

The Contemporary American Jury

Shari Seidman Diamond^{1,2} and Mary R. Rose³

¹Pritzker School of Law, Northwestern University, Chicago, Illinois 60611, USA;
email: s-diamond@law.northwestern.edu

²American Bar Foundation, Chicago, Illinois 60611, USA

³Department of Sociology, University of Texas, Austin, Texas 78712, USA;
email: mrose@austin.utexas.edu

Annu. Rev. Law Soc. Sci. 2018. 14:239–58

First published as a Review in Advance on
June 21, 2018

The *Annual Review of Law and Social Science* is
online at lawsocsci.annualreviews.org

<https://doi.org/10.1146/annurev-lawsocsci-110316-113618>

Copyright © 2018 by Annual Reviews.
All rights reserved

ANNUAL REVIEWS **CONNECT**

www.annualreviews.org

- Download figures
- Navigate cited references
- Keyword search
- Explore related articles
- Share via email or social media

Keywords

juries, jury selection, damage awards, competence, trial rates, representativeness

Abstract

The contemporary American jury is more inclusive than ever before, although multiple obstacles continue to make racial and ethnic representation a work in progress. Drastic contraction has also occurred: The rate of jury trials is at an all-time low, dampening the signal that jury verdicts provide to the justice system, reducing the opportunity for jury service, and potentially threatening the legitimacy of judgments. At the same time, new areas of jury research have been producing important explanations for how the jury goes about reaching its verdict in response to challenging questions, like how to assess damages. Yet the persistent focus on individual juror judgments as opposed to decision making by the jury as a group leaves unanswered important questions about how jury performance is influenced by a primary distinctive feature of the jury: the deliberation process.

INTRODUCTION

The American jury has changed dramatically over time in two crucial ways. To get an accurate picture of the contemporary American jury and its role in the justice system, we need to understand both of these changes. First, who are today's jurors? The make-up of the American jury has grown dramatically more democratic since its early days (Guzy 2012). After tracing the changes in jury composition over time, we consider the remaining limitations on eligibility and selection procedures that undermine jury representativeness.

At the same time, the modern era has experienced a radical drop in the rate of jury trials and changes in the nature of the cases that contemporary juries decide (Thomas 2016). Jury trials have become exceptional rather than ordinary outcomes as a percentage of the civil disputes and criminal charges that enter the legal system. Many factors have contributed to the decline of jury (and bench) trials, including the rise of alternative dispute resolution, judicial and legislative initiatives, higher litigation costs, and increased incentives to plead guilty. Some of these changes have also increased the perceived risk associated with opting for trial. After assessing the sources of the jury trial's declining numbers, we consider the impact this trend may have on the justice system and on democracy more broadly.

Other questions about the jury focus on how it functions as a decision maker. Jurors select, organize, elaborate, and interpret the evidence, drawing inferences to connect the pieces to develop an explanation-based narrative (Pennington & Hastie 1992, Simon 2004). But can we identify more specifically where jurors turn for assistance in reconstructing the events that led to trial and their consequences? New research enlarges our understanding of how jurors engage in what we term reference-point reasoning (Diamond et al. 1998, Hans & Reyna 2011). That is, jurors look for external and internal reference points to guide their decisions. One qualitative reference point is the party alignment of most witnesses in the adversary context. Other reference points are quantitative, such as attorney requests for specific damage awards (*ad damnum*) that can act as anchors for damage awards (Diamond et al. 2011). According to new work, this search for reference points is a natural outgrowth of how people encode information in contexts like jury trials. Rather than memorizing and analyzing the specifics of information they encounter, jurors represent and produce from memory the "gist" of information (Hans & Reyna 2011), which increases reliance on available reference points when they must produce specific numbers. As we show, reference point reasoning helps explain one of the most difficult and contested issues in jury decision making: the sources of variability in decisions on damages.

Lastly, we focus on deliberation. Should we care about what goes on during deliberations? Do we need jury deliberations? These may seem like odd questions, but consider this thought experiment: What if the jury members voted individually and their decision was determined by a secret ballot and mechanically applied decision rule? What, if anything, would be lost? Much research on the jury assumes that we can understand juries by studying individual decisions made in the absence of deliberations. We consider evidence on the effects of jury deliberations, which suggests how we can be limited and misled by a predominantly juror-focused approach.

REPRESENTATION ON JURIES: RACE AND ETHNICITY

Juries are more heterogeneous and representative today than they have ever been (Guzy 2012). Traditionally composed exclusively of white male property owners deemed (by a court official) to be of good character, the American jury is now drawn from the citizenry at large, including the women and minorities who were not eligible to serve as jurors when the country was founded. Yet the processes that lead to the selection of the jurors, both in identifying those eligible to serve on any jury and in choosing the members of a particular jury, sometimes undermine representativeness.

The result is that the contemporary American jury has grown more democratic, but it is not the fully representative body that some would view as optimal, particularly with respect to the participation of racial and ethnic minorities.

Attorney Strikes and Jury Participation

Studies of jury selection reveal systematic patterns in the relationship between juror race and the exercise of peremptory challenges. Multiple studies (Baldus et al. 2001, Diamond et al. 2009, Gau 2016, Rose 1999) find that prosecutors in criminal cases and defense attorneys in civil cases are more likely to use their challenges to dismiss African American jurors, whereas criminal defense attorneys and civil plaintiff's attorneys are more likely to exercise their strikes on white prospective jurors. These systematic racial maneuvers are particularly pronounced in capital cases (Grosso & O'Brien 2011–2012). On capital juries, the state's peremptory challenges in some instances have resulted in the nearly wholesale elimination of particular subgroups (e.g., young, African American males; Baldus et al. 2001).

Laboratory research has replicated the racialized patterns in jury selection found in field studies. Both attorneys and nonattorneys, asked to role play as prosecutors, focused their single remaining peremptory on an African American juror, regardless of how the vignette described that person's background (Sommers & Norton 2007). Participants also had no difficulty justifying their choices in nonracial terms. The latter finding helps to explain why *Batson v. Kentucky* (1986) and its progeny have not had the promised effect of eliminating race as a basis for the exercise of peremptory challenges. *Batson* prohibited using race as a basis for a peremptory challenge but set forth a test that made it difficult to prove that a challenge was racially motivated. Only the most blatant and explicitly documented use of race [e.g., *Foster v. Chatman* (2016)] is likely to produce a successful rejection of a racially biased challenge.

In any particular case, the adversarial, racialized use of peremptory challenges can radically shape the composition of the final jury, causing on occasion underrepresentation of minorities (Diamond & Kaiser 2016), in sometimes drastic amounts (Baldus et al. 2001). This can produce juries, particularly in high-profile cases, that media reports accurately describe as unrepresentative of communities, and such disparities can undermine the symbolic legitimacy of verdict outcomes (Ellis & Diamond 2003), leading to calls for the elimination of peremptory challenges [e.g., Hoffman 1997; Marder 1995; *Miller-El v. Dretke* (2005), Breyer, J., concurring; but see Rose & Diamond 2008]. Research shows that prosecutors in criminal cases and defense attorneys in civil cases disproportionately use their strikes against African Americans (Diamond et al. 2009, Gau 2016, Rose 1999). Except in a few metropolitan areas (e.g., Detroit and Washington, DC), African Americans typically make up a small proportion of an area (e.g., less than 10%), meaning that there are only a few members of that community in a particular jury pool (see Rose et al. 2018). It therefore takes only a few peremptory challenges to entirely eliminate that group's representation on the jury.

In contrast to effects on specific cases, the systematic countervailing patterns of challenge tend to cancel each other out in the aggregate and thus to produce few effects on the overall representativeness of juries. In most of the field studies described above that demonstrated the adversarial, racialized use of challenges, African Americans and whites were equally likely to be selected to serve (Diamond et al. 2009, Gau 2016, Rose 1999), although there were exceptions [in Caddo Parish, Louisiana (described in Diamond & Kaiser 2016) and in some capital cases (Baldus et al. 2001)].

These aggregated patterns may explain why existing research finds that race is a weak predictor of jury service history. In their study of Texas adults, Rose and colleagues (2012) found

that no factor—not race, income, residential mobility, prior jury service, or willingness to serve—significantly differentiated people who had been selected for a trial from people who had gone through jury selection questioning without being selected, implying that any distortions in the representativeness of juries are introduced primarily before members of the community are questioned in the courtroom.

Forming Jury Pools

As with politics, all juries are local. Selection practices vary across the federal system (e.g., Rose & Abramson 2011), across states (Mize et al. 2007), and even across counties within a state (e.g., urban versus rural areas). Such diversity markedly hampers research in this area. Courts may fail to collect, keep, or be willing to share demographic information about jury pools or the fate of all jurors who arrived for jury selection (e.g., Chernoff 2016). As a result, most studies of the early stages of jury selection take a case-study approach, reporting on, for example, what happens when a particular county or district diversifies its source lists (Neeley 2011, Newman 1995), uses the internet to empanel jurors (Rose & Brinkman 2008), or fails to summon jurors in a completely random fashion (Fukurai et al. 1993). Actual data sets on jury selection practices or jury representativeness outcomes are rare and quite dated (e.g., Bueker 1997, Van Dyke 1977), which limits our ability to answer even the most basic descriptive questions about the extent of underrepresentation in jury pools.

