

Jury Shadows: Reflections on the Civil Jury and the “Litigation Explosion”

Marc Galanter

To observers who think America is in a litigation crisis, juries are part of the trouble. At the least they are a cumbersome obstacle to judicial efficiency, preventing needed streamlining of procedures. But to most critics, it is not procedural cumbrousness that is the sin of juries, but their incompetence, arbitrariness and sentimental bias toward claimants. As one attorney puts it:

“Every jury is a one-night stand. It is not very expert, it is not held accountable, and it never has to live with the consequences of its actions. Civil litigation often is an opportunity for juries to play Robin Hood and redistribute wealth.

As a result, verdicts range all over the place. ... Sometimes it seems that the less tangible the harm, the greater the verdict. ...

Big verdicts on flimsy claims send an unhealthy message: that we all are victims, and that if life hits us with any unexpected unpleasantness, someone must have broken the law. ... Media coverage of big verdicts contributes to an Irish Sweepstakes kind of mentality: A person who suffers an accident thinks not just of filing suit, but of striking it rich.’

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A defense attorney concerned with "the crisis of skyrocketing jury awards" concurs:

Sympathy to an injured party, together with a latent hostility to anonymous and rich corporate America and its insurance carriers, often set the stage for enormous verdicts which exponentially exceed the earning power of the product liability plaintiff.

The present system is unfair in that the amount of the jury verdict often is not correlated to the injury a plaintiff has suffered. ...²

Even certified liberals concur with this view of the sentimental jury:

In real life, any theory will do as long as it gets the case to the jury, whose natural sympathies will usually produce a large judgment without much concern for the legal technicalities. Fear of juries leads defendants to settle suits, whatever their merits. High settlements lead to skyrocketing insurance rates. And soon ... the activity in question ... is no longer economically practicable.³

If the jury is thought to be jointly liable for the litigation crisis, the assault on it is relatively restrained, compared to the excoriation of greedy lawyers and activist judges, who are seen as the real culprits. Proposals abound to limit jury awards by caps on 'non-economic' damages and punitive damages and by changes in liability rules (e.g., joint and several liability). Other proposals would divert cases to arbitration and other 'alternatives'—though for the most part these would displace bilateral negotiation rather than jury trials. The absence of any significant campaign to abolish the civil jury may reflect a judgment that the Constitutional guarantee of trial by jury presents too formidable a barrier to be overcome. Perhaps it suggests that the current crop of reformers are not in civil justice reform for the long haul that such a campaign would require. It reveals that they are not animated by an alternative vision of the civil justice system.⁴ For the most part their discontent remains within the legalistic mainstream: the most audible critiques of present arrangements typically incorporate a heavy dose of nostalgia for the good old days when the system worked.⁵ Defenders reply in kind.⁶ The debate is framed in terms of admiring regard for the time-tested institutions of the common law.

The Role of the Jury

Before turning to what we know and don't know about the use and impact of juries, I want to reflect on some features of the jury in the context of our system of litigation. The first thing to note about civil juries is that there are relatively few of them. Just how few differs from field to field. Verdicts were returned in about one percent of paid liability claims in automobile insurance cases.⁷ In medical malpractice, verdicts made up some three to four percent of paid claims.⁸ But the impact of these jury trials is vastly disproportionate to their incidence.

We can apply to the civil jury Kalven and Zeisel's observation about the criminal jury:

... at every stage of this informal process of pre-trial depositions ... decisions are in part informed by expectations of what the jury will do. Thus, the jury is not controlling merely the immediate case before it, but the host of cases not before it which are destined to be disposed of by the pre-trial process. The jury thus controls not only the formal resolution of controversies ... but also the informal resolution of cases that never reach the trial stage. In a sense the jury, like the visible cap on an iceberg, exposes but a fraction of its true volume.⁹

To shift metaphors, we might visualize the jury as part of a system of "bargaining in the shadow of the law"¹⁰—in fact, the shadow that envelops maneuver and negotiation in the legal arena is cast not only by "the law" in the sense of the rules, but by other factors like cost, delay, risk, party capability and so forth. The jury casts a shadow across the wider arena of claims and settlements by communication of signals about what future juries might do. The transmission and reception of these signals is a crucial aspect of the jury institution. As an institution, the reality of juries includes the images of them held by lawyers, judges, insurers, litigants, and wider audiences. Juries are present as a threat and as a supply of markers, both variously interpreted. Hence, what gives rise to these interpretations is part of the jury process; what changes these interpretations is as crucial as changes in jury behavior.

This threat and signal function of the jury derives from the location of the jury in our legal system. Compared to other modes of lay participation in the legal process (e.g., justice of the peace, neighborhood dispute centers), the jury is located at the "top" of the system rather than the bottom. If a case involves sharp contest of claims and elicits heavy investment, it moves to a jury, not away from one. In most legal systems staffed by professionals, the popular element is present in the form of auxiliaries or alternatives; when they don't work, there is recourse to the professionals. But with the jury, the professionals work in the shadow of the amateurs.

This amateurism is often scorned as a blemish on legal rationality. Thus, a Harvard Law School dean observed that:

Even in the best of cases trial by jury is the apotheosis of amateurs. How can anyone think that 12 people selected at random in twelve different ways with the only criterion being a complete lack of general qualification, would have special ability to decide on disputes between people?¹¹

The jury is "lay" or "amateur" in two senses. First, it is not made up of professionals or experts who possess special knowledge of legal norms or their application. Second, jurors don't do it for a living—they are transients, who remain citizens rather than workers—and they don't do it recurrently or often.

The costs and benefits of the first aspect—absence of professional expertise—

have been much discussed.¹² I just want to note in passing some consequences of the jury's transient and episodic character. If juries introduce community perspectives, they are not the carriers of a rival popular legal culture. Judges and lawyers have access to a tradition of law: cases for them are part of a literary tradition that may be consulted; they have enduring, patterned reciprocal relations with other actors who may enforce on them the expectation of consulting that tradition. But jurors have neither a communicated tradition of work to draw on nor a web of patterned reciprocal relations with other actors in the system. The absence of continuity and transmission from one jury to the next may be a strength as well as a weakness. The jury doesn't get jaded or lapse into the typifications and routines that the regulars develop.¹³ And their transient, intermittent character liberates juries to depart from the understandings of the regulars.¹⁴ These departures may involve deviation from authoritative legal norms, but they may also involve the embrace of the law. Unlike those vocationally committed to a role in the system, the jury has no informal relations to be maintained nor any shared patterns of accommodating the law to other commitments.¹⁵

What Juries Do

Although a tradition of experimental studies has revealed much about what goes on "inside the jury,"¹⁶ we know very little about the functioning of juries—when and where they are present, what they decide, and what effects these decisions have. In the last five years, our fund of this "outside" knowledge about civil juries has been enormously increased by the pioneering work of the Institute of Civil Justice. Without going into their detailed findings, I want to draw from these studies some points that seem to me to illuminate the relation of the jury to patterns of litigation and the perceptions of crisis that surround them.

In the state courts, the civil jury is predominantly a tort institution. In Cook County from 1960-79, "fewer than two percent of civil trials involved nontort issues."¹⁷ In San Francisco County during this period, nontort cases were in the range of six percent.¹⁸ Daniels gives subject matter breakdown for civil jury trials in the early 1980s for state courts of general jurisdiction in six other metropolitan counties. Four have very similar patterns of almost exclusively tort juries; the two exceptions each have about twenty percent nontort juries.¹⁹ Statewide figures for court systems in six states suggest that the civil jury is not so exclusively confined to tort cases: the tort portions of civil jury trials from thirty-four percent to sixty-five percent.²⁰

In the federal courts, the pattern of case types of civil juries is somewhat different.²¹ In 1985, 5,440 civil cases terminated by jury trial—of these only 2,462 (45.3 percent) were tort cases.²² Another 1,096 were civil rights cases (20.1 percent), which we might think of as tort-like, but 1,073 were contracts (19.7 percent). The proportion of tort cases among federal civil jury trials has been dropping. In 1970, tort cases were 2,462 of 3,371 civil jury trials—i.e., seventy-three percent as opposed to the current forty-five percent.²³ While the number of tort jury trials is

the same as in 1970, the number of nontort jury trials has risen from 909 to 2,978—a 228 percent increase.

