

The Regulatory Function of the Civil Jury

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THE CIVIL JURY is largely an American institution.¹ Are we the last to discard an obsolete institution? Or do we know something other countries do not know? To decide whether civil juries are a good thing, one has to ask what Juries are supposed to do. I would answer that basically they do two things. Distributively, they decide cases.² Collectively, they generate a body of knowledge that fuels the American system of "litigotiation." I use this neologism as a reminder that this is a system in which only a minority of eligible claims are made and only a minority of these proceed to disposition by trial; the vast majority are resolved by settlement, abandonment, or ruling at an earlier stage.³ It is important to recall that America does not have two systems, one of litigation and one of negotiation, but a single system of "litigotiation"—that is, of contesting claims in the vicinity of courts, where recourse to the full process of adjudication is an infrequent occurrence but at every stage an important option and threat.

In the aggregate, juries provide signals or markers by which legal actors form estimates of what other juries will do and on that basis make decisions and formulate policies about claims, offers, settlements, and trials, and even about proclaim investments in safety, disclosure, and so forth. Thus the impact of the small number of jury trials is vastly disproportionate to their number. One can apply to the civil jury Harry Kalven's and Hans Zeisel's observation about the criminal jury:

at every stage of this informal process of pre-trial dispositions . . . 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 of an iceberg, exposes but a fraction of its true volume.⁴

To shift metaphors, one can visualize the jury as part of a system of "bargaining in the shadow of the law." The jury casts a shadow across the wider arena of claims, maneuvers, and settlements by communicating signals about what future juries might do. Of course, the jury is not the only source of these predictive shadows, which are cast not only by legal decisions but also by cost, delay, risk, party capability, and so forth.⁵

The transmission and reception of these signals is a crucial aspect of the jury. 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.

These threat and signal functions of the jury derive from the position of the jury in our legal system. In other modes of lay participation in the legal process—for example, justices of the peace and neighborhood dispute centers—the popular element is cast as alternative or auxiliary to the qualified professional court. If things are not resolved in the initial stages, there is recourse to the professionals.⁶ But the jury is located toward the "top" of the system rather than the bottom; the professionals work in the shadow of the amateurs. If a case involves a sharp contest of claims and elicits heavy investment, it moves to the jury not away from it. And the professionals are committed to defer to the jury, according its decisions some, often considerable, finality.

The salience of the jury's second function can be realized through a little thought experiment. Imagine a system of disputing in which not only juries but judges, courtrooms, lawyers, court reporters, experts, and parties' time and appetites for vindication were present in inexhaustible supply, so that each case proceeded through the full process to decision by a jury. In such a world, juries would not have this second, regulatory function and could be evaluated solely on their merits as deciders of each case.

But in a world of shortages, transaction costs, and risk aversion, trials and juries are few compared with the number of disputes. Hence, evaluation of the civil jury involves more than the question "are juries

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Table 3-1. *Trials as Percentage of Civil Terminations, U.S. District Courts, Selected Years, 1961-91*

<i>Terminations</i>	<i>1961</i>	<i>1970</i>	<i>1980</i>	<i>1988</i>	<i>1991</i>
Total civil terminations ^a	50,490 ^b	79,466	154,985	238,140	211,040
Total trials	5,553	7,975	10,091	11,618	8,427
Percentage of terminations that are trials	11.0	10.0	6.5	4.9	4.0
Total jury trials	2,585	3,409	3,920	5,920	4,294
Percentage of trials that are jury trials	46.6	42.7	38.8	51.0	51.0
Percentage of terminations that are jury trials	5.1	4.3	2.5	2.5	2.0

Source: Administrative Office of the U.S. Courts, *Annual Reports*, (1961, 1970, 1980, 1988, 1991), table C-4.

a. Land condemnation cases excluded.

b. Transferred and consolidated cases excluded.

good deciders of cases?" It also entails a second question: Is the system of civil juries a good means of regulating the system of "litigotiation"? in theory these are independent: one might be answered affirmatively and the other negatively. I propose to focus on the second question because it is more neglected and because, as I shall argue, it is more consequential. But before one can assess the jury's performance, it is important to have some sense of the institutional presence of the civil jury.

Incidence and Distribution of Jury Trials

Relative to the tens of millions of claims made each year or the millions of filings, the number of jury trials is exceedingly small. Overall, they take place in less than 1 percent of cases terminated in state courts and in 2 percent of terminations of federal courts (table 3-1, table 3-2).⁷ Jury presence varies from field to field. Tort cases go to juries more frequently than cases in other fields.⁸ Within the tort field, patterns of jury invocation differ from topic to topic. In medical malpractice, for example, verdicts made up 3 to 4 percent of paid claims.⁹ In the state courts of general jurisdiction for which data are available, the portion of contract cases disposed by jury trial ranges from 0.3 percent to 1.4 percent (table 3-3). In the federal courts, apart from torts (4.3 percent), only civil rights (4.5 percent), antitrust (5.0 percent), and "other diversity" (4.3 percent) had jury trials in more than 2 percent of dispositions in 1991 (table 3-4).

Overall there are more than 50,000 civil jury trials each year in the

Table 3-2. *Civil Jury Trials, by State and Subject Matter, 1988*

<i>Type</i>	<i>Number of Jury Trials</i>	<i>Percentage of total jury trials</i>	<i>Number of dispositions</i>	<i>Jury trials as percentage of dispositions</i>
<i>Florida Circuit Court</i>				
Tort	1,575	67.9	33,411	4.7
Contract	448	19.3	54,529	0.8
Property	98	4.2	51,062	0.2
Other ^a	200	8.6	101,765	0.2
Total	2,321	100.0	240,767	1.0
<i>Hawaii Circuit Court</i>				
Tort	31	55.4	1,635 ^b	1.9
Contract	8	14.3	1,554 ^b	0.5
Property	1	1.8	247 ^b	0.4
Other	16	28.6	5,039	0.3
Total	56	100.1 ^c	8,475 ^b	0.7
<i>Massachusetts Superior Court</i>				
Tort ^d	406	77.9	17,767	2.3
Contract	78	15.0	5,646	1.4
Property ^e	37	7.1	33,915	0.1
Total	521	100.0	57,328	0.9
<i>Minnesota District Court</i>				
Tort	481	60.4	10,807	4.5
Contract	122	15.3	8,899	1.4
Property	81	10.2	17,353	0.5
Other	113 ^f	14.2	40,940	0.3
Total	797	100.1 ^c	77,999	1.0
<i>Texas District Court</i>				
Tort	1,592	46.8	40,674	3.9
Contract	535	15.7	55,878	1.0
Property	9	0.3	439	2.1
Other	1,266	37.2	127,450	1.0
Total	3,402	100.0	224,441	1.5
<i>Washington Superior Court</i>				
Tort	501	82.8	10,888	4.6
Contract	51	8.4	13,237	0.4
Property	19	3.1	13,192	0.1
Other	34	5.6	19,843	0.2
Total	605	99.9 ^c	57,160	1.1

Source: National Center for State Courts, *Annual Report, 1988* (Williamsburg, Va., 1988), part 2, table 2.

a. "Other" includes miscellaneous civil cases.

b. All case types exclude some cases reported as reopened prior cases.

c. Does not equal 100 percent because of rounding.

d. Does not include data from Boston Municipal and District Court departments.

e. Real property rights disposed data do not include summary process and civil cases from Housing Court Department.

f. Does not include estate cases.

Table 3-3. *Disposition of Contract Cases in State Courts of General Information and in the Federal District Courts, 1988*

<i>Location and court</i>	<i>Number of contract dispositions</i>	<i>Number of contract trials^a</i>	<i>Contract trials as percentage of contract dispositions</i>	<i>Total number of civil jury trials^b</i>	<i>Number of contract jury trials</i>	<i>Contract jury trials as percentage of all civil jury trials</i>	<i>Jury trials as percentage of contract dispositions</i>	<i>Jury trials as percentage of contract trials</i>
Federal District Court	65,303 ^c	2,507 ^d	3.8	5,920	1,126	19.0	1.7	44.9
Federal District Court, diversity only	32,990	2,048	6.2	3,051	1,014	33.2	3.1	49.5
Florida Circuit Court	54,529	2,306	4.2	2,321	448	19.3	0.8	19.4
Hawaii Circuit Court	1,554	27	1.7	56	8	14.3	0.5	29.6
Massachusetts Superior Court	5,646	580	10.3	521	78	15.0	1.4	13.4
Minnesota District Court	8,899	496	5.6	797	122	15.3	1.4	25.0
Texas District Court	55,878	5,332	9.5	3,402	535	15.7	1.0	10.0
Washington Superior Court	13,237	452	3.4	605	51	8.4	0.4	11.3
Wisconsin Circuit Court	64,340	1,632	2.5	1,076	203	18.9	0.3	12.4

Source: Administrative Office of the U.S. Courts, *Annual Reports* (1988), table C-4; and National Center for State Courts, *Annual Reports* (1988), part 2, table 2.

a. A nonjury trial is counted when first evidence is introduced or first witness is sworn.

b. A jury trial is counted at jury selection, empaneling, or when a jury is sworn.

c. Includes recovery cases.

d. A trial is counted when a case terminates during or after trial.

Table 3-4. *Civil Jury Trials in U.S. District Courts, 1991*

<i>Type</i>	<i>Number of jury trials</i>	<i>Percentage of total jury trials</i>	<i>Number of terminations</i>	<i>Jury trials as percentage of terminations</i>
Tort	1,956	45.6	45,357	4.3
Civil rights	845	19.7	18,828	4.5
Contract	686	16.0	34,756	2.0
Prisoner petitions	311	7.2	40,776	0.8
Other federal question	126	2.9	10,177	1.2
Labor (FLSA, LMRA, & labor litigation)	94	2.2	13,847	0.7
Intellectual property	68	1.6	5,240	1.3
Real property	39	0.9	9,414	0.4
Tax	53	1.2	2,683	2.0
Antitrust	29	0.7	583	5.0
Bankruptcy	16	0.4	4,611	0.3
Other U.S.	21	0.5	4,115	0.5
Forfeiture (other than liquor)	38	0.9	5,443	0.7
Social security	2	0	7,366	0
Recovery	2	0	7,311	0
Other diversity	5	0.1	115	4.3
Constitutionality of state statute	2	0	245	0.8
Other local	1	0	93	1.1
Total	4,294	100.0	211,040	2.0

Source: Administrative Office of the U.S. Courts, *Annual Report* (1991), table C-4.

United States, compared with 200,000 civil cases in the federal courts and over 9 million in state courts of general jurisdiction.¹⁰

In many state courts, the civil jury is overwhelmingly a tort institution. Available statewide figures for courts of general jurisdiction in nine states show the tort portion of civil jury trials ranging from 46 percent to 82 percent: the median percentage of tort juries was 67.3 percent (table 3-5). Contract cases are usually the next largest portion of jury trials—from 8 percent to 19 percent (median 15.3 percent) in the seven courts of general jurisdiction for which statewide data exist (table 3-3)."

