* note 127, at 118 (“What we have here is representation as the substance, or content, or guiding principle of action.”).

<sup>141</sup> Of all state trial judges, about 80% are elected. See Roy A. Schotland, *New Challenges to States’ Judicial Selection*, 95 GEO. L.J. 1077, 1105 (2007) (finding, based on national data compiled by the National Center for State Courts in 2004, that 41% of state trial judges are elected in nonpartisan elections and 38% are elected in partisan elections). Among states that elect trial judges, nine employ partisan elections and eighteen hold nonpartisan elections. See BERKSON ET AL., *supra* note 55.

<sup>142</sup> See James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITTS. L. REV. 189, 222 (1990) (asserting that republican governments derive legitimacy from elections because they express the people’s consent to a government consisting of particular individuals, enact the rules of decision to which people have agreed to elect their leaders, and provide data about the people’s wishes in order to make their choices).

<sup>143</sup> Indeed, one could even argue that this is akin to direct democracy—the strongest pedigree of them all. In Athenian democracy, though the legislative assembly consisted simply of citizens who wanted to

Even appointed judges are arguably more democratic than juries. After all, the judges are appointed by elected officials.<sup>144</sup> Ostensibly, voters know, when voting for governor, for example, that appointing judges is part of the job, and if voters think that the governor is doing a bad job of this, she will be thrown out.

There are strong counterarguments, though, to the judges having a strong democratic pedigree. One is that elections for state trial judges have very few elements of true democracy. The elections are only contested about two-thirds of the time,<sup>145</sup> there is frequently very little information available to the electorate about the candidates,<sup>146</sup> and turnout tends to be very low.<sup>147</sup> Often

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participate, the Executive Council—the body that ran the legislature—was chosen by lot, just like contemporary juries in the United States. See Richard G. Mulgan, *Lot as a Democratic Device of Selection*, 46 REV. POL. 539, 540–42 (1984) (describing positions filled by lot in ancient Athens, including the Executive Council, jury, and various public offices); Richard A. Posner, *Judicial Autonomy in a Political Environment*, 38 ARIZ. ST. L.J. 1, 2 (2006) (“Athens really was a pure democracy. There was no legislature in the sense of a body of representatives; the citizens were the legislators, just as they are in the case of our modern referenda. Any citizen who chose to attend the Athenian Assembly would be a participating legislator.”).

<sup>144</sup> In fifteen jurisdictions (including the District of Columbia), governors appoint state trial judges after candidates are screened and submitted by judicial nominating commissions. See BERKSON ET AL., *supra* note 55. Maine and New Jersey allow the governor to appoint all judges without use of a judicial nominating commission. *Id.* In South Carolina and Virginia, legislatures directly appoint trial judges. *Id.* Four states appoint only some trial judges. *Id.* In Arizona, the governor appoints judges in larger counties, and judges are chosen in nonpartisan elections in smaller ones. *Id.* Indiana varies based on county and type of court; Kansas uses either partisan elections or appointment through judicial commissions based on the district; and Missouri uses mainly partisan elections, but five counties use commissions. *Id.*

<sup>145</sup> Abbe & Herrnson, *supra* note 101, at 288 tbl.1 (finding 30.8% of trial court elections uncontested nationwide, compared to only 9.1% of appellate and supreme court contests). *But see* Schotland, *supra* note 141, at 1092 (suggesting that California superior court elections, which have seen candidates contest far fewer than 5% of seats, are typical). Even when elections are contested, they often are not very competitive. See Abbe & Herrnson, *supra* note 101, at 288 & tbl.1 (finding about 30% of trial court elections to be “uncompetitive,” defined as candidates not receiving between 40% and 60% of the vote). Even though retention elections are by definition uncontested, empirical analysis has demonstrated that sitting judges are retained in an extremely high percentage of those elections. See William K. Hall & Larry R. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340, 343–44 (1987) (finding, in a study of 1864 trial court retention elections, that sitting judges were defeated only 22 times and received a mean affirmative vote of 77.2%).

<sup>146</sup> See Marie Hojnacki & Lawrence Baum, *Choosing Judicial Candidates: How Voters Explain Their Decisions*, 75 JUDICATURE 300, 300–01 (1992) (attributing the lack of information in judicial elections to limited campaigns, minimal media attention, and ethics rules barring discussion of policy issues by candidates); Nicholas P. Lovrich, Jr. & Charles H. Sheldon, *Voters in Contested, Nonpartisan Judicial Elections: A Responsible Electorate or a Problematic Public?*, 36 W. POL. Q. 241, 246 (1983) (finding in a survey of Washington primary voters and Oregon general and primary voters that between a third and half of voters had no information about the candidates; two-thirds of primary-election voters knew none or one candidate; and one-third of the Oregon general-election voters knew no candidates, one candidate, or got some names wrong).

money and backroom deals play a large role in who gets put up by political parties for election.<sup>148</sup> Because judicial elections are low-information contests, those who do participate are strongly influenced by information provided on the ballot, such as party affiliation in partisan elections and information that voters can infer from the names of candidates, including race and ethnicity.<sup>149</sup>

As for appointed judges, many are selected through a “merit system” that gives much of the power to select judges to the local bar associations,<sup>150</sup> which have no political accountability. The role of political considerations in such a system may not be any better than in judicial elections.<sup>151</sup> Meanwhile, elected officials, like governors, rarely hear from constituents about a poor judicial appointment.<sup>152</sup>

The claim here, though, is modest. I am not arguing that judges come closer than juries to the political ideal of representative democracy. Rather, I aim merely to complicate the picture of the civil jury’s claim to normative legitimacy on this score.

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<sup>147</sup> See Philip L. Dubois, *Voter Turnout in State Judicial Elections: An Analysis of the Tail on the Electoral Kite*, 41 J. POL. 865, 869, 872 (1979) (finding that, in major presidential and midterm partisan elections, which themselves garner no more than 55–60% of voters, 90% of those voting also voted in partisan judicial elections, 70% voted in nonpartisan judicial elections, and just 60% voted in retention elections); Schotland, *supra* note 141, at 1092 (“[I]n many states, [elections] are held at times with low turnout and also suffer high ‘drop-off,’ with many voters not casting votes for these down-ballot offices.”). *But see* Lovrich & Sheldon, *supra* note 146, at 247 & n.5 (providing survey responses in which 77% of eligible voters surveyed participated in judicial, nonpartisan primary or general elections but noting that the findings do not account for the possibility of significant response bias).

<sup>148</sup> See, e.g., *Lopez Torres v. N.Y. State Bd. of Elections*, 411 F. Supp. 2d 212, 215–29 (E.D.N.Y. 2006) (describing the path to becoming a state trial court judge in New York as one where local party leaders “control the process”), *aff’d*, 462 F.3d 161 (2d Cir. 2006), *rev’d*, 552 U.S. 196 (2008).

<sup>149</sup> See Lawrence Baum & David Klein, *Voter Responses to High-Visibility Judicial Campaigns*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 140, 141–42 (Matthew J. Streb ed., 2007). When voters are knowledgeable about the candidates, however, they are much more likely to participate in judicial elections. See Nicholas P. Lovrich et al., *Citizen Knowledge and Voting in Judicial Elections*, 73 JUDICATURE 28, 32–33 (1989); Lovrich & Sheldon, *supra* note 146, at 247 (finding that voters who reported having enough information about judicial candidates voted 90% of the time, while voters who said they had no information voted 46% of the time).

<sup>150</sup> See AM. JUDICATURE SOC’Y, JUDICIAL MERIT SELECTION: CURRENT STATUS tbl.1, 2 (2011), available at [http://www.judicialselection.us/uploads/documents/Judicial\\_Merit\\_Charts\\_0FC20225EC6C2.pdf](http://www.judicialselection.us/uploads/documents/Judicial_Merit_Charts_0FC20225EC6C2.pdf). Charts of the states’ various merit-selection plans show that, while their details vary widely, state and local bar associations are often employed in the selection of lawyers on the commission, while governors and other elected officials often select nonlawyers on the commission. See *id.*; see also COAL. FOR JUSTICE, AM. BAR ASS’N, JUDICIAL SELECTION: THE PROCESS OF CHOOSING JUDGES 6 (2008).

<sup>151</sup> See Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675 (2009).

<sup>152</sup> See Schotland, *supra* note 141, at 1092 (“[P]olls over many years have shown startling voter unawareness of even the most visible judicial candidates.”).



*b. The Epistemic Claim: Information Aggregation*

Having explored how juries measure up against the political ideal of representative democracy, we turn to the epistemic claim. This claim is based on a theory of information aggregation.<sup>153</sup> The idea goes back to Aristotle, who discussed the concept of “pooling of perspectives,” which we now refer to as the “wisdom of the multitude.”<sup>154</sup> In the context of the civil jury’s role in deciding normative issues, the idea is that each juror brings her experiences to the table and that this leads to better outcomes than if any one individual decided. This is the idea behind the “aggregation model” of the Condorcet Jury Theorem.<sup>155</sup>

Under this version of the Theorem, we assume that the probability is greater than .5 that each juror will answer correctly on what the outcome ought to be, and so the more perspectives are aggregated, the greater the chances the decision maker (here, the jury) will get it right. That concept—in plain English, twelve heads are better than one—applied to the jury has long been taken as axiomatic by the Theorem.<sup>156</sup>

The problem is that the model relies on the critical assumption that each vote or answer is independent of the others.<sup>157</sup> But of course, the jurors’ final votes are not at all independent, having been reached after discussion with one another. This means that the aggregation model does not apply; we no longer have reason to believe that each juror has a better than even chance of getting it right. In fact, various informational cascades and other biases means that discussion may make it more likely they get it *wrong*.<sup>158</sup>

To the extent that jurors make up their minds, or at least adopt a preliminary view, prior to beginning deliberation with others, the Condorcet Jury Theorem might well fit. Indeed, research shows that jurors usually make

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<sup>153</sup> Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1, 3 (2009).

<sup>154</sup> This term is from Jeremy Waldron. JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 93 (1999). The idea itself, though, is from Aristotle. ARISTOTLE, *THE POLITICS* bk. 3, ch. 11, at 66 (Stephen Everson ed., 1988) (c. 350 BCE); see generally Vermeule, *supra* note 153, at 3 (applying Aristotle’s idea of the “pooling of perspectives” to jury deliberations).

<sup>155</sup> See Paul H. Edelman, *On Legal Interpretations of the Condorcet Jury Theorem*, 31 J. LEGAL STUD. 327, 333–34 (2002) (describing the application of the aggregation model to the Condorcet Jury Theorem).

<sup>156</sup> See, e.g., Landsman, *Appellate Courts*, *supra* note 29, at 885 (“Twelve heads . . . are, pretty clearly, better than one when it comes to assessing evidence presented in open court.”).

<sup>157</sup> See Vermeule, *supra* note 153, at 6 (“[A] crucial engine behind the Theorem is the independence of the group members’ views or guesses.”).

<sup>158</sup> See CASS R. SUNSTEIN, *INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE* 81–91 (2006).

up their minds about a case during the course of a trial,<sup>159</sup> and in nine out of ten cases, the initial straw poll or vote a jury takes predicts the ultimate outcome.<sup>160</sup> However, these preliminary votes only take place, it seems, in a minority of cases.<sup>161</sup>

It might well be that if civil juries in America operated like juries in Brazil—voting by secret ballot without discussion<sup>162</sup>—then this theory could provide a basis for thinking that twelve jurors might better identify who was at fault in an auto accident, for example, than one judge. Or they might be better at identifying the relevant norm of reasonable driving, even before applying it. But this theory only works if the viewpoints in each mind are developed independently, and they are not so in the U.S. civil jury.