This suggests that federal courts loom larger on the map of jury trials—and thus of symbols and signals—than the distribution of civil litigation would suggest. Federal courts only handle something like two percent of all civil cases, but they have a much higher percentage of jury cases. Guinther estimates some 45,000 to 75,000 civil jury trials a year in state courts.²⁴ If the total is somewhere in the range, then the federal courts with two percent of all civil cases are conducting seven percent to eleven percent of all civil jury trials—and a higher percentage of nontort civil jury trials.

Looking at the Institute of Civil Justice studies of the jury, one is immediately struck by the massive stability of the institution over the twenty years. There are changes, but they play out over a framework of stability in terms of jury determinations of liability and awards of damages. Determinations of liability hover around the fifty percent mark.²⁵ Median award of damages has remained relatively constant over two decades.²⁶ Average awards have risen sharply but virtually all the growth in the average is due to a great increase in the size of awards in the largest cases. Most awards stayed within the same range for the entire period—the median award in Cook County actually fell.²⁷

A few very large and visible awards account for most of the money awarded by juries. In Cook County, three quarters of the total dollars were awarded to fifteen percent of plaintiffs.²⁸ Just three awards, each over two million dollars, account for fifty percent of all the money awarded by San Francisco juries in the last five years of the 1970s—and thus doubled the average award for that period.²⁹

The pattern of jury awards seems to be a bifurcated, two-tier system of modest and relatively stable awards in most cases and large and growing awards in a subset of cases. Peterson concluded that the trend of more outcomes more favorable to plaintiffs resulted from the changing mix of cases presented to juries and the theories under which they were tried. The trend "was not due to changes in jurors' ways of thinking but to the upsurge in serious trials involving multiple theories."³⁰ The appearance of new theories may reflect changes in judicial work, but it also reflects changes in the culture and organization of the plaintiffs' bar—the way that cases are obtained and referred, the dissemination of learning and techniques, the sharing of information through networks and specialized publications, etc.

The ICJ jury studies confirm the powerful association of case type with variations of process and outcome. The percentage of plaintiff victories differs substantially by case type.³¹ And there is a patterned difference in damages by case type and different trends in the level of awards. (E.g., while the typical award for other case types increased, the median award in Cook County for the most numerous type, automobile accidents, "decreased steadily, if slowly, throughout the entire period. . . ."³² These patterns held up when recoveries were controlled for identity of litigants and seriousness of injury. "Even when litigants and injuries were similar, a plaintiff in a work injury case received twice the award of a

plaintiff in an injury-on-property case.³³ These case type patterns comport with the findings of the Civil Litigation Research Project that the translation of injuries into claims and disputes differs substantially from field to field—for example, between tort complaints and discrimination complaints.³⁴ Replicating the CLRP research in Australia, Fitzgerald concluded that "by far the most powerful explanatory factor" for the career of a dispute was the type of grievance involved."³⁵

The identity of litigants did have an effect, but it too operates on two tiers. Contrary to litigation explosion lore, businesses and government units were on the whole more successful with juries than were individuals.³⁶ In cases involving ordinary injuries, government and corporate defendants were no more likely to be found liable than other defendants. "But when they were sued by plaintiffs with severe, permanent injuries, corporations were found liable more often than other defendants" and they usually paid larger awards.³⁷ These patterns remained constant over two decades.³⁸

We should of course beware of taking Cook County as representative. Where the ICJ studies provide a comparison of Cook County with San Francisco, we do not get a sense of profound differences between the culture of juries at these two sites. But the uses of jury differ in these localities: e.g., there are more contract and business cases in San Francisco than in Cook County and more high stakes cases and fewer automobile accidents, and San Francisco juries were more likely to find liability.³⁹ Similarly, Daniels study of punitive damages suggest very different local patterns in the incidence and amount of punitive damage awards.⁴⁰ Apparently, differences in jury use and behavior are part of the persisting patterns of variation that we summarize under the rubric of "local legal cultures." We may safely surmise that the regulars in any locality have different expectations about when juries should be used, what they are likely to do, etc. How much these differences derive from differences in the culture of juries is unknown.

We should be careful not to equate jury verdicts with ultimate outcomes in the cases.⁴¹ Verdicts may be modified on post-trial motion, or on appeal; or they may be discounted in negotiations with an eye to these contingencies, as well as others, such as difficulties of collection. It might be more accurate to think of the jury as providing the winner with a formidable bargaining counter, but one that may be discounted a little or a lot in the final settlement.⁴² The contours of this attrition remain to be studied.⁴³

Most jury trials, the ICJ studies find, are probably economically justified for the parties.⁴⁴ This comports with the finding of the Civil Litigation Research Project, studying a more varied population of cases, few of which were tried, that overall litigation "pays" for both plaintiffs and defendants.⁴⁵ If the cost of public facilities were added, total costs would exceed the amount at stake in some cases. This is sometimes taken to display the irrationality of adjudicating such cases,⁴⁶ but that overlooks the public interest in legal vindication and in the production of the signals and markers broadcast by the jury.

We shall focus on the way that juries shape expectations about the behavior

of subsequent juries and thus influence settlement decisions. But the jury has effects that radiate even further than the settlement process. Jury verdicts are not only counters in negotiating claims, but also signals that affect the conduct underlying those claims—i.e., they may mobilize preventive efforts or legitimate a given level of care. Eads and Reuter found that of the various external pressures on large manufacturers, product liability litigation had "the greatest influence on product design decisions," but the signal it sent was "extremely vague."⁴⁷ The role of the jury's messages in these remote arenas awaits systematic exploration.⁴⁸

The presence of the jury has massive but invisible effects on the shape of the whole system of litigation. The tendency of civil procedure toward diffusion into serial proceedings—discovery, motions, pretrial conferences, hearings, and so forth is limited by the exigencies of physically assembling (and insulating) the jury to hold a concentrated continuous trial. This in turn radiates influence back to earlier stages of the process. There can be no interruptions to pursue new evidentiary leads. Hence all information that might be relevant must be gathered beforehand to permit uninterrupted presentation within the fixed time frame of the continuous trial.

The presence of the trial as a uninterrupted plenary event, requiring a closure of case development, massive commitment of resources and taking of risks for all actors makes it a formidable threat, but one that is hard to use.⁴⁹ Because it is costly to deliver, the value of the threat depends on the credibility with which it can be delivered which, in turn, varies with the prowess of counsel and the formidability of parties.

Shadow Play: The Jury as Transmitter of Symbols

Those cases that get to juries are a small and unrepresentative subset of cases that are disposed of. For example, Danzon find that the medical malpractice cases

that are actually litigated to verdict constitute a small, atypical subset, "self-selected" to that stage of disposition precisely because the outcome was unprecipitable to the litigants, the potential award was large, and the evidence for the plaintiff was weak.⁵⁰

In other words, of cases, the "survivors" of the settlement process may have different distinguishing characteristics. Cases may reach trial because one party places a premium on having an external party make the decision or in order to vindicate a fundamental value commitment or in order to display credibility as an adversary.⁵¹

This small fraction of cases not only distributes a sizable portion of the compensation paid, but provides signals and markers that influence the outcome of a vastly larger number of cases that are settled (or abandoned) without trial. In his classic study of automobile injury settlements, Ross found that "[t]he basis ... of settlements in serious cases seems on both sides to be an estimate of the likely recovery of the claimant before a jury. [B]oth sides come to this estimate by comparing a given case in its many dimensions against other, similar, cases that have

gone to trial."⁵² Reference to jury value was more attenuated in the evaluation of smaller, routine claims, where potential trial was rendered improbable by the transaction costs, but even here "the relevance of jury value [was] generally admitted."⁵³

The relative importance of juries as transmitters of signals rather than as deciders of cases seems to have increased in recent years.⁵⁴ That juries actually decided a smaller portion of the tort cases terminated is implied in the decrease in the absolute number of jury trials found in the ICJ studies of Cook and San Francisco Counties. The relative decline of jury verdicts is found in federal tort cases. In 1970, of the 16,705 tort cases terminated in the federal district courts, 2,462 were by jury trial—i.e., some 14.7 percent.⁵⁵ In 1985, the total of tort terminations in the federal district courts rose to 28,588. But there were, coincidentally, just the same number of tort jury trials as fifteen years earlier, 2,462.⁵⁶ But in 1985, they comprised 8.6 percent of all tort terminations. In short, jury trials dropped from one in seven to one in twelve tort terminations.

