Civil Jury as a Regulator of the Litigation Process

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The Civil Jury as Regulator of the Litigation Process

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This paper is not about juries as such, but about their role in the complex of adjudication, bargaining and maneuver that constitutes the American system of civil litigation. I have elsewhere insisted, not entirely facetiously, that we should refer to this as a system of "litigotiation," in which adjudication and negotiation are blended into a single system of disputing in the vicinity of courts. In many sectors of our disputing system, jury trials are thought to form the apex of a pyramid of cases, most of which are settled "in the shadow" of expected jury verdicts. The effects of juries then depend upon professional and non-professional legal actors' estimates of the propensities of juries. These estimates reflect what juries have done—so far as this is known to subsequent legal actors. Thus, the inquiry is a double one into what juries do and how we form our working knowledge of what they do.

† Evjue-Bascom Professor of Law and South Asian Studies and Director, Disputes Processing Research Program, University of Wisconsin-Madison. My curiosity about the question addressed in this paper was provoked by participating in the Chief Justice Earl Warren Conference in Boston, Massachusetts, June 12-15, 1986. (A revised version of my presentation there was published in The American Civil Jury: Final Report of the 1986 Chief Justice Earl Warren Conference on Advocacy in the United States (1987).) Further stimulation was provided by responses to presentations at Columbia Law School, the University of Pennsylvania Law School, the Proseminar on Public Law at Rutgers University, the Center for Negotiation and Conflict Resolution at Rutgers University-Newark, and the Centre for Criminology, University of Toronto. In its meandering course to the present paper, my thinking about juries has benefited from the helpful comments of Bruce Ackerman, Christopher J. Brown, Robert Hayden, Ethan Katsh, Elizabeth Loftus, Henry Monaghan, and Maurice Rosenberg. I am indebted to Patricia A. Lombard of the Federal Judicial Center for patiently explaining puzzling features of the federal judicial statistics, to Christopher J. Brown and the editors of the Wisconsin Law Review for graciously permitting me to cite from their unpublished research, to Gerald Williams for permission to reproduce his data in Table 15, to Shari Diamond for permission to reproduce the table in note 73, to David Rottman of the National Center for State Courts for providing data on state court juries, and to William Bogert and Ross Cranston for valuable bibliographic help. Suzanne Cohen, David Tabachnik, Seth Galanter and Jesse Wing have provided capable and indispensable research assistance. Brenda Storanand produced the manuscript with her usual efficiency and aplomb.

This paper begins with contemporary discontent with civil juries. It proceeds to sketch the contours of their work and how these have changed over the past generation. It then examines the way that practitioner and public knowledge about juries is formed, communicated and used. In exploring the use of this jury knowledge in the litigation process, questions are raised about the adequacy of the received notion of hierarchic control that underlies the pyramid and bargaining-in-the-shadow images. Finally, this paper examines how jury knowledge combines with other features of the litigation process to contribute to the sense of instability and unpredictability that feeds the controversy that was our starting point.

I. THE CIVIL JURY: ITS FANS AND CRITICS

As we enter the last decade of the twentieth century, the civil jury is largely an American institution. In England, a series of restrictions reduced the use of juries from 100 percent of civil trials in 1854 to two percent a century later. In 1963, “there were only 27 jury trials out of a total of 962 in the Queens Bench division.” “All that remains today is an occasionally used statutory right to jury trial in ... actions for libel, slander, malicious prosecution and false imprisonment.” Civil juries are used more often in Scotland and the Republic of Ireland.

In Canada, civil juries are little used outside of Ontario and British Columbia. Ontario juries were reduced to six members—five votes needed for decision—in 1955. In 1971, some six

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1 See Henry W. Ehrmann, Comparative Legal Cultures 97 (Prentice-Hall, 1976). With few exceptions, all civil jury trials in the world take place in the United States.
2 Sir Patrick Devlin, Trial By Jury 129-33 (Stevens & Sons, 1956). Use of civil juries was restricted during World War I; in 1933, recourse to a jury became a matter of judicial discretion.
3 Sally Lloyd-Bostock, The Jury in the United Kingdom 10 (paper delivered at the Annual Meeting of the Law and Society Association, Madison, Wisconsin, June 8-11, 1989) (quoting Michael Zander). Lloyd-Bostock estimates that there have been one or two dozen civil jury cases a year since 1963.
4 Id. Even in defamation cases, a jury will “be excluded if the court considers that the case will involve a prolonged examination of documents, etc.” James Driscoll, The Decline of the English Jury, 17 Amer Bus L J 99, 107 n 58 (1979).
5 McKeown v Arrol & Co., 1974 SC 97; Rodgers v James Crow & Sons, 1971 SC 155. In Northern Ireland, personal injury cases were tried by juries until 1988, when this was turned over to judges. Simpson v Harland and Wolff, 13 NIJB 10 (Court of Appeal, Civil Division, 1988).
6 Arnott v O'Keeffe, 1977 IR 1.
percent of all actions in the Supreme Court of Ontario, the trial
court of general jurisdiction, were on the jury list, as were some 15
percent of actions in the County Court. The great bulk of these
were motor-vehicle injury cases. The Ontario Law Reform Com-
mission noted that “[t]he frequency of requests for a jury in non-
motor vehicle cases is negligible.”9 In Australia, civil juries are
available in all of the states except South Australia, but are rarely
used outside New South Wales and Victoria.10 In New South
Wales, juries are used mostly in industrial-accident cases.11 In Vic-
toria, where juries are used mostly for industrial-accident and mo-
tor-vehicle cases, requests for juries—usually six members—are
frequent, although jury trials are rare.12 In the civil law and social-
ist countries, where there are no civil juries, the important vehicles
for lay participation are the lay assessors or judges who sit on com-
bined benches with professional judges.13

In the United States, the civil jury is a familiar and well-
accepted institution. Approximately one-sixth or one-fifth of all
adults have served on a jury.14 Three-quarters of adults know
someone who has served.15 Those who serve on juries tend to find
the experience a positive one and to emerge with more favorable
views of the judicial system and of the jury as an institution.16 The

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9 Id at 335.
10 Ross Cranston, et al, Delays & Efficiency in Civil Litigation 146-48 (Australian Insti-
tute of Judicial Administration, 1985).
11 Id at 147.
12 In Victoria, more than half the cases entering the “major lists” from 1978 to 1981
were on the jury list. But of the jury-list cases disposed of in 1980-81, only 6.7 percent were
tried to verdict; another 11.8 percent were settled during trial and fully half settled on the
day of hearing before trial commenced. Peter Haynes, Julia Pullen and I.R. Scott, A Survey
of Civil Case Progress in the Supreme Court of Victoria tables 2, 14 (1983) (unpublished
paper on file with author).
13 For example, the “lay judges” described in John P. Richert, West German Lay
Judges: Recruitment and Representativeness (University Press of Florida, 1983); Kalman
Kulcsar, People’s Assessors in the Courts: A Study on the Sociology of Law (Akademiai
Kiado, 1982); Maria Borucka-Arctowa, Citizen Participation in the Administration of Jus-
tice: Research and Policy in Poland, 1976 Jahrbuch für Rechtssoziologie und Rechtstheorie
286.
14 A Hearst Corporation survey estimates that 16 percent of adults have served on ju-
ries. The American Public, The Media and the Judicial System: A National Survey on
Gallup estimates 20 percent. Attitudes Toward the Liability and Litigation System: A Sur-
vey of the General Public and Business Executives, No. 81168 at 185 (The Gallup Organi-
zation, 1982) (“Gallup Survey”).
15 Gallup Survey at 185.
16 Bettyruth Walter, The Civil Juror, in John Guinther, The Jury in America 283, 305
(Facts on File Publications, 1988) (97 percent of those having served on juries thought the
jury a good system); William R. Pabst, Jr., G. Thomas Munsterman and Chester H. Mount,
American public is reasonably well-informed about jury trials. Many Americans think that jury awards are excessive. But on the whole, Americans think the jury is a commendable and useful institution. Only a tiny minority would abolish it.

This general approval is echoed by judges who have experience with civil juries. In the early 1960s, the University of Chicago Jury Project surveyed a national sample of 1038 trial judges. Sixty-four percent subscribed to the response that the civil jury system was "on balance ... thoroughly satisfactory," while another 27 percent thought it had serious disadvantages that could be and should be corrected. Only nine percent thought that "[t]he disadvantages ... outweigh the advantages so much that its use should be sharply curtailed."

The same strong judicial endorsement of civil juries is manifested in two recent surveys of American judges. In a 1987 Louis Harris poll of 200 federal and 800 state judges who spend at least one-half of their time on general civil cases, there was virtually no disagreement with the assertion that "jurors usually make a serious effort to apply the law as they are instructed." More than three-quarters believed that the right to jury trial should be preserved in routine civil cases, and the great majority tended to oppose almost all suggestions for restriction of the jury. Just a few months before the Harris Judges' Poll, the National Law Journal

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For example, 79 percent know that prospective jurors can be challenged and 75 percent know that a judge or an appellate court can alter a jury verdict. Hearst Survey at 16-17.

Louis Harris and Associates, Public Attitudes toward the Civil Justice System and Tort Law Reform, No 874017 at 14, 17 (1987).

Hearst Survey, at 29, reports that 85 percent think it useful; 6 percent would abolish it.

Harry Kalven, Jr., The Dignity of the Civil Jury, 50 Va L Rev 1055, 1072-73 (1964). Similar approval was voiced by respondents to a series of surveys conducted by Professor Maurice Rosenberg. Only 13 percent of 90 new state trial judges polled in 1965 thought that the civil jury needed substantial restrictions; the overwhelming majority were satisfied with the institution. This was confirmed by polls of more seasoned judges. Maurice Rosenberg, The Trial Judges' Verdict on the Civil Jury, 5 Trial Judges' J 5 (1966); Comment, With Love in Their Hearts But Reform on Their Minds: How Trial Judges View the Civil Jury, 4 Colum J L & Soc Probs 178 (1968).

For a strong personal endorsement by a judge who served as a juror, see Shirley S. Abrahamson, Justice and Juror, 20 Ga L Rev 257 (1986).

Louis Harris and Associates, Judge's Opinions on Procedural Issues, No 874017 at 76 (1987) ("Harris Judges' Poll").

Id at 76-90.
polled a random sample of 348 state and 57 federal judges, representative of all judges in the United States. On the whole, the judges thought civil jurors had been doing the right thing. Three-quarters reported that they disagreed with jury verdicts in civil cases no more than ten percent of the time, and only six percent thought jury awards had been excessive "in many cases."

This general commendation contrasts with the disdain for juries that flourished in the post-World War II years. Many intellectuals viewed jurors as incompetent decisionmakers, animated by sentimentality and prejudice, epitomized by southern, white juries who refused to convict those who victimized blacks. The negative view of juries was given forceful expression in Jerome Frank's Courts on Trial, published in 1949. Frank, a judge on the United States Court of Appeals for the Second Circuit and a prominent legal realist, portrayed juries as incapable of rational decisionmaking. At the same time, those who managed courts blamed the jury for their institutional problems:

[T]he slow process of jury trial constitutes a bottleneck and is the cause of all the delay which has come to characterize the courts and brand the courts in public estimation as dilatory. It is the jury system which is principally responsible for the flight of commercial litigation from the courts. Businessmen will not put up with it.

During the 1960s and 1970s, such institutional concerns combined with doubts about the ability of juries to inspire a scatter of judges and lawmakers to call for abolition of the civil jury.
Since that time, there has accumulated a formidable body of empirical research on juries that undermines the premises of the jury’s critics. On the “efficiency” side, studies showed that juries could not be credited with delay and congestion. And on the “competence” side, there is a mounting body of evidence suggesting that accounts of jury irrationality were greatly exaggerated. The picture of juries that emerges from the research is, for the most part, a portrait of an admirable institution. The estimation of juries undoubtedly benefits from the general skepticism about experts and declining confidence in government. Positive feelings about juries have been reinforced by a long series of highly visible cases—involving Angela Davis, John Mitchell and others—in which juries have shown themselves both resistent to prosecutorial zeal and independent of public opinion.

Although intellectual disdain for juries has largely receded, the civil jury has faced a more focused attack in the 1980s. Observers who think America is in a litigation crisis view juries as part of the problem. As with the earlier criticism, there are institutional efficiency concerns and concerns about decisionmaking competence. Some judges see juries as a cumbersome obstacle to judicial efficiency, preventing needed streamlining of procedures. This pursuit of “efficiency” has led to widespread use of smaller juries and less trials is to clean up the backlog of cases, maintain calendars current, and obtain the better and more efficient administration of justice.” Id at 570.


31 Hans Zeisel, Harry Kalven, Jr., and Bernard Buchholz, Delay in the Court (Little, Brown & Co., 1959). A recent study of delay in the state trial courts of 14 cities concluded that “[o]n the civil side there appears to be virtually no relationship between jury trial rates and median times [to disposition].” Barry Mahoney, Larry L. Sipes and Jeanne A. Ito, Implementing Delay Reduction and Delay Prevention Programs in Urban Trial Courts 14 (National Center for State Courts, 1985).


stringent decision rules. But to most critics, the jury's sin is not its procedural cumbrousness, but rather its incompetence, arbitrariness and sentimental bias toward claimants. As one attorney puts it:

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\text{[E]very jury is a one-night stand. It is not very expert, it is not held accountable, and it never has to live with the consequences of its actions. Civil litigation often is an opportunity for juries to play Robin Hood and redistribute wealth. As a result verdicts range all over the place. . . . Sometimes it seems that the less tangible the harm, the greater the verdict. . . . Big verdicts on flimsy claims send an unhealthy message: that we all are victims, and that if life hits us with any unexpected unpleasantness, someone must have broken the law. . . . Media coverage of big verdicts contributes to an Irish Sweepstakes kind of mentality: A person who suffers an accident thinks not just of filing suit, but of striking it rich.}
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A defense attorney concerned with "the crisis of skyrocketing jury awards" concurs:

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\text{Sympathy to an injured party, together with a latent hostility to anonymous and rich corporate America and its insurance carriers, often set the stage for enormous verdicts which exponentially exceed the earning power of the product liability plaintiff. The present system is unfair in that the amount of the jury verdict often is not correlated to the injury a plaintiff has suffered.}
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Ann § 2A:80-2 (West 1976) (Civil cases may have a jury of six). "By April 1973, 56 of the 94 federal district courts were employing some form of jury with fewer than twelve members." Edward N. Beiser and Rene Varrin, Six-Member Juries in the Federal Courts, 58 Judicature 424, 425 (1975). In Colgrove v Battin, 413 US 149 (1973), the Supreme Court held that a six-member civil jury in a United States 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 at 5.

** The Supreme Court, in Johnson v Louisiana, 406 US 356 (1972), and Apodaca v Oregon, 406 US 404 (1972), ruled that states need not require jury unanimity. The Court allowed proportions of nine out of 12 in Louisiana and ten out of 12 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 at 9.


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

In real life, any theory will do as long as it gets the case to the jury, whose natural sympathies will usually produce a large judgment without much concern for the legal technicalities.\(^{37}\) Fear of juries leads defendants to settle suits, whatever their merits. High settlements lead to skyrocketing insurance rates. And soon . . . the activity in question . . . is no longer economically practicable.\(^{38}\)

If the jury is thought to be jointly liable for the litigation crisis, the assault on it is relatively restrained, compared to the excoriation of greedy lawyers and activist judges, who are seen as the real culprits. The absence of any significant campaign to abolish the civil jury may reflect a judgment that the constitutional guarantee of trial by jury presents too formidable a barrier to be overcome. But proposals abound to limit jury awards by caps on "non-economic" damages and punitive damages and by changes in liability rules, for example, joint and several liability.\(^{39}\) Other proposals would divert cases to arbitration and other "alternatives" to jury trials.\(^{40}\) Yet other proposals would dispense with the jury in cases deemed too complex for lay decisionmakers.\(^{41}\)

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\(^{37}\) This reflects a durable commonplace among elite lawyers. Thus, a liberal Harvard law professor off-handedly observed that

the impulse that accounts for the volume of personal injury litigation is not the demand of the parties for an adjudication under law, but the plaintiff's desire for access to a jury where the governing legal rules are at odds with popular sentiment.


\(^{39}\) From 1986 through 1989, 32 states modified or abolished joint and several liability; nine states imposed caps on non-economic damages; and 27 states enacted limitations on punitive damages. American Tort Reform Association, *Tort Reform Record* 2 (Dec 31, 1989).

\(^{40}\) For the most part, these would displace bilateral negotiation rather than reduce the number of jury trials.

\(^{41}\) Warren E. Burger, in *Thinking the Unthinkable*, 31 Loyola L Rev 205, 207 (1985), suggests "ponder[ing] whether fundamental structural changes must someday be made in the . . . jury system in civil cases," and calls for limiting the use of juries in complex civil cases. Compare the results of the two 1987 polls of trial judges, in which one shows that a majority favor dispensing with juries in certain complex cases, *Harris Judges' Poll* at 81-82 (cited in note 18), and the other reports a slight majority disagreeing with the suggestion that the Seventh Amendment should be changed in order to exclude juries from certain complex civil cases, *National Law Journal Survey* at S-8 (cited in note 24).
Contemporary critics of the jury are not animated by an alternative vision of the civil justice system. For the most part, their discontent remains within the legalistic mainstream, but tinctured by a concern for efficiency and an abounding faith in expertise. The most audible critiques of present arrangements typically incorporate a heavy dose of nostalgia for the good old days when the system worked. Defenders reply in kind. The debate is framed in terms of admiring regard for the time-tested institutions of the common law.