It seems, then, that information aggregation cannot support the epistemic component of the representative-democracy claim, at least in the civil jury context. This then undermines the claim that a representative jury is a source of normative legitimacy.

## 2. *Deliberative Democracy*

Deliberative democracy is the other democratic ideal that drives the claim that the jury confers legitimacy. As with representative democracy, we will consider both the political and epistemic components of the claim. Though the ideal is an attractive one, the civil jury appears to fall far short in practice.

### a. *The Political Ideal*

In democratic theory, deliberative democracy became prominent in large part as a reaction to the then-dominant pluralist model, which was associated with a version of the representative-democracy ideal.<sup>163</sup> As two of the leading

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<sup>159</sup> See GASTIL ET AL., *supra* note 28, at 82 (citing Ann Burnett Pettus, *The Verdict Is In: A Study of Jury Decision Making Factors, Moment of Personal Decision, and Jury Deliberations—From the Jurors' Point of View*, 38 COMM. Q. 83 (1990)); Paula L. Hannaford et al., *The Timing of Opinion Formation by Jurors in Civil Cases: An Empirical Examination*, 67 TENN. L. REV. 627, 650 (2000) (“[A] substantial portion [of the jurors] reported making up their minds before final deliberations . . .”).

<sup>160</sup> See GASTIL ET AL., *supra* note 28, at 82 (citing KALVEN & ZEISEL, *supra* note 121).

<sup>161</sup> See *id.* at 95.

<sup>162</sup> James Kachmar, Comment, *Silencing the Minority: Permitting Nonunanimous Jury Verdicts in Criminal Trials*, 28 PAC. L.J. 273, 279 n.41 (1996) (“In Brazil, federal juries do not deliberate, but rather, simply vote by secret ballot at the conclusion of the trial with a majority verdict accepted.”).

<sup>163</sup> For some of the important works, see AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996); AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* (2004) [hereinafter GUTMANN & THOMPSON, *WHY DELIBERATIVE DEMOCRACY?*]; JÜRGEN HABERMAS, *BETWEEN*

contemporary deliberative-democratic theorists describe it, deliberative democracy is

a form of government in which free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future.<sup>164</sup>

Within the jury literature, political theorist Jeffrey Abramson's book, *We, the Jury*, is a leading account of the jury as deliberative democracy.<sup>165</sup> Abramson contrasts the individual-impartiality model—where jurors are loci for reasoned deliberation, and so we try to avoid selecting jurors who have too much relevant knowledge or a particular perspective—with the representative or pluralist model that sees the jury as a cross section of the community and sees multiple perspectives and backgrounds as leading to improved deliberations and outcomes.<sup>166</sup>

The jury is in fact the touchstone for the broader theory of deliberative democracy itself: “When asked to give a practical example of such deliberation, deliberative democracy theorists often cite the jury as an institution that embodies the ideal of using collective reasoned discussion to attain a common verdict.”<sup>167</sup>

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FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., MIT Press 1996) (1992); JANE J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* (1980); and Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *DEMOCRACY* 87 (David Estlund ed., 2002). The deliberative-democracy ideal is closely associated in contemporary legal theory with “civic republicanism,” a school of thought promoted in the 1980s and 1990s by Frank Michelman and Cass Sunstein. See Frank Michelman, *Law's Republic*, 97 *YALE L.J.* 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539 (1988). These scholars tried to rescue republicanism from its classical, elitist roots by reconceiving it as a mode of governance whose primary purpose, as one scholar put it, is a “definition of community values and creation of the public and private virtue necessary for societal achievement of those values.” Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 *VA. L. REV.* 543, 551 (1986).

<sup>164</sup> GUTMANN & THOMPSON, *WHY DELIBERATIVE DEMOCRACY?*, *supra* note 163, at 7.

<sup>165</sup> ABRAMSON, *supra* note 32. Abramson's book focuses on criminal juries, though it does not explicitly limit its discussion to that context. For one of the more extensive discussions in the law reviews on the jury as deliberative democracy, see Iontcheva, *supra* note 32, at 346.

<sup>166</sup> ABRAMSON, *supra* note 32, at 125–26 (discussing the central tenets of both theoretical models). As Abramson put it, “In the end, what is at stake is whether we want jurors to understand their task primarily in terms of deliberation or representation.” *Id.* at 140. *But see* Deborah Ramirez, *Affirmative Jury Selection: A Proposal to Advance Both the Deliberative Ideal and Jury Diversity*, 1998 *U. CHI. LEGAL F.* 161, 162, 176 (arguing that Abramson's dichotomy is a false choice).

<sup>167</sup> Abramson, *supra* note 32, at 125.

Indeed, there are important ways in which the jury appears to meet the deliberative-democracy ideal. The evidence from both mock and actual jury deliberations indicates that people treat one another with civility and respect.<sup>168</sup> There are also genuine exchanges of views that sometimes affect outcomes.<sup>169</sup> Surveys and discussions with jurors after participating in trials show a positive view of the deliberation process.<sup>170</sup> And within the jury room, there is generally the kind of reason-giving practice that is central to the deliberative-democratic conception.

But there are also important ways in which civil jury deliberations diverge from the deliberative-democratic ideal. First, the reasons that justify the decision are not accessible to the people who are bound by the decision—the litigants—let alone the public at large. As part of the public nature of deliberative democracy, reason giving is a critical part of the enterprise. Parties are expected and even required to state their reasons for their positions, and the debate about reasons is expected to be the center of decision making.<sup>171</sup> As Habermas put it, “[N]o force except that of the better argument is exercised.”<sup>172</sup> But juries do not give reasons for their decisions, and so their claim to be deliberative-democracy institutions is on shaky ground.

One can imagine that a “deliberative accountability”<sup>173</sup> might support the jury’s claim to legitimacy, but the jury system would have to be altered considerably to have juries provide reasons for their decisions.<sup>174</sup> The provision of such reasons would strengthen the civil justice system on

<sup>168</sup> See, e.g., Shari Seidman Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1, 34 (2003) (finding, after reviewing videotapes of jury deliberations in fifty Arizona civil jury trials, that, although “[o]ccasionally there are minor personality clashes, and occasionally sharp words, . . . overwhelmingly the jury room atmosphere in [a] sample of Arizona cases is marked by civility”). But see Nicole B. Cásarez, *Examining the Evidence: Post-Verdict Interviews and the Jury System*, 25 HASTINGS COMM. & ENT. L.J. 499, 524–25 (2003) (finding that, in a sample of articles in which jurors discussed their deliberations with the press, twenty-one out of the forty that described the tone of jury-room discussions characterized it as “hostile or discordant,” whereas only eight called the discussions “harmonious, polite or respectful”).

<sup>169</sup> See Marla Sandys & Ronald C. Dillehay, *First-Ballot Votes, Predeliberation Dispositions, and Final Verdicts in Jury Trials*, 19 LAW & HUM. BEHAV. 175, 188 (1995) (indicating that jurors’ initial instincts change in 10% of cases).

<sup>170</sup> See GASTIL ET AL., *supra* note 28, at 98–100.

<sup>171</sup> See GUTMANN & THOMPSON, *WHY DELIBERATIVE DEMOCRACY?*, *supra* note 163, at 43–45 (describing “public justification” as central to deliberative democracy and legitimacy).

<sup>172</sup> JÜRGEN HABERMAS, *LEGITIMATION CRISIS* 108 (Thomas McCarthy trans., Beacon Press 1975) (1973).

<sup>173</sup> See Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1278–94 (2009) (discussing the “deliberative accountability paradigm”); see also RUBIN, *supra* note 117, at 157.

<sup>174</sup> Cf. Staszewski, *supra* note 173, at 1301 (discussing the need for “public-regarding reasons for . . . policy choices” from elected officials).

Dworkin's rule-of-law conception, which envisions law as a theater of debate where different sides participate in an argumentative practice.<sup>175</sup> Under current practice, where juries do not give any reasons for their decisions and the standard of review both by the trial judge and appellate courts shields the jury's decision from meaningful review,<sup>176</sup> this argumentative practice is undermined.

Moreover, although the decision is binding in the sense that the litigants have to follow it, it is not binding on anyone else besides the litigants. If a particular jury decides that a community norm of conduct was violated, the exact same conduct could be held *not* to have violated the norm in a different case.

Deliberative democracy is also characterized by its ongoing and provisional nature—citizens discuss issues, put forward public justifications, and revisit the decisions and justifications down the road in light of further developments and thoughts. As one leading deliberative-democracy theorist put it, “[D]eliberative democracy is an ongoing and independent association, whose members expect it to continue into the indefinite future.”<sup>177</sup> The civil jury is together once, makes its decision, and is on its way.

Deliberative democracy is necessarily public: the discussion necessarily faces outward to fellow citizens, not inward, as in the jury room.<sup>178</sup> In the jury setting, the deliberators cannot discuss what they are doing with those not in the jury and cannot rely on external information.

In sum, there are many ways in which the jury falls short of the deliberative-democracy ideal. What about judges?

Some civic republicans, for example, see judges as the ones who would do the deliberating and reasoning.<sup>179</sup> The idea is that judges issue decisions,

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<sup>175</sup> See RONALD DWORKIN, *LAW'S EMPIRE* 13 (1986) (“Legal practice, unlike many other social phenomena, is *argumentative*.”).

<sup>176</sup> See Robert P. Burns, *Notes on the Future of Evidence Law*, 74 *TEMP. L. REV.* 69, 78 (2001) (“Trial judges are reluctant to direct verdicts and appellate courts, too, appear increasingly deferential to jury verdicts.”).

<sup>177</sup> Cohen, *supra* note 163, at 91.

<sup>178</sup> See Thomas Christiano, *The Significance of Public Deliberation*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* 243, 256–57 (James Bohman & William Rehg eds., 1997) (arguing that “public deliberation” improves democratic outcomes and treats all members of society as equals).

<sup>179</sup> See Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 *HARV. L. REV.* 1, 13 (1979); Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 *HARV. L. REV.* 4, 74 (1986); Michelman, *supra* note 163, at 1525.

members of the public might comment on them in some way, other judges later issue decisions on similar issues, and the public debate continues as a result. To be sure, this kind of deliberation is very much subject to information cascades, where earlier information—say, a prior judge’s decision—is given more weight than it should be in deciding the best answer.<sup>180</sup> But as an approximation of the deliberative-democracy ideal politically, this more external focus may well come closer than the private deliberations of the jury.

Judges are certainly charged with articulating the common law, which is derived from custom and community norms. And though the judges’ roles in articulating the law, whether the common law or otherwise, are most frequently attributed to their skill and training in the kind of moral and logical reasoning that the law involves, there is an alternative view of the judges’ authority to articulate the law—a view held by some of the Founders. And that is that judges—just like the jury in colonial times—could “stand for” their community and reason about the common good simply as representatives of citizens, not because of any particular epistemological claim about access to or skill at legal reasoning.<sup>181</sup>

*b. The Epistemic Claim: Deliberation*

Having seen how the jury falls short of the deliberative ideal, both absolutely and, possibly, relative to judges, we turn to the epistemic claim: that the jury’s deliberation provides legitimacy because it is a mechanism well suited to getting the “right” answer.<sup>182</sup> Note that a distinct use of the word *deliberation* is at work here: group discussion about reasons for an action or decision.<sup>183</sup> This model relies on empirical research about the benefits of this kind of deliberation in certain circumstances and the theoretical work of Jürgen Habermas and others.<sup>184</sup>

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<sup>180</sup> See Vermeule, *supra* note 153, at 32 (“[A] body of precedent generated sequentially may embody reduced epistemic value”).

