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## The Jury and Participatory Democracy

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## THE JURY AND PARTICIPATORY DEMOCRACY

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## INTRODUCTION

Citizens directly participate in the civil justice system in three ways. They can be sued, they can sue another, and they can serve on a jury. Beyond that involvement, the court system is peopled by professionals: judges, lawyers, clerks, and administrators. This Essay considers the reasons our society might want citizens to directly participate as adjudicators in the third branch.

Our constitutional legacy and collective self-understanding has included a place for citizen adjudicators.<sup>1</sup> This self-understanding may be contrasted with the idea that specialists, experts, and professionals ought to have sole responsibility for legal decisions. The theory that underlies this self-understanding is an ideal of law as accessible to ordinary people and of a populace educated enough to understand the laws governing their lives. The debate about the jury right can be linked to a broader debate about the role of experts and to skepticism about the possibility of true objectivity, the social good that experts purport to provide.<sup>2</sup> The controversy surrounding the jury is also an expression of disagreements over the desirability of a representative form of government, perhaps one ruled by virtuous elites, as compared with direct democracy.<sup>3</sup> But the choice

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1. See, e.g., *Powers v. Ohio*, 499 U.S. 400, 407 (1990) (“[T]he institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority [and] invests the people or that class of citizens, with the direction of society.”) (quoting 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 334-37 (Schocken Books 1961) (1835)). See generally Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973); see also William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 70 (2006) (“[W]ithin her proper fact-finding sphere, an American juror is a constitutional officer—the constitutional equal of the President, a Senator or Representative, or the Chief Justice of the United States.”).

2. See, e.g., PETER NOVICK, *THAT NOBLE DREAM: THE “OBJECTIVITY QUESTION” AND THE AMERICAN HISTORICAL PROFESSION* 1 (1988); EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 42-43 (1973); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1678-79 (1975).

3. For books advocating or analyzing popular sovereignty American-style, see, for example, LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (arguing that the founding generation saw constitutional interpretation as the province of the people, not limited to an elite group of judges) and EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* (1989) (describing the historical origins of the concept of popular sovereignty).

need not be all one or the other. Indeed, the jury provides one element of ordinary common sense in a system governed by experts, a melody of populism in an institution otherwise dominated by the harmony of elites.

The ideal that our legal system is knowable to lay people and amenable to lay intervention does not reflect lived reality. Jury trials are increasingly rare.<sup>4</sup> Our education system is much criticized.<sup>5</sup> Complex legal disputes are difficult to understand even for generalist judges,<sup>6</sup> and the legal world is growing ever more complex.<sup>7</sup> The Founders themselves were not entirely in agreement over the benefits of the trial by jury,<sup>8</sup> and the right to participate in the jury, like other civil rights, was severely restricted when the Seventh Amendment was ratified.<sup>9</sup> Even so, were we to give up on the jury trial, that loss would constitute an injury to the moral ideal of citizen participation in government.<sup>10</sup>

The best argument in favor of juries in a pluralist republic such as our own is not that jurors make better decisions than other

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A somewhat different description can be found in GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1993) (describing the transformation of American society in the revolutionary period to a republican form of government emphasizing ideas of virtue and egalitarianism). For a description of the idea republican virtue, see J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT* (2d ed. 2003) and Frank I. Michelman, *Law's Republic*, 97 *YALE L.J.* 1493 (1988). Bruce A. Ackerman presents a description of constitutional dualism in somewhat different terms, as the dualism of an ongoing dialogue with the "People," which reaffirms national identity on the one hand, and the competition of private interests on the other. Neither of these ideas really includes direct democracy. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013, 1032 (1984).

4. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 *J. EMPIRICAL LEGAL STUD.* 459, 510 (2004).

5. See, e.g., JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA* 176-219 (2010).

6. LAWRENCE BAUM, *SPECIALIZING THE COURTS* 175-76, 219 (2011); see also Edward K. Cheng, *The Myth of the Generalist Judge*, 61 *STAN. L. REV.* 519, 549-50 (2008); Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 *WASH. U. L. REV.* 847, 871-73 (2012).

7. Mila Sohoni, *The Idea of "Too Much Law,"* 80 *FORDHAM L. REV.* 1585, 1608-09 (2012).

8. See Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 *HASTINGS L.J.* 579, 598-600 (1993).

9. NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES* 66 (2007) (describing exclusion of women).

10. *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004) ("[The right to a jury trial] is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.").

actors, but that citizens are the ones making these decisions.<sup>11</sup> This Essay considers the significance of the choice of adjudicator for the ideal of self-rule.<sup>12</sup>

### I. WHO DECIDES AND WHY IT MATTERS

A man is speeding late at night on a rural road. The police try to pull him over. He accelerates. Sirens blaring, the police chase him down the road through several intersections and the quiet parking lot of a mall closed for the night. A few other cars are on the road. At several points the driver crosses a double yellow line. Finally, one of the police cars giving chase bumps the back bumper of the speeding car to run it off the road. As a result, the car careens off the road and crashes. The driver is severely injured, paralyzed from the neck down. He sues, arguing that when the officer bumped his car, this was excessive force under the Fourth Amendment. The question in the case is straightforward, but not an easy one: was the officer's conduct reasonable?

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11. On the subject of whether juries make better or worse decisions, studies show that juries agree with judges on liability almost 80 percent of the time. In tort cases, the most studied area, judges, jurors, and lawyers disagree about damages more often, but that does not necessarily mean juries are making worse decisions than their professional counterparts. Often in tort cases there is no objective measure of damages against which the jury's performance can be compared. For a discussion of these studies, see Alexandra D. Lahav, *The Case for "Trial by Formula,"* 90 TEX. L. REV. 571, 585-591 (2012).

12. This Essay takes as its departure point the idea that regardless of what the correct descriptive theory of American government is, elements of popular sovereignty in our constitutional system support the tradition of inserting ordinary citizens into the judicial process. For sources on what form of government we have, see *supra* note 1. On the difference between a democracy and a republic and the relationship of these concepts to the idea of self-government, see Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 758-59 (1994) (discussing the similarities between a republic and a democracy); Morton J. Horowitz, *The Supreme Court 1992, Term—Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 58-61 (1993) (discussing understandings of democracy and republican forms of government in historical context).

This question should be answered by a jury.<sup>13</sup> But no jury had a chance to hear *Scott v. Harris*, the case on which this short story is based, before the Supreme Court weighed in.<sup>14</sup> Police officers had videotaped the entire incident through cameras mounted on their cars.<sup>15</sup> The Supreme Court watched the video and nearly all the Justices agreed.<sup>16</sup> Officer Scott's decision to ram the back of Mr. Harris's car was reasonable because the high speed chase was extremely dangerous to the officers and innocent bystanders.<sup>17</sup> Eight Justices believed that the video showed them everything they needed to know.<sup>18</sup> They did not see how any reasonable person could interpret the video differently than they did.<sup>19</sup>

A subsequent study, however, showed that people have a variety of reactions to the video.<sup>20</sup> Some agreed with the Justices; others disagreed.<sup>21</sup> It is possible that a good lawyer, presenting this video to the jury, could convince them that the officer's conduct was unreasonable.<sup>22</sup> A local jury, familiar with the road in question, might also believe that the officer's conduct was reasonable. One of

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13. See Akhil Reed Amar, *An Unreasonable View of the 4th Amendment*, L.A. TIMES (Apr. 29, 2001), <http://articles.latimes.com/2001.apr/29/opinion/op-57091> (stating that “[t]he landmark English search-and-seizure cases that inspired the framers were themselves civil-damage suits where juries helped determine whether government officials had acted reasonably” and arguing that the text of the Fourth Amendment, read in conjunction with that of the Seventh Amendment, promises that the people should interpret the scope of the right to be free from unreasonable searches and seizures).

14. 550 U.S. 372, 378 (2007).

15. The video was appended to the Supreme Court opinion and is available on the Supreme Court website. Video: *Scott v. Harris*, SUP. CT. U.S., <http://www.supremecourt.gov/media/media.aspx> (last visited Jan. 24, 2014).

16. *Harris*, 550 U.S. at 373.

17. *Id.* at 380, 384.

18. *Id.* at 373.