Rose and colleagues (2018) recently analyzed data from federal courts in 52 jurisdictions and found that underrepresentation was ubiquitous, with nearly every jurisdiction exhibiting some underrepresentation of Latinos and African Americans. According to the comparative disparity measure, which asks what proportion of the population of adult citizens is missing from a community's jury pool or jury list, on average almost one-third of Latinos in these communities were unrepresented in jury pools or jury lists and more than 40% of African Americans were unrepresented. The authors compared these figures with those reported 20 years prior in the same areas (e.g., Bueker 1997) and found that the average rate of loss for Latinos was somewhat lower than in the past, but the average rate of loss for African Americans had changed little over time.

Results also revealed serious barriers to addressing jury pool underrepresentation through legal challenges. The raw difference between the proportion of a group in the population and the proportion in the jury pool, or absolute disparity (AD), was modest. For African Americans, the average AD was 3.9% (median: 3.1%); for Latinos, it was 4.7% (median: 4.2%). These ADs were well below the commonly used bright-line 10% rule, which requires a 10% AD to prove underrepresentation (see Rose & Abramson 2011). The Supreme Court's most recent representation decision, *Bergbuis v. Smith* (2010), did not endorse the exacting 10% rule, but it also failed to prohibit it, implicitly accepting its continued use. This renders many areas safe harbors against jury underrepresentation claims (Hannaford-Agor & Waters 2011), both because communities with a minority population lower than 10% can never show recognizable underrepresentation (i.e., the AD would always be <10%) and because disparities in any area rarely reach the 10% level.

Some evidence suggests that even small levels of underrepresentation can affect verdict outcomes. According to Anwar and colleagues (2012), Florida juries chosen from venirees that contained at least one African American were less likely to convict an African American defendant than were juries from venirees containing no African Americans, regardless of whether African Americans ultimately served on the jury. The authors argue that the presence of the minority group member (or members) in the courtroom focuses the state's peremptory challenges on this group, likely missing some defense-prone whites. Such results are novel and need to be replicated, but they suggest that getting even a few more minority members to court can make a difference.

Courts have struggled with the challenge of getting citizens to the courthouse and reducing summons nonresponse (e.g., Caprath et al. 2016). The cause of this nonresponse is unclear. Some scholars (Boatright 1998, Fukurai et al. 1993, Walters & Curriden 2004) urge courts to do more to address structural barriers to participation by increasing compensation, making service less onerous, and educating citizens about what service will actually involve; also, there is some evidence that simple reminders can boost response (Bowler et al. 2014). However, it is worth recognizing that more may be required.

Minorities—particularly African Americans—experience alienation from legal systems and institutions (e.g., Alexander 2010, Kirk & Papachristos 2011), so it seems unwise to ignore the role on nonresponse such views may play in leading these prospective jurors to exempt themselves. Although the majority of the US population expresses support for the jury system, including among minority group members, on average African Americans and Latinos show somewhat more tepid support for the jury as a trusted decision maker (Rose et al. 2008). Minority group members also show less enthusiasm about serving on juries than do whites (Dote 2006, Musick et al. 2015), even if they have already served (Rose 2005), and particularly if they have served on capital cases (Denver 2011). Although a mandatory duty, appearing for jury service depends upon the strength of personal norms concerning duties and obligations (Musick et al. 2015) and an authority-mindedness orientation surrounding court orders (Rose et al. 2017). Potential sources of alienation from courts among minority group members, including the ways that jury service dynamics mimic other well-known procedural justice and legitimacy effects (Tyler 1990), need far more research attention. These views—who holds them, for what reasons, and to what effect—could inform courts about how to deal with nonresponse. Reminding prospective jurors of consequences of not serving can motivate appearances (e.g., Bowler et al. 2014), but courts dealing with populations that are already alienated from the law and legal actions might think twice about employing greater and more punitive steps to counteract attrition.

Eligibility Rules

Some features of jury selection that undermine representativeness result from policy choices that might be revisited. The question is normative: What definition should be used to identify the eligible population the jury sample is designed to represent? Until recently, most states excluded from jury service individuals in particular occupations (e.g., physicians, lawyers, clergy), but a majority of states have eliminated all professional exemptions (Strickland et al. 2017). Others have substantially reduced them. For example, Indiana eliminated or substantially reduced all automatic exemptions except for active military service.

In contrast to this occupational expansion of the jury pool, English language proficiency, citizenship, and lack of a felony record are prerequisites that limit jury service, although there have been some efforts to remove those requirements. The state of New Mexico permits non-English speaking citizens to serve as jurors, and its constitution explicitly prohibits the exclusion of citizens who are unable to speak, read, or write English (N.M. Const. Art. VII, §3 1911). This provision has been interpreted to require reasonable efforts to accommodate the non-English speaking juror by providing an interpreter [*State v. Rico* (2002)]. With an eye toward maximizing representativeness, the 2005 American Bar Association Principles for Juries and Jury Trials endorsed eligibility “unless the court is unable to provide a satisfactory interpreter” (Am. Bar Assoc. 2005, Principle 2, A.4). Although it is unclear whether the presence of a non-English speaking juror (and interpreter) in the deliberation room negatively affects the deliberations, Justice Edward Chávez (2008) reports that including non-English speaking jurors in New Mexico has not caused difficulties and that 11 trials in the Third Judicial District Court in Las Cruces went to verdict with non-English

speaking jurors in the first three months of 2008. There have been reports of as many as four non-English speaking citizens serving on the same jury panel in recent years (Santos 2014), but the effect of these jurors on decision making and how people respond to translation in the jury room has received only nascent empirical attention (e.g., Chavez 2012). Thus far, no other state has followed New Mexico's lead.

Citizenship is a standard requirement for jury service that excludes the estimated 13.1 million lawful permanent residents in the United States (Baker & Rytina 2014). In 2013, the State Assembly in California, where 3.5 million noncitizens are legal permanent residents, passed a bill that would have allowed those noncitizens to serve as jurors [AB-1401, 2013 Leg. (Cal. 2013)]. Governor Brown (2013) vetoed the bill, characterizing jury service as "quintessentially a prerogative and responsibility of citizenship." The result of the citizenry requirement is that a substantial portion of legal permanent residents in the United States are not included in the population from which jury pools are drawn. This limitation differentially excludes ethnic minorities, raising the potential for an equal protection or Sixth Amendment claim (Motomura 2012).

The qualification for jury service that may have the largest effect on representativeness excludes individuals with felony convictions. A majority of states exclude convicted felons from serving on a jury for life, which disproportionately affects black adult males. According to Uggen et al. (2006), the more than 16 million felons and ex-felons, who constitute 7.5% of the adult population, represent 33.4% of the black adult male population. Wheelock (2011) estimates that felony juror exclusion reduces the pool of eligible African Americans in Georgia by nearly one-third, reducing the expected number of African American men on a jury from 1.61 to 1.17 per jury. To the extent that felon exclusion is justified by presumed antiprossecution bias among felons, that presumption may not be warranted. Binnall (2014) found that convicted felons and law students did not differ on a measure of pretrial bias. The wholesale exclusion of felons undermines the goal of achieving juries that represent a fair cross-section of the larger community.

In summary, the production of a jury is the result of a complex set of requirements and interactions between the legal system and the population of prospective jurors, inside and outside the courthouse. Although the contemporary American jury is far more heterogeneous and representative than it has ever been, systematic underrepresentation from minorities persists. Given other research demonstrating that greater diversity of background and experience brings not only greater legitimacy for the jury system (Ellis & Diamond 2003) but also more robust fact-finding and deliberation (e.g., Cowan et al. 1984, Sommers 2006), additional understanding and efforts to address sources of underrepresentativeness are in order.

THE DISAPPEARING JURY TRIAL

The right of citizens to have both criminal and civil controversies resolved by groups of ordinary fellow citizens is guaranteed by the US Constitution and by every state constitution. Yet juries today rarely resolve these cases. The jury was a standard decision forum for both criminal and civil disputes at the nation's founding (Thomas 2016), but the jury trial in the twentieth century, even at its peak, resolved only a minority of cases. Today rates of trial by jury have shrunk to make the jury trial an exceptional rather than a commonplace outcome. Bench trials have not taken the place of jury trials; rather, the trial itself has been disappearing.

How rare are jury trials? In the federal courts, where the data are most reliable, juries in 1962 resolved 8.2% of criminal cases and 5.5% of civil cases. The drop in rates that characterizes the contemporary jury has dramatically cut even those modest earlier percentages by more than half in criminal cases and even more drastically in civil cases. By 2013, jury trials represented only 3.6% of criminal case dispositions in federal courts and 0.8% of civil case dispositions. The reduction

in state courts has been similarly dramatic. In 1976, when criminal charges were filed, they led to jury trials in 3.4% of cases in state courts in the most populous 22 states; by 2002, the percentage dropped to 1.3% of the cases. The corresponding rates for state civil cases were 1.8% in 1976 and 0.6% in 2002 (Thomas 2016, p. 2).

