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ESSAY

OUR JURIES, OUR SELVES: THE POWER, PERCEPTION, AND POLITICS OF THE CIVIL JURY

Laura Gaston Dooley†

The modern American jury has a bipolar presence in the popular consciousness. On the one hand, the jury is a cultural icon as revered in the United States as the flag,¹ its contribution to democracy equated to voting.² On the other hand, the jury is reviled as an agent of arbitrary injustice, its output considered evidence of the decline of moral consensus. Controversial, high-profile jury verdicts in the last few years have intensified the debate about the efficacy of the jury as the principal decisionmaker in court-settled disputes.

This cultural ambivalence about the jury has significance beyond the ongoing need to assess jury performance, because the modern jury is the most diverse of our democratic bodies.³ After courts began

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¹ Akhil Amar calls the jury the “paradigmatic image underlying the Bill of Rights The jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights.” Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1190 (1991).

² 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 283 (Francis Bowen trans., Alfred A. Knopf 1976) (1840) (“The jury system as it is understood in America appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage. They are two instruments of equal power, which contribute to the supremacy of the majority.”).

³ As to gender diversity, a recent study reveals that in the federal courts of eight major cities, women comprised an average of 52.875% of serving jurors, defined in the study as a “qualified person reporting or on call to report to the courthouse for jury duty.” NATIONAL CENTER FOR STATE COURTS, *THE RELATIONSHIP OF JUROR FEES AND TERMS OF SERVICE TO JURY SYSTEM PERFORMANCE* 3 n.4 (Janice T. Munsterman, Project Director, 1991) [hereinafter *JUROR FEES STUDY*]. In the state courts serving the same metropolitan areas, women comprised 53.75% of serving jurors. The cities surveyed were Bismarck, Boston, Dallas, Denver, Montgomery, Phoenix, Seattle, and Washington, D.C. *Id.* app. D at D1.

The degree of racial diversity was much more varied. In Montgomery, for example, African-Americans comprised 22% of serving jurors in state court and 23% in federal court; in Washington, D.C., African-Americans comprised 65% and 73% of serving jurors in state and federal court; in Bismarck, Boston, Phoenix, and Seattle, the percentage of African-Americans hovered around 3% in both state and federal court, though other minorities added somewhat to the diversity of juries in those cities. *Id.*

to interpret constitutional mandates of equal protection and impartial juries to require that women and minorities be included on juries,⁴ the demographics of juries changed dramatically at a pace far exceeding the diversification of legislatures, executive branches, or the judiciary.⁵

But as this jurisprudence of inclusion developed, so too did restraints on jury power. The twentieth-century civil jury is subject to legal restraints unknown to our constitutional framers and enjoys far less prestige than its eighteenth-century ancestor. The confluence of the dual trends toward inclusion and restraint creates some troubling questions. What does it mean that the most diverse of our democratic institutions is subject to increasing legal restraints and cultural disdain? Is the treatment of the modern jury as an institution (now that

Although these numbers do not indicate the representation of women and minorities on petit juries, some diversity likely persists into the trial jury composition, especially given the developing case law restricting the use of peremptory challenges to strike jurors solely on the basis of race or gender. See *infra* notes 164-67 and accompanying text.

⁴ The Supreme Court has developed two strands of jurisprudence designed to ensure that juries will fairly represent the community from which they are drawn. The first is derived from the Sixth Amendment guarantee of criminal trials by "impartial" juries, which the Court reads to mean that jury venire pools must be drawn from a "fair cross section" of the community. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). The Court does not require, however, that the final jury chosen in any particular case be demographically proportionate.

A more important tool in the movement toward representativeness has been the Equal Protection Clause of the Fourteenth Amendment, which has been successfully invoked to prevent the use of peremptory challenges to strike prospective jurors on the basis of their race or gender. See *J.E.B. v. Alabama ex rel T.B.*, 114 S. Ct. 1419 (1994) (declaring unconstitutional the use of peremptory challenges to strike jurors on the basis of gender); *Batson v. Kentucky*, 476 U.S. 79 (1986) (establishing that use of peremptories to strike jurors on the basis of race violates the federal constitution); see also *infra* notes 164-67 and accompanying text.

⁵ Despite growing awareness of the gender gap in legislative bodies, the judiciary, and the executive offices of government, the numbers are still vastly disproportionate. In the 103d Congress, only six women served among the 100 members of the United States Senate; only 47 women served among the 435 members of the House of Representatives. In 1992, only 60 women held state-wide elective executive offices in the United States, and only 1375 women served in state legislatures. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1992, at 268 (1992). As of 1988, women comprised only 7.4% of the federal judiciary, and only 7.2% of state judges. COMMISSION ON WOMEN IN THE PROFESSION, REPORT TO THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION 6 (Hillary Rodham Clinton, Chair, 1988). See Carl Tobias, *Closing the Gender Gap on the Federal Courts*, 61 U. CIN. L. REV. 1237 (1993) (noting that the gender gap remains and suggesting solutions to the Clinton Administration).

The pace of jury diversification has been far swifter. A 1968 survey of juror characteristics performed by the American Bar Foundation found that 27% of jurors serving in one federal district court's accelerated docket were women; as noted above, the numbers of women rose dramatically when 1990 survey results were tabulated from multiple districts. Compare FREDRIC R. MERRILL & LINUS SCHRAGE, A PILOT STUDY OF UTILIZATION OF JURORS 16 (1970) (giving 1968 figures for the Western District of Missouri) with JUROR FEES STUDY, *supra* note 3, at D1 (giving 1990 figures for multiple districts).

women are routinely included) itself a manifestation of sexism?⁶ Does the power distribution in the courtroom between judge and jury reflect a cultural privileging of the judge as the presumably "rational" actor?

This Essay confronts these underlying questions by examining the semiotics of the jury, as manifested both by its position within the power structure of the civil courtroom and by the underlying ideology that justifies and maintains that position. The procedural structure within which the civil jury operates, together with the language that manifests that structure, tell a story of a progressive cultural privileging of judicial rationality and distaste for perceived populist excesses. Thus, the jury's power is held in check by procedural devices which ensure that judges will have the last word, while its value as a trustworthy decisionmaker is called into question by courtroom protocol and rhetoric that casts it in feminine terms. Like women, juries are placed on rhetorical pedestals yet are condescended to by the other actors in the legal system.

Part I of this Essay examines the power distribution between jury and judge established by procedural rules in the federal civil system⁷ and demonstrates how that structure reinforces an ideology that privileges the judge as the more rational decisionmaker. Part II analyzes the way juries are spoken of, as well as the way jurors are spoken to, to illustrate the cultural fear of jury irrationality. Modern judicial opinions, legal scholarship, and the popular press frequently exhibit a marked, if somewhat masked, disdain for the jury. An institution whose presence on the colonial scene had often been a symbol of populist revolt has inexorably become the signal of ethical breakdown,⁸ and even sometimes a laughingstock.⁹ In the name of so-called "rational" decisionmaking, the jury is marginalized by language that

⁶ Though advances in jury diversification were consistently made for racial minorities before they were made for women, the decline of the jury's prestige analyzed here no doubt reflects both racism and sexism. This Essay focuses on sexism, without in any way diminishing the possibility that racism plays a role. More broadly, the analysis points to classism at work: judges are well-educated, middle- to upper-class individuals. Though jurors are supposed to come from all walks of life, it is commonly believed that because professionals are able to get out of jury service more easily, the process may produce jury compositions drawn disproportionately from lower economic classes and from those with less formal education.

⁷ Since most state court procedural systems track the federal rules' jury restraint mechanisms of directed verdicts and judgments notwithstanding verdicts ("JNOV"), the analysis presented applies to both state and federal courts.

⁸ See Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 44-47.

⁹ In a recent *Doomesbury* strip, Garry Trudeau depicts the questioning of a potential juror:

Lawyer: Ms. Luckenblatt, are you a professional? A decision maker?
 Do you hold a position that carries any responsibility whatsoever?
 Juror: Um . . . no. Not really.

frames it as feminine. Allowing the judge to define rationality, by giving him¹⁰ the ability to set aside jury verdicts he considers irrational, implies that juries, like women, tend toward the irrational, and must constantly be monitored.

Finally, Part III proposes a possible historical explanation for the modern cultural ambivalence toward the civil jury. It focuses on the correlation between the development of a jurisprudence of inclusion and the growth of procedural restraints that vest final power in judges to check jury "irrationality."¹¹ While the civil jury's decline in modern times has been widely acknowledged,¹² common theoretical explanations have neglected this unsettling correlation.¹³ Part III suggests that we must examine the shift toward privileging an idea of rationality¹⁴ defined and enforced by judges if we want to understand why the jury has been stripped, both functionally and rhetorically, of the power and authority it once enjoyed.

The cultural critique presented here also has important implications for the future of the jury system. The marginalization of the jury undermines the democratic vision of full participation and may discourage citizen respect for the legal system in general. Current restraints on and proposed modifications to the jury system must take into account its democratic value. In a legal world in which the jury is the most diversified of the possible decisionmakers for most dis-

Lawyer: Are you informed? Educated? Articulate? Do you have any opinions about anything? Anything at *all*?

Juror: Well, I'm . . . I'm not exactly sure . . .

Lawyer: She'll do, your honor.

Garry Trudeau, *Doonisbury*, CHI. TRI., June 30, 1994, § 5, at 12.

¹⁰ I use the masculine pronoun "he" in recognition of the demographic fact that judges still are predominantly male and to reinforce the semiotic analysis presented here, which identifies the judge as the "male" actor in the courtroom power dynamic, regardless of actual gender.

¹¹ See FED. R. CIV. P. 50; *infra* notes 32-34, 37 and accompanying text.

In criminal trials, judges have the power to set aside jury verdicts of guilt when found to be irrational, see *Jackson v. Virginia*, 443 U.S. 307 (1979), but must leave intact jury acquittals due to the special restraints imposed by the Double Jeopardy Clause of the federal constitution. This one absolute power retained by the jury under modern procedural systems is sometimes called the nullification power. It has given rise to a populist movement aimed at requiring that juries be told they have this power. See Katherine Bishop, *Diverse Group Wants Juries to Follow Natural Law*, N.Y. TIMES, Sept. 27, 1991, at B16.

This Essay will focus on the civil jury, which operates under more rigid constraints since it has no nullification power. However, because high-profile criminal jury verdicts are frequently the objects of public scorn, their impact on the cultural perception of the jury as an institution is also considered.

¹² See *infra* notes 143-46 and accompanying text.

¹³ Cf. Albert W. Alshuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867 (1994) (tracing decline of criminal jury's power).

¹⁴ For discussions of the gendered correspondences traditionally drawn in relation to the concept of rationality, see Genevieve Lloyd, *The Man of Reason, reprinted in WOMEN, KNOWLEDGE AND REALITY* (Ann Garry & Marilyn Pearsall eds., 1992); Margaret J. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1712-1714 (1990).

putes,¹⁵ its relative lack of power and clear authority has political fallout that can no longer be disregarded.

I

ANGEL OF THE COURTROOM: THE POWER OF THE CIVIL JURY

The American public seems to have a love-hate relationship with the institution of the civil jury. Popular literature reveals a cultural ambiguity about whether a group of twelve laypersons are qualified to handle legal disputes, especially potentially complex or difficult moral ones. From the time of de Tocqueville's work¹⁶ to the newspaper op-ed pages of the 1990s,¹⁷ the literature is replete with rhapsodic testimonials to the quintessentially democratic character of the American jury. Yet the popular press,¹⁸ the entertainment media,¹⁹ and highly esteemed legal scholars²⁰ have bemoaned the unpredictability and the

¹⁵ The increasing diversification of the judiciary is laudable and important. But given the relatively slow progress in that arena due to infrequent turnover and the realities of political life, the jury will continue to be the more diverse decisionmaker for the foreseeable future.

¹⁶ DE TOCQUEVILLE, *supra* note 2.

¹⁷ See, e.g., Ellen Goodman, *Today's Juror Must Carry the Baggage of Evolving Values*, CHI. TRIB., Mar. 21, 1994, § 1, at 13; Philip H. Corboy, *Trust Juries in Awarding Damages*, CHI. TRI., Dec. 31, 1991, at 18 (letter to the editor) ("When the Founders planned out our civil justice system, they entrusted the responsibility for determining the facts and assessing damages to common people . . . Their belief in the common sense of a neutral group of ordinary people was so strong that they placed the right to trial by jury in the Constitution itself."). For an op-ed focusing on criminal jury competence, see Paul H. Robinson, *Not Guilty Isn't Always Innocent*, CHI. TRI., Feb. 8, 1994, § 1, at 17. It is appropriate to disclose that my own contribution to the public debate has been decidedly pro-jury. See Laura Gaston Dooley, *The Public Conscience in the Courtroom*, INDIANAPOLIS STAR, Mar. 7, 1994, at A9 [hereinafter Dooley, *The Public Conscience in the Courtroom*]; Laura Gaston Dooley, *The Importance of Diverse Juries*, IND. LAW., May 18, 1994, at 4 [hereinafter Dooley, *The Importance of Diverse Juries*].

¹⁸ See, e.g., *Nightline Friday Night Special* (ABC television broadcast, Feb. 4, 1994), available in LEXIS, Nexis Library, Transcript No. 3315 [hereinafter *Nightline Special*] (comments of Wendy Kaminer, attorney-author, Charles Krauthammer, essayist-journalist, and Alan Dershowitz, law professor); see also Fred Reed, *If Jury Finds Truth, It's Only By Accident*, WASH. TIMES, Mar. 1, 1993 ("Having spent considerable time now watching our system of trial by jury, a suspicion grows on me that it is unworkable and badly conceived. . . . [T]he whole process appears philosophically disreputable, procedurally unsound, too influenced by nonrational factors and a crap shoot.")