19. *Id.* at 380 (“[Harris’s] version of events is so utterly discredited by the record that no reasonable jury could have believed him.”).

20. Dan Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 838 (2009).

21. *Id.* at 864-70.

22. Contrast this to the Rodney King criminal trial in which a video of police officers beating King was deconstructed by the defense, ultimately resulting in an acquittal. For a description and analysis, see Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLINICAL L. REV. 1, 202 (2005). See also Jessica Silbey, *Cross Examining Film*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 17, 45-46 (2008) (applying film theory to the decision in *Scott v. Harris*); Howard Wasserman, *Orwell’s Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600, 601, 646-47 (2009) (describing effect of an increasingly recorded world on civil rights litigation).

my students from Georgia made an eloquent argument in favor of the majority's conclusion that the police officer's conduct was reasonable based on his experience driving that very road. This would ordinarily be considered a fact to be determined by jurors like him.

Because *Scott v. Harris* involves a contested constitutional right, it is a good core case to think about in connection to two central and related arguments in favor of the jury right: that it is a form of self-government and a protection against government tyranny.<sup>23</sup> 42 U.S.C. § 1983 allows any person to sue state officials for depriving that person of their federal constitutional rights, and in those suits plaintiffs have a right to a trial by jury.<sup>24</sup> Such lawsuits are in part intended to regulate the conduct of the police departments and other governmental entities that are sued by ordinary citizens.<sup>25</sup> These suits are also meant to compensate individuals who were harmed and to express disapproval of wrongful conduct.<sup>26</sup> The decision maker in *Scott v. Harris*, be he a judge or juror, is making law in the sense that going forward, police and citizens will know a little more about what is appropriate in the context of a high-speed chase. This decision regulates primary conduct in society. That adjudicator is also deciding the scope of a constitutional right that informs everyday interactions between individuals and the state. Who should set the parameters of those interactions?

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23. The same basic arguments also apply in the private law context. The origin of the argument in favor of the Seventh Amendment was protection of debtors. *See infra* notes 60-66 (discussing the debates over debtor's rights around 1789).

24. 42 U.S.C. § 1983 (2006); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708-09 (1999) (holding that a § 1983 action is an "action at law" for Seventh Amendment purposes).

25. One study demonstrates that these suits have an effect. *See* Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 *CARDOZO L. REV.* 841, 862 (2012) (surveying police departments and showing that police use lawsuit data to improve their practices and policies).

26. *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) ("The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.").

*A. Self-Government*

The jury is a constitutional office.<sup>27</sup> Service on a jury provides the opportunity for individuals to participate in the making and enforcement of law, jobs that are usually the province of government officials. Many characterize the jury right as a type of political participation, like voting.<sup>28</sup> Some of the same questions apply to voting and jury service: Is the electorate sophisticated enough to make these decisions? Does citizen involvement lead to better decisions? Does it lead to greater sociological legitimacy—that is, are people more willing to accept results they do not like when the decisions come from a popular body? Does it enable people to make better judgments as citizens in other areas of political life?<sup>29</sup> It is not clear that we can ever come to a final conclusion on these questions, but jury service unequivocally achieves two things: it exposes citizens to the inner workings of the courts, and it places them in a position of power within the court system.<sup>30</sup> The value of observation is educational; the value of participation is dignitary.<sup>31</sup>

First, by serving on a jury citizens observe how the court works first hand. They watch the judge's interactions with the parties and with them. They hear the evidence and a description of the relevant law. They see the lawyers' conduct before the court and towards them. There are other ways to achieve the same ends, such as by

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27. Young, *supra* note 1, at 70. Most of the federal judiciary is a product of congressional action, whereas the Supreme Court and the jury are constitutionally mandated.

28. For an explicit comparison, see Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 206 (1995).

29. Some evidence demonstrates that persons serving as jurors in criminal cases are more likely to vote after their service, but such correlation was not shown for civil jury service. See JOHN GASTIL ET AL., THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION 46-47 (2010).

30. See *id.* at 20 (“[T]he jury puts citizens right at the heart of a legal process and lets them not merely test its legitimacy but actually take responsibility for rendering its judgments.”).

31. On the educational value of jury service, see generally Andrew Guthrie Ferguson, *Jury Instructions as Constitutional Education*, 84 U. COLO. L. REV. 233, 233 (2013) (arguing that there is “a historical and theoretical basis for reclaiming the educative value of jury service”). On dignitary values in civil process, see JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 189-99 (1985) (discussing respect for individual dignity) and Robert P. Burns, *The Dignity, Rights, and Responsibilities of the Jury: On the Structure of Normative Argument*, 43 ARIZ. ST. L.J. 1147, 1152-58 (2011). Burn's discussion of Hannah Arendt's jury experience is illuminating. *Id.* at 1149-50.



observing open court proceedings as a visitor. Most of the exposure individuals have to the civil justice system probably does not come from such direct observation, however. Instead, it likely comes from the media, in the fictionalized form of serial television shows such as *Law and Order*, the semi-fictionalized reality court television shows like *Judge Judy*, or in the form of generalized critiques of the civil justice system found in books or news reports.<sup>32</sup> None of these provide accurate portrayals of the civil justice system, although each may have something to commend it. Seeing the workings of the court system first hand is not the only educational benefit of jury service, as jurors also learn about the specific law at issue in the case in order to decide it.<sup>33</sup> But one cannot expect a citizen's entire civic education to be contained in the jury box. Too few citizens serve on juries<sup>34</sup> and too little law applies to each case for jury service to be a robust form of civic education. Accordingly, the role of the jury trial as an educational tool is more symbolic or expressive than real.

The fact that jurors are *deciding* cases, not only observing them, is important. Jurors who are charged with ultimately deciding a case before them are likely to be focused and attentive to the proceedings and to understand the importance of deciding cases correctly. Deciding cases also emphasizes the significance of a legal decision maker's job to the jury. Studies indicate that jurors take their job seriously.<sup>35</sup> Primarily, the decision-making power communicates respect for the jurors who are entrusted with the fate of another citizen's case. Although civil matters decided by juries ordinarily do not involve liberty interests,<sup>36</sup> they are still very

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32. See, e.g., PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (2011) (New York Times bestselling book criticizing civil litigation).

33. Ferguson, *supra* note 31, at 287-88.

34. Because there are so few jury trials, few citizens have the opportunity to serve on civil juries. See Galanter, *supra* note 4, at 459-570. There are more opportunities in the criminal context.

35. See Shari Seidman Diamond et al., *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537, 1552-57 (2012) (explaining studies demonstrating the importance jurors attribute to jury instruction).

36. Liberty interests include the parent-child relationship or physical freedom, for example—cases that are either part of the courts' contempt power or allocated to courts without juries such as probate courts. Liberty interests are usually at stake in criminal matters, where there is also a right to a jury. The civil jury is usually called to decide cases involving money damages. The civil jury right attaches to cases at law, and money damages

important to the participants, important enough to invest the significant amounts of time and money necessary to get to trial. This dignitary interest is the basis for the equal protection jurisprudence governing juror selection. In forbidding peremptory challenges of jurors solely on the basis of race and gender, the Supreme Court emphasized “the honor and privilege of participating in our system of justice.”<sup>37</sup> Being excluded from jury service, through the selection of the initial pool or by peremptory challenge, violates the rights of the juror to equal protection because it denies that juror the opportunity to exercise a right that is accorded other citizens—to sit in judgment at a civil trial.<sup>38</sup>

Now let us return for a moment to the case of the speeding motorist, *Scott v. Harris*. This case raises two interlinked questions: Who ought to decide the case? What ought to be the outcome? To separate these questions, assume that any juror would find that Officer Scott’s conduct was reasonable under the circumstances, as the Supreme Court insisted.<sup>39</sup> Would there be any civic value to having a jury decide this question rather than a judge if the outcome would be the same? The way the doctrinal question of both summary judgment and judgment as a matter of law is framed asks whether any reasonable juror could decide otherwise.<sup>40</sup> This inquiry

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was “the traditional form of relief offered in the courts of law.” *Curtis v. Loether*, 415 U.S. 189, 196 (1974); see also Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 616-17 (2008) (describing when the jury right attaches).

37. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991) (holding that race-based exclusions from civil jury service violate the jurors’ right to equal protection); see also *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994) (“It denigrates the dignity of the excluded juror, and, for a woman, reinvokes a history of exclusion from political participation.”).

38. Arguably, if all nonprofessional citizens were excluded from jury service, there would be no equal protection problem because education level is not a protected category. As a doctrinal matter, the Seventh Amendment guarantees the right to a jury trial but has not been interpreted to guarantee the right to a jury with a particular makeup. But by implication, the jury right has been understood to include the right of citizens to sit on a jury. See *Powers v. Ohio*, 499 U.S. 400, 407 (1990) (analogizing jury service to voting as a right from which citizens may not be excluded). The Seventh Amendment does not specify who the jurors must be or whether they must be lay persons as opposed to specialized citizens. U.S. CONST. amend. VII. The history of the jury has been one of exclusion of certain categories of persons, see GASTIL ET AL., *supra* note 29, at 5, and the jury right has been interpreted with a particular focus on history, so it is at least an open question whether limiting jury service to experts would be unconstitutional.

39. See *supra* notes 18-19 and accompanying text.

40. See FED. R. CIV. P. 56(a) (“The court shall grant summary judgment if the movant

privileges the jury as the preferred decision maker, retaining its right to decide unless it is unreasonable. Today, the summary judgment rule's mandate that the judge consider whether there is a material fact in dispute and the judgment as a matter of law rule's requirement that the judge ask whether the evidence is legally sufficient are much more judge-friendly.<sup>41</sup> As interpreted by the majority in *Scott v. Harris*, this inquiry privileges judicial decision-making because if the judge finds the outcome obvious, she has the discretion to determine that there is no issue of material fact in dispute over the losing party's objection. The same is that case with judgment as a matter of law.<sup>42</sup>

If we assume that jurors and judges would decide the questions the same way, and the judge already has all the information before him or her, it is arguably a waste of resources to have a jury decide the case. Justifying twelve people taking time out of work under these circumstances is difficult. But this use of resources may be justified on the grounds that it builds civic culture for citizen jurors, rather than the professional judiciary, to go through the process of hearing and deciding the case, even if it is inefficient, because being a decision maker empowers citizens.<sup>43</sup> This is particularly true of civil rights cases that determine the relationship between the people and the police going forward.<sup>44</sup> But the rationale is not limited to suits involving government. Jury trials improve civic culture by expressing respect for and empowerment of ordinary citizens who

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shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."); FED. R. CIV. P. 50(a) ("If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may" grant judgment against that party.).

41. My argument here is that the Supreme Court's approach to summary judgment and judgment as a matter of law is a result of the application and interpretation of the rules in particular cases, not of a logical requirement. *SEC v. Eagle Eye Asset Mgmt.*, No. 11-11576-WGY, 2013 WL 5498182, at \*2-6 (D. Mass. Oct. 4, 2013) (describing doctrinal relationship between summary judgment and trial).

42. Justice Black's primary objection in his dissent in *Galloway v. U.S.* was that a motion for a directed verdict (now called judgment as a matter of law) that allowed judges to revisit trial testimony violated the jury right. 319 U.S. 372, 397 (1943).

43. See GASTIL ET AL., *supra* note 29, at 20 ("[T]he jury puts citizens right at the heart of the legal process and lets them ... take responsibility for rendering its judgments.").

44. See Schwartz, *supra* note 25 (describing what police learn from modern civil litigation).

are elevated, for a brief time, to the role of adjudicators over their fellow citizens' disputes.<sup>45</sup> Contrast this with a more authoritarian, hierarchical system that requires citizen deference to a class of judges.<sup>46</sup>

If juror adjudication has an expressive value beyond the accuracy of the decision rendered, the next question is whether it is worth the costs to jurors to express these values. Who is in the best position to make this trade-off? One concern about judges making this trade-off is that perhaps in the rush to streamline the system they will prefer to avoid trial without thinking through the values lost.<sup>47</sup> One of these values is allowing citizens to participate in adjudication because it lets the people into the courts.<sup>48</sup> Another related concern about judges making this trade-off is that they may be inclined to seize power by finding too often that no reasonable jury could disagree with them. As the case of *Scott v. Harris* illustrates, it is very easy to be sure that one's own views are objectively correct and unassailable.<sup>49</sup> Dan Kahan and his coauthors diagnose overconfidence in the correctness of one's position as "cognitive illiberalism."<sup>50</sup> Concerns about judicial preference for the government's side in a dispute are the basis for arguments in favor of the jury on corruption grounds.<sup>51</sup> But judges may also simply prefer judicial decision making to that by non-professional citizens without having a particular preference for outcomes favoring the government.<sup>52</sup>

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45. See Burns, *supra* note 31, at 1152.

46. See generally MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 23 (1986) (arguing that legal system structure reflects the political structure of a society); Amalia D. Kessler, *Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication*, 10 *THEORETICAL INQUIRIES* L. 423, 424 (2009) (describing alternative visions of justice in the United States, their relationship to the political order, and why they failed to gain traction).

47. See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 *HARV. L. REV.* 924, 926 (2000) (describing the judicial perception that when a case goes to trial the lawyers have failed).

48. See *supra* note 30.

49. See *supra* notes 14-20 and accompanying text.

50. Kahan, *supra* note 20, at 895-96.

51. See Jenny E. Carroll, *The Jury's Second Coming*, 100 *GEO. L.J.* 657, 685-86 (2012).

52. There could be a number of reasons for such a preference. One is that bureaucracies like the judicial branch tend to prefer policies that benefit their own continued existence and growth.

Mistrust of judges brings us back to the question of what the outcome in *Scott v. Harris* ought to have been. What if judges wrongly predict a reasonable juror's reaction? In a pluralist society, we must consider the possibility that in every case there may be a difference of opinion about the facts. This is not only because we tell different stories about facts, but because the facts themselves are disputed. That is, differences of opinion may be a cultural or epistemic problem. Any fact-finding and evaluation involves some uncertainty.<sup>53</sup> A dispute becomes a legal case and ultimately proceeds beyond the initial stages of discovery because the people involved do not see the facts in the same way.<sup>54</sup> This means that other reasonable people might also differ in their interpretation of the facts. Even if eight out of nine Supreme Court Justices agree that Officer Scott was reasonable in bumping Mr. Harris' car the way he did, members of a jury may still find otherwise. Allowing the jury to decide these questions recognizes the existence of factual uncertainty. As an epistemological matter, uncertainty about facts may always exist.<sup>55</sup> If that is the case, then the jury should always have the opportunity to adjudicate matters of fact because reasonable minds will differ about what happened and, importantly, about the significance of what happened.

Is denying jurors the ability to determine the facts and apply the law to those facts an affront to juror dignity or to our commitment to self-government? To the extent that the decision denies the validity of jurors' rational disagreement with their fellow citizens who are also judges, then a decision like *Scott v. Harris* does limit self-government. Whenever a court takes away from the jury the ability to decide a question at issue in a case, this is to some extent a limitation on self-government. At the same time, many decisions have been outside of the jury's purview for a long time, such as the ability to determine a criminal sentence other than death,<sup>56</sup> or the

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53. Alex Stein, *An Essay on Uncertainty and Fact-Finding in Civil Litigation, with Special Reference to Contract Cases*, 48 U. TORONTO L.J. 299, 299 (1998).

54. See Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 PSYCHOL. PUB. POL'Y. & L. 133, 140-41 (2010) (describing a study proving that lawyers are consistently overconfident in their predictions of the outcomes of their cases).

55. Stein, *supra* note 53, at 302.

56. Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 37 (2003).

ability to decide the law as well as the facts.<sup>57</sup> The difficult question is where to draw the line between the power of the professional judiciary and the power of a lay citizenry. We are unlikely to go back to the days when the jury decided both the law and the facts, but it is worth noting that the old rule is more consistent with ideals of self-governance.<sup>58</sup>

### *B. Tyranny, Corruption, Judicial Bias*

Three related concerns about the judiciary support the jury right. The first is that judges will enforce government tyranny, the second that judges will be corrupted, and the third that they will be biased.

