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## Introduction: The Civil Jury as a Political Institution

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# William & Mary Law Review

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## *INTRODUCTION*

### THE CIVIL JURY AS A POLITICAL INSTITUTION

JASON SOLOMON\* & PAULA HANNAFORD-AGOR\*\*

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For much of the nation's history, the criminal jury has enjoyed an iconic role in the American justice system. In *Duncan v. Louisiana*, Justice Byron White described the criminal jury as a protection against arbitrary rule that had been recognized as an essential safeguard of individual liberty since the founding of the nation.<sup>1</sup> But White also acknowledged the existence of a longstanding debate about the wisdom of "permitting untrained laymen to determine the facts in civil and criminal proceedings."<sup>2</sup> He intimated that those criticisms may be even stronger with respect to the competence of civil jurors to understand evidence and to decide cases fairly and predictably. Such criticisms dated back to the Founding, and the debate between Federalists and anti-Federalists over the Seventh Amendment's guarantee of a jury in civil cases.

More than two hundred years later, the debate over the role of the civil jury continues unabated. But even as questions about the civil jury's competence as an *adjudicative* institution continue, questions surrounding the civil jury's justification and role as a *political* institution are underexplored.

To explore these questions in contemporary society, the Bill of Rights Institute and *Law Review* at William & Mary Law School hosted a symposium on *The Civil Jury as a Political Institution*. For two days in February 2013, scholars from an array of disciplines gathered to consider the extent to which the civil jury played a meaningful role as a political institution historically, whether it still serves that purpose today and, if so, what measures can or should be taken to ensure its continuing significance. This issue of the *William & Mary Law Review* is the compilation of papers that formed the basis for that discussion.

Robert Burns' contribution is a useful place to start, as he interrogates what we might mean when we say that the civil jury is a "political institution."<sup>3</sup> For Burns, the jury is a political institution in part because each juror—and then the jury collectively—is "taking public action through public institutions" and in choosing

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1. 391 U.S. 145 (1968). The Court held that the Sixth Amendment right to an "impartial jury of the State and district wherein the crime shall have been committed" applied to defendants charged with criminal offenses in state courts. *Id.* at 156.

2. *Id.* at 157.

3. Robert P. Burns, *The Jury As a Political Institution: An Internal Perspective*, 55 WM. & MARY L. REV. 805 (2014).

one narrative over another, is determining “his own public identity and the identity of his community.”<sup>4</sup> In rendering a verdict, juries act politically by implicitly understanding their task as the “reconstitution of a common project and the establishment of a public identity.”<sup>5</sup> It is also a political institution because it allows and encourages a “multiplicity of perspectives.”<sup>6</sup> Finally, Burns sees the jury as political in the sense that it is balancing competing values—political, moral, and legal—in a particular case.<sup>7</sup> In this way, the jury can decide to elevate their own “common sense political and moral judgment” above the “law of rules.”<sup>8</sup>

With Burns’ framing in mind, three distinct themes emerged from the Symposium papers: the jury as locus of popular sovereignty; differing conceptions of the role of individual jurors; and the tension between community or justice values, and rule-of-law values.

#### *A. The Jury as Locus of Popular Sovereignty*

For Akhil Amar, the jury was the locus of popular sovereignty—lay control over governance—from the time of the Founding,<sup>9</sup> and this historical pedigree remains a compelling justification for the jury’s role.<sup>10</sup> Amar encourages us to see the civil jury as part of a larger family of juries, including the grand jury and criminal petit jury.<sup>11</sup> By looking at the grand jury, which hears several cases at once, we see that the civil jury may be disadvantaged institutionally versus the judiciary by the fact that it only sees one case at the time.<sup>12</sup> Amar draws the analogy between the jury and the House of Representatives as the “lower house” in their respective branch of government.<sup>13</sup>

Amar also points to the criminal jury’s role as a tool to prevent government oppression, and suggests that the jury is particularly

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4. *Id.* at 825.

5. *Id.* at 811.