II. WHAT JURIES DO

A. The Role of the Jury

The first thing to note about civil juries is that there are relatively few of them. Overall, jury trials take place in less than one percent of cases terminated in state courts and in just over two percent of terminations in federal courts. Just how few differs from field to field. Tort cases go to juries more frequently than cases in other fields. Within the tort field, patterns of jury invo-

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42 On alternative technocratic and communalist bases for criticism of contemporary legal arrangements, see Marc Galanter, Legality and Its Discontents: A Preliminary Assessment of Theories of Legalization and Delegalization, 1980 Jarbuch für Rechtssoziologie und Rechtstheorie 11-26 (1980).

43 Examples abound: throughout 1985, the Insurance Information Institute ran a full-page advertisement in national magazines (my example is from New Yorker 59 (Sept 16, 1985)), depicting a shell-pocked statue of blindfolded justice encased in scaffolding, and bearing the heading “Now let’s restore civil justice.” It began with a lament that “[y]ear after year, our civil justice system has become slower. More costly. Less fair to the very people it was meant to help.” The theme of “[r]estoring fairness, efficiency and predictability to our civil liability system” that “is no longer fair . . . no longer efficient” recurs in a recent advertisement by AEtna, entitled “AEtna on the Lawsuit Crisis and Your Insurance,” that appeared in the Wall Street Journal on April 8, 1986. This same revivalist theme underlies a series of Wall Street Journal editorials, culminating in one applauding Senator Robert Kasten’s products liability bill on the ground that “[t]hese reforms are modeled after the law from the 1200s in England to about 25 years ago in the U.S. In tort law moving backward would be a step forward.” Interstate Liability, Wall St J 20 (May 12, 1986).

44 See, for example, Scott Baldwin, Don’t Debase a 200-Year-Old Tradition, NY Times B8 (Sept 1, 1985), who cautions that “[t]he system, which dates back two centuries, is not broken, but the tinkerers would do radical repair that would punish innocent victims and overwhelm the courts with endless lawsuits spawned by the complex, unclear and unneeded legislative proposals.”

45 Among the six state courts for which data is available, jury trials as a percentage of overall civil dispositions ranged from 0.7 percent in Hawaii Circuit Court, Table 11, to 3.7 percent in Massachusetts Superior Court, Table 12.

46 See Table 1.

47 In each of the six state court systems for which 1988 statewide data is available, juries were found most frequently in tort cases—from 1.9 percent of tort disposi-
cation differ from topic to topic: in medical malpractice, verdicts made up some three to four percent of paid claims. Much smaller portions of cases in other fields are tried by juries. In the seven state courts of general jurisdiction for which we have data, the portion of contracts dispositions by jury trial ranges from three-tenths of one percent to 1.7 percent. In the federal courts, leaving aside torts, only civil rights (six percent in 1988), antitrust (4.1 percent in 1988), "other diversity" (three percent in 1988), "other federal question" (2.6 percent in 1988), and contract cases (2.5 percent in 1988) have jury trials in more than two percent of dispositions. Overall, there are between 50,000 and 80,000 civil jury trials each year in the United States—out of a total one-quarter million civil cases in the federal courts and about eight million in state courts of general jurisdiction.

But the impact of these jury trials is vastly disproportionate to their incidence. We can apply to the civil jury Kalven and Zeisel's observation about the criminal jury:

[A]t 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

Hawaii Circuit Court to 4.7 percent of tort cases in Florida Circuit Court. See Tables 10-15. 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 one percent of a large sample of paid-liability claims in automobile insurance cases in 1977. James K. Hammitt, Stephen J. Carroll and Daniel A. Relles analyzed verdicts in a nationwide sample of over 20,000 automobile insurance claims which closed with some payment by twenty-nine insurers during a two-week period in 1977. They report that "verdicts were returned in only about two hundred cases." Hammitt, Carroll and Relles, Tort Standards and Jury Decisions, 14 J Legal Stud 751, 753 (1985).

Danzon reports that seven percent of her sample of six thousand malpractice claims closed in 1974 and 1976 were tried to verdict. Only some 57 percent of all claims were paid something, including just over a quarter (28 percent) of the seven percent tried to verdict. Patricia M. Danzon, Medical Malpractice: Theory, Evidence and Public Policy 32 (Harvard University Press, 1985).

See Table 8.

See Table 5.

Dr. Robert Roper, then at the National Center for State Courts, estimated that there were about 48,000 civil jury trials in the state courts in 1984; in that year there were 5510 jury trials in the federal courts. Telephone interview, 1986. Compare Guinther's estimate of 45,000 to 75,000 civil jury trials in state courts in 1985. Guinther, The Jury in America at 167 (cited in note 16).
stage. In a sense the jury, like the visible cap of an ice-berg, exposes but a fraction of its true volume.22

To shift metaphors, we might visualize the jury as part of a system of "bargaining in the shadow of the law." In fact, the shadow that envelopes maneuver and negotiation in the legal arena is cast not only by legal decisions, but also by other factors such as cost, delay, risk, party capability and so forth.23 The jury casts a shadow across the wider arena of claims and settlements by communicating signals about what future juries might do. Of course, the jury is not the only source of these predictive shadows.24

The transmission and reception of these signals is a crucial aspect of the jury institution. As an institution, the reality of juries includes the images of them held by lawyers, judges, insurers, litigants, and wider audiences. Juries are present as a threat and as a supply of markers, both variously interpreted. Hence, what gives rise to these interpretations is part of the jury process; what changes these interpretations is as crucial as changes in jury behavior.

This threat and signal function of the jury derives from the location of the jury in our legal system. 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.25 But the jury is located at the "top" of the system

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23 The "bargaining in the shadow" image is set out in Robert H. Mnookin and Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L J 950 (1979); the elaboration can be found in Marc Galanter, Justice in Many Rooms: Courts, Private Ordering and Indigenous Law, 19 J Legal Pluralism and Unofficial L 1 (1981).
24 Numerically, juries provide only a minority of authoritative decisions by courts. Analyzing some 1649 cases in federal and state courts in five localities, Kritzer found that seven 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. Herbert M. Kritzer, The Form of Negotiation in Ordinary Litigation, Disputes Processing Research Program, Working Paper 7-2 at 12 (University of Wisconsin, 1985). Default judgments have been omitted from this computation.
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.\footnote{54}

Although a tradition of experimental studies has revealed much about what goes on “inside the jury,”\footnote{55} we know very little about the functioning of juries—when and where they are present, what they decide, and what effects these decisions have. In the course of the 1980s, our fund of this “outside” knowledge about civil juries has been enormously increased by the pioneering work of the Institute for Civil Justice, by the enhanced data collection efforts of the courts in several states and of the National Center for State Courts, by surveys commissioned by bar groups, and by the explorations of individual scholars. Without recounting their findings in detail, I propose to draw from these sources some points that illuminate the relation of the jury to litigation patterns and the perceptions of crisis that surround them.

B. Where and When Juries Sit

In many state courts, the civil jury is overwhelmingly a tort institution. In Cook County, Illinois, from 1960-79, “fewer than 2 percent of civil trials involved non-tort issues.”\footnote{56} In San Francisco County during this same period, non-tort cases were in the range of six percent.\footnote{57} Stephen Daniels gives subject matter breakdowns for civil jury trials in the early 1980s for state courts of general jurisdiction in six other metropolitan counties.\footnote{58} Four have very

\footnote{54} How much do trial and appellate judges exercise their prerogative to modify and nullify the jury’s decisions? See Section D. For an argument that there has been sharp increase recently in judicial interference with jury decisions, see Eric Schnapper, Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts, 1989 Wisc L Rev 237. On the limitations of this analysis, see note 120.

\footnote{55} Hastie, Penrod & Pennington, Inside the Jury (cited in note 30); Hans & Vidmar, Judging the Jury (cited in note 30); Kassin & Wrightsman, The American Jury (cited in note 30).


\footnote{57} Michael G. Shanley and Mark A. Peterson, Comparative Justice: Civil Jury Verdicts in San Francisco and Cook Counties, 1959-1980 ? (Institute for Civil Justice, 1983). This study does not seem to give a precise count, but the combined and non-exclusive “contract/business tort” category includes six percent of all jury trials. In addition, there is a miscellaneous category that includes five percent of jury trials, but that seems to be made up mostly of tort cases. Id at 83.

\footnote{58} Stephen Daniels, Punitive Damages: Storm on the Horizon?, Preliminary Report of the American Bar Foundation Punitive Damages Project, Prepared for Delivery at the
similar patterns of almost exclusively tort juries; the two exceptions have about 19.5 percent and 29.5 percent non-tort juries.\textsuperscript{61}

Available statewide figures for courts of general jurisdiction in nine states suggest that the civil jury is not so exclusively confined to tort cases.\textsuperscript{62} The tort portion of civil jury trials ranged from 46.8 percent to 82.8 percent: the median percentage of tort juries was 67.3 percent.\textsuperscript{63} Contracts cases are usually the next largest portion of jury trials—from 8.4 percent to 19.3 percent (median 15.3 percent) in the seven courts of general jurisdiction for which we have statewide data.\textsuperscript{64}

The most detailed picture of juries in a single state is Patrick Hubbard’s study of South Carolina, which collected information on verdicts in 26 of the state’s 46 counties, containing 80 percent of its population and accounting for 80 percent of case filings, for the years 1976 to 1985.\textsuperscript{65} In South Carolina, over two-thirds of all jury verdicts were in tort cases: this included over 40 percent in motor vehicles cases, roughly three percent in products liability cases, three percent in medical malpractice cases, and five percent in premises liability cases. Most of the remainder—more than 20 percent—were contracts cases.

In the federal courts, the distribution of civil juries is somewhat different.\textsuperscript{66} As displayed in Table 5, 5920 civil cases terminated by jury trial in 1988. Of these, 2549 (43.1 percent) were tort

\textsuperscript{61} Id.

\textsuperscript{62} These states are the only ones that furnished to the National Center for State Courts jury trial data for the year 1988 that would permit this calculation. \textit{State Court Caseload Statistics: Annual Report 1988} part II, table 2 (National Center for State Courts, 1990).

\textsuperscript{63} See Table 7.

\textsuperscript{64} See Table 8. Property cases are the scene of the next largest—but far smaller—number of jury trials. In the seven 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 9. In six states we can assemble a rough picture of how all civil jury trials are distributed by subject matter. Tables 10-15.

\textsuperscript{65} F. Patrick Hubbard, "Patterns" in Civil Jury Verdicts in the State Circuit Courts of South Carolina: 1976-85, 38 SC L Rev 699 (1987). Additional data from the study may be found in South Carolina Civil Jury Verdict Research Project, \textit{Report on Findings} (South Carolina Law Institute, 1986). Unlike the ICJ, see notes 58 and 59, and Daniels, see note 60, who rely on published jury verdict reports, and unlike the NCSC reports, see note 62, which are aggregates derived from recorded filing data, the South Carolina study was based on examination of individual case files in the county courthouses.

\textsuperscript{66} The Federal figures are for terminations, but some state figures and the ICJ studies, see notes 58 and 59, are based on a count of all jury trials commenced and include drop-outs—directed verdicts, dismissals, settlements—and hung juries. See Audrey Chin and
cases, another 1213 were civil rights cases (20.5 percent), and 1123 were contracts cases (19 percent). The proportion of tort cases among federal civil jury trials has fallen dramatically in recent decades. In 1961, tort cases accounted for 2102 of 2585 civil jury trials, or 81.3 percent; in 1970, torts accounted for 2593 of 3409 civil jury trials, or 76.1 percent; in 1980, torts accounted for 2169 of 3920 civil jury trials, or 55.3 percent. Although torts remain a large component of federal civil jury trials, the number of non-tort civil jury trials has increased much faster. From 1961 to 1988, tort juries increased just 21.3 percent, from 2102 to 2549, but in this same twenty-seven-year period, non-tort jury trials increased by 697.9 percent, from 483 to 3371. That is, the rate of increase of non-tort jury trials was nearly thirty-three times as great as the rate of increase of tort juries.

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 about two percent of all civil cases in American courts, but they conduct a much higher portion of civil trials, from seven to ten percent of all civil juries, if our earlier estimates of the number of state civil juries are in the right range. And, given the greater preponderance of torts in state court jury trials, the federal courts are the scene of an even higher percentage of non-tort civil jury trials.

C. What Juries Decide

It is often assumed that juries are more prone to find liability than are judges. 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.


* 1961 is the first year in which the data are presented in a way that is readily comparable to that in the current reports. Earlier, the count of jury trials was for “judgment on jury verdict,” while in later years what is counted is disposition “during or after (jury) trial.” Thus, the number of jury trials in later years includes cases that settled after jury trial was commenced and cases where a jury verdict did not lead to entry of a judgment. Comparison of figures from before 1961 with later ones will exaggerate the recent increase in the number of civil juries.

** See Tables 2-4.

*** But the portion of tort terminations by jury trial fell from 11.0 percent to 5.8 percent in this period.

*6 See Tables 2-5.

*7 See note 51.
Judges and juries agreed on liability in 79 percent of the cases, and the disagreements were approximately even—that is, in ten percent of cases judges would have found liability where juries did not and in 11 percent of the cases in which judges would not have found liability where juries did. This rate of agreement compares favorably with the consistency achieved by other pairs of decision-makers engaged in making complex human judgments.

Looking at the Institute of Civil Justice studies of jury verdicts in Cook County, Illinois, and San Francisco County, one is immediately struck by the stability of the institution over a quar-

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Kalven, 50 Va L Rev at 1065 (cited in note 20). 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.” Id at 1063.

Shari S. 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.” Shari Seidman Diamond, Order in the Court: Consistency in Criminal-Court Decisions, in C. James Scheirer and Barbara L. Hammonds, eds, Psychology and the Law 119, 124-25 (American Psychological Association, 1983). The following table includes the University of Chicago Jury Study criminal jury findings, which are comparable to the civil jury findings noted above:

<table>
<thead>
<tr>
<th>Decision makers</th>
<th>Stimulus</th>
<th>Decision</th>
<th>Agreement between 2 judges</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSF versus NAS peer reviewers</td>
<td>150 grant proposals submitted to NSF</td>
<td>To fund or not to fund (half funded by NSF)</td>
<td>75%</td>
</tr>
<tr>
<td>7 employment interviewers</td>
<td>10 job applicants</td>
<td>Ranked in top 5 or in bottom 5</td>
<td>70%</td>
</tr>
<tr>
<td>4 experienced psychiatrists</td>
<td>153 patients interviewed twice, once by each of 2 psychiatrists</td>
<td>Psychosis, neurosis, character disorder</td>
<td>70%</td>
</tr>
<tr>
<td>21-23 practicing physicians</td>
<td>3 patient-actors with presenting symptoms (Doctors could request further information and could order and receive test results.)</td>
<td>Diagnosis: correct or incorrect</td>
<td>67%, 77%, 70%</td>
</tr>
<tr>
<td>3576 judge-jury pairs</td>
<td>3576 jury trials</td>
<td>Guilty or not guilty</td>
<td>78%</td>
</tr>
<tr>
<td>12 federal judges</td>
<td>460 presentence reports (at sentencing council)</td>
<td>Custody or no custody</td>
<td>80%</td>
</tr>
<tr>
<td>8 federal judges</td>
<td>439 presentence reports (at sentencing council)</td>
<td>Custody or no custody</td>
<td>79%</td>
</tr>
</tbody>
</table>
There are changes, but they play out over a framework of stability, both in jury determinations of liability and in jury awards of damages. The proportion of juries holding defendants liable varies by location and case type. In their 1980s study of jury trials in 43 counties in ten states, Daniels and Martin found that in 30 of these counties, “[plaintiffs'] success rates cluster within the 55 to 65 percent range.” They found that “success rates in [vehicular accident] cases are consistently higher than in other types of cases.” In the 40 counties in which there were product liability verdicts, plaintiffs won 50 percent in only 14 of those counties. Rates of plaintiff success have increased markedly in Cook County during the 1980s but more modestly in San Francisco. This may reflect changing jury sentiments, but it more likely reflects changes in legal doctrine—for example, the introduction of comparative negligence in Illinois—and a change in the mix of cases reaching juries.

The median award of damages, in constant dollars, remained relatively constant over two decades, but in the 1980s there were marked increases in medians for certain types of cases. Mark Peterson concluded that

median jury award is related to the number of jury trials.

Usually the median jury award moved in the opposite di-

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74 In addition to the three volumes tracing jury verdicts from 1960 to 1979 in Cook County (Peterson & Priest, The Civil Jury (cited in note 58); Mark A. Peterson, Compensation of Injuries: Civil Jury Verdicts in Cook County (Institute for Civil Justice, 1984); Chin & Peterson, Deep Pockets, Empty Pockets (cited in note 66)) and the one volume comparing Cook and San Francisco Counties (Shanley & Peterson, Comparative Justice (cited in note 59)), there is a subsequent volume that extends the comparison to 1984 and includes additional California sites, Mark A. Peterson, Civil Juries in the 1980s: Trends in Jury Trials and Verdicts in California and Cook County, Illinois (Institute for Civil Justice, 1987).


76 Id at 333.

77 Id at 334-35, Table 2. In a General Accounting Office study of product liability litigation in five states from 1983 to 1985, only 45 percent of the cases were won by plaintiffs. United States General Accounting Office, Product Liability: Verdicts and Case Resolution in Five States, GAO/HRD 89-99, Table 2.1 at 24 (1989). On the tendency of liability verdicts generally to hover around the fifty percent mark, see George L. Priest and Benjamin Klein, The Selection of Disputes for Litigation, 13 J Legal Stud 1 (1984), explaining the tendency toward a fifty percent rate of liability findings as resulting from the parties' selection of disputes for trial and also explaining departures from that rate in terms of asymmetric stakes.