The most detailed picture of juries in a single state is E. Patrick Hubbard's study of South Carolina, which collected information on verdicts in twenty-six of the state's forty-six counties, containing 80 percent of its population and accounting for 80 percent of case filings, for 1976 to 1985.¹² In South Carolina over two-thirds of all jury verdicts were in tort cases: of these more than 40 percent were in motor vehicles cases, 3 percent in products liability cases, 3 percent in medical malpractice

Table 3-5. *Disposition of Tort Cases in State Court of General Jurisdiction and in Federal District Courts, 1988*

<i>Location and court</i>	<i>Number of tort dispositions</i>	<i>Number of tort trials^a</i>	<i>Tort trials as percentage of tort dispositions</i>	<i>Number of civil jury trials^b</i>	<i>Number of tort jury trials</i>	<i>Tort jury trials as percentage of all civil jury trials</i>	<i>Jury trials as percentage of tort dispositions</i>	<i>Jury trials as percentage of tort trials</i>
Federal District Court	44,145	3,517 ^c	8.0	5,920	2,549	43.1	5.8	72.5
Federal District Court, diversity only	30,172	2,408	8.0	3,051	1,994	65.4	6.6	82.8
California Superior Court	103,822	4,031	3.9	n.a.	1,610	n.a.	1.6	39.9
Florida Circuit Court	33,411	1,903	5.7	2,321	1,575	67.9	4.7	82.8
Hawaii Circuit Court	1,635	46	2.8	56	31	55.4	1.9	67.4
Massachusetts Superior Court	17,767	1,155	6.5	521	406	77.9	2.3	35.2
Michigan Circuit Court	35,531	1,159	3.3	1,318 ^d	1,020	77.4	2.9	88
Minnesota District Court	10,807	1,755	16.2	797	481	60.4	4.5	27.4
Ohio Court of Commons Pleas	29,302	2,128	7.3	1,391	936	67.3	3.2	44
Texas District Court	40,674	5,461	13.4	3,402	1,592	46.8	3.9	29.2
Washington Superior Court	10,888	700	6.4	605	501	82.8	4.6	71.6
Wisconsin Circuit Court	16,949	928	5.5	1,076	692	64.3	4.1	74.6

Sources: Administrative Office of the U.S. Courts, *Annual Report* (1988), table C-4; and National Center for State Courts, *Annual Report* (1988), part 2, table 2.

n.a. Not available.

a. A nonjury trial is counted when first evidence is introduced or first witness is sworn.

b. A jury trial is counted at jury selection, empaneling, or when a jury is sworn, except as noted.

c. A trial is counted when a case terminates during or after trial.

d. A jury trial is counted at verdict or decision.

e. Disposition data exclude wrongful death torts.

Table 3-6. *Change in Composition of Civil Jury Trials (major categories only) in U.S. District Courts, 1961-91*

	1961		1970		1980		1988		1991	
	<i>Number of jury trials</i>	<i>Percentage of total jury trials</i>	<i>Number of jury trials</i>	<i>Percentage of total jury trials</i>	<i>Number of jury trials</i>	<i>Percentage of total jury trials</i>	<i>Number of jury trials</i>	<i>Percentage of total jury trials</i>	<i>Number of jury trials</i>	<i>Percentage of total jury trials</i>
Tort	2,102	81.3	2,593	76.1	2,169	55.3	2,549	43.1	1,956	45.6
	...	...	(1,968)	(57.7)	(1,699)	(42.6)	(1,994)	(34.1)	(1,592)	(37.1)
(Diversity)										
Contract	302	11.7	459	13.5	686	17.5	1,126	19.2	686	16.0
	...	...	(416)	(12.2)	(649)	(16.6)	(1,014)	(17.3)	(610)	(14.2)
(Diversity)										
Tax	55	2.1	83	2.4	63	1.6	47	0.8	53	1.2
Real property	40	1.5	36	1.1	24	0.6	52	0.9	39	0.9
Labor	24	0.9	32	0.9	98	2.5	135	2.3	94	2.2
Antitrust	17	0.7	27	0.8	74	1.9	38	0.6	29	0.7
Civil rights	6	0.2	97	2.8	520	13.3	1,213	20.5	845	19.7
Intellectual property	4	0.2	9	0.3	37	0.9	105	1.8	68	1.6
Prisoner petitions	0	0	9	0.3	97	2.5	336	5.7	311	7.2
Local jurisdiction	n.a.	n.a.	226	6.6	26	0.7	13	0.2	14	0.3
(Tort)	...	...	(195)	(5.7)	(14)	(0.4)	(9)	(0.2)	(8)	(0.2)
(Other)	...	...	(31)	(0.9)	(12)	(0.3)	(4)	(0.1)	(6)	(0.1)
Total jury trials ^a	2,585	...	3,409	...	3,920	...	5,920	...	4,294	...

Source: Administrative Office of the U.S. Courts, *Annual Reports* (1961, 1970, 1980, 1988, 1991), table C-4.

n.a. Not available.

a. Totals are for jury trials in all categories, not just those listed.

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cases, and 5 percent in premises liability cases. Most of the remainder—over 20 percent—were contracts cases.

In the federal courts, the distribution of civil juries is somewhat different.¹³ In 1991 there were 4,294 civil cases terminated by jury trial (table 3-4)—of these 1,956 (45.6 percent) were tort cases. Another 845 were civil rights cases (19.7 percent), and 686 were contracts cases (16 percent). The proportion of tort cases has fallen dramatically from 81.3 percent in all civil jury trials in 1961 to 45.6 percent thirty years later (table 3-6). There were actually fewer tort jury trials in the federal courts in 1991 (1,956) than there were in 1961 (2,102)—a decrease of 7 percent. But in this same thirty-year period the number of nontort juries increased by 384 percent, from 483 to 2,338. Unfortunately there is no comparable information about the number and composition of jury trials in state courts.

The number of jury trials in federal courts (2,585 in 1961, 4,294 in 1991) increased more slowly than the total number of cases, so that jury trials as a portion of all terminations fell from 5.1 percent in 1961 to a historic low of 2.0 percent in 1991.

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 handle only 2 percent of all the civil cases in American courts of general jurisdiction, but they hold a much higher portion of jury trials—perhaps 10 percent in 1988. And given the greater preponderance of torts in state court jury trials, the federal courts are the scene of an even higher percentage of nontort civil jury trials—perhaps over 15 percent.

The Jury as Decisionmaker

Whether juries are good deciders of cases is a more complicated question than it may first appear. There are many dimensions of goodness to be considered and weighted. Beyond this, the question is ambivalent. Does it refer to the cases that contemporary civil juries actually decide? Or does it ask whether there *is* some population of cases that juries are ideally suited to decide? Does it refer to juries as presently constituted, regulated, and instructed or to some ostensibly improved sort of juries? And of course such a question inescapably entails comparison of juries as decisionmakers with the other institutions that might be deployed in their stead: judges or arbitrators or bureaucrats or mediators. This requires

consideration of how these alternative devices actually work. For it is important to avoid false comparisons between the idealized institutions that inhabit the pages of proposals and the flawed and imperfect institutions that populate the real world.

I shall give this series of questions short shrift in order to focus on the jury's neglected second function as regulator. I justify this emphasis as a counterbalance to the copious attention given the good-decider question. Michael Saks recently observed that "we know more about jury decision-making than about any other aspect of the legal process."¹⁴ The already sizable literature on this topic is further enriched by many of the papers in this volume. So I shall touch here on only a few aspects of the good-decider question (which I take in the limited sense of asking how real world juries as presently arranged compare with real world alternatives as they now function).

The literature, on the whole, converges on the judgment that juries are fine decisionmakers.¹⁵ They are conscientious, collectively they understand and recall the evidence as well as judges, and they decide on the basis of the evidence presented.¹⁶

Juries decide cases pretty much (but not too much) along the same lines as judges. It is often assumed that juries are more prone than judges to find liability. A preliminary report from the University of Chicago Jury Project a generation ago found that juries held defendants liable in 55 percent of personal injury cases. Judges reported that they would have found liability in 54 percent of those cases. Judges and juries agreed on liability in 79 percent of the cases, and the disagreements were approximately even—that is, in 10 percent of cases the judges would have found liability where juries did not and in 11 percent of the cases the judges would not have found liability where juries did.¹⁷ This rate of agreement compares favorably with the consistency achieved by other pairs of decisionmakers engaged in complex human judgments. Shari Diamond compiled for comparison a set of representative studies of consistency among judges faced with complex clinical judgments in individual cases where the decisionmaker had to "evaluate and combine incomplete or potentially unreliable information to reach a decision."¹⁸ Table 3-7, adapted from Diamond, includes the University of Chicago Jury Study criminal jury findings, which are comparable to the civil jury findings noted above.

The limited divergence of judge and jury comports with the finding of Kevin Clermont and Theodore Eisenberg that federal court judges decide in favor of plaintiffs in a higher proportion of cases than do juries,

Table 3-7. *Frequency of Consistency between Judges on Complex Decisions*

<i>Decisionmakers</i>	<i>Stimulus</i>	<i>Decision</i>	<i>Agreement between two judges</i>
NSF versus NAS peer reviewers	150 grant proposals submitted to NSF	To find or not find (half funded by NSF)	75%
7 employment interviewers	10 job applicants	Rated in top 5 and in bottom 5	70%
4 experienced psychiatrists	153 patients interviewed twice, once by each of 2 psychiatrists	Psychosis, neurosis, character disorder	70%
21-23 practicing physicians	3 patient-actors with presenting symptoms (doctors could request further information and could order and receive test results)	Diagnosis: correct, incorrect	67%, 77%, 70%
3,576 judge-jury pairs	3,576 jury trials	Guilty or not guilty	78%
12 federal judges	460 presentence reports (at sentencing council)	Custody or no custody	80%
8 federal judges	439 presentence reports (at sentencing council)	Custody or no custody	79%

Source: Shari Seidman Diamond, "Order in the Court: Consistency in Criminal-Court Decisions," in C. James Scheirer and Barbara L. Hammonds, eds., *The Master Lecture Series: Psychology and the Law*, vol. 2 (Washington: American Psychological Association, 1983), pp. 124-25.

a result they attribute to biased selection based on misattribution to juries of pro-plaintiff bias.¹⁹

There is a widespread belief that jurors are biased against corporations and other defendants with deep pockets. But the patterns of jury response are more complex. In studies by the Institute for Civil Justice, litigant identity did have an effect on outcomes, but it operated on two tiers. Contrary to common lore, businesses and government units were, on the whole, more successful with juries than were individuals.²⁰ 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, and these patterns have remained constant over two decades.²¹ The differential is commonly attributed to the presence of deep corporate pockets, an explanation that fails to account for the favorable treatment of corporations in ordinary cases.²² A recent study of juror response to personal injury claims by individuals against corporate

defendants described jurors as highly suspicious of the motivations and deservingness of plaintiffs and found "little evidence of tough standards and punitiveness" toward corporations.²³

A related notion is that jurors are excessively generous. Awards in jury cases are, on the whole, higher than those in cases tried by judges. In a study of tort dispositions in twenty-four metropolitan trial courts in one month of 1988, the median jury award was \$26,500 and the median bench trial award was \$8,500.²⁴ Obviously, there is a strong selection bias; that is, the cases that go to juries are not comparable to those tried by judges. Comparing jury verdicts with judges' "shadow verdicts" in the same cases, the University of Chicago Jury Project found jury damage awards in the 1960s about 20 percent higher than judges would have awarded—although judges reported that they would have made higher awards in a significant minority of cases.²⁵ Recent surveys of judges give no indication that judges and juries have diverged in the thirty years since then. Only 6 percent of the judges in the 1987 *National Law Journal* survey thought jury awards had been excessive "in many cases."²⁶ And in the Harris judges' poll, only 5 percent of federal judges and 4 percent of state judges reported that they had reduced jury damage awards more than five times in the previous three years.²⁷ Indeed, some recent evidence suggests that jurors are less generous with compensation than judges or arbitrators.²⁸ In any event, one could readily indict jurors for undercompensation as for the opposite. Larger verdicts typically fall short of covering the plaintiff's full economic losses.²⁹

The performance of juries as decisionmakers is particularly remarkable because there is reason to think that the cases submitted to juries are selected because they are particularly difficult and ambiguous. Compared to other decisionmakers, Michael Saks reminds us, the jury, uniquely, has to "deal with a body of cases from which the easiest 80-95 percent have been removed. . . . Other decisionmakers have the luxury of the full range of their cases, which makes higher concordance rates easier to attain."³⁰

Learning about Juries

Is the jury a good means of regulating the system of litigation? Here the "jury" needs to be distinguished from the general architectural features of the system so that one does not inadvertently attribute to the jury effects that are produced by these other features and thus overestimate

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the potential effects of modifications in the role of the jury. Among the features that frame the jury as we know it are the following.

—A system with many lawyers relative to the number of judges.

—An adversary system with a private market in lawyers, who exhibit strong ties to clients and seek to maximize the interests of those clients.

—A judicial "plant" capable of full-blown processing of only a small minority of disputes that reach the legal system.

—A system of bargained outcomes in which most cases are resolved by negotiation between disputants rather than by the authoritative decision of a judge; such settlements are officially commended and encouraged.

—A system in which actors strategize about settlements in the light of their expectations, including expectations of future involvement with the system and available knowledge about the probable outcome of official decisions.