¹⁹ The comedian Dennis Miller says in an ad for his cable television show: "The entire American legal system is upside down. We have people's lives being determined by twelve people in a room whose main goal in life is to wrap it up and get home in time to watch reruns on the superstation." Advertisement, NEW YORKER, Apr. 25, 1994, at 91.

²⁰ Justice Oliver Wendell Holmes wrote:

I confess that in my experience I have not found juries specially inspired for the discovery of truth. I have not noticed that they could see further into things or form a saner judgment than a sensible and well trained judge. I have not found them freer from prejudice than an ordinary judge would be. Indeed one reason why I believe in our practice of leaving questions of negligence to them is what is precisely one of their gravest defects from the point of view of their theoretical function: that they will introduce into

"irrational" behavior of juries. The long and continuing debate over the efficacy of the jury manifests a major cultural ambivalence, a reverence for the institution as a democratic ideal mixed with disdain for the people who actually serve as jurors.²¹

Moreover, the ideology of jury-as-iron/jurors-as-fools plays out both in the structural relationship between judge and jury in the civil courtroom and in the language used to establish and perpetuate that relationship. Modern procedural rules place the judge in a position to control, even negate, civil jury action in the service of an ideal of rationality. Indeed, so great is our fear of irrational decisionmaking that most of us intuitively recoil at the idea of unchecked civil juries. That intuition, of course, rests on a conviction that judges, either sin-

their verdict a certain amount—a very large amount, so far as I have observed—of popular prejudice, and thus keep the administration of the law in accord with the wishes and feelings of the community.

OLIVER W. HOLMES, *Law in Science and Science in Law*, in THE HOLMES READER 85, 96-97 (Julius J. Marke ed., 2d ed. Oceana 1964). In this quote we see Justice Holmes expressing at once the reverence and disdain for the jury, the ambiguity that drives our cultural perceptions of that institution.

The most famous judicial critic of the jury was Judge Jerome Frank. See JEROME FRANK, COURTS ON TRIAL 120 (1949) [hereinafter FRANK, COURTS ON TRIAL]; JEROME FRANK, LAW AND THE MODERN MIND 181 (1930) ("The jury makes the orderly administration of justice virtually impossible.") [hereinafter FRANK, LAW AND THE MODERN MIND].

²¹ On a recent *Nightline* special, Harvard Law Professor Alan Dershowitz condemned jury action in the acquittals of Lorena Bobbitt (who had admitted castrating her husband but attributed the act to temporary insanity caused by his abuse of her) and in the hung juries of Lyle and Erik Menendez (whose juries could not agree on whether they should be convicted of murder or manslaughter in the killing of their parents who they claimed abused them). At one point, Professor Dershowitz referred to the Menendez jurors as "fools" and even suggested that the split on the jury may reflect that some of them had been watching too much daytime television. See *Nightline Special*, *supra* note 18, at 16. Since Erik's jury split precisely along gender lines, Professor Dershowitz's comment takes on particular significance. Commentator Margaret Carlson struck a similar note in a *Time* magazine essay: "The [Menendez] brothers went from parents who understood too much to a jury that did." Margaret Carlson, *That Killer Smile*, TIME, Feb. 7, 1994, at 76.

Another modern manifestation of this disdain can be seen in newspaper accounts of jury damage awards. See, e.g., John Murawski, *The Jury's \$10 Million Surprise*, LEGAL TIMES, Feb. 15, 1993, at 6 (describing District of Columbia jury award to a medical malpractice plaintiff, and quoting anonymous lawyer as saying that "this is the kind of verdict that the tort-reform people take and say, 'this proves that juries are irrational and cannot be trusted with decision-making' . . ."); see also Reed, *supra* note 18 (describing the "contempt in which juries are held by both prosecution and defense" in criminal cases and attributing that to "a belief that jurors are to be emotionally manipulated, like children of limited intellect, rather than convinced by logic").

Though disdain for the jury has been building recently, it certainly is not new. Nearly 100 years ago, the famous fictional bartender and sooth-sayer Mr. Dooley (no relation) had this to say about the competency of the lay jury: "Whin th' case is all over, the jury'll pitch th' testimony out iv th' window, an' consider three questions: 'Did Lootgert look as though he'd kill his wife? Did his wife look as though she ought to be kilt? Isn't it time we went to supper?'" FINLEY P. DUNNE, MR. DOOLEY IN PEACE AND WAR 141-45 (Boston, Small, Maynard & Co. 1898), quoted in JAMES P. LEVINE, JURIES AND POLITICS ix (1992).

gly or collectively,²² are more likely than jurors to have a handle on rationality. And that conviction, in turn, mirrors a perception gap in the wider culture along gender lines.²³ Society's ambivalence about the competence and usefulness of juries is both a manifestation of and a metaphor for society's ambivalence about women and about what is perceived as a feminine approach to decisionmaking.²⁴

This ideology has been fueled by the elitism of the bench and bar,²⁵ which has subtly shaped public perception of the jury. The jury has been cast as the "other"²⁶ in the courtroom; its value and power are directly and proportionately relative to that of the judge and ultimately it is he who determines its contours. The jury's sphere of influence is thus wholly externally controlled.

²² A trial judge who rejects a jury decision is usually subject to the control of the appellate process; of course, then his judgment is reviewed only by other judges, not juries. See *infra* notes 33-34, 37 and accompanying text for discussion of civil procedural devices that vest this control in judges. Most systems, including the federal courts, also give judges the option of ordering new trials when the judge is dissatisfied with a jury verdict. In a new trial, a new jury might be empaneled, and temporarily empowered, to hear the case. But the control mechanisms remain in place then as well: the jurors are vindicated only if they render a verdict that the judge leaves in place. See *Craft v. Metromedia*, 766 F.2d 1205 (8th Cir. 1985) (after two jury trials ended in verdicts for plaintiff, district court's JNOV upheld), *cert. denied*, 475 U.S. 1058 (1986).

²³ Professor Carrie Menkel-Meadow has asked, "Is the judge 'male,' the jury 'female'? Is the search for facts a feminine search for context and the search for legal principles a masculine search for certainty and abstract rules?" Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 49 (1985). Indeed, my analysis demonstrates that the system does treat the jury's job as feminine, and correspondingly limits its discretion even within its already limited sphere. To hope for reform at the hand of the civil jury acting alone is naive, given the restraints on its ultimate decisionmaking power in civil cases.

²⁴ Cf. Laura Gaston Dooley, *Sounds of Silence on the Civil Jury*, 26 VAL. U. L. REV. 405 (1991) (noting the difficulty in assessing any influence of a different voice of women as jurors given the rigid format of the verdict process).

²⁵ The cover of the June 1994 issue of the American Bar Association Journal featured this caption: "Has a Talk-Show Mentality Softened Jurors to Accept any Excuse?" The featured article focused on the growth of criminal defenses based on past circumstances of the accused. See Stephanie B. Goldberg, *Fault Lines*, A.B.A. J., June 1994, at 40.

²⁶ The term "other" here is being used in its critical sense as the marginalized actor in a two-part drama: the jury is important, useful, and esteemed only insofar as the primary actor, the judge, deems it so in particular circumstances. More broadly, the culture perceives the jury as "other" because it has been so portrayed by those who have the power to shape popular consciousness.

Casting the jury as "other" corresponds to what feminist literary critics, including Simone de Beauvoir, Mary Ellman, and Kate Millett, have long argued about the place of women in literature. See, e.g., Cheryl B. Torsney, *The Critical Quilt: Alternative Authority in Feminist Criticism*, in CONTEMPORARY LITERARY THEORY 181 (G. Douglas Atkins & Laura Morrow eds., 1989) ("[T]hroughout literary history women have been conceived of as 'other,' as somehow abnormal or deviant."); see also Josephine Donovan, *Beyond the Net: Feminist Criticism as a Moral Criticism*, 17 DEN. Q. 40, 42 (1983) ("Sexist ideology necessarily promotes the concept of woman-as-object or woman-as-other."); see generally MICHAEL THEUNISSEN, *THE OTHER: STUDIES IN THE SOCIAL ONTOLOGY OF HUSSERL, HEIDEGGER, SARTRE, AND BUBER* (Christopher Macann trans., 1984).

In the Victorian period, it was often argued that the social arrangements of the day properly divided power, influence, and responsibilities according to the relative attributes of men and women. Far from being oppressed, the woman was said to exercise great power in the domestic sphere, to which her feminine talents were particularly well-suited. She was the "angel in the house,"²⁷ and her ability to control her private world was supposed to satiate any general desire for power that she might have. Of course, any power women had was completely circumscribed by men (usually husband or father). The limited sphere of her influence was always subject to external control.

The notion that Victorian women enjoyed a position of power in the private sphere under the convention of the time seems quaint to us now. But the same power dynamic that allowed for such an argument in the nineteenth century is reinventing itself in the twentieth-century relationship between judge and jury in the courtroom. Because the judge always retains ultimate authority to override jury decisions,²⁸ he controls the jury's sphere of influence.

This power disparity did not always exist. In colonial times civil juries were frequently entrusted to adjudicate both law and fact. Although historical sources are scarce and sometimes inconsistent, causing scholars to debate the precise lines of authority between judge and jury in late eighteenth and early nineteenth century American courtrooms,²⁹ one thing is clear: the authority of the jury vis-a-vis the judge eroded in the late nineteenth century³⁰ and especially in the twentieth.

Over the course of the nineteenth century, sweeping changes in courtroom procedures forced the creation of much more discrete spheres of influence for judge and jury.³¹ Though "[t]he modifica-

²⁷ See, e.g., Virginia Woolf, *Professions for Women*, reprinted in 2 NORTON ANTHOLOGY OF ENGLISH LITERATURE (M.H. Abrams et al. eds., 16th ed. 1987) (citing a poem by that name written by Coventry Patmore and published between 1854 and 1862).

²⁸ See *infra* notes 34-37 and accompanying text (describing directed verdict and JNOV procedures in civil cases).

²⁹ Compare Edith G. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 299-310 (1966) (noting disparity of jury power among states) with LEVINE, *supra* note 21, at 24-25 ("[J]urors had enormous leeway [in first half of the nineteenth century] to draw on their own feelings about the cases in addition to the evidence laid out in the courtroom. . . . This all changed in the latter part of the nineteenth century and during the twentieth century [when] [p]rosecutors and judges gained more control over cases. . . .").

³⁰ See VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 38 (1986) ("Beginning about 1850, Americans' unfettered enthusiasm for the jury began to wane.").

³¹ In a recent article, law professor Al Alschuler and historian Andrew Deiss have contributed greatly to the literature by undertaking the project of sketching a general history of the criminal jury's transformation in the nineteenth and twentieth centuries. See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867 (1994). The authors conclude that the criminal jury's loss of its power to decide legal, as opposed to factual, issues, along with the rise in plea bargaining, weakened the societal role of criminal juries. *Id.* at 906-11, 921-27. Their historical work,

tions of the jury trial in the several states differed in detail and in timetable, . . . the decline of the jury from its exalted status at the beginning of the [nineteenth] century was a general trend observable in all the states.³² In particular, the authority of the jury to make factual determinations was tempered by the judge's broadening power to decide legal issues. This power shift manifested itself in the increasing use of the special verdict, which circumscribes juries' decisionmaking by requiring specificity,³³ and the directed verdict, which bypasses the jury altogether when the judge finds the evidence to be one-sided.³⁴

The procedure authorizing a judge to "direct a verdict" in a case in which he feels the evidence to be so one-sided as to compel a particular result might seem to conflict with the Seventh Amendment, which "preserves" the right to jury trial in civil cases as it existed at common law.³⁵ Indeed, this problem provoked a constitutional challenge to the directed verdict procedure, a problem that the Supreme Court finessed by characterizing the directed verdict as a legal, not factual, issue, legal issues being within the province of the judge.³⁶

The twentieth century also produced an even more forthright encroachment on jury power in the device of the judgment notwithstanding the verdict, popularly known as the JNOV,³⁷ which, as its name suggests, allows the judge to override a jury verdict that he concludes no reasonable jury could have reached. In other words, the entry of a JNOV is tantamount to a judicial holding that the jury in the case acted unreasonably or irrationally in reaching its verdict.

The obvious conflict between this practice and the Seventh Amendment's prohibition against reexamination of a jury verdict was resolved by the Supreme Court in 1935,³⁸ when it characterized the

which recognizes that the criminal jury declined as it diversified while suggesting "neither cause nor effect, merely irony," *id.* at 868, supports my proposition that a connection can be made between growing procedural restraints on the civil side and the increasing diversity in jury composition.

³² Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 170-71 (1964).

³³ HANS & VIDMAR, *supra* note 30, at 39.

³⁴ See Note, *supra* note 32, at 173.

³⁵ The Seventh Amendment reads, in its entirety: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

³⁶ See *Galloway v. United States*, 319 U.S. 372 (1943).

³⁷ The 1991 amendments to the Federal Rules change the Rule 50 nomenclature and replace both the directed verdict and the JNOV with the term "judgment as a matter of law." The name change is cosmetic only, however; both devices continue to operate in the same manner as before the amendment. FED. R. CIV. P. 50(a), 50(b).