What explains the drop? On the civil side, potential explanations fall into three general categories, all of which may have contributed to the trend: the growth of alternative dispute resolution, the support of Supreme Court rulings and state legislative actions, and increases in the costs and perceived risks of trial. In civil cases, the growth of alternative dispute resolution in the form of mediation and arbitration has increasingly diverted cases from trial. In a mediation, settlement negotiations are facilitated by a neutral mediator, but the parties maintain control over the outcome. Arbitration, touted as a way to expedite case resolution, reduce costs, and promote settlement, permits litigants to avoid the public features of a trial. The parties in an arbitration also may have input on the identity of the individual who will preside over the hearing and decide the case. Although initially arbitration clauses appeared in contracts between parties with relatively equal bargaining power, standard contracts increasingly impose this requirement through a binding arbitration clause (Stone & Colvin 2015). Thus, employment and consumer contracts involving applications for a credit card or a cell phone, purchases online, or a car or apartment rental now often specify that any dispute will be resolved by arbitration (Lipsky 2016). These arbitration clauses have been repeatedly found enforceable by the US Supreme Court [e.g., *Buckeye Check Cashing v. Cardehna* (2006); *Rent-A-Center West v. Jackson* (2010)]. This push by employers and other commercial actors appears to be rational: On average, workers who pursue legal claims through arbitration are less likely to prevail and are awarded less than those who pursue employment claims in court (Stone & Colvin 2015). What is key about this trend is that it explicitly deprives potential litigants of the right to a formal public trial by either a jury or a judge.

Arbitration has also grown within court systems, with court-annexed mandatory arbitration procedures diverting claims filed in court. A litigant dissatisfied with an arbitration outcome who wishes to persevere may return to the traditional court system for a trial, but the initial diversion steers disputes away from trial.

Courts, with the support of Supreme Court rulings, are encouraged to use dispositive motions that bypass a trial to resolve the dispute. Summary judgment authorizes the trial judge to determine whether “a reasonable jury could return a verdict for the nonmoving party” [*Anderson v. Liberty Lobby, Inc.* (1986), p. 248]. In other words, the trial judge “decides whether factual inferences from the evidence are reasonable, applies the law to any ‘reasonable’ factual inferences, and makes the determination as to whether a claim could exist” (Thomas 2007, p. 143). Although scholars debate why summary judgment has increased in the modern era, the net effect in federal courts is that approximately 19% of cases filed now end in summary judgment (Cecil et al. 2007). Similarly, the Supreme Court in *Bell Atlantic Corp. v. Twombly* (2007) and in *Ashecroft v. Iqbal* (2009) changed the rule that required courts to assume that the alleged claims were true in deciding whether to grant a motion to dismiss for failure to state a claim on which relief can be granted [Fed. R. Civ. Proc. 12(b)(6)]. The Court specified that judges could consider the plausibility of the claim and draw on judicial experience and common sense to make that assessment. How these decisions shape access to trial is in some dispute, but critics allege that the new standards have usurped litigants’ right to have their claims decided by a jury (Thomas 2010).

Finally, a variety of tort reform initiatives have also contributed to the decline in civil jury trials. For example, statutory caps imposed on damage awards, especially for general damages such as pain and suffering and for punitive damages, by reducing potential recovery, may discourage some claims and promote early settlement of others to avoid the cost of trial. The tort reform movement reflects a perception that trials produce irrational and unjustified damage awards. In

the next section, we find little support for that claim, but as Galanter (2004, p. 517, emphasis in original) so wisely observed, “Litigants respond not to what is happening in the courts but to what they *believe* is happening.” Moreover, to the extent that litigation costs for the contemporary trial have grown, the incentive to avoid the risk of loss has grown as well.

In criminal cases, trial rates have also declined in both state and federal courts. Plea bargaining has become the primary, almost exclusive, outcome for a criminal charge. As Justice Kennedy recognized in *Lafley v. Cooper* (2012, p. 1388), plea bargaining dominates the criminal justice system: “Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”¹ This pattern led him to conclude that “criminal justice today is for the most part a system of pleas, not a system of trials.”

Has it become riskier to demand trial in recent years? Although improved prosecutorial screening may explain part of this willingness to plead guilty, the most compelling explanation is probably the increased cost of opting to go to trial. For example, under the Federal Sentencing Guidelines, introduced in the 1980s, defendants are offered an explicit and substantial reduction in the presumptive sentence if they demonstrate acceptance of responsibility for the offense, typically by pleading guilty (US Sentencing Comm. 2014). This offer imposes a trial penalty on defendants who exercise their right to a trial by jury. As on the civil side, the perceived risks associated with trial have become significant. For example, in 2012, the average sentence received by a federal drug offender after trial was three times higher than the sentence received after a guilty plea (16 years versus 5 years and 3 months) (Appleman 2015). Judges in state courts too impose a trial tax on defendants convicted at trial (Aprile 2014).

The mandatory minimum sentences for some federal offenses also increase the incentive to plead guilty to a lesser charge. Over one-fifth of all federal offenders in 2016 were convicted of an offense carrying a mandatory minimum penalty (US Sentencing Comm. 2017). In addition, at both the state and federal level, the number of diversionary programs for nonviolent offenders that often make eligibility dependent on the willingness to accept responsibility for the underlying offense create another pathway leading away from trial (e.g., Vermont Association of Court Diversion Programs, <http://vtcourtdiversion.org/court-diversion/faq/>).

If the importance of the jury is measured by how often cases are resolved by a jury, the dwindling rate of jury trials over the past half century suggests that the jury has become a marginalized player in the justice system (Thomas 2016). Although it is not clear which of the variety of explanations offered for this trend has contributed most to the reduction in jury trials, this drop has significant consequences. Not only are defendants in criminal cases and parties in civil cases losing or surrendering their day in court, with its procedural protections and access to the decisions of disinterested citizens, but a system with fewer trials provides reduced citizen feedback on the justice system. In addition, if fewer citizens have the opportunity to participate as jurors, this reduction threatens the values of a deliberative democracy, including the educative benefits that Tocqueville [1899 (1841)] recognized and the stimulus to civil engagement and political participation that Gastil and colleagues (2010) recently demonstrated (e.g., prior jurors showed an increased likelihood of voting). It is ironic that the decline in jury trials in the United States has been occurring at the same time that several other countries have moved toward implementing jury trials and other forms of lay participation in trials as a way to increase the legitimacy of their legal systems (e.g., Hans 2017).

¹Justice Kennedy was referring to the rates of pleas among all convictions, rather than the rates of pleas among all indictments, but in light of the fact that trials are far more likely to result in convictions than acquittals, the plea bargain is the dominant outcome.

UNDERSTANDING JURY FUNCTIONING

Reference Points and the Question of Damages: Meaningful Numbers

The jury in civil cases is often attacked for its perceived unpredictability, particularly in arriving at damage awards, a perception that may in part explain the movement toward settlement and away from trial. But how unpredictable are juries in light of the mixture of factors they must consider in reaching a verdict? When juries set damages in personal injury cases, they must draw case-specific conclusions about the claimed injuries, including how long the plaintiff has suffered injury from the defendant's conduct and how long the injury will continue. They must evaluate which injuries or other personal setbacks are the result of the defendant's behavior and which are not.²

Although how juries think about injuries offers a rich array of research topics (e.g., Greene et al. 2016, Mott et al. 2000, Wilson & Gilbert 2005, Wissler et al. 1997), research on juries and damages has typically focused on how jurors translate their evidentiary conclusions into specific dollar amounts. Mock jury research reveals some potential distortions in this translation, for example, fusion of liability and damages (e.g., Robbennolt & Sobus 1997, Wissler et al. 2001) and framing effects from attorneys' per-diem requests (e.g., more damages for requests framed as \$10/hour than \$7,300/month, although those are equivalent; McAuliff & Bornstein 2010). By far, however, the most common concern about the translation of injury perceptions into damage awards centers on variability, defined in two ways: desirable vertical and undesirable horizontal variability. Lack of vertical variability would occur if jury awards did not increase with increases in harm. In fact, jury awards show "an impressive degree of vertical equity" (Saks et al. 1997, p. 243), whether based on a rough, nine-point scale of injury severity in real cases (see, e.g., Avraham 2006) or in mock jury experiments in which juries give higher awards to otherwise identical cases that involve higher levels of harm (e.g., Diamond et al. 1998, Wissler et al. 1997).