*Scott v. Harris* raises the concern that judges will consistently prefer the side of government in disputes. Could a judge's review of the video in that case be affected by their concern or identification with police officers or their desire to protect the government from civil rights suits? And if this is the case, what does it mean for the jury in cases involving private actors?

Fear of corruption was a central argument in favor of the civil jury during the debates over the original Constitution and subsequently the Bill of Rights.<sup>59</sup> One stated reason for the Antifederalists' opposition to the ratification of the original Constitution was that Article III contained no right to a trial by jury in civil cases.<sup>60</sup> Antifederalists worried that debtors would be treated unfairly as a group by distant federal judges.<sup>61</sup> The right to a local jury was particularly important in debt cases because opponents feared that Federalist judges would hold debtors accountable to English and other out-of-state creditors because this was the federal government's preference, and they predicted that local juries would not.<sup>62</sup> For example, in the North Carolina convention debates, Antifederal

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57. *Id.* at 36.

58. See Carroll, *supra* note 51, at 676 (discussing evidence of the jury's power to decide law as well as fact, focusing on the criminal context); Landsman, *supra* note 8, at 602 (discussing Massachusetts civil juries' power to decide questions of law as well as fact in the early days of the republic).

59. Landsman, *supra* note 8, at 599-600.

60. *Id.* at 599.

61. Wolfram, *supra* note 1, at 673-74.

62. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 143 (Jonathan Elliot ed., 2d ed. 1891), *reprinted in* THE COMPLETE

ists argued that “the trial by a jury of the vicinage is one of the greatest securities for property. If causes are to be decided at such a great distance, the poor will be oppressed.”<sup>63</sup> More broadly, Jefferson explained in a private letter that everyone “know[s] that permanent judges acquire an *Esprit de corps*” and may be tempted by bribery and misled “by a spirit of party, by a devotion to the Executive or Legislative.”<sup>64</sup> And “[i]t is left therefore to the juries, if they think the permanent judges are under any bias [sic] whatever in any cause, to take upon themselves to judge the law as well as the fact.”<sup>65</sup> Proponents of the jury right were concerned that the identity of the decision maker would determine the treatment of litigants before the court.<sup>66</sup>

By contrast, Alexander Hamilton was critical of the jury and in *The Federalist* 83 refuted the idea that the jury would be free of corruption, maintaining that the selection of jurors could be corrupt and the jurors themselves could be bribed.<sup>67</sup> He argued, instead, that with two decision makers, both judge and the jury would need to be corrupted. For this reason, the jury right constituted a “double security” as each would protect the integrity of the other.<sup>68</sup>

Does the physical and mental distance between the rural Georgia road on which Mr. Harris was speeding and the marble columns of the Supreme Court create an increased risk of bias and error? If the issue is distance, it does not logically follow that the problem is the identity of the decision maker rather than a failure to grant sufficient deference to the trial court and to the specifics of the individual case.<sup>69</sup> A local judge can be as close to the rural route in

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BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 523 (Neil H. Cogan ed., 1997).

63. See Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 IOWA L. REV. 145, 195 (2002) (quoting James M'Dowall).

64. Letter from Thomas Jefferson to the Abbé Arnoux, reprinted in 5 THE FOUNDERS' CONSTITUTION 363, 364 (Philip B. Kurland & Ralph Lerner eds., 1987).

65. *Id.*

66. Landsman, *supra* note 8, at 599-600. This is analogous to a recent finding that a majority of Supreme Court justices currently sitting on the Court prefer business interests in the cases before them. See Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1471 (2013) (concluding that the Roberts Court is more friendly to business than either the Burger or Rehnquist Courts were).

67. THE FEDERALIST NO. 83 (Alexander Hamilton), reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* note 64, at 358, 360.

68. *Id.*

69. See ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL 117 (2009) (suggesting that

question as a jury. More convincing are arguments about bias stemming either from the professional role of judges or from their political position.

The first set of arguments concerns bias resulting from a judge holding a particular point of view, either as a result of their personal experiences or legal training.<sup>70</sup> Juries are an antidote to this problem because there are a number of them, so more than one person's limited set of experiences is part of the decision-making process.<sup>71</sup> Perhaps jurors would see the case of *Scott v. Harris* differently than a judge because they would have the opportunity to debate and discuss the video in deliberation with one another.<sup>72</sup> But it is not clear that a judge, in conversation with clerks, other judges, or in the case of the Supreme Court, other Justices, cannot have a similar experience as a juror would in deliberation.

A second set of arguments concern bias due to judges being beholden to or identifying with their party, the other branches of government or other interests.<sup>73</sup> For example, the Supreme Court dismissed a lawsuit against the former Attorney General John Ashcroft for failure to state a claim. The claim, which the Court found to be unsupported by the facts alleged and not plausible, was that Mr. Ashcroft participated in a conspiracy to detain Muslims of Middle Eastern origin based solely on their religion or national origin in the immediate aftermath of the tragedy of September 11.<sup>74</sup>

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attention to specific facts in an individual case is one of the important values in trials). The Supreme Court decided *Scott* on summary judgment, so there was no trial with live witnesses—only a videotape. *See supra* notes 14-19 and accompanying text.

70. *See supra* notes 62-63 and accompanying text (describing Jefferson's argument regarding judicial bias); *see also* Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1472 (2013) (describing an empirical study showing business interests have greater success in the Roberts Supreme Court than other sectors).

71. This can be styled either as an argument about many minds being better than one or as an argument that the deliberative process produces better results.

72. Theoretically, the situation at the appellate level is different, as three judges sit on Courts of Appeals panels and nine on the Supreme Court. Studies show that juror damages determinations change in deliberation. For studies showing that deliberation increases jury awards, see Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOC'Y REV. 513, 553-57 (1992); David Schkade et al., *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139, 1140-41 (2000).

73. *See supra* note 64.

74. *Ashcroft v. Iqbal*, 556 U.S. 662, 662 (2009).



Did the Justices' identification with or support for Attorney General Ashcroft spur the decision?<sup>75</sup> Would a jury react differently to these allegations? Surely a jury, depending on its makeup, would not be free from prejudice and fear in deciding a case about the government's reactions in the immediate aftermath of 9/11. Perhaps a diverse group of jurors may have sufficiently different experiences with the police and government officials so that individual jurors may not be as deferential to the executive as judges.

A third consideration is that a jury comes to the legal system with fresh eyes, whereas judges may be jaundiced by familiarity with certain types of litigants. Consider the case of Michael Turner as an illustration of the principle that familiarity breeds contempt.<sup>76</sup> Mr. Turner had been held in contempt five times for failing to pay child support.<sup>77</sup> The last time, Mr. Turner claimed to be addicted to drugs and to have a debilitating back injury that prevented him from working.<sup>78</sup> Although South Carolina law required the judge to determine whether Mr. Turner had the ability to pay, the judge did not do so.<sup>79</sup> The judge did not even complete the required form regarding financial ability.<sup>80</sup> Instead, he sentenced Mr. Turner to twelve months in prison.<sup>81</sup> When Mr. Turner asked why he could not obtain "good time or work credits" to reduce his term of imprison-

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75. The Court explained the protection afforded government officials as follows:

Our rejection of the careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity.... If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government. The costs of diversion are only magnified when Government officials are charged with responding to, as Judge Cabranes aptly put it, "a national and international security emergency unprecedented in the history of the American Republic."

*Id.* at 685 (quoting *Iqbal v. Hasty*, 490 F.3d 143, 179 (2d Cir. 2007)).

76. *Turner v. Rogers*, 131 S. Ct. 2507, 2512 (2011).

77. *Id.* at 2513.

78. *Id.*

79. *Id.* at 2513-14.

80. *Id.*

81. *Id.* at 2513.

ment, the judge responded, “Because that’s my ruling.”<sup>82</sup> The case went all the way to the Supreme Court, where the question presented was whether an indigent person was entitled to a lawyer in a civil contempt proceeding.<sup>83</sup> Civil contempt orders are largely a matter of judicial decision in the modern courts,<sup>84</sup> which is why the case was framed as one of access to a lawyer.<sup>85</sup> The Court held that the appointment of a lawyer was not required.<sup>86</sup> But the adjudicator’s disdain for the litigant was a bigger problem than the framing of the case admits.