<sup>181</sup> See SHANNON C. STIMSON, *THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL* 135 (1990); David Millon, *Judges, Juries, and Democracy*, 18 *LAW & SOC. INQUIRY* 135, 157 (1993) (noting that, although “populism” conceives of the jury as speaking for the community, the judge’s role in “professionalism” can be seen as “paralleling the role of the jury”).

<sup>182</sup> One question is what the right answer means in the context of deciding a civil case.

<sup>183</sup> It is important to distinguish this use from “deliberation,” as opposed to intuition, as a method of decision making. That can be done by a single person and has nothing to do with communication.

<sup>184</sup> See HABERMAS, *supra* note 163, at 303–14.

In what follows, I discuss the relevant research on when deliberation can improve decision making. The question is how often these preconditions of high-quality deliberation hold true in the civil jury.

*Cognitive Diversity.* The benefits of deliberation are tied significantly to what is called “cognitive diversity” in the group.<sup>185</sup> For twelve heads to be better than one, those heads have to think differently in order for the group to benefit from different perspectives. Though cognitive diversity is correlated with racial and gender diversity,<sup>186</sup> the best way to maximize cognitive diversity is to have a variety of occupational and educational backgrounds in the jury.<sup>187</sup> We have little evidence as to the extent to which this is the case in civil juries.

*Decision Rule.* In most jurisdictions, civil juries must have either unanimity or an 80% supermajority to reach a verdict.<sup>188</sup> Some evidence, though, indicates that majority rule is better at producing high-quality deliberation than the unanimous or near-unanimous rules that prevail.<sup>189</sup> The reason is that majority rule allows dissenters to speak up without fear of being ostracized as holding up the consensus.<sup>190</sup> Where there is a unanimity rule, group norms act to suppress discussion and dissent that might improve decisions compared to a majority rule.<sup>191</sup> On the other hand, there is also evidence that a majority-decision rule allows dissenters to be ignored.<sup>192</sup>

*Voting Practices.* In some cases, civil juries take some kind of vote or straw poll toward the beginning of deliberations. Research shows that, when such a vote is taken, the jury then approaches a decision talking about possible

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<sup>185</sup> See SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* 290–312 (2007) (describing cognitive diversity and detailing how diverse perspectives can improve decision making and increase the number of potential solutions identified by a group).

<sup>186</sup> See *id.* at 305–09.

<sup>187</sup> See *id.* at 302–05 (describing how training and experiences influence how a person interprets information).

<sup>188</sup> See Saul Levmore, *Conjunction and Aggregation*, 99 MICH. L. REV. 723, 740 & n.33 (2001).

<sup>189</sup> See Tali Mendelberg & Christopher Karpowitz, *How People Deliberate About Justice: Groups, Gender, and Decision Rules*, in *DELIBERATION, PARTICIPATION AND DEMOCRACY: CAN THE PEOPLE GOVERN?* 101, 106–07 (Shawn W. Rosenberg ed., 2007).

<sup>190</sup> *Id.*

<sup>191</sup> See, e.g., *id.*

<sup>192</sup> See Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201, 230 (2006) (concluding that observed civil jury deliberations “demonstrate that thoughtful minorities are sometimes marginalized when the majority has the power to ignore them in reaching a verdict”).

verdicts and compromises, as opposed to discussing the evidence itself.<sup>193</sup> If such a vote is not taken, the jury will tend to discuss different views of the evidence first, and this is more likely to bring out dissenting views and information that might not otherwise be discussed.<sup>194</sup>

*Equality of Participation.* Research shows that the more different views are aired, the better the decision.<sup>195</sup> Similarly, the more jurors feel that there was a deliberation where people participated equally and listened to one another respectfully, the more the jurors feel that the outcome was fair. In other words, those factors contributing to a high-quality deliberation from an epistemic perspective have a political-legitimacy benefit as well.<sup>196</sup> It is not clear how much civil juries in practice approach this ideal. Posttrial surveys show that most jurors tend to think that deliberation was quite good, but social science research also shows that high-status people tend to talk more than others and have undue influence.<sup>197</sup> And minorities tend to shut down and participate less.<sup>198</sup>

*Group Decision Making.* Finally, there are both benefits and pitfalls of group decision making generally that need to be considered in evaluating the jury's deliberative process. The process is hard to evaluate because of the relatively few actual jury deliberations that have been observed and the lack of a metric of correctness to judge any decision.

The benefits of group decision making in the deliberative context include individuals being able to correct one another's biases or cancel one another out. Hearing from multiple perspectives or dissenters can cause people to rethink their initial instincts and get a better answer.<sup>199</sup> On the other hand, information cascades can lead to certain information that is widely known—common knowledge—to be overemphasized, while other information that certain people may have—what are called “hidden profiles”—is never shared with the group.<sup>200</sup> Reputational cascades can also play a negative role, where

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<sup>193</sup> See Reid Hastie et al., *A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages*, 22 LAW & HUM. BEHAV. 287, 305 (1998).

<sup>194</sup> See *id.*

<sup>195</sup> See *supra* note 178.

<sup>196</sup> See GASTIL ET AL., *supra* note 28, at 99–100.

<sup>197</sup> See Caryn Christensen & Ann S. Abbott, *Team Medical Decision Making*, in DECISION MAKING IN HEALTH CARE: THEORY, PSYCHOLOGY, AND APPLICATIONS 267, 273 (Gretchen B. Chapman & Frank A. Sonnenberg eds., 2000).

<sup>198</sup> *Id.*

<sup>199</sup> See CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 74–84 (2003).

<sup>200</sup> *Id.* at 96; see also SUNSTEIN, *supra* note 158, at 81–88.



high-status individuals—such as the foreman—can skew outcomes unduly.<sup>201</sup> And group polarization can lead the initial views of the majority to become even more extreme upon discussion.<sup>202</sup>

In sum, the particular features of the jury that make it unique relative to a judge—the purported “many-minds”<sup>203</sup> benefits of information aggregation and deliberation—are not likely to support a claim of epistemic superiority given the way the jury actually functions, unless laypersons have greater access to community norms, an argument I review below.

### B. *Sociological Legitimacy*

Now that we have reviewed the jury’s claim to normative legitimacy, we turn to sociological legitimacy. Recall that the sociological legitimacy claim is an empirical claim that citizens perceive the civil justice system as more legitimate and fairer than a system without a civil jury. And let us assume that legitimacy for civil justice is an important goal for at least two possible reasons: first, legitimacy might affect compliance with the law, and second, legitimacy might affect the accuracy or fairness of jury determinations in future cases.<sup>204</sup>

Are litigants more likely to comply with, or perceive as more legitimate, a judgment produced by a jury or a judge? We do not have good data to answer that question right now. Survey data indicate that people prefer juries for civil as well as criminal cases.<sup>205</sup> On the other hand, the federal courts, at least as an institution, tend to receive fairly strong support: a recent survey indicated that

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<sup>201</sup> See SUNSTEIN, *supra* note 199, at 74–81.

<sup>202</sup> See SUNSTEIN, *supra* note 158, at 92–96.

<sup>203</sup> Vermeule, *supra* note 153 (summarizing and critiquing the “many-minds” arguments).

<sup>204</sup> These are certainly examples of areas where, once we have some theoretical and conceptual clarity on what we think is happening, we would want to test it with more empirical research.

<sup>205</sup> See HARRIS INTERACTIVE, JURY SERVICE: IS FULFILLING YOUR CIVIC DUTY A TRIAL? 11 (2004), available at [http://www.abanow.org/wordpress/wp-content/files\\_flutter/1272052715\\_20\\_1\\_1\\_7\\_Upload\\_File.pdf](http://www.abanow.org/wordpress/wp-content/files_flutter/1272052715_20_1_1_7_Upload_File.pdf) (finding that 75% agreed with the statement, “If I were a participant in a trial I would want a jury to decide my case, rather than a judge” (internal quotation marks omitted)). Mary Rose’s recent study, sorted by racial demographics, seems to show that most demographic groups would prefer a jury to try their case, whether criminal or civil, defendant or plaintiff. Mary R. Rose et al., *Juries and Judges in the Public’s Mind: Race, Ethnicity, and Jury Experience*, 93 JUDICATURE 194, 199 (2010). African-Americans without previous jury experience, however, were more skeptical of the civil jury. *Id.* But see, e.g., CLARUS RESEARCH GRP., NATIONAL VOTER SURVEY: HEALTH CARE REFORM AND THE LEGAL SYSTEM 2009, at 8 (2009), available at [http://www.philipkhoward.com/images/uploads/CommonGood\\_PPT\\_Clarus-poll-sept10-09\\_ppt.pdf](http://www.philipkhoward.com/images/uploads/CommonGood_PPT_Clarus-poll-sept10-09_ppt.pdf) (finding, in a 2009 survey, that 53% agree and 41% disagree with the statement, “Lawsuits that involve complex and technical issues should be decided by expert judges and not by juries” (emphasis omitted)).

62% of Americans had at least some confidence in the lower federal courts. This might mean federal judges are seen as fair.<sup>206</sup>

State judges, or judges generally, tend to do slightly less well. Seventy-six percent of people in one survey believed that campaign contributions affect how a judge decides issues.<sup>207</sup> One might speculate that voters think that appointive systems are more legitimate, but a recent poll conducted by the Justice at Stake Campaign indicated otherwise, with approximately 75% of voters preferring election of judges.<sup>208</sup> Another poll by the ABA indicated that only 32% of Americans had high levels of confidence in judges,<sup>209</sup> and polls also have consistently shown that Americans think the justice system generally favors wealthy persons.<sup>210</sup> On the other hand, there are some indicators that people support judges exercising their discretion to take cases away from juries.<sup>211</sup>

It is difficult to draw conclusions from this kind of survey evidence. In a world where we have the jury and frequently glorify it, it should not be surprising that people say they like juries. But that does not do much to answer the question of what people would think of a world in which judges decided more issues more often. And it does not answer the question of the legitimacy of individual verdicts, as opposed to the overall legitimacy of the system.

Why might people be more likely to view jury decisions as fair or legitimate? Perhaps juries are seen as more free from bias because they have no stake in the system itself.<sup>212</sup> Or perhaps lay people are simply deemed more worthy of trust than lawyers or elected officials, which many judges are.

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<sup>206</sup> Sarah C. Benesh et al., Public Perceptions of the Lower Federal Courts 14 (Aug. 3, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1443434>.

<sup>207</sup> See GREENBERG QUINLAN ROSNER RESEARCH INC. ET AL., JUSTICE AT STAKE FREQUENCY QUESTIONNAIRE 4 (2001), available at [http://www.justiceatstake.org/media/cms/JASNationalSurveyResults\\_6F537F99272D4.pdf](http://www.justiceatstake.org/media/cms/JASNationalSurveyResults_6F537F99272D4.pdf).

<sup>208</sup> See *id.* at 7.

<sup>209</sup> See *American Bar Association Report on Perceptions of the U.S. Justice System*, 62 ALB. L. REV. 1307, 1320–21 (1999).

<sup>210</sup> See Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1157 (1996).

<sup>211</sup> See, e.g., CLARUS RESEARCH GRP., *supra* note 205, at 5 (finding that 74% agree with judges having discretion to dismiss lawsuits that “they believe to be without legal merit” before the case goes to a jury).