The relative decline in jury trials is part of a long-term decline in the portion of civil cases reaching trial. This trend is pronounced in the federal courts, where the percentage of terminated cases reaching trial has dropped steadily from 15.2 percent in 1940 to 10.0 percent in 1970 to 4.7 percent in 1985.⁵⁷ Although the evidence is more spotty, there appears to be a comparable relative decline of trials in state courts.⁵⁸ But absolutely there are more trials, more relevant markers and symbols, more information and more problems of retrieving, collating and interpreting it.

This minority of tried cases casts a major part of the law's shadow—but the shadow is not simply the product of what juries do. It is affected by the process of creating, communicating and extracting knowledge about what juries do. The shadow depends on what actors think juries do are derived in some measure from what they think juries have done and why they have done it. This is derived from several kinds of information: knowledge of jury verdicts (which must be assessed in the light of judgments of what kind of a case it was and what kind of jury).

Table 1

CHANNELS OF INFORMATION ABOUT JURIES

1. Personal experience
2. The oral culture of local regulars—lawyers, insurance people, etc.
3. Judges and other "settlement promoters" (clerks, masters, mediators, etc.)
4. Appellate courts/official reporting
5. Jury verdict reporting services
6. Specialized trade media: handbooks, specialized litigation reporters, practitioner journals, continuing education, seminars and other presentations
7. Mass media: newspapers, television, etc.
8. Jury investigations "scientific jury selection," etc.
9. Research

In addition, there is "micro" information about jury perceptions and deliberations revealed in interviews with jurors. Finally, there is "macro" information about trends in jury awards and propensities, announced by researchers and publicists.

Information about juries reaches legal actors through a number of channels. Before discussing them, it may be helpful simply to list them:

We know very little about the process by which information about juries is disseminated and images and beliefs formed, and about these interact with other factors in the settlement process. To provide some grist for discussion of these channels, I would like to present a provocative experiment conducted by Professor Gerald Williams which displays dramatically how complex and variable is the process by which information about what juries do is translated into assessments of what a case is worth. Williams reports that he:

obtained the cooperation of 40 practicing lawyers in Des Moines, Iowa, who agreed to be divided into 20 pairs and to prepare and undertake settlement negotiations in a personal injury case. Approximately two weeks in advance of the negotiations, the attorneys were randomly assigned to represent either the plaintiff or the defendant (as counsel for his insurance company). Attorneys assigned to represent the

Table 2
RESULTS OF WILLIAMS' EXPERIMENTAL NEGOTIATION
AMONG DES MOINES ATTORNEYS

Attorneys' Names Demand	Plaintiff's Opening Demand	Defendant's Opening	Settlement
1. [omitted here]	\$ 32,000	\$10,000	\$18,000
2.	\$ 50,000	\$25,000	no settlement
3.	\$675,000	\$32,150	\$95,000
4.	\$110,000	\$ 3,000	\$25,120
5.	Not reported	Not reported	\$15,000
6.	\$100,000	\$ 5,000	\$25,000
7.	\$475,000	\$15,000	no settlement
8.	\$180,000	\$40,000	\$80,000
9.	\$210,000	\$17,000	\$57,000
10.	\$350,000	\$48,500	\$61,000
11.	\$ 87,500	\$15,000	\$30,000
12.	\$175,000	\$50,000	no settlement narrowed to \$137,000-\$77,000
13.	\$ 97,000	\$10,000	\$57,500
14.	\$100,000		\$56,875
		Average settlement	\$47,318

Source: Williams 1983:7

plaintiff were given identical case files, as were attorneys assigned to the defense. Under the facts it was assumed that the case arose in Iowa, Iowa law applied, and if the case went to trial it would be tried to a jury in Des Moines, Iowa. To assure comparability of predicted jury awards, photocopies of comparable jury awards from the Des Moines area were included in the case files for both sides, [and] participating lawyers were informed that results of the negotiations would be published, with attorney names attached, among the participants at the workshop. This meant the attorneys had their professional reputations riding on their outcomes.⁵⁹

After the attorneys negotiated their settlements, 14 of the 20 pairs were willing to submit a signed statement of results. Williams gives us the results in a striking table (page 23).

Both outcomes and demands ranged widely among these experienced lawyers who were equipped with the same information about jury verdicts. Although one can imagine various threats to the validity of these results (sampling bias, varying amounts of experience with personal injury cases, etc.), nevertheless they suggest strongly that information about what juries have done in "comparable cases" interacts with other factors to produce great variation in lawyers' responses to a case.⁶⁰

A pioneering study being conducted by members of the *Wisconsin Law Review* will throw light on the way that lawyers evaluate cases.⁶¹ A survey of a cross section of Wisconsin attorneys (focusing on the trial bar) found that jury verdict reports and handbooks were employed far less in forming evaluations than consultation with other attorneys—especially attorneys within the same firm.⁶² When asked to report about their evaluation of their most recent case, less than one quarter used verdict reports, while seventy percent relied heavily on consultations with other attorneys in their own firm. When asked about the effect of various factors on the initial monetary value they put on the case, less than half (46.6 percent) attributed "most" or "great" effect to "knowledge of jury verdicts in similar cases." "Extent of damages" and "difficulties of proof/probability of success" led the list, followed by 62.3 percent who credited "my own experience with similar cases" with most or great effect.

Let us turn to our checklist of the various media or channels of knowledge about the jury:

1. PERSONAL EXPERIENCE. The *Wisconsin Law Review* study suggests that an amalgam of personal experience, checked by collegial consultation, is the core of the evaluation process and that systematic tracking down of information about juries is relatively uncommon. But the personal experience referred to there is experience of "cases," not of juries. But recall that there are roughly twice as many lawyers as there were just twenty years ago, but roughly the same number of jury trials.⁶³ Because the profession has grown rapidly, lawyers are on the average younger and have fewer years of experience in practice.⁶⁴ We can surmise that lawyers have, per capita, less experience of jury trials as participants. Lawyers'

experience of juries is, on the whole, more mediated, more indirect, more vicarious. The shadow of the jury is viewed less through the lenses of personal experience and more through other media. (At the same time for a few lawyers their personal experience has been enlarged through freer post-verdict interviewing of jurors.)

2. ORAL CULTURE. The patterns of reliance on colleague consultation revealed in the *Wisconsin Law Review* survey suggest that the major medium through which the signals of jury propensities are transmitted remains the oral culture of the lawyer. We know that this culture includes a great deal of lore about juries and about particular kinds of jurors. We don't know much about the way that lawyers combine this with information from other sources.

The prominence of colleague consultation suggests one possible explanation of the high variation found in Williams' Des Moines experiment. If we assume that Des Moines lawyers are like those in Wisconsin and consult colleagues in deciding what a case is worth, we might guess that while his subjects conscientiously applied themselves to the file, they might have curtailed the usual practice of consultation, declining to burden colleagues with a simulation. If so, the situation involved a shift for many participants from colleague consultation to jury verdict reports as a basis for evaluation. Could it be that the former would generate greater consensus on valuation than the latter?

We may suspect that this oral culture is undergoing changes as the structure of law practice changes. There are many more lawyers: they are younger and have fewer years of experience than their predecessors of twenty-five years ago; they practice in larger units and more of them are more specialized. Since the number of those practicing in most localities and specialties has increased, it seems likely that more of their encounters with other lawyers are with those who are not previously known to them.