Would the presence of a jury have caused the judge to think more carefully about his actions before ruling without explanation or adequate consideration of Mr. Turner’s situation? Would a jury have followed the procedures more carefully? In Alexander Hamilton’s words, perhaps a jury in Turner’s case would have been a double security. Not because the jury would have disagreed with the judge that Michael Turner deserved no more chances, but rather because the jury would expect the judge to follow the formal processes of legality. Perhaps the jury is a protection against this type of corruption—the corruption of disdain and cynicism—because the institution of the jury serves as a monitor of the judicial branch.<sup>87</sup>

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82. *Id.* (internal quotation marks omitted).

83. *Id.* at 2512 (“We must decide whether the Fourteenth Amendment’s Due Process Clause requires the State to provide counsel (at a civil contempt hearing) to an *indigent* person potentially faced with such incarceration.”).

84. Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor’s Prison*, 18 CORNELL J.L. & PUB. POL’Y 95, 103 (2008).

85. The history of contempt gives little comfort to anyone concerned about the type of decision maker. Consider Martin Luther King, Jr.’s contempt hearing for violation of an unconstitutional injunction to prevent a march in Birmingham, Alabama in April 1963. *See generally* Walker v. City of Birmingham, 388 U.S. 307, 321 (1967) (holding that the injunction was lawful). A jury in that time and place would not have made a better decision. DAVID LUBAN, LEGAL MODERNISM 221-43 (1994) (providing an overview and analysis of *Walker*).

86. *Turner*, 131 S. Ct. at 2520.

87. “And the horrible thing about all legal officials, even the best, about all judges, magistrates, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it.... Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop. Therefore the instinct of Christian civilization has most wisely declared that into their judgments there shall upon every occasion be infused fresh blood and fresh thoughts from the streets.” BURNS, *supra* note 69, at 11 (quoting G. K. CHESTERTON, TREMENDOUS TRIFLES 67-68 (1920)).

Unlike clerks, bailiffs, judges, and lawyers, juries do not answer to judges, nor do their futures depend on being in the judge's good graces. The disapproval of the citizenry may spur judges to behave better, especially in the workaday types of cases that are important to the individual participants but hold no glory for the judge.

## II. SOME OBJECTIONS TO JURIES

Three main objections to a robust jury right ought to be addressed. First, some argue that many cases are too complex to be heard by lay citizens, either because of complicated law or complicated facts. Second, others argue that juries reach inconsistent results more often than other legal decision makers. Third, critics are concerned about jury bias, especially bias in favor of some classes of litigants against others. This section will address each of these concerns.

### A. Complexity

Does it make sense to continue to support the jury right when more cases require jurors to decide complex questions of fact and law relating to subjects such as antitrust, for example? This has been a critique of the jury since the Founding Era,<sup>88</sup> and both the law and the world have gotten more complex since then. One of the challenges for lawyers and judges is to explain complex ideas to lay jurors. This exercise may be useful. First, the idea that we live in a society where many citizens are unable to know, and if they do know, to fully comprehend, the laws that govern conduct is troubling. Second, judges may face the same complexity critique that is made of jurors. Sometimes it is not clear whether generalist judges, trained in law, are able to understand fully the complexities that are involved in the application of that law without further training. For example, one study found that judges with economic training

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88. In *The Federalist No. 83*, Alexander Hamilton argued that equity cases, which were not decided by juries, presented extraordinary remedies for difficult cases, and, presciently, explained that equity cases "require often such long, deliberate, and critical investigation as would be impracticable to men called from their occupations and obliged to decide before they were permitted to return to them." THE FEDERALIST NO. 83, *supra* note 67, at 362.

were reversed less often than judges without economic training in antitrust cases.<sup>89</sup> In cases that are very complex, the court could provide more training and explanation to the jurors. Indeed, scholars have proposed investments that would make jurors better decision makers in complex cases.<sup>90</sup>

### *B. Inconsistency*

A second criticism of the jury right is the claim that jury verdicts are inconsistent.<sup>91</sup> Inconsistency of jury verdicts is troubling, but perhaps more troubling is the answer to the question, “Compared to what?” Numerous studies have found that juries and judges mostly agree on liability.<sup>92</sup> And juries do not suffer in comparison to other legal actors when it comes to some of the hardest decisions in the legal system: monetization of injury in tort cases. Studies show that judges, lawyers, and potential jurors are all inconsistent with respect to valuation of harm.<sup>93</sup> This makes sense because society does not have a common metric for valuing noneconomic damages

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89. See Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J.L. & ECON. 1, 5 (2011).

90. See N.J. Schweitzer & Michael J. Saks, *Jurors and Scientific Causation: What Don't They Know, and What Can Be Done About It?* 52 JURIMETRICS J. 433 (2012) (proposing juror training intervention as a new method of educating jurors regarding complex causation issues).

91. See, e.g., Byron Stier, *Jackpot Justice: Verdict Variability and the Mass Tort Class Action*, 80 TEMPLE L. REV. 1013, 1033-43 (2007) (noting juror verdict inconsistency in tobacco cases).

92. One might ask why it is that judges, not juries, are considered the baseline correct decision maker on liability. If the question is one of fact, should we not be just as concerned about the judge disagreeing with the jury as the jury disagreeing with the judge? See Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 FLA. ST. U. L. REV. 469, 502-06 (2005). For studies of jury inconsistency, see HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 56 (1966) (finding 78 percent agreement on verdict between judges and juries in both civil and criminal cases); Shari Seidman Diamond et al., *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301, 303 (1998); Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 LAW & HUM. BEHAV. 29, 48 (1994); Michael J. Saks et al., *Reducing Variability in Civil Jury Awards*, 21 LAW & HUM. BEHAV. 243, 246 (1997); Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 854 (1998).

93. See Lahav, *supra* note 11, at 587-89 (describing studies on valuation of damages by various actors).

from physical and emotional injuries.<sup>94</sup> This fact makes it difficult to determine which jury awards are true outliers and which reflect emerging community consensus regarding harm valuation. At a minimum, jury valuations provide the fodder for beginning a conversation about these questions. But too often the public conversation focuses on the rare case of a shockingly large verdict when many cases end in perfectly reasonable verdicts.<sup>95</sup> Upon further inspection, sometimes these shockingly high verdicts are not so shocking.<sup>96</sup> Furthermore, parties have mechanisms for limiting risk of exposure in jury trials—such as the high-low agreement—which mitigate some of these criticisms.<sup>97</sup>

Although consistency of law application is an important value in a society governed by laws, it is not the only value. Consistently applying a law that is substantively unjust, that is inefficient, or that subordinates some members of society does not justify that law. It may be that jury inconsistency reflects something deep and unavoidable about the process of law application that is overlooked when judges are the decision makers: that the law is often inconsistently applied across judges.<sup>98</sup> Or perhaps jurors are merely hampered by rules that prohibit note-taking, forbid them from asking questions of witnesses, limit their interactions with the judge, and do not provide written jury instructions for their review.<sup>99</sup>

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94. See *id.* at 579; Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391, 403 (2005).

95. Shari Seidman Diamond, *Truth, Justice, and the Jury*, 26 HARV. J.L. & PUB. POL'Y 143, 145 (2003).

96. The famous McDonald's hot coffee case is an example. See *id.* at 145-47 for a discussion of the verdict's reasonableness.

97. See generally JJ Prescott et al., *Trial and Settlement: A Study of High-Low Agreements* 12 (Harvard John M. Olin Ctr. for Law, Econ. & Bus., Discussion Paper No. 678, 2010), available at [www.law.harvard.edu/programs/olin\\_center/papers/pdf/spier\\_678.pdf](http://www.law.harvard.edu/programs/olin_center/papers/pdf/spier_678.pdf) (discussing and evaluating the use of high-low agreements in civil litigation).

98. See generally Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 53-56 (2009) (arguing in part that inconsistency in judicial decision making validates random assignment of judges).

99. For developments in trial procedures allowing the jury to better process and understand information, see GREGORY E. MIZE ET AL., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS 31-43 (2007), available at <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/juries/id/112>. For example, most courts now permit jurors to take notes. *Id.* at 32. But most jurisdictions do not permit jurors to submit written questions for witnesses, although studies show this improves juror comprehension without prejudicing parties. *Id.* at 34-35; see also Shari Seidman Diamond et al., *Juror Questions During Trial: A Window into*

If judges are in fact more consistent than jurors, it may be because they have more information about the run of cases.