—The knowledge about probable outcomes available to disputants includes a stock of ostensibly applicable rules and a body of commentary on them; authoritative discursive applications of these rules in some contested cases—that is, judicial opinions—and commentary on them.³¹ It also includes information about nondiscursive decisions in specific cases (such as sentencing and jury verdicts). And it includes information about settlements and policies that reflect participants' expectations about these decisions.

—The information that is broadcast is incomplete and unrepresentative; it is subjected to many baffles and filters. For example, case reports are selected by judges and publishers, jury verdicts are selected by media appeal and the exigencies of reporter services, and information about settlements is filtered by the strategic considerations of parties.³²

In assessing the performance of the jury as a source of signals that regulate the litigotiation system, I assume that the jury and rival devices will be functioning in a system more or less like the one sketched here. I take these features as given for the present discussion of possible reform, although some features may be more malleable than others.

How does the jury fit into this system? The small fraction of cases that are tried by juries not only distributes a sizable portion of the compensation paid to plaintiffs but also provides the signals that influence the outcome of a vastly larger number of cases settled or abandoned without trial. In his classic study of automobile injury settlements, H. Laurence Ross found that the "basis of settlements in serious cases seems on both sides to be an estimate of the likely recovery of the claimant

before a jury. . . . Both sides come to this estimate by comparing a given case in its many dimensions against other, similar, cases, that have gone to trial."³³ 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."³⁴

The relative importance of juries as transmitters of signals rather than as deciders of cases seems to have increased.³⁵ Filings and dispositions have increased more rapidly than jury trials.³⁶ Jury trials in the federal courts increased from 2,585 in 1961 to 4,294 in 1991 (table 3-1) but make up a declining portion of total terminations. The percentage of cases terminated by jury trial dropped from 5.1 percent in 1961 to 2.0 percent in 1991.³⁷ Although the evidence is spotty, there appears to be a comparable relative decline in cases terminated by jury trials in state courts.³⁸ But absolutely, there are more trials, more relevant markers and symbols, more information, and more problems of retrieving, collating, and interpreting these signals.

This minority of tried cases casts a major part of the law's shadow; however, the shadow is not simply the product of what juries do. It is affected by the process of creating and communicating and extracting knowledge about what juries do. The shadow depends on what the disputants, lawyers, judges, mediators, parties, potential parties, and so forth think juries will do. (The discussion here focuses on lawyers, who form the majority of those who self-consciously deploy jury knowledge, but the observations that follow apply, with appropriate modification, to others as well.) Presumably, their expectations are derived in some measure from what they think juries have done and their understanding of why. How are the responses—partly shrouded by secrecy—of a multitude of dispersed juries crystallized into usable knowledge?

Information about juries and the assumptions and theories that inform such assessments reaches legal actors through a number of channels.

Personal Experience

Lawyers rely on their own experience with juries. Because only a small portion of cases are tried, the fund of experience of settled cases is far larger than experience with tried cases. Recall that there are roughly twice as many lawyers as there were just twenty years ago, but there are probably not appreciably more civil jury trials. Because the profession has grown rapidly, lawyers are on the average younger and have fewer years of experience in practice.³⁹ Lawyers probably have, per capita, less

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experience with jury trials as participants. Assuming that there are more than 50,000 civil jury trials each year and assuming (generously) that each jury trial engages four lawyers, every lawyer would participate in a jury trial less than once in three years—if jury trials were evenly spread among lawyers, which of course they are not. But even trial specialists have a limited fund of first-hand jury experience. A recent survey found that the median career number of trials was fifty-one for a population of plaintiff and defense lawyers whose median involvement with litigation was fourteen years.⁴⁰ For all but a few lawyers, experience with juries is 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.⁴¹

Oral Culture

Probably the major medium through which the signals of jury propensities are transmitted remains the oral culture of the lawyers and other "regulars."⁴² This culture includes a great deal of lore about juries and about particular kinds of jurors. Not much is known about the way that lawyers combine this with information from other sources.

This oral culture may be undergoing changes as the structure of law practice changes. There are many more lawyers; as noted earlier, 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 opposing lawyers are with lawyers not previously known to them. One might anticipate, then, that the oral culture would rely less on implicit understandings and reference to shared experience.

Judges and Other Settlement Brokers

Many trial judges have more experience with juries than all but a few lawyers. Over the past generation, judges have become more active in promoting settlements, which has come to be seen as a respectable and commendable part of judicial work.⁴³ Judges—and other court personnel such as magistrates, clerks, and special masters—have devised and adopted many innovative techniques for promoting settlements.⁴⁴ These efforts

tend to be more intense when an eventual trial would be by jury because judges feel more inhibited about aggressive settlement efforts when they might end up trying the cases themselves.⁴⁵ 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 its various features.

However, judges' usable direct experience of civil juries may be limited. There are fewer than ten civil jury trials per judge annually in the federal system, and their features vary sufficiently to render elusive any useful generalizations. In any event, lawyers seem to welcome settlement promotion by judges. One poll of lawyers reported that 73 percent believed judges should push for settlements; only 20 percent were opposed.⁴⁶ Lawyers with cases in the four federal districts studied by Wayne Brazil overwhelmingly believed that such judicial intervention would significantly improve the prospects for achieving settlement; they especially approved judicial settlement efforts in jury matters and credited them with greater effectiveness in that setting.⁴⁷

Intensified promotion of settlement by judges works a curious distortion of jury signals. More than thirty years ago Harry Kalven, noting the ability of the jury to blend conflicting considerations, observed that "the function of the jury in the end may be not to adjudicate the case, but, as it were, to settle it vicariously."⁴⁸ Today, judges eager to promote settlements undertake to provide what is in effect a vicarious jury verdict. This is formalized in the curious device known as a summary jury trial, in which a group of jurors drawn from the jury panel listens to summary presentations by both sides and provides an advisory response.⁴⁹ By cutting such corners as witness' testimony, the summary jury trial attempts to unlock early a genuine and direct jury signal. In judicial settlement conferences, on the other hand, judges often respond to comparably incomplete presentations by proffering their reading of what a jury might do. Such readings are based on the judge's experience, as lawyer and judge, with juries, garnished by an admixture of "jury knowledge" from various oral and published sources.

Another variant on these devices for delivering the jury signal is the voluntary jury-determined settlement, in which the parties have set limits on the range of the jury's award through a high-low agreement. The parties retain control over the process and the jury issues a binding verdict after an abbreviated trial. Reversing the sequence of the summary jury trial, here the jury makes the final cut within the parameters established by the settlement. But like the summary jury trial, the jury-

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determined settlement confines the jury's role to dispute settlement and attenuates its broader signaling function.⁵⁰

Appellate Courts and Official Reporting

Some information about what juries do is carried in law reports, typically in opinions about jury awards that were challenged as excessive or not justifiable on the basis of the evidence. In the course of describing the leeways that trial judges and appellate courts will allow juries, these reports, and the legal publications summarizing and collating them, provide a picture of what juries do. Until the publication in the late 1980s of after-the-verdict research, these materials were the principal basis for ascertaining the relation of verdicts to actual payouts.⁵¹

Jury Verdict Reporting Services

National and local services compile and distribute information about jury verdicts. These services differ in scope, sources, comprehensiveness, detail, frequency, and depth of analysis. Local services approach comprehensive coverage, while the national Jury Verdict Research is more selective.⁵² JVR aims to include "significant" or "important" verdicts, and it makes "every effort to collect reliable information on all million-dollar verdicts."⁵³ This selectivity, combined with its computational practices, means that JVR's portrayal of jury awards emphasizes the high end of the range.⁵⁴ Presumably these services are used differently by various participants in different kinds of cases. There are only a few glimmerings of the patterns of use. H. Laurence Ross found that jury verdict reports, routinely consulted by attorneys, "were seldom used by [insurance company] claims men [adjusters]." Daniels noted other uses of these reporters: by a judge, for example, to inform pre-trial conferences and by a lawyer to "cool out" overly optimistic clients.⁵⁵

Specialized Trade Sources

These sources, including handbooks, specialized litigation reporters, practitioner journals, continuing education seminars and other presentations range from coverage that is more technical and systematic than the jury verdict services to presentations that are only a step removed from the informal oral culture of lawyers. One subcategory of particular interest is the flow of information, written and oral, along the specialized

networks for information sharing and, sometimes, for strategic coordination that have grown up among lawyers engaged with particular kinds of cases. Examples include the networks among plaintiffs' lawyers in asbestos, DES, and formaldehyde cases.⁵⁶

Jury Consulting

In the past two decades jury research commissioned for use in individual cases has grown.⁵⁷ This research takes a number of forms, including community surveys and focus groups to identify favorable jurors and appealing themes for presentation; videotaping and interviewing jurors in mock trials; and shadow juries who observe trials and are debriefed daily.⁵⁸ Since use of these techniques is costly, they are confined mostly to sizable civil cases, but they have been used in some criminal trials involving rich or visible defendants. It has been estimated that in 1989 there were 300 businesses in the trial consultant field.⁵⁹ Lawyers who use them obtain new information, of varying quality, and presumably some of this spills back into lawyers' lore about juries.

Mass Media

One should be wary of underestimating the extent to which legal professionals draw on the mass media, not only for specific items of information, but by absorbing general orientations for interpreting such information. Current discourse about the litigation explosion and the liability crisis, for example, displays a complex linkage between mass media and presentations in specialist forums. Thus "horror stories," often originating with professionals, are popularized by the mass media and return to be incorporated in discourse among professionals.⁶⁰ Even purportedly analytic findings may be adopted uncritically from the media.⁶¹ The media therefore help determine which aspects of legal activity languish in obscurity and which gain wide currency and are used to interpret the legal world.⁶² Daniels points out that the 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."⁶³ Media influence varies from setting to setting: for legal professionals, as for others, general estimates of conditions will more closely track media accounts than will their judgments in familiar contexts.⁶⁴

Popular Culture

Lawyers and other civil justice regulars share in the popular culture about juries—the beliefs and expectations about juries that circulate among nonprofessionals. Fed by the mass media on one side and the lawyers' oral culture on the other, the popular legal culture carries stories and adages about juries' role and performance. It is not known how much participation in more specialized occupational discourse displaces these popular perceptions.⁶⁵

Research

Research such as that of the University of Chicago Jury Project, psychological studies of jury decisionmaking, and the reports of the Institute for Civil Justice is creating a systematic and cumulative portrait of jury behavior. This constitutes a kind of learning about juries that had not previously been available. Results of this research can be expected to feed back through specialist presentations and mass media into the pool of knowledge employed by various legal actors."

The legal world as a whole has opened up remarkably in recent years. We have enormously expanded our knowledge of the world of American law since the days of the University of Chicago Jury Project. A tradition of sustained, systematic, cumulative research has been institutionalized in universities, research institutes, journals, and scholarly associations. A richer, more detailed picture of legal institutions also comes from 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.⁶⁷

Barriers of secrecy have fallen. Core legal activities are more accessible—as dramatized by laws mandating open meetings, the Freedom of Information Act, and televised courtroom proceedings. The old presumptions of confidentiality have given way to a presumption favoring free flow of information: thus the growth of the practice of permitting jurors to be interviewed after the verdict and the occasional court-sponsored debriefing.⁶⁸ In 1955, after the Chicago jury researchers were censured for tape-recording actual jury deliberations with judicial and counsel permission, over thirty jurisdictions enacted prohibitions of jury tapping.⁶⁹ In contrast, in 1986 the filming and television broadcast of an actual jury deliberation passed with little comment.⁷⁰ Exposure that is unremarkable now was unthinkable just a generation ago. Everything

points to overcoming the barriers that made research with real juries forbidding.

Conclusion

As the structures of professional life are altered, the sources of information about juries are changing. With fewer jury trials relative to the total number of cases and to the number of lawyers, lawyers have less direct personal experience with juries; new channels of information proliferate, making available a flow that is both richer and harder to interpret. Improved education, greater specialization, the nationalization of law practice, the upgrading of the plaintiffs' bar—all change the ways in which this information is processed. The arrival of voluminous and detailed systematic research on juries means that there is both more good and more bad jury information around. To their skill in doping out juries, lawyers now must add skill in doping out research.