78 Peterson, Civil Juries in the 1980s at 16.

79 Id at 16, 19.

80 Id at 20-25.
rection from changes in the number of trials: When the number of trials fell, the median increased; when the number of trials increased, the median decreased. This relationship suggests that the total number of jury trials changed primarily because the number of small cases (i.e., those that involved modest damages) increased or decreased at different times.81

Average awards have risen sharply, but virtually all the growth in the average is due to a great increase in the size of awards in the largest cases. Most awards stayed within the same range for the entire period: the median award in Cook County actually fell by 22 percent between the 1960-64 period and the 1980-84 period.82

A few very large and visible awards account for most of the money awarded by juries. In Cook County, three-quarters of the total dollars were awarded to 15 percent of plaintiffs.83 Just three awards, each over two million dollars, accounted for fifty percent of all the money awarded by San Francisco juries in the last five years of the 1970s—and thus doubled the average award for that period.84

The pattern of jury awards seems to be a two-tier structure of modest and relatively stable awards in most cases and large and growing awards in a subset of cases.85 Peterson concluded that the trend toward more outcomes that are more favorable to plaintiffs resulted from the changing mix of cases presented to juries and the theories under which they were tried. "[T]he trend was not due to changes in jurors' ways of thinking but to the upsurge in serious trials involving multiple theories."86 The appearance of new theories may reflect not only changes in legal doctrine, but also changes in the culture and organization of the plaintiffs' bar—the way that cases are obtained and referred, the dissemination of learning and techniques, the sharing of information through networks and spe-

81 Peterson, Civil Juries in the 1980s at 29-31.
82 Id at 29. The median award in San Francisco more than doubled during this period, from $27,000 to $62,000, but the number of jury trials in San Francisco decreased by more than half, from 1357 to 616, while the number in Cook County remained virtually unchanged. Id.
83 Peterson & Priest, The Civil Jury at 8 (cited in note 58).
84 Shanley & Peterson, Comparative Justice at 58 (cited in note 59).
85 This subset of large cases is not necessarily growing in every location; as it appears to be doing in San Francisco. For example, Hubbard finds that in South Carolina, controlling for inflation, verdicts over $100,000 remained steady at roughly two percent of all verdicts. Hubbard, 38 SC L Rev at 739-40 (cited in note 65).
86 Peterson, Compensation of Injuries at 43 (cited in note 74).
cialized publications, and the accumulation of capital to bankroll expensive litigation.

Are jury awards of damages excessively high? Awards in jury cases are, on the whole, higher than those in cases tried by judges. In a study of tort dispositions in 24 metropolitan trial courts in one month of 1988, the median jury award was $26,500 and the median bench trial award was $8500.\textsuperscript{87} 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 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.\textsuperscript{88} Recent surveys of judges give no indication that judges and juries have diverged in the 30 years since then. Only six percent of the judges in the 1987 \textit{National Law Journal} survey thought jury awards had been excessive "in many cases."\textsuperscript{89} And in the \textit{Harris Judges' Poll}, only five percent of federal judges and four percent of state judges reported that they had reduced jury damage awards more than five times in the previous three years.\textsuperscript{90}

How can we explain the sustained and steep increase in awards to victims of serious injury? Two contrasting, but not mutually exclusive, explanations might be called the "recomputation" theory and the "changing consciousness" theory. By the recomputation theory, I refer to the notion that higher average jury awards reflect juror responses to inflation, real income growth, longer life expectancy, increased elderly income, and medical inflation. Analyzing the period 1975-84, Mark Cooper finds that

juries have adjusted their awards to reflect the basic social and economic changes that have taken place in the past decade. They are making awards to their peers that are consistent with the increasing economic output of society and value placed on life.\textsuperscript{91}

In this view, the apparent explosive increase in damage awards turns out to be "virtually no increase (1 to 10 percent) in product

\textsuperscript{87} David B. Rottman, \textit{Tort Litigation in the State Courts: Evidence from the Trial Court Information Network} 11 (National Center for State Courts, 1989).
\textsuperscript{88} Kalven, 50 Va L Rev at 1065 (cited in note 20).
\textsuperscript{89} \textit{National Law Journal Survey} at S8 (cited in note 24).
\textsuperscript{90} \textit{Harris Judges' Poll} at 87 (cited in note 22).
\textsuperscript{91} Mark N. Cooper, \textit{Trends in Liability Awards: Have Juries Run Wild?} 1 (Consumer Federation of America, May 1986).
liability awards” and “a modest (15 to 20 percent) increase in medical malpractice and wrongful death awards.”92 In this recomputation view, jurors are engaged in business as usual. The cases that come to them reflect a different mix of injuries and enhanced access to the courts for many victims; but juries do what they have always done—follow the law’s formula for awarding full compensation.

In contrast, the changing consciousness view, most eloquently set out in the work of Lawrence Friedman, sees a change in the way the jury relates to the law’s notions about damages. The law of damages promises to make the victim whole—this is nothing new. But in practice, this commitment has always been qualified by competing considerations—by recoil at the expense, reluctance to impose calamitous loss on the tortfeasor, skepticism about the capacity of money to assuage the harm, a sense that the victim must bear some of the cost of his bad luck. But appreciation of the devastating ramifications of serious injury has grown, along with awareness of the intricate and expensive technology available to cope with it. There is, Friedman reports, a general expectation that undeserved suffering can and should be compensated. He suggests that changing damage awards reflect the development of a notion of “total compensation”:

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

These unconscious restraints have now vanished. Almost nothing inhibits the jury (and the court) from searching for, computing, and awarding money that comes as close as one can to full compensation.93

92 Id at 31.
93 Lawrence M. Friedman, Total Justice 63 (Russell Sage Foundation, 1985). See also the observation in G. Edward White, Tort Law in America: An Intellectual History xv (Oxford University Press, 1980) that
The relative constancy of the jury response to routine injuries poses some difficulty for the recomputation theory, for if juries are responding to changes in lost earnings, higher medical costs, and so forth, it is not clear why their recalculation in the great bulk of cases is confined to adjustment for inflation. On the other hand, the selective pattern of increases at the serious injury end of the spectrum fits nicely with the changed consciousness view. A series of compensation studies has shown that victims with smaller injuries tend to be overcompensated compared to their economic losses, while those most seriously injured recover only a small portion of their economic losses. Thus, juries appear to be bringing recoveries into line with the reparative theory of the tort system by

A widespread attitude which associated injury with bad luck or deficiencies in character has been gradually replaced by one which presumes that most injured persons are entitled to compensation, through the legal system or some other mechanism.

Although it is evident that something has changed, it is less clear just how to characterize this shift. Friedman views it as change in popular culture, but Sanders suggests that it is not a general change in views but an increase in variance, so that there are now sizable portions, but not necessarily a majority, of the population that hold views more favorable to high accountability and high recovery. Joseph Sanders, The Meaning of the Law Explosion: On Friedman’s Total Justice, 1987 Am Bar Found Res J 601, 610 (1987). For a portrayal of an outcropping of the older, low remedy culture, and considerable unease about the newer, see the description of an Illinois county in David M. Engel, The Oven Bird’s Song: Insiders, Outsiders, and Personal Injuries in an American Community, 18 L & Society Rev 551 (1984). Some famous pockets of the most expansive and generous juries are to be found in the southern part of that same state. Richard Greene, “Plaintiff’s Paradise” Loses: A 2d County Faces Threat of Insurance Cutoff, Chicago Tribune 3 (June 8, 1985). In any case, it is necessary to explain why the impulse to general protection in America has taken the form of strong tort law rather than the kind of comprehensive welfare state that is found in other industrial societies.

Alfred F. Conard and his associates studied the reparations of all the victims of automobile accidents that occurred in Michigan in 1958. Examining payments from all sources, they found that

When the economic loss was under $1000, the chances were quite good that it would be paid for with something left over for psychic loss. But when the [economic] loss was a crushing one—over $10,000 for instance—it was very rare that the reparation even came close to matching economic loss. Two-thirds of the persons with such severe losses received less than a quarter of their economic losses, with no consideration of psychic losses.

Alfred F. Conard, et al, Automobile Accident Costs and Payments: Studies in the Economics of Injury Reparation 179 (University of Michigan Press, 1964). When tort recovery was examined separately, the same pattern of underpayment of large losses prevailed:

Most [victims with large losses] got less than 25 percent of their economic loss, and none passed 75 percent. The smaller the loss, the higher the percent of settlement; the larger the loss, the smaller the percent of settlement.

Id at 196. A national survey of compensation of victims of 1967 automobile accidents found the same pattern:

[Moving from] the lowest economic loss class to ... the highest economic loss class, the ratio of reparations to loss drops from 1.8 to 0.2. That is, those with
responding to a fuller notion of the whole loss in cases of cata-
strophic injury. Indeed, if we accept the notion of increased loss
implicit in Cooper's recalculation theory, we might conclude that
contemporary juries are, in effect, reducing the level of awards in
most small injury cases—perhaps again aligning the pattern of
recoveries with legal standards.

If contemporary juries have given new content to the norm of
"making whole" the injured—at least some of them—we should
not necessarily expect that the trend towards more expansive in-
terpretation of this norm will proceed indefinitely. Further devel-
opments of technology and of empathy may enlarge this "making
whole" commitment to a point where new limits assert themselves,
just as the commitment to a social norm of the absolute value of

small economic losses recover, on the average, nearly twice their loss, but those
with high economic losses (that is, $25,000 and over) recover only one-fifth.
United States Department of Transportation, 1 Economic Consequences of Automobile Acci-
cludes reparations from all sources of liability, not only tort. The tort system supplied
roughly one-third of all the money recovered by these victims, but "recovery under tort is
relatively less for large losses than for small losses." Those with the smallest economic losses
(less than $499) received 74.4 percent of their recovery through tort; those with losses of
$25,000 and over received only 17.3 percent through the tort system. Id at 44-45.
A survey of 53,164 automobile personal injury claims paid by insurers representing 61.7
percent of the nationwide auto insurance business conducted by an insurance industry re-
search group found that

There was a tendency for persons with small economic losses to receive more re-
imbursement per dollar of loss than persons with large economic losses under all
types of benefit sources, government and private. As a group, persons with eco-
nomic losses up to $2,500 received payments of more than $2 for every $1 of eco-
nomic loss. Those with losses between $2,501 and $10,000 received more than $1
for each $1 of loss, while those with losses between $10,0001 and $25,000 received
$.97 and the four persons with losses over $25,000 received $.79 per $1 of economic
loss.

1 Automobile Injuries and their Compensation in the United States 17-18 (All-Industry
Research Advisory Comittee, 1979). These are all automobile victim studies, so the low pay-
ments for big injuries may be influenced by low policy limits. But the same pattern appears
in a study of large product liability claims closed in 1985. Claimants with less than $100,000
of economic loss collected 5.31 times their economic loss, while claimants with more than $1
million of economic loss collected 0.58 of their economic loss. Lawrence W. Soular, A Study
of Large Product Liability Claims Closed in 1985 18 (American Insurance Association,
1986).

The pattern that recurs in these aggregate studies is echoed in Rosenthal's detailed
study of 57 personal injury cases: "The more a claim is worth the less favorable the recovery
is likely to be. . . . The smaller the claim, the better the chances of a fair return." Douglas

* Not all of Cooper's social and economic change factors are as relevant to small and
temporary injuries as to large and permanent ones, but some are. And if we imagine juries
taking into account increased expenditures, should we attribute to them a greater awareness
of other sources of compensation?
life may be read more restrictively as the technological possibilities and costs of sustaining life expand. In both cases, readiness to respond with heroic generosity when faced with instances of individual disaster leads to the question of what levels of response can be institutionalized on a routine and general basis.

These high awards, even if justified by established legal standards, may put pressure on other features of the civil liability system. One basic feature that may be less stable than it recently appeared is the notion of the "once and for all" award of damages, in which all uncertainties are compounded in a single lump sum. It has already been modified by the acceptance of the structured settlement, which has accustomed parties to the notion of a periodic and adjustable payout. Provision for optional or mandatory periodic payments had been enacted in fifteen states through 1989 and proposed in many more.\textsuperscript{96} We may be moving toward allowing juries to award an adjustable stream of payments, which would entail some administrative machinery for making subsequent adjustments.

The Institute for Civil Justice's jury studies display the powerful association of case-type with variations in process and outcome.\textsuperscript{97} The percentage of plaintiff victories differs substantially by case type.\textsuperscript{98} In addition, there is a patterned difference in damages by case-type and different trends in the level of awards—for example, while the typical award for other case-types increased, the median award in Cook County for the most numerous type, automobile accidents, "decreased steadily, if slowly, throughout the entire period."\textsuperscript{\textsuperscript{99}} These patterns held up when recoveries were controlled for identity of litigants and seriousness of injury. "Even when litigants and injuries were similar, a plaintiff in a work injury case received twice the award of a plaintiff in an injury-on-property

\textsuperscript{96} American Tort Reform Association, \textit{Tort Reform Record} 1 (Dec 31, 1989) (cited in note 39).
\textsuperscript{97} As Peterson summarized it,
Throughout the 20 years, Cook County seemed to have two tiers of justice. Plaintiffs in automobile accident, intentional tort, common carrier, injury on property, and dramshop cases received modest awards; for the same injuries, plaintiffs in work injury, malpractice, product liability, and (increasingly) street hazard cases received a great deal more.
Peterson, \textit{Compensation of Injuries} at 56 (cited in note 74).
\textsuperscript{99} Peterson & Priest, \textit{The Civil Jury} at 27.
These case-type patterns provide a more fine-grained instance of the Civil Litigation Research Project’s findings that the translation of injuries into claims and disputes differs substantially from field to field—for example, between tort complaints and discrimination complaints.¹⁰¹

Litigant identity did have an effect on outcomes, but it, too, operated on two tiers. Contrary to litigation explosion lore, businesses and government units were, on the whole, more successful with juries than were individuals.¹⁰² 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.¹⁰³ These patterns have remained constant over two decades.¹⁰⁴ The differential response to corporate defendants 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.¹⁰⁵

We should, of course, beware of taking a single county as representative. While the ICJ studies provide a comparison of Cook County with San Francisco,¹⁰⁶ we do not get a sense of profound differences between the culture of juries at these two sites. The uses of the jury, however, differ in these localities. For example, there are more contract and business cases in San Francisco than in Cook County, more high-stakes cases and fewer automobile accidents, and San Francisco juries were more likely to find liability.¹⁰⁷

¹⁰⁰ Chin & Peterson, Deep Pockets, Empty Pockets at 54 (cited in note 66).
¹⁰² Id at 42-43.
¹⁰³ Id at 44.
¹⁰⁴ An interesting alternative to the “deep pocket” theory—that the public holds corporations to a higher standard of behavior 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 Wrongdoing, 13 L & Human Beh 151 (1989).
¹⁰⁵ See notes 58 and 59.
¹⁰⁶ Shanley & Peterson, Comparative Justice at 11 (cited in note 59). Plaintiff victories were 59 percent in San Francisco, 52 percent in Cook County.
Similarly, Daniels’ study of punitive damages suggests very different local patterns in the incidence and amount of punitive damage awards.\textsuperscript{108} Apparently, differences in jury use and behavior are part of the persisting patterns of variation that we summarize under the rubric of “local legal cultures.”\textsuperscript{109} We may safely surmise that the regulars in any locality have different expectations about, for example, when juries should be used and what they are likely to do. How much these differences derive from differences in the culture of juries is unknown.\textsuperscript{110}

D. After the Verdict

We should be careful not to equate jury verdicts with the ultimate outcomes of disputes.\textsuperscript{111} Verdicts may be modified on post-trial motion or on appeal; or they may be discounted in negotiations with an eye to these contingencies, as well as others, such as difficulties of collection. It might be more accurate to think of the jury as providing the winner with a formidable bargaining counter, but one that may discounted, either slightly or completely.\textsuperscript{112} The contours of award attrition are only beginning to emerge.

Only a small fraction of jury verdicts are disturbed by appellate courts. A Federal Judicial Center study examined the histories

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\textsuperscript{108} Daniels, \textit{Punitive Damages} at Table 1 (cited in note 60).

\textsuperscript{109} On these persisting and patterned differences among norms, understanding, concerns and priorities shared by legal actors and audiences in different localities, see Marc Galanter, \textit{Adjudication, Litigation and Related Phenomena}, in Leon Lipson and Stanton Wheeler, eds, \textit{Law and the Social Sciences} 151, 181-82 (Russell Sage Foundation, 1987), and references cited therein.

\textsuperscript{110} By the “culture of juries” I refer to recurring propensities of juries in a locality, not to a communicated tradition of jury lore—although the latter may exist in some cases. Compare note 93.

\textsuperscript{111} Much of the literature of alarm about excessive litigation takes awards as equivalent to outcomes and often conflates settlements, awards and judgments. For example, a medical society president writes of “juries . . . awarding settlements akin to lottery prizes,” Gloria Aitken, Letter to the Editor, NY Times A26 (Oct 16, 1985). And a United States Senator reports that “[h]uge settlements are being awarded for ‘pain and suffering’ that far exceed the bounds of reasonableness.” Mitch McConnell, Letter to the Editor, NY Times A22 (June 8, 1986).