3. JUDGES AND OTHER SETTLEMENT PROMOTERS. Many trial judges have more experience with juries than all but a few lawyers. Over the past generation, judges have become more active in the promotion of settlements, which has come to be seen as a respectable and commendable part of judicial work.⁶⁵ There has been a proliferation of innovations, as judges—and other court personnel such as magistrates, clerks and special masters⁶⁶—adopt many techniques for promoting settlements.⁶⁷ These efforts tend to be more intense where an eventual trial would be by jury, since judges feel more inhibited about aggressive settlement efforts where they might end up trying the case.⁶⁸ Hence the settlement discourse of judges contains considerable lore about juries. Many judges are confident that they know "what a case is worth" and how juries will react to various features of a case. However, judges' direct experience of civil juries may be limited. There are less than ten civil jury trials per judge annually in the federal system. Of course, judges know about juries in other trials than the ones in which they preside. A survey of Wisconsin trial judges by Christopher J. Brown asked them

"How frequently do you learn about recent *jury verdicts* from trial courts other than your own, whether through publications or informal conversations?" Only a quarter responded that they "frequently" learned about such verdicts; half said they did "occasionally" and a quarter said "rarely or almost never."⁶⁹ Nevertheless, lawyers seem to welcome such initiative by judges. Lawyers with cases in the four federal districts studied by Brazil overwhelmingly believed that such judicial intervention would significantly improve the prospects for achieving settlement; they are especially approving of judicial settlement efforts in jury matters and attribute greater effectiveness to them in that setting.⁷⁰

4. APPELLATE COURTS/OFFICIAL REPORTING. Some information about what juries do is carried in law reports, typically in reports of appeals of awards for being excessive or not justifiable on the basis of the evidence. These reports (and the legal publications summarizing and collating them) provide a picture of what juries do and the leeways that judges will allow them.

5. JURY VERDICT REPORTING SERVICES. There are national and local services that compile and distribute information about jury verdicts. These jury verdict reporters differ in scope, sources, comprehensiveness, detail and frequency. Local services approach comprehensive coverage, while the national Jury Verdicts Research is selective in coverage, reporting only "what it considers to be precedent setting verdicts."⁷¹ National reporters, Daniels finds, are "highly selective and the picture they present is biased toward the unusual situation and the large award (the ones that attract attention); and for some reporters there is a very real plaintiff victory bias because of the reliance on lawyer self reporting of cases. ..."⁷² Presumably, these services are used differentially by various kinds of legal actors in different kinds of cases. but we have only a few glimmerings of what the patterns of use are. Ross found that jury verdict reports, routinely consulted by attorneys, "were seldom used by claims men."⁷³ Daniels reports other uses of these reporters: by a judge to inform pretrial conferences; by a lawyer to "cool out" over-optimistic clients.⁷⁴ The *Wisconsin Law Review* study indicates that they are used more by lawyers in smaller localities.

6. SPECIALIZED TRADE MEDIA: HANDBOOKS, SPECIALIZED LITIGATION REPORTERS, PRACTITIONERS JOURNALS, CONTINUING EDUCATION, SEMINARS AND OTHER PRESENTATIONS. These cover a range from coverage that is more technical and systematic than the jury verdict reporters to presentation that is only a step removed from the informal oral culture of lawyers. One subcategory that may be of particular interest is the flow of information, written and oral, along the specialized networks for information-sharing and (sometimes) strategic coordination that have grown up among lawyers engaged with particular kinds of cases—e.g., the networks among plaintiffs' lawyers in asbestos, DES, or formaldehyde cases

7. MASS MEDIA. We should be wary of underestimating the extent to which professional actors draw on the mass media, not only for specific items of information, but by absorbing general orientations for interpreting such information. The current discourse about the litigation explosion, the liability crisis, etc. displays a complex linkage between mass media and presentations in specialist forums. For example, "horror stories," often originating with professionals, are popularized by the mass media and return to be incorporated in discourse among professionals.⁷⁵ Even purportedly analytic findings may be adopted uncritically from the mass media.⁷⁶ Thus the media may act as a filter, determining which aspects of legal activity languish in obscurity and which gain wide currency and are used to interpret the legal world. Daniels points out that "[t]he media, especially the national media, and legal elites rely on each other and on the national [jury verdict] reporters for information. This leads to an emphasis on the unusual cases and those with high awards, which then are treated as if they are representative of all cases."⁷⁷

8. JURY SELECTION INVESTIGATIONS. In the last fifteen years there has been a growth of jury selection research conducted on behalf of lawyers in particular cases.⁷⁸ It is unknown how much lore from these has spilled back into lawyers knowledge about juries.

9. RESEARCH. Research like that of the Institute of Civil Justice, creating a systematic and cumulative portrait of jury behavior, constitutes a kind of learning about juries that hasn't previously been available. We may expect that it will feed back—through specialist presentations and mass media—into the pool of knowledge employed by various legal actors.

Even complete and accurate information about what juries had done would be very difficult to apply, since everything depends on judgments of similarity and difference in the cases and estimates of the range of jury variation in responding to them. And clearly the information received through these various media is incomplete, conflicting and distorted. Even those in possession of a great deal of accurate information may be mistaken in their attributions of jury disposition toward different types of injuries or different types of parties. Thus, Chin and Peterson are concerned about litigants basing tactical decisions on "apparent associations between verdicts and litigant types" where observed "patterns may be explained by other case features. ..."⁷⁹ The messages that actors extract even from ample and accurate reports of jury behavior may diverge from researchers' explanations of what animates juries. And the setting in which this knowledge is used does not enforce learning. Since most cases end in settlement, the great majority of readings by actors are never tested; like the participants in Williams' mock negotiation, everyone can go away thinking that they performed well—an impression that other actors have a strategic interest in fostering.⁸⁰

How much distortion and ignorance is there? The existing literature provides only a few tantalizing hints. Danson, who is sanguine about the rationality of actors and the efficiency of the tort system, estimates that some thirty-nine to fifty-three percent of medical malpractice claims that are dropped would in fact have won if pressed to verdict and twenty-three to forty-three percent of claims that received a settlement would not have come at verdict.⁸¹ And this is in medical malpractice claims, which probably command greater investment in research and preparation than most any category of claims! She presents this to show that there are stable and predictable relations between potential verdicts and settlement outcomes.⁸² The presence of so many false negatives and false positives is presumably accounted for by transaction costs. But their presence on such a scale is troubling. It suggests that the signaling function of verdicts is overwhelmed by other factors or is accompanied by a tremendous amount of noise.

In contrast with this aggregate analysis, Rosenthal's research on personal injury settlements in New York City in the 1960s enables us to see the range of variability in evaluation of individual cases. A panel of five experts were asked to estimate what each of fifty-nine actual settled cases were worth in terms of settlement at various stages and jury award.⁸³ Panelists tended to agree about the relative value of the cases. But Rosenthal observed that "[t]he considerable variation among panelists with respect to each case does not accord with the widespread assumption that experts will tend to reach a consensus on the value of any particular case."⁸⁴ The panel average was then compared to the actual settlement. Actual settlements ranged from more than twice the panel consensus to just one sixth of it. The median recovery was about seventy-five percent of the panel evaluation for the corresponding stage.⁸⁵ About forty percent of recoveries were less than sixty percent of the panel valuation.⁸⁶

The discrepancy of results and panel estimations might be read in several ways. It might be taken as evidence that the expert panel was unrepresentative of the range of estimates in the local legal community—that is, that existing signals would be read differently by other lawyers. Or it might suggest that the outcome of the case was determined by factors other than those taken into account by the panel⁸⁷—in particular by the relative capability of the parties to play the litigation game.