6. *Id.* at 824.

7. *Id.* at 811.

8. *Id.* at 818.

9. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

10. Akhil Reed Amar, *Opening Remarks*, 55 WM. & MARY L. REV. 729 (2014).

11. *Id.* at 730.

12. *Id.*

13. *Id.*

important in civil cases involving “man against the government.”<sup>14</sup> Meanwhile, we might consider, says Amar, whether the nonunanimous verdicts in civil cases could also work on the criminal side.<sup>15</sup> Finally, he points out that we think of jury *duty* and voting *rights*, but what about a duty to vote?<sup>16</sup> Indeed, we might decide that voters have a duty to listen to different sources of information and deliberate over their choice, just as we now require of jurors.<sup>17</sup>

Alexandra Lahav sees this popular-sovereignty justification as important as well, and particularly emphasizes the Tocquevillian theme of educating citizens in self-governance.<sup>18</sup> For Lahav, “The best argument in favor of juries in a pluralist republic such as our own is not that jurors make better decisions than other actors, but that citizens are the ones making the decisions.”<sup>19</sup>

Jury service exposes citizens to the inner workings of the courts and places them in a position of power within the court system.<sup>20</sup> According to Lahav, “The value of observation is educational; the value of participation is dignitary.”<sup>21</sup> When judges grab power for themselves, one risk is corruption or bias in favor of government; another risk is simply unwarranted confidence in the accuracy of their own decision-making skills.<sup>22</sup> Lahav suggests that perhaps juries favor individuals over institutions, which might counterbalance the fact that institutions have greater resources, or are repeat players.<sup>23</sup>

William Nelson and Suja Thomas draw on history to argue for particular roles for the jury that are worth preserving. Nelson points to the civil jury as the appropriate adjudicative body to make informed decisions on politically sensitive issues.<sup>24</sup> Indeed, Nelson

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14. *Id.* at 733.

15. *Id.* at 734.

16. *Id.*

17. *Id.* at 735-36.

18. Alexandra D. Lahav, *The Jury and Participatory Democracy*, 55 WM. & MARY L. REV. 1029 (2014); see also ANDREW GUTHRIE FERGUSON, WHY JURY DUTY MATTERS: A CITIZEN'S GUIDE TO CONSTITUTIONAL ACTION (2012).

19. Lahav, *supra* note 18, at 1031-32.

20. *Id.* at 1035.

21. *Id.*

22. *Id.* at 1041.

23. *Id.* at 1050-51.

24. William E. Nelson, *Political Decision Making by Informed Juries*, 55 WM. & MARY L. REV. 1149 (2014).

argues that legislators and judges “affirmatively delegate political power to juries.”<sup>25</sup> Nelson recounted how judges had historically relied on juries to head off criticism of bias or self-interested judgments in cases that required the application of “political morality” rather than strict legal rules.<sup>26</sup> According to Nelson, judges lack the “democratic pedigree” necessary to inspire confidence in their ability to reflect community values in tough cases regardless of whether they are appointed or elected to the bench.<sup>27</sup> Juries, by contrast, are insulated from charges of favoring powerful political interests because they are drawn randomly from the community, and the verdict reflects a consensus view.<sup>28</sup>

The key to the jury’s ability to fulfill this role, Nelson argues, is access to complete and accurate information about the various factors that might affect their decision.<sup>29</sup> Nelson compares the outcomes in *Erving v. Craddock*, a 1761 civil case out of Massachusetts in which the jury was fully informed about the law and facts, with *Arizona v. May*, in which the jury was likely confused about the consequences of convicting the defendant of sexual molestation, and he received a seventy-five-year sentence.<sup>30</sup> In Nelson’s view, this comparison illustrates how juries that are able to draw on information about the likely consequences of their decision will be able to render fair and legitimate verdicts, while juries that are deprived of relevant information will ultimately fail to do so.<sup>31</sup> And for Nelson, there is no necessary tension between political and legal judgments; rather, there are “inevitably political judgments that are required in applying preexisting rules of law to the facts of particular cases.”<sup>32</sup> Nelson’s argument is that well-informed juries, rather than judges, are the ones to make such judgments.<sup>33</sup>

Whereas Nelson supports the practice of judges submitting cases involving sensitive political issues to the jury, other Symposium participants were more skeptical of (at least some parts of) the

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25. *Id.* at 1150.