<sup>212</sup> See, e.g., Michael R. Dimino, Sr., *Accountability Before the Fact*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 451 (2008) (discussing the politics of reelection and judging); James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and “New Style” Judicial Campaigns*, 102 AM. POL. SCI. REV. 59, 69 (2008) (finding, through survey data, that campaign contributions to judicial candidates strongly harm the legitimacy of courts). *But see* Keith J. Bybee, *The Rule of Law is Dead! Long Live the Rule of Law!* 18–19, 25, 28–30 (Jan. 1, 2009) (unpublished manuscript), available at <http://surface.syr.edu/cgi/>

It might also be that the black box of the jury is a virtue for legitimacy purposes.<sup>213</sup> Because jurors' identities are not known to the broader public, they can make difficult decisions and avoid taking the heat.<sup>214</sup> In contrast, if judges were to decide things like whether the Ford Explorer was defectively designed, for example, they would soon find themselves targets of vitriol—much like the federal judges who ordered schools desegregated—from corporate America, Ford shareholders and workers, and the Governor of Michigan if they decided against Ford or unhappy Explorer owners if the judge ruled in favor of Ford.<sup>215</sup> But as George Priest has pointed out, these kinds of value-laden decisions are relatively rare in the context of the day-to-day business of civil justice.<sup>216</sup>

We might also ask, though, why jury decisions are not perceived as more legitimate or fair than they are. After all, surveys also indicate that most Americans think that “plaintiffs get too much”<sup>217</sup>—and it is juries that are doing the giving. Perhaps some have been convinced by the business community that juries have redistributionist tendencies or are otherwise biased against defendants.

It may also be that certain features of the jury as decision maker cut against legitimacy. Research by Tom Tyler and colleagues, for example, indicates that assessments of procedural justice, which includes a sense that decision making

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viewcontent.cgi?article=1053&context=lawpub (finding that the public perceives in apparent contradiction that judges are both political and impartial actors, and suggesting that judges can maintain legitimacy despite such a tension).

<sup>213</sup> See *Developments in the Law—The Civil Jury*, *supra* note 28, 1434 (“The transient, ad hoc jury operates as a black box: jury verdicts are sufficiently opaque and complex to prevent any detailed estimation of jurors’ deliberative processes.”); Julie A. Seaman, *Black Boxes*, 58 EMORY L.J. 427, 465 (2008) (relating the argument that the jury system’s legitimacy would be undermined “were the black box to be opened to public view”).

<sup>214</sup> See Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1196–97 (1979) (observing that this opacity and complexity is contingent on the particular institutional features that currently characterize the civil jury system); *see also* Clark v. United States, 289 U.S. 1, 13 (1933) (“Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.”); Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886 (1983) (arguing that juries’ deliberations should not be publicly disclosed).

<sup>215</sup> See GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 17–19, 57–64, 186–89 (1978); Nockleby, *supra* note 28, at 8; Kalven, *supra* note 92, at 1062 (describing the jury’s function here as a “lightning rod for animosity”). *But see* George L. Priest, *Justifying the Civil Jury*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra* note 10, at 103, 124–26 (disputing the relevance of this argument to all but a handful of cases).

<sup>216</sup> See Priest, *supra* note 215, at 124–26.

<sup>217</sup> See *supra* note 70 and accompanying text.

is rule based and consistent, are a key determinant of perceptions of legitimacy and then compliance.<sup>218</sup>

So it may be that the structural features of jury decision making—the lack of reason giving and the concomitant lack of precedential value (meaning like cases may not be treated alike)—means that jury decisions are perceived as less legitimate than decisions made by judges. And it is not clear that we have empirical evidence on point to help us answer how the various legitimacy strengths and weaknesses of jury versus judge decision making shake out.<sup>219</sup>

Perhaps the presence of the jury as decision maker is less important in individual decisions, but it helps secure the legitimacy of that system as a whole.<sup>220</sup> Evidence for or against this is difficult to come by as well. Certainly we can look at other countries,<sup>221</sup> including England, where the U.S. civil jury originated, and see that its use of judges in civil cases does not appear to have harmed the legitimacy of their civil justice system.<sup>222</sup>

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<sup>218</sup> Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, in 30 CRIME AND JUSTICE: A REVIEW OF RESEARCH 283, 299–301 (Michael Tonry ed., 2003).

<sup>219</sup> See Robbenolt, *supra* note 11, at 471 (“Compared to the extensive study of the decisionmaking of jurors and juries, there has been relatively little examination of trial judges’ decisionmaking, and even fewer studies have directly compared the decisionmaking of juries and judges. While there are reasonable arguments for why judges and juries might differ in how they make legal decisions, these arguments are, in the absence of more research, speculative at best.” (footnotes omitted)).

<sup>220</sup> See, e.g., Stanley Marcus, “*Wither the Jury Trial*,” 21 ST. THOMAS L. REV. 27, 30 (2008) (“I submit to you that what we are talking about is the very legitimacy of our judicial system in the eyes of our citizens, in other words, the very foundation of the rule of law in our political culture. I believe we cannot overstate the importance of the public not only being able to witness the judicial process, but of participating . . . [on the jury] as well.”); see also DAVID B. ROTTMAN, NAT’L CTR. FOR STATE COURTS, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS—PART I: FINDINGS AND RECOMMENDATIONS 4 (2005) (finding that only service as a jury member increases the average approval of California courts), available at [http://www.courts.ca.gov/documents/4\\_37pubtrust1.pdf](http://www.courts.ca.gov/documents/4_37pubtrust1.pdf); Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381, 2439–40 (1999) (suggesting, in the criminal context, that, by engendering in jurors a sense of responsibility for their judgments, the jury lends legitimacy to the law).

<sup>221</sup> See Hein Kötz, *Civil Justice Systems in Europe and the United States*, 13 DUKE J. COMP. & INT’L L. 61, 73 (2003) (asserting that civil jury trials have “almost disappeared” in England and “withered to insignificance” in Canada and Australia); Justin C. Barnes, Comment, *Lessons from England’s “Great Guardian of Liberty”: A Comparative Study of English and American Civil Juries*, 3 U. ST. THOMAS L.J. 345, 345 (2005) (“[T]he civil jury is a dying institution: the United States remains one of the last jurisdictions to guarantee the civil jury right.”).

<sup>222</sup> See Christopher Slobogin, Response, *The Perils of the Fight Against Cognitive Illiberalism*, 122 HARV. L. REV. F. 1, 4 (2009), <http://www.harvardlawreview.org/media/pdf/slobogin.pdf> (“European court systems do not appear to have a major legitimacy problem despite the fact that they routinely rely on judges or judge–jury panels rather than lay-only juries to answer most factual questions.”); Barnes, *supra* note 221, at 361 (“It seems the English people did not consider the civil jury all that essential to their liberties, or, perhaps more realistically, they did not see the jury as essential to the fair adjudication of cases. The difference

Moreover, the sociological-legitimacy claim is undermined by the fact that 96% of state court civil trials—where most civil trials take place—are bench trials.<sup>223</sup> It may be that the minority of trials that are decided by juries are propping up the rest of the civil justice system. Or perhaps it is citizens' mistaken belief that the civil system is made up of mostly or all jury trials that provides legitimacy. Both of these, though, seem like slender reeds to support the civil jury's claim to sociological legitimacy. And at a time when faith in the civil jury appears to be falling, it seems odd to justify the civil jury based on the fact that it provides citizens with a sense that the system is fair or legitimate, or that justice is being done.

To be sure, this is an area where more empirical research would be helpful. We can imagine experimental studies where individuals are taken through a mock dispute that is then resolved by a judge or jury, and we can see if it makes a difference in perceptions of fairness. In doing so, of course, we would have to simulate how the respective institutions actually work: specifically, that the judge provides reasons, and the jury does not. Indeed, there is considerable evidence in the procedural-justice literature indicating that providing reasons to a person if she does not like the outcome can have a significant impact in convincing that person that the decision was fair.<sup>224</sup> Ideally, we would want a controlled, real-world experiment where cases were randomly assigned to juries or judges for trial, and perceptions of legitimacy were measured afterwards.

For now, it appears we ought to be cautious about claiming too much for the civil jury and its benefits for democratic legitimacy.

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between the United States, where the jury right is still seen as one of the great barriers protecting liberties, is startling to say the least.”) *But see* Carrington, *supra* note 29, at 90 (noting that the jury is seldom used in civil cases in England, Canada, and Australia, but arguing that, compared to the United States, those countries have different histories, parliamentary systems in which the legislature is supreme, a diminished political role for courts, and less need for the moral support that arises out of community participation in decisions).

<sup>223</sup> Clermont & Eisenberg, *supra* note 93, at 1127 n.7. The authors attribute this to the state courts' heavy domestic relations and estate dockets. *Id.*

<sup>224</sup> Much of this research is done in the workplace context. *See, e.g.*, Robert J. Bies & Debra L. Shapiro, *Interactional Fairness Judgments: The Influence of Causal Accounts*, 1 SOC. JUST. RES. 199 (1987) (examining in organizational contexts the effects of giving justifications on individuals' judgments of interactional fairness); Daniel P. Skarlicki & Robert Folger, *Retaliation in the Workplace: The Roles of Distributive, Procedural, and Interactional Justice*, 82 J. APPLIED PSYCHOL. 434 (1997) (examining the relationship between organizational justice and reactions by disgruntled employees from perceived unfairness).

### III. FROM LOCALISM TO COMMUNITY

We have now seen, then, two principal justifications that have long been used for the civil jury as a political institution. The check-on-government-power justification seems a poor fit for today's civil justice system. And as a check on corporate power, the civil jury seems an unlikely candidate given the evidence that juries and judges decide cases largely the same way.

The civil jury may well provide some democratic legitimacy, but given falling support and the legitimacy tradeoff that comes from not supplying reasons, it is hard to have much confidence in this claim. On the existing evidence, then, neither the check-on-power justification nor the legitimacy justification appear to be up to the task.

Two important justifications remain: (1) that the jury serves to inject community norms into the legal system and (2) that jury service educates citizens for democracy, increasing political and civic engagement. We will start with the community-norms justification and then turn to the democratic-citizenship justification.

Like the ascending theories of legitimacy from representative or deliberative democracy, the argument about community norms has political and epistemic components.<sup>225</sup> But the community-norms story is about more than legitimacy. It is a functional or structural justification and a variant of the localism justification at the Founding: the importance of preserving local self-rule.<sup>226</sup>

By identifying, perhaps creating, and certainly applying norms of right and wrong conduct, the civil jury is exercising a right of self-government to which it is normatively entitled as, collectively, a representative of the community.<sup>227</sup> In generating and applying such norms, the community helps constitute itself as a community.<sup>228</sup> This has value in its own right and also helps generate

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<sup>225</sup> For an overview of each, see Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 694 (1992).

<sup>226</sup> *Id.* (citing Michael Walzer, *Philosophy and Democracy*, 9 POL. THEORY 379, 397 (1981)).

<sup>227</sup> Michael J. Sandel, *Introduction to LIBERALISM AND ITS CRITICS* 1, 5 (Michael J. Sandel ed., 1984).

<sup>228</sup> *Id.*; see also Sunstein, *supra* note 163, at 1556 (“[P]olitical participation is not only instrumental in the ordinary sense; it is also a vehicle for . . . feelings of community . . .”).

legitimacy for the institution.<sup>229</sup> In what follows, I unpack this argument and examine its components.

### A. *Political Ideal*

The political ideal is that the civil jury is at the heart of local self-governance. It is not simply that its members have unique access to community norms that already exist. It is that by serving on the jury, its members participate in the making of such norms, and this very act is part of what helps constitute a community. That is, a community in a democratic society is one that works together to govern itself by creating and applying norms that govern the conduct of members of the community.