The Quality of "Jury Knowledge"

In visualizing the role of the jury in the litigation process, I have had recourse to familiar metaphors: the iceberg or pyramid of cases, of which fully adjudicated cases form the visible peak, and the idea that most cases are resolved by bargaining in the shadow of the jury. Each implies that throughout the pyramid or realm of shadows the construction of cases and the negotiation of settlements are guided by the visible stratum of authoritative decisions, including those of juries. This image of hierarchic control is typically reinforced by assumptions that legal actors are rational, resource-maximizing decisionmakers, that they possess accurate knowledge of what juries and judges might do, and that these expectations dominate or control their actions. Thus, with adjustments for the inevitable noise and for transaction costs, the bargaining process accurately transmits the authoritative decisions in a few cases into outcomes in the vast majority of them. In this model of hierarchic control, if outcomes at the base of the iceberg appear arbitrary or capricious, the suspicion arises that these qualities infect the decisionmaker at the top—in this instance, the jury.

Is the hierarchic control model accurate? Does the process produce outcomes that accurately reflect what juries would do? How much

distortion is present? The literature provides only a few tantalizing hints. Patricia Danzon, who is sanguine about the rationality of participants and the efficiency of the tort system, estimates that "some 39 to 53 percent of [medical malpractice] claims that are dropped [without payment] would in fact have won if pressed to verdict" and 23 to 43 percent of claims that received a settlement would not have won at verdict.⁷¹ She presents these estimates as evidence that there are stable and predictable relations between potential verdicts and settlement outcomes. The presence of false negatives and false positives on such a scale is troubling. It suggests that the signals provided by verdicts are accompanied by a tremendous amount of noise or are overwhelmed by other factors.

Very little is known about the process by which information about juries is disseminated and images and beliefs formed, and about how these interact with other factors in the settlement process. Danzon's aggregate analysis may be supplemented by several studies that illuminate the way jury knowledge is used in the evaluation of individual cases.

A provocative experiment conducted by Gerald Williams dramatically showed the complexity and variability of the process of translating information about what juries do into assessments of what a case is worth. Williams reported 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 the insurance company).. Attorneys assigned to represent the plaintiff were given identical case files, as were attorneys assigned to the defense. Under the facts, it was assumed 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 the outcomes.⁷²

After the attorneys negotiated their settlements, fourteen of the twenty

Table 3-8. *Results of Experimental Negotiation by Des Moines Attorneys*

<i>Attorney pair</i>	<i>Plaintiff's opening demand</i>	<i>Defendant's opening demand</i>	<i>Settlement</i>
1.	\$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	87,000
10.	350,000	48,500	61,000
11.	87,500	50,000	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: Gerald R. Williams, *Legal Negotiations and Settlement* (West, 1983), p. 7.

pairs were willing to submit a signed statement of results. Williams gives us the striking results in table 3-8.

Both demands and outcomes 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—for example, sampling bias or varying amounts of experience with personal injury cases—they nevertheless strongly suggest that information about what juries have done in "comparable cases" can interact with other factors to produce great variation in lawyers' responses to a case.

The amount of variance in Williams's experiment may be accentuated by two departures from real life. Although Williams's subjects conscientiously applied themselves to the files, they may 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 the primary basis for case valuation. Could it be that the former would generate greater consensus on valuation than the latter?

Another important element missing in the Williams's simulation was the alternative of the trial. In a real life bargaining situation, the alternative to successful settlement negotiations is a trial, viewed by most lawyers

most of the time as a costly, risky, disruptive, and onerous undertaking. In the simulation the risk of this outcome was absent. The only penalty for failure to settle was a possible and marginal loss of face before the researcher. With the sanction for failure thus reduced, many lawyers may have been inclined to act more optimistically, exposing themselves to greater risk of disagreement than when a situation contained real sanctions for failure to agree.

The "trial as the alternative" element was very much present in Philip Hermann's early 1960s study, which compared verdicts in 443 back and neck injury cases with the final demands and offers of plaintiffs and defendants. Only one-sixth of the demands and offers fell within 25 percent of the verdict. Hermann concluded that "the guessing is equally wild on the part of both attorneys and the insurance companies."⁷³

Douglas Rosenthal's analysis of the settlement of personal injury cases in New York in the 1960s retains the "same case" quality of the simulation, while providing a realistic context and comparison with the real world outcome. Five experts were asked to estimate what each of fifty-nine actual settled cases was worth in terms of settlement at various stages and jury award. Panelists tended to agree about the relative value of the cases. But Rosenthal observed that the "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."⁷⁴ 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 75 percent of the panel evaluation for the corresponding stage. About 40 percent of recoveries were for less than two-thirds of the panel valuation.⁷⁵

What are we to make of this persistent and sizable variability and error in lawyers' readings of potential outcomes? Is it the result of the capriciousness of juries? Or does it point to problems in the formation and use of knowledge about juries? Or do the sources of error lie outside juries in other features of the litigation process?

Contemporary critics of the jury blame this disarray on the capriciousness and unpredictability of the jury.⁷⁶ But one should take pause, for the Institute for Civil Justice studies, Danzon's study, and others provide evidence of massive stability and consistency in jury decisionmaking. This steadiness is particularly impressive in view of the selection factors that deliver to juries only the most difficult-to-decide cases and the increased diversity of the juries themselves. Over the past generation,

there has been a striking change in the composition of juries as jury rolls have expanded by the inclusion of more women and minorities, and by the curtailment of automatic or easy excusal for various occupational groups.⁷⁷

Yet there is a widespread perception that juries are less stable and predictable than they once were. Unlike many such perceptions of decline, this one may have some foundation. It may be that jury stability has been compromised by the innovation of using smaller juries and less demanding decision rules,⁷⁸ practices guaranteed to produce greater variability in jury verdicts.⁷⁹ Although there is some uncertainty about the magnitude of such effects, it may well be that it is sufficient to aggravate the sense of unpredictability and danger that besets players in the liability game.

Even complete and accurate information about what juries have 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. In fact, the information received through the various channels is incomplete, conflicting, and of very mixed quality. And the daunting task of interpretation is rendered especially perilous by features of the setting in which this information is generated and used.

The literature of cognitive psychology catalogs a number of factors that lead to biased inferences and judgments about uncertain events.⁸⁰ For example, decisionmakers often ignore relevant baseline information, misattributing representativeness to data. The frequency of easily remembered events is exaggerated, leading to overestimation of risk from publicized hazards relative to less visible ones.⁸¹ "Vivid information, that is, concrete, sensory and personally relevant information, may have a disproportionate impact on beliefs and inferences."⁸² Furthermore, biased receptiveness to confirming evidence makes people excessively confident of the accuracy of their knowledge.⁸³ It has been suggested that these cognitive infirmities afflict juries and judges.⁸⁴ They seem especially applicable to the users of jury knowledge, who draw conclusions about the characteristics of large populations on the basis of incomplete and biased samples.

Using jury knowledge is a complex interpretive undertaking, involving assessments of the comparability of earlier and later cases, of the location of specific verdicts along the range of expectable jury responses, and of the scope, slope, and speed of trends in jury behavior. It is an undertaking ideally suited for the appearance of the kinds of flawed intuitive judgment described in the cognitive psychology literature. Even those in possession

of a great deal of accurate information may make spurious inferences about the patterns of jury response.

The setting in which jury knowledge is used lacks some of the checks that might minimize these cognitive slips. Bargaining in the shadow of jury verdicts involves constant estimates of imponderables, and only intermittent opportunities for feedback to check the accuracy of these estimates. Law and economics scholars liken litigation decisions to investment decisions, such as the decision to purchase or sell stock, the accuracy of which can be checked against changes in the market price. Because most cases end in settlement, however, the accuracy of the great majority of readings by legal actors are never tested. Like the participants in Williams's mock negotiations, each negotiator can go away thinking that he or she performed well—an impression that other actors have a strategic interest in fostering. The opportunities for learning are quite skewed. Lawyers' estimates that are excessively favorable to their own clients 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.⁸⁵ Because the feedback is biased, the accumulation of experience does not improve the accuracy of the readings.⁸⁶

The distortions that result from the micropolitics of settlement interact with distortions that result from the social organization of jury knowledge.⁸⁷ A number of mutually reinforcing factors conspire to institutionalize the overestimation of jury awards. Plaintiffs' lawyers exaggerate the size of claims for tactical and promotional purposes, especially in tort cases. Recoveries are only a fraction of demands.⁸⁸ Large demands are newsworthy—as are large verdicts—but plaintiff losses and reductions of awards are rarely news. Widely circulated horror stories recount, with fictitious embellishments, ludicrous claims and outlandishly large awards.⁸⁹ The market for tales of stonewalling resistance and Scrooge-like offers is more restricted. Stephen Daniels found that the national jury verdict reporters tended to replicate and feed the bias of the popular press: "All 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 . . . there is a very real plaintiff victory bias because of the reliance on . . . lawyer self-reporting of cases."⁹⁰

Skewed feedback and media bias interact to produce systematic overestimation of the frequency and magnitude of jury verdicts not only in wider publics but among those whose attentiveness or expertise might be thought to make them more accurate observers. Overestimation of

recoveries is found among lawyers generally and among experienced trial specialists as well as among doctors and legislators.⁹¹ There is some suggestive evidence that judges tend to overestimate the amounts that juries will award.⁹² One experienced observer, the head of Jury Verdict Research and a former personal injury defense lawyer, reported a similar tendency among insurers:

Representing insurance carriers, it has always surprised me how the evaluations of value of similar injury claims varied so widely among different companies, even for claims which they see with frequency, such as cervical strain. Of course, all claim executives believe their evaluations are sound because they have been evaluating claims for many years. Their "experience" may be simply repeating the same evaluation philosophy—often far from the reality of what juries are really awarding. Unfortunately for their companies, they often believe that juries award larger verdicts than they really do. I am continually amazed at the numerous settlements for far greater amounts than could be reasonably expected for a similar case by a jury. ... It is obvious that the insurance carrier's representatives were influenced by the high verdict awards reported by the news media.⁹³

The presence of systematic misperceptions of jury performance is indirectly but dramatically displayed in Kevin Clermont's and Theodore Eisenberg's recent analysis of differences in outcomes between judge and jury trials. Comparing outcomes of cases tried to judges and to juries in federal district courts from 1979 to 1989, they found that, contrary to the lore of lawyers and observers, plaintiffs won a higher portion of the cases tried before judges. They explain this result by the skewed mix of cases that reach judges and juries, which is in turn driven by "misinformed bargaining" based on "persistent misperceptions" of the characteristics of juries as decisionmakers. These misperceptions persist because they draw on enduring cultural stereotypes; evidence that could be used to refine them is difficult to assemble and assess; and "many lawyers prefer to rely on personal experience and anecdote."⁹⁴

Maintaining the Integrity of the Legal Process

The costs and disadvantages of the jury—expense, administrative cum-brousness, majoritarian bias, variance, inconsistency, blurry signals—might be thought to argue in favor of letting some other decisionmakers—judges or arbitrators or bureaucrats—make the determinations presently

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entrusted to juries. But such a conclusion can follow only from a comparative analysis of institutional alternatives.⁹⁵ It is not sufficient to ascertain that juries have deficiencies as well as virtues; one must weigh those against the virtues and deficiencies of the likely alternative institutions. Unfortunately, less is known about the performance of those alternatives than about juries, so that a comprehensive systematic comparison is not possible.

Nevertheless there is some evidence that the cognitive disarray that pervades our system of litigotiation is not traceable to the fact that the signals are broadcast by juries rather than professional decisionmakers. Several studies of settings in which decisionmakers were not juries but judges portray a similar regime of indistinct and distorted signals that are often lost or misread. For example, studies of personal injury settlements in England, where there are no juries in such cases, show a process pervaded by a sense of uncertainty about what judges will do.⁹⁶ In a revealing American study, Howard Erlanger, Elizabeth Chambliss, and Marygold Melli 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 divisions, they observed, "Several of the lawyers we interviewed report that they have difficulty discerning court standards and that they cannot predict the outcomes of court processes. . . . Even the lawyers in our sample who do think there are set standards and who do say they can predict outcomes differ in their opinion of the content of those court standards; obviously, they cannot all be correct."⁹⁷ Unclear signals about outcomes can flourish when decisions are entirely in the hands of professionals. Departure from the orderly hierarchy conveyed by the pyramid or iceberg images with their suggestion that the "visible cap" of verdicts "controls" the larger settlement arena is not necessarily a function of the presence of the jury. That is, legal actors read jury signals badly not because juries are bad signalers but because the signals in many sectors of the litigotiation system are blurred and distorted by the cognitive, contextual, and media biases reviewed in the previous section.