26. *Id.* at 1154.

27. *Id.* at 1162.

28. *Id.*

29. *Id.* at 1163.

30. *Id.* at 1156-60.

31. *Id.* at 1160-61.

32. *Id.* at 1163-64.

33. *Id.* at 1164.

judiciary's intentions toward the civil jury. In his keynote address, Senator Sheldon Whitehouse argued that a number of decisions by the United States Supreme Court in recent years have substantially restricted the role of the civil jury.<sup>34</sup> In particular, he pointed to the interpretation of the Federal Arbitration Act in *Rent-a-Center v. Jackson* and *AT&T Mobility v. Concepcion*, restrictions on class certification in *Wal-Mart v. Dukes*, and the elevation of predictability for corporate financial interests over the finality of damage awards guaranteed by the Seventh Amendment in *Exxon v. Baker* as examples of the Court usurping the power of civil juries to benefit politically powerful interests.<sup>35</sup>

For Whitehouse, the civil jury is a valuable political institution for guarding against "judicial autocracy" as well as distributing power to the people.<sup>36</sup> Whitehouse sees juries as a check against the potential of judicial bias, as well as a way to make sure that businesses are held accountable.<sup>37</sup> He sees the civil jury as a structural part of our government, "vest[ing] citizens with direct and substantial authority" in adjudicating disputes.<sup>38</sup> This grant of authority, Whitehouse says, is important so that there is an institution that is "separate from the prevailing structure of power."<sup>39</sup> As he puts it, "[O]ne last sanctuary remains: the hard square corners of the jury box stand firm against the tide of influence and money."<sup>40</sup>

Suja Thomas likewise laments the diminution of Seventh Amendment protections on the civil jury's authority by the more entrenched branches of government.<sup>41</sup> Under common law, judges had relatively few opportunities to curtail litigants' rights to a jury trial.<sup>42</sup> Over the course of the past century, however, she notes that the executive branch has increasingly augmented the jurisdiction of

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34. Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of Our Government*, 55 WM. & MARY L. REV. 1241 (2014).

35. *Id.* at 1259, 1267, 1264.

36. *Id.* at 1266-72.

37. *Id.* at 1254-55, 1266.

38. *Id.* at 1271.

39. *Id.*

40. *Id.*

41. Suja A. Thomas, *Blackstone's Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States*, 55 WM. & MARY L. REV. 1195 (2014).

42. *Id.* at 1209-11.

administrative agencies, often placing procedural hurdles in the way of litigants seeking justice from the civil jury.<sup>43</sup> And the legislative branch has also enacted caps on damage awards that limit the practical impact—Thomas argues—of the jury’s ability to send a message about standards of conduct for the community.<sup>44</sup>

Thomas also accuses the Supreme Court of interfering with civil litigants’ rights to have a jury decide their cases: by permitting judges to determine the plausibility of litigants’ claims as articulated in the pleadings, and to substitute their own judgments as to the appropriate amount of a damage award.<sup>45</sup> Finally, by not incorporating the Seventh Amendment guarantees against the States, the Supreme Court has permitted the same types of executive, legislative, and judicial encroachments to take place in state courts as well as federal courts.<sup>46</sup> The irony of all this for Thomas is that the jury was originally intended as a check against these other institutions.<sup>47</sup>

### *B. Conceptions of the Juror’s Role*

Another theme was different conceptions of the role of individual jurors. Put differently, how should jurors conceive of their role in a civil case?