This kind of claim can be found in part in Anti-Federalist rhetoric at the time of the Founding, is perhaps best traced more recently to communitarian writers such as Michael Sandel, and has been imported into legal theory by scholars like Gerald Frug.<sup>230</sup>

#### 1. *A Way of Constituting Community*

There are a few problems with this claim, though, both conceptually and empirically. The first question, of course, is what is the relevant community. With the civil jury, the community is geographic, and in a sense defined backward with reference to the pool from which the jurors were drawn. In the context of state trials, where most civil cases happen, the community is the county. Most state trial courts are organized by county and draw their jurors from that county.<sup>231</sup>

Descriptively, there are no doubt places in the country where individuals conceive of their county as a meaningful community, but it is unclear how many. Moreover, there is the question of how plausible it is to describe counties as loci for particular and unique norms. I live in Richmond, Virginia, near Henrico, Goochland, and Chesterfield Counties. Do each of these counties

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<sup>229</sup> See Nancy Gertner, *Is the Jury Worth Saving?*, 75 B.U. L. REV. 923, 928 (1995) (reviewing ADLER, *supra* note 36) (“An outcome is legitimate not because of its intrinsic value—its accuracy—but because of lay participation and the application of lay values to impersonal, neutral laws.”).

<sup>230</sup> See GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 73–112 (1999); see also Gardbaum, *supra* note 225 (summarizing and analyzing the various claims about community in legal theory).

<sup>231</sup> Laura G. Dooley, *The Dilution Effect: Federalization, Fair Cross-Sections, and the Concept of Community*, 54 DEPAUL L. REV. 79, 88 (2004) (comparing federal courts to state courts, which are “organized by county”).

have different norms for what constitutes safe driving? Medical malpractice? Designing defective products? Count me as a skeptic.

Normatively, it is not clear that we *want* counties to play such a role. The boundaries of counties have been sites for contestation over issues of race and class throughout American history, continuing today.<sup>232</sup> When more affluent or white residents want to stop paying taxes for services that benefit poor minority residents, they will frequently try to get the county line redrawn or form a separate county.<sup>233</sup> The word *community* and the ability to define norms for “our community” have a nostalgic appeal. But as many scholars have pointed out, communities have always been about not just who belongs but who does not belong.<sup>234</sup>

Even if we were to change jury pools to be drawn from particular towns or neighborhoods, as opposed to counties, it is not clear that the community-norms-as-self-governance story works there either. The story about communities having the right to self-govern is premised in large part on a notion of community premised on consent.<sup>235</sup> That is, individuals make decisions on where to live based on a conscious, voluntary choice about what kinds of values they want to live their lives by.<sup>236</sup> Or in economic terms, they choose a locality that offers them the bundle of municipal services they want at

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<sup>232</sup> Although there are procedures for annexation, present-day county boundaries are virtually fixed. Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act*, 102 *YALE L.J.* 105, 114 (1992). For a few examples of the history of county formation, see sources cited *infra* note **Error! Bookmark not defined.** When counties today do change, typically it is because they are annexed by a city. Race-income differences are political issues that greatly affect the likelihood of this happening. See, e.g., Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 *STAN. L. REV.* 1115, 1142 (1996) (“[F]ormal boundary lines may make an area’s ethnic composition or social status more evident, thereby directly facilitating an interjurisdictional sorting . . .” (citing GREGORY R. WEIHER, *THE FRACTURED METROPOLIS: POLITICAL FRAGMENTATION AND METROPOLITAN SEGREGATION* 87–143 (1991))); Thomas R. Dye, *Urban Political Integration: Conditions Associated with Annexation in American Cities*, 8 *MIDWEST J. POL. SCI.* 430, 439–42 (1964) (noting that race and class, categorized by county, may play important roles in determining where people decide to live).

<sup>233</sup> See, e.g., *A Georgia County Divided Against Itself*, MSNBC.COM (Jan. 25, 2007, 10:14 AM), [http://www.msnbc.msn.com/id/16773267/ns/us\\_news-life/t/georgia-county-divided-against-itself/](http://www.msnbc.msn.com/id/16773267/ns/us_news-life/t/georgia-county-divided-against-itself/) (describing a situation in which class differences were an issue in redrawing county boundaries).

<sup>234</sup> See, e.g., Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L. REV.* 903, 941 (1994) (“[C]ommunities tend to be exclusionary . . .”); Richard C. Schragger, *The Limits of Localism*, 100 *MICH. L. REV.* 371, 375 (2001) (“[C]ommunity . . . exists in relation to (and to the exclusion of) other, equally plausible alternative communities.”).

<sup>235</sup> Local government scholar Richard Schragger calls this a “contractarian” account of community. See Schragger, *supra* note 234, at 387–93.

<sup>236</sup> *Id.* at 387, 390.



the lowest possible tax rate.<sup>237</sup> Having done so, the argument goes, they are entitled to self-govern to maintain control over the norms or values they chose along with the other members of their community.<sup>238</sup>

Certainly, it is plausible to see the choice for many of whether to live in a city or suburb, for example, as having this character of conscious choice about values or lifestyle. But individuals decide where to live based on a number of factors, including where they grew up, can find work, and can afford housing for their families. Some people endure commutes of as much as an hour or more each way because they prefer a particular lifestyle, but others do so because that is where they could find an affordable home.

Of course, what people consider their community in the twenty-first century is far different than what people considered their community in the late eighteenth. Communities are not only geographic, and when people live and work in different places, they are less so. As geographic communities have become more heterogeneous, people identify their neighbors as their community less often. Indeed, with residents living increasingly far apart in the suburbs and exurbs, people often don't know their neighbors at all.

Other bases for communities abound. Communities can be religious, racial or ethnic, or associated with a shared experience, like where one went to school. Moreover, with the Internet and social networking, it is easier than ever for people to form or join new communities based on shared interests or identities, such as home-schooling parents, gay teenagers, or fans of the teen heartthrob Justin Bieber.

## 2. *Local Self-Rule and Political Participation*

### a. *Defining Community Norms*

The historian William Nelson identifies preserving local self-rule as “[t]he main function that the jury can serve” even today.<sup>239</sup> Here, local self-rule means simply the ability of political jurisdictions below the state level—usually municipalities and counties—to make laws governing their community. But how relevant is this function in contemporary America? The evidence is mixed. Nelson asserts that “few Americans really care about preserving local

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<sup>237</sup> See Charles M. Tiebout, *A Pure Theory of Local Public Expenditures*, 64 J. POL. ECON. 416 (1956).

<sup>238</sup> See Schragger, *supra* note 234, at 387.

<sup>239</sup> Nelson, *supra* note 74, at 1662.

power”<sup>240</sup> and that “[s]tates’ rights and the rights of localities . . . come into play not as values in themselves, but only as means to some other end.”<sup>241</sup> But there is research that shows that citizens do care about federalism values, independent of the particular outcome on an issue.<sup>242</sup> This could translate to the local level as well.

In this context, though, the argument has to be that citizens care about retaining lay (not judicial) control over the definition of what conduct is reasonable and unreasonable, specifically in the instances in which tort cases most commonly arise: driving, upkeep of premises (slip-and-fall cases), medical malpractice, and design of consumer products.<sup>243</sup> It would be surprising if citizens felt this way for any of these categories of cases, but let us consider a few possibilities.

Perhaps medical malpractice is one area where we might want local norms. In the context of debates over the new federal health care law, one scholar has suggested that, because “[p]rofessional standards for the practice of medicine raise religiously and culturally sensitive issues of life and death, physical privacy, and acceptable risk-taking,” subnational jurisdictions might well take the lead in regulation.<sup>244</sup> He was referring to states, but the same argument could apply to counties.

Products liability might be another good example. I discussed above whether it made sense to think about civil juries’ ability to decide issues like what constituted acceptable risks and warnings in product design as a check against corporate power.<sup>245</sup> But that was based on a conception of the brooding omnipresence of civil juries nationwide casting their shadows on the decisions of manufacturers.

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<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 1663.

<sup>242</sup> See Cindy D. Kam & Robert A. Mikos, *Do Citizens Care About Federalism? An Experimental Test*, 4 J. EMPIRICAL LEGAL STUD. 589 (2007).

<sup>243</sup> See STEVEN K. SMITH ET AL., U.S. DEP’T OF JUSTICE, NCJ 153177, TORT CASES IN LARGE COUNTIES 2 tbl.1 (1995), available at <http://bjs.gov/content/pub/pdf/TCILC.PDF> (finding that, in the nation’s largest seventy-five counties, auto cases represented 60.1% of tort cases filed in state courts, premises liability cases 17.3%, product liability cases 3.4%, and medical malpractice cases 4.9%).

<sup>244</sup> See Rick Hills, *Healthcare and Federalism: Should Courts Strictly Scrutinize Federal Regulation of Medical Services?*, PRAWFSBLAWG (Aug. 14, 2011, 11:39 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2011/08/healthcare-and-federalism-should-courts-strictly-scrutinize-federal-regulation-of-medical-services-.html>.

<sup>245</sup> See *supra* text accompanying notes 89–91.

In this context, the question is whether individual communities—really, counties—should be able to decide for themselves what are acceptable risks of product design as an important component of local self-governance.

Probably not. First, as a practical matter, manufacturers cannot make different product designs and tailor different warnings to different counties. Second, the norms in this context are unlikely to differ from county to county. When I buy a Ford Bronco, I would like it to not have a significant risk of rollover, and I am guessing that people who live in rural Virginia feel the same way. Similarly, consumers in both red counties and blue counties probably want to be warned of non-negligible risks of side effects of prescription medicine. Though to be sure, if things go wrong, there may be differences in how likely people are to blame the drug company or sue.

Or consider what is frequently a statutory tort under state law: consumer fraud. Your friendly neighborhood fireworks distributor is advertising his wares across county lines certainly and often intentionally across state lines. Or a ski-resort operator runs radio ads in markets that reach multiple counties and even states, claiming, “Fresh Snow—ski with us, and you’ll have a nice, smooth ride!” Now it is certainly possible that different counties could have different norms about how much puffery is permissible. If you want to do business here, the county says through the jury, you have to live by our rules. But it makes little sense, as a matter of institutional design, that we would want the content of a state statute’s mandates to be defined on a county-by-county basis. With the statute enacted on a statewide basis, county-level definitions would lack legitimacy or normative force.

Of course, because of the nonprecedential nature of jury decisions, a formulation and application of a norm in a particular case is not even a decision by a county at all. It is a decision by a particular jury that could be contradicted by a different jury in the next courtroom on quite similar facts involving the very same defendant.

Just as appeals to states’ rights have been largely left behind in favor of appeals to federalism, the language of local self-rule, in this context, has turned into an argument about community norms. But it is not clear that there are many contexts in the civil justice system where defining norms locally ought to be valued or that the change in label ought to add to the self-rule concept’s normative appeal.

*b. Small-Scale Participation*

Another argument for the civil jury as a site for community self-governance—and perhaps a more appealing one—is an argument about scale. The argument essentially goes like this: Citizen participation in governance is important. But in today’s society, individual participation in national and state affairs is simply not practical; the scale is too big for individuals to participate in a meaningful way. Therefore, such participation has to happen at a local level.<sup>246</sup>

This participation argument has always been one of the primary arguments in support of localism.<sup>247</sup> The civil jury is a well-established site of local self-governance, and with its manageable size of twelve people, it has long been and continues to be an excellent place to achieve this participation.<sup>248</sup> So the argument goes.