³⁸ *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654 (1935). Interestingly, constitutional approval of the JNOV came before explicit constitutional approval of the

"asserted insufficiency of the evidence" as a "question of law to be resolved by the court."³⁹ As with the directed verdict procedure, the judge was not usurping jury power or in any way "reexamining" its behavior, but was merely rendering a legal decision on an issue of law. This was justified by reference to the common law practice of "reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved."⁴⁰

This adroit constitutional maneuver masks the very real power coup manifested in the JNOV procedure.⁴¹ Once a directed verdict motion is made at the close of all the evidence, the judge can submit the case to the jury and hope that it will reach what he thinks is the "rational" decision. If it does, then everyone is satisfied: the jury system is vindicated as the people's voice in the courtroom, and the judge may distance himself from a potentially difficult or unpopular decision.⁴² If the jury reaches a verdict for the other side, and the judge considers the verdict "irrational" under his construction of the evidence, then the judge can fall back on the JNOV device (provided the losing side makes the appropriate motion) and enter what he has all along considered the right verdict.⁴³

Thus, the modern system places the judge in a position of virtually absolute authority in the civil courtroom, quite a departure from the practice of the early days of the Republic. By enlarging the domain of "legal questions,"⁴⁴ by recognizing devices that facilitate sec-

directed verdict in *Galloway v. United States*, 319 U.S. 372 (1943); see *infra* notes 168-73 and accompanying text.

³⁹ 295 U.S. at 659.

⁴⁰ *Id.* Thus, the language of Federal Rule of Civil Procedure 50, in codifying the JNOV, requires that a directed verdict motion be made before the case goes to the jury in order to set up a later JNOV—the judge is "deemed to have submitted the action to the jury subject to a later determination of the legal questions raised" by the earlier motion for directed verdict (now called motion for a judgment as a matter of law). FED. R. CIV. P. 50(b).

⁴¹ As an efficiency matter, using the JNOV instead of the directed verdict permits an appellate court that disagrees with the trial judge to reinstate the jury verdict, obviating the need for a new trial.

⁴² Professor Charles Clark recognized and extolled this function as the jury's chief value, when he stated that the jury's "real advantage seems to be as a kind of safety valve for the judicial system. It relieves the judges of the burden and the odium of deciding close questions of fact in cases, such as personal injury actions, where the feelings of litigants are apt to run high." Charles E. Clark, Comment, *Union of Law and Equity and Trial by Jury under the Codes*, 32 YALE L.J. 707, 711 (1923); see also Arthur T. Vanderbilt, *Judges and Jurors: Their Functions, Qualifications and Selection*, 36 B.U. L. REV. 1, 57 (1956) (jury "spares [the judge] from making the harsh decisions that the sharp application of the law to the actual facts of a hard case would often require").

⁴³ This, of course, would be reviewable on appeal by other judges, as would the denial of the motion for JNOV.

⁴⁴ The strengthening of the summary judgment device as a method of case resolution also decreases the impact of jury participation in civil cases. In 1986, the Supreme Court decided cases signaling its view that summary judgment is a procedural mechanism on par

ond-guessing of jury decisions,⁴⁵ and by redefining the circumstances under which that interference may occur, the legal system has quietly but unquestionably eroded the power of the jury. And perhaps the most remarkable aspect of the power redistribution is its relative obscurity—few people seem to notice, much less mind. The facilitating subtext is the widespread perception that juries are not quite smart enough to pull off the decisionmaking job in difficult cases (that is, cases in which the judge disagrees with the jury).

Moreover, the ideology reproduces itself effortlessly. Jury verdicts that judges agree with are left in place, and the jury system is thought to be strong and thriving. But by branding overturned verdicts as irrational, the system allows judges to spurn jury power “for the good of society.” This deft rhetorical system plays out in the reasonable jury standard: the errant jury is unreasonable, irrational, inflamed by passion—indeed, a menace to a civilized dispute resolution system.⁴⁶ And of course, these dangerous decisionmaking groups now include, by constitutional compulsion, women and minorities.⁴⁷ The next section explores how this power structure manifests itself in legal and cultural discourse, in a continual process of reproducing and justifying the subordinate position of the jury.

II

SIGNS OF (IR)RATIONALITY: THE PERCEPTION OF THE AMERICAN JURY

The structural weakening of the civil jury was made possible by a prevailing ideology that jury irrationality is a thing to be greatly feared, and thus carefully controlled. That fear seems to have become progressively more pronounced since the early days of the Republic,

with directed verdicts; both are meant to screen cases due to insufficient evidence *as a matter of law*, thus obviating the need for jury trial. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

⁴⁵ A study of reported federal court cases between 1938 and 1968 revealed that 1002 cases involved Rule 50. The win ratios for directed verdict motions in the district court were 64.2% for individuals, 67.8% for corporations and 70.5% for the government (and others). For JNOVs, the win ratio was 33.8% for individuals, 42.4% for corporations, and 28.5% for the government (and others). William P. McLauchlan, *An Empirical Study of Civil Procedure: Directed Verdicts and Judgments Notwithstanding Verdict*, 2 J. LEGAL STUD. 459, 463 (1973).

⁴⁶ See, e.g., FRANK, *LAW AND THE MODERN MIND*, *supra* note 20, at 172-81.

⁴⁷ For a discussion of the constitutional developments that led to the demographic diversity of the civil jury, see *infra* text accompanying notes 147-67.

Interestingly, the very arguments that were raised in opposition to including women on juries are now arguments made about the efficacy of the juries themselves. Professor Babcock has pointed out that opponents argued women “would skew the otherwise reliable factfinding process” and “would not be able to sustain the mental labor and intensity of the work” of jurors. See Barbara A. Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1168 (1993). Those same concerns animate the standard for granting judgments as a matter of law in modern courts.

and now manifests itself both in the language used to describe jury behavior and in the signals sent to jurors by their treatment in the courtroom. Perhaps the best evidence of the enormous hold this ideology has is our aversion to any thought of abandoning the rationality standard as a check on potential jury imprudence.

Moreover, there is an obvious parallel between the language used by judges to describe juries that they believe to have decided a case the wrong way and language commonly used to demean the decision-making of women.⁴⁸ Thus, juries are referred to as "easily swayed by emotion" and "not given to hard logical thinking."⁴⁹ Such rhetoric validates the intuition fostered by the structural system of restraints on juries: that indeed juror irrationality is an ever-present threat that must be kept in constant check.

In reported opinions of the nineteenth century, courts often referred to jurors as "reasonable men" as though that characterization was so natural and inevitable that it was almost a given. Juries were romanticized; their supposed diversity in terms of drawing members from different walks of life contributed to their prestige.⁵⁰ Whatever verdict a jury returned in those early days was presumably reasonable, since the jury was made up of men who were themselves reasonable. For example, in an 1881 case, the Supreme Court confirmed the jury's

⁴⁸ In a dialogue between Gerald Torres and Donald Brewster, the connection between the stereotypes used to describe women and the language used to characterize juries is noted to demonstrate that "[t]he jury is an ever present threat to the reality established by the rest of the system." See Gerald Torres & Donald P. Brewster, *Judges and Juries: Separate Moments in the Same Phenomenon*, 4 LAW & INEQ. J. 171, 181 (1986). The possibility of jury nullification in criminal trials (that is, once a criminal jury acquits a defendant, the Double Jeopardy Clause prohibits any court interference with the jury's decision) is, to the authors, the way in which "jurors resist their subordination" just as "women resist their subordination through feminism." *Id.* at 184.

On the civil side, however, there is no possibility of nullification; any civil jury decision may be overridden by the judge. Thus, for civil jurors, there is no path of hegemonic resistance, assuming that they might seek one. Moreover, given the absolute constraints imposed on the civil jury, it is hard to conceive of that body as any threat to the hegemony. Nor is there cause to celebrate the "humane law" of the jury, *see id.* at 180, at least in civil cases, when that law has no inherent legitimacy apart from validation by a judge.

⁴⁹ *Id.* at 181.

⁵⁰ Consider, for example, this rhapsodic description of the jury, offered by the Supreme Court in an early case:

Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.

R.R. Co. v. Stout, 84 U.S. (17 Wall.) 657, 664 (1873).

right to interpret contractual language with this observation: "[W]hatever sense the jury, as reasonable men, in the light of that circumstance, would put upon it, might well be taken as the sense in which it was understood by the company, to whose agent it was personally spoken, for that would be the sense in which it would be understood commonly by reasonable men in similar circumstances."⁵¹

This rhetorical assumption of reasonableness began to erode at the same time that procedural restraints on jury power began to develop.⁵² By the early twentieth century the case law rhetoric about juries was changing apace with the rise in judicial power.⁵³ At this point courts began to take a more evaluative stance in language about the jury. References to jury action being "reasonable rather than capricious"⁵⁴ appeared, and instead of the assumed "reasonable jury," courts would declare that "the *verdict* of the jury *was* reasonable."⁵⁵

The sense from more modern cases is that the paradigm shift is complete: the earlier assumption of the reasonableness of juries has been replaced with the assumption that juries are *unreasonable*, and this assumption is brought to bear on a whole range of decisions made about what goes on in courtrooms. For example, the Federal Rules of Evidence rest on an assumption that the judge must protect the jury from certain evidence lest the jurors allow their emotional reaction to overpower their intellectual obligation to decide the case according to the judge's instructions.⁵⁶ Cases interpreting Rule 403 frequently refer to the danger of inflaming the jury's passions.⁵⁷ The subtext is that jurors would lack the wherewithal to control an emotional re-

⁵¹ *Insurance Co. v. Trefz*, 104 U.S. 197, 204 (1881). The Court was answering the defendant's challenge that it was improper for the Court to direct the jury that they could consider the insured's lack of familiarity with the English language.

⁵² See *supra* notes 31-37 and accompanying text (describing various procedural limitations); see also *infra* notes 168-83 and accompanying text (charting historical development of directed verdict procedure).

⁵³ There are, of course, counterexamples. However, a discernible progression in the rhetoric toward distrust of juries is evident. My claim is not that this rhetoric itself establishes the increasing dissatisfaction with the jury. Indeed, as explained above, the decline of jury influence throughout the end of the nineteenth century and into the twentieth is documentable and not even controversial. See *supra* notes 29-45 and accompanying text. Rather, the rhetoric reflected and hastened the jury's decline and became part of the pattern of marginalization.

⁵⁴ *Chesapeake & Ohio Ry. v. Martin*, 283 U.S. 209, 220 (1931) (quoting *M.H. Thomas & Co. v. Hawthorne*, 245 S.W. 966, 972 (Tex. Civ. App. 1922)).

⁵⁵ See, e.g., *Cargill v. Duffy*, 123 F. 721, 721 (S.D.N.Y. 1903) (emphasis added).

⁵⁶ FED. R. EVID. 403 reads as follows:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

⁵⁷ See, e.g., *United States v. Greenwood*, 796 F.2d 49, 53 (4th Cir. 1986) ("The prejudice which the rule is designed to prevent is jury emotionalism or irrationality."); see generally FED. R. EVID. 403 advisory committee's note.

sponse; thus, the approach is to withhold information from them. One is reminded of the archetypal scenario of the female shielded from life's ugliness by a gallant male protector.⁵⁸

During the process of voir dire, jurors are picked for a particular case by the combined action of the lawyers, who exercise challenges, and the judge, who must approve those challenges. The jurors themselves have no choice in the matter. Though they are paid, the pitifully small amount of the stipend, as compared to the salary paid judges, reflects the relative worth assigned to these players by the legal system. Moreover, jurors traditionally must be silent throughout the trial, like women (and children) seen but not heard.⁵⁹ Unlike judges, jurors do not give reasons for the decisions they render. Juries are thus stripped of their chance to give voice to their concerns, memorialize their reasoning, or defend their decisions against external attack.

One can see this same disdain in the profusion of attorney training manuals that are used to prepare lawyers to choose juries and to try cases in front of them.⁶⁰ In addition to the blatant stereotyping of the "expert advice" on choosing particular jurors for particular cases based on their gender or ethnicity,⁶¹ there are subtler signals of condescension. Attorneys are taught that their dress, mannerisms, and demeanor will greatly impact the jury. Even the best-prepared attorney with the most compelling facts and a clear win on the law is told he must worry about whether the jury will like him, lest the jury punish his client in disregard of their obligation. Again, the jury is painted in feminine terms; it is an object to be wooed by the charms of the attorney.⁶²

Significantly, when judges decide to overrule jury verdicts, the language they use mirrors the rhetoric that traditionally has marginalized the intellectual and decisionmaking faculties of women.⁶³ The

⁵⁸ See, e.g., WALTER SCOTT, *IVANHOE* (Edinburgh, A. Constable 1820). A more modern manifestation of this archetypal scenario can be found in most any dime-store romance novel.

⁵⁹ Some modern reformers have started to push for greater jury participation at trial. See Lis Wiehl, *After 200 Years, the Silent Juror Learns to Talk*, N.Y. TIMES, July 7, 1989, at B5.

⁶⁰ For example, the 1994-95 Course Materials Guide of the National Institute for Trial Advocacy includes a whole section on jury selection and persuasion. One advertised videotape, *Advocacy and the Art of Storytelling*, promises to teach attorneys how to "hold the jury's attention while persuading them that yours is the true version of that story . . . you will learn winning ways to compose and tell your story to your jury." NATIONAL INSTITUTE FOR TRIAL ADVOCACY, 1994-95 COURSE MATERIALS GUIDE 29.

⁶¹ See MELVIN BELL, *MODERN TRIALS* (1954), cited in REID HASTIE ET AL., *INSIDE THE JURY* 122 (1983); Clarence Darrow, *Attorney for the Defense*, ESQUIRE, May 1936, at 36.

