The New Jury and the Ancient Jury Conflict

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Any lawyer can tell you that jury trial is an ancient monument of the common law. Some would immediately add that it is a palladium of liberty; others would hasten to say that the jury is the legal equivalent of the vermiform appendix—at best harmless, at worst a life-threatening source of infection. I shall argue that the first statement—about the jury’s antiquity—is only trivially accurate; today’s jury is a comparatively new legal institution. By contrast, the dispute about the jury’s virtues is a venerable, persistent, and defining institution both of the common law and of political discourse. The dispute is older than the present version of the jury itself. To speak intelligently about the contemporary jury one must understand both its novelty and the antiquity of the debate it has engendered. Understanding these points makes attacking or defending the jury more difficult—because it requires both attackers and defenders to face up to the values behind their stances.

Groups called “juries” have existed for more than eight centuries, but the institution examined in these pages has been part of the legal system for fewer than two hundred years, and in some important respects is less than two decades old. One speaks in 1990 of a body different in fundamental respects from that in 1600, and different even from that in 1970. I take this relative novelty (in the glacial world of legal change) to have no bearing on the desirability of the contemporary civil jury. One can see the civil jury as an accidental, irrational survivor of a pre-modern world. With equal plausibility one can view it as a marvelously adaptable institution that has for almost a millennium democratized law application at its most fundamental level. The historical record supports both views with equal force.

The historical record does speak unequivocally about one point. The institution of jury trial has proved to be a durable source of conflict; only the locus of the conflict has changed over

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the centuries. For most of the jury's history the conflict has been between rulers (who impanel juries to decide cases) and the ruled (the populations from which juries are drawn). The rulers have generally lost, as juries have bent law to their beliefs. For the last two hundred years, however, the struggle has occurred inside government, with Britain and the United States taking different paths. The British have entrusted plenary power to Parliament, which operates almost unchecked. Parliament has restricted use of the British civil jury to a handful of categories, and the institution has withered away. By contrast, both state and federal governments in the United States reflect distrust of unchecked power. The judiciary checks other branches of government. Operating within the judicial system, the jury checks not only the judiciary but the other two branches of government as well.

In this setting, jury trial remains a political issue: it places an unaccountable democratic institution within the least democratic of the branches of government. Those who, like the contributors to this forum, debate the jury, ought to do so with a clear eye on the political character of the institution under discussion. For the jury is not now and never has been a simple, functional piece of the judicial machine, to be judged on how well it finds facts. Instead it plays a complicated role, simultaneously functional and symbolic, checking judicial power and strengthening judicial institutions, reshaping law as it gives a remarkable efficacy to the legal regime.

I. THE NEW JURY

So far as we can tell, the designers of the jury did not attempt to create a complex political institution. Their failure to anticipate the possibilities of the institution they created provides an emblem of the jury's history. At each point in its development, events have turned intentions from their paths. Medieval kings intended the jury to enable a thinly stretched bureaucracy to administer an unruly nation; they got instead an institutionalized means of civil disobedience. Seventeenth- and eighteenth-century judges sought to harness what seemed to be inaccurate or irresponsible factfinding. They failed in that effort, but created the law of evidence, a monster found in no other legal system. The twentieth-century United States Supreme Court, seeking to streamline jury trials, has altered the requirements of size and unanimity; a chorus of social scientists tells us we have created almost laboratory-perfect conditions for aberrational verdicts.
A. Origins

By giving factfinding duties to unsupervised laymen, the medieval jury system brilliantly solved a chronic medieval problem: how to administer without enough administrators. Although not confined to law, the problem was particularly acute in law because it required people who were both literate and highly trained. Training more people was part of the problem; paying them was an even greater one for the perpetually strained English royal purse. Moreover, in the centuries immediately following the Conquest, judges not only had to apply the law but also largely to create it. Though they managed to create the law, they could not without assistance apply that law.

Then, as now, law is relatively cheap; facts are expensive. A legal rule by its nature applies to many situations. In each of those situations someone must determine whether the events that would trigger the legal rule have occurred. To describe the jury as if its only task was to determine the existence of a single historical fact considerably oversimplifies—even in a regime of the strictest common law pleading. Medieval, like modern, juries often had to decide which of competing, overlapping factual contentions best fit their sense of the situation. If the royal officials who made the law had been forced in each instance also to find the facts (even simple

1 The account of the pre-modern jury contained in this section does not purport to contain original historical research. It may nevertheless be worth reciting because some of those who debate the contemporary jury seem to ignore the constant evolution of this ancient institution.

2 This account closely follows that of Thomas Andrew Green, Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800 (University of Chicago Press, 1985). As Green’s title suggests, his focus is criminal law. But the motivations behind the extension of civil jurisdiction—and with it the jury inquest—were milder versions of the policy underlying criminal enforcement. The Crown had a duty to keep peace among its subjects; that task included dispensing justice between subject and subject. In a world in which criminal prosecutions were brought by private parties, the line between civil and criminal law was not so sharp as we now see it. The great civil writs grew from trespass, which connoted a crime—breach of the king’s peace—as well as what we would now call a tort.

3 “The substitution for the feudal barons of professional officials for the judicial work of the old curia was a common phenomenon in Europe in the later Middle Ages; in England it took place at a very early date and the ablest men in the realm were thought just good enough for the task, many of them highly educated clerics.” R.C. van Caenegem, Royal Writs in England from the Conquest to Glanvill 30 (Selden Society, v 77 1959) (“Royal Writs”).

4 As the grip of single-issue pleading loosened, juries received even more complex tasks. They must often decide, first, which facts in a constellation appear most prominent and then apply the law to the salient constellation: for example, is this a lie (fraud) or a broken promise (contract)?
facts), the system would have died in its infancy. No medieval Eu-
ropean government was capable of bearing that weight, though
contemporary political theory said that a good monarch would ad-
minister justice to his people. Accordingly, each system had to find
ways of shedding the obligation without admitting that it was fail-
ing in a central task of government.

The English solved the problem with institutions that did not,
for the most part, require royal officials to find facts. The jury sys-
tem fit this specification in two respects. It forced on the lay popu-
lation the task of saying what was so and not so, whether John had
with force and arms wounded Ralph; whether the Prioress had
wrongfully ejected Henry, her tenant. Such findings not only
spared the judges the task of hearing witnesses, sifting kernels of
fact from the chaff of mutual perjury, and reconstructing events.
Using a jury also shifted to a local institution the unpleasant task
of delivering bad news to one of the parties to the lawsuit. The
loser’s neighbors, not the judge, caused his unhappiness. The medi-
eval jury thus represented an effort by rulers to require the gov-
erned population to perform an often difficult and unwelcome task
of government.

The procedure attending medieval jury trial testifies to its
roots in official desperation. It is a well-known circumstance that
medieval jurors were witnesses as much as factfinders. Less often
stressed is a byproduct of this role: such a procedure saved much
judicial time.\footnote{\textit{Royal Writs} at 92 (cited in note 3).} Summoned, at least in theory, from the hundred\footnote{The “hundred” was an administrative subdivision of the county or shire; each hun-
dred had its own court.} in
which the suit arose, the jurors were asked to say the truth of the
matter between the parties. For example, a court in 1188 asked an
assize jury:

whether Peter, the father of Peter of Oakerthorpe, was
seised in demesne as of fee of 25 acres of land near the
church of South Wingfield on the day of his death and
whether he died after the first coronation of the lord king
and whether the said Peter was his nearest heir.\footnote{John Dawson’s study is one that does emphasize this aspect of the in-
stitution: “[c]rude and clumsy as it was, the early common law jury was an essential means of con-
serving trained manpower in a government that had taken on new tasks of immense scope
and complexity.” John P. Dawson, \textit{A History of Lay Judges} 128 (Harvard University Press,
1960).}
The assemblages to which these questions were put were supposed to know the answers to the court’s inquiries. The jurors were to be selected for their knowledge of the underlying events; if they were ignorant, the solution was not to present evidence, but to select more jurors until one found those who knew. Judges who were not sure often made inquiries of those outside the jury who were thought to know. The common denominator in these practices is that they required little time of counsel and none of the judiciary; once properly summoned, the jurors bore the weight of whatever factual investigation they chose to conduct. Moreover, because the jury did not have to rest its finding on evidence presented in open court, one could not assail gaps in the evidence or weaknesses in the inferences necessary to support a verdict. So long as the jury had not found a logically impossible “fact,” one could assume that knowledge or investigation had led to the inference contained in the verdict. This arrangement left the small judiciary to do the work for which it was trained: creating the law.