For Leib et al., jurors ought think of themselves as fiduciaries.<sup>48</sup> Drawing on private law, Leib argues that fiduciaries are people who act on behalf of others, have their trust, and protect their vulnerability.<sup>49</sup> In this context, the populace essentially chooses jurors at random and trusts them to adjudicate civil disputes, and people are vulnerable to these jurors because they can be subject to their decisions, whether as a party in a case or because they must conform their primary conduct to the norms articulated and

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43. *Id.* at 1235.

44. *Id.* at 1236-37.

45. *Id.* at 1237.

46. *Id.* at 1238.

47. *Id.* at 1239.

48. Ethan J. Leib et al., *Fiduciary Principles and the Jury*, 55 WM. & MARY L. REV. 1109 (2014).

49. *Id.* at 1113-14.

enforced by juries.<sup>50</sup> As fiduciaries, jurors should act on behalf of their fellow citizens in making decisions.<sup>51</sup>

For Landsman, jurors are a “regulator of last resort” in certain kinds of cases in which the political process has failed to protect the interests of ordinary people.<sup>52</sup> The civil jury, in Landsman's account, is in some sense its own administrative agency—perhaps even a mini-legislature or state attorney general—safeguarding the interests of consumers because financial interests have captured the existing institutions.<sup>53</sup> Here, he echoes the populist view of Sen. Whitehouse.

Landsman recounts how in a series of cases in California, civil juries found insurers liable for intentionally delaying claims payments or placing their own financial interests over those of customers, and the juries assessed substantial damages.<sup>54</sup> These verdicts served to put insurers on notice of the reach of common law in setting standards for acceptable behavior even when federal and state regulatory bodies charged with overseeing insurance carriers failed to do so.<sup>55</sup>

For Diamond, Rose, and Murphy, an important subset of jurors are actually best thought of as experts “embedded” in the jury.<sup>56</sup> This is, of course, a quite counterintuitive claim because we normally think of jurors as the opposite of experts—generalists, or worse.

But Diamond, Rose, and Murphy present empirical evidence that with the decline of automatic occupational exemptions, a significant subset of jurors are actually experts in the subject matter involved in the case—nurses, engineers, etc.<sup>57</sup> And Diamond, Rose, and Murphy think this is a positive development in our justice system.<sup>58</sup> Their empirical evidence suggests that in the aggregate, “expert-

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50. *Id.* at 1131-32.

51. *Id.* at 1138.

52. Stephan Landsman, *Juries As Regulators of Last Resort*, 55 WM. & MARY L. REV. 1061 (2014).

53. *Id.* at 1064.

54. *Id.* at 1076-88.

55. *Id.* at 1093.

56. Shari Seidman Diamond, Mary R. Rose & Beth Murphy, *Embedded Experts on Real Juries: A Delicate Balance*, 55 WM. & MARY L. REV. 885 (2014).

57. *Id.* at 905-06.

58. *Id.* at 930-33.

jurors as a whole” are less likely to take a one-sided view of the evidence than other jurors.<sup>59</sup>

Under existing law, it is unclear and varies among jurisdictions whether this expertise can be used during juror deliberations.<sup>60</sup> But if these jurors were recognized and embraced as experts in this way, though with appropriate cautions from the judge, this might carry important implications for deliberations on the jury, instructions given by the judge, and even jury selection itself.

### *C. Injecting Community or Justice Values*

Across virtually all of the Symposium discussions was recognition of the tension between the view that the civil jury operates as a political institution by interjecting community views of justice and fairness into the judicial process, and the view that justice under the rule of law implies that outcomes in like cases will be the same.

Jeffrey Abramson confronts this dilemma in a rebuttal to Heather Gerken’s interesting essay on second-order diversity.<sup>61</sup> He explains that first-order diversity, in which the jury fairly reflects the diversity of the community, permits the jury to fulfill both an adjudicative and a political role—adjudicative insofar as the collective decision of the jury in fact resolves the case, and political insofar as the jurors’ deliberations across demographic and attitudinal boundaries to reach a common consensus on a just outcome is itself political.<sup>62</sup> Second-order diversity, in which variation among case outcomes results from permitting minorities to be numerically dominant on juries in accordance with laws of probability, divorces the jury’s legal and political roles and consequently undermines both, according to Abramson.<sup>63</sup>

Valerie Hans and Herbert Kritzer, Guangya Liu, and Neil Vidmar focus their attention on explaining the factors that produce

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59. *Id.* at 918.