This argument seems quite reasonable on its face, but there are a few questions worth exploring. First, assuming we do want participation in local self-governance, are the kinds of issues that a civil jury deals with the ones that are most important for citizens to be engaged in? Recall that, at the time of the Founding, civil juries did things that were much different, like collecting taxes or setting land-use policy—the kinds of things that various municipal governments do now. Perhaps encouraging more community school boards of the kind they have in Chicago<sup>249</sup> or having citizen juries provide input into budgeting, as they do in British Columbia,<sup>250</sup> are better ways to involve citizens in local self-governance.

Even if we think particular communities do not have norms of conduct, though, or that a particular community does not have a strong interest in defining said norms, it may be that there is an interest in a community defining

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<sup>246</sup> See Schragger, *supra* note 234, at 398 (associating local participation with a “dualist” notion of community that “emphasizes the individual’s engagement in a process of collective self-governance”).

<sup>247</sup> See Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 632–34 (2001). By “localism,” I mean self-governance at a small-scale territorial level.

<sup>248</sup> See *Developments in the Law—The Civil Jury*, *supra* note 28, at 1438 (“[T]he jury is valuable not because of the independent substantive desirability of any particular outcomes that result, but because it is an institution of democratic procedure, an institution through which ordinary citizens can participate in government. In this sense, the jury is intrinsically valuable as a concrete manifestation of democratic process.” (footnote omitted)).

<sup>249</sup> See Dorf & Sabel, *supra* note 124, at 411.

<sup>250</sup> Kevin O’Leary, *The Citizen Assembly: An Alternative to the Initiative*, 78 U. COLO. L. REV. 1489, 1497–98 (2007).

who ought to take responsibility for what, or attributing blame. In common-law-tort terms, we can think of this coming into play in the causation element, which always has a normative dimension, or perhaps in defenses, such as assumption of risk. In this sense, perhaps we ought not be troubled that the available empirical research shows that jurors tend to do “total justice” in tort cases, taking many different factors into account and not deciding based on a formal, element-by-element basis.<sup>251</sup>

Though this makes some sense, the total-justice approach skirts over the issue of whether the conduct is reasonable, and so risks putting the stigma of liability on conduct that does not deserve reproach. When combined with the black box of the jury and the lack of obligation to give reasons, this means that litigants and the public have little idea what norm was applied or violated. Rather than helping to constitute community norms, such decisions merely cloud them if they have any effect at all.

Community norms might also dictate how much certain wrongs or injuries are worth in damages. Indeed, there is evidence that the amount of damages is related to the racial composition and income level of people on the jury.<sup>252</sup> One could say that the level of damages is a way that the community sends a message about how bad the wrong or injury is, and this is an important part of helping constitute a community—meting out justice, akin to deciding a sentence in a criminal case,<sup>253</sup> is a way of articulating a community’s values.

As a practical matter, though, community values rarely come into play in damage awards<sup>254</sup> because punitive damages are rare, and the only other category that is indeterminate is pain and suffering. So deciding damages in civil cases seems like a poor way for members of a community to articulate their values and participate in government. Small groups of citizens could do this by participating in discussions of local education, tax policy, zoning laws, possible changes to social-welfare services provided—the list goes on.<sup>255</sup> But

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<sup>251</sup> See NEAL FEIGENSON, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS* 5 (2000).

<sup>252</sup> See Eric Helland & Alexander Tabarrok, *Race, Poverty, and American Tort Awards: Evidence from Three Data Sets*, 32 J. LEGAL STUD. 27, 51–53 (2003).

<sup>253</sup> Juries make the underlying factual findings for criminal cases but generally do not actually decide sentencing.

<sup>254</sup> See Priest, *supra* note 215, at 112–17 (demonstrating that this was the case in his study of Cook County juries between 1959 and 1979).

<sup>255</sup> Such a suggestion has been made by Professors Michael Dorf and Charles Sabel, among others. Dorf & Sabel, *supra* note 124, at 287–89. They call this “directly deliberative polyarchy.” *Id.* at 288.

estimating the pain and suffering associated with whiplash or a broken leg? I am not so sure.

### *B. Epistemic Claim: Local Knowledge*

Besides the political claim about a community's right to define its own norms as part of a localism or participation ideal, the jury's access to community norms is in part an epistemic claim. The civil jury is worthy of respect, and its results are legitimate, because it is most likely to get it right when it comes to identifying and applying the relevant community norms.<sup>256</sup>

The idea that jurors have unique knowledge about the community can be traced back to the origins of the modern jury and its precursor in the Norman era.<sup>257</sup> Under that model, laypeople were called as witnesses before the judge because they were thought to have information about the particular incident at issue or whether the people involved had good or bad character.<sup>258</sup> It is this juror-as-witness concept that is the root of the idea that jurors have unique access to some kind of local knowledge.<sup>259</sup> But though the juror-as-witness notion faded long ago, the idea of jurors as having access to local knowledge—referred to generally now as community norms—has remained.<sup>260</sup>

Steven Hetcher, for example, refers to the “pervasive role that social norms play in providing grist for the jury’s concrete application of the reasonable person standard.”<sup>261</sup> He describes the phenomenon he calls the “jury norm effect,” which “allows the norms of ordinary people to exert a direct causal

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<sup>256</sup> Harry Kalven, a leader of the well-known Chicago Jury Project in the 1950s and 1960s, was a prominent supporter of this kind of community-norms rationale. See Kalven, *supra* note 92, at 1058, 1061–68; Harry Kalven, Jr., *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158, 161 (1958).

<sup>257</sup> See Stephan Landsman, *The History and Objectives of the Civil Jury System*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra* note 10, at 22, 25.

<sup>258</sup> *Id.* at 27; Laurie L. Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 S. CAL. L. REV. 1533, 1546 (1993) (pointing out that, in Anglo-Saxon law, criminal jurors were chosen “because they were familiar with the criminal activity in question or the character of the accused persons”).

<sup>259</sup> See Drew L. Kershen, *Vicinage* (pt. 1), 29 OKLA. L. REV. 801, 813 (1976) (describing the origins of the jury as an “administrative inquest” by which “the government ascertained its rights and obtained information”); Levenson, *supra* note 258, at 1546.

<sup>260</sup> See Haddon, *supra* note 36, at 51–52 (identifying the historical significance of jury decision making as the capacity of citizens to “provide local knowledge from experience and community connection, knowledge unavailable to the judge or other expert”).

<sup>261</sup> Steven Hetcher, *The Jury’s Out: Social Norms’ Misunderstood Role in Negligence Law*, 91 GEO. L.J. 633, 647 (2003).

effect over formal legal outcomes.”<sup>262</sup> Though he presents his analysis as an interpretive account, he appears to look favorably upon the jury norm effect.

But it is not clear from Hetcher’s account—and that of the literature more generally—whether the jury’s community norms are designed to improve legal outcomes or simply improve liability outcomes.

Let me explain. We might care about injecting community norms because jurors are epistemically superior in identifying and applying community norms relative to judges. This might be the case because they are less educated, have a broader range of life and work experiences, or are simply a collection of many minds.<sup>263</sup> Under this account, jurors will do a better job than judges at reaching accurate legal outcomes on whether conduct is reasonable according to community standards. Here, we see the civil jury’s advertised benefits as an adjudicative institution, not a political one.

One problem with this account, though, is the research that juries and judges most often decide cases the same way.<sup>264</sup> This is in considerable tension with the claim that juries somehow have unique access to community norms and will therefore define what conduct is reasonable or unreasonable differently than judges.<sup>265</sup>

Further, the community norms in many if not most tort contexts are not norms that lay jurors have particular access to. Consider each of the major categories of tort cases: medical malpractice, products liability, premises liability, and auto accidents.<sup>266</sup> Juries are not likely to be experts about community norms in medical care (medical malpractice), designing consumer

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<sup>262</sup> *Id.* at 635.

<sup>263</sup> PAGE, *supra* note 185, at 405; CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN’T MEAN WHAT IT MEANT BEFORE 7–8 (2009).

<sup>264</sup> See Robbenolt, *supra* note 11, at 502 (“[T]he decisionmaking of judges and jurors is strikingly similar. While there is evidence of some differences, there is a high degree of agreement between the groups, they appear to decide real cases quite similarly, and they show a great deal of similarity in responding to simulated cases designed to examine a variety of legal decisionmaking processes.”).

<sup>265</sup> But see Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1542 (1992) (“Courts, however, are too far removed from the voice of the citizenry, and judges’ backgrounds are too homogenous and distinct from those of many Americans to ensure that judicially-defined policy will accord with the public values of the polity.”).

<sup>266</sup> At the federal level, products liability cases often compose the majority of tort cases from year to year. See *Key Facts at a Glance: Federal Tort Trials*, BUREAU JUST. STAT., <http://bjs.ojp.usdoj.gov/content/glance/tables/tortcltdtypetab.cfm> (last modified June 17, 2012). For a detailed account of all civil claims in federal district courts by type, see STATISTICS DIV., *supra* note 15, at 141–43. For a detailed account of civil trials by case type at the state level in 2005, see LANGTON & COHEN, *supra* note 15, at 2. For a sample of incoming civil claims in state courts, see NAT’L CTR. FOR STATE COURTS, *supra* note 61, at 2.

products or warning about dangers (products liability), or sweeping the floor and shoveling the sidewalk at a business (premises liability).

Even in the driving context, where the people on the jury are arguably best equipped to apply the reasonable person standard to conduct, it may well be that an accident-reconstruction expert would be better suited than a group of people who drive to decide who was at fault in a particular accident. So the epistemic-superiority argument for jurors applying community norms rests on shaky ground.

Meanwhile, the other account of the value of injecting community norms spins out entirely the opposite story. This account holds that sometimes strict application of law yields unjust results and that community norms on the right outcome, courtesy of the jury, yield greater justice.<sup>267</sup> This is a justification for nullification, with little force in the civil context.<sup>268</sup>

What about intentional or dignitary torts? Perhaps that is where we want jurors applying the community norms. In certain circumstances, this may be true. For example, the legal privilege of self-defense to battery varies by region of the country, and in Southern jurisdictions that retain traces of honor cultures, individuals do not have a duty to retreat.<sup>269</sup> One could argue that being able to define such norms at a local level is valued by citizens.

But community norms have their downsides. As Robert Post has pointed out, “[W]ithin our constitutional tradition democracy can not be equated with majoritarian expressions of popular will.”<sup>270</sup> Post distinguishes between democracy and “popular sovereignty,”<sup>271</sup> and it is not so clear that we want popular sovereignty to be the mechanism for adjudicating ex post what conduct is reasonable and unreasonable.

In defamation law, it was precisely a concern for community norms trampling rights that led the Supreme Court to intervene in the context of the

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<sup>267</sup> Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601, 1650 (2001).

<sup>268</sup> See *supra* note 73 and accompanying text.

<sup>269</sup> Steven Hetcher, *Creating Safe Social Norms in a Dangerous World*, 73 S. CAL. L. REV. 1, 4 n.7 (1999); see also JOHN W. WADE ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS 107 (12th ed. 2010) (“The majority have insisted upon a higher importance of the dignity and honor of the individual and have held that the defendant may stand his ground . . .”).

<sup>270</sup> Robert Post, *Democracy, Popular Sovereignty, and Judicial Review*, 86 CALIF. L. REV. 429, 437 (1998).