At the same time, however, this delegation created an unintended area of jury power. Left in control of the facts, the medieval jury could “find” those facts in ways that reshaped or challenged the formal legal regime. Thomas Green’s account of the medieval jury demonstrates that juries persistently fought the rigorous definition of felony homicide, acquitting many of murder who appear to have been guilty of that offense as defined in law. That law offended juries’ sense of justice. Over centuries, that communal sense of justice prevailed. The formal law recognized degrees of homicide, and the regime of capital punishment relaxed. The substantive law bent under the pressure of the communal sense of right and wrong. Substantive legal change had resulted from an administrative delegation compelled by necessity.

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8 Id at 90.
9 Id at 93.
10 “The lack of concern with the source of the jury’s information is perhaps indicative of the jury’s origin as a royal instrument of power, used to further the Crown’s interests while maintaining a procedural facade of justice.” John Marshall Mitnick, From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror, 32 Am J Legal Hist 201, 204 (1988).
11 One sees this proposition at work in the sole means of attacking a medieval jury verdict—through attaint. In attaint, one accused the jurors of perjuring themselves by rendering an erroneous verdict. Id at 203. Logically, that position made sense: if the jurors were witnesses/investigators who “knew” the truth, then it followed that an inaccurate verdict could occur only if they lied.
12 Green, Verdict According to Conscience at 28-64 (cited in note 2).
The jury was not the only solution to the shortage of administrators. In what we would now call civil actions, the jury competed with other procedures, the most common of which was compurgation (oath-taking). Modern observers draw a sharp contrast between the reliability and empirical orientation of the jury verdict and the introspective and perjury-prone system of oath-taking. Seen from the perspective suggested here, however, similarities override contrasts. First, both compurgation and the jury inquest relieved the judge of fact-finding duties. Second, both procedures produced virtually opaque statements, relieving the courts of the task of dissecting factual analyses for consistency and reliability. From this standpoint, compurgation and the jury were equally satisfactory solutions to the problem of royal understaffing. Only in a world with greater surpluses was it possible to indulge in the luxury of wondering which system produced better, "truer" judgments.

B. The Eighteenth-Century Transformation

The late seventeenth and eighteenth centuries saw that more luxurious world. In it the jury underwent a basic change. Jurors ceased to be witnesses, functioning instead as fact-finders, assembled on the basis of their ignorance rather than of their knowledge. No longer did they investigate. In this early modern period the jurors began to hear evidence presented in open court and governed by an elaborate set of rules about its presentation. Because their verdict could rest only on such evidence, one could conclude that in some subset of jury cases the jury had reached an irrational verdict. When that happened, judges began to set verdicts aside and to enter judgment notwithstanding the verdict or order a new trial. All of these developments—the demise of the juror-witness, the restriction of the flow of evidence to open court, and the power of the judge to set aside or reverse a civil jury verdict—made the

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13 Compurgation, available in some common law actions (debt was the most notorious), permitted a defendant to avoid liability by appearing with a sufficient number of oath-helpers who swore, without testifying to the underlying events or submitting to cross-examination, that the defendant was not liable. Perhaps once a reasonable test of local reputation for credibility when claims were tried in county courts, compurgation became a joke when trials occurred in London and oath-helpers could be recruited for the price of a drink. Sir Frederick Pollock & Frederic William Maitland, 2 The History of English Law Before the Time of Edward I 634-37 (Cambridge University Press, 2d ed 1899).

14 We have come so far from the medieval model that today independent investigation—even when well-intentioned—is grounds for setting aside the resulting verdict. See In re Beverly Hills Fire Litigation, 695 F2d 207, 214 (6th Cir 1982).
NEW AND ANCIENT JURY CONFLICT

early modern jury a fundamentally different institution from its medieval parent. Combined, these changes altered the relationships of power among the three institutions of civil jury trials—judge, counsel and jury.

1. Evidence and Translucency.

By the late middle ages, the entirely self-informing jury had become rare. Courts and litigants expected jurors to base their verdicts on evidence presented in court though rules did not explicitly reflect these expectations. In the latter seventeenth and eighteenth centuries, legal rules caught up with these practices and made the self-informing jury not just rare but illegal. Recent work by John Mitnick has carefully traced two linked developments in the relationship between judge and civil juror in the 150 years before 1800. First, the granting of new trials replaced attaint as the remedy for an erroneous verdict. Second, judges developed the rule that evidence on which the jury based its verdict must have been received in open court; the jury could no longer “know” things not presented at trial. Together these two changes meant that trials as we know them today—competing efforts to demonstrate factual propositions in support of legally sufficient ac-

1. The preceding paragraph summarizes a set of changes that happened over more than a century and a half, with some of them not crystallizing into well-established rules until the end of the nineteenth century. All of them were well in motion by 1800.

15 “By the fourteenth century the collective, judicial character of the jury was obviously going to prevail. Although jurors were allowed, even encouraged, to inform themselves before the trial, it became an irregularity to communicate with them once they were sworn other than by giving evidence in open court . . . . So far was the judicial theory of jury trial carried that by the mid-sixteenth century it was irregular even for jurors to inform each other of facts without giving evidence in open court.” John Hamilton Baker, An Introduction to English Legal History 65-66 (Butterworth, 2d ed 1979) (“Introduction”).

16 Mitnick, 32 Am J Legal Hist at 212, 223 (cited in note 10).

17 Formally, attaint was not an appeal but an indictment of the original jury for perjury for failing to speak truly about the facts of the case. See note 11. If effective, it overturned the verdict and convicted the original jury of a crime. William S. Holdsworth, 1 A History of English Law 337-42 (Little, Brown & Co., 1931). As one might expect, attaint juries were extremely reluctant to convict their neighbors in such circumstances, and the attaint was acknowledged even in medieval times to be a failure as a system for controlling trial juries.

18 As Mitnick points out, attaint remained as an available remedy for wrong verdicts until 6 George IV ch 50 § 60 abolished it in 1825, but no rational litigant would invoke its tortuous and usually ineffective processes when a new trial was available as a remedy. Mitnick, 32 Am J Legal Hist at 211 (cited in note 10).

19 Bushell’s Case, 124 Eng Rep 1006, 1012-13 (CP 1670), held that jury nullification was permissible, resting on the contrary proposition—that jurors were supposed to possess personal knowledge of the events in question sufficient to permit them to acquit in the face of the evidence. But the holding in Bushell’s Case was limited to criminal trials, and did not impede the granting of new trials in civil litigation. Id at 1013-14.
counts—emerged. As the modern trial developed, two new characteristics of litigation accompanied it—the law of evidence and the translucent judgment.

Once judges determined that juries had to base their findings on in-court presentations, courts needed rules to govern those presentations. A law of evidence resulted. The matter was partly one of convenience and fairness: parties ought not be able to sink a case simply by going on until the other side drops of exhaustion. But it involved a substantive principle as well; with the demise of the writs, rules of relevance guarded the substantive law. If, for example, inability to pay was not a defense to breach of contract, then one way of assuring that a judgment would not be based on this “tainted” defense was to insist that it not be heard in the trial arena. Once party presentation rather than jury investigation and knowledge became the basis for verdicts, courts had either to treat substantive law as merely hortatory or to invent principles to protect it. By taking the latter path, courts created the law of evidence. The law of evidence was largely an eighteenth-century growth. By the nineteenth century that growth had become sufficiently luxuriant to draw an attack by Jeremy Bentham.

Courtroom presentation governed by evidentiary rules also rendered verdicts translucent—though not entirely transparent.