Horizontal variability arises if similar cases are treated differently. Concerns about horizontal variability have stimulated calls to impose consistency through greater jury control (e.g., schedules that set damage levels for particular injuries; Avraham 2006). Normative concerns have been particularly evident in the work on punitive damages, in which several critics have attacked variability in outcomes as harmful to businesses (Sunstein et al. 2002), often seen as the most likely target of punitive awards, although these awards are also often part of civil actions stemming from criminal offenses (e.g., drunk driving; Vidmar & Rose 2001). In addition to raising concerns about erratic outcomes, some scholars also critique judgments by laypersons as failing to reflect the economic principle of "optimal deterrence" (Sunstein et al. 2002, chapter 8). The US Supreme Court's most recent decision on punitive damage awards, however, did not require that they be based on optimal deterrence. It recognized the "twin goals of punitive awards" as both punishment (retribution) and deterrence [*Exxon Shipping Co. v. Baker* (2008, p. 2621)]. It did, however, deem variability in punitive awards as a problem for either goal. The Court endorsed a guidepost for judges and appellate courts assessing the appropriateness of punitive damages, finding that a 1:1 ratio of punitive to compensatory damages reflected the median ratios observed in empirical work (e.g., Eisenberg et al. 2006, Vidmar & Rose 2001) and should have guided the maritime-based damage award against Exxon for its Alaskan oil spill. Whether this ratio produces awards that appropriately punish and deter—and whether various actors (juries, judges, businesses) agree on appropriateness—still awaits empirical attention. Interestingly, the 1:1 ratio adopted by

²Juries may also set damages in tort and contract cases that do not involve physical injury. Although there are occasionally high-profile cases in these realms [e.g., *Apple v. Samsung* (2013)], much of the debate and controversy over juries involve cases in which plaintiffs suffered physical or emotional injuries (e.g., Haltom & McCann 2004). Further, even in a contract or patent dispute, jurors have to gauge the meaning and import of losses if they decide that the defendant is liable.

the Supreme Court represents precisely the kind of reference-point reasoning evidenced more generally by juries in recent research.

Could Awards Be Less Variable?

Recent studies of decisions by professionals suggest that variability and systematic distortions in judging injury are not unique to jurors and juries. Greene and colleagues (2016) show, for example, that both laypeople and rehabilitation specialists underestimated how well people cope with a less common severe injury (paraplegia) and overestimated how well people tend to cope with a common, but also severe, ailment (chronic back pain following an injury). Research also consistently shows that judges too are subject to the types of cognitive biases identified in jury decision making (e.g., anchoring; Guthrie et al. 2001, 2007). Judges do have the advantage of sitting as “repeat players” (Galanter 1974) and therefore are able to compare their cases to similar or dissimilar cases they have been exposed to in the past, a guidepost that juries do not possess (see Saks et al. 1997). This suggests that one solution to jury variability is to give juries the same types of information judges have.

Such a move might reduce variability in awards, but it is important to note that such information would not necessarily produce lower award amounts. Saks and colleagues (1997) found that giving jurors guidance on amounts awarded to other plaintiffs with similar injuries reduced variability but did not change average amounts given. With the exception of the few largest jury awards (Hersch & Viscusi 2004), judges in actual cases do not tend to give lower punitive damage amounts than juries (Eisenberg et al. 2006). This also appears true of compensatory awards in more routine cases. In the Arizona Jury Project (Diamond et al. 2003), judges filled out questionnaires in cases that juries decided, and they listed recommended amounts if liability was found. In an analysis of these data (Rose & Diamond 2017a), we found that judges on average recommended giving twice what the jury returned (with a median of one and a half times), again suggesting that repeat-player status does not reduce the size of awards.

Further, research on the psychology of valuation shows evidence of both variability and orderly judgment. In a series of studies, Ariely and colleagues (2003) showed that people have difficulty selecting money amounts when asked to value products or to pay to avoid a painful experience (e.g., to avoid hearing a loud noise through headphones). Participants’ estimates were strongly affected by an irrelevant anchor (the last two digits of their social security number), demonstrating arbitrariness in the amounts produced.

At the same time, participants also consistently revealed stable relative preferences; for example, nearly all participants produced higher numbers for rare wine than for average wine and paid more to avoid 60 seconds of noise than 10 seconds. The authors dubbed this pattern coherent arbitrariness: Any given estimate was, in essence, made up, but the numbers were also systematic because estimates clearly reflected individuals’ awareness that some things are costlier or more serious (i.e., more painful) than others. This pattern is a plausible description of jury awards’ demonstrating both horizontal inequity and vertical equity. Thus, although one jury hearing a case might not produce the same damage award as another (i.e., there is some amount of arbitrariness), juries systematically recognize that the pain and suffering associated with a broken arm that ultimately heals is less in kind and degree than the anguish that accompanies the permanent loss of an arm (coherence).

How is it that awards can be both variable and orderly? Hans & Reyna have proposed a model of civil damage awards that relies on fuzzy trace theory and the distinction between gist and verbatim encoding of information (Hans & Reyna 2011, Reyna et al. 2015). Through verbatim encoding,

people represent in memory the meaning of a concept (or number) in precise and detailed ways; this type of encoding is not highly susceptible to influence from, for example, arbitrary anchors. As Ariely et al.'s (2003) results indicate, most people do not approach valuation tasks in a verbatim way. In contrast, gist representation focuses on the bottom-line meaning of a concept (e.g., “a lot,” “not much”). According to Hans & Reyna, the representation of an injury and deciding the appropriate number for it reflect ordinal gist representation (e.g., “a high amount” or “a low amount”), and the ordinal nature of this assessment likely accounts for the broad coherence observed. As evidence for the model, the authors find that damage amounts from real cases are disproportionately likely to involve rounded values (i.e., to end in zero; Hans & Reyna 2011), and the model is consistent with the finding that jurors pay attention to anchor values that attorneys provide (see Diamond et al. 2011), which would not likely occur if people processed the case, and the recommended amounts, in a verbatim manner.

Case-Relevant Numbers

In previous work, Diamond and colleagues (1998) suggested that jurors draw on reference points to determine what dollar value to assign. Most recent research indicates that jurors are primarily drawn to standards, analogies, and suggestions that are closely tied to the case at hand. In experimental work, Reyna and colleagues (2015) also find that jurors provided with potential anchors are more influenced by anchors that appear to be more meaningful: A comment that an award is high or low relative to the median national income had more effect on award outcomes than a comment that an amount was higher or lower than the cost of a courthouse renovation. The former, more meaningful, anchor also reduced overall variability in amounts because jurors made more use of it. This pattern of results is also broadly consistent with findings from the Arizona Jury Project's study of damage decision making in real cases (Rose & Diamond 2017b). Jurors deciding pain and suffering amounts consistently looked for ways to explicitly link their award to something concrete and case relevant, such as the total special award given (e.g., half thereof, the same, or twice as much), the medical bills or plaintiff's wage, and the attorneys' suggested amounts—although, on the latter, the defense's recommendations resonated with juries far more than the plaintiff's (Diamond et al. 2011). Jurors also looked to case-relevant reference points in determining how long an injury lasted, almost never saying, “Let's just say two months.” Instead, discussion of time periods centered around reference points, such as when treatment ended or the plaintiff was released from care based on “maximal medical improvement,” when the plaintiff returned to work or had been medically released to do so, or when injuries like the plaintiff's typically resolve, according to the defense expert's assessment.

The Arizona data do not permit us to know why a given amount came to mind for any particular juror; however, once amounts were on the table for discussion, the Arizona jurors defended awards and looked for meaning primarily by sticking close to specific case facts (e.g., a year of the plaintiff's wage, how a number compared with the defense's concession). Hence, consistent with Reyna et al.'s (2015) findings, jurors are unlikely to see totally irrelevant numbers like costs of courthouse renovations as useful reference points in arriving at their pain-and-suffering figures; however, the sources these real jurors turned to further suggest that jurors may also find little meaning in arguably more relevant reference points, like the median national income. Jurors instead need to see a close nexus to the case. Based on this perspective, variability in awards is produced by a variety of factors. Different juries may see injuries differently (Wissler et al. 1997), and valuation will be influenced by gist-based thinking (Hans & Reyna 2011) and the nature of available anchors. Awards will also vary—and appear to be variable—simply because facts vary across cases, and juries tend to adhere closely to the information and evidence specific to their case.

JURORS AND JURIES: THE ROLE OF DELIBERATIONS

A jury system need not require or permit deliberations. Today in Brazil, jurors on a seven-person jury cast their individual votes without speaking to one another. The virtue of the nondeliberation procedure, touted in Brazil, is that the secrecy of each juror's vote secures its independence (Gomes & Zomer 2001–2002). Brazilian jurors are also forbidden to reveal their vote afterward. In contrast, the model of deliberative democracy that characterizes the American jury assumes that exchange and persuasion occur during deliberations, improving the quality and legitimacy of decision making and affecting processes and outcomes in positive ways.