\textsuperscript{112} Jurors, in turn, may attempt to take this discounting into account. In a case in which a Texas jury awarded $64,000,000 to an injured worker, it was reported that the jurors also were well aware that big judgments often are reduced on appeal. . . . “We knew the case would be appealed,” recalls Ms. McIlroy, “so we wanted to give him a lot to start with before it was reduced.” Or as [another juror in the same case] reasoned, “I went along with it . . . because I figured it would be reduced by a judge or on appeal.”

of 18,528 cases that terminated after full trial in the federal district courts between July 1976, and the end of 1978. About one-third of these were jury trials. Twenty-two percent of the jury trials led to appeals, as did 24 percent of the bench trials. Seventeen percent of the jury appeals concluded with reversal or remand, as did 19 percent of the appeals from bench trials. Thus, results of jury trial were disturbed at the appellate level in only four percent of the cases.

Appeal is only one source of post-trial adjustment. Shanley and Peterson, studying verdicts rendered in 1982-84 in Cook County, Illinois, San Francisco and other California counties, found that 80 percent of jury verdicts remained unchanged after trial, but post-trial processes resulted in lower payments in 15 percent of cases (about one-quarter of the cases in which plaintiffs had prevailed). The larger the award, the smaller the percentage actually paid: 93 percent of awards under $100,000 was paid, compared to only 57 percent of awards of more than $10,000,000. Reductions differed little by locality or case-type, except that payouts were lower in cases involving intentional torts and punitive damages, and were higher in cases involving corporate or organizational defendants. A study of 198 verdicts of one million dollars or more returned in 1984 and 1985 found that almost three-quarters of these cases were subject to some reduction; disbursements to plaintiffs were only 43 percent of the original verdict amounts. A recent General Accounting Office study of product liability litigation in five states found that the ratio of payments to amounts awarded was 76 percent in cases where only compensatory damages were awarded, but dropped to 39 percent in cases where there were punitive as well as compensatory damages. The ratio of payment in all cases taken together was 40 percent. The amount of reduction differed from jurisdiction to jurisdiction.

114 Id at 41.
115 Id at 42.
116 Shanley & Peterson, Comparative Justice at ix-x (cited in note 59).
118 Mark A. Peterson reviewed post-trial action in 65 large punitive awards and found that approximately half were reduced and the amount paid in the whole 65 was approximately half the amount awarded. Punitive Damages: Preliminary Empirical Findings, 14-15 (Institute for Civil Justice, 1985).
119 GAO, Product Liability: Verdicts and Case Resolution in Five States at 45 (cited in note 77).
Is this kind of judicial control of awards a long-standing pattern or an innovation?\footnote{Schnapper, 1989 Wisc L Rev 237 (cited in note 56), examined all published federal appellate opinions for the period October 1984 to October 1985, and found that 64 jury verdicts challenged as excessive, reductions were ordered in 30 (47 percent). The percentage of reductions was roughly the same in commercial, personal injury, and constitutional cases. Id at 249. It seems likely that this overestimates the percentage of jury verdicts disturbed on appeal, for publication of federal appellate opinions is selective and not necessarily representative. Thus, comparison of published and unpublished opinions found that non-'affirmances were nearly three times as frequent among published opinions than among the more numerous unpublished opinions. William L. Reynolds and William M. Richman, An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform, 48 U Chi L Rev 573, 617-18 (1981). Schnapper argues that the reductions he observed are part of a wider pattern of increased judicial overriding of juries. No data is presented on judicial control of juries at any earlier point; the argument is based on changes in Supreme Court review patterns and on the decisional propensities of Reagan-appointed judges, who are more likely to modify and overturn jury verdicts. Schnapper, 1989 Wisc L Rev 237.} None of these “attrition” studies is very old and none looks at more than a single point in time. To provide a crude sense of the history of these patterns, we examined a series of ALR annotations of cases appealed on grounds of excessiveness of the jury verdict. At intervals, ALR publishes compilations of cases involving particular sorts of injuries. We chose annotations about damages for non-fatal injuries to trunk and torso, head and brain, and legs and feet, and we computed aggregate results on all the cases mentioned that were reported in the years 1951-53, 1961-63, 1971-73, and 1980-83. The percentage of verdicts that remained undisturbed by either the trial court or the appellate court rose from 74 percent in 1951-53 and 75.9 percent in 1961-63 to 83.9 percent in 1971-73 and 85.9 percent in 1981-83. Where appellate courts did order reductions, the average size of these reductions remained about 40 percent throughout.\footnote{We used the following ALR notes: 11 ALR3d 9 (1967); 11 ALR3d 370 (1967); 12 ALR3d 117 (1967); 13 ALR4th 212 (1982 and Supp 1985); 14 ALR4th 328 (1982 and Supp 1985); and 16 ALR4th 238 (1982 and Supp 1985). Sections on specific sub-categories of injuries such as fingers and knees were omitted. The detailed sources and computations are on file with the author.} In other words, the percentage of judicially disturbed awards fell by almost half from the two earlier sets of years to the two later sets. However, it is not evident that this represents a withdrawal of judicial control. It might as plausibly reflect changes in patterns of selection of cases for publication. The different patterns for different injury categories suggest that we may be observing not a loosening, but a focusing of control on larger awards. For example, disturbance of verdicts involving legs/feet injuries declined from 36 percent of cases in 1951-53 to six percent in 1981-83; but disturbance of verdicts in
(presumptively) higher-stake head/brain injuries remained steady—22 percent in 1951-53 and 21.7 percent in 1981-83.

Most jury trials, the ICJ studies find, are probably economically justified for the parties.122 That is, they are economically justified as compared to inaction or default. Whether they are cost-justified as compared to the last pre-trial offer, we do not know. This comports with the finding of the Civil Litigation Research Project, which studied a more varied population of cases, few of which were tried, that, overall, litigation “pays” for both plaintiffs and defendants.123 If the cost of public facilities were added, total costs would exceed the amount at stake in some cases. This is sometimes taken to display the irrationality of adjudicating such cases. Thus the Chicago Sun-Times editorialized that:

[Chief Justice Burger] offered one exceedingly good argument on behalf of dumping some civil-case juries. He said a survey of civil cases showed the average jury trial cost taxpayers $8,300 while half of the successful suers were awarded less than $8,000.124

But this putative hard-headed realism ignores the possibility of substantial party interests in the precedential or reputational results of trials. And it overlooks the wider public interest in legal vindication and in the production of the signals and markers broadcast by the jury. It is to these downstream effects of jury verdicts that we now turn.

III. KNOWING ABOUT JURIES

The decisions of juries are most visible as resolutions of particular disputes.125 But these dispersed responses of individual juries do more than resolve individual disputes; collectively and cumulatively they influence what happens in subsequent cases. They do this by being transmuted into a kind of knowledge about what juries are likely to do—“jury knowledge.”126

Jury decisions shape expectations about the behavior of subsequent juries and thus influence settlement decisions. These effects

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122 Shanley & Peterson, Comparative Justice at 75 (cited in note 59).
125 More accurately, as contributions to or influences on such resolutions, since the verdict may be modified by rulings of trial or appellate judges or by negotiations among the parties.
126 See, more specifically, text accompanying notes 197-214.
are framed by the invisible but massive influence of the jury on the shape of the whole system of litigation. The use of the jury requires a concentrated trial rather than a discontinuous one.\textsuperscript{127} The tendency of American civil procedure toward diffusion into serial proceedings—discovery, motions, pre-trial conferences, hearings, and so forth—is limited by the exigencies of physically assembling and insulating the jury to hold a concentrated, continuous trial. This, in turn, radiates influence back to earlier stages of the process. 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 taking of risks for all actors makes it a formidable threat, but one that is hard to use.\textsuperscript{128} Because this threat is costly to carry out, its value depends on the credibility with which it can be delivered which, in turn, varies with the prowess of counsel and the formidability of parties.

In addition to other features of the dispute process, the jury influences the wider arena of action in which disputes arise. Jury verdicts are not only counters in negotiating claims; they are also signals that affect the conduct underlying those claims—for example, they may mobilize preventive efforts or legitimate a given level of care. In addition to inducing prevention by inspiring recalculation of litigation risks, the flow of messages from the jury process has more diffuse effects, partially independent of calculation about litigation outcomes. Messages may be salient but incapable of precise reading,\textsuperscript{129} and the effects they induce may not be reducible to calculating re-estimation of costs and benefits, but may include


\textsuperscript{129} Eads and Reuter found that of the various external pressures on large manufacturers, product liability litigation had "the greatest influence on product design decisions," but the signal it sent was "extremely vague." George Eads and Peter Reuter, Designing Safer Products: Corporate Responses to Product Liability Law and Regulation viii (Institute for Civil Justice, 1983).
changes in moral estimation of the conduct in question. The variety and complexity of the effects of the jury’s messages awaits systematic exploration.

Those cases that reach juries are a small and unrepresentative subset of the cases disposed of in American courts. For example, Danzon finds that the medical malpractice cases

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

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

This small fraction of cases that are tried by juries not only distribute a sizable portion of the compensation paid to plaintiffs, but they also provide the signals and markers that influence the

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130 The complexity of the effects of judicial decisions are displayed by the reaction to the well-known case of Tarasoff v Regents of the University of California, 13 Cal 3d 177, 529 P2d 553, 118 Cal Rptr 129 (1974), withdrawn and replaced by 17 Cal 3d 425, 551 P2d 334, 131 Cal Rptr 14 (1976). The Supreme Court of California ruled that therapists had a duty to warn potential victims of violence threatened by their patients. Eighteen months after its highly publicized duty to warn ruling, the court, upon reconsideration, nullified its earlier opinion and modified the duty to one of exercising reasonable care to protect potential victims. Givelber, Bowers and Blitch surveyed therapists in 18 localities some five years after the decision. Daniel Givelber, William Bowers and Carolyn Blitch, Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action, 1984 Wis L Rev 443. The researchers found that the case was widely known by therapists throughout the nation, that observation of its ruling was felt to be obligatory by most even though technically it bound only those in California, id at 474, and “by and large the case appears to be misunderstood as involving and requiring the warning of potential victims,” id at 466 (that is, in accordance with the withdrawn original opinion)—and to have influenced therapist responses to threatening behavior toward giving warnings, initiating involuntary hospitalizations and taking notes. Id at 481-82. A majority of respondents had translated the obligation to threatened third parties into a requirement of professional ethics. Id at 475. The response to Tarasoff displays the difficulties of assigning a definitive meaning to a carefully-crafted judicial opinion, recorded in unchanging written form; we might think that deciphering the meaning of an unrecorded and unexplained jury verdict is at least as formidable an undertaking.

131 On the question of conceptualizing and measuring these effects, see Marc Galanter, The Day After the Litigation Explosion, 46 Md L Rev 3, 39 (1986).

132 Danzon, Medical Malpractice at 51 (cited in note 48).

133 For a catalog of types of cases that manage to survive the winnowing process, 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, 31 UCLA L Rev 4, 28-30 (1983).
outcome of a vastly larger number of cases settled or abandoned without trial. In his classic study of automobile injury settlements, Ross found that "[t]he basis . . . of settlements in serious cases seems on both sides to be an estimate of the likely recovery of the claimant before a jury . . . Both sides come to this estimate by comparing a given case in its many dimensions against other, similar, cases, that have gone to trial." 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 . . . ,"  

The relative importance of juries as transmitters of signals rather than as deciders of cases seems to have increased in recent years. Filings and dispositions have increased more rapidly than jury trials. Against the relative stability of state jury trial levels, there has been a dramatic increase in the number of jury trials in the federal courts. Jury trials have increased from 2585 in 1961 to 5920 in 1988. But jury trials have made up a declining portion of the total terminations of cases in federal courts. The percentage of terminated cases reaching trial has dropped steadily from 15.2 per-

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134 Jurors may occasionally be alerted to this precedential role. In the Newmann case described by Selvin and Picus, the judge "advised the jurors that he intended to apply many of their findings from this first trial of four plaintiffs to the remaining 26." Molly Selvin and Larry Picus, The Debate over Jury Performance: Observations from a Recent Asbestos Case 12 (Institute for Civil Justice, 1987). But for the most part it remains unannounced. If, when, and how much jurors ponder their precedential role remains unknown.

135 Ross, Settled Out of Court at 114-15 (cited in note 128). 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." Id at 115. Ross's field work was conducted in the mid-1960s, so there is a question of whether the patterns he reported still obtain.

136 Id at 112. In his study of personal injury claims in New York City, Rosenthal reports that "[t]he 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." Rosenthal, Lawyer and Client at 36 (cited in note 94).

137 See, for example, Richard Lempert, More Tales of Two Courts: Exploring Changes in the "Dispute Settlement Function" of Trial Courts, 13 L & Soc Rev 91 (1978), on the shift in mode of court contribution to dispute settlement.

138 Indeed, the absolute number of jury trials has fallen in at least some jurisdictions. Thus, in San Francisco, there were less 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 in each of the two periods. Peterson, Civil Juries in the 1980s at 6 (cited in note 74).

139 See Table 1.
cent in 1940 to 10.0 percent in 1970 to 4.9 percent in 1988.\textsuperscript{140} Although the evidence is more spotty, there appears to be a comparable relative decline in cases terminated by jury trials in state courts.\textsuperscript{141} However, there are, without doubt, more trials, more relevant markers and symbols, more information, and more problems of retrieving, collating and interpreting these symbols.

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 actors—disputants, lawyers, judges, mediators, and so forth—think juries will do. On what do they base their opinions? 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 by these actors? In addition to a fund of personal experience with juries, an actor will have various kinds of information about what juries have done. Such information might be crudely divided into the following categories:

- information about the deliberations and verdicts of particular juries in earlier cases. This kind of information might be gained through personal observation or by jury verdict reports,
- "micro" information about the propensities, perceptions and behavior of particular jurors. This sort of information is sometimes obtained in post-trial interviews with jurors,
- "macro" information about aggregates of jury verdicts and patterns in them. Such findings are announced by researchers and publicists, and
- "trend" information—about the way any of these persist or change over time.

\textsuperscript{140} Administrative Office of the United States Courts, Annual Report 39 (1940); Administrative Office of the United States Courts, Annual Report 245a (1970); Administrative Office of the United States Courts, Annual Report 211 (1988). This includes terminations "during or after trial," so it includes cases that settled after trial had begun.

\textsuperscript{141} See, for example, Lawrence Friedman and Robert Percival, A Tale of Two Courts: Litigation in Alameda and San Benito Counties, 10 L & Soc Rev 267, 288 (1976); Stephen Daniels, Continuity and Change in Patterns of Case Handling: A Case Study of Two Rural Counties, 19 L & Soc Rev 381 (1985); Wayne McIntosh, 150 Years of Litigation and Dispute Settlement: A Court Tale, 15 L & Soc Rev 823, 838-39 (1980-81). Compare Peterson, Civil Juries in the 1980s at 6.
Knowing about juries is not simply a matter of possessing such information. Even for the lawyer with a rich supply of such information, predictive extrapolation is a complex interpretive undertaking. Information about juries and the assumptions and theories that inform such assessments reaches legal actors through a number of channels or media, including at least those discussed below.

A. Personal Experience

An unpublished study by members of the Wisconsin Law Review asked a cross-section of Wisconsin attorneys about the effect of various factors on the initial monetary value each placed on his or her most recently completed case. The study suggests that an amalgam of personal experience, checked by collegial consultation, is the core of the evaluation process and that pursuit of systematic information about juries is relatively uncommon. Less than half (46.6 percent) attributed “most” or “great” effect to “knowledge of jury verdicts in similar cases.” “Extent of damages” (76.9 percent) and “difficulties of proof/probability of success” (71.8 percent) led the list, followed by 62.3 percent who credited “my own experience with similar cases” with most or great effect. But the personal experience referred to is experience of “cases,” not of juries. Since 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. We can surmise that lawyers have, per capita, less experi-

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143 The exigencies of interpreting jury knowledge are discussed in the text accompanying notes 197-214. The discussion here focuses on lawyers, who form the majority of those who deploy jury knowledge, but the observations that follow apply, with appropriate modification, to other actors as well.


145 This is assuming that the findings in San Francisco, where jury trials declined, and Cook County, where the number remained unchanged, are as representative as the federal system, where they increased. This seems to be supported by the decline in the portion of cases disposed of by trial. See notes 140-41.

ence with jury trials as participants. (If we take our estimate\textsuperscript{146} of some 50,000 civil jury trials each year and make the generous assumption that each jury trial engages four lawyers, every lawyer would engage in a jury trial once in three years—if jury trials were evenly spread among lawyers, which of course they are not. For all but a tiny minority of 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. (At the same time the personal experience of a small minority of lawyers has been enlarged in recent years through freer post-verdict interviewing of jurors.)

B. Oral Culture

When asked how they arrived at their initial evaluation of their most recently resolved case, less than one-quarter of the respondents to the \textit{Wisconsin Law Review} survey reported using jury verdict reports, while 70 percent relied heavily on consultations with other attorneys in their own firm.\textsuperscript{147} If this reliance on colleague consultation is at all representative, it suggests that the major medium through which the signals of jury propensities are transmitted remains the oral culture of the lawyers and other “regulars.” We know that this culture includes a great deal of lore about juries and about particular kinds of jurors. We don’t know much about the way that lawyers combine this with information from other sources.

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 those who are not previously known to them. We might anticipate, then, that the oral culture would come to rely less on implicit understandings and reference to shared experience.

\textsuperscript{146} See note 51.

\textsuperscript{147} Compare Hazel Genn, \textit{Hard Bargaining: Out of Court Settlement in Personal Injury Actions} 75 (Clarendon Press, 1987), on how English barristers “do a quantum.”
C. 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 the promotion of settlements, which has come to be seen as a respectable and commendable part of judicial work. Judges—and other court personnel such as magistrates, clerks, and special masters—have devised and adopted many innovative techniques for promoting settlements. These efforts tend to be more intense where an eventual trial would be by jury, because judges feel more inhibited about aggressive settlement efforts where they might end up trying the case themselves. Hence the settlement discourse of judges contains considerable lore about juries. Many judges are confident that they know "what a case is worth" and how juries will react to various features of a case.