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21 Though certainly useful, such rules were not logically necessary. We are all familiar with party-dominated presentations in which the only limiting factor is the time allotted to each side’s presentation: formal debates and legislative proceedings are two common instances. In such situations the parties are permitted to present anything they think persuasive. The differences between these processes and the judicial trial are telling. We hold trials to a higher standard of rationality than debates: hence the law of evidence.

22 The writs—the medieval forms of action—involvèd both what we would now call substantive law and what we would call procedure. Many of the writs carried with them what one can anachronistically call their own rules of evidence. For example, in the writ of novel disseisin, the question was whether, within a stated time period, a freeholder had been unjustly (that is, without a judicial action) deprived of seisin. See Royal Writs at 261-67 (cited in note 3). In debt, the question was whether the appropriate number of oath-helpers would swear the debt was not owed.

23 Blackstone remarks on it only in passing, referring readers to a then-recently published treatise by Baron Gilbert. 3 William Blackstone, Commentaries on the Law of England *367, note n (1768; reprinted by University of Chicago Press, 1979) ("Commentaries").


25 Calabresi and Bobbitt have invoked the opposite metaphor, arguing that juries are “black boxes” into which we put questions without answers that we are prepared to defend publicly. Guido Calabresi and Philip Bobbitt, Tragic Choices 57-64 (W.W. Norton & Co., 1978). But the starting point of their argument supports my point: in modern trials, civil juries get only cases that are capable of being rationally decided for either party. To say that there are borderline cases in which no system of decision can yield results capable of rigorously rational defense is not to say that all decisions are irrational.

26 Transparency—complete visibility of the links between evidence and inference—would require the jury analogue of judicial findings, the special verdict.
With a record, an appellate court could decide whether the evidence supported the verdict. Even without a record (which was still rare in the eighteenth century), the judge presiding at trial could make such a decision. Retrospective analysis and second-guessing became possible. Trials in consequence became attempted empirical demonstrations rather than soundings of local feelings and beliefs.


Several consequences flow from the regulated presentation of evidence in open proceedings. The first is longer trials. The increased length of trials is commonly linked to the regulation of evidentiary presentation in open proceedings. Rules regulating the presentation of proof flowered, often shaped by fear that the jury was likely to draw false conclusions from certain types of evidence. Demonstrations conducted according to these rules of evidence took longer. Trials therefore lasted longer because the jury had to "learn" rather than to declare the facts.

Trials not only took longer; they displayed different relationships of institutional power. The law of evidence, combined with what I have referred to as the principle of translucency, produced these changes. When the jury could no longer know in advance what was true or investigate on its own, the parties had to assume responsibility for demonstrating their versions of truth. Experts rather than laypersons exerted more control over the proceedings. Such rival presentations increased the length of trials. Rules of evidence have a symbiotic relationship with the use of trial counsel. Only counsel could handle complex evidentiary rules, and complex evidentiary rules could emerge only as counsel became more common. When factual investigation moved from the hands of an independent lay agency to those of partisan experts, parties had more control over proceedings, and used that opportunity to present

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27 A history of trial records would be an important contribution to our understanding of the developing rationalism of the modern trial.

28 I do not mean to suggest that medieval jury verdicts depended entirely on which party was the most fearsome or the most popular—though accounts suggest that both factors affected results. Facts mattered then as now. The point is rather that modern trials subject facts to considerably more scrutiny than is customary in everyday life—or was necessary in the closed confines of medieval jury deliberation. In both situations people can "know" things that may not withstand sustained rational scrutiny.
competing versions of the facts. Translucent trials thus gave the adversary system a new shape, and a longer length.29

Finally, translucency and the growth of a law of evidence gave new responsibility to judges. In the medieval world, once the skirmishing over pleading had ended, the judges could hand the case to the trial jury, which would render a verdict impervious except to attain. In the regime that emerged in the eighteenth century, the judge had a much more active role after the pleadings closed. As lawyers' presentations became more elaborate, judges had to control those presentations by ruling on whether evidence might be admitted. Judges thus began to exert more control both over the lawyers and over the verdicts resulting from the evidence presented by lawyers. Because the jury's verdict had to be based on that presentation, the judge could abort the trial (by entering a nonsuit)30 or by ordering a new trial. Judges could take these actions because they had rules for controlling the flow of evidence and the new ability to compare the verdict to the facts offered to sustain it. Only in the middle of the eighteenth century did it become absolutely clear that a trial court could control jury "misconduct" by granting a new trial.31 A product of the "new" jury trial, this remedy itself created longer trials: counsel seeking to assure themselves against this catastrophe would increase the quantum of evidence presented. Paradoxically, the possession of one instrument of control—grant of new trial—may have made judges eager to avoid the time-wasting necessity for its use by relying heavily on another—commenting on evidence to urge juries to render a verdict that agreed with the judge's view of the facts. Translucency, produced by an uninformed jury and the law of evidence, thus made verdicts subject to challenge, and required judges to rule on those challenges.

These transformations were not instantaneous. As John Langbein has taught us,32 seventeenth- and eighteenth-century criminal jury trials were by modern standards astonishingly rapid

29 Paradoxically, these longer trials became simultaneously more open to reversal, as the preceding section suggested. When the basis of the jury's decision was laid bare, it was always possible that a judge—prodded by opposing counsel—would discover some logically necessary piece of evidence was missing.
30 The nonsuit or demurrer to the evidence functioned as the directed verdict, a modern term, does today. Edith Guild Henderson, The Background of the Seventh Amendment, 80 Harv L Rev 289, 300-305 (1966).
31 Mitnick, 32 Am J Legal Hist at 212-16 (cited in note 10).
affairs: "At [Lord Chief Justice] Ryder's first Old Bailey sessions in October 1754, for example, he presided over sixteen trials by two juries in three days." A similar situation prevailed in colonial Massachusetts. Langbein traces much of this rapidity to the use of experienced juries and to the absence of lawyers, who were still not common in criminal cases. Once seated, juries would try a number of cases, often hearing several before they were asked to render verdicts in any. What they heard was adversarial—the parties had different versions of the facts—but, in criminal cases, often unguided by lawyers. In civil actions, where counsel had always been more prominent, the changes came earlier.

The combination of these circumstances—the demise of the juror-witness, the attendant necessity for the presentation of proof at trial, the concomitant growth of the law of evidence and the incidence of judicial control and supervision, and the beginning of the increased duration of trial—made a civil jury trial at the end of the eighteenth century a markedly different affair from that in 1600, a difference disguised by the circumstance that one could trace the roots of the institution to the ambitious reforms of a medieval king. These eighteenth-century changes involved changed relationships among the participants—the parties, the court and counsel. Jurors now depended on counsel for the information on which they based a verdict. Counsel depended on judges for evidentiary rulings and for decisions on whether the evidence offered was sufficient to sustain a verdict. Both the necessity to hear evidence and the more complex traffic rules regulating that evidence made trials take longer—and made more likely the necessity for a second trial to correct errors in the first.

C. The Modern Transformation

The institution of the jury did not remain static between 1800 and the present day. The last two decades in particular, however, have seen a constellation of changes; together they have worked another, if somewhat lesser, transformation in the nature of the institution that continues to go under the old name. These

32 Id at 115.
34 "Litigation was certainly more peremptory than it is today; the Minute Books show that the Superior Court would dispose of as many as six jury trials (using only two twelve-man juries) in a single day, and the [Boston] Massacre Trials... were said to have been the first criminal matters to require more than one day for trial in the history of Massachusetts." Wroth and Zobel, eds, 1 The Legal Papers of John Adams at xlvii to xlix (Belknap Press of Harvard University Press, 1965).
changes—in size, composition, and unanimity requirements—affected not the relation between judge and jury but the jury's internal structure and functioning, aspects untouched by the eighteenth-century changes. Between 1600 and 1950, the jury remained essentially stable in size.\(^\text{38}\) It also made no pretense to demographic cross-sectionality: Sheriffs were supposed to summon the "right sort" of jurors, and would have been appalled at the suggestion that they ought to seek out a broad cross-section of the population. Moreover, the jury's internal decisional rule required unanimity.\(^\text{39}\) Thus a sixteenth-century jury might base a verdict on jurors' own knowledge, but it had to convince all its members. By the nineteenth century, the verdict had to be based on the evidence presented in court, but the same rule of unanimity prevailed: all twelve jurors had to concur. These requirements have undergone significant change in the United States in the past twenty years. The result is an institution with internal dynamics different from those of earlier juries; those dynamics, in turn, may produce different verdicts in some cases.