Like ignorance, inconsistency can also be addressed through education. Some procedures can be used to mitigate the effects of variance in jury verdicts if this is a serious problem.<sup>100</sup> For example, juries could be told what previous juries have found in similar cases.<sup>101</sup> After all, judges are privy to such information in bench trials, as are good lawyers negotiating settlements.<sup>102</sup> The problem with this approach is that it may hamper the jury from expressing the community perspective because jurors might feel constrained not to deviate from the normal range even when the case warrants such deviation. If consistency is the chief concern, it can be achieved without jettisoning the jury right.

### *C. Juror Bias*

A final objection to the jury turns the original argument that jurors avoid corruption and systemic bias on its head. Some raise concerns that jurors are biased and find facts for the litigants they favor.<sup>103</sup> Historically, the concern was a biased judiciary, despite strong professional norms, whereas jury bias was seen by some to be a boon.<sup>104</sup> Beliefs about local jury bias against the national government in debt cases was what spurred the Antifederalists to support the jury right so vehemently.<sup>105</sup> Perhaps one man's bias is

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*Juror Thinking*, 59 VAND. L. REV. 1927 (2006).

100. See Schweitzer & Saks, *supra* note 90, at 443-45.

101. See Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763, 777-78 (1995) (proposing that courts provide jurors with a grid informing them of the range of awards made by other juries in their state in similar cases).

102. *Id.* at 783.

103. See, e.g., *The DRI National Poll on the Civil Justice System*, DRI-THE VOICE OF THE DEFENSE BAR 3-4 (2012) [hereinafter *DRI National Poll*], available at <http://www.dri.org/content/public/polls/2012%20DRI%20Survey%20Analysis.pdf>.

104. Some different examples of allegations of bias include Jefferson's letter to the Abbé Arnoux, see Letter from Thomas Jefferson to the Abbé Arnoux, *supra* note 64, and concerns about bias of southern state judges against civil rights protestors. See Alexandra D. Lahav, *Portraits of Resistance: Lawyer Responses to Unjust Proceedings*, 57 UCLA L. REV. 725, 733-35 (2010) (describing civil rights demonstrators' opinion that they could not get a fair hearing in the southern state courts). These demonstrators would not have been any happier with a local jury, especially as blacks were excluded from jury service. They preferred federal judges.

105. See Landsman, *supra* note 8, at 523; Lahav, *supra* note 104, at 733.

another man's clear-eyed point of view. But there is a sorry history of biased juries in the United States, one that is bound up with race.<sup>106</sup> The benefit of the jury, assuming groups of citizens have not been systematically excluded from it, is that as an institution it cannot be corrupted because jurors are not repeat players in the legal system.<sup>107</sup> A diverse jury pool should also represent different points of view, so that whatever biases jurors have cannot systematically affect outcomes unless these biases are more or less universal. If their time is managed well, there is no reason to think jurors will not take their job and the mandate of impartiality seriously. New to the system and with the prospect that their service will soon be over, jurors may not suffer the same fatigue or cynicism that regular participants in the legal system sometimes develop.<sup>108</sup>

Nevertheless, there is some evidence of bias in polls of potential jurors. In one recent poll, 54 percent of respondents said they would favor individuals in lawsuits against corporations.<sup>109</sup> Because the poll asked ordinary individuals who were not jurors at the moment,<sup>110</sup> it is hard to say what these people would do when actually in a court of law making a decision. If jurors do favor the individual, this bias resembles the Antifederalists' preference for jurors because they were thought to favor debtors.<sup>111</sup> Perhaps a built-in bias in favor of the individual against institutions, be they public or private, is what advocates of the Seventh Amendment intended, although that cannot be said to reflect what the Founders as a whole preferred. Juror favoritism to individuals might be beneficial for society if the legal system as a whole favors institutional litigants.<sup>112</sup>

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106. See MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 152-53 (2010); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1619-20 (1985).

107. Diamond, *supra* note 95, at 149 (reporting that 18 percent of jurors who qualified and reported for duty had previously been on a jury). Of course, an individual juror could be bribed and thereby corrupt an individual jury.

108. See *supra* notes 76-87 and accompanying text.

109. See *DRI National Poll*, *supra* note 103, at 7. Eleven percent of the respondents said they would favor the corporation, and 23 percent said they would be neutral. *Id.* This finding was consistent when respondents were asked about a variety of large institutions: pharmaceutical manufacturers, automobile manufacturers, and insurance companies. *Id.*

110. See *id.*

111. See *supra* notes 60-66 and accompanying text.

112. Institutional litigants may have more success in litigation because they have greater

The insight that adjudication favors institutional players is not limited to academia. This idea is supported by other responses in the survey described earlier.<sup>113</sup> Tellingly, 83 percent of respondents agreed with the statement that the side with more money generally prevails in litigation.<sup>114</sup> Perhaps the stated preference for the individual when faced with a large institution is a product of the perception that there is a thumb on the scales of justice. If that is the case, the decentralized local jury is a useful institution for counteracting such bias. Other solutions might include electing judges or recruiting more judges with diverse backgrounds. But judicial elections present serious concerns about corruption and lack of independence, in part as a result of judicial reliance on donations.<sup>115</sup>

Many of the objections to juries are amenable to empirical study. If jurors are systematically biased in a socially detrimental way, inconsistent to a greater extent than other legal decision makers, or unable to understand the cases they are supposed to decide, something would need to change. But it is not clear that the appropriate change should be further limits on jury power. If society wants to reaffirm its faith in the rationality and intelligence of its fellow citizens as individuals worthy of equal respect, the correct response to concerns of ignorance, confusion, inconsistency, and bias would be to determine which aspects of our practices within the courts ought to be changed to improve the jury's ability to do its job.

### III. WHAT THE JURY DOES NOT KNOW

Concerns about complexity, inconsistency, and bias have led to limitations on what the jury is allowed to know as it deliberates.<sup>116</sup>

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resources, are repeat players, or both. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97, 103-04 (1994).

113. Only 32 percent of respondents said they would favor an individual over a small business in their community. See *DRI National Poll*, *supra* note 103, at 7, 25.

114. *Id.* at 4, 24.

115. See Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of Caperton*, 123 HARV. L. REV. 80, 90-91 (2009) (discussing *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009)).

116. See, e.g., EDIE GREENE & BRIAN H. BORNSTEIN, *DETERMINING DAMAGES: THE PSYCHOLOGY OF JURY AWARDS* 199 (2003) (stating that jurors receive "minimal guidance" when determining damage awards at trials).



These limitations are not based on scientific study, although many of them sound like ideas a behavioral economist might support.<sup>117</sup> If the jury is given due respect as an agent of self-government, should these limitations on jury knowledge persist?

Consider all the things that jurors are not allowed to know in many jurisdictions. Jurors are not informed that damages caps may apply to the plaintiff's award, so they may end up awarding damages only to have those damages reduced by a statutory cap.<sup>118</sup> Juries are not instructed on comparative negligence or joint and several liability.<sup>119</sup> Jurors are not told that, when issuing special verdicts, they must be consistent or the entire verdict may be overturned.<sup>120</sup> They are not allowed to know whether the defendant

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117. The insights of behavioral economics are increasingly reaching a wide audience. *See generally* DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2008) (discussing the field of behavioral economics); DANIEL KAHNEMAN, THINKING, FAST AND SLOW 413-14 (2011) (discussing the importance of behavioral policy in foreign countries); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 5-6 (2008) (supporting government intervention that helps people make "better" life choices by "tracking" or "anticipat[ing]" said choices through behavioral policy). For a summary of some of these ideas as they apply to law, see On Amir & Orly Lobel, *Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy*, 108 COLUM. L. REV. 2098, 2099 (2008).