In any event, comparisons of costs are incomplete without consideration of the corresponding benefits. Do juries have advantages that commend them over professional decisionmakers, whether judges or bureaucrats or arbitrators? I shall put aside arguments about the role of the civil jury in the larger political system (by providing civic education and by legitimizing the judicial process) in favor of arguments for the more proximate effects of the jury on the litigotiation process itself.

The shape of that process is invisibly but massively influenced by the presence of the jury institution. The use of the jury requires a concentrated trial rather than a discontinuous one.⁹⁸ The tendency of American civil procedure toward diffusion into serial proceedings—discovery, motions, hearings, pretrial conferences, 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. For example, since there can be no interruptions to pursue new evidentiary leads, all potentially relevant information must be gathered beforehand to permit uninterrupted presentation within the fixed time frame of the continuous trial.

The presence of the trial as an uninterrupted plenary event requiring a closure of case development, massive commitment of resources, and acceptance of risks by all actors, makes it a formidable threat. It is a threat that is difficult to use but it drives the bargaining that lies at the heart of the litigotiation system.¹⁰⁰

The costs of the jury are associated with its amateurism and its transience, but these are also the source of important virtues. The jury is lay or amateur in two senses. Its members are not professionals or experts who possess special knowledge of legal norms or of the realm of facts in question. Nor do jurors decide cases for a living: they are transients who remain citizens rather than workers in the litigation shop, and they don't do it recurrently or often.¹⁰¹ Jurors have neither a communicated tradition of work to draw upon nor a web of reciprocal relations with other actors in the system. Unlike those who work in the system, they have no continuing relations with other actors to maintain nor any shared patterns of accommodating the law to institutional exigencies. The absence of experience and continuity means they do not become jaded or lapse into the typifications and routines that envelop the regulars.¹⁰²

By providing fresh individualized responses impervious to customary patterns and knowing expectations, the jury helps preserve the decision process from being swallowed up by the surrounding bargaining process. Marygold Melli, Howard Erlanger, and Elizabeth Chambliss observed that in the child support arena they explored (where there were no juries) there was 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

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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 one of adjudication in the shadow of bargaining.¹⁰³

The regime they describe features a spiral of attribution in which supposedly autonomous decisionmakers take cues from other actors who purport to be mirroring the decisions of the former.¹⁰⁴ A similar dissolution of legal standards is evident in Janet Cooper Alexander's description of securities class actions as "a world where all cases settle." In such a world, "it may not even be possible to base settlements on the merits because lawyers may not be able to make reliable estimates of expected trial outcomes. . . . There is nothing to cast a shadow in which the parties can bargain."¹⁰⁵ Judges preside over routine settlements that reflect not legal standards but the strategic position of the repeat players:

because securities class actions rarely if ever go to trial, settlement judges, like lawyers, have little relevant experience to draw on other than their knowledge of settlements in similar cases . . . their role becomes not to increase the accuracy of settlements, but to provide an impetus to reach *some* settlement. In the absence of information about how similar cases fared at trial, settlement judges could be an important force in maintaining a "going rate" approach to settlements.¹⁰⁶

Judith Resnik found, in the prevalence of consent decrees in which judges in effect delegate official power to the negotiators before the bench, another example of the supposedly central and independent formal process of adjudication becoming subordinated to the supposedly penumbral process of bargaining that surrounds it.¹⁰⁷

Juries impede the collapse of individualized decisionmaking into the stereotyping, cooperation and trade-offs of routine processing that "favors status quo distributions of wealth and power, gives repeat players an advantage, and encourages stereotypical settlements in which bargainers smooth over or ignore the idiosyncratic features of individual claims."¹⁰⁸ In doing so, the jury helps retain the salience of the substantive morality embodied in the law—and helps align that morality with the emergent moral sense of the community or communities.¹⁰⁹ In a system in which issues of culpability are typically effaced in settlement and routine processing it is a good thing that at the end of the day there is

recourse to a forum that can respond to the particulars in terms of moral conviction undiluted by the constraints of institutional priorities or career concerns.

From the point of view of regulating the litigation process, the major offset to a net increase in blurrier signals or other disadvantages of the jury is the advantage of a fresh response less mediated by institutional concerns and more resonant with the emerging moral sense of community. I make no claim to know the magnitude of these beneficial effects, but it is my sense as an observer of the process that they are sufficiently in evidence that other means of addressing the disadvantages of the jury should be tried before measures that reduce its incidence or its decisional mandate.

I have argued that much of the apparent capriciousness and unpredictability that disturbs the jury's critics has its source not only in the performance of the jury but in the general features of the litigation system, including the way that "jury knowledge" is organized and used. The jury's contribution to these discomforts of the system can be addressed by several kinds of measures:

- structural changes to reduce variance, such as larger juries with strict decision rules, and

- reforms that improve the quality of jury response, such as permitting note-taking and questioning by jurors, providing understandable instructions and better information to make damage calculations

Beyond these it is important to upgrade the quality of jury knowledge by breaking the feedback loops that project distorted signals. Since less is known about jury knowledge than about juries, ideas about how to accomplish this are necessarily tentative.

- One line that seems promising is to improve the collection and compilation of information about juries and to develop reliable indicators to trace the contours and trends of jury decisions.

- Another is to develop knowledge about the way that actors construct "jury knowledge" out of this information and the way they employ this knowledge in the litigation process.¹¹⁰

- The simulation techniques, with their capacity for controlled variation, that have played such an important role in research on jury decisionmaking, may be equally fruitful in teaching us about jury knowledge. Imagine, for example, an experimental "duplicate bridge" negotiation between lawyers, like that devised by Williams in which information on the actions of previous juries was systematically varied.¹¹¹

- One particularly significant inquiry into the impact of jury knowl-

edge is the effect of the jury knowledge that jurors themselves bring into the process and the problem of upgrading or constraining that knowledge.

Jurors themselves may be affected by views of what jurors generally do and by other information about the civil justice system. We are only beginning to get a sense of the complex effects of this feedback loop on patterns of jury awards. A 1986 survey of 213 Seattle jurors found that they greatly overestimated the frequency of million dollar damage awards and that the greater they believed the frequency of million dollar awards to be, the *higher* the damages they awarded in a mock trial. Paradoxically, most of these jurors attributed their sense that jury awards were too high to the news media while agreeing that the media tended to exaggerate the number of high awards."¹¹² Interviewing 141 Delaware jurors who had sat in tort cases involving a business, Valerie Hans and William Lofquist concluded that the jurors they interviewed were "quite cognizant of other civil juries, real and apocryphal. Their concerns about deep pockets, the litigation crisis, and the integrity of plaintiffs were implicitly and explicitly linked to the presumed excesses of antecedent juries . . . jurors often viewed themselves as responsible for returning moderation and good judgment to the civil justice system."¹¹³ But in this study, stronger juror perceptions of a litigation explosion were correlated with *lower* awards.¹¹⁴

For a long time the policy discourse about civil justice proceeded at some remove from the formation of the beliefs and understandings that jurors injected into the system. One of the distinctive features of the present period of heated concern about civil justice is the systematic attempt to harness jury sentiments to stances in the policy debate.¹¹⁵ Once this loop has been established, it raises the tricky questions whether, to preserve the integrity of the jury as a regulatory mechanism, jurors should be given an accurate picture of what earlier juries have done, or whether the ban on communicating with jurors should be extended to restrict propaganda aimed to influence the jury pool.¹¹⁶

I think that an emphasis on restricting propaganda aimed at jurors is misguided. Even apart from First Amendment problems, it strikes me that such targeted commercial speech is only a small part of the system of information about the civil justice system. A far larger and more influential stream runs through the media and the popular culture that feeds on them. The real problem is not that there are distorted pictures out there but that there is so little reliable, comprehensive, and comprehensible stuff to compete with them. Knowledge about civil justice matters is pitifully thin and inadequate. Legal professionals, as guardians of the

civil justice system, have a collective responsibility to promote an appreciation of its accomplishments and its problems. This entails a joint responsibility to contribute to a cumulative and reliable body of knowledge about the system. We have come a long way with research on the jury as decisionmaker; it is time to begin to seriously to address our ignorance of the larger role of the jury as regulator of the litigation process. This requires that we build institutions to monitor and understand that process.

Notes

1. See Marc Galanter, "The Civil Jury as Regulator of the Litigation Process," *University of Chicago Legal Forum*, vol. 1990, pp. 201-71, especially p. 202.

2. Technically, they influence the outcome of cases by deciding certain disputed "issues of fact" in a way that is binding on the trial judge and appellate courts, subject to limited powers to set aside or modify the verdict because of prejudice, excessiveness, or being against the weight of the evidence—and subject to the power of the parties to negotiate a postverdict settlement with an eye to the possibilities just mentioned.

3. Numerically, trials provide only a minority of authoritative decisions by courts. Analyzing 1,649 cases in federal and state courts in five localities, Herbert M. Kritzer found that 7 percent terminated through trial, but another 24 percent terminated through some other form of adjudication—for example, arbitration, dismissal on the merits, or decision on a significant motion that led to settlement. See *The Justice Broker: Lawyers and Ordinary Litigation* (Oxford University Press, 1990), pp. 73-76. Default judgments have been omitted from this computation.

4. Harry Kalven, Jr., and Hans Zeisel, *The American Jury* (Little, Brown, 1966), pp. 31-32.

5. The "bargaining in the shadow" image is set out in Robert H. Mnookin and Lewis Komhauser, "Bargaining in the Shadow of the Law: The Case of Divorce," *Yale Law Journal*, vol. 88 (April 1979), pp. 950-97; the elaboration can be found in Marc Galanter, "Justice in Many Rooms: Courts, Private Ordering and Indigenous Law," *Journal of Legal Pluralism and Unofficial Law*, vol. 19 (1981), pp. 1-48.

6. Compare the persistent reports from civil law and socialist countries with "mixed" tribunals that lay judges are dominated by the professionals: Robert M. Hayden, "Who Wants Informal Courts? Paradoxical Evidence from a Yugoslav Attempt to Create Workers' Courts for Labor Cases," *American Bar Foundation Research Journal*, vol. 1985 (Spring 1985), pp. 293-314; Gerhard Casper and Hans Zeisel, "Lay Judges in the German Criminal Courts," *Journal of Legal Studies*, vol. 1 (January 1972), pp. 135-92; Kalman Kulcsar, *People's Assessors in the Courts: A Study on the Sociology of Law*, trans. Patricia Austin (Budapest: Akademiai Kiado, 1982); Erhard Blankenburg, Ralf Rogowski, and Siegfried Schonholz, "Phenomena of Legalization: Observations in a German Labour Court," *European Yearbook in Law and Sociology*, vol. 1978 (The Hague: Martinus Nijhoff Publishers, 1979), p. 33; and John P. Richert, *West German Lay Judges: Recruitment and Representatives* (University Presses of Florida, 1983).

7. Comprehensive data on jury trials in courts of general jurisdiction are available for six states for 1988. Jury trials as a percentage of overall civil dispositions ranged from 0.7 percent in Hawaii to 1.5 percent in Texas (see table 3-2).

8. In every state court system for which 1988 statewide data are available, juries were

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found most frequently in tort cases—from 1.6 percent of tort dispositions in the California Supreme Court to 4.7 percent in the Florida Circuit Court (see table 3-5). These tort juries make up a smaller portion of all the tort *claims* disposed of, since many claims do not show up as filings. Verdicts were returned in about 1 percent of a large sample of paid liability claims in automobile insurance cases in 1977. James K. Hammitt, and colleagues analyzed verdicts in a nationwide sample of over 20,000 automobile insurance claims closed with some payment by twenty-nine insurers during a two-week period in 1977. They report that "verdicts were returned in only about 200 cases." James K. Hammitt and others. *Automobile Accident Compensation* (Santa Monica: Rand Institute for Civil Justice, 1985), p. 753.