1. Size and Composition.

The reduction in jury size had simple and laudable motives: saving of time and juror inconvenience. Not only did the eighteenth century changes produce longer trials; they also made the process of selecting juries take longer. Once the juror informed about the case became a thing to be feared rather than desired, it became necessary to screen jurors for now-forbidden knowledge about the dispute. Voir dire, originally a simple charge to speak

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\(^{38}\) Medieval juries had varied a good deal, though twelve was thought to be the minimum size. By the early modern period, however, twelve had become the standard jury size. See John Langbein, *The English Criminal Jury on the Eve of the French Revolution*, in *The Trial Jury in England, France, and Germany 1700-1900* 13, 27 (Duncker & Humblot, 1987). The American colonies made occasional exceptions to this practice, perhaps because in a more thinly populated land it was more difficult to find twelve jurors. As *Colgrove v Battin*, 413 US 149, 158 n 12 (1973), noted, "juries of less than 12 were commonplace in this country throughout colonial times." That may overstate things. The *Colgrove* Court's only citation for its assertion was H. Richmond Fisher, *The Seventh Amendment and the Common Law: No Magic in Numbers*, 56 FRD 507, 529-32 (1973). Fisher cites seven instances of use of a jury of other than 12, some being larger rather than smaller; in some of these instances the jury was trying small claims. The Supreme Court, which otherwise relies on English precedents in its Seventh Amendment jurisprudence, somewhat unusually cited this small sample of colonial American experience in approving a six-person civil jury.

\(^{39}\) "Although traces are found until 1346 of the earlier view that the judges were to umpire any disagreements, the vast majority of verdicts in the rolls were the unqualified verdicts of twelve. A leading case of 1367 put the matter beyond doubt; rejecting earlier precedents, the court held a majority verdict to be void." Baker, *Introduction* at 66 (cited in note 16).
truly concerning what one knew, became an inquiry into degrees of knowledge and predisposing attitudes. It takes time to conduct such inquiries, a good deal of time if lawyers do so themselves, combining such inquiry with an introduction to their view of the case. Picking a twelve-person jury (and perhaps alternates) thus takes longer than picking a jury of smaller size; smaller juries may also take less time to reach a verdict. Moreover, if one imposes a low threshold for discharging a juror, selecting a jury of any given size will require the attendance of substantially more citizens than will eventually serve—a significant inconvenience.

Our era's response to these administrative problems has been to reduce the required size of the jury. In 1973, the United States Supreme Court concluded, in Colgrove v Battin that the use of a six-person civil jury violated neither the Seventh Amendment to the federal Constitution, nor the Rules Enabling Act, nor the Federal Rules of Civil Procedure. The constitutional holding essentially ratified what was already a widespread practice in the federal courts. According to a footnote in the opinion, fifty-four federal district courts had already adopted local rules that mandated six-member juries in some or all civil cases. A number of states have followed suit.

This trend toward smaller juries in the name of efficiency collided with a conflicting social policy requiring juries to reflect demography more accurately. In the not-far-distant past, women, racial minorities, the working class and others had been routinely omitted from juries. Many of the practices that resulted in this exclusion are now unlawful. As court administrators were reducing jury size, legislatures were requiring that jury selection

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38 Id at 159-60.
39 Id at 162-63. Petitioner argued that the Act, 28 USC § 2072, which then provided that the rules of procedure should not abridge the right to trial by jury, bolstered the constitutional provision. Id at 161.
40 Id at 163-64. Petitioner argued that FRCP 48, which provides that the parties may stipulate to a jury of fewer than 12, implied that absent such stipulation, a court must empanel a twelve-member jury. Id at 163.
41 Id at 150 n 1. New York, for example, provides for six-member juries in all civil cases. NY CPLR § 4104 (McKinney 1975 & Supp 1990).
42 See, for example, Taylor v Louisiana, 419 US 522 (1975) (holding unconstitutional the exclusion from juries of non-volunteer women); Thiel v Southern Pacific Co., 328 US 217 (1946) (exercising the Court's supervisory power to hold improper the exclusion of daily-wage workers from jury selection lists); 28 USC §§ 1863-74 (1988); NY Judiciary Law § 500 (McKinney 1975 & Supp 1990) ("It is the policy of this state that all litigants... shall have the right to grand and petit juries selected at random from a fair cross section of the community ....").
processes achieve broad cross-sectionality. Such requirements reflect a cautious opening of the political classes to include women, ethnic minorities and the poor. They also reflect the difficulty of filling jury pools in a multi-racial society if one limits the venire to the white, male and middle class.

Without anyone's apparently intending it, these two changes—reduced size and increased demographic representativeness—conflicted with each other. Decreasing the size of a jury reduces the likelihood that any given social characteristic will be reflected in the jury's members. The average jury will not change, but the rate of variation among actual juries will. In Ballew v Georgia, the Supreme Court belatedly acknowledged the validity of this statistical critique, stopping the reduction in jury size at six, but not requiring a movement back to twelve. The point for our purposes, however, is not the desirability of the smaller jury, but the change represented by acceptance of that smaller jury.


The second modern change in jury procedure further reduces the situations in which the "old" dynamics will prevail. As juries were shrinking, many jurisdictions were eliminating the requirement that their verdicts be unanimous. The laudable motivations were again increased speed and decreased cost. Hung juries require retrials, and trial time is very expensive both for the parties and for the judiciary; courtrooms are scarce, and lawyers expensive. One solution lies in changing the decisional rules for juries: abol-

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43 See, for example, 28 USC § 1861 (1988): "It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to . . . juries selected at random from a fair cross section of the community . . . ."; Cal Civ Proc Code §§ 197 (West 1990) ("All persons selected for jury service shall be selected at random, from a source or sources inclusive of a representative cross section of the population of the area served by the court."); Or Rev Stat § 10.030 (1989) ("[O]pportunity for jury service shall not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation, or any other factor that discriminates against a cognizable group . . . .").

44 See Valerie P. Hans & Neil Vidmar, Judging the Jury 171 (Plenum Press, 1978): "[T]here was a considerable body of literature on the differences between six- and twelve-person juries. Most of the literature supported the arguments of early critics that smaller juries provided poorer representation of community viewpoints."


46 See, for example, Mich Comp Laws Ann §§ 600.1352, 600.1304 (West 1981 & Supp 1989) (expanding jury pool by requiring use of driver's licence and identification lists; simultaneously providing for a verdict of five of six civil jurors); Pa Cons Stat Ann §§ 4501, 5104 (Purdon 1981) (requiring broad demographic representation on juries; providing for verdict by five-sixths of civil jury).
ishing unanimity in favor of some super-majority. For every jury in which most but not all of the members agree on a verdict, the potential cost of a new trial will be saved.

This change in decisional rules has two effects. The first is to award victory to an uncertain percentage of parties who, had the jury hung, would have had to choose between a new trial and settling for whatever the other party would offer. Evaluations of this result will differ. One might believe that the majorities are likely to have the correct view of the case. In that case, lopping off the holdouts will be but an unobjectionable shortcut to the foreordained result of a second trial. Or one might believe that significant if aberrant viewpoints are valuable parts of the jury process, in which case the result will seem regrettable.

A second change possibly achieved by the movement to the non-unanimous jury may be invisible in the verdict. Experiments suggest that juries required to reach unanimous verdicts do so by discussing the evidence in detail, sorting through it and using it as a way of persuading colleagues. By contrast, juries in which other decisional rules prevail discuss not the evidence, but the verdict itself, debating the justice of the consequences perceived to flow from one rather than another verdict. Given the state of the empirical studies and the absence of any strong intuitive support for the claimed difference, one should be cautious about drawing any strong conclusions. But, to the extent that differences exist, one can reasonably prefer either pattern. If one views the jury primarily as a factfinding machine, focus on the evidence is the aim, and any movement away from that focus is regrettable. But if one thinks of the jury as a reflector of community sentiment, increased discussion of the verdict would be a desirable change. Whatever one’s normative stance, however, the point for the present is that the changes in jury process in the past few decades have produced both a different internal dynamic and a number of different verdicts than would have been the case under previous regimes. The

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47 In fact, not quite every; some cases will settle before retrial because the party against whom the majority on the hung jury was aligned will decide that dodging one bullet is enough.