However, judges' direct experience of civil juries may be limited. There are less than ten civil jury trials per judge annually in the federal system, and their features vary sufficiently to render elusive any useful generalizations. Of course, judges know about juries in other trials than the ones in which they preside. In a survey of Wisconsin trial judges, Christopher J. Brown asked them, "How frequently do you learn about recent jury verdicts from trial courts other than your own, whether through publications or informal conversations?" Only a quarter responded that they "frequently" learned about such verdicts; half said they did "occasionally" and a quarter said "rarely or almost never."


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


151 For example, Judge Hubert L. Will counselled 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, et al, The Role of the Judge in the Settlement Process, 75 FRD 89, 211 (1976).

152 This is from unpublished data made available to me by Christopher J. Brown, a 1986 graduate of the University of Wisconsin Law School. Other items in Brown's survey inquired about judges' knowledge of the terms of settlement agreements in their own court and in other courts. Roughly one-third of the judges reported that they learned the terms of settlements in less than 30 percent of the settlements in their own court; another third said they learned the terms in 30 to 60 percent of the settlements; and the final third reported learning about the terms in more than 60 percent of the settlements. But only 12 percent of
Lawyers seem to welcome settlement promotion by judges. A recent poll of lawyers reported that 73 percent believe judges should push for settlements; only 20 percent were opposed.\textsuperscript{153} Lawyers with cases in the four federal districts studied by Wayne Brazil overwhelmingly believe that such judicial intervention would significantly improve the prospects for achieving settlement; they are especially approving of judicial settlement efforts in jury matters and attribute greater effectiveness to them in that setting.\textsuperscript{154}

Intensified promotion of settlement by judges works a curious distortion of jury signals. Over a generation 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.”\textsuperscript{155} 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.\textsuperscript{156} The summary jury trial attempts, by cutting such corners as witnesses, 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.

\textsuperscript{153} Paul Reidinger, The Litigation Boom, 73 ABA J 37 (Feb 1, 1987).


\textsuperscript{155} Harry Kalven, Jr., The Jury, the Law, and the Personal Injury Damage Award, 10 Ohio St L J 158, 177 (1958).

D. 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. These reports, and the legal publications summarizing and collating them, provide a picture of what juries do in the course of describing the leeways that trial judges and appellate courts will allow them. 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.

E. Jury Verdict Reporting Services

National and local services compile and distribute information about jury verdicts. These jury verdict reporters differ in scope, sources, comprehensiveness, detail, frequency, and the amount of analysis they construct. Local services approach comprehensive coverage, while the national Jury Verdict Research ("JVR") is more selective. JVR aims to include "significant" or "important" verdicts, and it makes "every effort to collect reliable information on all million-dollar verdicts." This selectivity, combined with its computational practices, means that JVR's portrayal of jury awards emphasizes the high-end of the range. Presumably, these services are used differently by various kinds of legal actors in dif-

187 See, for example, the ALR compilations cited in note 121.
188 Reported appellate cases are an incomplete source of information on post-verdict reductions, since they give no information about trial court reductions that are not appealed or about settlements incorporating reductions.
189 Even here, there seems to be some bias toward more complete reporting of tort cases than others. Studies based on three verdict reporters consistently display a higher portion of tort juries than do official state statistics. See text accompanying notes 58-60. 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.
190 4 Injury Valuation: Current Award Trends 12 (Jury Verdict Research, Inc., 1986). This is not to say that JVR collects only large verdicts. Philip J. Hermann, President of Jury Verdict Research, Inc., reports that JVR collects sufficient 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.
191 Daniels' study of jury verdicts, based on the local jury verdict services, observes that "JVR's coverage is highly selective, reporting on what it determines to be precedent-setting verdicts." Stephen Daniels, Civil Juries, Jury Verdict Reporters and the Going Rate 6 (Paper prepared for delivery at the annual meeting of the Law and Society Association, May 29 to June 1, 1986, Chicago, Illinois); A. Russell Localio, Variations on $962,258: The Misuse of Data on Medical Malpractice, 13 L Med & Health Care 126 (1985).
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ferent kinds of cases. But we have only a few glimmerings of the patterns of use. Ross found that jury verdict reports, routinely con-
sulted by attorneys, “were seldom used by [insurance company] claims men [adjusters].” Daniels notes other uses of these re-
porters: by a judge, for example, to inform pre-trial conferences; by a lawyer to “cool out” over-optimistic clients.

F. Specialized Trade Media—Handbooks, Specialized Litigation Reporters, Practitioner Journals, Continuing Education Seminars and Other Presentations

These sources range from coverage that is more technical and systematic than the jury verdict reporters 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.

G. Jury Consulting

In the last two decades there has been a growth of jury research commissioned for use in individual cases. This takes a number of forms, including community surveys and focus groups to identify favorable jurors and appealing themes for presentation; videotaping and interviewing of jurors in mock trials; and

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163 The Wisconsin Law Review study indicates that they are used more by lawyers in smaller localities. But this may reflect smaller opportunities for colleague consultation or a difference in the make-up of the cases.
164 Ross, Settled Out of Court at 112 (cited in note 128). But compare reported use by claims offices, Daniels, Civil Juries at 10.
165 Daniels, Civil Juries at 10-11.
166 See, generally, Marc Galanter, Lawyers’ Litigation Networks (paper presented to the Conference on Frontiers of Research on Litigation, Sept 20, 1985, University of Wisconsin, Madison).
"shadow" juries, who observe trials and are debriefed daily.\textsuperscript{167} Since the use of these techniques is expensive, they are confined mostly to sizable civil cases, but they have been used in some criminal trials involving rich or visible defendants. It was recently estimated that there were 300 businesses in the trial consultant field.\textsuperscript{168} Lawyers who use them obtain new information, of varying quality, and presumably some of this spills back into lawyers' lore about juries.

H. Mass Media

We 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. The 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.\textsuperscript{169} Even purportedly analytic findings may be adopted uncritically from the mass media.\textsuperscript{170} Thus, the media may act as a filter, determining which aspects of legal activity languish in obscurity and which gain wide currency and are used to interpret the legal world.\textsuperscript{171} Daniels

\textsuperscript{167} For a profile of these techniques and some of their practitioners, see Couric, Natl L J 34 (July 21, 1986). For an assessment of their efficacy, see Hans & Vidmar, \textit{Judging the Jury} ch 6; Hastie, Penrod & Pennington, \textit{Inside the Jury} ch 7 (cited in note 30).


\textsuperscript{170} For example, a major law firm, preparing a report on the liability crisis on behalf of a coalition of "affected organizations," provides 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 of Jury Verdict Research, Inc. See \textit{Your Policy is Canceled}, Time 20 (Mar 24, 1986).


\textsuperscript{171} Thus, the media feature stories about the size of product liability judgments derived from Jury Verdict Research, Inc., reports, but the qualifications and shortcomings of the
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points out that “[t]he media, especially the national media, and legal elites rely on each other and on the national [jury verdict] reporters for information. This leads to an emphasis on the unusual cases and those with high awards, which then are treated as if they are representative of all cases.” We should be cautious about the ways that legal professionals are influenced by the mass media. Like others, their general estimate of conditions will more closely track media accounts than will their judgments in familiar contexts.

I. Popular Culture

Lawyers and other civil justice regulars share in the popular culture about juries—the beliefs and expectations about juries that circulate among non-professionals. 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 perform-

172 There is a whole tradition of research which suggests 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*, 47 J Pers & Soc Psych 693 (1984). 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. Levrajas, *Cognitions Leading to Personal and Political Behaviors: The Case of Crime*, in Sidney Kraus and Richard Perloff, eds, *Mass Media and Political Thought* (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*, 40 J Soc Issues 27, 31 (1984). 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 utilize the relatively abstract “societal level” information about the world in general to form estimates of risk in “personal level” situations.

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172 Daniels, *Civil Juries* at 17 (cited in note 161). Lawyers may be particularly susceptible to this fallacy since legal education consists of a diet of unusual cases which are taken to be typical.

173 Data are omitted. Compare Localio, 13 L Med & Health Care at 126 (cited in note 161), on the misreading of medical malpractice award data.
It is not known how much participation in more specialized occupational discourse displaces these popular perceptions.\textsuperscript{176}

J. Research

Research like that of the University of Chicago Jury Project, psychological studies of jury decisionmaking and, recently, 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 has not previously been available. We may expect that it will feed back through specialist presentations and mass media into the pool of knowledge employed by various legal actors.\textsuperscript{178}

The legal world as a whole has opened up remarkably in recent years. There is a great deal more information available about the working of legal institutions. We have enormously expanded our knowledge of the world of American law since the period of the University of Chicago Jury Project. We know more about litigation—about aggregate patterns, about changes over time, about plea bargaining, about settlement, about litigants’ strategies. We know more about courts and judges—about their working routines, about their decisionmaking, about their variability. We know more about the world of law practice—about the work of lawyers, about the organization of law firms, about the structure and politics of the bar. We know more, too, about the making of regulatory policy, about the politics of implementation, about the impact of legal regulation. Our richer and more detailed picture of law in American society derives partly from the development of a tradition of sustained, systematic, cumulative research that has been institutional-
ized in universities, research institutes, journals and scholarly associations. It also comes from the development of new modes of legal journalism—more detailed, intrusive, investigative reporting about law in the general press, and the emergence of a new kind of trade press within the legal world.\textsuperscript{177}

Barriers of secrecy have fallen. Core legal activities are more accessible—as dramatized by open meeting laws, the Freedom of Information Act and courtroom television. The old presumptions of confidentiality have given way to a presumption favoring free flows of information. In the case of the jury, we find this in the growth of the practice of permitting jurors to be interviewed after the verdict,\textsuperscript{178} and the occasional court-sponsored debriefing. In 1955, after the Chicago jury researchers were censured for tape recording actual jury deliberations with judicial and counsel permission, over 30 jurisdictions enacted prohibitions of "jury-tapping."\textsuperscript{179} In contrast, the recent filming and television broadcast of an actual jury deliberation passed with little comment.\textsuperscript{180} Exposure that is unremarkable now was unthinkable just a generation ago. Everything points to overcoming the barriers that made research with real juries forbidding.

IV. Shadow Play: Jury Signals and Rival Influences in the Bargaining Process

In visualizing the role of the jury in the litigation process, we had recourse to familiar metaphors: the "iceberg" or pyramid of cases, of which fully adjudicated cases form the visible peak; and the notion that the bulk of cases are resolved by "bargaining in the shadow" of the jury. Both images assume that the construction of cases and the negotiation of settlements throughout the pyramid or realm of shadows are guided by the visible stratum of authoritative decisions, including those of juries. This image of hierarchic control is typically reinforced with 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.\textsuperscript{181} Thus,

\textsuperscript{177} See Marc Galanter, The Legal Malaise; Or, Justice Observed, 19 L & Soc Rev 537 (1985).
\textsuperscript{179} Kalven & Zeisel, The American Jury at vi-vii (cited in note 32).
\textsuperscript{180} Steven Herzberg's Inside the Jury Room, broadcast on Public Broadcasting Service's Frontline April 11, 1986.
\textsuperscript{181} One of many possible examples of the presence of these assumptions is George L. Priest, Measuring Legal Change, 3 J Law, Econ & Org 193 (1987).
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. If the outcomes below, reflecting as they do the decisions at the top of the pyramid, are arbitrary or capricious, this must be because these qualities infect the decisionmaker there, that is, the jury.

Does the process produce outcomes that are an accurate reflection of what juries would do? How much distortion is present? The existing literature provides only a few tantalizing hints. Patricia Danzon, who is sanguine about the rationality of actors and the efficiency of the tort system, estimates that “[s]ome 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. And this is in medical malpractice claims, which probably command more investment in research and preparation than almost any category of claims! Danzon 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.

We know very little 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. We can supplement Danzon’s aggregate analysis with several studies that enable us to see the way that jury knowledge is used in the evaluation of individual cases.

A provocative experiment conducted by Gerald Williams displays dramatically the complexity and variability of the process of translating information about what juries do into assessments of what a case is worth. Williams reports that he

obtained the cooperation of 40 practicing lawyers in Des Moines, Iowa, who agreed to be divided into 20 pairs and to prepare and undertake settlement negotiations in a personal injury case. Approximately two weeks in advance of the negotiations, the attorneys were randomly

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182 Danzon, Medical Malpractice at 50 (cited in note 48). Compare id at 43. The derivation of these estimates is explained in Patricia Danzon and Lee Lillard, The Resolution of Medical Malpractice Claims: Modeling and Analysis 47 (RAND Corp., 1982).

183 Danzon, Medical Malpractice at 50.
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.184

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

RESULTS OF WILLIAMS’ EXPERIMENTAL NEGOTIATION AMONG DES MOINES ATTORNEYS

<table>
<thead>
<tr>
<th>Attorney Pair</th>
<th>Plaintiff’s Opening Demand</th>
<th>Defendant’s Opening Demand</th>
<th>Settlement</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>$32,000</td>
<td>$10,000</td>
<td>$18,000</td>
</tr>
<tr>
<td>2.</td>
<td>$50,000</td>
<td>$25,000</td>
<td>no settlement</td>
</tr>
<tr>
<td>3.</td>
<td>$675,000</td>
<td>$32,150</td>
<td>$95,000</td>
</tr>
<tr>
<td>4.</td>
<td>$110,000</td>
<td>$3,000</td>
<td>$25,120</td>
</tr>
<tr>
<td>5.</td>
<td>Not reported</td>
<td>Not reported</td>
<td>$15,000</td>
</tr>
<tr>
<td>6.</td>
<td>$100,000</td>
<td>$5,000</td>
<td>$25,000</td>
</tr>
<tr>
<td>7.</td>
<td>$475,000</td>
<td>$15,000</td>
<td>no settlement</td>
</tr>
<tr>
<td>8.</td>
<td>$180,000</td>
<td>$40,000</td>
<td>$30,000</td>
</tr>
<tr>
<td>9.</td>
<td>$210,000</td>
<td>$17,000</td>
<td>$80,000</td>
</tr>
<tr>
<td>10.</td>
<td>$550,000</td>
<td>$48,500</td>
<td>$87,000</td>
</tr>
<tr>
<td>11.</td>
<td>$87,500</td>
<td>$15,000</td>
<td>$61,000</td>
</tr>
<tr>
<td>12.</td>
<td>$175,000</td>
<td>$50,000</td>
<td>$30,000</td>
</tr>
<tr>
<td>13.</td>
<td>$97,000</td>
<td>$10,000</td>
<td>no settlement: narrowed to $137,000-$77,000</td>
</tr>
<tr>
<td>14.</td>
<td>$100,000</td>
<td>$56,875</td>
<td>$57,500</td>
</tr>
</tbody>
</table>

Average settlement $47,818

Source: Williams, Legal Negotiation at 7.

184 Gerald R. Williams, Legal Negotiation and Settlement 6 (West, 1983) (emphasis added).
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” interacts with other factors to produce great variation in lawyers’ responses to a case.\textsuperscript{8}

The prominence of colleague consultation in the case evaluation process\textsuperscript{166} suggests one possible explanation for the high variation found in Williams’ Des Moines experiment. If we assume that Des Moines lawyers are like those in Wisconsin and consult colleagues in deciding what a case is worth, we might guess that while Williams’ subjects conscientiously applied themselves to the file, they might have curtailed the usual practice of consultation, declining to burden colleagues with a simulation. If so, the situation involved a shift for many participants from colleague consultation to jury verdict reports as a basis for valuation. Could it be that the former would generate greater consensus on valuation than the latter?\textsuperscript{9}

Another important element is missing in the Williams’ simulation: the alternative of the trial. In the 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. We might expect that with the sanction for failure thus reduced, many lawyers would incline to act more “optimistically,” exposing themselves to greater risk of disagreement than where the situation contained real sanctions for failure to agree. The “trial as the alternative” element was very much present in an early 1960s study of 443 back and neck injury verdicts, reported by Philip Hermann, that compared the verdicts 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 concludes

\textsuperscript{8} It also suggests a neat little experiment to measure the impact of these reports: imagine an experimental “duplicate bridge” negotiation like Williams’, but with the information on the previous juries varied among the participants.

\textsuperscript{9} See text accompanying note 147.
that "the guessing is equally wild on the part of both attorneys and the insurance companies."\textsuperscript{187}

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. A panel of five experts were asked to estimate what each of 59 actual settled cases was worth in terms of settlement at various stages and jury award.\textsuperscript{188} Panelists tended to agree about the relative value of the cases. But Rosenthal observed that "[t]he considerable variation among panelists with respect to each case does not accord with the widespread assumption that experts will tend to reach a consensus on the value of any particular case."\textsuperscript{189} 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.\textsuperscript{190} About 40 percent of recoveries were for less than 60 percent of the panel valuation.\textsuperscript{191}

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 are there 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?

A. Jury Variation and Capriciousness

Contemporary critics of the jury blame this disarray on the capriciousness and unpredictability of the jury.\textsuperscript{192} If outcomes are arbitrary or capricious, this must be because these qualities infect the jury. The Institute for Civil Justice studies, Danzon, and other studies, however, provide evidence of massive stability and consistency in jury decisionmaking. This is particularly impressive in view of the changes in the composition of juries over the past generation—by the expansion of jury rolls to include more women and minorities, and by the restrictions on automatic or easy excusal for

\textsuperscript{187} Philip J. Hermann, Predicting Verdicts in Personal Injury Cases, 475 Insur L J 505 (1962).
\textsuperscript{188} The makeup of the panel and the method of securing evaluations are described by Rosenthal, Lawyer and Client at 202-07 (cited in note 94).
\textsuperscript{189} Id at 202.
\textsuperscript{190} Id at 38.
\textsuperscript{191} Id at 207.
\textsuperscript{192} See examples in text accompanying notes 35-38.
various occupational groups. 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, practices guaranteed to produce greater variability in jury verdicts. 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.