⁶² Cf. Torres & Brewster, *supra* note 48, at 184 ("Historically, the jury in this system . . . had to be courted . . .").

⁶³ For example, in the psychological literature, much attention has been directed to exposing the fragmented approach of early moral theorists who based their ideas about moral development on the behavior of men and then measured women by those stan-

traditional stereotype of women is that they are irrational, emotional, and passionate. Indeed, it was this stereotype that so long delayed women's successful participation in the democratic exercises of both jury service and voting.⁶⁴ Once it was no longer politically possible to exclude women from jury service outright, their power was more subtly restrained by procedural devices that control, and rhetoric that compromises, the institution that now included them.⁶⁵ Now, like women, juries are called irrational,⁶⁶ emotional,⁶⁷ and inflamed by pas-

dards. Carol Gilligan's work in debunking male-oriented theories of moral development has been quite influential and is often cited in legal literature. See CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). Though Gilligan's work has been criticized as essentialist, its importance as an exposé of male-centered evaluative processes has endured.

⁶⁴ See generally Babcock, *supra* note 47, at 1168 ("Whether as lawyers or as jurors, it was thought that women would not be able to sustain the mental labor and intensity of the work and would constantly fall ill, causing mistrials and other inefficiencies in the system.").

⁶⁵ See *supra* notes 31-45 and accompanying text (discussing the rise in jury control mechanisms).

⁶⁶ See, e.g., *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 236 (7th Cir. 1988) (Posner, J., dissenting) ("In fact, the verdict was *irrational*, a distressingly frequent occurrence in complex commercial cases, where the issues are remote from the experience and understanding of jurors. So clear is the verdict's *unreasonableness* that we can order a new trial even though Judge Holderman, perhaps out of pique at our decision reversing him, refused to do so.") (emphasis added), *cert. denied*, 493 U.S. 847 (1989); *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033, 1045 (4th Cir. 1987) ("In granting the judgment notwithstanding the verdict, the district court reasoned that . . . it was 'simply *irrational* [for the jury] to find that Mercedes-Benz would not have made any extra sales but for the illegal incentive program.'") (emphasis added), *cert. denied*, 486 U.S. 1017 (1988); *In re U.S. Fin. Sec. Litig.*, 609 F.2d 411, 432 (9th Cir. 1979) ("These procedures protect litigants from the risk of a jury reaching an '*irrational* verdict.") (emphasis added) (quoting *Curtis v. Loether*, 415 U.S. 189, 198 (1974)), *cert. denied*, 446 U.S. 929 (1980); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. 889, 936 (E.D. Penn. 1979) ("The foregoing observations demonstrate why we reject . . . the related argument that, in complex litigation, a right to trial by jury would carry with it the 'right to an *irrational* verdict.' Juries—like judges—may sometimes render *irrational* verdicts, but in such an event the court serves as a check on the power of the jury.") (emphasis added), *rev'd*, 631 F.2d 1069, 1090 (3d Cir. 1980); see also *Proteus Books Ltd. v. Cherry Lane Music Co.*, 873 F.2d 502, 510 (2d Cir. 1989) ("We agree with Judge Carter that the jury's damage award to Proteus on this claim was *unreasonable* and unfounded.") (emphasis added); *United States v. Coonan*, 839 F.2d 886, 891 (2d Cir. 1988) ("Most importantly, however, the government, unlike a defendant, may not rightfully seek the benefit of an *irrational* verdict; although juries may freely temper the rigor of the law, they surely may not enhance it.") (emphasis added); *United States v. Michelena-Orovio*, 702 F.2d 496, 507 (5th Cir. 1983) ("But it was *irrational* for the jury to infer beyond a reasonable doubt that this lowly, non-English speaking seaman knew about the plan to distribute the marijuana in the United States or had an intention of joining in any such plans.") (emphasis added), *cert. denied*, 465 U.S. 1104 (1984); *O'Gee v. Dobbs Houses, Inc.*, 570 F.2d 1084, 1092 (2d Cir. 1978) ("I find it hard to understand how the majority can say that the \$170,000 jury verdict is '*irrational* or so high as to shock the judicial conscience.'") (quoting *Batchkowsky v. Penn Central Co.*, 525 F.2d 1121, 1124 (2d Cir. 1975)) (Feinberg, J., concurring in part and dissenting in part) (emphasis added); *United States v. McGowan*, 385 F. Supp. 956, 960 (D.N.J. 1974) ("Stated differently, the question is whether defendant is entitled to the

sion.⁶⁸ Of course, the juries branded by these demeaning feminine terms are precisely those whose error it was to disagree with a presiding judge on how a case should come out.

Interestingly, this modern assumption of unreasonableness that underscores court opinions is often mixed rhetorically with high-sounding homages to the importance and value of the jury. Like women, juries are put on pedestals in almost the same rhetorical breath in which they are compromised. In the course of a single opinion, courts may deferentially describe the hallowed place juries as an insti-

benefit of a conclusive presumption that a *demonstrably irrational jury* reached a rational acquittal verdict.") (emphasis added).

One might argue that courts are forced to use this description of juries when verdicts are set aside given that "rationality" and "reasonableness" of the verdict are the touchstones of the test in both criminal and civil cases. See *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (standard for overturning criminal conviction is whether a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"); Fed. R. Civ. P. 50(a)(1) (judgment as a matter of law should be entered in a civil case when there is "no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue"). Such an argument merely begs the question, though, since the judges (through case decision and rules formulation) are setting the standard in the first place on an apparent assumption that juries are potentially irrational actors.

⁶⁷ See, e.g., *Adams v. Wainwright*, 804 F.2d 1526, 1529 (11th Cir. 1986) ("While the judge is in fact the only entity that imposes sentence under the Florida scheme, his role is to serve as a 'buffer where the jury allows *emotion* to override the duty of a deliberate determination' of the appropriate sentence.") (citation omitted) (emphasis added), *rev'd sub nom. Dugger v. Adams*, 489 U.S. 401 (1989); *United States v. Burch*, 490 F.2d 1300, 1303 (8th Cir.) ("Among those counterbalancing factors, McCormick lists the danger that the facts offered may unduly arouse the jury's *emotions of prejudice, hostility, or sympathy.*") (citation omitted) (emphasis added), *cert. denied*, 416 U.S. 990 (1974); *Fineman v. Armstrong World Indus., Inc.*, 774 F. Supp. 266, 269 (D.N.J. 1991) ("The verdict in this matter is the product of impermissible speculation, sympathy, and *emotion*. The jury decided this case with its viscera, not its reasoning, and therefore permitting the verdict to stand would constitute the gravest miscarriage of justice.") (emphasis added), *aff'd*, 980 F.2d 171 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1285 (1993); *Collins v. Retail Credit Co.*, 410 F. Supp. 924, 933 (E.D. Mich. 1976) ("The language 'as the Court may allow' seems only to be the formal codification and reiteration of the Court's duty to review excessive verdicts and to attempt to eliminate from the jury system the *emotion* and prejudice that may exist.") (emphasis added).

⁶⁸ *Fleming v. County of Kane, Ill.*, 898 F.2d 553, 561 (7th Cir. 1990) ("Under our traditional standard, only in those circumstances where the jury damage award is '*monstrously excessive, a product of passion and prejudice, or if there is no rational connection between it and the evidence, may the trial court disturb it.*' ") (internal quotation marks omitted) (citation omitted) (first emphasis added); *United States v. Peterson*, 808 F.2d 969, 977 (2d Cir. 1987) ("Statements designed to appeal to the jury's emotions or to '*inflame the passions*' or prejudices of the jury . . . are improper.") (citation omitted) (emphasis added). Cf. *Groppi v. Wisconsin*, 400 U.S. 505, 511 n.12 (1971) ("There can be no justice in a trial by jurors *inflamed by passion*, warped by prejudice, awed by violence, menaced by the virulence of public opinion or manifestly biased by any influences operating either openly or insidiously to such an extent as to poison the judgment and prevent the freedom of fair action. Justice cannot be assured in a trial where other considerations enter the minds of those who are to decide than the single desire to ascertain and declare the truth according to the law and the evidence.") (quoting *Crocker v. Justices of the Superior Court*, 208 Mass. 162, 178-79 (1911)) (emphasis added).

tution occupy in our justice system while worrying about jury incompetence in a particular case.⁶⁹ On the surface, this may seem to serve the straightforward function of strengthening and reaffirming the institution by pruning away potential mistakes. But the rhetorical strategy of mixing praise for the jury writ large with reproach for the individual jury has much more far-reaching consequences. Given that most consumers of the popular media will be exposed predominantly to examples of jury verdicts painted as wrong-headed, the cultural perception is that jury decisionmaking is dangerous. And since the criticism is tempered by purported esteem for juries, the people remain unaware of the very real decline of this supposedly treasured democratic institution.

Not surprisingly, the rhetoric is strongest in cases that are at the cutting edge of the law in terms of new substantive theories or high monetary awards. Some spectacularly large punitive damage awards⁷⁰ in recent years have focused media attention on the civil jury.⁷¹ Much

⁶⁹ This phenomenon is most starkly manifested in cases which courts have found to be too complex for juries to handle. After a jury in a civil antitrust case deadlocked, for example, the district court concluded that the case should be retried before the judge alone. The court quoted a Supreme Court homage to the civil jury: " '[M]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' " *ILC Peripherals Leasing Corp. v. IBM*, 458 F. Supp. 423, 445 (N.D. Cal. 1978) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)), *aff'd*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981). Yet the court struck the jury demand on retrial, noting that the jury composition in the 10-month trial would likely repeat itself. The jury, which included several housewives, a retiree, and workers whose jury service did not jeopardize their jobs, had trouble, according to the court, "grasping the concepts that were being discussed by the expert witnesses." *Id.* at 447. The court concluded that jury trial in the case created a "substantial risk" of arbitrary decisionmaking. *Id.* at 449. This concern about jury incompetence has also prompted courts to deny jury demands in the first instance. In *In re Boise Cascade Sec. Litig.*, 420 F. Supp. 99, 103 (W.D. Wash. 1976), for example, a federal district court found that "a jury would not be a rational and capable fact finder" in a securities fraud action. While acknowledging that "[t]here can be no doubt that jury trials are favored in civil litigation in this country," the court worried that the anticipated four to six-month trial would limit "the availability of employed persons to serve on [the] jury" and thus the case "would be heard by jurors who have not had exposure to a contemporary commercial or business environment." *Id.* at 103-04.

⁷⁰ See Debra Cassens Moss, *The Punitive Thunderbolt*, A.B.A. J., May 1993, at 88; see generally Alan H. Scheiner, Note, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 142 (1991) ("At common law, jurors possessed discretionary power to assess punitive damages, and their judgment was not lightly questioned. It has been a consistent element of the tort reform agenda to strip jurors of this historical power.").

⁷¹ For example, consider the media attention devoted to the \$105 million verdict against General Motors in the exploding truck case and the \$3 billion punitive award to Pennzoil in its litigation with Texaco, *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987); see David Everett, *Verdict Shows Painful Path Ahead for GM*, DET. FREE PRESS, Feb. 5, 1993, at A1. The jury verdict in the GM case was recently overturned by the Georgia Court of Appeals. *General Motors v. Mosley*, 447 S.E.2d 302 (Ga. Ct. App. 1994). Warren Brown, *Court Overturns Verdict Against GM in Crash Case*, WASH. POST, June 14, 1994, at D1.

of this coverage pegs the jury as a major reason for the perceived litigation explosion in modern society.⁷² The alarm about "skyrocketing" jury awards⁷³ contributes to public distrust of the jury institution. Juries are considered too liberal with the purse; like the stereotypical woman, juries are portrayed as unable to handle money sensibly.⁷⁴

Judges have a special jury control mechanism, the remittitur, which they may use when they believe damage awards to be unreasonable. If, for example, a jury finds for a plaintiff in a tort case and the judge agrees on liability but believes the damages set by the jury are too high, he may order the damages reduced to the level he thinks reasonable.⁷⁵ Remittitur cases provide some of the most patronizing rhetoric about juries. For example, a trial judge in a libel case justified remittitur by citing his own observation of the plaintiff's testimony and stating that "[t]o me, it is quite obvious that the jury was inflamed by passion and prejudice in awarding the amount of damages"⁷⁶ Even though the judge felt the jury was competent to reach a verdict on liability (competent, in that he apparently agreed with the result),⁷⁷ he could control the amount of the verdict by remittitur and even base that on his assessment of the testimony and demeanor of a witness—a task usually considered within the sole province of the jury. Indeed, the remittitur device has been used in cases in which the judge directs a verdict for the plaintiff—so that the judge is both controlling the initial verdict and essentially setting the damage amount.⁷⁸ Under such circumstances, the jury seems to exist only

⁷² See Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building*, LAW & CONTEMP. PROBS., Autumn 1989, at 271.

⁷³ See *Supreme Court Review*, NAT'L L.J., Aug. 19, 1991, at 523 (noting what a "broad coalition of American business refer to as sky-rocketing and irrational jury awards in personal-injury and other civil lawsuits"); Moss, *supra* note 70, at 92. But when the prospect of imposing substantive limits on punitive damage awards reached the Supreme Court, the Court declined to place constitutional limits on the jury's discretion. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

⁷⁴ There is evidence that the so-called litigation explosion is a myth. See, e.g., Remarks of Marc Galanter before the National Conference of Bar Presidents on February 1, 1992, reported in N.J. L.J., Feb. 24, 1992, at 15, 22 (noting that "research findings . . . suggest that the world of product liability is shrinking rather than growing").