Thus Rosenthal himself finds that settlement outcome was strongly affected by how active the client was—a feature reflected only dimly in the information available to the panel. This comports with findings of other studies that results are affected by the relative capability of the parties as disputants. Thus Ross finds that represented accident claimants recover more than unrepresented ones and those represented by specialists, more.⁸⁸ In a different field, Meli and her collaborators find that the level of child support provided in settlement agreements is affected by the relative reluctance or impatience of the divorcing parties:

... for impatient custodial mothers and reluctant supporting fathers, child support tended to comprise a lower than average percent of father's income; conversely, for impatient supporting fathers and reluctant custodial mothers, the percent of father's

income paid in child support was higher than average.

... The role of impatience and reluctance in shaping the amount of the award is illustrated most graphically by comparing mean awards. The mean awards for two children was 23% of the supporter's income. However, in the seen cases where the supporting parent was reluctant or the custodial parent impatient, the mean award was 19% of father's income; in the five cases where the custodian was reluctant or the supportant parent impatient, the mean award was 29% of father's income.⁸⁹

This suggests that outcomes reflect other features of the process in addition to signals about what official decision makers (juries or others) would do. The notion that such signals are dim and accompanied by considerable noise gains support from several studies in contexts where the decision maker is judge rather than jury.

Erlanger conducted in-depth interviews with thirty lawyers involved in twenty-five settled cases of divorce involving minor children in Dane County, Wisconsin. Regarding child support and property division.

A number of the lawyers we interviewed acknowledge that they have difficulty in explaining court standards and that they cannot predict the outcomes of court processes.

....
... among the lawyers in our sample who do think that there are set standards, and who do say they can predict outcomes, there are differences of opinion as to the content of those standards. Different lawyers cite different "court standards": obviously, they cannot all be correct.⁹⁰

Studies of personal injury settlements in England, where there are no juries, display a process pervaded by a sense of uncertainty about what judges will do.⁹¹ Hazel Genn found that eight-nine percent of the solicitors in her survey agreed that it is difficult to predict how much a judge will award to a successful plaintiff.⁹²

How is the mix of knowledge and ignorance distributed? Are some actors better equipped or positioned to extract more accurate messages? We badly need a rich experimental account of how various sorts of players—specialist big ticket plaintiffs' lawyers, ordinary plaintiffs' lawyers, insurance company claims managers, insurance defense attorneys, municipal attorneys, etc.—read the jury shadows. What messages about juries reach them, through what channels? How are they interpreted? How is this learning stored, shared and used?

Although the way in which the jury's signals affect the settlement process remains to be explored, my sense is that it is not adequately captured by the "iceberg" metaphor, with its connotation of orderly bonds of rational calculation by which the "visible cap" of jury verdicts "controls" the larger settlement arena. Rather than a symmetrical crystalline structure, we may find an irregular heap of cognitive slush in which indistinct and distorted signals are lost or misread. The disorienting experience of predicability that disturbs the jury's critics may have

its source not in the incompetence and bias of the jury, but in the settlement process itself.

The shadow metaphor, although it admits the possibility of systematic distortion, also conveys an image of hierarchic control in which settlements are guided by the rulings of authoritative decision makers. But Meli, et. al found that in the divorce arena, there is a

question of who is in fact casting the shadow of the law the expectation of what a particular judge would set for child support had to be determined from the cases in his or her court—most of which involved settlements. The shadow of the law, therefore, was cast by the agreements of the parties. It seems, that, rather than a system of bargaining in the shadow of the law, divorce may well be on of adjudication in the shadow of bargaining.⁹³

In this bargaining arena it is not clear that the central formal process of decision is independent of the penumbral process of bargaining that surrounds it. This brings us back to the amateurism of the jury, which may turn out to have an important and unsuspected function. The jury's fresh inputs, independent of the understandings and routines of the regulars, may preserve the decision process from being swallowed by the surrounding bargaining process.⁹⁴

Portents of Change

I want to reflect on some things that seem to be changing and to suggest some of the questions we should be asking about these changes.

How can we explain the steep increase in the upper tier of awards? Do these higher awards reflect perceptions of the availability of more expensive treatment and longer life expectancy for those catastrophically injured?

What are the long-term effects of higher educational levels in the population from which jurors are drawn? (To what extent are higher educational levels of juries augmented by a reduction of excused categories or offset by the inclusion of previously excluded minorities?)

How widespread is the use of smaller juries? Has the use of smaller juries introduced greater variability into jury awards, as statistical analysis would lead us to expect.⁹⁵

Are juries diverging from judges on a different scale than the relatively modest differences found a generation ago by the University of Chicago Jury Project? Are judges' damage awards in catastrophic injury cases rising in a similar fashion? Analysis of recoveries in categories of liability without juries (e.g., under the Federal Trade Claims Act) would be revealing.

How should we read this change in the level of awards? It hardly seems an instance of jury nullification of the law. The law of damages promises to make the victim whole—this is nothing new. But in practice this commitment has always been qualified by competing considerations—by recoil at the expense; reluctance

to impose calamitous loss on the tortfeasor; skepticism about the capability of money to assuage the harm; a sense that the victim must bear some of the cost of his bad luck. But appreciation of the devastating and ramifying character of serious injury has grown, along with awareness of the intricate and expensive technology of copying with it. There is, Lawrence Friedman reports, a general expectation that undeserved suffering can and should be compensated. He suggests that the changing damage awards reflect the development of a notion of "total compensation."

From the modern standpoint, then, damages in 1850 or 1900 fell short of full compensation. They did not go into the question of a lifetime of suffering, even allowing for a shorter life-span. The research for damages went on under the shadow of an unconscious theory of limits. It is not hard to understand why. Who, after all, would pay for inflated damages? Businesses as a whole were smaller and more precarious than today. The deep pocket was not so deep. Liability insurance was less widespread. Even more important was the legal culture, linked to the [pervasive sense of life's] uncertainties. ...

These unconscious restraints have now vanished. Almost nothing inhibits the jury (and the court) from searching for, computing, and awarding money that comes as close as one can to full compensation.⁹⁶

If contemporary juries have given new content to the norm of "making whole" the injured—at least some of them—we should not necessarily expect that trend to more expansive interpretation of this norm will proceed indefinitely. Further developments of technology and of empathy may enlarge this "making whole" commitment to a point where a new set of limits assert themselves—just as the commitment to the social norm of the absolute value of life may be read more restrictively as the technological possibilities and costs of sustaining it expand. In both cases, the readiness to respond with heroic generosity when faced with instances of individual disaster leads to the question of the levels of general and comprehensive response that could be institutionalized on a routine basis.

High awards are putting pressure on other features of the civil liability system. One basic feature that may be less stable than it recently appeared is the notion of the once-and-for-all award of damages, in which all uncertainties are compounded in a single lump-sum. It has already been modified by the acceptance of the structured settlement, which has accustomed parties to the notion of a periodic and adjustable payout. Provision for periodic payments has been enacted in some instances and is proposed in many more. We may be moving toward allowing juries to award an adjustable stream of payments, which would entail some administrative machinery for making the adjustments.

As important as changes in the culture *of* juries, the culture *about* juries may be changing. The process by which jury verdicts are transformed into threats and signals may be undergoing a transformation. There are relatively fewer jury trials and less personal experience of them; the oral culture of lawyers may be chang-

ing as the structures of professional life are altered; there is a proliferation of channels of information—judges, specialized publications, lawyers' litigation networks—that make available a richer flow of information. Improved education, greater specialization, the "professionalization of the plaintiffs bar" and so forth may be changing the ways in which this information is processed. It may turn out that the perceived decline in the "predictability" of jury awards is located in the process of decoding the shadows rather than in casting them.