Why then does most research on the contemporary American jury focus solely on individual juror judgments, ignoring the impact of deliberations in creating a jury verdict? In reviewing 50 years of research on the jury, Devine (2012) estimated that only 5–10% of the empirical literature on jury decision making has involved intensive study of the deliberation process. Juror research is less expensive and time consuming than jury research, but other explanations for the deficit in jury research exist as well. In the first major study of jury decisions, Kalven & Zeisel (1966) conducted a judicial survey that covered 3,500 criminal jury trials and asked judges to also report how they would decide the case. Kalven & Zeisel recognized that they had ignored deliberations. For evidence that they had not missed something of importance, they relied on a set of 225 jurors' postdeliberation retrospective reports of the number of the jury's guilty votes on the first ballot and the final jury verdict. Because a majority vote on the first ballot matched the jury's verdict in "roughly nine out of ten cases" (p. 488) (the precise value was 87%), they offered what they called their "radical hunch," that important events did not occur during deliberations—providing later researchers with a welcome justification to dispense with the arduous and costly process of obtaining and analyzing group deliberation data. For current jury researchers, the attraction of dispensing with studies of deliberation has only increased with the advent of Mechanical Turk, Qualtrics, and related internet-based survey research platforms that permit swift and low-cost data collection from heterogeneous populations of individuals (Koehler & Meixner 2017).

In retrospect, the wisdom of Kalven & Zeisel's radical hunch seems questionable, or at least overstated. A significant weakness in using retrospective reports of first votes to estimate the transition between predeliberation voting and verdict is that jurors do not generally take an immediate anonymous vote—the only procedure that would reveal independent and truly predeliberation vote preferences. Although a juror often suggests taking an early vote, discussion may interrupt or derail this process as jurors raise questions about the interpretation of the evidence [Diamond & Casper 1992 (mock juries); Diamond et al. 2003 (real juries)]. Moreover, the expressed verdict preferences of those voting first can influence those who vote later (Davis et al. 1988). Most importantly, if any deliberations precede the initial vote, that first vote will not reflect any changes in position that occurred during deliberations before the vote was taken, thereby underestimating the impact of deliberations. Research indicates that the longer the trial, the longer the prevote discussion lasts, suggesting that a heavier evidentiary load leads to more processing time before jurors attempt to reach a verdict (Diamond et al. 2003). The most ecologically valid mock jury studies of deliberations suggest that immediate votes are in the minority [Hastie et al. 1983 (28%); Diamond & Casper 1992 (21%)], rather than the normal first step in deliberations. Posttrial surveys of real jurors have produced rates of reported early voting that range from 3% (Sandys & Dillehay 1995) to 31% (Devine et al. 2004).

Jurors naturally form opinions and construct plausible accounts in the course of the trial, but retrospective reports from real jurors suggest that their views can be mixed or tentative as deliberations begin. In a posttrial survey of real jurors from 382 criminal trials, 20% of the jurors indicated that they did not lean toward one side or the other until during the jury's deliberations

(Hannaford-Agor et al. 2002), and over one-third selected 3, 4, or 5 on a 7-point scale, with 17% of them choosing 4, the midpoint. Kalven & Zeisel (1966) also found that some of the jurors' reported first ballots included undecided votes, although they did not specify how many. Of course, these retrospective reports of uncertainty might be somewhat inflated by jurors' desire to report behavior consistent with the court's admonition to avoid reaching conclusions before the end of the trial, but to the extent that they reflect actual juror thinking at the beginning of deliberations, a lack of strong leaning or certainty at that point by a substantial percentage of jurors would leave ample room for deliberations to play a crucial role in jurors' verdict preferences.

The strongest evidence that the initial distribution of views on the jury trumps the impact of deliberation comes from a series of mock jury studies in which Davis and colleagues (e.g., Davis et al. 1975) compared actual predeliberation verdict preferences in criminal cases with the jury verdicts reached after deliberations. Verdicts revealed that the best-fitting model for transforming predeliberation preferences to final verdicts was a two-thirds majority rule (if two-thirds of the initial preferences favor a verdict, predict that verdict; otherwise, predict a hung jury). A later review of jury simulations, however, found that the better-fitting critical threshold for conviction was between .75 and .83, and for acquittal, between .67 and .50 (Devine et al. 2001).

A major problem for drawing conclusions from these laboratory studies is that with few exceptions, deliberations in the lab are conducted under severe time constraints, resulting in high rates of hung juries. The hung jury rate for the 348 12-person mock jury verdicts reviewed by Devine and his colleagues (2001) was 23%, whereas outside the laboratory, a large-scale study of 30 state courts found a hung jury rate of 6.2% (Hannaford-Agor et al. 1999). We cannot know how often the predeliberation majority position would have prevailed when the jury hung in the mock jury studies because jury deliberations were cut off prematurely.

The potential for deliberations to affect outcomes becomes even more likely as we move from cases with a dichotomous verdict choice to those with multiple charges or a multi-option outcome in a criminal context or multiple claims and damage determinations in the civil context. For example, in Hastie et al.'s (1983) mock jury research, juries considered four verdict options, and although the distribution of juror predeliberation preferences favored a manslaughter verdict, the modal jury verdict was second-degree murder, which was most defensible for the tested case. If a substantial majority of jury members independently prefer the same verdict before deliberations begin, deliberations may have little effect, but where uncertainty and disagreement need to be resolved, deliberations can play an important role.

With the dominant focus of jury researchers on decision rule, the effect of initial vote distributions on verdicts, and procedural mechanisms, including the timing of polls (see Devine 2012 for an excellent review), there has been little attention to the content of deliberations and how deliberation addresses questions of competence and bias. To what extent do jurors take advantage of the greater recall in the group as a whole, the greater ability of some jurors to accurately use quantitatively demanding evidence, and the like? To what extent does social loafing and consequent free riding mean that some jurors put forth little effort in the group setting, and if so, which jurors and with what effect? To what extent are individual biases magnified or counteracted during jury deliberations? We have clues that all of these forces are at work in deliberations, but the sparse record of deliberation research limits our understanding of their frequency and the circumstances under which each occurs.

Most research shows that jurors are quite successful in understanding and recalling most evidence from the trial, but scientific evidence poses a special challenge. Jurors vary in their comprehension levels, so what happens when they have an opportunity to deliberate? The results are mixed. In one study of scientific evidence, Hans et al. (2011) showed mock jurors a videotaped trial that included expert testimony on mitochondrial DNA, testing their comprehension before

and after deliberations. Those with more math and science training generally performed better, but in addition, level of comprehension improved following deliberations, particularly for those jurors with low pre-deliberation performance.

In our study of the deliberations of real civil juries, we could not give jurors comprehension tests, but we were able to observe how they talked about the expert testimony during deliberations (Diamond & Rose 2017). The jurors referred to most of the experts and generally helped each other sort through conflicting claims by opposing experts. Not all jurors participated equally, but those who were most active tended to show a fair grasp of the issues. The juries included an average of two members per eight-person jury who had potentially relevant expertise, broadly construed (e.g., an engineer or mechanic, a nurse or nurse's assistant in an auto accident), and those "juror-experts" tended to talk more than average during deliberations (Diamond et al. 2014). The "expert" jurors we observed during deliberations were not more likely to be forepersons or to show other indications of greater overall influence once participation level was controlled for, but they did tend to talk marginally more about the expert testimony, even with participation level controlled ($p < .10$). According to conventional wisdom, jurors with relevant occupational expertise are likely to be removed by one side or the other, but both on the Arizona juries whose deliberations we observed and in a follow-up national survey of active trial attorneys, we found evidence that contemporary American juries often include jurors with some relevant expertise.

The unfamiliar legal doctrine in instructions on the law is another challenge. Study after study has demonstrated that jurors do not perform well on comprehension tests designed to show what messages the instructions conveyed (e.g., comprehension rates below 65%; Lieberman & Sales 2000). Some of the few mock jury experiments, conducted primarily on criminal cases, that have compared post-trial comprehension performance of deliberating jurors and non-deliberating jurors have shown modest improvements with deliberation [e.g., Elwork et al. 1982 (civil), Severance et al. 1984 (criminal)], but others have not [e.g., Ellsworth 1989 (criminal), Hastie et al. 1998 (punitive damages)]. Even after deliberation, jurors in these experiments typically do not perform well on these comprehension tests. Nor have real jurors in post-trial surveys performed well (e.g., Saxton 1998). It is unclear on the basis of this research how much of the poor performance is due to poorly drafted instructions, to the measures used to assess juror comprehension, or to more fundamental problems.

The deliberations of the jurors in the tort cases of the Arizona Jury Project tell a more complex story (Diamond et al. 2012). The deliberations revealed that in these ordinary civil cases, most juries arrived at a reasonable understanding of the relevant law during their deliberations. A majority of the comments about legal issues (79%) were consistent with the law, and almost half of the juror comprehension errors on the law that jurors made (47%) were explicitly corrected. Nonetheless, errors occurred that appeared to affect several awards. Analysis of the errors jurors made during deliberations revealed a need to address issues in addition to legal jargon, specifically, omissions that leave jurors without guidance on some legal issues (e.g., that in a jurisdiction that does not require a unanimous verdict, all jurors should participate in determining the award even if some voted against finding liability, or that neither insurance nor attorneys' fees are relevant in assessing damages) and structural problems that arise because the piecemeal construction of jury instructions may leave jurors confused about how the pieces fit together. We do not know how these jurors would have performed on post-trial comprehension tests, but their conversations during deliberations indicate better performance as a group than post-trial tests may capture, albeit with clear room for improvement. Efforts to improve the comprehensibility of jury instructions need to be accompanied by jury deliberation research to assess their success.

