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Public Opinion about the Civil Jury: Can Reality Be Found in the Illusions?

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PUBLIC OPINION ABOUT THE CIVIL JURY: CAN REALITY BE FOUND IN THE ILLUSIONS?

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There are certain times when public opinion is the worst of all opinions.[1]

The private citizen, beset by partisan appeals for the loan of his Public Opinion, will soon see, perhaps, that these appeals are not a compliment to his intelligence, but . . . an insult to his sense of evidence.[2]

The greatest challenge of writing this paper is to try to say something more complete, more thoughtful, or more illuminating than Valerie Hans already has in her chapter on the same subject, published only a few years ago.[3]

If I may oversimplify for a moment: In summary, the survey results Hans examined suggested that the public's views of the civil jury were less than sanguine,[4] especially on the question of awarding damages, which by a ratio of about 3:1, respondents in one major survey thought were "excessive" rather than "not enough."[5] What little additional data have been gathered since her review do not reveal that those dim views of the civil jury have reversed direction.

I will take advantage of having been invited to discuss "illusion and reality" about the civil jury to offer a skeptical view of what useful knowledge such survey results can provide us about the institution of the civil jury. Undoubtedly there is a place for public opinion re-

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1. Sébastien-roch Nicolas de Chamfort, 1 MAXIMS AND CONSIDERATIONS No. 92 (1796).

2. WALTER LIPPMANN, PUBLIC OPINION 401 (1945).

3. Valerie P. Hans, *Attitudes Toward the Civil Jury*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 248, 248-81 (Robert E. Litan ed., 1993). For more on this subject, see Edith Greene et al., *Jurors' Attitudes about Civil Litigation and the Size of Damage Awards*, 40 AM. U. L. REV. 805 (1991).

4. Hans offers a somewhat more positive interpretation of the public's views of the jury than I see in the same data. *See* Hans, *supra* note 3, at 275.

5. *Id.* at 257 (discussing results from a 1986 survey conducted by Louis Harris and Associates for Aetna Life and Casualty).

search in social science and the law,[6] but I question how informative it is on the subject of evaluating the institution of the jury.[7] My suggestion is that these survey results are deeply illusory. These results tell us less about the allegedly sad state of the institution of the civil jury and more about the arguably sad state of polling, public misinformation about the civil justice system, the public disinformation campaigns of interest groups that expect to profit from certain changes in the civil justice system, and the state of news reporting which—by the nature of its selection of what is news and by its gullibility in passing along as truth the press releases of some special interest public relations firms—fosters public misinformation on this subject.[8] But I am getting ahead of myself.

As attitude and opinion researchers well know, if asked for answers, people can and will give responses on subjects about which they know absolutely nothing. For example, a recent poll asked members of the public if they thought extra-terrestrials were of greater or lesser intelligence than earthlings.[9] Forty-seven percent of respondents said they thought that extra-terrestrials were more intelligent; 13% thought they were less intelligent; and 40% thought extra-terrestrials and earthlings were "about the same."[10] Of course, even if every earthling thought extra-terrestrials were more intelligent, nothing is revealed about the relative intelligence of extra-terrestrials. But the fact that an extra-terrestrial has not yet even been interviewed on a talk show, much less been given an IQ test, does not stand in the way of obtaining responses to an opinion survey on the subject.

Similarly, the public's belief that litigation is too frequent, justice too infrequent, awards too large, and so on, is not the same as learning something about the justice system. Here, then, is our first major

6. Shari Seidman Diamond, *Legal Applications of Survey Research: The Legal Relevance of Survey Research*, § 5-1.0, *in* 1 MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY (David L. Faigman et al. eds., 1997).

7. I do not mean to imply that Hans took these expressions of opinion at face value. Indeed, she took some pains to try to put the responses in context so that readers could understand their (more limited) meaning. Hans's ultimate conclusion was that the public supported the institution of the civil jury, while finding fault with the ability of jurors to make certain decisions, especially the awarding of damages. Hans, *supra* note 3, at 261.

8. *See infra* notes 61-67 and accompanying text.

9. More precisely, the question about intelligence was put to the 60% of respondents who believed that extra-terrestrials exist. But no doubt most of those who did not believe extra-terrestrials existed still would have been willing to opine on ET's intellectual prowess. The survey was conducted by the Marist Institute for Public Opinion at Marist College, Poughkeepsie, N.Y., and was released in December, 1997. These survey findings were reported widely in the press. *See, e.g.*, Robert Cooke, *Life Out There? Majority Think So*, NEWSDAY, Dec. 16, 1997, at A35.

10. *Id.*

problem: Public beliefs reflected in poll results are sometimes mistaken as being evidence bearing on the reality of the phenomenon at issue, rather than being merely statements of belief by people who may have no idea what they are talking about. If nothing else, we should not mistake one kind of information for the other.[11] A unanimous public, certain that juries award "too much," adds nothing to our knowledge of whether or not juries award too much.