48 One study gives modest support to this belief. “We cannot conclude that the two jury types differ in the consistency with which they arrive at verdicts. The various measures of accuracy (recall scores, amount of discussion, etc.) suggest that if either jury performs with greater accuracy, it is the quorum jury.” Michael J. Saks, Jury Verdicts: The Role of Group Size and Social Decision Rules 96-98 (Lexington Books, 1977).

49 Hans & Vidmar, Judging the Jury at 174-75 (cited in note 44).
jury in 1990 is an institution with characteristics significantly different from those it possessed in 1970.

3. Actual and Hypothetical Change.

Yet the offsetting combination of these changes may have in part prevented even greater alterations in the civil jury. Describing these imagined changes is tricky. One must distinguish between hypothetical and historical circumstances involving three variables: size, composition, and rule of decision. The base line is the “old” jury—twelve persons (usually male, white and middle class) required to reach a unanimous verdict. The greatest hypothetical change would have involved a jury of the same size and rule of decision, but opened to a broader part of the population.

But in courts (like the federal system) that shrank jury size as they expanded representation, the two changes offset each other: smaller juries are less likely to contain a member possessing any given characteristic. So the impossible task facing one who would describe changes involves comparing the demographic characteristics of a twelve-person jury before the opening of the social gates with a six-person jury after the broadening of jury selection processes. I am unprepared to hazard that comparison. One can say with confidence only that smaller juries have greater inter-jury demographic variation than those they would have possessed had the size remained at twelve.

One is on slightly surer ground in arguing that reducing group size increases the number of aberrant verdicts. This consequence flows from a statistical commonplace, the small sample error. If a given population holds a particular view, reducing the size of the sample used as a proxy for the population makes it more likely that the smaller group will hold a view unrepresentative of the larger group. Thus if a representative sample of a locale would view the facts presented at trial in one way, halving the size of the group (here the jury) increases the chances that it will hold an aberrant view. This proposition does not, of course, depend on one’s

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80 Indeed, such greater changes may in fact be occurring in those states that have held to the larger jury and still require unanimity, but which have adopted broader principles of demographic representation. Because most courts still prohibit the recording of jury deliberation or the use of control juries, empirical research on jury decisions and decisional processes is puny. Hans & Vidmar review its current state. Id.

81 One theoretical and empirical study of juries concluded, “[L]arge juries were more reliable in that they were more consistent in their choice of verdict.” Saks, Jury Verdicts at 86 (cited in note 48).
belief that the more representative group is correct; one need only say that it is average, and that smaller groups will produce larger deviations from the average. On any given evidence, then, smaller juries will produce more anomalous defendant’s verdicts at the same time as they produce more jackpot-figure punitive damage awards. One cannot say for any given jury which is more likely; one can say that both outlying results are more likely in the aggregate.

Some have also argued that reducing jury size changes the jury’s propensity to come to no decision at all, contending that six-person juries will deadlock less often than twelve-person juries. Resting on premises about group behavior, this observation suggests hold-outs are more likely when they have some initial support from other members who share their minority view. Because of the formidable difficulties of designing a study that would isolate this question, no well founded empirical evidence supports this proposition. Nor is there any to refute it. What one can say, again, is that changes in unanimity rules make the point moot: a jury that does not need to come to a unanimous decision will not be affected by a single holdout.

II. THE ANCIENT CONFLICT

As the jury has changed, however, one characteristic has persisted: its position as a focus for conflict among ideas about law and government. Part of that conflict appears in clashes between judge and jury, between law and sentiment. Another part of the conflict appears as a broader political question concerning the design of government and the popular trust of governmental authority.

A. The Social Conflict: Lay and Professional Justice

The conflict that emerged at the birth of the jury has proved durable—that between juries as mirrors of popular (or at least lay) values and judges as representatives of a professional elite. At
stake was how law created by judges and lawyers would be applied in practice. In the Middle Ages, the law and practice of murder provided the arena of struggle; today the most contested arena may well involve civil disputes. No sharply delineated struggle occurred in medieval actions of the sort we would now label civil, in part because there never seems to have been such a systematic conflict between lay and professional rules. But one cannot doubt that community sentiment, sometimes admirable, sometimes parochial or craven, shaped civil verdicts. What humanly caused harms would be held to be unavoidable accidents rather than trespasses? How many strangers with good title would be permitted to eject popular local occupiers? How many powerful and fearsome litigants would win verdicts despite the letter of the law?

One well-documented instance of such a clash between community views and strict legal requirements occurred in the early American republic. The Seventh Amendment to the United States Constitution grew, in part, out of sharp inflation followed by the prospect of deflation. In the inflation attending and following the revolutionary war, many, especially farmers, had borrowed money of an ever-decreasing value. Much of the debt had taken the form of state-issued notes. Had the inflation continued, they would have been able to repay their debts with cheap currency. The ratification of the Constitution threatened to change the balance dramatically in favor of creditors. The new federal government was to be permitted, and states forbidden, to coin money, and the new government was to assume the debts of the old. These provisions indicated that the new government took credit seriously, and intended to pursue a policy that would retain the confidence of prospective creditors. These developments suggested that debts incurred with the prospect of cheap money would have to be expensively repaid.

The characteristics of the creditor and debtor classes made things worse. Some debt was local, but a good deal was owed either to regional financial centers or to foreign creditors, chiefly British. That meant that suits to collect debts regularly pitted Boston and Charleston bankers against inland farmers, British lenders against American borrowers. No one was prepared to argue in principle that these debts ought simply to be repudiated, probably because

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** See text accompanying note 12.
lenders were sufficiently dispersed to make that an unpopular argument in many quarters. But much of the anti-Federalist argument against ratifying the Constitution focused on the absence of an explicit provision for jury trial, linking that institution to the welfare of debtors. Their argument clearly drew the lines between professional and lay perceptions of law; as Wolfram points out, the anti-Federalists arguing for the jury were under no illusions that jury trials were faster or cheaper than bench trials:

[I]nconveniences [were] accepted precisely because, in important instances, through its ability to disregard substantive rules of law, the jury would reach a result that the judge either could not or would not reach. Those who favored the civil jury were not misguided tinkerers . . . they were, for the day, libertarians who avowed that important areas of protection for litigants . . . would be placed in grave danger unless it were required that juries sit in civil cases.  

Though creditor-debtor conflict no longer has the same political valence it possessed in late eighteenth-century America, numerous cases present similar conflicts between the formal legal regime and popular notions of justice. Some would say that awards against deep-pocket defendants represent either a generalized casualness about inflicting damage awards on such entities or, perhaps, an effort to achieve, via the tort system, some of the goals that might be achieved through social insurance in other cultures. Though contexts shift, the jury remains a potentially volatile voice of popular sentiment that occasionally clashes with the formal legal regime. The jury’s ability to turn this sentiment into judgments is limited by the judge’s power to enter judgments notwithstanding the verdict and to order new trials, but the jury still enjoys a significant discretionary power. Nor need the jury be conscious of this power to exercise it. One can agree entirely with Harry Kalven’s and Hans Zeisel’s careful demonstration that juries do not consciously substitute a personal sense of justice for the law and yet acknowledge that in a significant number of cases juries bend the formal legal regime.  

I take no position on the desirability of that power. Lawyers, perhaps especially law teachers, are often critical about departures

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60 Wolfram, 57 Minn L Rev at 668-705.  
61 Id at 671-72.  
from the regime of "hard" law. Even those who have made careers and fortunes presenting cases to juries will always be somewhat wary of the jury because it is unaccountable and unpredictable. In such a view the jury is a regrettable experiment in sentimentality freed from the restraints of accountability. But common sense and the adjustment of individual equities have equally persuasive defenders. A society that depends on compromise and the blurring of sharp differences will have use for an institution so well suited to this function. From this standpoint the jury is the one trustworthy governmental institution—trustworthy because it has no private ambition. For present purposes choosing sides is unnecessary. Both the critic and the advocate can agree that the jury makes a difference in some cases.