B. The Nature and Use of Jury Knowledge

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 a number of 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. For example, decisionmakers often ignore relevant

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194 On the shift to smaller juries and non-unanimity rules, see text accompanying notes 33 and 34.
195 Hans Zeisel, . . . And Then There Were None: The Diminution of the Federal Jury, 38 U Chi L Rev 710 (1971); Hans Zeisel and Shari S. Diamond, 'Convincing Empirical Evidence' on the Six Member Jury, 41 U Chi L Rev 281 (1974). Zeisel's analysis is qualified and extended by Lempert, who agrees that "[t]he 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, 73 Mich L Rev 644, 679 (1975). A recent commentator thinks the decline in jury size is the "best explanation" of increased variability of jury awards. Michael J. Saks, In Search of the "Lawsuit Crisis", 14 L Med & Health Care 77, 79 (1986).
196 See text accompanying note 35.
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. Vivid information, that is, concrete, sensory and personally relevant information, may have a disproportionate impact on beliefs and inferences. Furthermore, biased receptiveness to confirming evidence makes people excessively confident in the accuracy of their knowledge. It has been suggested that these cognitive infirmities afflict juries and judges, as well. 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 accu-

assessed in Elizabeth Loftus and Lee Roy Beach, Human Inference and Judgment: Is the Glass Half Empty or Half Full, 34 Stan L Rev 938 (1982).

198 Loftus & Beach, 34 Stan L Rev at 944-45.
199 Nisbett & Ross, Human Inference at 190.
200 Loftus & Beach, 34 Stan L Rev at 946.
201 Selvin & Picus, The Debate over Jury Performance at 46 (cited in note 134); Loftus & Beach, 34 Stan L Rev at 946.
203 Thus, Chin and Peterson envision litigants basing tactical decisions on "apparent associations between verdicts and litigant-types" where observed "patterns may be explained by other case features...." Chin & Peterson, Deep Pockets, Empty Pockets at 32 (cited in note 66).
racy of the great majority of readings by actors are never tested. Like the participants in Williams’ 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 would be expected to encounter challenge and testing more often than estimates that were too “pessimistic.” Hence lawyers typically experience “correction” only at the optimistic end of the scale. Because the feedback is biased, the accumulation of experience does not improve the accuracy of the readings.

The distortions that result from the micro-politics of settlement interact with distortions that result from the social organization of jury knowledge. 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. Large demands are newsworthy—as are large verdicts—but plaintiff losses and reductions of awards are rarely news. Widely-circulated horror stories recount, with ficti-

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204 The situation of negotiators is a mirror image of that of teachers, who are challenged when they grade with unexpected severity, but arouse no corrective response when they grade with unexpected generosity.

205 Compare Williams’ 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 at 19 (cited in note 184).

206 Compare Loftus & Beach, 34 Stan L Rev at 955 (cited in note 197). 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. On the failure of the Kutak Commission’s attempt to include standards of negotiating behavior in the Model Rules of Professional Conduct, compare § 4 of the Discussion Draft of January 30, 1980, with the counterpart sections of the Rules as they emerged in the ABA Rules of Professional Conduct, adopted August 2, 1983. See, generally, Geoffrey C. Hazard, The Lawyer’s Obligation to Be Trustworthy When Dealing with Opposing Parties, 33 SC L Rev 181, 191-95 (1981); Gerald Clark, Fear and Loathing in New Orleans: The Sorry Fate of the Kutak Commission’s Rules, 17 Suffolk U L Rev 79, 89 (1983).

tious embellishments, ludicrous claims and outlandishly large awards. The appetite for tales of stonewalling resistance and Scrooge-like offers is less developed. 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.\(^{209}\)

Rosenthal’s findings suggest that even experienced specialist-lawyers tend to overestimate recoveries.\(^{210}\)

Skewed feedback and media bias interact. Thus, the head of Jury Verdict Research, a former personal injury defense lawyer observed:

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.\(^{211}\)


\(^{209}\) Daniels, Civil Juries at 14 (cited in note 161). Compare Localio, 13 L Med & Health Care at 126-29 (cited in note 161). Compare the assertion that the English counterpart, Current Law, is “low on damages” because of selective reporting by insurance companies. Genn, Hard Bargaining at 77 (cited in note 147).

\(^{210}\) Discussed in text accompanying notes 190-91.

Just how these various distortive forces play out may be changing. As the structures of professional life are altered, the sources of information about juries are changing. With fewer jury trials relative to the 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 of information 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 “bad” jury information around. Lawyers now must add skill in doping-out research to skill in doping-out juries.

If jury signals are so hard to read and decode, would not justice be better served by a process that gave stronger and clearer signals, for example, by professional decisionmakers whose decisions could be accompanied by generalizable explanations? This assumes that the cognitive disarray besetting jury knowledge is due to the fact that the signals are broadcast by juries. But several studies of settings where the decisionmakers are not juries, but judges, cast some doubt on this.

Studies of personal injury settlements in England, for example, where there are no juries in such cases, portray a process pervaded by a sense of uncertainty about what judges will do. In a revealing American study, Melli, Erlanger and Chambliss conducted in-depth interviews with 30 lawyers involved in 25 settled cases of divorce involving minor children in Dane County, Wisconsin. Regarding child support and property division,

A number of the lawyers we interviewed acknowledge that they have difficulty in explaining court standards and that they cannot predict the outcomes of court processes. Among the lawyers in our sample who do think that there are set standards, and who do say they can predict outcomes, there are differences of opinion as to the content of those standards. Different lawyers cite

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211 Donald Harris, et al, Compensation and Support for Illness and Injury 98 (Clarendon Press, 1984). Genn found that 89 percent of the solicitors in her survey agreed that it is difficult to predict how much a judge will award to a successful plaintiff. Genn, Hard Bargaining at 75.
different “court standards”: obviously, they cannot all be correct.\textsuperscript{213}

It appears that unclear signals about outcome can flourish in the absence of the jury, when decisions are entirely in the hands of professionals.\textsuperscript{214}

Although the way the jury’s signals affect the settlement process must be explored further, my sense is that it is not adequately captured by the “pyramid” or “iceberg” images, with their connotation of orderly bonds of rational calculation by which the “visible cap” of jury verdicts “controls” the larger settlement arena. Rather than a symmetrical and comprehensible crystalline structure, we find indistinct and distorted signals that are often lost or misread. The disorienting experience of unpredictability that disturbs the jury’s critics may have its major sources not in the incompetence and bias of the jury, nor even in the infirmities of knowledge about the jury, but in the settlement process itself.

C. Extra-Jury Features of the Litigation Process

The discrepancy of results and panel estimations in Rosenthal’s study\textsuperscript{215} might be read as suggesting that the outcome of the case was determined by factors other than those taken into account by the panel—in particular by the relative capability of the parties to play the litigation game.\textsuperscript{216} Thus, Rosenthal himself found that the settlement outcome was strongly affected by how

\textsuperscript{213} Howard S. Erlanger, et al, Cooperation or Coercion: Informal Settlement in the Divorce Court 29-30 (Institute for Legal Studies, 1986). In interpreting this and other findings of this research team, it is important to remember that the research was conducted in a setting in which virtually all lawyers handle divorces and there are few specialists.

\textsuperscript{214} This indeterminacy of authoritative decisionmaking may not always be entirely unwelcome to those who negotiate in its shadow. Austin Sarat and William F. Felstiner, Law and Strategy in the Divorce Lawyer’s Office, 20 L & Soc Rev 93 (1986), observing interactions between divorce lawyers and clients in two settings, found lawyers utilizing the uncertainties of the legal system to dampen client expectations, to avoid clients who seek prediction and certainty and to portray cynically the legal process as pervaded by “human frailties, contradictions between appearance and reality, carelessness, incoherence, accident, and built-in limitations.” Id at 108. By creating doubt about the result, the lawyer succeeds in dampening client expectations, averting blame for disappointments, and making the client more malleable in negotiations and focused on what the lawyer can deliver.

\textsuperscript{215} Rosenthal conducted a detailed study of 57 personal injury cases, in which he concluded “[t]he more a claim is worth the less favorable the recovery is likely to be . . . The smaller the claim, the better the chances for a fair return.” Douglas Rosenthal, Lawyer and Client: Who’s in Charge? 78, 206 (Russell Sage Foundation, 1974).

\textsuperscript{216} It might also be taken as evidence that the expert panel was unrepresentative of the range of estimates in the local legal community—that is, that existing signals would be read differently by other lawyers.
“active” the client was—a feature reflected only dimly in the information available to the panel. This comports with findings of other studies that outcomes are affected by the relative capability of the parties as disputants. Thus, Ross also found that represented accident claimants recovered more than unrepresented ones, and those represented by specialists recovered still more. But lawyer specialization is not the only characteristic that made a difference. Melli, Erlanger and Chambliss found that the level of child support provided in settlement agreements is affected by the relative reluctance or impatience of the divorcing parties.

Beyond disparities in party capability, more general features of the litigation process may act to muffle the effect of jury signals. Increases in two notable and interconnected sets of such features, legal uncertainty and transaction costs, have in turn enlarged the settlement ranges and further undermined the integrity of the signalling system.

D. Legal Uncertainty

Growth in the scale and complexity of the legal system is accompanied by increased indeterminacy. Increases in the number and variety of legal actors, in the number of decisionmakers, in the amount and scope of authoritative material, in the span of legal theory, in the amount and kinds of available information, in ex-
penditures for legal services and the consequent intensity of lawyer work—
all of these multiply the opportunities, incentives and resources for unforeseen juxtaposition and innovative enterprise to undermine established theories, rules and practices. Contingency and discretion increase as rules and institutions grow in bulk and complexity. Mirjan Damaska observed that “there is a point beyond which increased complexity of law, especially in loosely ordered normative systems, objectively increases rather than decreases the decisionmaker’s freedom. Contradictory views can plausibly be held, and support found for almost any position.” Anthony d’Amato presented a striking analysis of actors’ incentives that support an inherent entropic tendency of legal rules within our complex legal system to become “increasingly vague, inapplicable, remote, ambiguous or exception-ridden.” In a recent book, Ethan Katsh argued that these processes are accelerated by the shift from print to electronic media for storing and retrieving legal information.

E. Increase in Transaction Costs

As the society becomes richer, the stakes in disputes become higher, and there are more organizations and individuals that can make greater investments in litigation. Expenditures on one side produce costs on the other. Again, as the law becomes more voluminous, more complex, and more uncertain, costs increase. Virtually every “improvement” in adjudication—refinements of due process that require more submissions, hearings, and findings; elaborations of the law that require research, investigation and evidence; provision of additional services by specialized experts—increases the need and opportunity for greater expenditures. As transaction costs—time, resources, uncertainty about recovery and its amount—rise, there is more chance of overlap in the bargaining position of the parties. That is, there is a greater “settlement range” in which both parties are better off than in

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221 The growth of these and other dimensions of the legal world over the past generation are described in Marc Galanter and Thomas Palay, Tournament of Lawyers: the Growth and Transformation of the Large Law Firm ch 4 (forthcoming, University of Chicago Press, 1991).


As settlement ranges are extended, actors face the problem of how to reach agreement within the settlement range. The recent proliferation of settlement brokers (judges, mediators, special masters) and devices (mini-trials and summary jury trials, for example) testifies to the increasing demand for signals to identify points of convergence within the broad settlement ranges created by higher transaction costs.

Like the “pyramid” or “iceberg” image, the “bargaining in the shadow” metaphor, although admitting the possibility of systematic distortion, also conveys an image of hierarchic control in which settlements are guided by the rulings of authoritative decision-makers. But Melli and her collaborators found that in the divorce arena, there is a question of who is in fact casting the shadow of the law.

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

For example, if a plaintiff believes his claim is worth $1 million and it will cost $200,000 to achieve it, any settlement over $800,000 leaves him better off than a verdict for $1 million (putting aside uncertainty for the moment, which would lower the settlement point further). Similarly, a defendant who anticipated a $1 million judgment and $200,000 expenses in the course of defending the case would regard any settlement below $1,200,000 as preferable. The settlement range is roughly from $800,001 to $1,199,999. At any point over this range, both parties are better off settling than going to verdict. If the transaction costs of the parties rise—for example to $400,000 each, the settlement range increases accordingly—in our example from $600,001 to $1,399,999.

This is an instance of dividing the “exchange surplus”—the “total gain in utility perceived by the two parties from the exchange itself as compared to not trading.” Ian MacNeil, *The New Social Contract: An Inquiry Into Modern Contractual Relations* 130 n 19 (Yale University Press, 1980). But since settlements are exchanges under conditions of bilateral monopoly—plaintiff is the only plaintiff with whom defendant can deal and vice versa—the normal availability of alternative trading partners is absent so markets cannot be relied upon to produce evenness or mutuality in the division of the exchange surplus.

Melli, et al, *The Process of Negotiation* at 12 (cited in note 220). Erlanger suggests than an “argument could be made that . . . judges may be following the patterns they see in informal settlements, rather than the other way around; and instead of ‘bargaining in the shadow of the law,’ we should refer to ‘litigating in the shadow of informal settlement.’” Erlanger, *Cooperation or Coercion* at 31 (cited in note 213).
CONCLUSION

The official picture of our litigation system is of expert professionals applying authoritative learning to adjudicate controversies in accordance with a pre-existing body of rules and formal procedures. Professional expertise is tempered by juries—a qualification justified on grounds of equality and participation. In actual operation, the system incorporates numerous departures from this model of formal professional justice. Alongside the imposition of binding decisions by professional judges and transient juries, we find, in vastly greater amount, negotiation by partisan actors and mediation by judges, commonly giving weight to a host of strategic considerations in addition to legal entitlements. The regulars develop understandings and priorities that apply, modify, supplement and sometimes displace formal legal norms. Melli provides a striking example of the ostensibly central and independent formal process of adjudicative decisionmaking becoming subordinated to the penumbral process of bargaining that surrounds it. Another example is provided by Judith Resnik's analysis of the prevalence of consent decrees in which judges in effect delegate judicial power to the negotiators before the bench.

In a setting where judges are increasingly entangled in the bargaining process and increasingly imbued with managerial and programmatic perspectives, the transience and amateurism of the jury may turn out to have important and unsuspected virtues. The amateurism of the jury has often been scorned as a blemish on legal rationality. Thus a Harvard Law School dean observed that

[j]ury trial, at best, is the apotheosis of the amateur. Why should anyone think that twelve people brought in from the street, selected in various ways, for their lack of general ability, should have any special capacity to decide controversies between persons?

The jury is “lay” or “amateur” in two senses. First, it is not made up of professionals or experts who possess special knowledge of le-
gal norms or their application. Second, jurors don’t 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.

The costs and benefits of the first aspect, absence of professional expertise, have been addressed by a body of research on jury decisionmaking; and it turns out that juries are reasonably good deciders of disputes. What of the jury’s transient and episodic character? If juries introduce community perspectives, they do not do so as the carriers of a rival popular legal culture. Judges and lawyers have access to a tradition of law. Cases for them are part of a literary tradition that may be consulted. These professionals have enduring, patterned, reciprocal relations with other actors who may enforce on them the expectation of consulting that tradition. Jurors, however, have neither a communicated tradition of work to draw on nor a web of patterned reciprocal relations with other actors in the system. The absence of continuity and transmission from one jury to the next may be a strength as well as a weakness. The jury does not become jaded or lapse into the typifications and routines that the regulars develop.

See, for example, Comment, A More Rational Approach to Complex Civil Litigation in the Federal Courts: The Special Jury, 1990 U Chi Legal F 575.

In earlier eras juries may have lacked this second type of amateurism. Describing jury practice at the Old Bailey from 1675 to 1735, Langbein reports that juries tried scores of cases, often deliberating on them in batches, and typically included many veteran jurors. John Langbein, The Criminal Trial before the Lawyers, 45 U Chi L Rev 263, 274-77 (1978).

See materials cited in note 32 and general discussion in note 73.

But compare Kalven & Zeisel, The American Jury at 219 (cited in note 32), who often seem to attribute to juries a kind of West System of jury sentiments and dispositions on which jurors can draw.

The tendency of regular actors to gravitate into such typifications and routines has been documented in civil (see, for example, Ross, Settled Out of Court at 134-35 (cited in note 128)) as well as criminal matters (see, for example, David Sudnow, Normal Crimes: Sociological Features of the Penal Code in a Public Defender’s Office, 12 Soc Prob 255 (1965); Lynn M. Mather, Some Determinants of the Method of Case Disposition: Decision-Making by Public Defenders in Los Angeles, 8 L & Soc Rev 187 (1973)). G.K. Chesterton endorsed juries for the reason that

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.

Gilbert K. Chesterton, The Twelve Men, in Tremendous Trifles 56 (Dufour Editions, 1968). I am indebted to Justice Shirley S. Abrahamson, A View from the Other Side of the Bench, 69 Marq L Rev 463 (1986), for this quotation. Compare Borucka-Arctowa’s description of the lay judge in Poland as “conceived as a means of preventing, or counter-balancing, a certain tendency toward the routine, a professional deformation inevitable in the performance of various professional functions, to which the judge is subject as well.” Maria Borucka-Arctowa, Citizen Participation in the Administration of Justice: Research and
intermittent character liberates juries to depart from the understandings of the regulars. Unlike those vocationally committed to a role in the system, the jury has no informal relations to be maintained nor any shared patterns of accommodating the law to other commitments. The jury's individualized responses and fresh inputs, impervious to precedent and knowing expectations, preserve the decision process from being swallowed by the surrounding bargaining process. The jury can keep the litigation process anchored in the emergent moral sense of the society.