9. Patricia Munch Danzon reports that 7 percent of her sample of 6,000 malpractice claims closed in 1974 and 1976 were tried to verdict: *Medical Malpractice: Theory, Evidence, and Public Policy* (Harvard University Press, 1985), p. 32.

10. The estimate of annual civil jury trials is based on the following calculation. According to the National Center for State Courts there were 20,597 civil jury trials in 1988 in the courts of general jurisdiction in the twenty-four states (and the District of Columbia) for which data were available. This figure is rough because small claims trials are included in the totals of a few states, and a few others leave out property and other case categories. But if we assume that these more or less cancel one another out and that these jurisdictions, which taken together contained 43 percent of the nation's population, were representative, there would have been a total of 47,900 jury trials in state courts of general jurisdiction in 1988. In that year the federal courts held 5,920 jury trials, so the grand total would be 53,820 plus the jury trials held in courts of limited jurisdiction. Compare John Guinther's estimate of 45,000 to 75,000 civil jury trials annually in state courts: *The Jury in America* (Facts on File, 1988), p. 167. For state courts of general jurisdiction, see *State Court Caseload Statistics: Annual Report 1990* (Williamsburg, Va.: National Center for State Courts, 1992), p. 10. The comparable figures for 1988 were roughly 250,000 in the federal courts and 8 million in the state court. I am indebted to Dr. Brian J. Ostrom of the National Center for State Courts for his helpfulness in analyzing the state data.

11. Property cases are the scene of the next largest, but far smaller, number of jury trials. In the six state courts of general jurisdiction for which data are available, property jury trials range from 0.3 percent to 10.2 percent of all jury trials (table 3-3). For six states a rough picture can be assembled of how all civil jury trials are distributed by subject matter (table 3-2).

12. F. Patrick Hubbard, "'Patterns' in Civil Jury Verdicts in the State Circuit Courts of South Carolina; 197&85," *South Carolina Law Review*, vol. 38 (Summer 1987), pp. 699-754. Additional data from the study may be found in F. Patrick Hubbard, *South Carolina Civil Jury Verdict Research Prefect: Report on Findings* (South Carolina Law Institute, 1986). Unlike the studies by the Institute of Civil Justice and by Stephen Daniels, which rely on published jury verdict reports, and unlike the reports by the National Center for State Courts, which are aggregates derived from recorded filing data, the South Carolina study was based on examination of individual case files in the county courthouses.

13. The federal figures are for terminations; but some state figures and the ICJ studies are based on a count of all jury trials commenced and include dropouts—directed verdicts, dismissals, settlements—and hung juries. See Audrey Chin and Mark A. Peterson, *Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials* (Santa Monica: Rand Institute for Civil Justice, 1985), pp. 21ff.

14. Michael J. Saks, "Do We Really Know Anything about the Behavior of the Tort Litigation System—and Why Not?" *University of Pennsylvania Law Review*, vol. 140 (April 1992), p. 1235.

15. Valeric P. Hans and Neil Vidmar, *Judging the Jury* (Plenum Press, 1986); Valerie

P. Hans, "Jury Decision Making," in Dorothy K. Kagehiro and William S. Laufer, eds., *Handbook of Psychology and Law* (Springer-Verlag, 1992), pp. 5&76; Reid Hastie, Steven D. Penrod, and Nancy Pennington, *Inside the Jury* (Harvard University Press, 1983); and Saul M. Kassin and Lawrence S. Wrightsman, *The American Jury on Trial: Psychological Perspectives* (Bristol, Pa.: Hemisphere Publishing, 1988).

16. Michael J. Saks, *Small-group Decision Making and Complex Information Tasks* (Washington: Federal Judicial Center, 1981); Richard O. Lempert, "Civil Juries and Complex Cases: Let's Not Rush to Judgment," *Michigan Law Review*, vol. 80 (November 1981), pp. 68-132; and Christy A. Visser, "Juror Decision Making: The Importance of Evidence," *Law and Human Behavior*, vol. 11 (March 1987), pp. 1-17.

17. Harry Kalven, Jr., "The Dignity of the Civil Jury," *Virginia Law Review*, vol. 50 (October 1964), p. 1065. Jury verdicts were compared with responses of judges who were asked to report "how he would have decided the case had it been tried to him alone" (p. 1063).

18. Shari Seidman Diamond, "Order in the Court: Consistency in Criminal-Court Decisions," in C. James Scheirer and Barbara L. Hammonds, eds., *The Master Lecture Series: Psychology and the Law*, vol. 2 (Washington: American Psychological Association, 1983), pp. 119, 124-25.

19. Kevin M. Clermont and Theodore Eisenberg, "Trial by Jury or Judge: Transcending Empiricism," *Cornell Law Review*, vol. 77 (July 1992), pp. 1124-77. They compare outcomes of cases tried to judges and to juries in federal district courts from 1979 to 1989. I discuss their interpretation of these results later.

20. Chin and Peterson, *Deep Pockets, Empty Pockets*, p. 25.

21. Chin and Peterson, *Deep Pockets, Empty Pockets*, pp. 42—43, 44.

22. An interesting alternative to the deep pocket theory—that the public holds corporations to a higher standard of behavior than it does individuals and thus attributes to corporations inexcusable recklessness in situations where an individual would be judged less harshly—is suggested by Valerie P. Hans and H. David Ermann, "Responses to Corporate Versus Individual Wrong-doing," *Law and Human Behavior*, vol. 13 (June 1989), pp. 151-66.

23. Valerie P. Hans and William S. Lofquist, "Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate," *Law & Society Review*, vol. 26, no. 1 (1992), p. 101.

24. David B. Rottman, "Tort Litigation in the State Courts: Evidence from the Trial Court Information Network," *State Court Journal*, vol. 14 (Fall 1990), pp. 4-18.

25. Kalven, "The Dignity of the Civil Jury," p. 1065.

26. Ellen L. Rosen, "The View from the Bench: A National Law Journal Poll," *National Law Journal* (August 10, 1987), p. S8.

27. Louis Harris and Associates, Inc. for Aetna Life and Casualty, *Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases*, no. 874017 (1987), p. 87.

28. Kevin M. Clermont and Theodore Eisenberg, "Trial by Jury or Judge: Transcending Empiricism," *Cornell Law Review*, vol. 77 (July 1992), pp. 1124-77; and Neil Vidmar, "Medical Malpractice Juries," *Duke Law Magazine*, vol. 9 (Summer 1991), p. 12.

29. Elizabeth M. King and James P. Smith, *Computing Economic Loss in Cases of Wrongful Death* (Santa Monica, Calif.; Rand Institute for Civil Justice, 1988)

30. Saks, "Do We Really Know Anything," pp. 1235-37.

31. It is worth reminding ourselves that authoritative statements are not the only possible way officials can give such guidance—they can publish abstract essays or illustrative examples rather than case reports.

32. Lauren K. Robel, "The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals," *Michigan Law Review*,

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vol. 87 (April 1989), pp. 940-62; William L. Reynolds and William M. Richman, "An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform," *University of Chicago Law Forum*, vol. 48 (Summer 1981), pp. 573-631; Daniel N. Hoffman, "Non-Publication of Federal Appellate Court Opinions," *Justice System Journal*, vol. 6 (Fall 1981), pp. 405-34; and Stephen Daniels, "Civil Juries, Jury Verdict Reporters, and the Going Rate," paper prepared for the 1986 annual meeting of the Law and Society Association.

33. H. Laurence Ross, *Settled Out of Court: The Social Process of Insurance Claims Adjustments* (Chicago: Aldine, 1970), pp. 114-15. Ross emphasizes that "jury value and settlement value are not the same thing," since the latter incorporates discounts for the costs and risks avoided. In his study, it was the claimant "who yields [the] discount for settlement" (p. 115). Ross's field work was conducted in the mid-1960s, so there is a question of whether the patterns he reported still obtain.

34. Ross, *Settled Out of Court*, p. 112. In his study of personal injury claims in New York City, Douglas E. Rosenthal reports that the "going values are based on prior settlements, recent jury verdicts obtained by the attorney and his associates in similar types of cases and some rules-of-the-game, such as the rule that a fair settlement in a strong case should not depart too greatly from a figure that reflects the victim's out-of-pocket expenses multiplied by three." *Lawyer and Client, Who's in Charge?* (N.Y.: Russell Sage Foundation, 1974), p. 36.

35. See, for example, Richard O. Lempert, "More Tales of Two Courts: Exploring Changes in the Dispute Settlement Function of Trial Courts," *Law & Society Review*, vol. 13 (Fall 1978), pp. 91-138, on the shift in mode of court contribution to dispute settlement.

36. Indeed, the absolute number of jury trials has fallen in at least some jurisdictions. Thus in San Francisco there were fewer than half as many jury trials in 1980-84 as in 1960—64. In Cook County the number of jury trials was about the same. Mark A. Peterson, *Civil Juries in the 1980s: Trends in Jury Trials and Verdicts in California and Cook County, Illinois* (Santa Monica: Rand Institute for Civil Justice, 1987), p. 6.

37. Administrative Office of the United States Courts, *Annual Report* (1940), p. 39; (1970), p. 245a; and (1991). This includes terminations "during or after trial," so it includes cases that were settled after trial had begun.

38. See, for example, Lawrence M. Friedman and Robert V. Percival, "A Tale of Two Courts: Litigation in Alameda and San Benito Counties," *Law & Society Review*, vol. 10 (Winter 1976), p. 288; Stephen Daniels, "Continuity and Change in Patterns of Case Handling: A Case Study of Two Rural Counties," *Law & Society Review*, vol. 19, no. 3 (1985), pp. 381-420; and Wayne McIntosh, "150 Years of Litigation and Dispute Settlement: A Court Tale," *Law & Society Review*, vol. 15, nos. 3-4 (1980-81), pp. 838-39. Compare Peterson, *Civil Juries in the 1980s*, p. 6.

39. "The median age of lawyers dropped from forty-six years in 1960 to thirty-nine years in 1980. Lawyers under thirty-six made up 24 percent of the lawyer population in 1960 and 39 percent in 1980." Barbara A. Curran, "American Lawyers in the 1980s: A Profession in Transition," *Law & Society Review*, vol. 20, no. 1 (1986), p. 23. Of all lawyers practicing in 1980, 42 percent had been admitted after 1970 (p. 25).

40. Defense Research Institute, *Civil Litigation in State Courts: Perspectives on the Process and Preferences for Reform* (Chicago: February 1992), section H, pp. 11-12.

41. However, the personal experience of a small minority of lawyers has been enriched in recent years through freer postverdict interviewing of jurors.

42. When asked how they arrived at their initial evaluation of their most recently resolved case, fewer than one-quarter of the respondents to an unpublished *Wisconsin Law Review* survey reported using jury verdict reports, while 70 percent relied heavily on consultations with other attorneys in their own firms. Report on file with the author.

43. Marc Galanter, "The Emergence of the Judge as a Mediator in Civil Cases," *Judicature*, vol. 69 (February-March 1986), pp. 257-62.

44. Marc Galanter, "A Settlement Judge, not a Trial Judge: Judicial Mediation in the United States," *Journal of Law & Society*, vol. 12 (Spring 1985), pp. 1-18. Data on the prevalence of judicial settlement activities are summarized on p. 7. The following discussion is in terms of judges' efforts to promote settlement, but applies with some adaptation to the other categories of intervenors as well.

45. For example. Judge Hubert L. Will counseled newly appointed judges, "I have no hesitation in rolling up my sleeves and going the whole way in an analysis of a jury case. I have some reservations about non-jury cases, but, if asked by counsel to participate, I will do so. You have to be more careful, and you have to indicate the possibility that you'll transfer the case to another judge for trial." Hubert L. Will, Robert R. Merhige, Jr., and Alvin B. Rubin, "The Role of the Judge in the Settlement Process," *Federal Rules Decisions*, vol. 75 (Sept. 13-18, 1976), p. 211.

46. Paul Reidinger, "The Litigation Boom," *American Bar Association Journal*, vol. 73 (February 1987), p. 37.

47. Wayne D. Brazil, *Settling Civil Suits: Litigators' Views About Appropriate Roles and Effective Techniques for Federal Judges* (Chicago: American Bar Association, 1985) pp. 40, 63, 73.