B. The Political Conflict: The Civil Jury and the Structure of Government

The jury makes a difference in governments as well as in individual cases. One can see this feature in the different paths taken by civil juries in Great Britain and in the United States. In the United States, where government power is checked in multiple ways, the civil jury lives. In England, which has entrusted plenary governmental power to Parliament, the civil jury is a vestigial institution, a curiosity. One cannot imagine this symposium occurring on the other side of the Atlantic Ocean except, perhaps, at a gathering of legal historians. Some argue that the American jury will meet the same fate in time, that only the accident of its enshrinement in written constitutions has preserved the civil jury in the United States.

I believe the matter is more complicated. The persistence of the civil jury in the United States reflects a distrust of concentrated governmental power. The place of American courts in the political order—checking other branches of government—results from that suspicion. Within the court system, the jury gives another expression to the same sentiment by dividing power between judge and jurors. The British, by contrast, have come to terms with plenary sovereignty. A single legislative branch exercises virtually complete power, unchecked by courts, which have long been reduced to a particularly prestigious branch of the civil service. One would be surprised to find randomly selected members of the public asked to serve as temporary civil servants.

The British civil jury began to die in the latter nineteenth century; available only in a narrow category of cases, it presently clings to life as a possibility rarely employed. Its demise occurred as Great Britain rebuilt the foundations of its political system so that sovereignty rested unmistakably with Parliament (by the early twentieth century the House of Commons), and political conflict was accordingly focused on the legislature. Courts, which had occasionally played a significant political role in the seventeenth century, became specialized tribunals for the resolution of specified conflicts. Judges accordingly came from a professional rather than a political elite, and they exercised no powers of constitutional review. With the courts' powers thus circumscribed, successive Parliaments have regularly reduced the range of cases in which juries are permitted. Professional preferences have even further limited the use of the jury within the permissible categories.

In 1800 such a reduction in the courts' influence would have looked very doubtful. In the preceding century courts had occasionally played significant political roles, and political rhetoric made those roles appear even more significant than the facts indicated. Within the legal system, the jury had played a particularly visible role in defying royal power. Responding to these events and perceptions, legal writers praised the jury. William Blackstone, the most influential common lawyer since Coke, had published an encomium to the civil jury, which he believed "ever has been, and I trust ever will be, looked upon as the glory of the English law," adding that "[it's] establishment ... and use, in this island, of what date soever it may be, though for a time greatly impaired and shaken by the introduction of the Norman trial by battel [sic], was always so highly esteemed and valued by the people that no conquest, no change of government, could ever prevail to abolish it." In this praise Blackstone was following Matthew Hale, who in his posthumously published History of the Common Law had devoted significant space and much praise to jury trial, describing it

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63 In 1969, there was a total of 25 actions tried to a jury in the High Court; a similar picture emerges from the County Courts. R.M. Jackson, The Machinery of Justice in England 85 (Cambridge University Press, 7th ed 1977).
64 Blackstone, 3 Commentaries *379 (cited in note 23).
65 Id at *350.
67 Hale devoted his twelfth and concluding chapter to trial by jury. Id at 160-68.
as "the best Trial in the World," and "this excellent Order of Trial by Jury, which is far beyond the Trial by Witnesses according to the Proceedings of the Civil Law, and of the Courts of Equity, both for the Certainty, the Dispatch, and the Cheapness thereof."

Hale and Blackstone wrote as apologists for the common law, but successful apologists (which both were) must strike responsive chords. Juries were popular institutions among the political classes of eighteenth-century England in part because they appeared to be bulwarks against royal power, and in part because they were part of the common law, which was itself in especially high repute. When Hale and Blackstone spoke of the common law as the guardian of English liberties, they were using well-worn rhetorical coinage. In the political struggles of the previous century, the parliamentary opponents of royal power had on several occasions invoked the common law to further their political goals. Appeals to common law, especially to common law procedure, were popular in the seventeenth-century struggles, not because common law contained any particularly Parliamentary or anti-monarchical bias, but because the common law favored whomever held the trump card in a political stalemate. The seventeenth-century English kings regularly proposed practices that would have required some change in the common law. In so doing they were following in the steps of the Tudors, who worked great changes in both the common law and the structure of government. But the Tudors did so through Parliament, and the seventeenth-century Parliaments were not about to accede to the Stuarts. In that situation, to appeal to the common law was to argue for the necessity of legislative change, when legislative change was precisely what the Stuarts sought to avoid.

The outcome of these fights suggests the discrepancy between reality and the hopes the Stuarts' opponents placed in common law. Only in Bushell's Case did those resisting the Crown prevail,

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48 Id at 160.
49 Id at 166.
50 The four most significant instances were An Information Against Bates, 145 Eng Rep 267 (Exch 1606), holding lawful an excise tax on imported currants; Hampden's Case, 3 St Tr 825 (Exch 1637), in which Charles I strained the limits of his power to levy extra-Parliamentary taxes; Bushell's Case, 124 Eng Rep 1006 (CP 1670), in which a jury refused to convict a group of Quakers who were almost certainly violating the law; and James II's efforts to use the writ of quo warranto to revoke the charter of the City of London. Jennifer Levin, The Charter Controversy in the City of London, 1660-1688, and Its Consequences (Athlone Press, 1969).
51 Bushell's Case, 124 Eng Rep 1006 (CP 1670).
and then, ironically, only by creating an innovation in the law.\textsuperscript{72}
The meagerness of their success did not, however, discourage the Stuarts' opponents, who regularly appealed to the common law.\textsuperscript{73} The appeal offered tantalizing possibilities, not because the common law had arisen as a guardian of individual liberty and property (though they sometimes so portrayed it) but because it had not. Common law had grown as an extension of royal power, and one could fairly ask the Crown to accept self-imposed limitations: estoppel is both a legal and a moral argument.

The common law ultimately failed to provide the Stuarts' adversaries with a barrier to royal power. Troops, not courts, had played the decisive part in the seventeenth-century revolutions. But the side using law as a rhetorical bulwark had in many respects prevailed, a circumstance that partly accounts for Hale's and Blackstone's praise of the legal system generally and their panegyric to the jury in particular. To the Parliamentary victors looking back at the seventeenth century, the Crown had prevailed too often, it seemed, because it could powerfully influence judges, who served at royal pleasure. One response lay in assuring that judges could be dismissed only for bad behavior. The eighteenth-century Parliaments had insisted that royally appointed judges should serve during good behavior to insulate them from royal influence. Another was to bolster the judiciary by injecting a second, independent institution at the point of law application—the jury.

But the very success of those who took these precautions, the Parliamentarians, in time made them unnecessary. In the nineteenth century, Parliament supplanted the monarchy as the unquestioned seat of power. With the battle over, one could contemplate changes in the common law that had previously been unthinkable. By the middle of the nineteenth century, English government had undergone a fundamental change. The Reform Bill of 1832 meant that the House of Commons represented broad sections of the middle class. Something approximating a responsible Parliamentary government was emerging, with Prime Ministers changing with electoral results. Moreover, the initiative lay with Commons: the Crown and the House of Lords might hope to hold their own, but it was unthinkable that they would increase their

\textsuperscript{72} See Mitnick, 32 Am J Legal Hist at 206-07, 222-23 (cited in note 10); Green, Verdict According to Conscience at 200-64 (cited in note 2).

strength or be the source of change. Most important, the judiciary and the common law played no role in this realignment of power. Though given the protection of lifetime tenure, British judges enjoyed no constitutional leverage. They expounded the common law and construed statutes, but only a Parliamentary majority stood between them and a change in either. Briefly conceivable in the seventeenth century, constitutional review had vanished as a judicial function by the nineteenth.