Most cases will continue to be resolved in the jury's shadow rather than by the jury itself. But some shadows are more distinct, readable and current than others. Just as the decisions of professionals may be degraded, so may the currency of jury decisions be debased. In considering the future of the jury, we must think of it not only as a decider of disputes, but as the producer of signals for the operation of the system of settlements. Protection of the integrity of the jury's signals involves action on three levels. First, it suggests policies to improve the quality of jury decisionmaking, for example, by such measures as allowing note-taking and questioning, and reducing its variability, by retaining or restoring large juries and strict decision rules. Second, it suggests the necessity of upgrading the quality of jury knowledge and the skills of actors in interpreting it. Third, it suggests the need to explore the bargaining process for ways to offset the influence of extra-jury factors that overwhelm jury signals—and legal norms as well. The vindication of the jury invites us to improve the litigation system by refining and enlarging the use of the civil jury, not by eliminating it.

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337 Compare the observation of Kulcsar that the "most important grounds for lay participation . . . lies in the organizational-alien nature of the lay element." Kulcsar, People's Assessors in the Courts at 126 (cited in note 13) (emphasis added). By this he refers to the fact that the lay participant "generally does not formulate expectations concerning the organization which would influence his own career and he does not become a permanent participant in organization work. . . . [T]he expectations of the organization become less internalized in him." Id at 127.

### TABLE 1

Trials as a Portion of Civil Terminations, United States District Courts, 1961-1988

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Civil Terminations*</td>
<td>50,490**</td>
<td>79,466</td>
<td>154,985</td>
<td>238,140</td>
</tr>
<tr>
<td>Total Trials</td>
<td>5,553</td>
<td>7,975</td>
<td>10,091</td>
<td>11,618</td>
</tr>
<tr>
<td>% of Terminations that are Trials</td>
<td>11.0%</td>
<td>10.0%</td>
<td>6.5%</td>
<td>4.9%</td>
</tr>
<tr>
<td>Number of Jury Trials</td>
<td>2,585</td>
<td>3,409</td>
<td>3,920</td>
<td>5,920</td>
</tr>
<tr>
<td>% of Trials that are Jury Trials</td>
<td>46.6%</td>
<td>42.7%</td>
<td>38.8%</td>
<td>51.0%</td>
</tr>
<tr>
<td>% of Terminations that are Jury Trials</td>
<td>5.1%</td>
<td>4.3%</td>
<td>2.5%</td>
<td>2.5%</td>
</tr>
</tbody>
</table>

* Land condemnation cases excluded.
** Transferred and consolidated cases excluded.

### TABLE 2

Civil Jury Trials in United States District Courts, 1961

<table>
<thead>
<tr>
<th>Type</th>
<th>Number of Jury Trials</th>
<th>% of Total Jury Trials</th>
<th>Number of Terminations</th>
<th>Jury Trials as % of Terminations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tort</td>
<td>2,102</td>
<td>81.3%</td>
<td>19,182</td>
<td>11.0%</td>
</tr>
<tr>
<td>Contract</td>
<td>302</td>
<td>11.7%</td>
<td>13,018</td>
<td>2.3%</td>
</tr>
<tr>
<td>Tax</td>
<td>55</td>
<td>2.1%</td>
<td>1,415</td>
<td>3.9%</td>
</tr>
<tr>
<td>Real Property</td>
<td>40</td>
<td>1.5%</td>
<td>2,000</td>
<td>2.0%</td>
</tr>
<tr>
<td>Labor (FLSA, LMRA)</td>
<td>24</td>
<td>0.9%</td>
<td>2,273</td>
<td>1.1%</td>
</tr>
<tr>
<td>Forfeitures (other than food &amp; drug)</td>
<td>22</td>
<td>0.9%</td>
<td>1,148</td>
<td>1.9%</td>
</tr>
<tr>
<td>Antitrust</td>
<td>17</td>
<td>0.7%</td>
<td>287</td>
<td>5.9%</td>
</tr>
<tr>
<td>Civil Rights</td>
<td>6</td>
<td>0.2%</td>
<td>243</td>
<td>2.5%</td>
</tr>
<tr>
<td>Bankruptcy</td>
<td>4</td>
<td>0.2%</td>
<td>250</td>
<td>1.6%</td>
</tr>
<tr>
<td>Intellectual Property</td>
<td>4</td>
<td>0.2%</td>
<td>1,529</td>
<td>0.3%</td>
</tr>
<tr>
<td>Interstate Commerce</td>
<td>2</td>
<td>0.1%</td>
<td>334</td>
<td>0.6%</td>
</tr>
<tr>
<td>Other Statutory Actions</td>
<td>2</td>
<td>0.1%</td>
<td>367</td>
<td>0.5%</td>
</tr>
<tr>
<td>Recovery</td>
<td>2</td>
<td>0.1%</td>
<td>2,407</td>
<td>0.1%</td>
</tr>
<tr>
<td>Food &amp; Drug Forfeitures</td>
<td>1</td>
<td>0.0%</td>
<td>1,054</td>
<td>0.1%</td>
</tr>
<tr>
<td>Local Officials</td>
<td>1</td>
<td>0.0%</td>
<td>87</td>
<td>1.1%</td>
</tr>
<tr>
<td>Securities, Commodities, Exchanges</td>
<td>1</td>
<td>0.0%</td>
<td>200</td>
<td>0.5%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>2,585</td>
<td>100.0%</td>
<td>50,490*</td>
<td>5.1%</td>
</tr>
</tbody>
</table>

* Total of terminations for all categories, including those in which there were no jury trials.

### TABLE 3
Civil Jury Trials in United States District Courts, 1970

<table>
<thead>
<tr>
<th>Type</th>
<th>Number of Jury Trials</th>
<th>% of Total Jury Trials</th>
<th>Number of Terminations</th>
<th>Jury Trials as % of Terminations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tort</td>
<td>2,593</td>
<td>76.1%</td>
<td>25,451</td>
<td>10.2%</td>
</tr>
<tr>
<td>Contract (excluding Recovery)</td>
<td>459</td>
<td>13.5%</td>
<td>14,987</td>
<td>3.1%</td>
</tr>
<tr>
<td>Civil Rights</td>
<td>97</td>
<td>2.8%</td>
<td>2,627</td>
<td>3.7%</td>
</tr>
<tr>
<td>Tax</td>
<td>83</td>
<td>2.4%</td>
<td>1,504</td>
<td>5.5%</td>
</tr>
<tr>
<td>Real Property</td>
<td>36</td>
<td>1.1%</td>
<td>2,398</td>
<td>1.5%</td>
</tr>
<tr>
<td>Other Federal Question</td>
<td>33</td>
<td>1.0%</td>
<td>1,599</td>
<td>2.1%</td>
</tr>
<tr>
<td>Labor (FLSA, LMRA, &amp; labor litigation)</td>
<td>32</td>
<td>0.9%</td>
<td>3,734</td>
<td>0.9%</td>
</tr>
<tr>
<td>Antitrust</td>
<td>27</td>
<td>0.8%</td>
<td>621</td>
<td>4.3%</td>
</tr>
<tr>
<td>All other Local Jurisdiction</td>
<td>11</td>
<td>0.3%</td>
<td>1,091</td>
<td>1.0%</td>
</tr>
<tr>
<td>Intellectual Property</td>
<td>9</td>
<td>0.3%</td>
<td>1,911</td>
<td>0.5%</td>
</tr>
<tr>
<td>Prisoner Petitions</td>
<td>9</td>
<td>0.3%</td>
<td>14,740</td>
<td>0.1%</td>
</tr>
<tr>
<td>Forfeitures (other than liquor)</td>
<td>8</td>
<td>0.2%</td>
<td>1,227</td>
<td>0.7%</td>
</tr>
<tr>
<td>Liquor Forfeitures</td>
<td>5</td>
<td>0.1%</td>
<td>111</td>
<td>4.5%</td>
</tr>
<tr>
<td>Bankruptcy</td>
<td>3</td>
<td>0.1%</td>
<td>347</td>
<td>0.9%</td>
</tr>
<tr>
<td>Other U.S.</td>
<td>2</td>
<td>0.1%</td>
<td>4,623</td>
<td>0.0%</td>
</tr>
<tr>
<td>Domestic Relations</td>
<td>1</td>
<td>0.0%</td>
<td>641</td>
<td>0.2%</td>
</tr>
<tr>
<td>Social Security</td>
<td>1</td>
<td>0.0%</td>
<td>1,384</td>
<td>0.1%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>3,409</td>
<td>100.0%</td>
<td>79,466*</td>
<td>4.3%</td>
</tr>
</tbody>
</table>

* Total of terminations for all categories, including those in which there were no jury trials.

### TABLE 4

Civil Jury Trials in United States District Courts, 1980

<table>
<thead>
<tr>
<th>Type</th>
<th>Number of Jury Trials</th>
<th>% of Total Jury Trials</th>
<th>Number of Terminations</th>
<th>Jury Trials as % of Terminations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tort</td>
<td>2,169</td>
<td>55.3%</td>
<td>29,420</td>
<td>7.4%</td>
</tr>
<tr>
<td>Contract</td>
<td>686</td>
<td>17.5%</td>
<td>30,287</td>
<td>2.3%</td>
</tr>
<tr>
<td>Civil Rights</td>
<td>520</td>
<td>13.3%</td>
<td>13,116</td>
<td>4.0%</td>
</tr>
<tr>
<td>Other Federal Question</td>
<td>123</td>
<td>3.1%</td>
<td>5,678</td>
<td>2.2%</td>
</tr>
<tr>
<td>Labor (FLSA, LMRA, &amp; labor litigation)</td>
<td>98</td>
<td>2.5%</td>
<td>8,285</td>
<td>1.2%</td>
</tr>
<tr>
<td>Prisoner Petitions</td>
<td>97</td>
<td>2.5%</td>
<td>21,447</td>
<td>0.5%</td>
</tr>
<tr>
<td>Antitrust</td>
<td>74</td>
<td>1.9%</td>
<td>1,644</td>
<td>4.5%</td>
</tr>
<tr>
<td>Tax</td>
<td>63</td>
<td>1.6%</td>
<td>3,307</td>
<td>1.9%</td>
</tr>
<tr>
<td>Intellectual Property</td>
<td>37</td>
<td>0.9%</td>
<td>3,559</td>
<td>1.0%</td>
</tr>
<tr>
<td>Real Property</td>
<td>24</td>
<td>0.6%</td>
<td>6,138</td>
<td>0.4%</td>
</tr>
<tr>
<td>Other Local Jurisdiction</td>
<td>9</td>
<td>0.2%</td>
<td>301</td>
<td>3.0%</td>
</tr>
<tr>
<td>Bankruptcy</td>
<td>9</td>
<td>0.2%</td>
<td>1,776</td>
<td>0.5%</td>
</tr>
<tr>
<td>Domestic Relations</td>
<td>3</td>
<td>0.1%</td>
<td>266</td>
<td>1.1%</td>
</tr>
<tr>
<td>Other U.S.</td>
<td>3</td>
<td>0.1%</td>
<td>3,908</td>
<td>0.1%</td>
</tr>
<tr>
<td>Forfeitures (other than liquor)</td>
<td>2</td>
<td>0.1%</td>
<td>2,680</td>
<td>0.1%</td>
</tr>
<tr>
<td>Social Security</td>
<td>2</td>
<td>0.1%</td>
<td>9,584</td>
<td>0.0%</td>
</tr>
<tr>
<td>Recovery</td>
<td>1</td>
<td>0.0%</td>
<td>13,417</td>
<td>0.0%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>3,920</td>
<td>100%</td>
<td>154,985*</td>
<td>2.5%</td>
</tr>
</tbody>
</table>

* Total of terminations for all categories, including those in which there were no jury trials.

TABLE 5
Civil Jury Trials in United States District Courts, 1988

<table>
<thead>
<tr>
<th>Type</th>
<th>Number of Jury Trials</th>
<th>% of Total Jury Trials</th>
<th>Number of Terminations</th>
<th>Jury Trials as % of Terminations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tort</td>
<td>2,549</td>
<td>43.1%</td>
<td>44,145</td>
<td>5.8%</td>
</tr>
<tr>
<td>Civil Rights</td>
<td>1,213</td>
<td>20.5%</td>
<td>20,113</td>
<td>6.0%</td>
</tr>
<tr>
<td>Contract</td>
<td>1,123</td>
<td>19.0%</td>
<td>45,478</td>
<td>2.5%</td>
</tr>
<tr>
<td>Prisoner Petitions</td>
<td>336</td>
<td>5.7%</td>
<td>37,261</td>
<td>0.9%</td>
</tr>
<tr>
<td>Other Federal Question</td>
<td>261</td>
<td>4.4%</td>
<td>9,866</td>
<td>2.6%</td>
</tr>
<tr>
<td>Labor (FLSA, LMRA &amp; labor litigation)</td>
<td>135</td>
<td>2.3%</td>
<td>12,681</td>
<td>1.1%</td>
</tr>
<tr>
<td>Intellectual Property</td>
<td>105</td>
<td>1.8%</td>
<td>5,798</td>
<td>1.8%</td>
</tr>
<tr>
<td>Real Property</td>
<td>52</td>
<td>0.9%</td>
<td>11,298</td>
<td>0.5%</td>
</tr>
<tr>
<td>Tax</td>
<td>47</td>
<td>0.8%</td>
<td>2,678</td>
<td>1.8%</td>
</tr>
<tr>
<td>Antitrust</td>
<td>38</td>
<td>0.6%</td>
<td>923</td>
<td>4.1%</td>
</tr>
<tr>
<td>Bankruptcy</td>
<td>25</td>
<td>0.4%</td>
<td>5,523</td>
<td>0.5%</td>
</tr>
<tr>
<td>Other U.S.</td>
<td>14</td>
<td>0.2%</td>
<td>4,477</td>
<td>0.3%</td>
</tr>
<tr>
<td>Forfeiture (other than liquor)</td>
<td>11</td>
<td>0.2%</td>
<td>3,390</td>
<td>0.0%</td>
</tr>
<tr>
<td>Social Security</td>
<td>5</td>
<td>0.1%</td>
<td>14,102</td>
<td>0.0%</td>
</tr>
<tr>
<td>Recovery</td>
<td>3</td>
<td>0.1%</td>
<td>19,825</td>
<td>0.0%</td>
</tr>
<tr>
<td>Other Diversity</td>
<td>2</td>
<td>0.0%</td>
<td>66</td>
<td>3.0%</td>
</tr>
<tr>
<td>Constitutionality of State Statute</td>
<td>1</td>
<td>0.0%</td>
<td>281</td>
<td>0.4%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>5,920</td>
<td>100.1%*</td>
<td>238,140**</td>
<td>2.5%</td>
</tr>
</tbody>
</table>

* Total does not add up to 100% due to rounding.
** Total of terminations for all categories, including those in which there were no jury trials.