60. *Id.* at 892-97.

61. Jeffrey Abramson, *Second-Order Diversity Revisited*, 55 WM. & MARY L. REV. 739 (2014). *But see* Heather Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1101 (2005); Foreword, *Federalism: All the Way Down*, 124 HARV. L. REV. 4 (2010); Heather Gerken, Cutler Lecture: *Federalism(s)*, 53 WM. & MARY L. REV. 1549 (2011).

62. Abramson, *supra* note 61, at 802.

63. *Id.* at 783.

variation in jury damage awards.<sup>64</sup> Kritzer, Liu, and Vidmar examine archival data from a variety of sources to investigate jury decision making in the context of noncompensatory damages.<sup>65</sup> Many critics point to the apparent variability in noncompensatory awards as evidence of the need for legal mechanisms such as statutory caps to control that variability, often referring to “run-away juries.” As a starting point, they first describe the great range of injuries that are generally classified as noncompensatory and suggest that some types of injuries (e.g., pain and suffering) may be more easily related to the severity of the injury while other types (e.g., disfigurement, emotional distress, loss of consortium) may be more related to specific case-related factors.<sup>66</sup>

After controlling for factors such as injury severity, gender, and age, they find that as the size of compensatory damage awards increases, both the ratio of compensatory to noncompensatory damages and the variability in ratios decreases.<sup>67</sup> Those ratios differ, however, based on the origin of the data and type of case.<sup>68</sup> They also examine the impact of statutory caps on noncompensatory damage awards in medical malpractice cases and find that the relationship between compensatory and noncompensatory damages is weaker for cases involving higher compensatory awards in jurisdictions with caps.<sup>69</sup>

Hans contends that damage awards are deeply intertwined with community values, responding in part to prior work from one of us,<sup>70</sup> and offers a model to describe how civil juries translate normative values into monetary awards.<sup>71</sup> Under that model, jurors first make a categorical determination of whether a damage award is merited or not. If an award is merited, jurors then make an ordinal assessment of whether the damage award should be large or small. Finally, they translate the ordinal assessment into a precise

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64. Herbert Kritzer, Guangya Liu & Neil Vidmar, *An Exploration of “Noneconomic” Damages in Civil Jury Awards*, 55 WM. & MARY L. REV. 971 (2014).

65. *Id.* at 986-90.

66. *Id.* at 976-80.

67. *Id.* at 1010.

68. *Id.*

69. *Id.* at 1011.

70. Jason Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331 (2012).

71. Valerie P. Hans, *What’s It Worth? Jury Damage Awards As Community Judgments*, 55 WM. & MARY L. REV. 935 (2014).

monetary value.<sup>72</sup> Community values inform each of those steps. But she also cautions that a number of institutional and procedural constraints hamper the ability of juries to fully reflect community values in damage awards.<sup>73</sup> She concludes that while models of jury decision making on damage awards do not necessarily produce precise estimates, their inherent variability suggests the impact of community values.<sup>74</sup>

How do these “community values” emerge from the jury? Christina Carbone and Victoria Plaut echo William Nelson’s comments that civil juries are better able than judges to decide cases in ways that will be perceived as fair by community standards, but argue that it is the diverse composition of the jury that inspires confidence rather than any superior decision-making capacity.<sup>75</sup> Diversity encourages robust deliberation and requires consensus-building around common views of justice in spite of different attitudes, life experiences, and viewpoints.<sup>76</sup>

Public confidence in the legitimacy of the verdict, however, might depend on whether the public views the civil jury through colorblind or multicultural lenses. In communities wedded to a colorblind model, diversity should not dictate case outcomes, according to Carbone and Plaut, and thus verdicts rendered by nondiverse juries do not undermine their own legitimacy.<sup>77</sup> Communities that value a multicultural approach recognize the United States as a pluralist society and value diversity for its contribution to a functioning democracy.<sup>78</sup> For these communities, verdicts by nondiverse juries are the result of an unfair process and are viewed with greater skepticism.<sup>79</sup>

To the extent that we rely on jurors to reliably inject community values into the legal system, though, Ilya Somin sounds a cautionary if mixed note.<sup>80</sup> Building on his work on the political ignorance

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72. *Id.* at 944.