Bias can infect not only jurors but also juries; for example, in *Peña-Rodriguez v. Colorado* (2017), jurors reported that another juror had expressed explicit anti-Hispanic bias toward the defendant and the defendant's alibi witness. *Peña-Rodriguez* presented a clear and extreme case of racial bias that likely affected the verdict, but we know little about how often such bias arises, or the extent to which deliberations stimulate rejection of such biased statements when they are offered.

A few studies have investigated the effects of deliberation on various forms of bias, with mixed results. Some have found that deliberations suppress or reduce bias that is evoked when jurors are exposed to extraneous or otherwise inadmissible information (e.g., Kerwin & Shaffer 1994, London & Nuñez 2000, Ruva et al. 2007). In contrast, Kramer et al. (1990) found an increase in the effect of biasing emotional publicity following jury deliberations and no effect of biasing factual publicity. As Nuñez and colleagues (2011) suggest, we need more direct evidence on the deliberation process to understand when group polarization or conformity pressures or other group factors negatively affect jury decision making, as well as when decision making is strengthened by deliberation.

CONCLUSIONS

As we have shown, the contemporary jury is more representative than it has ever been but less representative than it could be. And although we have learned a great deal through research on juror behavior, our understanding of the jury as a group has left some important puzzles (e.g., how deliberation affects bias) unresolved. Thus, we should expect to see further evolution of both the jury and jury research.

Despite the changes reflected in the contemporary American jury, three characteristics of the jury have a long history and are likely to remain prominent, but all three are being affected by the changes the jury has been undergoing. The first is that jurors are motivated to reach the correct verdict, one they perceive as fair and consistent with the evidence. Jurors take their important job seriously. This persistent characteristic of the jury is now encountering a modern world that has become crowded with digital sources and opportunities for online expression. Courts have developed detailed instructions warning jurors against use of internet sources and social media of any kind. Hoffmeister & Watts (2018) describe what these changes are likely to mean for the jury, but it is safe to say that the jury will not be immune from the temptation to use these new tools to help them figure out the right answer. The challenge will be how to handle these new enticements that have become so routine in all of our lives.

The second feature of the jury, also longstanding, is the American jury's crucial shadow role in affecting cases that do not end up before a jury. For example, Jury Verdict Reporters have traditionally supplied attorneys in civil cases with a wealth of information on past jury verdicts, informing them about "going rates" as they attempted to reach settlements. With few jury trials, the strength of the signals sent by jury verdicts has been weakened. What evidence will attorneys and parties use to assess what the outcome would be likely to be if the case went to trial? Yet assumptions about what a jury would do will persist as a crucial reference point for settlements and plea bargains. The problem is that with less feedback from real jury trials, distorted expectations are likely to increase.

The final continuing feature of the American jury is the impact of jury verdicts on the educative value of jury service and the legitimacy of the American legal system, roles that are now being recognized and celebrated outside the United States in countries in which the legal system has been under fire and the jury has received a contemporary welcome. Even if we expand jury eligibility on the contemporary American jury to be maximally inclusive, the representative jury will be merely a symbolic achievement if all that is left of the promise of a jury trial is an empty courtroom.

DISCLOSURE STATEMENT

The authors are not aware of any affiliations, memberships, funding, or financial holdings that might be perceived as affecting the objectivity of this review.

LITERATURE CITED

- Alexander M. 2010. *The New Jim Crow: Mass Incarceration in the Era of Color-Blindness*. New York: New Press
- Am. Bar Assoc. 2005. *Principles for Juries and Jury Trials*. Chicago: Am. Bar Assoc. https://www.americanbar.org/content/dam/aba/administrative/american_jury/principles.authcheckdam.pdf
- Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)
- Anwar S, Bayer P, Hjalmarsson R. 2012. The impact of race in criminal trials. *Q. J. Econ.* 127:1017–55
- Apple, Inc. v. Samsung Electronics Co., LTD.*, 727 F.3d 1214 (2013)
- Appleman LI. 2015. *Defending the Jury: Crime, Community and the Constitution*. New York: Cambridge Univ. Press
- Aprile JV II. 2014. Judicial imposition of the trial tax. *Crim. Justice* 29:30
- Ariely D, Loewenstein G, Prelec D. 2003. “Coherent arbitrariness”: stable demand curves without stable preferences. *Q. J. Econ.* 118:73–105
- Asbroft v. Iqbal*, 129 S. Ct. 1937 (2009)
- Avraham R. 2006. Putting a price on pain-and-suffering damages: a critique of the current approaches and a preliminary proposal for change. *Northwest. Law Rev.* 100:87–119
- Baker B, Rytina N. 2014. *Estimates of the lawful permanent resident population in the United States: January 2013*. Policy Dir., Off. Homel. Secur., Washington, DC. https://www.dhs.gov/sites/default/files/publications/ois_lpr_pe_2013_0.pdf
- Baldus DC, Woodworth G, Zuckerman D, Weiner NA, Broffitt B. 2001. The use of peremptory challenges in capital murder trials: a legal and empirical analysis. *Univ. Penn. J. Const. Law* 3:3–169
- Batson v. Kentucky*, 476 U.S. 79 (1986)
- Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007)
- Bergbuis v. Smith*, 559 U.S. 314 (2010)
- Binnall JM. 2014. A field study of the presumptively biased: Is there empirical support for excluding convicted felons from jury service? *Law Policy* 36:1–34
- Boatright RG. 1998. Why citizens don’t respond to jury summonses and what courts can do about it. *Judicature* 82:156–64
- Bowler S, Esterling K, Holmes D. 2014. GOTJ: Get out the juror. *Political Behav.* 36:515–33
- Brown EG. 2013. *Letter to the members of the California State Assembly*. Lett., Off. Gov., Oct. 7
- Buckeye Check Cashing v. Cardebna*, 546 U.S. 440 (2006)
- Bueker JP. 1997. Jury source lists: Does supplementation really work? *Cornell Law Rev.* 82:390–431
- Caprahe W, Hannaford-Agor P, Loquvam SM, Diamond SS. 2016. Increasing jury representativeness. *Judges J.* 55:16–20
- Cecil JS, Eyre RN, Miletich D, Rindskopf D. 2007. A quarter-century of summary judgment practice in six federal district courts. *J. Empir. Legal Stud.* 4:861–907
- Chávez EL. 2008. New Mexico’s success with non-English speaking jurors. *J. Court Innov.* 1:303–27
- Chavez H. 2012. *Examining the effects of non-English speaking jurors on jury verdicts and juror experiences*. PhD diss., Univ. Nev., Reno, NV
- Chernoff N. 2016. No records, no right: discovery and the fair cross-section guarantee. *Iowa Law Rev.* 101:1719–85
- Cowan CL, Thompson WC, Ellsworth PC. 1984. The effects of death qualification on jurors’ predisposition to convict and on the quality of deliberation. *Law Hum. Behav.* 8:53–79
- Davis JH, Kerr NL, Atkin RS, Holt R, Meek D. 1975. The decision processes of 6- and 12-person mock juries assigned unanimous and two-thirds majority rules. *J. Personal. Soc. Psych.* 32:1–14
- Davis JH, Stasson MF, Ono K, Zimmerman SK. 1988. Effects of straw polls on group decision making: sequential voting pattern, timing, and local majorities, *J. Personal. Soc. Psychol.* 55:918–26