⁷⁵ Technically, the judge orders a new trial that may be averted if the plaintiff agrees to the reduction of damages. This practice was approved by the Supreme Court for use in federal courts, though its converse, additur, in which a jury award is increased, is not allowed. *Dimick v. Schiedt*, 293 U.S. 474 (1935).

⁷⁶ *Dorin v. Equitable Life Assurance Soc'y*, 382 F.2d 73, 77 (7th Cir. 1967) (appellate court quoting trial judge's order). The libel defendant sought unsuccessfully on appeal to use the trial judge's strong language to argue that the jury's finding on liability must also be overruled. *Id.* at 75, 77.

⁷⁷ The appellate court characterized the evidence on libel "very persuasive." *Id.* at 77.

⁷⁸ See, e.g., *De Leon Lopez v. Corporacion Insular de Seguros*, 931 F.2d 116, 125 (1st Cir. 1991). The appellate court stated that "when the trial judge performs verdict surgery of this kind, an appellate court must be slow to interfere with the operation's outcome"

as an empty form.⁷⁹ Ironically, the jury is most prominently and openly marginalized in the very cases in which the argument for community participation is perhaps strongest. When a society struggles to weigh public safety against corporate stability, or individual harms against the economic fallout of damage awards, the diversity of community voices in the courtroom becomes more, not less, vital.⁸⁰

Rhetoric compromising jury authority can be found outside court opinions as well. Much legal scholarship, for example, has been quite harsh in its assessment of the competency of juries to decide modern disputes, especially private ones.⁸¹ The debate about the relative merits of lay versus professional decisionmakers is not a new one, certainly,⁸² but the modern discourse⁸³ discloses a particular hostility toward jurors' ability to comprehend the so-called complex cases of the post-industrial age.

and that when "there exists no truly objective way to measure damages, the trial judge's view is entitled to considerable deference." *Id.* Thus the court acknowledged the lack of objectivity on the point but was not troubled by the encroachment on jury authority.

See also *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal. Ct. App. 1981). The Grimshaw court remitted to \$3.5 million a punitive damage award of \$125 million in a case involving a death and injuries caused by the defective fuel tank on a Ford Pinto, despite the jury's wholly "rational" conclusion that \$125 million, being the amount the company saved by not remedying the defect, was an appropriate sanction. *Id.* at 389-90 & n.17.

⁷⁹ Ironically, the *De Leon Lopez* court praised the jury's ability to assess damages in difficult cases: "[T]he jury system, which depends heavily on the common sense and collective human experience of jurors for a fair resolution of such quandaries, has rendered yeoman service." 931 F.2d at 126. Yet the court approved the judge's reduction in award with just a casual observation that "the very purpose of a remittitur is to neutralize passion and prejudice insofar as such attributes may have caused an inflated jury award." *Id.* at 125.

⁸⁰ Stephan Landsman makes the interesting argument that the early twentieth-century civil jury performed the function of "humaniz[ing] the law" in a "backlash against one-sided and harsh, judicially-created tort doctrines" that had developed toward the end of the nineteenth century (particularly, contributory negligence as a bar to tort recovery). Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 *HASTINGS L.J.* 579, 605 (1993). However, since at that point judges had procedural power to overturn jury verdicts they disliked, the "humanizing" function of juries in the developing tort law might be understood as a proxy for the input of judges who were also dissatisfied with the harshness and one-sidedness of the contributory negligence rule.

⁸¹ The attack on jury competence has been mostly on the civil side, probably because the criminal jury serves a buffer function between the state and the accused that is seen to have separate constitutional significance.

⁸² Professor Yeazell points out that "the dispute about the jury's virtues is a venerable, persistent, and defining institution both of the common law and of political discourse." Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 *U. CHI. LEGAL F.* 87; see also Note, *With Love in Their Hearts but Reform on their Minds: How Trial Judges View the Civil Jury*, 4 *COLUM. J.L. & SOC. PROBS.* 178, 179 and n.12 (1968).

⁸³ I use the term modern to correspond to the time period from post-Civil War to the present. This relates temporally to the movement toward inclusion of women and minorities on juries which will be described in the next section.

In 1894,⁸⁴ Maximus A. Lesser published a book on the historical development of the jury system in which he said, following "[t]he weighty voice of Sir James Stephen," that "judges ought to be and usually are men of greater intelligence, better education and more force of mind, than jurors."⁸⁵ Though examples like this of overt classism are rare, mainstream scholarly skepticism about the competence of the jury began to build after the turn of the twentieth century. A movement for revival of "special juries"⁸⁶ more qualified than common juries received a good deal of scholarly attention.⁸⁷ Law reviews began to publish an increasing number of articles about the delay produced by the civil jury system, establishing what Stephan Landsman calls a "rhetoric of efficiency."⁸⁸

As this theme of jury inefficiency has evolved through this century, its most ardent and articulate champions have been judges, whose positions give their policy views extraordinary weight. Judge

⁸⁴ The post-Civil War period witnessed the development both of a jurisprudence of inclusiveness in jury service and growing restraint on jury authority. See *infra* notes 142-82 and accompanying text.

⁸⁵ MAXIMUS A. LESSER, *THE HISTORICAL DEVELOPMENT OF THE JURY SYSTEM* 208-09 (Rochester, Lawyers' Coop. 1894). He then quotes Mr. Stephen:

I think that as far as skill and intelligence go, it would be impossible to have a stronger tribunal than a jury of educated gentlemen presided over by a competent judge. I cannot, however, say much for the intelligence of small shopkeepers and petty farmers, and whatever the fashion of the times may say to the contrary, I think that the great bulk of the working classes are altogether unfit to discharge judicial duties, nor do I believe that, rare exceptions excepted, a man who has to work hard all day long at a mechanical trade will ever have either the memory, or the mental power, or the habits of thought, necessary to retain, analyze, and arrange in his mind the evidence of, say, twenty witnesses to a number of minute facts given perhaps on two different days.

Id. at 210.

⁸⁶ See Jeannette E. Thatcher, *Why Not Use the Special Jury?*, 31 MINN. L. REV. 232, 234 (1947) (defining special jury as "a body of twelve men believed to possess better qualifications as triers of fact in certain types of cases, superiority of the individual jurors being demonstrated by the nature of their respective trades or businesses").

⁸⁷ See Richard C. Baker, *In Defense of the "Blue Ribbon" Jury*, 35 IOWA L. REV. 409 (1949). For a more modern argument for special juries, see William V. Luneberg & Mark A. Nordenberg, *Specialty Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation*, 67 VA. L. REV. 887 (1981); Rita Sutton, Note, *A More Rational Approach to Complex Civil Litigation in the Federal Courts: The Special Jury*, 1990 U. CHI. LEGAL F. 575.

⁸⁸ See Landsman, *supra* note 80, at 611; see generally *id.* at 610-16 (discussing law review literature on jury inefficiency). The first major article appeared in 1901. See Alfred C. Coxe, *The Trials of Jury Trials*, 1 COLUM. L. REV. 286, 289 (1901). Coxe argued that the jury lacked the capacity to decide complex cases. This theme was picked up in numerous articles later in the century; Professor Edson Sunderland in particular carried the torch for greater judicial control of juries. See, e.g., Edson R. Sunderland, *The Inefficiency of the American Jury*, 13 MICH. L. REV. 302 (1915); Edson R. Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253 (1920); Edson R. Sunderland, *The Problem of Trying Issues*, 5 TEX. L. REV. 18 (1926). Professor Landsman points out the questionable empirical bases for the jury criticisms contained in the literature of that period.

Jerome Frank,⁸⁹ for example, was famously critical of juries.⁹⁰ Of the jury trial, he said “[a] better instrument could scarcely be imagined for achieving uncertainty, capriciousness, lack of uniformity, disregard of former decisions—utter unpredictability.”⁹¹ Jurors he described as “notoriously gullible and impressionable”⁹² and “hopelessly incompetent as fact-finders;”⁹³ they are “neither able to, nor do they attempt to, apply the instructions of the court.”⁹⁴ To explain the staying power of such an obviously flawed institution, Judge Frank used a gendered metaphor:

For while men want the law to be father-like, aloof, stern, coldly impartial, they also want it to be flexible, understanding, humanized. The judges too emphatically announce that they are serving the first of these wants. The public takes the judges seriously, assumes that the judges will apply hard-and-fast law to human facts, and turns to the jury for relief from such dehumanized justice.

. . . Judges, so conceived, are too terrifying. We dare not, says the public, let them act thus in our affairs. The public turns, therefore, to a humanizing agency—the jury. Then they can have it both ways. The judge, wearing a false-face, which makes him seem like the child’s stern father, gravely recites the impersonal and artificial rules which command respect; but the juries decide the actual legal controversies.⁹⁵

Judge Frank’s Freudian notion of judge-as-archetypal-father illustrates the sort of rhetorical compartmentalization of courtroom actors that ultimately demeans both juries and common people in general: his notion was that the public preferred the jury trial precisely because of its anti-intellectual and illogical qualities. The “humanizing agency” that tempers the stern judicial father must be the mother-jury.⁹⁶ And while Judge Frank pushed for judges to acknowledge the impossibility of perfectly logical decisionmaking, his disdain for the jury remained steadfast; he forthrightly stated that “[t]he jury makes the orderly administration of justice virtually impossible.”⁹⁷

⁸⁹ Judge Frank served on the United States Court of Appeals for the Second Circuit.

⁹⁰ See generally FRANK, *COURTS ON TRIAL*, *supra* note 20, at 116-20 (expressing skepticism about jurors’ ability to perform factfinding and law application functions).

⁹¹ FRANK, *LAW AND THE MODERN MIND*, *supra* note 20, at 172.

⁹² *Id.* at 179.

⁹³ *Id.* at 180.

⁹⁴ *Id.* at 172.

⁹⁵ *Id.* at 175. Judge Frank was denouncing judges’ “self-delusion” of “legal fixity, certainty and impartiality.” *Id.* at 177.

⁹⁶ Cf. HERMAN MELVILLE, *Billy Budd, Foretopman*, in *FOUR SHORT NOVELS* 195 (Bantam Classic 1963). In court-martial, members of the court were told that “[t]he heart is the feminine in man, and hard though it be, she must here be ruled out.” *Id.* at 261.

⁹⁷ FRANK, *LAW AND THE MODERN MIND*, *supra* note 20, at 181.

Judge Frank was not the only prominent twentieth-century jurist to challenge the supremacy of the jury trial method.⁹⁸ Chief Justice Warren Burger's concern about the increasingly complex nature of modern litigation and the delay in the federal courts led him to pick up the banner for revamping civil jury trials. In a 1984 lecture, he proposed that it was time to "inquire into the possibility of some alternatives to the traditional jury trial for the protracted civil trials of issues which baffle all but the rarest of jurors who actually wind up in the jury box."⁹⁹ Chief Justice Burger questioned whether modern juries are "truly representative" given that professionals, business executives, academics, and "others arguably more competent than most to cope with complex economic or scientific questions rarely survive [peremptory challenges] to sit in the box."¹⁰⁰

Indeed, the complexity debate has eclipsed the earlier efficiency debate to become the focus of dissatisfaction with the jury in recent years.¹⁰¹ The scholarly discourse built to a crescendo in the late 1970s and led to a decision by one of the circuit courts of appeals that litigants' right to due process of law under the Fifth Amendment, which would be compromised by the use of a jury deemed incapable of handling a highly complex case, trumps the Seventh Amendment right to jury trial.¹⁰² The Supreme Court has never directly considered the issue of the relationship between due process and the right to jury

⁹⁸ The Chief Justice of the Supreme Court of New Jersey delivered lectures at Boston University in 1955 on the roles of judges and jurors. Though not nearly as critical of juries as Judge Frank and Justice Burger, Justice Vanderbilt felt strongly about the need for judicial control of juries: "But the lay element cannot function without judicial guidance as to the law; if the administration of justice in the courts is to be based on law the respective functions and responsibilities of both judge and jury must be clearly recognized." Vanderbilt, *supra* note 42, at 76.

⁹⁹ Warren E. Burger, *Thinking the Unthinkable*, 31 *LOV. L. REV.* 205, 215-16 (1985) (Remarks of the Chief Justice in the first Robert A. Ainsworth, Jr. Memorial Lecture, Nov. 10, 1984).

¹⁰⁰ *Id.* at 210. Of course, not all judges agree with these views. Judge Higginbotham of the Fifth Circuit entered the more recent complexity debate on the side of juries, noting that "[a]part from the occasional situation in which a judge possesses unique training, however, the assumption that a jury collectively has less ability to comprehend complex material than does a single judge is an unjustified conclusion." Patrick Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 *TEX. L. REV.* 47, 53 (1977).

¹⁰¹ See, e.g., Symposium, *Is the Jury Competent*, *LAW & CONTEMP. PROBS.*, Autumn 1989, at 1. Professor Leon Green was one of the first to sound the alarm. In 1956, he noted that "[a]s long as civil cases remained simple, and the issues were in the domain of the understanding of everyday citizens, jury trial both in England and in this country was relatively satisfactory. But as civil cases became more complex and litigation brought within its vortex the interests of an expanding commercial and industrial economy; as the significance of these interests outran the understanding of laymen; . . . many serious conflicts have arisen within the jury process." Leon Green, *Jury Trial and Mr. Justice Black*, 65 *YALE L.J.* 482, 483-84 (1956).