This shrunken judicial role became evident in late eighteenth- and nineteenth-century political and social struggles. When English employers sought to prevent workers from uniting in pursuit of higher wages, they turned not to the courts but to Parliament, which obliged with the Combination Acts. When Catholics sought political emancipation, they waged their struggle in Parliament, not in courts. The great, defeated social and political movement of the mid-century, Chartism, symbolizes this Parliamentary ascendancy: its climax was a gathering outside Parliament to present a petition carrying more than a million signatures seeking political change.

Though it rejected the Chartists' petitions, nineteenth-century Parliament could be moved to legislation without waiting for royal proposals. It reformed itself in 1832 and 1867, broadening the franchise to an extent that would have been unimaginable a century before. Parliament also sporadically attacked legal procedure, first hesitantly in the early part of the century, then in a thoroughgoing fashion in the Judicature Act of 1873, which merged law and equity, abolished the forms of action, and reorganized the judicial system—probably the most sweeping change any Anglo-American legal system has undergone at one time. Formally, the Act did not affect civil trial by jury, but use of the jury began to decline dramatically. That change was made formal in 1920 in the Administration of Justice Act, which made jury trial discretionary except in seven enumerated cases. Thus, civil jury trials

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74 S.E. Thorne, Dr. Bonham's Case, 54 L Quarterly Rev 543 (1938), discusses the most famous episode, concluding that the theory of constitutional review that later generations attributed to Sir Edward Coke was not present in the 1610 case to which it was traced.

75 The Combination Acts, 39 and 40 Geo III ch 106 (1800).

76 A workingman's social movement, Chartism sought to expand the franchise for Parliament and to democratize its members.

77 Supreme Court of Judicature Act, 36 & 37 Vict ch 66 (1873).

78 Jackson, The Machinery of Justice at 84 (cited in note 63).

79 10 & 11 Geo V ch 81 (1920). The enumerated causes were fraud, libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise.
had moved in 150 years from the subject of encomia by society's leading figures to near extinction. Why?

Simply put, Parliament provided a far more effective voice of popular will than juries. As Parliament achieved power, the political significance of the judiciary, the common law and the jury declined. No one looked to courts to control the power of a monarch; no one looked to juries to check a judiciary too subservient to the Crown. In the seventeenth century, each tiny gear in common law procedure had the potential either to break the deadlock or to prolong the conflict and thus to favor whichever side held the stakes. By the nineteenth century the political fights were not about whether Parliament would have to be called to settle the conflict but about how Parliament would resolve the question. There is no inevitability here. British society might have distrusted the new Parliament as much as it had the old kings. But, because initially Commons shared power with the Lords and because both believed in some undefined residual power of the Crown, the concern never materialized.

Because common law process no longer played a national political role, it became possible to contemplate changes in procedure. Changes generated no political resistance because no one any longer thought that the courts themselves represented an important political force. The nation had put all its political eggs in the Parliamentary basket. For good or ill, Parliament would determine. As a result, when Parliament chose in the wake of World War I to limit civil juries to a few specified cases, the action aroused no strong protest. Lay participation in deciding civil cases had no political significance because the courts themselves were not strong political actors. Across the Atlantic matters developed quite differently.

2. United States: Divided Power and the Civil Jury.

During the two centuries in which British courts lost any traces of a political role, courts in the United States were providing a stage for a rich political theater. Even a partial list of the social and political issues in which courts played political roles would closely parallel the history of the society: federal control over the banking system, slavery, the power of labor, the federal role in regulating the economy, federal protection of civil rights, the apportionment of seats in state legislatures, capital punishment and

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*A wistful Lord Atkins limited himself to doubting whether Parliament could really have meant what the words of the act said. *Ford v Blurton, 38 TLR 801, 805 (1922).*
abortion. Courts have played a role in these conflicts because state and federal constitutions give judges a political trump card—judicial review. The power to render stringently limiting interpretations of legislation and to declare statutes unconstitutional has played an important role in the history of American society.

Judicial review reflects a distrust of plenary power held by a single branch of government. The elected branches draw their powers from their constituencies, but separately elected legislators and executives result in dispersed power. The unelected federal judiciary can rely on its lifetime tenure (protected by the difficulty of amending the constitution); state judiciaries can look only to their powers of persuasion and the polity's distrust of other branches. In spite of these seeming imbalances in power, the judiciary has proved a formidable counterbalance to executive and legislative power.

The same distrust of power produced both judicial review and the jury. If judicial review reflects a distrust of executive and legislative power, juries reflect in turn a distrust of judicial power. This role for the jury in a politicized judiciary was evident early in the debate over the federal constitution. Part of the enthusiasm for the jury resulted from its presumed sympathies with debtors, but jury trial played a second, deeper, political role:

A related aspect . . . concerned the much-discussed issue of jury trial, which it was alleged the Constitution would weaken or destroy . . . . [T]he crux of the objection lay in the political significance of the jury trial. While an adequate representation in at least one branch of the legislature was indispensable at the top, law-making level, the jury trial provided the people's safeguard at the bottom, administrative level. "Juries are constantly and frequently drawn from the body of the people, and freemen of the country; and by holding the jury's right to return a general verdict in all cases sacred, we secure to the people at large, their just and rightful controul [sic] in the judicial department." A [Maryland] Farmer argued, indeed, that the jury trial is more important than representation in the legislature, because "those usurpations, which silently undermine the spirit of liberty, under the

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81 Most states require their judges to withstand some sort of electoral testing, but outright political contests are rare. The defeat of some state supreme court judges in California several years ago made national headlines, attesting to the rarity of such electoral uprisings.
sanctions of law, are more dangerous than direct and open legislative attacks . . . . " The main point, however, is that the democratic branch of the legislature and the jury trial are the means of effective and popular control . . . . The often extreme and apparently unfounded claims by the Anti-Federalists that the proposed Constitution would destroy the trial by jury should be seen against this background. The question was not fundamentally whether the lack of adequate provision for jury trial would weaken a traditional bulwark of individual rights (although that was also involved) but whether it would fatally weaken the role of the people in the administration of government.82

Despite changes in its use and structure, the jury has continued to play such a role. It continues to influence the formal legal regime at the point of application. Some would describe the effects as tempering the law, others as distorting it. But, with the paradoxical and unintended effects that attend most efforts to use the jury, the American civil jury has strengthened the judiciary as much as it has controlled it. The jury supplies an element of citizen participation in the most elite branch of government, shaping the development of administered law. One can see this role in the contemporary civil jury’s actions in relation to several major common law bases of liability. The pattern, repeated under different doctrinal rubrics, is simple: the judiciary tentatively opens the door to a new pattern of liability by permitting a claim to reach the jury; juries accept the opportunity; and the insulation given to jury verdicts results in a legal regime much stronger than that which judges alone could have created. Several examples fit this pattern.

In torts, the civil jury has wrought much. It has, with a modest assist from the courts, rewritten the law of ordinary negligence. For many years juries simply declined to find contributory negligence when the strictest interpretation of the law might have suggested its presence. The result was a regime of comparative negligence that long preceded the judicial and legislative abolition of contributory negligence as a defense. Without being too fanciful, one can compare the change to that which medieval English jurors worked in the law of homicide. Without flatly ignoring the law, ju-

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ries interpreted facts in ways that created a more nuanced application of law. For the medieval jury, the nuanced application led to graded homicide; for the modern jury, the regime was comparative negligence. Ultimately, law caught up with the jury. Courts and legislatures formally adopted the system that jury verdicts had been applying informally for years.

Products liability offers a more complex example. In this area the jury did not act alone, but once given its head by the judiciary, jury verdicts created the modern rules of product liability. Early judicial decisions opened the door by holding that the manufacturer was liable to the ultimate user and that the safety of a product's design was a question for the jury. Over the last several decades, juries have responded with a string of plaintiffs' verdicts. That string is not unbroken: defendants win many verdicts. But the trend is sufficiently persistent and includes enough high verdicts to constitute a new legal regime. Whether one applauds or deplores the results, they are difficult to imagine without the jury. The judiciary—even a life-tenure, politically sensitive judiciary—could not have survived the attacks that a string of large plaintiffs' verdicts would have engendered. But while the defense bar and its clients may attack juries generally in industry meetings, such a public stance is as unthinkable as an American politician's campaigning against the wisdom of the electorate. The jury's egalitarian roots provide a defense against attacks on the system itself, however much individual verdicts may be attacked.