- Denver M. 2011. The future of capital trials: an exploration of procedural justice, race, and willingness to serve again. *Crim. Justice Rev.* 36:183–200
- Devine DJ. 2012. *Jury Decision Making: The State of the Science*. New York: N. Y. Univ. Press
- Devine DJ, Clayton LD, Dunford BB, Seying R, Pryce J. 2001. Jury decision making: 45 years of empirical research on deliberating groups. *Psychol. Public Policy Law* 7:622–727
- Devine DJ, Olafson KM, Jarvis LL, Bott JP, Clayton LD, Wolfe JT. 2004. Explaining jury verdicts: Is leniency bias for real? *J. Appl. Soc. Psychol.* 34:2069–98
- Diamond SS, Casper JD. 1992. Blindfolding the jury to verdict consequences: damages, experts, and the civil jury. *Law Soc. Rev.* 26:513–63
- Diamond SS, Kaiser J. 2016. Race and jury selection: the pernicious effects of backstrikes. *Howard Law J.* 59:705–38
- Diamond SS, Murphy B, Rose MR. 2012. The “kettleful of law” in real jury deliberations: successes, failures and next steps. *Northwest. Univ. Law Rev.* 106:1537–608
- Diamond SS, Peery D, Dolan FJ, Dolan E. 2009. Achieving diversity on the jury: jury size and the peremptory challenge. *J. Empir. Leg. Stud.* 6:425–49
- Diamond SS, Rose MR. 2017. *Judging experts: what real juries do*. Colloquium, Univ. Tex. Law School, Austin, TX
- Diamond SS, Rose MR, Murphy B. 2014. Embedded experts on real juries: a delicate balance. *William Mary Law Rev.* 55:885–933
- Diamond SS, Rose MR, Murphy B, Meixner J. 2011. Damage anchors on real juries. *J. Empir. Leg. Stud.* 8(s1):148–78
- Diamond SS, Saks MJ, Landsman S. 1998. Juror judgments about liability and damages: sources of variability and ways to increase consistency. *DePaul Law Rev.* 48:301–26
- Diamond SS, Vidmar N, Rose MR, Ellis L, Murphy B. 2003. Juror discussions in civil trials: studying an Arizona innovation. *Ariz. Law Rev.* 45:1–81
- Dote LT. 2006. *Citizen willingness to serve: explaining attitudes toward jury service in Philadelphia*. PhD Diss., Temple Univ., Philadelphia, PA
- Eisenberg T, Hannaford-Agor PL, Heise M, LaFountain N, Munsterman GT, et al. 2006. Juries, judges, and punitive damages: empirical analyses using the civil justice survey of state courts 1992, 1996, and 2001 data. *J. Empir. Leg. Stud.* 3:263–95
- Ellis L, Diamond SS. 2003. Race, diversity, and jury composition: battering and bolstering legitimacy. *Chicago-Kent Law Rev.* 78:1033–58
- Ellsworth P. 1989. Are twelve heads better than one? *Law Contemp. Probl.* 52:207–24
- Elwork A, Alfini JJ, Sales BD. 1982. Toward understandable jury instructions. *Judicature* 65:432–43
- Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008)
- Foster v. Chatman*, 136 S. Ct. 1737 (2016)
- Fukurai H, Butler EW, Krooth R. 1993. *Race and the Jury: Racial Disenfranchisement and the Search for Justice*. New York: Plenum
- Galanter M. 1974. Why the “haves” come out ahead: speculations on the limits of legal change. *Law Soc. Rev.* 9:95–160
- Galanter M. 2004. The vanishing trial: an examination of trials and related matters in federal and state courts. *J. Empir. Leg. Stud.* 3:459–570
- Gastil J, Deess EP, Weiser PJ, Simmons C. 2010. *The Jury and Democracy: How Jury Deliberation Promotes Civic Engagement and Political Participation*. Oxford, UK: Oxford Univ. Press
- Gau JM. 2016. A jury of whose peers? The impact of selection procedures on racial composition and the prevalence of majority-white juries. *J. Crim. Justice* 39:75–87
- Gomes LF, Zomer AP. 2001–2002. The Brazilian jury system. *St. Louis-Warsaw Transatl. Law J.* 2001–2002:75–79
- Greene E, Sturm KA, Evelo AJ. 2016. Affective forecasting about hedonic loss and adaptation: implications for damage awards. *Law Hum. Behav.* 40:244–56
- Grosso CM, O’Brien B. 2011–2012. A stubborn legacy: the overwhelming importance of race in jury selection in 173 North Carolina capital trials. *Iowa Law Rev.* 97:1531–59

- Guthrie C, Rachlinski JJ, Wistrich AJ. 2001. Inside the judicial mind. *Cornell Law Rev.* 86:777–830
- Guthrie C, Rachlinski JJ, Wistrich AJ. 2007. Blinking on the bench: how judges decide cases. *Cornell Law Rev.* 93:1–43
- Guzy N. 2012. Citizen participation in juries. In *The Social History of Crime and Punishment in America*, ed. WR Miller. Los Angeles, CA: Sage
- Haltom W, McCann M. 2004. *Distorting the Law: Politics, Media, and the Litigation Crisis*. Chicago: Univ. Chicago Press
- Hannaford-Agor PL, Hans VP, Mott NL, Munsterman GT. 2002. *Are hung juries a problem?* Rep., Natl. Inst. Justice, Washington, DC
- Hannaford-Agor P, Hans VP, Munsterman GT. 1999. How much justice hangs in the balance? A new look at hung jury rates. *Judicature* 83:59–67
- Hannaford-Agor P, Waters NL. 2011. Safe harbors from fair cross section challenges? The practical limitations of measuring representation in the jury pool. *J. Empir. Leg. Stud.* 8:762–91
- Hans VP. 2017. Trial by jury: story of a legal transplant. *Law Soc. Rev.* 51:471–99
- Hans VP, Kaye DH, Dann BM, Farley EJ, Albertson S. 2011. Science in the jury box: Jurors' comprehension of mitochondrial DNA evidence. *Law Hum. Behav.* 35:60–71
- Hans VP, Reyna VF. 2011. To dollars from sense: qualitative to quantitative translation in jury damage awards. *J. Empir. Leg. Stud.* 8(s1):120–47
- Hastie R, Penrod SD, Pennington N. 1983. *Inside the Jury*. Cambridge, MA: Harvard Univ. Press
- Hastie R, Schkade DA, Payne JW. 1998. A study of juror and jury judgments in civil cases: deciding liability for punitive damages. *Law Hum. Behav.* 22:287–314
- Hersch J, Viscusi WK. 2004. Punitive damages: how judges and juries perform. *J. Leg. Stud.* 33:1–36
- Hoffman MB. 1997. Peremptory challenges should be abolished: a trial judge's perspective. *Univ. Chicago Law Rev.* 64:809–71
- Hoffmeister T, Watts AC. 2018. Social media, the internet, and trial by jury. *Annu. Rev. Law Soc. Sci.* 14:259–70
- Kalven H Jr., Zeisel H. 1966. *The American Jury*. Boston: Little Brown
- Kerwin J, Shaffer DR. 1994. Mock jurors versus mock juries: the role of deliberations in reactions to inadmissible testimony. *Personal. Soc. Psychol. Bull.* 20:153–62
- Kirk DS, Papachristos AV. 2011. Cultural mechanisms and the persistence of neighborhood violence. *Am. J. Soc.* 116:1190–233
- Koehler JJ, Meixner JB Jr. 2017. Jury simulation goals. In *The Psychology of Juries*, ed. M. Kovera, pp. 161–184. Washington, DC: Am. Psychol. Assoc.
- Kramer GP, Kerr NL, Carroll JS. 1990. Pretrial publicity, judicial remedies, and jury bias. *Law Hum. Behav.* 14:409–38
- Lafler v. Cooper*, 132 S. Ct. 1376 (2012)
- Lieberman JD, Sales BD. 2000. Jury instructions: past, present, and future. *Psychol. Public Policy Law* 6:587–90
- Lipsky DB. 2016. The *New York Times'* attack on arbitration. *Dispute Resolution Magazine*, Summer, pp. 6–10
- London KY, Nuñez N. 2000. The effect of jury deliberation on jurors' propensity to disregard inadmissible evidence. *J. Appl. Psychol.* 85:932–39
- Marder NS. 1995. Beyond gender: peremptory challenges and the roles of the jury. *Tex. Law Rev.* 73:1041–138
- McAuliff BD, Bornstein BH. 2010. All anchors are not created equal: the effects of per diem versus lump sum requests on pain and suffering awards. *Law Hum. Behav.* 34:164–74
- Miller-El v. Dretke*, 545 U.S. 231 (2005)
- Mize GE, Hannaford-Agor P, Waters NL. 2007. *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report*. Williamsburg, VA: Natl. Cent. State Courts. <http://www.ncsc-jurystudies.org/State-of-the-States-Survey.aspx>
- Motomura A. 2012. The American jury: Can noncitizens still be excluded? *Stanford Law Rev.* 64:1503–49
- Mott NL, Hans VP, Simpson L. 2000. What's half a lung worth? Civil jurors' accounts of their award decision making. *Law Hum. Behav.* 24:401–19
- Musick MA, Rose MR, Dury S, Rose RP. 2015. Much obliged: volunteering, normative activities and willingness to serve on juries. *Law Soc. Inq.* 40:433–60
- Neeley E. 2011. Addressing nonsystematic factors contributing to the underrepresentation of minorities as jurors. *Court Rev.* 47:96–101