What is surely predictable is the academic ritual of closing with a reminder of how little we know and a call for further research. In this instance the ritual seems especially seasonable. The civil jury is an understudied institution. It is a propitious time to dispel some of our ignorance about it and about the civil liability system in which it is a key element. The legal world as a whole has opened up remarkably in recent years. There is a great deal more information available about the working of legal institutions. compared, say, to the period of the University of Chicago Jury Project, we have enormously expanded our knowledge of the world of American law. We know more about litigation—about aggregate patterns, about changes over time, about plea bargaining, about settlement, about litigants' strategies. We know more about courts and judges—about their working routines, about their decisionmaking, about their variability. We know more about the world of law practice—about the work of lawyers, about the organization of law firms, about the structure and politics of the bar. We know more, too, about the making of regulatory policy, about the politics of implementation, about the impact of legal regulation. Our richer and more detailed picture of law in American society derives partly from the development of a tradition of sustained systematic cumulative research that has been institutionalized in universities, research institutes, journals and scholarly associations. It also comes from the development of new modes of legal journalism—more detailed, intrusive investigative reporting about law in the general press and the emergence of a new kind of trade press within the legal world.

The richer flows of information in these channels contributes to and reflects an opening up of the legal world. Barriers of secrecy have fallen. Core legal activities are more accessible—as dramatized by open-meeting laws, the Freedom of Information Act, and courtroom television. Prosecutors and police chiefs talk openly about discretionary enforcement policies. Information about the clients, finances and operations of elite law firms is routinely available. The old presumptions of confidentiality have given way to a presumption of free flows of information. Even in the case of the jury, we find this in the growth of the practice of permitting jurors to be interviewed after the verdict, in the occasional court-sponsored debriefing, and now in the filming and broadcasting of an actual jury deliberation. This was all unthinkable just a generation ago. Everything points to overcoming the barriers that make research with real juries forbidding. It is an opportunity that should be grasped. The fruits of a generation of jury research—including such nonintuitive (to me at least) discoveries as the two-tier pattern of damages awards and the jury's nuanced deliberation—should excite

our sense of wonder. The jury and the process of translating its signals into markers and meanings are at the core of our system of litigation. Exploring them could reveal much about that system and about this society in which litigation plays such a central and distinctive role.

R E F E R E N C E S

- Administrative Office of the United States Courts
1940 *Annual Report of the Director, 1940* Washington: Superintendent of Documents
1960 *Annual Report of the Director, 1960* Washington: Superintendent of Documents
1970 *Annual Report of the Director, 1970* Washington: Superintendent of Documents
1985 *Annual Report of the Director, 1985* Washington: Superintendent of Documents
- Baldwin, Scott
1985 "Don't Debase a 200-Year-Old Tradition," *New York Times*, Sept. 1, 1985, p.8 [Midwest ed.]
- Borucka-Arctowa, Maria
1976 "Citizen Participation in the Administration of Justice: Research and Policy in Poland," *Jahrbuch fur Rechtssoziologie und Rechtstheorie* Band IV, 286-99
- Brazil, Wayne D.
1985 *Settling Civil Suits: Litigators' Views About Appropriate Roles and Effective Techniques for Federal Judges* Chicago: American Bar Association
- Brill, Steven and James Lyons
1986 "The Not-So-Simple Crisis," *American Lawyer* (May) 1, 12-17
- Broeder, Dale W.
1958 "The University of Chicago Jury Project," 38 *Nebraska Law Review* 744-60
- Brown, Chris
1985 "Bargaining in the Shadow of the Law: The Judicial Silhouette," Paper presented at Workshop on Judicial Promotion of Settlements, American Bar Foundation, Chicago, Nov. 7-8, 1985
- Chin, Audrey and Mark A. Peterson
1985 *Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials* Santa Monica: Institute for Civil Justice
- Church, Thomas W., Jr., Alan Carlson, Jo-Lynne Lee and Teresa Tan
1978 *Justice Delayed: The Pace of Litigation in Urban Trial Courts* Williamsburg: National Center for State Courts

- Curran, Barbara A.
1986 "American Lawyers in the 1980s: A Profession in Transition," 20 *Law & Society Review* 19-52
- Daniels, Stephen
1985 "Continuity and Change in Patterns of Case Handling: A Case Study of Two Rural Counties," 19 *Law & Society Review* 381-420
1986a "Punitive Damages: Storm on the Horizon," Preliminary Report of the [American Bar Foundation] Punitive Damages Project, Prepared for delivery at the American Bar Foundation Fellows Seminar, American Bar Association Midyear Meeting, Baltimore, Feb. 8, 1986
1986b "Civil Juries, Jury Verdict Reporters, and the Going Rate," Prepared for delivery at the annual meeting of the Law and Society Association, Chicago, May 29-June 1, 1986
- Danzon, Patricia M.
1985 *Medical Malpractice: Theory, Evidence and Public Policy* Cambridge: Harvard University Press
- Danzon, Patricia M. and Lee A. Lillard
1982 *The Resolution of Medical Malpractice Claims: Modeling the Bargaining Process* Santa Monica: Institute for Civil Justice
- Eads, George and Peter Reuter
1983 *Designing Safer Products: Corporate Responses to Product Liability Law and Regulation* Santa Monica: Institute for Civil Justice
- Erlanger, Howard S., Elizabeth Chambliss and Marygold S. Melli.
1986 "Cooperation or Coercion?" Informal Settlement in the Divorce Context, University of Wisconsin-Madison, Disputes Processing Research Program, Working Paper 7-6
- Fitzgerald, Jeffrey
1983 "Patterns of 'Middle Range' Disputing in Australia and the United States," 1 *Law in Context* 15-45
- Friedman, Lawrence M.
1985 *Total Justice* New York: Russell Sage Foundation
- Friedman, Lawrence M. and Robert V. Percival
1976 "A Tale of Two Courts: Litigation in Alameda and San Benito Counties," 10 *Law & Society Review* 267-301
- Galanter, Marc
1980 "Legality and Its Discontents: A Preliminary Assessment of Current Theories of Legalization and Delegalization," in E. Blankenburg et al., eds., *Jahrbuch für Rechtssoziologie und Rechtstheorie*, Band VI: 11-26

- 1983 "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society," 31 *UCLA Law Review* 4-71
- 1985a "... A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States," *Journal of Law and Society* 1-18
- 1985b "The Legal Malaise, or, Justice Observed," 19 *Law & Society Review* 537-56
- 1986a "The Emergence of the Judge as a Mediator in Civil Cases," 69 *Judicature* 257-62
- 1986b "The Day After the Litigation Explosion," University of Wisconsin-Madison, Disputes Processing Research Program, Working Paper (forthcoming)
- Genn, Hazel
1986 *Hard Bargaining: A Study of the Process of Out-of-Court Settlement in Personal Injury Actions* (unpublished manuscript)
- Graham, Fred
1970 "Burger Suggests Judicial Changes," *New York Times*, Nov. 15, 1970, at 32, col. 1
- Griswold, Erwin
1963 Harvard Law School, Dean's Report, 1962-63
- Guinther, John
n.d. *The Jury in America* (forthcoming, 1987)
- Hammit, James K., Stephen J. Carroll, and Daniel A. Relles
1985 "Tort Standards and Jury Decisions," 14 *Journal of Legal Studies* 751-62
- Hans, Valerie P. and Neil Vidmar
1986 *Judging the Jury* New York: Plenum Publishers
- Harris, Donald, Mavis Maclean, Hazel Genn, Sally Lloyd-Bostock, Paul Fenn, Peter Corfie and Yvonne Brittan
1984 *Compensation and Support for Illness and Injury* Oxford: Oxford University Press
- Hastie, Reid, Steven Penrod and N. Pennington
1983 *Inside the Jury* Cambridge: Harvard University Press
- Hendrix, Steve
1985 "Is What You See What You Get: Perspectives on Post-Verdict Bargaining." (Paper prepared for Disputes Processing Seminar, University of Wisconsin Law School, Fall 1985)