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84 One sign of the existence of that regime is work attacking it. See Peter W. Huber, Liability: The Legal Revolution and its Consequences (Basic Books, 1988).
85 To that extent, attacks on judicial iniquity in creating the law miss part of the picture: that "law" is as much a product of juries as of judges. One commentator who recognizes the jury's role nevertheless deplores it, arguing that its exercise of discretion in product liability cases is inherently "polycentric" and thus inappropriate for a court of law. James A. Henderson, Jr., Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication, 73 Colum L Rev 1531, 1534 (1973). Seen from the perspective of the jury's history, one might argue that the jury has never fit very comfortably within a regime of what Max Weber would have called legal rationality. See Max Weber, Max Weber on Law in Economy and Society 61-64 (Simon & Schuster, 1954).
86 And, of course, the law of products liability was primarily a result of state judiciaries that do not enjoy life-tenure.
87 The financing of the campaign that resulted in the electoral defeat of Chief Justice Rose Bird of California is a case in point. Although much of the campaign advertising—and the public opinion polls—treated it as a referendum on the death penalty, much of the financing came from industry groups with little interest in such issues: insurance companies and employer groups. One imagines that conducting a campaign against high product liability and wrongful discharge verdicts did not seem to be a likely winning strategy.
A similar pattern emerges in the law of wrongful discharge. In several states\textsuperscript{88} jury verdicts are in the process of creating, slowly and unevenly, a form of job security that the common law doctrine of employment-at-will denied. Some non-union workers in the United States are thus achieving through common law and jury verdict what their unionized counterparts won in collective bargaining and what their European counterparts got through legislation. A comparative perspective may help to highlight juries' political situation. In many industrialized societies employees enjoy security against discharge without cause.\textsuperscript{89} Their protection came through legislation. In the United States there has also been popular participation in the shaping of this new legal regime, but it has come at the level of law application, through the jury. Again, the jury's participation in this lawmaking gives it a status closer to legislation than to pure judge-made law.

Punitive damages provide a final example of the political valence—and attendant power to excite controversy—of the contemporary civil jury. Available in a variety of tort\textsuperscript{90} actions, punitive damages raise the stakes for defendants found to have engaged in various behavior, turning any given instance of liability into a potential disaster.\textsuperscript{91} Closer to my point, punitive damages explicitly recognize the quasi-political, lawmaking power of the jury. In deciding punitive damages cases, juries are asked to decide the reprehensibility of the defendant's conduct: they are fashioning an ad hoc criminal statute. A recently rejected challenge to this power of juries focused on just this aspect of punitive damages. In \textit{Browning Ferris Industries v Kelco},\textsuperscript{92} the petitioners argued that the jury's infliction of a punitive damage award more than one hundred times the amount of actual damages violated the excessive fines clause of the Eighth Amendment. The Court rejected the argument. In doing so, it remarked that "[h]ere the government of Ver-

\textsuperscript{88} One handbook lists 38 U.S. jurisdictions that have recognized limitations on the power of an employer to discharge at will a non-unionized employee. \textit{BNA Individual Employment Rights Manual}, 505:51-52 at 145-46 (1989).


\textsuperscript{90} Some would also say contract, citing such cases as \textit{Seaman's Direct Buying Service, Inc. v Standard Oil Co.}, 36 Cal 3d 752, 765-66 (1984), in which the California Supreme Court opened the possibility of punitive damages for "wrongful breach of contract."

\textsuperscript{91} The degree of disaster will depend on the jury's judgment about the appropriate amount of punitive liability. Because the jury is asked to consider the defendant's net worth in assessing the penalty, the stakes are high.

\textsuperscript{92} \textit{Browning-Ferris Industries of Vermont, Inc. v Kelco Disposal, Inc.}, 109 S Ct 2909 (1989).
mont has not taken a positive step to punish." That statement may be a bit facile. Vermont, after all, was not the only political body involved in assessing the damages: the federal government (in whose court system the trial occurred) was acting politically through the jury in a way that might be thought to trigger the Amendment.

Again, I do not wish to argue that punitive damages are unconstitutional, or even unwise. In a society as relatively unregulated as ours, one can make a good argument that the unpredictable, after-the-fact inquiry conducted by the jury and backed by a potentially catastrophic damage award serves a powerfully beneficial function. Instead, I want to focus on the way in which this power puts the civil jury, like the judicial system of which it is a part, into the center of the political arena. Civil jury verdicts make law. Civil juries create changes that the unaided judiciary could not achieve. That law-making, power-sharing role of the civil jury has two aspects. First, the existence of the civil jury as a factfinding, law-applying body may encourage judges to make the initial decision to let a question go to the jury. Judges deciding such questions know that the jury, not the judiciary, will actually apply the law. Second, once the jury gets the power to decide such questions, its temporary existence and insulation from review give it the freedom to grant awards likely to be higher than those a judge would give in the same circumstances. The jury need not expose its calculations of liability or damages to public scrutiny: the "black box" quality of the general verdict keeps these aspects of its law-making hidden and less susceptible to criticism.

Because juries have these powers, the protection is not complete, and verdicts draw blame and praise. But the nature of the jury system, if not of individual juries, provides a shelter against change. Ordinarily in the United States attacks on government take the form of attacks on persons: we regularly, perpetually, throw the rascals out. It is difficult to think of jurors as official rascals. Juries are not permanent government officials; they are us—citizens applying law to other citizens. This temporary status

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83 Id at 2920.
85 It does not matter, I believe, that much of the blame and praise come from intensely self-interested parties (for example, the plaintiffs' and defense bars and their clients). In all political discourse self-interest plays a strong role. It reinforces rather than detracts from my point that the praisers and blamers may be arguing about their own economic welfare.
renders them almost immune to criticism. As a consequence, any proposal to eliminate them would prove intensely controversial—as it was not in Britain, where law reform commissions could dispense of the matter without great passion. Here, dispersed political power, combined with the judiciary’s portion of that power, render juries political but, paradoxically, sheltered by their status as representatives of the people.

III. THINKING ABOUT THE JURY

Today’s jury is a comparatively new institution. The controversy over the jury is ancient, though the jury’s present functions dictate the form of the controversy. Recognizing both these facts ought to change the shape of the debate about the modern jury. Neither one, of course, dictates any normative stance toward the modern jury. Both those who argue for an extension of its egalitarian sway and those who view it as an unjustifiably irrational relic have strong arguments. My thesis does, however, have one strong implication for the contemporary jury debate: both those who attack and those who defend the modern jury ought to be clear about the political character of the institution under discussion. It is perfectly fair to argue that juries are inconsistent, expensive or unreliable finders of facts. All of those charges may be true. But one must then go on to face the political implications of this proposition: one cannot simply discuss the jury as if it were an entirely utilitarian institution to be judged by how well it performed a factfinding function. The jury’s supporters have a similar burden to bear. Praising its common sense or noting the extent of its agreement with the judge will not do: to defend the jury one must defend a peculiar, unelected and unaccountable political institution. The debate is about the shape of government as much as it is about the reconstruction of facts.

96 A modest demonstration of this proposition emerges if one compares the press treatment of grand juries, which typically sit for extended periods of time, with that accorded trial juries. The former are occasionally excoriated; the latter rarely. Even when thought to be wrong, trial juries usually draw sympathetic understanding for the difficulty of their job, not attacks for stupidity or bias.

97 When the Secretary of State for Scotland asked a commission to report on jury trial in that land, it disposed of its task in about 40 pages, dividing 7-3 with the majority favoring the continuation of the limited (though little used) opportunity for jury trial and the minority recommending its complete abolition. Civil Jury Trial in Scotland: A Report by A Committee Appointed by the Secretary of State for Scotland, Great Britain Parliament Papers by Command, Command no 851 (Edinburgh; Her Majesty’s Stationary Office 1959).