- Newman TC. 1995. Fair cross sections and good intentions: representation in federal juries. *Justice Sys. J.* 18:211–32
- Núñez N, McCrea SM, Calhane SE. 2011. Jury decision-making research: Are researchers focusing on the mouse and not the elephant in the room? *Behav. Sci. Law* 29:439–51
- Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017)
- Pennington N, Hastie R. 1992. Explaining the evidence: tests of the story model for juror decision making. *J. Personal. Soc. Psychol.* 62:189–206
- Rent-A-Center West v. Jackson*, 561 U.S. 63 (2010)
- Reyna VF, Hans VP, Corbin JC, Yeh R, Lin K, Royer C. 2015. The gist of juries: testing a model of damage award decision making. *Psychol. Public Policy Law.* 21:280–94
- Robbenolt JK, Sobus MS. 1997. An integration of hindsight bias and counterfactual thinking: decision making and drug courier profiles. *Law Hum. Behav.* 21:539–60
- Rose MR. 1999. The peremptory challenge accused of race or gender discrimination? Some data from one county. *Law Hum. Behav.* 23:695–702
- Rose MR. 2005. A dutiful voice: justice in the distribution of jury service. *Law Soc. Rev.* 39:601–34
- Rose MR, Abramson JB. 2011. Data, race, and the courts: some lessons on empiricism from jury representation cases. *Mich. State Law Rev.* 2011:911–66
- Rose MR, Brinkman M. 2008. Crossing the “digital divide”: using the internet to impanel jurors in Travis County, Texas. *J. Court Innov.* 1:5–32
- Rose MR, Casarez RS, Gutierrez C. 2018. Jury pool underrepresentation in the modern era: evidence from federal courts. *J. Empir. Leg. Stud.* 15:378–405
- Rose MR, Diamond SS. 2008. Judging bias: juror confidence and judicial rulings on challenges for cause. *Law Soc. Rev.* 42:513–546
- Rose MR, Diamond SS. 2017a. *Juries judging injuries: the special role of special damages in personal injury civil cases*. Presented at the Annual Meeting of the American Sociological Association, Montreal, Can., August 14.
- Rose MR, Diamond SS. 2017b. *Patterned variability: what deliberations reveal about general damage decisions*. Presented at the Annual Meeting of the Law and Society Association, Mexico City, Mex., June 21
- Rose MR, Diamond SS, Ellison CG, Krebs AV. 2017. Juries and viewpoint representation. *Justice Q.* 35:114–38
- Rose MR, Diamond SS, Musick MA. 2012. Selected to serve: an analysis of lifetime jury participation. *J. Empir. Leg. Stud.* 9:33–55
- Rose MR, Ellison C, Diamond SS. 2008. Preferences for juries over judges across racial and ethnic groups. *Soc. Sci. Q.* 89:372–91
- Ruva C, McEvoy C, Bryant JB. 2007. Effects of pre-trial publicity and jury deliberation on juror bias and source memory errors. *Appl. Cogn. Psychol.* 21:45–67
- Saks MJ, Hollinger LA, Wissler RL, Evans DL, Hart AJ. 1997. Reducing variability in civil jury awards. *Law Hum. Behav.* 21:243–56
- Sandys M, Dillehay RC. 1995. First-ballot votes, predeliberation dispositions, and final verdicts in jury trials. *Law Hum. Behav.* 19:175–95
- Santos F. 2014. As the demand for court interpreters climbs, state budget conflicts grow as well. *New York Times*, June 14. http://www.nytimes.com/2014/06/15/us/as-the-demand-for-court-interpreters-climbs-state-budget-conflicts-grow-as-well.html?_r=1
- Saxton B. 1998. How well do jurors understand jury instructions? A field test using real juries and real trials in Wyoming. *Land Water Law Rev.* 33:59–189
- Severance LJ, Greene E, Loftus E. 1984. Toward criminal jury instructions that jurors can understand. *J. Crim. Law Criminol.* 75:198–233
- Simon D. 2004. A third view of the black box: coherence reasoning in legal decision making. *Univ. Chicago Law Rev.* 71:511–86
- Sommers SR. 2006. On racial diversity and group decision making: identifying multiple effects of racial composition on jury deliberations. *J. Personal. Soc. Psychol.* 90:597–612
- Sommers SR, Norton MI. 2007. Race-based judgments, race-neutral explanations: experimental examination of peremptory use and the *Batson* challenge procedure. *Law Hum. Behav.* 31:261–73

- State v. Rico*, 52 P. 3d 942 (N.M. 2002)
- Stone K, Colvin A. 2015. *The arbitration epidemic: Mandatory arbitration deprives workers and consumers of their rights*. Brief. Pap. #414, Econ. Policy Inst., Washington, DC. <http://www.epi.org/publication/the-arbitration-epidemic/>
- Strickland SM, Schauffler R, LaFountain R, Holt K, eds. *State Court Organization*. Williamsburg, VA: Natl. Cent. State Courts, accessed Jan. 4, 2017. <https://www.ncsc.org/sco>
- Sunstein CR, Hastie R, Payne JW, Schkade DA, Viscusi WK. 2002. *Punitive Damages: How Juries Decide*. Chicago: Univ. Chicago Press.
- Thomas SA. 2007. Why summary judgment is unconstitutional. *Va. Law Rev.* 93:139–80
- Thomas SA. 2010. The new summary judgment motion: the motion to dismiss under *Twombly* and *Iqbal*. *Lewis Clark Law Rev.* 14:15–42
- Thomas SA. 2016. *The Missing American Jury: Restoring the Fundamental Constitutional Role of the Criminal, Civil and Grand Juries*. New York: Cambridge Univ. Press
- Tocqueville A. 1899 (1841). *Democracy in America*, transl. H Reeve. Washington, DC: Gateway Eds.
- Tyler TR. 1990. *Why People Obey the Law*. New Haven, CT: Yale Univ. Press
- Uggen C, Manza J, Thompson M. 2006. Citizenship, democracy, and the civic reintegration of criminal offenders. *Ann. Am. Acad. Political Soc. Sci.* 605:281–310
- US Sentencing Comm. 2014. *Guidelines Manual*. Washington, DC: US Sentencing Comm.
- US Sentencing Comm. 2017. *An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System*. Washington, DC: US Sentencing Comm.
- Van Dyke J. 1977. *Jury Selection Procedures: Our Uncertain Commitment to Representative Juries*. Cambridge, MA: Ballinger
- Vidmar N, Rose MR. 2001. Punitive damages by juries in Florida: *in terrorem* and in reality. *Harvard J. Legis.* 38:487–513
- Walters R, Curriden M. 2004. A jury of one's peers? Investigating underrepresentation in jury venires. *Judges J.* 43:17–21
- Wheelock D. 2011. A jury of one's "peers": the racial impact of felon jury exclusion in Georgia. *Justice Sys. J.* 32:335–59
- Wilson T, Gilbert D. 2005. Affective forecasting: knowing what to want. *Curr. Dir. Psychol. Sci.* 14:131–34
- Wissler RL, Evans DL, Hart AJ, Morry MM, Saks MJ. 1997. Explaining "pain and suffering" awards: the role of injury characteristics and fault attributions. *Law Hum. Behav.* 21:181–207
- Wissler RL, Rector KA, Saks MJ. 2001. The impact of jury instructions on the fusion of liability and compensatory damages. *Law Hum. Behav.* 25:125–39



Contents

Eyewitness Science and the Legal System <i>Elizabeth F. Loftus</i>	1
Campaign Finance Disclosure <i>Abby K. Wood</i>	11
Conditions of Confinement in American Prisons and Jails <i>Christopher Wildeman, Maria D. Fitzpatrick, and Alyssa W. Goldman</i>	29
Correctional Autonomy and Authority in the Rise of Mass Incarceration <i>Keramet Reiter and Kelsie Chesnut</i>	49
Critiques of Human Rights <i>Malcolm Langford</i>	69
From Nudge to Culture and Back Again: Coalface Governance in the Regulated Organization <i>Ruthanne Huising and Susan S. Silbey</i>	91
Law and the Dead Body: Is a Corpse a Person or a Thing? <i>Ellen Stroud</i>	115
Law's Underdog: A Call for More-than-Human Legalities <i>Irus Braverman</i>	127
Norms, Normativity, and the Legitimacy of Justice Institutions: International Perspectives <i>Jonathan Jackson</i>	145
Rule-of-Law Ethnography <i>Nick Cheesman</i>	167
Environmental Security and the Anthropocene: Law, Criminology, and International Relations <i>Cameron Holley, Clifford Shearing, Cameron Harrington, Amanda Kennedy, and Tariro Mutongwizo</i>	185
Styles of Argumentation in Judicial Opinions (Legitimizing Judicial Decisions) <i>Nicholas Scurich</i>	205

The Use of Amicus Briefs <i>Paul M. Collins, Jr.</i>	219
The Contemporary American Jury <i>Shari Seidman Diamond and Mary R. Rose</i>	239
Social Media, the Internet, and Trial by Jury <i>Thaddeus Hoffmeister and Ann Charles Watts</i>	259
The Lessons and Limitations of Experiments in Democratic Deliberation <i>John Gastil</i>	271
The Criminal Law and Law Enforcement Implications of Big Data <i>Sarah Brayne</i>	293
The Politics of Professionalism: Reappraising Occupational Licensure and Competition Policy <i>Sandeep Vabeesan and Frank Pasquale</i>	309
The Rise of International Regime Complexity <i>Karen J. Alter and Kal Raustiala</i>	329
The Sharing Economy <i>Bronwen Morgan</i>	351
The Social Psychology of Property: Looking Beyond Market Exchange <i>Janice Nadler</i>	367
The Use of Case Studies in Law and Social Science Research <i>Lisa L. Miller</i>	381
Transitional Justice and Economic Policy <i>René Urueña and María Angélica Prada-Uribe</i>	397
Violent Video Games, Sexist Video Games, and the Law: Why Can't We Find Effects? <i>Christopher J. Ferguson</i>	411

Indexes

Cumulative Index of Contributing Authors, Volumes 1–14	427
Cumulative Index of Article Titles, Volumes 1–14	431

Errata

An online log of corrections to *Annual Review of Law and Social Science* articles may be found at <http://www.annualreviews.org/errata/lawsocsci>