118. Courts have upheld the practice of keeping the jury ignorant of damages caps for three reasons. First, courts have held that a jury that knows of the cap may subvert it by shuffling damages between capped federal and uncapped state claims. *See, e.g., Sasaki v. Class*, 92 F.3d 232, 237 (4th Cir. 1996) (reversing the jury's award of \$50,000 for a federal claim and \$150,000 for a state claim on a subset of the same conduct). Courts have also held that if the cap applies only to injuries after a certain date, then the jury may subvert the cap by finding that the injury took place before that date. *See, e.g., Owens-Ill., Inc. v. Gianotti*, 813 A.2d 280, 288-89 (Md. Ct. Spec. App. 2002), *aff'd sub nom., Owens-Ill., Inc. v. Cook*, 872 A.2d 969, 978 (Md. 2005) (noting the possibility of subversion but finding no prejudice because the cap was inapplicable on a separate ground). Second, a jury aware of the cap may use it as a benchmark against which to calibrate its award. *See, e.g., Cent. Bering Sea Fishermen's Ass'n v. Anderson*, 54 P.3d 271, 281-82 (Alaska 2002) (noting the possibility of calibration but finding no prejudice because the cap dwarfed the award). Third, courts have held that the cap is not the factual determination of damages and is therefore outside the jury's purview. *See, e.g., Murphy v. Edmonds*, 601 A.2d 102, 116-18 (Md. 1992) (dismissing a constitutional challenge to cap nondisclosure because the jury had no duty to decide and thus no right to know of the plaintiff's ultimate recovery); *see also Tull v. United States*, 481 U.S. 412, 426 n.9 (1987) ("Nothing in the [Seventh] Amendment's language suggests that the right to a jury trial extends to the remedy phase of a civil trial.").

119. *See, e.g., Lacy v. CSX Transp., Inc.*, 520 S.E.2d 418, 428 (W. Va. 1999); *Fernanders v. Marks Constr. of South Carolina, Inc.*, 499 S.E.2d 509, 510-11 (S.C. 1998).

120. *See Gullett v. St. Paul Fire & Marine Ins. Co.*, 446 F.2d 1100, 1105 (7th Cir. 1971); *McCourtie v. U.S. Steel Corp.*, 93 N.W.2d 552, 562 (Minn. 1958) ("[Special verdicts] permit the

or the plaintiff has insurance, even though many jurors speculate about this question.<sup>121</sup> Nor are jurors informed of any indemnity or subrogation claims.<sup>122</sup> Jurors are also not informed of the taxability of their award,<sup>123</sup> and they are not given information regarding attorney's fees.<sup>124</sup> In criminal trials, jurors are not informed of minimum or maximum sentences.<sup>125</sup> Jurors are also not instructed that if their award is found to be excessive, the judge can remit that award or order a new trial.<sup>126</sup> Nor are jurors told how other similar cases have come out so that they can determine whether their contemplated damages award is an outlier. At least one study shows that most of these topics are of interest to jurors, and that jurors discuss them in deliberations even though they are not instructed about them.<sup>127</sup>

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jury to make findings of ultimate facts, free from bias, prejudice, and sympathy and without regard to the effect of their answers upon the ultimate outcome of the case.”); *Mitchell v. Perkins*, 54 N.W.2d 293, 296 (Mich. 1952) (explaining that if the jury knows what legal result attaches to its findings of fact, then it “will make the general verdict control the findings, instead of the findings control the general verdict”).

121. The rationale for excluding evidence of insurance is that the jury may adjust its award up or down to compensate for the extent to which a party is insured. *See, e.g., Cook v. Eney*, 277 So. 2d 848, 850 (Fla. Dist. Ct. App. 1973) (holding that if the plaintiff is insured, a jury may conclude that “since the appellant was otherwise being taken care of, there should be no recovery against appellee in tort”); *Diamond et al.*, *supra* note 35, at 1576 (stating that whether the parties have insurance is “a legally irrelevant issue in determining damages that, as we show below, jurors in tort cases often spontaneously consider as they discuss compensation”).

122. *See, e.g., Robinson v. Murlin Phillips & MFA Ins. Co.*, 557 S.W.2d 202, 204 (Ky. 1977) (indemnity); *Grandstaff v. T. E. Mercer, Teaming & Trucking Contractor*, 227 S.W.2d 372, 374 (Tex. Civ. App. 1950) (subrogation).

123. *See, e.g., Louisville & Nashville R.R. v. Mattingly*, 318 S.W.2d 844, 848 (Ky. 1958); *Briggs v. Chi. Great W. Ry. Co.*, 80 N.W.2d 625, 635-36 (Minn. 1957); *Highshew v. Kushto*, 134 N.E.2d 555, 556 (Ind. 1956); *Hall v. Chi. & Nw. Ry. Co.*, 125 N.E.2d 77, 86 (Ill. 1955).

124. *See, e.g., White v. Chi. & Nw. Ry. Co.*, 124 N.W. 309, 312 (Iowa 1910); *San Antonio Traction Co. v. Mendez*, 199 S.W. 691, 692, 694 (Tex. Civ. App. 1917); *see also Diamond et al.*, *supra* note 35, at 1561, 1564, 1589 (discussing a case in which the jury erroneously calculated attorney's fees as part of the damages and stating that the most common resistance to judicial instructions included consideration of insurance and attorney's fees).

125. *See Shannon v. United States*, 512 U.S. 573, 579 (1994).

126. The jury would not be instructed on this because it is a matter of law, not of fact. For a discussion of remittitur, see Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731, 731-33 (2003).

127. *See Diamond et al.*, *supra* note 35, at 1579 (describing juror interest in taxation, attorneys' fees, insurance, and other topics not legally relevant to damages determinations).

In May of 2013, a Wisconsin jury heard a misdemeanor case against an Amish farmer accused of illegally selling raw milk.<sup>128</sup> The farmer, Vernon Hershberger, was charged with three counts of selling milk without a license and one count of violating a holding order.<sup>129</sup> The sale of unpasteurized milk has increasingly become an issue for state and federal authorities as the product rises in popularity but also carries risks.<sup>130</sup> Hershberger admitted to violating the holding order at the trial.<sup>131</sup> The jury acquitted him of the three counts of selling milk without a license and convicted him on the holding order charge.<sup>132</sup> This was a compromise—one juror had refused to convict on the holding order charge, and another wanted to convict on the licensure charges.<sup>133</sup>

In the course of the trial, the jury saw the holding order, but it was redacted.<sup>134</sup> After the trial the jurors found out that the holding order had been issued because Hershberger did not have a license.<sup>135</sup> They understood what they had not known at the trial—that the licensure and holding order questions boiled down to the same violation.<sup>136</sup> The jurors regretted their verdict.<sup>137</sup> One juror wrote the judge afterwards:

In my opinion, our jury instructions required us to find Mr. Hershberger guilty of violating a food holding order because we were directed to determine whether a holding order had been issued and whether it had been violated—two events that Mr. Hershberger admitted to during his testimony. I believe that our three not guilty verdicts support the fact that the Wisconsin Department of Agriculture, Trade and Consumer Protection

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128. David Gumpert, *The Inside Story of a “Juror Revolt” in Amish Raw Milk Trial*, MODERN FARMER (Aug. 23, 2013), <http://modernfarmer.com/2013/06/raw-milk-farmer-vernon-hershberger-attracts-new-healthy-food-adherentsfrom-his-jury/>.

129. *Id.*

130. Joe Drape, *Should This Milk Be Legal?*, N.Y. TIMES (Aug. 8, 2007), [http://www.nytimes.com/2007/08/08/dining/08raw.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2007/08/08/dining/08raw.html?pagewanted=all&_r=0).

131. Gumpert, *supra* note 128.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

should never have issued a food holding order to Mr. Hershberger.<sup>138</sup>

Some of the jurors came to the sentencing hearing, hoping that if the judge understood their regrets he might impose a more lenient sentence.<sup>139</sup>

This story, albeit a criminal case, demonstrates that jurors care about the cases they adjudicate. They feel betrayed when they learn that they have been denied information that would have altered their calculus. And jurors find it difficult to reach a decision they think is just when they are denied information that a reasonable person would want to know in making a decision. Omissions of the kind routinely permitted in civil jury trials are similarly likely to engender feelings of betrayal and regret if jurors learn of them after the fact.