- Jacob, Herbert
1969 *Debtors in Court: The Consumption of Government Services* Chicago: Rand-McNally
- Kalven, Harry, Jr.
1959 "The Jury, the Law, and the Personal Injury Damage Award," 19 *Ohio State Law Journal* 158-78
- 1964 "The Dignity of the Civil Jury," 50 *Virginia Law Review* 1055-75
- Kalven, Harry, Jr. and Hans Zeisel
1966 *The American Jury* Boston: Little Brown & Co.
- Kester, John G.
1984 "Are Lawyers Becoming Public Enemy Number One?" 21 *Court Review* (2) 4-12 [Reprinted from *The Washingtonian*, Feb. 1984]
- Kritzer, Herbert M.
1985 "The Form of Negotiation in Ordinary Litigation," University of Wisconsin-Madison, Disputes Processing Research Program, Working Paper 7-2
- 1986 "The Lawyer as Negotiator: Working in the Shadows," University of Wisconsin-Madison, Disputes Processing Research Program, Working Paper 7-4
- Kulcsar, Kalman
1982 *People's Assessors in the Courts: A Study on the Sociology of Law* Budapest: Akademiai Kiado
- Langley, Monica
1986 "Generous Juries: In Awarding Damages, Panels Have Reasons for Thinking Very Big," *Wall Street Journal*, May 29, 1986
- Lempert, Richard
1978 "More Tales of Two Courts: Exploring Changes in the 'Dispute Settlement Function' of Trial Courts," 13 *Law & Society Review* 91-138
- Mather, Lynn M.
1973 "Some Determinants of the Method of Case Disposition: Decision-making by Public Defenders in Los Angeles" 8 *Law & Society Review* 187-216
- Mayhew, Leon H.
1975 "Institutions of Representation," 9 *Law & Society Review* 401-29
- Melli, Marygold S., Howard S. Erlanger and Elizabeth Chambliss
1985 "The Process of Negotiation: An Exploratory Investigation in the Divorce Context," University of Wisconsin-Madison, Disputes Processing Research Program, Working Paper 7-1

- Miller, E. Richard and Austin Sarat
1980-81 "Grievances, Claims, and Disputes: Assessing the Adversary Culture," 15 *Law & Society Review* 525-65
- Mnookin, Robert H. and Lewis Kornhauser
1979 "Bargaining in the Shadow of the Law: The Case of Divorce," 88 *Yale Law Journal* 950-97
- Peterson, Mark A.
1984 *Compensation of Injuries: Civil Jury Verdicts in Cook County* Santa Monica: Institute for Civil Justice
- Peterson, Mark A. and George L. Priest
1982 *The Civil Jury: Trends in Trials and Verdicts, Cook County, Illinois, 1960-1979* Santa Monica: Institute for Civil Justice
- Rosenthal, Douglas E.
1974 *Lawyer and Client: Who's in Charge?* New York: Russell Sage Foundation
- Ross, H. Laurence
1970 *Settled Out of Court: The Social Process of Insurance Claims Adjustment* Chicago: Aldine
- Schelling, Thomas
1969 [1960] *The Strategy of Conflict* New York: Oxford University Press
- Shuchman, Philip
1979 *Problems of Knowledge in Legal Scholarship* West Hartford: University of Connecticut Law School Press
- Shanley, Michael G. and Mark A. Peterson
1983 *Comparative Justice: Civil Jury Verdicts in San Francisco and Cook Counties, 1959-1980* Santa Monica: Institute for Civil Justice
- Sidley & Austin
1986 *The Need for Legislative Reform of the Tort System: A Report on the Liability Crisis from Affected Organizations*
- Sudnow, David
1965 "Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office," 12 *Social Problems* 255-76
- T.R.B.
1985 "The Tort Explosion," *New Republic*, Nov. 18, 1985, 4, at 50
- Trubek, David M., Austin Sarat, William L.F. Felstiner, Herbert M. Kritzer and Joel B. Grossman
1983 "The Costs of Ordinary Litigation," 31 *UCLA Law Review* 72-127

- Warshauer, Irene
1986 "Limiting Product Liability Verdicts," *For the Defense*, March 1986, 2
- Will, Hubert, Robert R. Merhige and Alvin B. Rubin
1976 "The Role of the Judge in the Settlement Process," 75 *Federal Rules Decisions* 89
- Williams, Gerald R.
1983 *Legal Negotiation and Settlement* St. Paul: West Publishing Co.
- Wisconsin Law Review
1986 Group Project: First Draft
- Zeisel, Hans
1971 "... And Then There Were None: The Diminution of the Federal Jury," 38 *University of Chicago Law Review* 710-24

NOTES

- ¹ Kester, *Are Lawyers Becoming Public Enemy Number One?* 21 *Court Rev.* 4, 8 (Spring 1984) reprinted from, *The Washingtonian*, Feb. 1984, at 114, 117.
- ² Warshauer, *Limiting Product Liability Verdicts*, *For The Defense*, Mar. 1986, at 2.
- ³ *The Tort Explosion*, *The New Republic*, Nov. 18, 1985, at 4, 50.
- ⁴ For alternative technocratic and communitarian bases for criticism of contemporary legal arrangements, see Galanter.
- ⁵ Examples abound. Throughout 1985 the Insurance Information Institute ran a full-page advertisement in national magazines depicting a shell-pocked statue of blindfolded justice encased in scaffolding, and bearing the heading "Now let's restore Civil Justice." It began with a lament that "Year after year, our civil justice system has become slower. More costly. Less fair to the very people it was meant to help." The theme of "[r]estoring fairness, efficiency and predictability to our civil liability system" that "is no longer fair...no longer efficient" recurs in a recent advertisement by Aetna, entitled "Aetna on the Lawsuit Crisis and Your Insurance." (My copy is from the *Wall St. J.*, Apr. 8, 1986.) This same revivalist theme underlies a series of *Wall Street Journal* editorials, culminating in one applauding Senator Robert Kasten's products liability bill on the ground that "[t]hese reforms are modeled after the law from the 1200s in England to about 25 years ago in the U.S. In tort law moving backward would be a step forward." Editorial, "Interstate Liability," *Wall St. J.*, May 1, 1986, at 20.
- ⁶ See Baldwin, *Don't Debase a 200-Year-Old Tradition*, *N.Y. Times*, Sept. 1, 1985, at 8, col. (midwest ed.) (cautioning that "the system, which dates back two centuries, is not broken, but the tinkers would do radical repair that would punish innocent victims and overwhelm the courts with endless lawsuits spawned by the complex, unclear and unneeded legislative proposals").
- ⁷ Hammit, Carroll & Relles, *Tort Standards and Jury Decisions*, 14 *J. Legal Studies* 751, 753 (1985). The article analyzes verdicts in a nationwide sample of more than 20,000 automobile insurance claims closed with some payment by 29 insurers during a two-week period in 1977. It reports that verdicts were returned in only about 200 cases.
- ⁸ P. M. Danzon, *Medical Malpractice: Theory, Evidence and Public Policy* 32 (1985). The author reports that 7 out of 100 claims in her sample of 6,000 malpractice claims closed in 1974 and 1976 were tried to verdict. Only some fifty-two percent of all claims were paid something, including just over a quarter (twenty-eight percent) of the seven percent tried to verdict.
- ⁹ Kalven, and H. Zeisel, *The American Jury* 31-32 (1966).
- ¹⁰ Mnookin and Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *Yale L. J.* 950 (1979).
- ¹¹ E. Griswold, Harvard Law School, Dean's Report, 5-6 (1962-63).

¹² See V. Hans and H. Vidmar, *Judging the Jury* (1986) [hereinafter Hans and Vidmar].

¹³ Cf. Borucka-Arctowa, *Citizen Participation in the Administration of Justice: Research and Policy in Poland*, 1976 *Jahrbuch für Rechtssoziologie und Rechtstheorie* Band IV, 286, 299 (describing lay judge in Poland as "conceived as a means of preventing, or counter-balancing, a certain tendency toward the routine, a professional deformation inevitable in the performance of various professional functions, to which the judge is subject as well"). The tendency of regular actors to gravitate into such typifications and routines has been documented in civil as well as criminal matters. See H.L. Ross, *Settled Out of Court: The Social Process of Insurance Claims Adjustments* 134-35 (1970); Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 *Social Problems* 255 (1965); Mather, *Some Determinants of the Method of Case Disposition: Decision-making By Public Defenders in Los Angeles*, 8 *Law and Soc'y Rev.* 187 (1973).