¹⁰² *In re Japanese Elecs. Prods. Antitrust Litig.*, 631 F.2d 1069, 1084-85 (3d Cir. 1980). As it turned out, the case was ultimately disposed of on summary judgment anyway.

trial, and the debate is ongoing.¹⁰³ At the center of the debate, of course, is not the competency of *juries*, but of *jurors*.¹⁰⁴

The rhetoric about the supposed defects in the jury has recently begun to capture the popular imagination as well,¹⁰⁵ largely due to a

¹⁰³ See, e.g., Morris S. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980); Morris S. Arnold, *A Modest Replication to a Lengthy Discourse*, 128 U. PA. L. REV. 986 (1980); James S. Campbell & Nicholas Le Poidevin, *Complex Cases and Jury Trials: A Reply to Professor Arnold*, 128 U. PA. L. REV. 965 (1980); Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 Nw. U. L. REV. 190 (1990); Richard O. Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICH. L. REV. 68 (1981); Frank M. Loo, *Rationale for an Exception to the Seventh Amendment Right to a Jury Trial: In re Japanese Electronics Products Antitrust Litigation*, 30 CLEV. ST. L. REV. 647 (1981).

¹⁰⁴ Among attorneys, jury folklore and humorous stories abound, often framing jurors as irresponsible and irrational. The following, written by a lawyer who does insurance defense work, presents a fictional scenario of a widow suing an insurance company on her husband's policy. The author says that "the following jury instruction is not to be given, but is always to be implied":

Ladies and gentlemen of the jury. You are instructed as follows:

...

3. When you retire to the jury room, your first decision will be whether to get down to business immediately, or whether to go out to lunch first (at the county's expense). After returning from lunch, you will then begin your discussions.

4. There probably will be a fat lady on the jury who will start by telling you about her uncle who paid premiums on his life insurance policy for many years. When he died, the company refused to pay on the policy for some ridiculous reason. . . .

...

6. You will then spend considerable time trading stories about insurance companies. A truck driver on the jury will suddenly announce that ". . . insurance companies are nothing but poop. . . ."

7. You will then take a vote upon the widow's case, and bring in a verdict for the full amount requested. This will take three minutes.

...

10. The ladies on the jury will then decide to take the widow out for coffee and cake at the nearest coffee shop so that they can all have a good time reviewing the exciting events of the day.

11. When everyone has left the courtroom, the attorney for the insurance company will gather up his papers and put them into his briefcase, and he will return silently to his office, wondering why he ever bothered to try the case at all.

Lowell J. Myers, *The Implied Jury Instruction*, A.B.A. J., Nov. 1984, at 88-89.

¹⁰⁵ Recent criminal trials have received sensationalized media attention. A jury's acquittal of Lorena Bobbitt in the maiming of her allegedly abusive husband and the mistrial in the Menendez cases based on the inability of jurors to agree on a verdict in the murder trial generated a great deal of publicity, much of it focused on the jurors themselves. Professor Dershowitz dubbed the phenomenon of juries' refusal to convict in cases where the victim had allegedly abused his attacker "the abuse excuse." See Goldberg, *supra* note 25, at 40. The cases gripped the public consciousness, and were featured several times on television talk shows. The talk shows themselves became part of the story as well, with commentators lamenting the so-called talk-show mentality of the public that was manifested in these juries. See *Nightline Special*, *supra* note 18. For a response to that argument, see Dooley, *The Public Conscience in the Courtroom*, *supra* note 17, at A9.

few high-profile, controversial jury verdicts¹⁰⁶ and to some political stumping by those who feel that civil litigation is debilitating the economy.¹⁰⁷ Despite this condescension toward the jury, it would be wildly inaccurate to claim that this is the only view.¹⁰⁸ Like case opinions, the scholarly literature and the popular media are rich with glowing references to the jury.¹⁰⁹ The work of Hans Zeisel and Harry Kalven as leaders of the University of Chicago Jury Project, in particular, is a testament to the importance of the jury. Among their empirical findings was the fact that judges agree with jury verdicts in both civil and criminal cases approximately eighty percent of the time.¹¹⁰ The empirical data generated by the project has been used to support defenses of the competence of juries to decide cases.¹¹¹

To the extent that the jury has enjoyed a scholarly renaissance in recent years, though, it is operating under judicial restraints which are now a given in our understanding of the institution. The jury of today is distinctly not the jury of the pre-Civil War period. No matter what one thinks of the merits of this evolution, the fact that the jury is today a compromised institution cannot seriously be questioned. And the connection between the emasculation of the jury and its increasingly diverse personnel¹¹² may shed new light on the continuing story of legal control of juries. In the next section, this Essay explores the pos-

¹⁰⁶ The state-court criminal acquittal of the Los Angeles police officers accused of beating motorist Rodney King is perhaps the most infamous jury verdict of our time. Interestingly, the most common criticism of the King beating jury was that its judgment was compromised by its lack of ethnic diversity. The trial had moved due to pretrial publicity to the nearly all-white suburb of Simi Valley, California; the jury was made up of all whites. The controversy surrounding this verdict had more to do with the problems associated with limiting the decisionmaking body to one demographic group, though its infamy contributes to the distrust of juries generally.

¹⁰⁷ See Vice President Dan Quayle, Remarks at the American Bar Association meeting in Atlanta (Aug. 13, 1991), in *LEGAL TIMES*, Aug. 19, 1991, at 9.

¹⁰⁸ See, for example, the generally upbeat report of the American Bar Association-Brookings Institution Symposium on the civil jury system, *CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM* (1992).

¹⁰⁹ In fact, Professor Priest makes the somewhat startling claim that "[o]ver the past quarter century . . . support for the civil jury has become nearly unanimous" and attributes this consensus to the work of the University of Chicago Jury Project. George Priest, *The Role of the Civil Jury in a System of Private Litigation*, 1990 U. CHI. LEGAL F. 161, 162.

¹¹⁰ See HARRY KALVEN AND HANS ZEISEL, *THE AMERICAN JURY* (1966). This finding has been used by both friends and foes of the jury, since it also means that juries and judges disagree at least 20% of the time.

¹¹¹ One of the most elegant of these was written by Harry Kalven himself, in which he defended the margin of judge-jury disagreement. Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1065-66 (1964) (concluding that it is "the jury's sense of equity, and not its relative competence, that is producing most of the disagreement" where it exists).

¹¹² Paul Carrington has noted that "any contemporary assessment of the jury ought take account of the reality that 'community' in America is a pale imitation of the social condition that gave rise to the institution of the jury. America is today far more an aggregation of individuals than a community, and the conception of a verdict as an expression

sibility of constructing a historical account that encompasses that connection.

III

SOWING DIVERSITY, REAPING MARGINALITY: THE POLITICS OF THE CIVIL JURY

The story of the civil jury in America is a tale that mixes progress in access for all citizens to this treasured civic duty with progressive decline in the influence associated with that duty. This section traces a historical sketch that highlights a possible connection between these two progressions. The temporal fit is not perfect—there is no specific point in time at which one can definitively mark *either* the downturn in the jury's influence as an institution or the emergence of jury access as a key element of full democratic participation for women and minorities. But the general progression of both these trends is documentable, and the correspondence between them produces an unsettling picture of an institution in decline during a period when its constituents were starting to change.¹¹³

In the earliest manifestations of the jury in medieval England,¹¹⁴ jurors were chosen for their expertise in the matters being tried. That is, a local man who had independent information about the dispute at hand was thought to be the best qualified to participate in its resolution.¹¹⁵ The idea that jurors should come to their task with an impartial mind and decide the case according to evidence presented to them during trial did not develop until the latter part of the seventeenth century.¹¹⁶ By this point, of course, common law had evolved into discrete forms of action that entitled private parties to recover for

of community morality is simply in most places quaint." Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 42.

¹¹³ In describing the general trend toward circumscribing the jury in the late nineteenth century, James P. Levine notes that "[t]he jury's freedom of action was also restricted, perhaps in part as a result of the growing professionalism of the legal system and the disdain that many prominent lawyers of the late-nineteenth century had for the nation's growing masses." See LEVINE, *supra* note 21, at 25; see generally JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976) (describing elitism of the legal profession through the turn of the twentieth century); see also Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867 (1994) (describing criminal jury's loss of power to decide legal issues).

¹¹⁴ See generally Landsman, *supra* note 80, at 582-88 (recounting the history of the jury in England). Juries of course had antecedents in the ancient Greek and Roman societies. See generally MORRIS J. BLOOMSTEIN, *VERDICT: THE JURY SYSTEM* (rev. ed. 1972).

¹¹⁵ See JOHN GUINTEH, *THE JURY IN AMERICA* 16-17 (1988); Barbara J. Shapiro, "To a Moral Certainty": *Theories of Knowledge and Anglo-American Juries 1600-1850*, 38 HASTINGS L.J. 153, 155 (1986); see generally JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* 474 (1985); 1 SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH COMMON LAW* 332-50 (7th ed. 1956); James B. Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 249 (1892).

¹¹⁶ GUINTEH, *supra* note 115, at 17-18.

non-criminal acts; recovery theories that did not adhere to the recognized forms were channeled to courts of equity which had no juries.¹¹⁷

In seventeenth-century England, the power dynamics of the courtroom reflected the public's dissatisfaction with the Stuart monarchy, for which judges were perceived to be agents.¹¹⁸ The English legal system was being exported to the American colonies during the seventeenth and eighteenth centuries. It was during this period that juries were often said to be judges of both fact and law.¹¹⁹ Though the historical record fails to show unequivocally that juries enjoyed unfettered discretion in colonial courtrooms,¹²⁰ there was a widespread perception that juries were powerful democratic agents of the people providing a counterweight to a potentially overreaching judiciary.¹²¹ Indeed, there is evidence that pre-Revolutionary American juries performed functions beyond what was required to decide particular disputes.¹²²

This reverence for the jury that motivated the early policymakers of the new Republic was of course connected to the overriding intellectual paradigm of the times: the notion that in the post-Enlightenment world men were reasonable creatures who were capable of

¹¹⁷ Professor Guinther notes that to avoid dismissal from law courts, litigants, especially the wealthy, would take advantage of rampant official corruption which sometimes included hiring the local sheriff to find a group of jurors "paid to reach the desired verdict." *Id.* at 21.

¹¹⁸ See Landsman, *supra* note 80, at 588-91; see also Austin W. Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 675-78 (1918).

¹¹⁹ See Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 44; see also Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 173 (1964). But see Henderson, *supra* note 29, at 299-310 (cataloging variety of colonial approaches to the role of the jury). As late as 1805, in the impeachment trial of Supreme Court Justice Samuel Chase, one item of Chase's alleged misconduct was his refusal to permit a lawyer to argue an issue of law to a jury, thereby undermining the jury's power to decide issues of law. See HANS & VIDMAR, *supra* note 30, at 38.

¹²⁰ Compare Note, *supra* note 32, at 173 and Alan H. Scheiner, Note, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142 (1991) (both arguing that eighteenth-century conception of juries was of a powerful political body whose function was to check the possible corruption of judges) with Henderson, *supra* note 29 (arguing that there was no unifying vision of jury power given the different procedural checks on juries in the various colonial systems). See also Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 746-49 (1993).

¹²¹ See Scheiner, *supra* note 120, at 153.

¹²² *Id.* at 153 n.56 ("In pre-Revolutionary America, juries not only decided both law and fact in litigation, but also performed various local government functions."); see also Landsman, *supra* note 80, at 592 ("Massachusetts juries had responsibilities strikingly similar to those assigned juries in medieval England. They were the chief assessors of legal claims and the primary enforcers of legal rights for their communities."); see generally FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 87 (1985) (describing the general status and function of the early American jury); WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* (1975).

discerning the natural law.¹²³ The Framers could trust that jurors would reach “right” decisions; their efforts to protect the jury trial right thus had more to do with concerns about concentrations of power in single men (judges) than it did with the notion that laymen would reach different kinds of judgments than would law-trained judges. And of course in those days, the jurors looked just like the judges—white, typically landowning men.¹²⁴ Women and minorities were excluded from jury service.¹²⁵ Given the cultural affinity between all the actors in the early legal system, the power struggle between judges and juries had little, if anything, to do with concern about accuracy or abstractly correct results. Instead, it reflected the general revolutionary conviction that power was best held in check when diffused among many participants in the system.¹²⁶

Against this historical backdrop, the Framers of the American Constitution included the right to jury trial in criminal cases.¹²⁷ The right to jury trial in civil cases was guaranteed a few years later in the Seventh Amendment,¹²⁸ as part of the Bill of Rights package. The Seventh Amendment, which by its terms “preserves” the civil jury, enshrined that institution at a point in its history when it enjoyed relative independence from the judiciary.¹²⁹ Indeed, it was this characteristic of the civil jury that elicited such passion from its defenders, the Anti-

¹²³ Note, *supra* note 32, at 172 (“Since natural law was thought to be accessible to the ordinary man, the theory invited each juror to inquire for himself whether a particular rule of law was consonant with principles of higher law.”).

¹²⁴ William E. Nelson, *The Eighteenth-Century Background of John Marshall’s Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 918 n.140 (1978) (Jurors were chosen “by lot from a list of freeholders, elected by the voters of the jurisdiction, or summoned by the sheriff from among the bystanders at court.”).

¹²⁵ LEVINE, *supra* note 21, at 24.

¹²⁶ Akhil Amar characterizes a central concern of the Bill of Rights, particularly the jury trial guarantees, as controlling agency costs, namely the possible self-dealing of government agents. See Amar, *supra* note 1, at 1133.

¹²⁷ U.S. CONST. art. III, § 2, cl. 3.

¹²⁸ The Seventh Amendment, ratified in 1791, reads:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend VII. The Seventh Amendment applies only to civil actions brought in federal court; unlike other guarantees of the Bill of Rights, it has never been held to constrain states’ ability to structure their own civil justice systems.