Does this mean that all the information withheld from jurors—from the parties' insurance coverage to the outcomes of similar cases—ought to be revealed? It is telling that every participant in the legal system—even the expert—wants to know this information. For example, in one study that presented a summary of two cases to participants over the phone and asked them how they would rate both injury severity and damages, judges and lawyers asked questions that were not legally relevant to the determination of damages.<sup>140</sup> These were similar to the questions jurors ask in deliberation.<sup>141</sup> The answer might be to take a cue from judges.

At a minimum, the threshold for withholding information from a jury should be much higher than it is today. More serious study of juror reactions to different types of evidence, rather than reliance on assumptions about human behavior or logic, is in order. If jurors are considering these issues notwithstanding instruction to the contrary and reaching decisions based on assumptions about the parties' insurance coverage, the taxation system, attorney's fees, or any other fact, it would be better to put juries closer to the position of

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138. *Id.*

139. *Id.* at 3.

140. Roselle L. Wissler et al., *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751, 795 & n.104 (1999).

141. Diamond et al., *supra* note 35, at 1576.

judges, explaining to them both the restricted information and why the law asks that they not consider it. A more transparent approach comports with evidence that jurors are serious about applying the law and demonstrates respect for jurors as adjudicators who are capable of setting aside their personal preferences, just as judges do.<sup>142</sup>

Consider the question of damages caps. Many jurisdictions have adopted damages caps in certain categories of tort suits such as medical malpractice.<sup>143</sup> These damages caps often apply to those damages awarded within particular categories which proponents believe to be particularly susceptible to juror overreaching.<sup>144</sup> The typical category is nonpecuniary damages, such as damages for pain and suffering. But studies have shown that plaintiff's lawyers react to damages caps by categorizing their request for damages to fit into the categories that are not capped.<sup>145</sup> So what might have been a request for damages under the category of pain and suffering now falls under lost future wages to avoid the cap. For example, imagine a person who has been disfigured. The disfigurement could cause pain and suffering and may also reduce the plaintiff's future earnings. Money to compensate the plaintiff may be allocated under either or both of these categories, and the category of economic damages for future earnings is malleable enough to permit courts to award whatever amount the jury thinks is the correct compensation.<sup>146</sup>

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142. Whether judges succeed at this any better than jurors is questionable. See Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001) (concluding that judges rely on the same cognitive decision-making processes as laypersons and other experts, including framing effects, egocentric biases, anchoring effects, errors caused by the representativeness heuristic, and hindsight bias).

143. See, e.g., VA. CODE ANN. § 8.01-581.15 (West 2013) (setting a damages cap in malpractice suits occurring on or after August 1, 1999). The amount for 2014 is \$2.10 million. *Id.*

144. Compare Adam D. Glassman, *The Imposition of Federal Caps in Medical Malpractice Liability Actions: Will They Cure the Current Crisis in Health Care?*, 37 AKRON L. REV. 417, 419 (2004) (describing jury awards in medical malpractice cases as "out-of-control"), with TOM BAKER, *THE MEDICAL MALPRACTICE MYTH* (2007) (describing studies demonstrating medical malpractice awards are reasonable).

145. See Sharkey, *supra* note 94, at 440 ("[E]xperts can exploit controversies surrounding calculations of lost wages and future medical costs, thereby breathing life into the crossover effect.").

146. See Lahav, *supra* note 11, at 583-84 (discussing the flexibility of categories of damages caps in practice); Neil Vidmar & Leigh Anne Brown, *Tort Reform and the Medical Liability*

Courts have explained that concealing the existence of a cap from jurors is intended to prevent them from moving damages around to reach the result they favor, that is, to avoid exactly the type of attempt to manipulate the system by categorizing damages that lawyers engage in anyway.<sup>147</sup> It is more respectful, and potentially more effective, to explain the cap and its purpose to jurors, as well as the legal standard that applies. At the very least, it would be worth studying how jurors react to this type of information and how it affects their verdicts before deciding that jurors should not be allowed to see it. Perhaps studies will find that jurors use damages caps as an anchor, even when they are told not to do so, or perhaps knowledge of damages caps will increase or decrease the amounts that jurors are willing to award, but without testing this question, how can we know?<sup>148</sup> Beyond the individual case, the application of a cap in a context where jurors think it is wrong to cap damages may change their behavior in the ballot box.

Likewise, why are jurors not informed of the outcome of cases similar to the one they are deciding? On the one hand, jurors might award damages in conformity with similar cases, even if it is unjust, rather than find the facts and damages as they truly believe them to be. Damages evolve over time, depending on social norms and economic realities. These longitudinal changes are necessary and would be eclipsed by an approach to damages that always reverts to the mean. It will be challenging to define which cases are sufficiently similar to be comparable and to decide how to describe them to the jury. Inevitably, these choices will be controversial and may also entrench existing inequalities. These are legitimate concerns. On the other hand, it is not fair to accuse juries of reaching less consistent outcomes than legal professionals, who are repeat players in the legal system, when judges and lawyers have at least a convenience sample of cases that they can think back to when looking at any one case before them.<sup>149</sup> Knowing the median award

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*Insurance Crisis in Mississippi: Diagnosing the Disease and Prescribing a Remedy*, 22 MISS. C. L. REV. 9, 28 (2002) (presenting the disfigurement example).

147. See *supra* note 145.

148. See, e.g., Shari Seidman Diamond et al., *Damage Anchors on Real Juries*, 8 J. EMPIRICAL LEGAL STUD. 148, 149 (2011) (studying the anchoring effect of attorney damage recommendation on juries).

149. See Lahav, *supra* note 11, at 591 (“Convenience sampling is a form of inductive reasoning based on establishing consistency of a given case with a nonrandom sample of cases

and median settlement amount in similar cases might avoid outlier awards and retrials and ultimately make jury verdicts more likely to be upheld and more legitimate in the eyes of critics. Should the data that goes into determining the median award include settlements, remittiturs, and reductions on appeal? In one case in which a jury awarded \$3,000,000, the judge remitted the award to only \$30,000.<sup>150</sup> But what if the going rate of settlement for that kind of case was \$300,000? It would be better for the system if a jury knew what the going rate on a given claim was before making their determination, with the explicit instruction that they may decide the value of damages as they see fit. It is very possible that if a jury had awarded \$300,000 in the case described above, their verdict would better withstand judicial scrutiny, and the plaintiff would have a tenfold greater award. As it was, the judge eviscerated the verdict.<sup>151</sup> On the other hand, there may be cases in which the going rate of settlement is far lower than what any reasonable jury would award because of power disparities between litigants or for other reasons. In these cases, a median verdict including settlements may skew the ultimate award downwards unfairly.<sup>152</sup>

At a minimum, the effects of such disclosures on potential jurors should be studied methodically, rather than resting on assumptions about human behavior that may not turn out to be correct.

### CONCLUSION

The vision of the jury right expressed in this Essay is an ideal, not the reality. Today the jury trial is often perceived as a failure, and summary judgment is king, despite a growing movement among judges to increase the number of trials.<sup>153</sup> Still, this ideal is worth

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readily available to the researcher.... [By contrast,] good social science methods require a random sampling to avoid bias.”)

150. *Morales v. City of N.Y.*, No. 99 Civ. 10004(DLC), 2001 WL 8594, at \*7, 11 (S.D.N.Y. Jan. 2, 2001).

151. *See id.*

152. *See generally* Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805 (2011) (describing a qualitative study of settlements in low value tort cases that demonstrated lack of relationship between settlement amount and case value in many instances).

153. Mark W. Bennett, *Essay: From the “No Spittin’, No Cussin’ and No Summary Judgment” Days of Employment Discrimination Litigation to the “Defendant’s Summary Judgment Affirmed Without Comment” Days: One Judge’s Four-Decade Perspective*, 57 N.Y.L.

pursuing because the jury right reaffirms some fundamental norms about what it means to be a citizen and to participate in our own governance. The idea of self-rule through the jury right militates in favor of allowing the jury to decide more cases and more questions of fact than is permitted under current law and to have more information about the legal constraints that limit jurors' decision-making power. Openness, respect, and education, rather than unproven and unreflective fear of bias, ignorance, or cognitive limitations, should drive the rules that govern the jury's access to information.

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SCH. L. REV. 685, 716 (2012) (proposing amendment or abolition of summary judgment in federal courts); Resnik, *supra* note 47, at 926.