<sup>271</sup> *Id.* at 437–38. Post distinguishes the two on the ground that “popular sovereignty is defined by reference to procedural criteria, whereas democracy is defined by reference to substantive values.” *Id.* at 438.



civil rights movement in *New York Times v. Sullivan*.<sup>272</sup> In that case, an Alabama jury spoke loud and clear about its norms: Northern elites (the *New York Times*) and African-Americans should not criticize elected officials. But such a defamation verdict, the Supreme Court held, violated the First Amendment. Defamation is a tort that can frequently be misused to suppress speech rights.<sup>273</sup>

Or consider the false imprisonment tort, which today is frequently used in the context of suspected shoplifting.<sup>274</sup> People in a store are stopped and held by store security guards, and they later bring a false imprisonment claim against the store if they did nothing wrong. The issue often comes down to whether what the store did in holding the individual was reasonable,<sup>275</sup> and many of these cases involve the security guard saying that the individual looked “suspicious”—often a racially coded word.<sup>276</sup>

In one recent and well-publicized false imprisonment claim, a hospital in Florida sent an undocumented immigrant back to his home country against his will because the hospital was having trouble getting reimbursed for his care.<sup>277</sup> The jury in Florida was asked whether what the hospital did was reasonable, and the jury said that it was and ruled against the plaintiff.<sup>278</sup> Regardless of the

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<sup>272</sup> See AMAR, *supra* note 12, at 243 (noting that the doctrinal rules crafted by the Court in *Sullivan* reflected “obvious suspicion” of white Southern juries).

<sup>273</sup> See David S. Han, *Autobiographical Lies and the First Amendment’s Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 75–77 (2012).

<sup>274</sup> DOBBS, *supra* note 14, at 68–69 (explaining that “[f]alse imprisonment is effected in many ways and in diverse social settings, but not surprisingly it most frequently involves a relatively powerful defendant,” and offering storekeepers, hospitals, and police officers as examples).

<sup>275</sup> See, e.g., *Grant v. Stop-N-Go Mkt. of Tex., Inc.*, 994 S.W.2d 867, 873 (Tex. App. 1999).

<sup>276</sup> See, e.g., *Hampton v. Dillard Dep’t Stores, Inc.*, 985 F. Supp. 1055, 1058 (D. Kan. 1997) (involving a false imprisonment claim arising out of the detention of black plaintiffs in a department store by a security guard, who began surveillance because one of the plaintiffs was “looking toward the ceiling and looking around”), *aff’d*, 247 F.3d 1091 (10th Cir. 2001); *Lewis v. J.C. Penney Co.*, 948 F. Supp. 367, 369 (D. Del. 1996) (involving a claim of false imprisonment by black plaintiffs who were followed and had their bags searched by security guards because they “displayed nervous behavior, avoided sales help and were shopping in darkened, deserted areas of the store”); see also Deseriee A. Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection*, 66 MO. L. REV. 275, 287 (2001) (“Customers of color are frequently faced with differential security measures based almost entirely on race. Black customers are followed, stopped, searched, and threatened for looking suspicious, displaying nervous behavior, avoiding sales help, and shopping in darkened, deserted areas of the store.” (footnote omitted)).

<sup>277</sup> This was detailed in a series in the *New York Times* a few years ago. See Deborah Sontag, *Jury Rules for Hospital that Deported Patient*, N.Y. TIMES, July 28, 2009, at A10.

<sup>278</sup> See *id.*

merits of these particular cases, they are not cases that call for majoritarian rule.<sup>279</sup>

Of course, it is not clear that judges—particularly the elected ones—will do any better at safeguarding minority rights. Judges may not be attentive to minority rights in the context of a private law dispute. Indeed, the family law scholar Vivian Hamilton has suggested that judges *ought* to go along with majority norms in private law disputes for legitimacy reasons, while saving their guardian-of-liberty role for cases where the state is a party.<sup>280</sup>

While I am inclined to disagree with Hamilton on what judges *ought* to do, she may well be right descriptively on how judges *do* conceive their role. If appointed, they were put in place by a governor or legislature supported by a political majority at the time. If elected, of course, they have plenty of incentive to follow the majority and avoid being associated with protecting minority rights in anticipation of the next election. On the other hand, a significant percentage of state trial court elections are uncontested,<sup>281</sup> making this effect perhaps less than it otherwise might be.

#### IV. BETTER CITIZENS

In this Part, I consider a final justification for the civil jury as a political institution. This is the argument that was made famous by Alexis de Tocqueville and is fairly unquestioned in our political and legal culture: jury service makes better democratic citizens.<sup>282</sup> Until recently, there was very little

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<sup>279</sup> See Haddon, *supra* note 36, at 31 (“Indeed the reprieve of no jury has been seen as an advantage for people of color: jury decision-making on more than one occasion, after all, has confirmed that the political majority devalues the worth of the lives and dignity of outsiders.”); Partlett, *supra* note 36, at 1423–24 (“The jury reflects the society from which its members are drawn—its high values and its low.”).

<sup>280</sup> Vivian E. Hamilton, *Expressing Community Values Through Family Law Adjudication*, 77 UMKC L. REV. 325, 336–37 (2008).

<sup>281</sup> See *supra* note 145 and accompanying text.

<sup>282</sup> As de Tocqueville put it:

Juries, especially civil juries, instill some of the habits of the judicial mind into every citizen, and just those habits are the very best way of preparing people to be free.

. . .

Juries teach men equity in practice. Each man, when judging his neighbor, thinks that he may be judged himself. That is especially true of juries in civil suits; hardly anyone is afraid that he will have to face a criminal trial, but anybody may have a lawsuit.

Juries teach each individual not to shirk responsibility for his own acts, and without that manly characteristic no political virtue is possible.

Juries invest each citizen with a sort of magisterial office; they make all men feel that they have duties toward society and that they take a share in its government. By making men pay

evidence on this point, but a significant study by John Gastil and colleagues has begun to change that state of affairs.<sup>283</sup> Still, the empirical research is in its infancy.

In what follows, I consider the theory behind and empirical evidence for the connection between jury service and (A) voting and other forms of political participation; (B) civic engagement and attention to public affairs; and (C) understanding of different views, or empathy.

### A. *Voting and Political Participation*

Though de Tocqueville focused on the civil jury, the evidence seems to indicate that civil jurors do not vote more frequently after their jury service.<sup>284</sup> It is the criminal jury where we see the positive effects on citizenship, particularly voting.<sup>285</sup> Why might the criminal jury make more of a difference? It seems likely that the feeling of holding a “magisterial office,” as de Tocqueville put it—feeling like you are a government official—is significantly stronger during a criminal trial because the juror is making such a weighty decision about a fellow citizen: whether to deprive her of liberty.<sup>286</sup>

Though decisions about liability and damages in a civil trial are certainly significant for the parties, the consequences are less severe, particularly with the widespread holding of liability insurance. It may also be that the issues and witnesses involved in a civil trial are simply less engaging. Eighty-six percent

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attention to things other than their own affairs, they combat that individual selfishness which is like rust in society.

Juries are wonderfully effective in shaping a nation's judgment and increasing its natural lights. That, in my view, is [the jury system's] greatest advantage. It should be regarded as a free school which is always open and in which each juror learns his rights, comes into daily contact with the best-educated and most-enlightened members of the upper classes, and is given practical lessons in the law, lessons which the advocate's efforts, the judge's advice, and also the very passions of the litigants bring within his mental grasp. I think that the main reason for the practical intelligence and the political good sense of the Americans is their long experience with juries in civil cases.

DE TOCQUEVILLE, *supra* note 1, at 274–75. This education-of-citizens rationale was also employed by John Stuart Mill. See JOHN STUART MILL, *Considerations on Representative Government*, in ON LIBERTY AND OTHER ESSAYS 205, 254–55 (John Gray ed., Oxford Univ. Press 1991) (1859).

<sup>283</sup> See GASTIL ET AL., *supra* note 28.

<sup>284</sup> See *id.* at 47.

<sup>285</sup> *Id.* at 45–46.

<sup>286</sup> Another possible explanation is that the attacks on the civil justice system have made civil cases seem less important or legitimate, and this undermines the sense in which jurors feel they are undertaking a civic duty. See *id.* at 171.

of sampled civil cases involved expert witness testimony playing a key role.<sup>287</sup> The battle of accident-reconstruction experts in a car-accident case may not match the drama of a criminal case.

Indeed, to the extent that the jury is composed of people with diverse normative viewpoints—often a desideratum in the jury literature—it may even reduce the likelihood of voting for the jurors who participate. As Diana Mutz found in her study of people’s social networks, “Having friends and associates with opposing political views makes it less likely that a person will vote.”<sup>288</sup>

To the extent that political participation besides voting—becoming active in a local political party or otherwise mobilizing on issues—is one aim of the jury as a political institution, it may well make sense to have juries with more homogeneous viewpoints, not a diversity of “normative viewpoints.”<sup>289</sup> Mutz’s research has shown that individuals with greater “cross-cutting exposure” in their social networks are less likely to become politically active.<sup>290</sup> Possible theories for this effect include people fearing social conflict as a result of political activity or people becoming more ambivalent in their political views as they are exposed to opposing views.<sup>291</sup> Indeed, research seems to show that it is deliberation among like-minded people—what Cass Sunstein calls “enclave deliberation”<sup>292</sup>—that leads to collective action.<sup>293</sup>

### *B. Civic Engagement (plus Attention to Public Affairs)*

For de Tocqueville, it was by forcing people to pay attention to “things other than their own affairs” through jury service that people would become less selfish and would become extensively more focused on their community and polity after leaving jury service.<sup>294</sup> We might then see increased civic engagement and attention to public affairs after jury service, according to this

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<sup>287</sup> Edward J. Imwinkelried, *A Minimalist Approach to the Presentation of Expert Testimony*, 31 STETSON L. REV. 105, 105 (2001).

<sup>288</sup> See DIANA C. MUTZ, HEARING THE OTHER SIDE: DELIBERATIVE VERSUS PARTICIPATORY DEMOCRACY 112 (2006) (“The greater the cross-cutting exposure in the person’s network, the more likely he or she is to abstain from voting.”).

<sup>289</sup> See *id.* at 133 (“[W]ithin any given individual, enthusiastic participation rarely coexists with ongoing exposure to diverse political viewpoints and careful consideration of the political alternatives.”).

<sup>290</sup> *Id.* at 112–13.

<sup>291</sup> See *id.* at 102–08 (defining and describing the existing evidence for these two possible theories).

<sup>292</sup> Cass R. Sunstein, *The Law of Group Polarization*, 10 J. POL. PHIL. 175, 177 (2002).

<sup>293</sup> MUTZ, *supra* note 288, at 127.

<sup>294</sup> DE TOCQUEVILLE, *supra* note 1, at 274.

theory. The Jury and Democracy Project investigated this and came back with interesting findings, summarized below.

In civil trials, jurors who were confused during the trial started paying more attention to politics and read more about public affairs after the trial. The theory is one of self-improvement: jurors decided, consciously or otherwise, that they needed to learn more about government or the law.<sup>295</sup> But confused jurors took political action less often, the theory being that they were less confident in their abilities or views.<sup>296</sup>

Jurors who *did* feel that they understood the trial increased their political action and community participation afterwards.<sup>297</sup> And for these jurors, civil trials were more powerful than criminal trials for “developing the political self-confidence of less active and informed voters.”<sup>298</sup>

### C. *Understanding of Different Views/Empathy*

The theory behind this product of jury service works in a few ways. For de Tocqueville, it was the empathy involved in imagining oneself as a plaintiff or defendant in a lawsuit.<sup>299</sup> For other commentators, it is the give-and-take among the people of different backgrounds in the jury room that leads to tolerance and understanding of different views and empathy for others.

The political scientist Diana Mutz conducted an interesting study exploring the relationship between exposure to people with different viewpoints and attitudes toward others.<sup>300</sup> There is good news and bad news. The good news is that exposure to people with different political views can help increase tolerance of different viewpoints.<sup>301</sup> As indicated earlier, though, the bad news is that being exposed to different viewpoints actually leads to less political participation, not more.<sup>302</sup> The reason apparently is that people fear the social

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<sup>295</sup> GASTIL ET AL., *supra* note 28, at 118–19.