¹²⁹ Indeed, the omission of the civil jury trial guarantee from the text of the original constitution nearly derailed ratification. The Antifederalists championed its inclusion and in fact used its exclusion to argue that the proposed constitution would abolish civil jury trials. See Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 672 n.89 (1973). “For the Antifederalists, the civil jury would play a dual role in the new Republic: it would protect the common people against the judges’ biases in favor of the government and the private ruling class, and also establish a small preserve of direct self-government in the face of the remote Federal regime.” Scheiner, *supra* note 120, at 144.

federalists, who considered it the last bulwark against a judiciary tainted by the British imperialist influence.¹³⁰ Moreover, the civil jury was thought to provide an antidote to the tendency for judges in a republic to favor wealthy, elite private litigants.¹³¹ More broadly, the Antifederalists who eventually won the fight for including the civil jury trial¹³² believed it to be the last and best bastion of true, direct democracy—the one vehicle for the exercise of direct political power by common people.¹³³

At the heart of our constitutional jury trial guarantees, then, was the populist notion that ordinary citizens were not just capable but indeed were the best possible decisionmakers for most types of disputes.¹³⁴ Yet the authority of the jury in the courtroom was not even then completely unregulated.¹³⁵ Eighteenth-century procedural practice included two mechanisms that directly controlled the authority of civil juries: the demurrer to the evidence and the new trial.¹³⁶ The

¹³⁰ See 4 THE COMPLETE ANTI-FEDERALIST 122 (Herbert J. Storing ed., 1981) ("Never was the trial by jury in civil cases thought of so lightly in America as at this day: we have bled for it, and are now almost ready to trifle it away . . ."); Scheiner, *supra* note 120, at 148-49; Wolfram, *supra* note 129, at 683. John Guinther posits that American colonists were impressed "with the importance of the right to jury as a bulwark against official oppression" by the jury's acquittal of John Peter Zenger in his seditious libel trial, and notes that the denial of the right to jury trial in the Stamp Act and the Navigation Acts spurred the Revolution. GUNTHER, *supra* note 115, at 30-31.

¹³¹ Scheiner, *supra* note 120, at 152; Wolfram, *supra* note 129, at 679-84. The paradigm situation discussed in the ratification debates was the debt collection case. The Antifederalists expressed concern that judges would favor creditors as members of their own social class. See Scheiner, *supra* note 120, at 152.

¹³² See Wolfram, *supra* note 129, at 672.

¹³³ Scheiner, *supra* note 120, at 153-54. A leading constitutional theorist of the time, John Taylor, envisioned the jury as the lower chamber of a bicameral judiciary. JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 209 (Dr. W. Stark ed., 1950); see also Amar, *supra* note 1, at 1189 (discussing functional role of jury in constitutional structure).

¹³⁴ See Note, *supra* note 32, at 178 ("The proponents [of jury trials in Massachusetts] saw 'the people' as the only sure protection of the natural law standard.") But see Henderson, *supra* note 29, at 290 ("Nowhere in the history of the Philadelphia convention, the ratifying conventions of the several states, or the specific 'legislative history' of the Bill of Rights can any evidence be found that the relation of judge to jury was considered as affected in any but the most general possible way by the seventh amendment, or even that it was considered at all.")

¹³⁵ See Murphy, *supra* note 120, at 747.

¹³⁶ See *Galloway v. United States*, 319 U.S. 372 (1943) (discussing historical analogues to modern directed verdict procedures). In addition to the demurrer to the evidence and motions for new trial, the device of nonsuit also allowed a defendant to challenge the sufficiency of a plaintiff's evidence, but did not prevent plaintiff from relitigating. *Id.* at 391-92 n.23; see also Henderson, *supra* note 29, at 300-01 (describing variety of colonial procedures). There is evidence that special verdicts existed then as well. See Murphy, *supra* note 120, at 760. In England, there was also a rule that complex cases should go to equity court, which had no juries. See Burger, *supra* note 99, at 209 ("England, the source of our common law, had, in 1791, a rule that if a civil case presented issues that were too complex for the understanding of a 'ploughman' by which was meant the ordinary man, the case was to be disposed of as in equity by a judge without a jury.") (citing Patrick Devlin, *Jury*

demurrer to the evidence generally functioned by allowing a defendant to concede the truth of plaintiff's evidence but argue that plaintiff was not entitled to recover. The risk to the defendant was that if the court disagreed, the plaintiff was automatically entitled to a verdict, given defendant's concession.¹³⁷ The motion for a new trial, like its modern counterpart,¹³⁸ allowed a judge to set aside a jury verdict, but preserved the right to a jury decision in the second trial. Because the demurrer option was such a risky one, and because the new trial did not undermine the authority of the jury as an institution (though it obviously undermined the initial jury's authority), it is fair to say that civil juries enjoyed the position of ultimate decisionmaker in most legal disputes.¹³⁹

This deference to jury decisions was a product of a system set up by men, designed to employ the rational faculties¹⁴⁰ of other men for the benefit of still other men. Since only men participated in all aspects of the legal system, as judges, lawyers, jurors, and even typically as litigants,¹⁴¹ they must have imagined that juries could provide rational, if not predictable, results. As the Massachusetts Supreme

Trial of Complex Cases: English Practice at the Time of the Seventh Amendment, 80 COLUM. L. REV. 43 (1980); Morris S. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980)).

¹³⁷ *Galloway*, 319 U.S. at 393.

¹³⁸ See FED. R. CIV. P. 59.

¹³⁹ James Levine notes that juries had "power not only to decide the facts but to interpret the law and to apply their own moral standards" and that juries "dominated the judicial process" into the early nineteenth century. LEVINE, *supra* note 21, at 24; cf. Henderson, *supra* note 29, at 299 ("A study of the decided cases in the thirteen original states shows that, on the contrary, the power of the civil jury and the extent of judicial control over its verdicts varied enormously and unsystematically from state to state."). Moreover, disputes that were equitable in nature were, of course, decided by chancellors, the judges who sat in courts of equity.

¹⁴⁰ As Akhil Amar points out, our acceptance of judges' superior ability to consider questions of law, including questions of constitutionality, stands in sharp contrast to "the powerful and prevailing sense of 200 years ago that the Constitution was the *people's law*." Amar, *supra* note 1, at 1195; see also Mark D. Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939); Note, *supra* note 32 (noting widespread eighteenth-century belief that juries had authority to judge both law and fact).

¹⁴¹ See Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 511-12 (1992) ("The 'due process' guaranteed by the Fifth Amendment thus entitled its framers, mostly elite white men, to the procedures and substantive rules of a legal system developed by and for people like themselves. At that time, women and African Americans could not participate as either lawyers or judges."); cf. Mary E. Becker, *Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment*, 79 GEO. L.J. 1659, 1681 (1991) ("My impression [from the cases] is that it is much easier for federal judges to empathize with and find for plaintiffs in age discrimination cases . . . since age discrimination plaintiffs are often elderly professional white men like the judges themselves, people judges can easily imagine are qualified. Juries do better than judges at empathizing with plaintiffs in employment discrimination cases.").

Court put it in an early nineteenth-century case, "the law *presumes* intelligence in the jury."¹⁴²

The jury's rapid fall from grace over the course of the nineteenth century, from virtual omnipotence to near subjugation, has often been explained in theoretical terms, notably as a manifestation of the emerging notion of law as science¹⁴³ and its emphasis on uniform, predictable rules.¹⁴⁴ Jury scholars Valerie Hans and Neil Vidmar speculate that the decline in the jury's prestige is attributable to a combination of the fading image of its revolutionary heyday as a weapon against English imperialist oppression and the rise in number of well-trained judges.¹⁴⁵ Many historians have posited that the rise in judicial control of juries stems from the judiciary's concern that juries might thwart industrial progress by returning verdicts against large corporate interests.¹⁴⁶ Each of these theories points to a sort of elitism that began to poison nineteenth-century attitudes toward juries. But they fail to account for a starker political reality connected to the jury's descent.

Simply put, a correlation may be drawn between the decline of jury influence and the inevitable post-Civil War change in jury personnel: as the jury became an object of demographic diversification, restraints on its power also were tightening. The very institution that was touted by constitutional framers as the bulwark of liberty had become a dangerous vehicle for upsetting the status quo.

¹⁴² *Commonwealth v. Child*, 27 Mass. (10 Pick.) 252, 257 (1829) (emphasis added).

¹⁴³ See generally AUERBACH, *supra* note 113, at 74-101 (documenting the intellectual history of law teaching in the late nineteenth century and its movement toward a view of law as a "scientific enterprise").

¹⁴⁴ See generally OLIVER W. HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS 237 (1920).

¹⁴⁵ HANS & VIDMAR, *supra* note 30, at 38-39. The rise of judicial power vis-a-vis juries also could be explained as a triumph of organized interests over less organized ones. Judges and lawyers were forming professional groups to pursue their collective interests. Jurors, of course, have no organized interest group. I am grateful to Akhil Amar for pointing to this explanation.

¹⁴⁶ See Landsman, *supra* note 80, at 605-07 (citing MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977); WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* (1975); Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946)).

Paul Carrington echoes this view, explaining that

The evolution of judicial control over jury verdicts was animated in part by a concern for "reckonability" in commercial law. It was perceived that allowing a party to a bargain to argue equities to a jury without the constraining effect of judicial oversight was too threatening to the value of bargains. And a similar risk of aberrant, emotional decisionmaking in tort actions may be to deter investment in activities that are exposed to tort liability. Economic activity of all kinds is a function of social and political stability that facilitates planning; nineteenth-century American law was much concerned with encouraging economic activity.

Carrington, *supra* note 112, at 45.

The rise of Jacksonian democracy and the trauma of the Civil War forced the Republic into an era of reexamining its democratic institutions toward the end of the nineteenth century. This period witnessed a flurry of legislative activity centered on cementing constitutional protections for newly-freed slaves. In particular, the Fourteenth Amendment's¹⁴⁷ guarantees of due process and equal protection of the laws to all men, including freed slaves, and the Fifteenth Amendment's¹⁴⁸ extension of the franchise to all men irrespective of race signaled the dawn of an era where exclusivity of democratic institutions could no longer be assumed.

The assertion of the right of previously excluded groups to serve on juries would not be far behind. In 1880, the Supreme Court held in *Strauder v. West Virginia*¹⁴⁹ that a state statute barring African-Americans from jury service violated an African-American defendant's right to equal protection of the laws. The Supreme Court's nod toward more inclusive juries in *Strauder*, coupled with the constitutional guarantee of the right to vote which traditionally was connected to jury service, signaled that juries would not continue to be the white male bastion that they had been.¹⁵⁰ At about the same time, as the women's suffrage movement gained momentum in the United States,¹⁵¹ the fight for access to the vote was combined with demands for women's full participation in the entire democratic process, including access to jury service.¹⁵²

Given the convergence in the late nineteenth century of the social movements designed to benefit women and minorities (particularly African-Americans), the growing distrust of juries during the same period takes on a new significance. The movement toward limiting jury power corresponds with the struggle of formerly excluded groups to gain access to jury service. Since the judiciary was less responsive than juries to demographic diversification,¹⁵³ the rules favor-

¹⁴⁷ U.S. CONST. Amend XIV (ratified July 9, 1868).

¹⁴⁸ U.S. CONST. Amend XV (ratified Feb. 3, 1870).

¹⁴⁹ 100 U.S. 303 (1879).

¹⁵⁰ But as late as 1896, the Supreme Court upheld a law limiting prospective jurors to male property owners. *Gibson v. Mississippi*, 162 U.S. 565, 580 (1896).

¹⁵¹ See generally JoEllen Lind, *Dominance & Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 U.C.L.A. WOMEN'S L.J. 70 (1994) (tracing history of suffrage movement).

¹⁵² See generally Jennifer K. Brown, Note, *The Nineteenth Amendment and Women's Equality*, 102 YALE L.J. 2175 (1993) (discussing the differing interpretations of the meaning of suffrage that emerged as state courts considered whether women's new voting rights made them eligible for jury service). The women's suffrage movement placed great emphasis on the right to serve on juries as essential to citizenship. See Babcock, *supra* note 47, at 1165 ("[T]heir struggle was also about the right to serve on juries. The two causes were the twin indicia of full citizenship both in the minds of woman suffragists and in the attitudes of American society.")

¹⁵³ Akhil Amar pointed out to me that this is perhaps a transitional problem: once the ranks of judges proportionately reflect the demographic makeup of society at large, then

ing judge-controlled decisionmaking served to keep power in the hands of the white male elite.

The duality of movement toward inclusiveness in jury participation and greater control of jury behavior continued into the twentieth century. On the inclusiveness front, advocates of jury diversification successfully invoked two constitutional provisions in their demand for juries that more accurately reflected the growing diversity of American communities. First, the right to an impartial jury guaranteed by the Sixth Amendment in criminal trials was found to encompass a requirement that juries be drawn from a "fair cross-section" of the community.¹⁵⁴ Second, the Equal Protection Clause of the Fourteenth Amendment was invoked to protect both the rights of litigants to trial by juries from which members of their demographic group were not barred *per se* and the rights of individuals to have access to jury service.¹⁵⁵

One can find sporadic examples of state efforts to include women in jury pools from as early as the turn of the century,¹⁵⁶ but the systematic effort began only after women had won a constitutional guarantee of their right to vote in 1920.¹⁵⁷ Although most states had legislatively revoked the wholesale exclusion of women from jury pools,¹⁵⁸ many still granted women automatic exemptions from service, on the theory that women's domestic responsibilities precluded prolonged absences from home.¹⁵⁹ Other schemes required women to indicate their desire to serve as jurors by a registration or some other affirmative act, with the net result that very few women were included in jury service.¹⁶⁰ The Supreme Court upheld the former practice as late as 1961,¹⁶¹ but finally reversed its course in the seventies to hold that

rules favoring judges will no longer have that effect. It is likely, though, that even after demographic representation has been achieved in the judiciary, classism will remain, since judges will continue to come from the more privileged sectors of society. Moreover, the power dynamic described here and in the previous section will continue to marginalize juries and compromise their democratizing function in the courtroom. Pro-judge rules, therefore, will still benefit a privileged, albeit more diverse, elite.