¹⁴ There is a sizable literature on the way that legal actors develop understandings and priorities that modify, supplement and sometimes displace formal legal norms. For a description of such local legal cultures, see Church, Carlson, Lee and Tan, *Justice Delayed: The Pace of Litigation in Urban Trial Courts*, National Center for State Courts, Williamsburg (1978); H. Jacob, *Debtors in Court: The Consumption of Government Services* (1969).

¹⁵ Cf. K. Kulcsar, *People's Assessors in the Courts: A Study on the Sociology of Law* 126-27 (1982). Kulcsar writes that the "most important grounds for lay participation ... lies in the organization-alien nature of the lay element." *Id.* at 126 (emphasis in original). By this he refers to the fact that the lay participant generally does not formulate expectations concerning the organization which would influence his own career and he does not become a permanent participant in organization work. Therefore, the expectations of the organization become less internalized.

¹⁶ See generally R. Hastie, S. Penrod & N. Pennington, *Inside the Jury* (1983); Hans and Vidmar, *supra* note 13.

¹⁷ M. Peterson & G. Priest, *The Civil Jury: Trends in Trials and Verdicts, Cook County, Illinois* (1960-79) (1982) [hereinafter Peterson & Priest]

¹⁸ M. Shanley & M. Peterson, (1983) *Comparative Justice: Civil Jury Verdicts in San Francisco and Cook Counties 1959-80* [hereinafter Shanley & Peterson]. The authors do not give a precise count, but their combined and non-exclusive "contract/business tort" category includes six percent of all jury trials. *Id.* at 7. In addition there is a miscellaneous category that includes five percent of jury trials, but which seems to be made up mostly of tort cases. *Id.* at 83.

¹⁹ Daniels, *Punitive Damages: Storm on the Horizon*, Preliminary Report of the [American Bar Foundation] Punitive Damages Project, (prepared for delivery at the American Bar Foundation Fellows Seminar, American Bar Assoc. Midyear Meeting, Baltimore, Feb. 8, 1986). The exceptions are Fulton County, Georgia, and Maricopa County, Arizona.

²⁰ National Center for State Courts, *State Court Caseload Statistics: Annual Report, 1984*, Table 19 (1986).

²¹ This comparison needs to be checked: the Federal figures are for terminations; but the ICJ studies are based on a count of all jury trials commenced and include dropouts [directed verdicts, dismissals, settlements] and hung juries. See A. Chin & M. Peterson, *Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials*, Santa Monica: Institute for Civil Justice (1985) [hereinafter Chin & Peterson].

²² *Administrative Office of the United States Courts, Superintendent of Documents: Washington 1985 Annual Report of the Director* 328.

²³ *Id.* at 1970 *Annual Report* 255. Coincidentally, the number of tort jury trials terminations was exactly the same in 1970 and 1985. Further back, in 1960, 1923 of 3040 (63.2 percent) of civil jury trials were torts. *Id.* at 1960 *Annual Report* 280.

²⁴ J. Guinther, *The Jury in America* 360 (1987) (forthcoming publication).

²⁵ Is this high or low? The assumption is often made that juries are more prone to find liability than judges would be. A preliminary report from the University of Chicago Jury Project a generation ago found that judges and juries agreed on liability in seventy-nine percent of the cases and the disagreements were approximately even—that is, in ten percent of cases judges would have found liability where juries did not and in eleven percent of the cases judges would not have found liability where juries did. Kalven, *The Dignity of the Civil Jury*, 50 *Va. L. Rev.* 1055, 1065 (1964). Assuming the sample was representative of American judges then, we do not know whether this has changed.

²⁶ Are jury awards of damages excessively high? The University of Chicago Jury Project reported finding jury damage awards about twenty percent higher than judges would have awarded—although judges reported that they would have made higher awards in a significant minority of cases. *Id.*

²⁷ Peterson & Priest, *supra* note 18 at 22.

²⁸ *Id.* at 8.

²⁹ Shanley & Peterson, *supra* note 19 at 58.

³⁰ M. Peterson, *Compensation of Injuries: Civil Jury Verdicts in Cook County* 43 (1984).

³¹ Peterson & Priest, *supra* note 18 at 19.

³² *Id.* at 27.

³³ Chin & Peterson, *supra* note 21 at 54.

³⁴ Miller & Sorat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 *Law & Soc'y Rev.* 525, 545 (1980-81).

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³⁷ *Id.* at 42-43.

³⁸ *Id.* at 44.

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⁶⁶ The following discussion is in terms of judges' efforts to promote settlement, but applies with some adaptation to these categories of intervenors as well.

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⁶⁹ This is taken from data made available to me by Christopher J. Brown, a recent graduate of the University of Wisconsin Law School. Other items in Brown's survey inquired about judges' knowledge of the terms of settlement agreements in their own court and in other courts. Roughly a third of judges reported that they learned the terms of settlements in less than thirty percent of the settlements in their own court; another third said they learned the terms in thirty to sixty percent of the settlements; and the final third reported learning about the terms in more than sixty percent of the settlements. But only twelve percent of the judges reported that they "frequently" learned about settlement agreements in other trial courts.

⁷⁰ W. Brazil, *Settling Civil Suits: Litigators' Views About Appropriate Roles and Effective Techniques for Federal Judges* 4, 66, 73 (1985).

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⁷⁸ For a helpful account, see Hans & Vidmar, *supra* note 13 at 6.

⁷⁹ Chin & Peterson, *supra* note 21 at 32.

⁸⁰ Lawyers' estimates that are excessively favorable to their own clients would be expected to encounter challenge and testing more often than estimates that were too "pessimistic." Hence lawyers typically experience "correction" only at the optimistic end of the scale. *Cf.* Williams, *supra* note 59 at 19 (finding based on study of Denver and Phoenix attorneys, that prevalent negotiating style sixty-five percent of his respondents) is cooperative rather than aggressively competitive one, so that opportunities for testing "optimistic" claims are reduced).

⁸¹ Danzon, *supra* note 9 at 43. See P. Danzon & L. Lillard, *The Resolution of Medical Malpractice Claims: Modeling the Bargaining Process* 47 (1982) (explaining the derivation of these estimates).

⁸² Danzon, *supra* note 9 at 49-50.

⁸³ See Rosenthal, *supra* note 53 at 202-07 (describing the panel and the method of securing evaluations).

⁸⁴ *Id.* at 202.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 206 (listing categories on fact sheet prepared for panel).

⁸⁸ Ross, *supra* note 14 at 197.

⁸⁹ M. Melli, H. Erlanger & E. Chambliss, *The Process of Negotiation: an Exploratory Investigation in the Divorce Context* 34-35 (University of Wisconsin-Madison, Disputes Processing Research Program) (working paper) [hereinafter Melli].

⁹⁰ H. Erlanger, E. Chambliss & M. Melli, *Cooperation or Coercion? Informal Settlement in the Divorce Context* 29-30 (University of Wisconsin-Madison Disputes Processing Research Program) (working paper) [hereinafter Erlanger]. In interpreting this and other findings of Erlanger and his collaborators, it is important to remember that the research was conducted in a setting in which virtually all lawyers handle divorces; there are few specialists.

⁹¹ D. Harris, M. Maclean, H. Genn, S. Lloyd-Bostock, P. Fenn, P. Cortie & Y. Brittan, *Compensation and Support for Illness and Injury* 98 (1984).

⁹² Genn, *supra* note 73 at 85.

⁹³ Melli, *supra* note 90 at 12. Erlanger, *supra* note 91 at 31 (suggesting that "an argument could be made that ... judges may be following the patterns they see in informal settlements, rather than the other way around"; and instead of "bargaining in the shadow of the law," we should refer to "litigating in the shadow of informal settlement").

⁹⁴ Note connecting this with literature on judges as promoters of settlements.

⁹⁵ Zeisel, ... *And Then There Were None: The Diminution of the Federal Jury*, 38 *U. Chi. L. Rev.* 710 (1971).

⁹⁶ L. Friedman, *Total Justice* 63 (1985).