48. Harry Kalven, Jr., "The Jury, the Law, and the Personal Injury Damage Award," *Ohio State Law Journal*, vol. 19 (Spring 1958), p. 177.

49. Thomas D. Lambros and Thomas H. Shunk, "The Summary Jury Trial," *Cleveland State Law Review*, vol. 29 (1980), pp. 43-57; Thomas D. Lambros, "The Summary Jury Trial and Other Alternative Methods of Dispute Resolution: A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System," January 1984, *Federal Rules Decisions*, vol. 103, pp. 461-518; and Thomas D. Lambros, "The Summary Jury Trial—An Alternative Method of Resolving Disputes," *Judicature*, vol. 69 (February-March 1986), pp. 28&90. Results are evaluated in M. Daniel Jacobovitch and Carl M. Moore, *Summary Jury Trials in the Northern District of Ohio* (Washington: Federal Judicial Center, 1982); Richard Posner, "The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations," *University of Chicago Law Review*, vol. 53 (Spring 1986), pp. 366—93; and James J. Alfini and others, *Summary Jury Trials in Florida: An Empirical Assessment* (Tallahassee: Florida Dispute Resolution Center, 1989).

50. Neil Vidmar and Jeffrey Rice, "Jury-Determined Settlements and Summary Jury Trials: Observations about Alternative Dispute Resolution in an Adversary Culture," *Florida State University Law Review*, vol. 19 (Summer 1991), pp. 89-103.

51. Reported appellate cases are an incomplete source of information about postverdict reductions because they give no information about trial court reductions that are not appealed or about settlements incorporating reductions.

52. Even local services seem to display some bias toward more complete reporting of tort cases than others. Studies based on verdict-reporting services consistently display a higher portion of tort juries than do official state statistics. Perhaps this reflects more user interest in tort cases, where verdicts might reveal recurrent jury propensities, than in contract cases, where damages are more likely to be driven by the particulars of the agreement in question.

53. Jury Verdict Research, *Injury Valuation: Current Award Trends*, vol. 4 (Solon, Ohio, 1986), p. 12. This is not to say that JVR collects only large verdicts. Philip J. Hermann, its president, reports that JVR collects data, mostly from clerks of court, on over 24,000 of an estimated 31,000 personal injury verdicts rendered each year. Telephone interview with Philip J. Hermann, May 11, 1990.

54. Stephen Daniels's study of jury verdicts, based on the local jury verdict services,

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observes that "JVR's coverage is highly selective, reporting on what it determines to be precedent-setting verdicts." See Daniels, "Civil Juries," p. 6. See also A. Russell Localio, "Variations on \$962,258: The Misuse of Data on Medical Malpractice," *Law, Medicine and Health Care*, vol. 13 (June 1985), pp. 12&28.

55. Ross, *Settled Out of Court*, p. 112; and Daniels, "Civil Juries," pp. 10-11.

56. See generally. Marc Galanter, "Lawyers' Litigation Networks," paper prepared for the Conference on Frontiers of Research on Litigation, September 20, 1985, University of Wisconsin.

57. The origin of so-called scientific jury selection is commonly considered the involvement of sociologist Jay Schulman in the 1972 conspiracy trial of the Berrigan brothers and other Vietnam War opponents. See Hans and Vidmar, *Judging the Jury*, p. 81. In a turnabout, Schulman worked for General Westmoreland in his libel suit against CBS. Emily Couric, "Jury Sleuths: In Search of the Perfect Panel," *National Law Journal*, vol. 8 (July 21, 1986), p. 34. The use of shadow juries dates from a 1977 IBM antitrust case: Stephen J. Adler, "Consultants Dope Out the Mysteries of Jurors for Clients Being Sued," *Wall Street Journal*, October 24, 1989, pp. A1, A10.

58. For a profile of these techniques and some of their practitioners, see Couric, "Jury Sleuths." For an assessment of their efficacy, see Hans and Vidmar, *Judging the Jury*, chap. 6; and Hastie, Penrod and, Pennington, *Inside the Jury*, chap. 7.

59. Adler, "Consultants Dope Out the Mysteries of Jurors." A year earlier it was reported that membership of the American Society of Trial Consultants had grown to 150 from 32 in 1982. Doron P. Levin, "Stretching the Limits of the Jury Consulting Game," *New York Times*, July 1, 1988, p. B9.

60. Compare Steven Brill and James Lyons, "Headnotes: The Not-So-Simple Crisis," *American Lawyer* (May 1986), pp. 1, 12-17; Fred Strasser, "1987 Focus on States: Both Sides Brace for Battle," *National Law Journal*, vol. 9 (February 16, 1987), pp. 1, 37, 39; and Robert M. Hayden, "The Cultural Logic of a Political Crisis: Common Sense, Hegemony, and the Great American Liability Insurance Famine of 1986," *Studies in Law, Politics and Society*, vol. 11 (1991), pp. 95-117. See also Stephen Daniels, "The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols Rhetoric and Agenda-Building," *Law and Contemporary Problems*, vol. 52 (Autumn 1989), pp. 269—310. On the role of atrocity stories in legal policy discourse, see Marc Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about Our Allegedly Contentious and Litigious Society," *UCLA Law Review*, vol. 31 (October 1983), p. 64.

61. For example, a major law firm, preparing a report on the liability crisis on behalf of a coalition of "affected organizations," provided the following evidence that "defendants are being exposed to damage awards of increasing and unpredictable amounts. . . . The average verdict in both products liability and medical malpractice cases now exceeds one million dollars, according to preliminary studies by Jury Verdict, Research, Inc. See "Sorry Your Policy is Canceled," *Time* 20 (Mar. 24, 1986)." Sidley & Austin, *The Need for Legislative Reform of the Tort System* (Chicago, May 1986), p. 32, note 47.

62. Thus, the media feature stories about the size of product liability judgments derived from JVR reports but omit the qualifications and shortcomings of the data. Compare Localio, "Variations on \$962,258," p. 126.

63. Daniels, "Civil Juries," p. 17. Lawyers may be particularly susceptible to believing in this representativeness because legal education consists of a diet of unusual cases that are taken to be typical.

64. There is a whole tradition of research suggesting that media accounts influence societal-level judgments (that is, judgments about patterns and conditions in the larger community) more strongly than they influence personal-level judgment (that is, about the problems and risks that face the respondent). Tom R. Tyler and Fay Lomax Cook, "The

Mass Media and Judgments of Risk: Distinguishing Impact on Personal and Societal Level Judgments," *Journal of Personality and Social Psychology*, vol. 47 (October 1984), pp. 693-708. Thus, researchers have found that concern about crime as a public problem and personal fear of crime are often unrelated, and that judgments about personal risk are influenced primarily by personal experience and experiences conveyed through social networks, not by media reports of crime. Tom R. Tyler and Paul J. Levrakas, "Cognitions Leading to Personal and Political Behaviors: The Case of Crime," in Sidney Kraus and Richard M. Perloff, eds., *Mass Media and Political Thought: An Information Processing Approach* (Beverly Hills: Sage Publications, 1985). Reviewing the literature, Tyler concludes that "mass media reports of crime do not appear to be an important influence on fear of crime. Instead, fear appears to be generated primarily through personal victimization and the experiences of friends and neighbors." Tom R. Tyler, "Assessing the Risk of Crime Victimization: The Integration of Personal Victimization Experience and Socially Transmitted Information," *Journal of Social Issues*, vol. 40 (Spring 1984), p. 31. This same dissociation of social and personal levels of analysis may characterize the professionals who are the audience and source of mass media reports on litigation, juries, and so forth. Perhaps it is the mark of professionals to be able to use the relatively abstract societal-level information about the world in general to form estimates of risk in personal-level situations.

65. For a sense of the carryover of popular views into local legal culture, see David M. Engel, "The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community," *Law & Society Review*, vol. 18, no. 4 (1984), pp. 551-82.

66. It is often assumed that insurers, trade associations, or recurrent defendants are possessed of systematic portrayals of trends in jury behavior beyond the public domain knowledge referred to in the preceding discussion. Perhaps there is some closely guarded proprietary information of this type, but the only systematic information circulated under insurance industry auspices is in closed-claim studies. These are aggregate portraits of claims closed and do not contain any analyses of juries. It is my sense that the findings of ICJ's jury research were as new to insurers as to others in the system.

67. Marc Galanter, "The Legal Malaise; or, Justice Observed," *Law & Society Review*, vol. 19, no. 4 (1985), pp. 537-56.

68. Comment, "Public Disclosures of Jury Deliberations," *Harvard Law Review*, vol. 96 (February 1983), pp. 88&906.

69. Kalven and Zeisel, *The American Jury*, pp. vi-vii.

70. Herzberg's *Inside the Jury Room*, broadcast on PBS "Frontline," April 11, 1986.

71. Danzon, *Medical Malpractice*, p. 50; compare p. 43. The derivation of these estimates is explained in Patricia Munch Danzon and Lee A. Lillard, *The Resolution of Medical Malpractice Claims' Modeling the Bargaining Process* (Santa Monica, Calif.: Rand Institute for Civil Justice, 1982), p. 47.

72. Gerald R. Williams, *Legal Negotiations and Settlement* (West, 1983), p. 3.

73. Philip J. Hermann, "Predicting Verdicts in Personal Injury Cases," *Insurance Law Journal*, no. 475 (August 1962), pp. 505-17.

74. Rosenthal, *Lawyer and Client*, p. 202. The makeup of the panel and the method of securing evaluations are described on pp. 202-07.

75. Rosenthal, *Lawyer and Client*, pp. 38, 207.

76. See examples in Galanter, "Jury as Regulator," pp. 207-08.

77. Hans and Vidmar, *Judging the Jury*, chap. 4.

78. *Williams v Florida*, 399 U.S. 78 (1970), established the constitutionality of state juries of fewer than twelve members. By 1976, thirty-eight states had passed legislation specifically authorizing juries of fewer than twelve for civil actions. National Center for State Courts Research and Information Service, *Facets of the Jury System: A Survey*, R0028 (Denver: 1976), pp. 4—5. In Washington State, for example, civil jury trials automatically

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began employing six-member juries unless one of the litigants requested a twelve-member jury: *Revised Code of Washington Annotated*, 4.44.120 (West, 1968). See also New Jersey Constitution Article I, and *New Jersey Statutes Annotated*, 2A:80-2 (West, 1976). In *Colgrove v. Battin*, 413 U.S. 149 (1973), the Supreme Court held that a six-member civil jury in a U.S. district court does not violate the Seventh Amendment. By 1976, "some 81 of the 94 federal district courts [had] adopted rules reducing the size of juries in civil actions" (*Facets of the Jury System*, p. 5).

The Supreme Court, in *Johnson v. Louisiana*, 406 U.S. 356 (1972), and *Apodaca v. Oregon*, 406 U.S. 404 (1972), ruled that states need not require jury unanimity. The Court allowed proportions of nine out of twelve in Louisiana and ten out of twelve in Oregon to constitute a majority for a valid verdict. By 1976 "over half the states allow[ed] for non-unanimous verdicts in civil cases" (*Facets of the Jury System*, p. 9).

79. Hans Zeisel, ". . . And Then There Were None: The Diminution of the Federal Jury," *University of Chicago Law Review*, vol. 38 (Summer 1971), pp. 710-24; and Hans Zeisel and Shari S. Diamond, "Convincing Empirical Evidence on the Six Member Jury," *University of Chicago Law Review*, vol. 41 (Winter 1974), pp. 281-95. Zeisel's analysis is qualified and extended by Lempert, who agrees that the decisions of twelve-person juries are "likely to be more consistent across similar cases, and are more representative of the community in that they are more likely to reflect the decisions that would prevail if the entire community could judge the trial for itself." Richard Lempert, "Uncovering 'Nondiscernible' Differences: Empirical Research and the Jury-Size Cases," *Michigan Law Review*, vol. 73 (March 1975), p. 679. Saks views the decline in jury size as the "best explanation" of increased variability of jury awards. Michael J. Saks, "In Search of the 'Lawsuit Crisis,'" *Law, Medicine and Health Care*, vol. 14 (1986), pp. 77-79.