### TABLE 6

Change in Composition of Civil Jury Trials (major categories only) in United States District Courts, 1961-1988

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td># of Jury Trials</td>
<td>% of Total Jury Trials</td>
<td># of Jury Trials</td>
<td>% of Total Jury Trials</td>
<td># of Jury Trials</td>
<td>% of Total Jury Trials</td>
<td># of Jury Trials</td>
<td>% of Total Jury Trials</td>
</tr>
<tr>
<td>Tort</td>
<td>2,102</td>
<td>81.3%</td>
<td>2,593</td>
<td>76.1%</td>
<td>2,169</td>
<td>55.3%</td>
<td>2,549</td>
<td>43.1%</td>
</tr>
<tr>
<td>(Diversity)</td>
<td></td>
<td></td>
<td>(1,968)</td>
<td>(57.7%)</td>
<td>(1,699)</td>
<td>(42.6%)</td>
<td>(1,994)</td>
<td>(34.1%)</td>
</tr>
<tr>
<td>Contract</td>
<td>302</td>
<td>11.7%</td>
<td>459</td>
<td>13.5%</td>
<td>686</td>
<td>17.5%</td>
<td>1,126</td>
<td>19.2%</td>
</tr>
<tr>
<td>(Diversity)</td>
<td></td>
<td></td>
<td>(416)</td>
<td>(12.2%)</td>
<td>(649)</td>
<td>(16.6%)</td>
<td>(1,014)</td>
<td>(17.3%)</td>
</tr>
<tr>
<td>Tax</td>
<td>55</td>
<td>2.1%</td>
<td>83</td>
<td>2.4%</td>
<td>63</td>
<td>1.6%</td>
<td>47</td>
<td>0.8%</td>
</tr>
<tr>
<td>Real Property</td>
<td>40</td>
<td>1.5%</td>
<td>36</td>
<td>1.1%</td>
<td>24</td>
<td>0.6%</td>
<td>52</td>
<td>0.9%</td>
</tr>
<tr>
<td>Labor</td>
<td>24</td>
<td>0.9%</td>
<td>32</td>
<td>0.9%</td>
<td>98</td>
<td>2.5%</td>
<td>135</td>
<td>2.3%</td>
</tr>
<tr>
<td>Antitrust</td>
<td>17</td>
<td>0.7%</td>
<td>27</td>
<td>0.8%</td>
<td>74</td>
<td>1.9%</td>
<td>38</td>
<td>0.6%</td>
</tr>
<tr>
<td>Civil Rights</td>
<td>6</td>
<td>0.2%</td>
<td>97</td>
<td>2.8%</td>
<td>520</td>
<td>13.3%</td>
<td>1,213</td>
<td>20.5%</td>
</tr>
<tr>
<td>Intellectual Property</td>
<td>4</td>
<td>0.2%</td>
<td>9</td>
<td>0.3%</td>
<td>37</td>
<td>0.9%</td>
<td>105</td>
<td>1.8%</td>
</tr>
<tr>
<td>Prisoner Petitions</td>
<td>0</td>
<td>0.0%</td>
<td>9</td>
<td>0.3%</td>
<td>97</td>
<td>2.5%</td>
<td>336</td>
<td>5.7%</td>
</tr>
<tr>
<td>Local Jurisdiction</td>
<td>N/A</td>
<td></td>
<td>226</td>
<td>6.6%</td>
<td>26</td>
<td>0.7%</td>
<td>13</td>
<td>0.2%</td>
</tr>
<tr>
<td>Tort</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>195</td>
<td>5.7%</td>
<td>14</td>
<td>0.4%</td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>31</td>
<td>0.9%</td>
<td>12</td>
<td>0.3%</td>
</tr>
<tr>
<td>TOTAL JURY TRIALS</td>
<td>2,585</td>
<td></td>
<td>3,409</td>
<td></td>
<td>3,920</td>
<td></td>
<td>5,920</td>
<td></td>
</tr>
</tbody>
</table>

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

### TABLE 7

Disposition of Tort Cases in State Courts of General Jurisdiction, Compared with Disposition in Federal District Courts, 1988

<table>
<thead>
<tr>
<th>Location and Court</th>
<th>Number of Tort Dispositions</th>
<th>Number of Tort Trials(^*)</th>
<th>Tort Trials As % of Tort Dispositions</th>
<th>Number of Civil Jury Trials(^*)</th>
<th>Number of Tort Jury Trials</th>
<th>Tort Jury Trials As % of All Civil Jury Trials</th>
<th>Jury Trials As % of Tort Dispositions</th>
<th>Jury Trials As % of Tort Trials</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal District Court</td>
<td>44,146</td>
<td>3,517(^*)</td>
<td>8.0%</td>
<td>5,920</td>
<td>2,549</td>
<td>43.1%</td>
<td>5.8%</td>
<td>72.5%</td>
</tr>
<tr>
<td>Federal District Court</td>
<td>30,172</td>
<td>2,408</td>
<td>8.0%</td>
<td>5,920</td>
<td>1,994</td>
<td>33.7%</td>
<td>6.6%</td>
<td>82.8%</td>
</tr>
<tr>
<td>California Superior Court</td>
<td>103,822</td>
<td>4,031</td>
<td>3.9%</td>
<td>N/A</td>
<td>1,610</td>
<td>N/A</td>
<td>1.6%</td>
<td>39.9%</td>
</tr>
<tr>
<td>Florida Circuit Court</td>
<td>33,411</td>
<td>1,903</td>
<td>5.7%</td>
<td>2,321</td>
<td>1,575</td>
<td>67.9%</td>
<td>4.7%</td>
<td>82.8%</td>
</tr>
<tr>
<td>Hawaii Circuit Court</td>
<td>1,835</td>
<td>46</td>
<td>2.8%</td>
<td>56</td>
<td>31</td>
<td>55.4%</td>
<td>1.9%</td>
<td>67.4%</td>
</tr>
<tr>
<td>Massachusetts Superior Court</td>
<td>17,787</td>
<td>1,155</td>
<td>6.5%</td>
<td>521</td>
<td>406</td>
<td>77.9%</td>
<td>2.3%</td>
<td>35.2%</td>
</tr>
<tr>
<td>Michigan Circuit Court</td>
<td>35,531</td>
<td>1,159</td>
<td>3.3%</td>
<td>1,318(^*)</td>
<td>1,020</td>
<td>77.4%</td>
<td>2.9%</td>
<td>88%</td>
</tr>
<tr>
<td>Minnesota District Court</td>
<td>10,807</td>
<td>1,755</td>
<td>16.2%</td>
<td>797</td>
<td>481</td>
<td>60.4%</td>
<td>4.5%</td>
<td>27.4%</td>
</tr>
<tr>
<td>Ohio Court Of Commons Pleas</td>
<td>29,302</td>
<td>2,128</td>
<td>7.3%</td>
<td>1,391</td>
<td>936</td>
<td>67.3%</td>
<td>3.2%</td>
<td>44%</td>
</tr>
<tr>
<td>Texas District Court</td>
<td>40,674</td>
<td>5,461</td>
<td>13.4%</td>
<td>3,402</td>
<td>1,592</td>
<td>46.8%</td>
<td>3.9%</td>
<td>29.2%</td>
</tr>
<tr>
<td>Washington Superior Court</td>
<td>10,888</td>
<td>700</td>
<td>6.4%</td>
<td>605</td>
<td>501</td>
<td>82.8%</td>
<td>4.6%</td>
<td>71.6%</td>
</tr>
</tbody>
</table>

Sources: Administrative Office of the U.S. Courts, Annual Reports, 1988, Table C-4; National Center for State Courts, Annual Reports, 1988 Part II, Table 2.

\(^*\) A non-jury trial is counted when first evidence is introduced or first witness is sworn.
\(^*\) A jury trial is counted at jury selection, empaneling, or when a jury is sworn, except as noted.
\(^*\) A trial is counted when a case terminates during or after trial.
\(^*\) A jury trial is counted at verdict or decision.
\(^*\) Disposition data exclude wrongful death torts.
TABLE 8
Disposition of Contract Cases in State Courts of General Jurisdiction, Compared with Disposition in Federal District Courts, 1988

<table>
<thead>
<tr>
<th>Location And Court</th>
<th>Number Of Contract Dispositions</th>
<th>Number Of Contract Trials¹</th>
<th>Contract Trials As % Of Contract Dispositions</th>
<th>Total Number Civil Jury Trials</th>
<th>Number Of Contract Jury Trials</th>
<th>Contract Jury Trials As % Of All Civil Jury Trials</th>
<th>Jury Trials As % Of Contract Dispositions</th>
<th>Jury Trials As % Of Contract Trials</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal District Court</td>
<td>65,303*</td>
<td>2,507*</td>
<td>3.8%</td>
<td>5,920</td>
<td>1,126</td>
<td>19.0%</td>
<td>1.7%</td>
<td>44.9%</td>
</tr>
<tr>
<td>Federal District Court Diversity Only</td>
<td>32,990</td>
<td>2,048</td>
<td>6.2%</td>
<td>5,920</td>
<td>1,014</td>
<td>17.1%</td>
<td>3.1%</td>
<td>49.5%</td>
</tr>
<tr>
<td>Florida Circuit Court</td>
<td>54,529</td>
<td>2,306</td>
<td>4.2%</td>
<td>2,321</td>
<td>448</td>
<td>19.3%</td>
<td>0.8%</td>
<td>19.4%</td>
</tr>
<tr>
<td>Hawaii Circuit Court</td>
<td>1,554</td>
<td>27</td>
<td>1.7%</td>
<td>56</td>
<td>8</td>
<td>14.3%</td>
<td>0.5%</td>
<td>29.6%</td>
</tr>
<tr>
<td>Massachusetts Superior Court</td>
<td>5,646</td>
<td>580</td>
<td>10.3%</td>
<td>521</td>
<td>78</td>
<td>15%</td>
<td>1.4%</td>
<td>13.4%</td>
</tr>
<tr>
<td>Minnesota District Court</td>
<td>8,899</td>
<td>496</td>
<td>5.6%</td>
<td>797</td>
<td>122</td>
<td>15.3%</td>
<td>1.4%</td>
<td>25%</td>
</tr>
<tr>
<td>Texas District Court</td>
<td>55,878</td>
<td>5,332</td>
<td>9.5%</td>
<td>3,402</td>
<td>535</td>
<td>15.7%</td>
<td>1%</td>
<td>10%</td>
</tr>
<tr>
<td>Washington Superior Court</td>
<td>13,237</td>
<td>452</td>
<td>3.4%</td>
<td>605</td>
<td>51</td>
<td>8.4%</td>
<td>0.4%</td>
<td>11.3%</td>
</tr>
<tr>
<td>Wisconsin Circuit Court</td>
<td>64,340</td>
<td>1,632</td>
<td>2.5%</td>
<td>1,078</td>
<td>203</td>
<td>18.9%</td>
<td>0.3%</td>
<td>12.4%</td>
</tr>
</tbody>
</table>

* Includes recovery cases.
Sources: Administrative office of the U.S. Courts, Annual Reports, 1988, Table C-4; National Center of State Courts, Annual Reports, 1988 Part II, Table 2.

¹ A non-jury trial is counted when first evidence is introduced or first witness is sworn.
² A jury trial is counted at jury selection, empaneling, or when a jury is sworn.
³ A trial is counted when a case terminates during or after trial.
# TABLE 9

Disposition of Property Cases in State Courts of General Jurisdiction, 1988

<table>
<thead>
<tr>
<th>Location and Court</th>
<th>Number of Property Dispositions</th>
<th>Number of Property Trials¹</th>
<th>Property Trials as % of Dispositions</th>
<th>Total Number of Civil Jury Trials²</th>
<th>Number of Property Jury Trials as % of all Civil Jury Trials</th>
<th>Jury Trials as % of Property Dispositions</th>
<th>Jury Trials as % of Property Trials</th>
</tr>
</thead>
<tbody>
<tr>
<td>California Superior Court</td>
<td>795</td>
<td>135</td>
<td>17%</td>
<td>N/A</td>
<td>40</td>
<td>N/A</td>
<td>5.0%</td>
</tr>
<tr>
<td>Florida Circuit Court</td>
<td>51,062</td>
<td>1,880</td>
<td>3.7%</td>
<td>2,321</td>
<td>98</td>
<td>4.2%</td>
<td>0.2%</td>
</tr>
<tr>
<td>Hawaii Circuit Court</td>
<td>247</td>
<td>1</td>
<td>0.4%</td>
<td>56</td>
<td>1</td>
<td>1.8%</td>
<td>0.4%</td>
</tr>
<tr>
<td>Massachusetts Superior Court</td>
<td>2,382</td>
<td>357</td>
<td>15%</td>
<td>521</td>
<td>37</td>
<td>7.1%</td>
<td>1.6%</td>
</tr>
<tr>
<td>Minnesota District Court</td>
<td>17,353</td>
<td>395</td>
<td>2.3%</td>
<td>797</td>
<td>81</td>
<td>10.2%</td>
<td>0.5%</td>
</tr>
<tr>
<td>Texas District Court</td>
<td>439</td>
<td>85</td>
<td>19.4%</td>
<td>3,402</td>
<td>9</td>
<td>0.3%</td>
<td>2.1%</td>
</tr>
<tr>
<td>Washington Superior Court</td>
<td>13,192</td>
<td>320</td>
<td>2.4%</td>
<td>605</td>
<td>19</td>
<td>3.1%</td>
<td>0.1%</td>
</tr>
</tbody>
</table>

Source: National Center for State Courts, Annual Report, 1988 Part II, Table 2.

¹ A non-jury trial is counted when first evidence is introduced or first witness is sworn.
² A jury trial is counted at jury selection, empaneling, or when a jury is sworn.
## TABLE 10

Civil Jury Trials in Florida Circuit Court, 1988

<table>
<thead>
<tr>
<th>Type</th>
<th>Number of Jury Trials</th>
<th>% of Total Jury Trials</th>
<th>Number of Dispositions</th>
<th>Jury Trials as % of Dispositions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tort</td>
<td>1,575</td>
<td>67.9%</td>
<td>33,411</td>
<td>4.7%</td>
</tr>
<tr>
<td>Contract</td>
<td>448</td>
<td>19.3%</td>
<td>54,529</td>
<td>0.8%</td>
</tr>
<tr>
<td>Property</td>
<td>98</td>
<td>4.2%</td>
<td>51,062</td>
<td>0.2%</td>
</tr>
<tr>
<td>Other*</td>
<td>200</td>
<td>8.6%</td>
<td>101,765</td>
<td>0.2%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>2,321</td>
<td>100%</td>
<td>240,767</td>
<td>1.0%</td>
</tr>
</tbody>
</table>

* "Other" data includes miscellaneous civil cases.

Source: National Center for State Courts, Annual Report, 1988 Part II, Table 2.
<table>
<thead>
<tr>
<th>Type</th>
<th>Number of Jury Trials</th>
<th>% of Total Jury Trials</th>
<th>Number of Dispositions</th>
<th>Jury Trials as % of Dispositions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tort</td>
<td>31</td>
<td>55.4%</td>
<td>1,635</td>
<td>0.7%</td>
</tr>
<tr>
<td>Contract</td>
<td>8</td>
<td>14.3%</td>
<td>1,554</td>
<td>0.6%</td>
</tr>
<tr>
<td>Property</td>
<td>1</td>
<td>1.8%</td>
<td>247</td>
<td>0.5%</td>
</tr>
<tr>
<td>Other</td>
<td>16</td>
<td>28.6%</td>
<td>5,039</td>
<td>0.3%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>56</td>
<td>100.1%</td>
<td>8,475</td>
<td>0.7%</td>
</tr>
</tbody>
</table>

Source: National Center for State Courts, Annual Report, 1988 Part II, Table 2.

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

Note: % of total jury trials does not equal 100% due to rounding.
<table>
<thead>
<tr>
<th>Type</th>
<th>No. of Jury Trials</th>
<th>% of Total Jury Trials</th>
<th>No. of Dispositions</th>
<th>Jury Trials as % of Dispositions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tort(^1)</td>
<td>406</td>
<td>77.9%</td>
<td>17,767</td>
<td>2.3%</td>
</tr>
<tr>
<td>Contract</td>
<td>78</td>
<td>15.0%</td>
<td>5,646</td>
<td>1.4%</td>
</tr>
<tr>
<td>Property(^2)</td>
<td>37</td>
<td>7.1%</td>
<td>33,915</td>
<td>0.1%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>521</td>
<td>100.0%</td>
<td>57,328</td>
<td>3.7%</td>
</tr>
</tbody>
</table>

Sources: National Center for State Courts, Annual Report, 1988 Part II, Table 2.

\(^1\) Tort data do not include data from Boston Municipal and District Court Departments.

\(^2\) Real property rights disposed data do not include summary process and civil cases from the Housing Court Department.
TABLE 13

Civil Jury Trials in Minnesota District Court, 1988

<table>
<thead>
<tr>
<th>Type</th>
<th>Number of Jury Trials</th>
<th>% of Total Jury Trials</th>
<th>Number of Dispositions</th>
<th>Jury Trials as % of Dispositions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tort</td>
<td>481</td>
<td>60.4%</td>
<td>10,807</td>
<td>4.5%</td>
</tr>
<tr>
<td>Contract</td>
<td>122</td>
<td>15.3%</td>
<td>8,899</td>
<td>1.4%</td>
</tr>
<tr>
<td>Property</td>
<td>81</td>
<td>10.2%</td>
<td>17,353</td>
<td>0.5%</td>
</tr>
<tr>
<td>Other</td>
<td>113**</td>
<td>14.2%</td>
<td>40,940</td>
<td>0.3%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>797</td>
<td>100.1%*</td>
<td>77,999</td>
<td>1.0%</td>
</tr>
</tbody>
</table>

* Percentage of total jury trials does not equal 100% due to rounding.
** "Other" civil trials do not include estate cases.

Sources: National Center for State Courts, Annual Report, 1988 Part II, Table 2.

TABLE 14

Civil Jury Trials in Texas District Court, 1988

<table>
<thead>
<tr>
<th>Type</th>
<th>Number of Jury Trials</th>
<th>% of Total Jury Trials</th>
<th>Number of Dispositions</th>
<th>Jury Trials as % of Dispositions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tort</td>
<td>1,592</td>
<td>46.8%</td>
<td>40,674</td>
<td>3.9%</td>
</tr>
<tr>
<td>Contract</td>
<td>535</td>
<td>15.7%</td>
<td>55,878</td>
<td>1.0%</td>
</tr>
<tr>
<td>Property</td>
<td>9</td>
<td>0.3%</td>
<td>439</td>
<td>2.1%</td>
</tr>
<tr>
<td>Other</td>
<td>1,266</td>
<td>37.2%</td>
<td>127,450</td>
<td>1.0%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>3,402</td>
<td>100%</td>
<td>224,441</td>
<td>1.5%</td>
</tr>
</tbody>
</table>

Sources: National Center for State Courts, Annual Report, 1988 Part II, Table 2.
### TABLE 15

Civil Jury Trials in Washington Superior Court, 1988

<table>
<thead>
<tr>
<th>Type</th>
<th>Number of Jury Trials</th>
<th>% of Total Jury Trials</th>
<th>Number of Dispositions</th>
<th>Jury Trials as % of Dispositions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tort</td>
<td>501</td>
<td>82.8%</td>
<td>10,888</td>
<td>4.6%</td>
</tr>
<tr>
<td>Contract</td>
<td>51</td>
<td>8.4%</td>
<td>13,237</td>
<td>0.4%</td>
</tr>
<tr>
<td>Property</td>
<td>19</td>
<td>3.1%</td>
<td>13,192</td>
<td>0.1%</td>
</tr>
<tr>
<td>Other</td>
<td>34</td>
<td>5.6%</td>
<td>19,843</td>
<td>0.2%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>695</td>
<td>99.9%*</td>
<td>57,160</td>
<td>1.1%</td>
</tr>
</tbody>
</table>

* Percentage of total jury trials does not add up to 100% due to rounding.

Sources: National Center for State Courts, Annual Report, 1988 Part II, Table 2.