¹⁵⁴ *Ballard v. United States*, 329 U.S. 187 (1946).

¹⁵⁵ *Batson v. Kentucky*, 476 U.S. 79 (1986).

¹⁵⁶ Utah was the first state to include women as jurors in state court trials, beginning in 1898. HANS & VIDMAR, *supra* note 30, at 51.

¹⁵⁷ *Id.* at 51-52. The Nineteenth Amendment reads in part: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. CONST. amend XIX.

¹⁵⁸ Alabama, Mississippi, and South Carolina retained their prohibitions against women jurors into the 1960s. HANS & VIDMAR, *supra* note 30, at 52.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 52-53.

¹⁶¹ *Hoyt v. Florida*, 368 U.S. 57 (1961), *overruled in part by Taylor v. Louisiana*, 419 U.S. 522 (1975). The defendant in *Hoyt* challenged her conviction for second-degree murder in the killing of her husband on the ground that her all-male jury was not representative. Despite the fact that the automatic exemption scheme in Florida resulted in the inclusion

both affirmative registration schemes¹⁶² and automatic exemptions for women summoned to serve¹⁶³ violate the Sixth Amendment's guarantee of an impartial jury.

Conquering the obstacles to inclusion on jury lists proved to be only half the battle. The availability of peremptory challenges, which allow litigators to strike members of jury pools without any showing of cause, continued to limit access of women and minorities to actual jury service at trial. This last frontier of the fight for inclusion has centered on equal protection challenges to discriminatory use of peremptories. In 1986, the Supreme Court held that litigators could not constitutionally use peremptory challenges to strike potential jurors solely on account of their race.¹⁶⁴ Later cases make clear that the equal protection restraint on the use of peremptory challenges protects both the rights of litigants and of excluded jurors,¹⁶⁵ and applies in both criminal and civil cases.¹⁶⁶ The most recent decision regarding the peremptory challenge occurred in 1994 when the Supreme Court held that the Equal Protection Clause forbids the use of peremptory challenges based on gender.¹⁶⁷

As was the case in the late nineteenth century, these twentieth-century developments which angled toward more inclusive juries were accompanied by tightening procedural restraints on jury power. The directed verdict procedure, first introduced in the nineteenth century,¹⁶⁸ hit its stride in the twentieth. In the early days of the procedure, the evidentiary standard used to gauge the appropriateness of a

of only 10 women on a 10,000 member jury list, the Supreme Court rejected her claim. See HANS & VIDMAR, *supra* note 30, at 52.

¹⁶² Taylor v. Louisiana, 419 U.S. 522 (1975) (striking down a provision of the Louisiana constitution that required a woman to file a written declaration of her desire to be eligible to serve on a jury).

¹⁶³ Duren v. Missouri, 439 U.S. 357, 360 (1979) ("[S]ystematic exclusion of women [produced by giving them an automatic exemption] that results in jury venires averaging less than 15% female violates the Constitution's fair-cross-section requirement.").

¹⁶⁴ Batson v. Kentucky, 476 U.S. 79 (1986).

¹⁶⁵ Powers v. Ohio, 499 U.S. 400 (1991).

¹⁶⁶ Batson was a criminal case; its rule was extended to apply to civil cases in Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

¹⁶⁷ See J.E.B. v. Alabama *ex rel* T.B., 114 S. Ct. 1419 (1994). Interestingly, this case involved a paternity suit in which a putative father objected to an all-female jury.

¹⁶⁸ In Justice Black's dissent in Galloway v. United States, 319 U.S. 372 (1943), he identifies Parks v. Ross, 52 U.S. (11 How.) 362, 372 (1850), as the first directed verdict case considered by the United States Supreme Court: "[T]he [Parks] Court held that the directed verdict serves the same purpose as the demurrer to the evidence, and that since there was 'no evidence whatever' on the critical issue in the case, the directed verdict was approved." Galloway, 319 U.S. at 401-02 (Black, J., dissenting) (footnotes omitted). Justice Black characterized the Parks decision as an "innovation," noting that only 15 years prior to that case the Court had reiterated that courts "cannot legally give any instruction which shall take from the jury the right of weighing the evidence and determining what effect it shall have." *Id.* at 402 (quoting Greenleaf v. Birth, 34 U.S. (9 Pet.) 292, 298 (1835)).

directed verdict was whether there existed even a "scintilla"¹⁶⁹ of evidence to support the likely loser's case. The introduction of virtually any evidence rescued a litigant from the possibility of an unfavorable directed verdict, and also preserved the jury's decisionmaking province.¹⁷⁰ But by the turn of the century this standard had eased, so that when a constitutional challenge to the procedure finally reached the Supreme Court,¹⁷¹ directed verdicts were being granted whenever there was a lack of "substantial" evidence to support the losing side. Obviously, evaluating whether "substantial" evidence existed required judges to weigh evidence in some sense; it was that invasion of the traditional jury function that prompted the constitutional challenge. In 1943, the Supreme Court held in *Galloway v. United States*¹⁷² that the directed verdict procedure did not compromise the Seventh Amendment's guarantee of a jury trial in civil cases. Instead, the Court said, the Framers intended the Seventh Amendment guarantee to "preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions."¹⁷³

Justice Black, a great defender of juries during a period when that was not a fashionable intellectual stance,¹⁷⁴ predictably dissented in *Galloway*.¹⁷⁵ Quoting Alexander Hamilton¹⁷⁶ and Patrick Henry¹⁷⁷

¹⁶⁹ See 319 U.S. at 404 (Black, J., dissenting).

¹⁷⁰ See, e.g., *Parks*, 52 U.S. (11 How.) at 373-74 ("There was no evidence whatever tending to show [that plaintiff was entitled to recover].").

¹⁷¹ See *Galloway*, 319 U.S. at 372. This was a civil case in which a former serviceman sued the government for disability benefits due on an insurance policy. The plaintiff, against whom a verdict was directed, argued that he had a right under the Seventh Amendment to jury trial on the issue of his mental disability, and that the directed verdict procedure effectively deprived him of that constitutional right.

¹⁷² 319 U.S. 372 (1943).

¹⁷³ *Id.* at 392 (footnote omitted).

¹⁷⁴ This is the period during which Judge Jerome Frank was writing his famous attacks on the competency of juries. See FRANK, COURTS ON TRIAL, *supra* note 20, at 120; FRANK, LAW AND THE MODERN MIND, *supra* note 20, at 181.

¹⁷⁵ Justice Black also dissented in other cases in which he thought the right to jury trial was compromised. See, e.g., *Brady v. Southern Ry. Co.*, 320 U.S. 476, 485 (1943) ("Truly, appellate review of jury verdicts by application of a supposed norm of reasonableness gives rise to puzzling results.") (footnote omitted).

¹⁷⁶ "Alexander Hamilton in *The Federalist* emphasized his loyalty to the jury system in civil cases and declared that jury verdicts should be re-examined, if at all, only 'by a second jury, either by remanding the cause to the court below for a second trial of the fact, or by directing an issue immediately out of the Supreme Court.'" 319 U.S. at 397 (quoting *THE FEDERALIST* Nos. 81 & 83).

¹⁷⁷ "Henry, speaking in the Virginia Constitutional Convention, had expressed the general conviction of the people of the Thirteen States when he said, 'Trial by jury is the best appendage of freedom. We are told that we are to part with that trial by jury with which our ancestors secured their lives and property. . . . I hope we shall never be induced, by such arguments, to part with that excellent mode of trial. No appeal can now be made as to fact in common law suits. *The unanimous verdict of impartial men cannot be reversed.*'" 319 U.S. at 398 (footnotes omitted) (quoting Henry in 3 ELLIOT'S DEBATES 324, 544 (1787))

on the importance of preserving a jury's authority to render binding verdicts, Justice Black surveyed the history of growing procedural restraint on jury power and passionately argued that the standard approved in *Galloway* "comes dangerously close" to a system in which judges usurp even the most basic of jury responsibilities—weighing the credibility of witnesses.¹⁷⁸ Justice Black's concerns were heightened when some years later, amendments to the Federal Rules of Civil Procedure effectively codifying *Galloway* were approved by the Supreme Court and submitted to Congress.¹⁷⁹ Joined by Justice Douglas in his dissent to the rule changes, Justice Black lamented the amendment's giving "formal sanction to the process by which the courts have been wresting from juries the power to render verdicts" and declared that "[s]ince we do not approve of this sapping of the Seventh Amendment's guarantee of a jury trial, we cannot join even this technical *coup de grace*."¹⁸⁰

Until very recently, the standard upon which judges based the entry of either the directed verdict or the JNOV¹⁸¹ was left to case law development. As the *Galloway* dissenters intimated, the standard evolved from a very strict restraint on judges' ability to interfere with the jury process (that the case should go to the jury if there exists a "scintilla" of evidence to support the non-moving side)¹⁸² toward a standard that is quite obscure and manipulable (that the case should *not* go to the jury unless a "reasonable" or "rational" jury could find for the non-moving side). Finally, in 1991, Congress amended the Federal Rules of Civil Procedure to explicitly incorporate the "reasonable jury" standard as the proper basis for a directed verdict or JNOV.¹⁸³ Thus, just as the barriers to full participation begin to break

(emphasis added in *Galloway* dissent)). The vehemence of this rhetoric may, of course, be a function of the predictable demographic characteristics of eighteenth century jurors. See *supra* text accompanying notes 124-25.

¹⁷⁸ *Galloway*, 319 U.S. at 405 (Black, J., dissenting).

¹⁷⁹ See 374 U.S. 865 (1963).

¹⁸⁰ *Id.* at 865, 866-67 (Statement of Black and Douglas, JJ.). The justices reiterated the concerns in the *Galloway* dissent that "judges have whittled away or denied the right of trial by jury through the devices of directed verdicts and judgments notwithstanding verdicts." *Id.* at 866.

¹⁸¹ For a description of how a judgment notwithstanding the verdict, or JNOV, operates, see *supra* notes 38-44 and accompanying text.

¹⁸² See *Galloway*, 319 U.S. at 404 (Black, J., dissenting).

¹⁸³ Rule 50 reads, in pertinent part, as follows:

(a) Judgment as a Matter of Law

(1) If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a *reasonable jury* to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, cross-claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

...

down, and as the numbers of women and minorities in jury service begin to show true proportionality to the population, the compromised power of the civil jury has been encoded into the Federal Rules of Civil Procedure.

CONCLUSION

The intersection of the two jurisprudential trends that have dominated the development of the jury in the last hundred or so years—the movement toward inclusive juries and the growth of judicial restraint on jury power—produces an unsettling picture of a power struggle along gender and racial lines. Acknowledging this political truth forces a reexamination of jury restraint mechanisms that we have come to accept as necessary and therefore constitutional.

Moreover, the semiotic analysis presented here prepares the field for a more self-conscious appraisal of both the current system and proposed reforms.¹⁸⁴ The ideology of juror distrust that is facilitated and reinforced by the rationality standard for evaluating jury decisionmaking should no longer conceal the power dynamic in the modern courtroom. The stark reality is that jury power is externally controlled; if this is the justice system we prefer, we must openly acknowledge its anti-democratic features.

If, on the other hand, we do not want to see the jury system limp along in its present condition, we should demonstrate our respect for the good faith and intellect of jurors by enlarging their sphere of influence in the courtroom.¹⁸⁵ For example, we might consider enlarg-

(b) Renewal of Motion for judgment after Trial; Alternative Motion for New Trial.

Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the *legal* questions raised by the motion.

FED. R. CIV. P. 50 (as amended, 1991) (emphasis added). Rule 50 is drafted in such a way as to allow judges to police the “reasonableness” of jury decisionmaking without running afoul of the Seventh Amendment’s Reexamination Clause; thus the rule characterizes evidence sufficiency as a legal question.

¹⁸⁴ See Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 Nw. U. L. REV. at 191-92 (1990) (describing two possible approaches to remedying dissatisfaction with the jury system; the first would take cases away from jury, the second would enlarge jury participation in the courtroom).

¹⁸⁵ This seems to be the spirit of the Brookings Institution conference and report. See Emily Courie, *Jurors’ Rights Endorsed*, A.B.A. J., Mar. 1993, at 38 (quoting Marc Whitehead’s description of the Brookings Institution conference and report on American juries: “The report may mark a major change in thinking of the jury as a pro-active participant in the process rather than as a passive, absorbing listener.”); see also Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL OF RIGHTS J. 29, 87-106 (1994) (positing a communitarian model of jury and extolling its participatory value).

ing the universe of information available to jurors¹⁸⁶ or giving jurors a voice in information gathering. Most importantly, we must as a society vigilantly ensure that our supposedly democratic institutions do not simply mask power concentrations that we have not affirmatively sanctioned.

¹⁸⁶ See Shari Seidman Diamond et al., *Blindfolding the Jury*, LAW & CONTEMP. PROBS., Autumn 1989, at 247 (developing a theoretical model to determine when information should and should not be withheld from jurors).