80. Richard E. Nisbett and Lee Ross, *Human Inference: Strategies and Shortcomings of Social Judgment* (Englewood Cliffs, N.J.: Prentice-Hall, 1980); Amos Tversky and Daniel Kahneman, "Availability: A Heuristic for Judging Frequency and Probability," *Cognitive Psychology*, vol. 5 (September 1973), pp. 207-32; Tversky and Kahneman, "Belief in the Law of Small Numbers," *Psychological Bulletin*, vol. 76 (August 1971), pp. 105-10; Kahneman and Tversky, "Subjective Probability: A Judgment of Representativeness," *Cognitive Psychology*, vol. 3 (July 1972), pp. 430-54; Kahneman and Tversky, "On the Psychology of Prediction," *Psychological Review*, vol. 80 (July 1973), pp. 237-51. Much of this literature is usefully assessed in Elizabeth Loftus and Lee Roy Beach, "Human Inference and Judgment: Is the Glass Half Empty or Half Full?" *Stanford Law Review*, vol. 34 (April 1982), pp. 938-56.

81. Loftus and Beach, "Human Inference and Judgment," pp. 944—45.

82. Nisbett and Ross, *Human Inference*, p. 190.

83. Loftus and Beach, "Human Inference and Judgment," p. 946.

84. Molly Selvin and Larry Picus, *The Debate over Jury Performance: Observations from a Recent Asbestos Case* (Santa Monica: Rand Institute for Civil Justice, 1987), p. 46;

Loftus and Beach, "Human Inference and Judgment," p. 946; Troyen A. Brennan and Robert F. Carter, "Legal and Scientific Probability of Causation of Cancer and Other Environmental Disease in Individuals," *Journal of Health Politics, Policy and Law*, vol. 10 (Spring 1985), p. 54.

85. Compare Williams's finding, based on a study of Denver and Phoenix attorneys, that the prevalent negotiating style (65 percent of his respondents) is a cooperative rather than an aggressively competitive one, so that opportunities for testing "optimistic" claims are reduced. Williams, *Legal Negotiations and Settlement*, p. 19.

86. Compare Loftus and Beach, "Human Inference and Judgments," p. 955. This bias is one example of a general lack of feedback in settlement behavior, which in turn is one part of a problem of quality control. Concern in recent years about lawyers' competence in the courtroom has eclipsed the question of their performance as negotiators. Unlike the

courtroom, where performance is subject to controls and sanctions as well as observation and comparison, negotiation is unregulated and largely invisible.

87. The strategic character of settlement negotiations and the influence of contextual factors, such as litigant resources, on their course are analyzed in Samuel R. Gross and Kent D. Syverud, "Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial," *Michigan Law Review*, vol. 90 (November 1991), pp. 319-93.

88. This is a historic pattern of long standing. Over a ninety-year period in two Massachusetts counties, recoveries amounted to about one-quarter of the *ad damnum*—only 15 percent in ton cases, the yield declining over time. Michael Stephen Hindus, Theodore M. Hammett, and Barbara M. Hobson, *The Files of the Massachusetts Superior Court: An Analysis and A Plan for Action, 1859-1959: A Report of the Massachusetts judicial Records Committee of the Supreme Judicial Court* (Boston: The Court, 1979), p. 149. For instance, Robert Silverman found of Boston courts in the late nineteenth century, "the sum recovered rarely equaled more than 10 percent of the *ad damnum*." *Law and Urban Growth: Civil Litigation in the Boston Trial Courts, 1880—1900* (Princeton University Press, 1981), p. 115.

89. See note 60.

90. Daniels, "Civil Juries," p. 14. Compare Localio, "Variations on \$962,258," pp. 12& 29. Compare the assertion that the English counterpart, *Current Law*, is "low on damages" because of selective reporting by insurance companies. Hazel G. Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (N.Y.: Oxford University Press, 1987).

91. Donald R. Songer, "Tort Reform in South Carolina: The Effect of Empirical Research on Elite Perceptions concerning Jury Verdicts," *South Carolina Law Review*, vol. 39 (Spring 1988), pp. 585-605; Rosenthal, *Lawyer and Client*, pp. 23, 202-07.

92. G. Thomas Munsterman, Janice T. Munsterman, and Stephen D. Penrod, *A Comparison of the Performance of Eight- and Twelve-Person Juries* (Arlington, Va.: National Center for State Courts, 1990), pp. 70-72.

93. Philip J. Hermann, *Report to the Subcommittee on Economic Stabilization of the [United States House of Representatives] Committee on Banking, Finance and Urban Affairs: Testimony on the Liability Crisis Focusing on the Facts of the Insurance Crisis*, in HR 241.15.4, Part I *Liability Insurance Crisis* (Solon, Ohio: Jury Verdict Research, August 6, 1986), pp. 22-23.

94. Kevin M. Clermont and Theodore Eisenberg, "Trial by Jury or Judge: Transcending Empiricism," *Comell Law Review*, vol. 77 (July 1992), pp. 1161, 1170, 1172.

95. Neil Komesar, "In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative," *Michigan Law Review*, vol. 79 (June 1981), pp. 1350-92.

96. Donald Harris and others, *Compensation and Support for Illness and Injury* (Oxford: Clarendon Press, 1984), p. 98. Hazel Genn, *Hard Bargaining*, p. 75, found that 89 percent of solicitors in her survey agreed that it is difficult to predict how much a judge will award to a successful plaintiff. Compare Clermont and Eisenberg's suggestion that American lawyers misperceive the decisional patterns of judges as well as of juries: "Trial by Jury or Judge," p. 1163.

97. Howard S. Erlanger, Elizabeth Chambliss, and Marygold S. Melli, "Participation and Flexibility in Informal Processes: Cautions from the Divorce Context," *Law & Society Review*, vol. 21, no. 4 (1987), p. 599.

98. Arthur Taylor von Mehren, "The Significance for Procedural Practice and Theory of the Concentrated Trial: Comparative Remarks," in Norbert Horn, ed., *Europaishes Rechtsdenken in Geschichte und Gegenwart*, vol. 2 (München: Beck, 1982), pp. 361, 364.

99. Compare the observation of Jack B. Weinstein and Eileen B. Hershenov on the jury system inhibiting the "procedural swing to equity" in contemporary mass ton litigation. "The Effect of Equity on Mass Ton Law," *University of Illinois Law Review*, vol. 1991, no. 2 (1992), p. 274.

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100. H. Laurence Ross, *Settled Out of Court: The Social Process of Insurance Claims Adjustment* (Aldine, 1980), p. 157. Compare, for example, Thomas C. Schelling's observation that threats that cannot be "decomposed into a series of consecutive smaller threats" are harder to make credible. *The Strategy of Conflict* (Oxford University Press, 1963), p. 41. Because this threat is costly to carry out, its value depends on the credibility with which it can be delivered. That in turn varies with the prowess of counsel and the formidability of panics.

101. In earlier eras juries may have lacked this second type of amateurism. Describing jury practice at the Old Bailey from 1675 to 1735, John H. Langbein reported that juries tried scores of cases, often deliberating on them in batches, and typically included many veteran jurors. "The Criminal Trial before the Lawyers," *University of Chicago Law Review*, vol. 45 (Winter 1978), pp. 263-274-77.

102. The tendency of regulars in the legal process to gravitate into such typifications and routines has been documented in civil claims (see, for example, Ross, *Settled Out of Court*, pp. 134—35) as well as in criminal matters (see, for example, David Sudnow, "Normal Crimes: Sociological Features of the Penal Code in a Public Defender's Office," *Social Problems*, vol. 12 (Winter 1965), p. 255; and Lynn M. Mather, "Some Determinants of the Method of Case Disposition: Decision-making by Public Defenders in Los Angeles," *Law & Society Review*, vol. 8 (Winter 1973), p. 187). G. K. Chesterton endorsed juries because "the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked . . . not that they are stupid . . . it is simply that they have got used to it. . . . They do not see the awful court of judgment; they only see their own workshop." "The Twelve Men," in *Tremendous Trifles* (Philadelphia: Dufour Editions, 1968), p. 56. I am indebted to Justice Shirley S. Abrahamson for drawing my attention to this essay.

Neil Komesar argues that the knowledge accumulated by the regulars absorbs biases from the cumulative efforts of constituency groups to educate them—a subtle, attenuated form of "capture by the regulated." "Injuries and Institutions: Tort Reform, Tort Theory and Beyond," *New York University Law Review*, vol. 65 (April 1990), pp. 27, 42. In this view one of the virtues of the jury is its relative ineducability.

103. Marygold S. Melli, Howard S. Erlanger, and Elizabeth Chambliss, "The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce," *Rutgers Law Review*, vol. 40 (Summer, 1988), p. 1147.

104. Erlanger, Chambliss, and Melli observe that in such a regime "judges may be following the patterns they see in informal settlements, rather than the other way around; thus instead of 'bargaining in the shadow of the law,' one should refer to 'litigating in the shadow of informal settlement.'" See "Participating and Flexibility in Informal Processes," pp. 599-600.

105. Janet Cooper Alexander, "Do the Merits Matter? A Study of Settlements in Securities Class Actions," *Stanford Law Review*, vol. 43 (February 1991), p. 567.

106. Alexander, "Do the Merits Matter?" p. 566.

107. Judith Resnik, "Judging Consent," *University of Chicago Legal Forum*, vol. 1987, pp. 43-102

108. Robert J. Condlin, "Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role," *Maryland Law Review*, vol. 51, no. 1 (1992), p. 21. On the "informational poverty of bargaining," see John Roemer, "The Mismatch of Bargaining Theory and Distributive Justice," *Ethics*, vol. 97 (October 1986), pp. 88, 97, 102; and David Luban, "The Quality of Justice," *Denver University Law Review*, vol. 66, no. 3 (1989), pp. 393-95.

109. In their richly elaborated depiction of English and American legal cultures, Patrick S. Atiyah and Robert S. Summers contrast a more formal, more certain, more predictable, more strictly and evenly enforced English law with a more indefinite and uneven American

counterpart that is more substantive—that is, grounded in the country's moral and policy commitments. They regard the jury as closely associated with the "substantive vision" of law in America. *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press, 1987), p. 425.

110. This would entail examination both of the cognitive qualities and of the cultural proclivities. Robert M. Hayden, "The Cultural Logic of a Political Crisis: Common Sense, Hegemony, and the Great American Liability Insurance Famine of 1986," *Studies in Law, Politics, and Society*, vol. 11 (1991), pp. 95-117.

111. See the discussion in this chapter of the experiment by Gerald Williams.

112. Edith Greene, Jane Goodman, and Elizabeth F. Loftus, "Jurors' Attitudes about Civil Litigation and the Size of Damage Awards," *American University Law Review*, vol. 40 (Winter 1991), pp. 813, 815.

113. Hans and Lofquist, "Jurors' Judgments of Business Liability in Tort Cases," pp. 111-12.

114. Hans and Lofquist, "Jurors' Judgments," pp. 93-107. This result is compatible with the results of a 1979 experiment by Elizabeth Loftus finding that exposure of subjects to a single insurance advertisement linking soaring insurance costs to inflated jury awards led to significantly lower awards for pain and suffering. "Insurance Advertising and Jury Awards," *American Bar Association Journal*, vol. 65 (January 1979), pp. 68-70.

115. Daniels, "Question of Jury Competence."

116. In October 1992 a Texas trial judge ordered a new trial in a personal injury case in response to claims by a plaintiff that jurors might have been swayed by President Bush's animadversions against trial lawyers and "crazy lawsuits" in his acceptance speech at the Republican convention the night before the jury deliberated and awarded \$11,000 to a plaintiff "seeking more than \$60,000 in medical expenses for an on-the-job back injury." Ruth Rendon, "Lawyer-Bashing by Bush Gets Man a Second Shot at Lawsuit," *Houston Chronicle*, October 27, 1992, p. A1. Similar questions are raised by campaigns against "lawsuit abuse" that place billboards decrying excessive awards near courthouses. Christ! Harlan, "Trial Lawyers Battle Critics in the Courts," *Wall Street Journal*, October 19, 1992, p. B1.