<sup>296</sup> *Id.* at 119.

<sup>297</sup> *Id.* This particular group was a fairly small sample size, so the conclusions are particularly tentative.

*See id.*

<sup>298</sup> *Id.* at 153.

<sup>299</sup> *See* DE TOCQUEVILLE, *supra* note 1, at 274. When imagining oneself a defendant in a lawsuit, one was also learning the “manly” virtue of personal responsibility, according to de Tocqueville. *See id.*

<sup>300</sup> MUTZ, *supra* note 288, at 63 (summarizing the nature of the survey).

<sup>301</sup> *Id.* at 76–78.

<sup>302</sup> *Id.* at 111–14.

conflict that can arise from engaging with people who have different views.<sup>303</sup> Doing so makes them less inclined to do so in the future.<sup>304</sup>

Even more than increasing tolerance of different views, one might think that exposure to a diverse group of citizens might make one more tolerant generally—it might reduce prejudice. Indeed, this is what is known as the “intergroup contact hypothesis,” and the research seems to indicate that, in certain circumstances, exposure to diverse views does have the desired effect.<sup>305</sup>

Of course, the inquiry is an incremental one: To what extent are people exposed in the civil jury to a diversity of views or backgrounds that they are not otherwise exposed to in their everyday lives? Interestingly, though we do not have much direct evidence, we can draw on research into social networks to speculate that the effect may be greater for people who live in urban areas than in rural areas.<sup>306</sup> Is the civil jury one of those contexts where exposure to diverse views is likely to occur? We don’t have any direct evidence on the subject.

Despite the excellent Jury and Democracy Project and Mutz’s work, they are just a start. Much more empirical work needs to be done—based in part on a clearer conception of the causal mechanisms between particular aspects of jury service and aspects of citizenship—to continue to explore these questions about the value of the civil jury as a political institution.

## V. IMPLICATIONS AND CONCLUSION

Conceiving of the civil jury as a political institution is not new.<sup>307</sup> But it is new to, first, evaluate its performance as such and, second, seek to reform and strengthen it as a political institution. It is second nature in the literature and public debate to evaluate and then argue about ways to improve the way the

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<sup>303</sup> See *id.* at 116–23 (analyzing survey data and concluding that people who have social networks that include those with different political views limit their political activity “to avoid putting their social relationships at risk”).

<sup>304</sup> *Id.* at 114–15.

<sup>305</sup> *Id.* at 64–65 (citing GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (1954); and Rupert Brown & Miles Hewstone, *An Integrated Theory of Intergroup Contact*, 37 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 255, 256 (2005)).

<sup>306</sup> *Id.* at 11 (citing Claude S. Fischer, *Community Values, Diversity, and Conflict in City Life*, in *DIVERSITY AND ITS DISCONTENTS* 213, 216 (Neil J. Smelser & Jeffrey C. Alexander eds., 1999)).

<sup>307</sup> See *supra* note 28.

civil jury functions as an adjudicative institution—to help ensure that the jury decides cases in a fair and accurate way.

How to improve the functioning of the civil jury as a political institution—its ability to command legitimacy of the civil justice system among citizens, to define and reflect community norms, to act as a check on government and corporate power, and to increase political and civic engagement among those who serve—has rarely been seriously evaluated or discussed. And it may well be that in discussing these issues, scholars and policymakers conclude that one or more of the political functions are no longer worth pursuing.

A. *Understanding the Trade-Offs*

We have seen different kinds of trade-offs in exploring the jury's function as a political institution. One is a legitimacy–legitimacy trade-off. On the one hand, a decision by a jury tends to be perceived as more fair by citizens than a decision from a judge. On the other hand, individuals tend to see an outcome as more fair when it is accompanied by reasons, which it is not with a jury but tends to be with a judge.

Another is a trade-off between having a jury that represents a range of normative viewpoints and having jurors go home and become more engaged democratic citizens. Unfortunately, confronting viewpoints that are different from one's own—thought to be a desirable attribute of the civil jury experience from either a representative- or deliberative-democracy perspective—appears to make jurors less politically active, not more.<sup>308</sup>

And finally, the value of letting individual juries construct and apply community norms is in serious tension with the deliberative-democratic ideals of public discussion, accessible reasons, and binding but provisional decisions that are later revisited in light of experience. These trade-offs, meanwhile, are simply some of the most salient, and these are trade-offs within the confines of the goals of the jury as a political institution. Certainly there are many other trade-offs between the jury's function as a political institution and its function as an adjudicative institution in light of inner-morality-of-law values, such as clarity and prospectivity.

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<sup>308</sup> See MUTZ, *supra* note 288, at 111–14.

## B. *Improving the Political Institution*

Exploring how to improve this political institution would require a separate paper just to begin, but let me briefly suggest a few possibilities. These are very much preliminary thoughts, not firm conclusions.

*No initial vote.* The existing research shows that juries that take initial votes or straw polls can be verdict-driven, as opposed to evidence-driven.<sup>309</sup> This can lead to a dynamic that shuts down dissenting views and prevents relevant information from being aired. A lower quality deliberation may mean not only a less accurate outcome but also a less legitimate outcome from the jurors' perspectives.

*Eighty-percent supermajority rule.* Recall that the evidence is mixed about what the best decision rule is—unanimous or majority—from the perspective of the civil jury as a political institution. On the one hand, a unanimous-decision rule can lead to dissenting jurors not speaking out for fear of being ostracized as getting in the way of consensus.<sup>310</sup> On the other hand, a majority-decision rule can lead to the majority ignoring dissenting views because their support is not necessary to reaching a verdict.<sup>311</sup> Again, more research is needed, but it may just be that the 80% supermajority rule—in place in some jurisdictions—gets the balance about right.

*Strive for occupational and educational diversity.* In a sense, the representative- and deliberative-democracy ideals will always be in some tension, and it is unlikely that we can simply arrive at some kind of national consensus to choose one. On the other hand, there may be ways to manage the tension.

One possibility is to strive for occupational and educational diversity on the jury.<sup>312</sup> From a legitimacy perspective, this kind of representativeness on the jury can increase the legitimacy of the outcome for the litigants and their lawyers.<sup>313</sup> For example, take a premises liability, or “slip-and-fall,” case that happened in a store. Litigants might be reassured to hear that there were efforts

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<sup>309</sup> See Hastie et al., *supra* note 193, at 296–99.

<sup>310</sup> See, e.g., Mendelberg & Karpowitz, *supra* note 189, at 106.

<sup>311</sup> See ABRAMSON, *supra* note 32, at 179–205 (arguing that a unanimity rule avoids the problem of ignoring dissenters); Diamond et al., *supra* note 192, at 230 (concluding that observed civil jury deliberations “demonstrate that thoughtful minorities are sometimes marginalized when the majority has the power to ignore them in reaching a verdict”).

<sup>312</sup> See *supra* notes 132, 187, and accompanying text.

<sup>313</sup> See *supra* notes 132–35 and accompanying text.



made to include on the jury not only the perspective of customers but also the perspective of people who have worked in stores. This kind of diversity would have a benefit for deliberative democracy as well, because the evidence shows that occupational and educational diversity is highly correlated with cognitive diversity, which is in turn associated with better outcomes.<sup>314</sup>

*Rethink the county as community.* The literature on local government law tells us that boundaries like county lines are frequently the product of past decisions over who belongs where, decisions very much tied up with race and class.<sup>315</sup> In other cases, county lines may simply be arbitrary.<sup>316</sup> Either way, if we take seriously the idea that the civil jury is a site for constituting community, we need to think harder about what the relevant community ought to be.

It may be that, instead of selecting jurors randomly from a particular county, we should try to have a representative jury from different census tracts within the county. Alternatively, it may be that, to get a certain kind of descriptive representation or diversity on a jury, we ought to construct the jury pool across county lines, say, from residents who live within a ten-mile radius of the courthouse.

*Encourage jurors to keep in touch.* This may appear to be a strange and not very law-like or policy-oriented suggestion. But if we think that engaging in democratic governance with others can increase political and civic engagement down the road, it may well be that fostering relationships among jurors can have an even greater effect. One can imagine the foreperson passing around a piece of paper and asking any jurors who wouldn't mind to share their contact information. Jurors can simply opt out of such an arrangement if they so choose. In a world where many people have hundreds of Facebook friends, this might be an easy way to foster continued engagement.

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<sup>314</sup> See PAGE, *supra* note 185, at 302–05, 322–25 (summarizing evidence on cognitive-diversity benefits in the problem-solving context).

<sup>315</sup> See Briffault, *supra* note 232, at 1142 (citing NANCY BURNS, *THE FORMATION OF AMERICAN LOCAL GOVERNMENTS: PRIVATE VALUES IN PUBLIC INSTITUTIONS* 23–24 (1994)) (describing the formation of county and incorporated town boundaries).

<sup>316</sup> See Lisa R. Pruitt, *Spatial Inequality as Constitutional Infirmity: Equal Protection, Child Poverty and Place*, 71 MONT. L. REV. 1, 75 (2010) (discussing “the arbitrary nature of county boundaries” in Montana). Or county lines may be the product of geographical features. See 35 DAVID B. BROOKS, *TEXAS PRACTICE SERIES: COUNTY AND SPECIAL DISTRICT LAW* § 1.6 (2d ed. 2002 & Supp. 2012) (“Texas customarily defined newly created counties in terms of waterways, established roads, the dividing ridge between river basins, and previously established surveys.”).

### C. Concluding Thoughts

I do not claim that thinking about the role of the civil jury as a political institution can help decide particular cases, but it can help inform what is at stake. Recall the high-profile Supreme Court cases mentioned in the Introduction. In *Snyder v. Phelps*, the jury verdict served to articulate the voice of the community that the conduct of the Westboro Baptist Church protesters was “outrageous,”<sup>317</sup> much like the message sent by the jury in *Exxon Shipping Co. v. Baker* through \$5 million in punitive damages against Exxon.<sup>318</sup> Is it important for juries to articulate community norms in this way? We can now start to think more seriously about that question.

In *Wyeth v. Levine*, we can see the civil jury acting as a backstop to the FDA, and as a check on corporate power, and begin to assess whether that is an appropriate function of the civil jury to serve.<sup>319</sup> And in *Wal-Mart Stores, Inc. v. Dukes*, an employment discrimination class action, we can see the specter of the civil jury performing both of these functions: acting as a check on corporate power in combination with the class action device and being prepared to articulate community norms of equal treatment for men and women if it were to hold the company liable at trial.<sup>320</sup> These functions, of course, are to be weighed against the due process concerns that carried the day in the Court.<sup>321</sup>

Having begun to think more seriously about the civil jury as a political institution, then, we now have the resources to start to make judgments about the importance of these political functions, both relative to each other and relative to the concerns about the jury as an adjudicative institution that prompted the Court to take these cases in the first place. Of course, our primary focus ought to remain on juries (and judges) deciding cases as fairly and accurately as possible. But we can also begin to take seriously de Tocqueville’s admonition that it is as a political institution, that the civil jury “must always be judged.”

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<sup>317</sup> See 131 S. Ct. 1207 (2011).

<sup>318</sup> See 554 U.S. 471, 515 (2008).

<sup>319</sup> See 555 U.S. 555, 564, 604, 626 (2009).

<sup>320</sup> See 131 S. Ct. 2541 (2011).

<sup>321</sup> See *id.* at 2559.