73. *Id.* at 963-68.

74. *Id.* at 968.

75. Christina S. Carbone & Victoria C. Plaut, *Diversity and the Civil Jury*, 55 WM. & MARY L. REV. 837 (2014).

76. *Id.* at 875.

77. *Id.* at 852-53.

78. *Id.* at 853-54.

79. *Id.* at 854.

80. Ilya Somin, *Jury Ignorance and Political Ignorance*, 55 WM. & MARY L. REV. 1167

of voters, Somin casts doubt on the idea that jurors are sufficiently knowledgeable to properly adjudicate civil cases.<sup>81</sup> But Somin also points out that to the extent we look to both jury service and voting as means of lay people participating in governance, citizens may do a better job of serving as jurors than of either voting or providing input into policy choices more directly.<sup>82</sup> Somin points out that jurors' limited knowledge and time is better suited for sitting for a few days and deciding a particular case, with competing evidence presented to them, as compared to voting, when citizens are not obligated to consider any evidence at all.<sup>83</sup>

#### *D. Implications*

What might we take away from this Symposium? One implication is the interdependence of the historical, interpretive, theoretical, and empirical inquiries—all represented here. If we understand the historical context in which the jury was seen as a political institution, as Nelson and Thomas help us understand, we can make arguments about whether the historical justification still carries weight. History also helps the interpretive exercise of giving meaning to our current practices, as Amar and Burns do. And then that interpretive exercise can lead to a more theoretical take on the role of individual jurors, or juries more broadly, in our democratic order. This is the kind of exercise that Abramson, Leib, Landsman, and Lahav in different ways are engaged in. Finally, with a firmer grasp of the role of juries, we can ask empirical questions about how this role is fulfilled, shown in the work of Hans; Kritzer, Liu, and Vidmar; Diamond, Rose and Murphy; and Somin.

Another implication is the need to engage with democratic theory in both understanding—and making arguments about how to improve—the functioning of the jury as a political institution. If one sees the civil jury as an instantiation of pluralist democracy, then one must forego the importance of diversity of perspectives on individual juries, as Carbone and Plaut (and to a certain extent Diamond and Rose) emphasize, or on juries in the aggregate, as

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(2014).

81. *Id.* at 1181-88.

82. *Id.* at 1193.

83. *Id.* at 1189.

Hans and Gerken do. But if one sees the civil jury as a site for deliberative democracy, as Abramson and Leib do, then one might see the the role of the juror differently. One might even instruct the jury differently depending on which perspective one adopts. Should individual jurors draw on their life experiences during deliberation? The choice between pluralist and deliberative democracy might help determine the answer to this question.

And finally, understanding and navigating the tension between legal and political (or justice) values might go a long way in understanding different perspectives on the importance and efficacy of the civil jury. The argument between Jeffrey Abramson and Heather Gerken, and to a lesser extent Valerie Hans and one of us (Solomon), is about this tension, and the appropriate normative stance towards elevating political or justice values over legal values in deciding a particular case. For Gerken and Hans, the jury is performing an appropriate and useful function in injecting community values, even if it means elevating them over the “law of rules.” Abramson and Solomon are more concerned about the harm to rule-of-law values.

Most, if not all, Symposium participants seem to agree that much theoretical and empirical work remains to be done on this topic of the civil jury as a political institution. We hope that this Symposium made a modest contribution and served as a useful jump-start to such an effort.