Indeed, I am tempted to go further: Such opinion survey findings tell us only what members of the public *think* they think about some issue. Were they asked how confident they are about their answers to these questions, or asked to consider the foundation on which their answers are based, respondents might readily concede that their opinions about the stupidity of juries and courts are built on a base not much sturdier than the one that supports their beliefs about the brilliance of extra-terrestrials. I suspect that in the face of real information about extra-terrestrials or the civil justice system, respondents would cheerfully revise their views.

This is not to say that citizens are virtuosos when they are jurors, but fools when they are survey respondents. It suggests only that people do the best they can to answer the questions put to them, in reliance on their available knowledge. As survey respondents, what do they know about the IQs of extra-terrestrials or data on the performance of civil juries? Not much. As jurors, what do they know about the facts of the case presented to them? Quite a lot. The point is simply that jurors are in a better position to decide on the questions of liability or damages of the case before them (having heard the evidence, arguments, applicable law) than people who are considerably removed from the trial. It would be remarkable indeed if those who know far less or nothing at all about a body of thousands of cases were more likely to reach a sensible judgment about the individual cases and the aggregation of cases, and consequently about the institution of the civil jury.

In the sections that follow, I try to reflect on the value and meaning of survey findings on opinions about the civil jury. I will not set out in the text the findings of these surveys on which I will comment. Rather, I refer the reader to other summaries of them,[12] or to the selected findings which appear in the Appendix accompanying this article.

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11. If you doubt that commentators on the justice system actually make this mistake, see Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1163 & nn.38-40 (1992).

12. *See* Greene et al., *supra* note 3; Hans, *supra* note 3.

THE PARADOX OF THE PUBLIC'S OPINIONS ON JURIES

The one finding already mentioned above—that by a ratio of about 3:1 respondents thought juries made awards that were "excessive"[13]—suggests an interesting paradox. Citizens, in the role of respondents, judge that a more or less equivalent group of citizens, in the role of jurors, routinely make awards that are higher than the respondents think is correct.[14] By damning their fellow citizens, the respondents are in effect damning themselves, because citizens serving as survey respondents are no different from their fellow citizens serving as jurors.[15]

For the moment, put aside the fact that the respondents have no idea what amounts of damages are awarded in response to the evidence of injury and loss in the great run of cases, or perhaps, in any cases at all. Why would the respondents not assume that two similar groups of citizens (themselves and the jurors) would behave the same? Or why not assume that if we were in their place, we would see things pretty much as they see them? One essential idea of the jury, after all, is that they are representative of the rest of us. Would a group of judges selected at random assert that they give generally longer (or shorter) sentences than the larger population of colleagues from whom they were drawn? Or a randomly selected group of teachers that they give generally lower (or higher) grades than the larger population of their colleagues? Is this not a bit like assuming that two groups drawn at random will be different? Or that a few spoonfuls of the soup taste different from the rest of the soup in the bowl?

A more refined possibility is that survey respondents assume that juries are not selected in a representative way, and that the people who wind up on juries tend to be the less able members of the community. First, it is doubtful that the public at large has much idea about who serves on juries. Second, as the one-day-one-trial system

13. Hans, *supra* note 3, at 257.

14. Perhaps I should say: would think is correct—if they knew what the awards were.

15. If the difference is that citizens as jurors in court are subject to the manipulations of lawyers, we should not overlook that citizens as survey respondents are vulnerable to other manipulations. Indeed, the latter manipulations may be more powerful and more pervasive. See the discussion of persuasion techniques available to trial lawyers versus to others in society, in Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 20-30 (1997). Moreover, the manipulations of lawyers in court are amenable to prompt and vigilant correction by the opposing side, or structurally through changing rules of evidence and procedure. For example, one of the most potent techniques for influencing damages is simply to suggest to jurors what a party thinks an injury is worth. Assertion of an *ad damnum* amount can simply be prohibited, as some states have. *See* 14 A.L.R. 3D 541, 558 (1998); 22 AM. JUR. 2D *Damages* § 860 (1988).

of jury selection[16] spreads across the country, any discrepancy between the eligible community and those serving as jurors diminishes. If this is the source of the survey responses, the responses grow increasingly obsolete as the one-day-one-trial system advances.

One likely possibility, of course, is that there is a systematic bias, such that we assume that we do better than others, especially when the question is put to us as individuals, and the awards we are asked to evaluate were made by a group of people. In fact, there are numerous areas of belief and opinion where this kind of systematic bias has been observed. Most businesspeople have been found to view themselves as more ethical[17] and more competent[18] than the average businessperson. Most employees regard their own job performance as superior to that of their average co-worker.[19] Most drivers, including those who have been in serious accidents, consider themselves to be safer and more skilled than the average driver.[20] Most people think they are more intelligent,[21] healthier,[22] less prejudiced,[23] and observe all of the Ten Commandments[24] more than the majority of people in their communities. In short, most of us do assume that we are above average. If the same phenomenon is at work in these opinion surveys about juries, we should discount the results as systematically overstating the public's disapproval of jury decisions, and instead recognize them as merely another example of the well documented "self-serving bias" in public opinion.

An alternative interpretation of these survey responses is that they do not reflect self-condemnation or mere above-averageness, so much as they reflect *chutzpa*. To make such judgments about the decisions

16. A jurisdiction using a "one-day-one-trial" jury system requires citizens called for jury service to serve only for a single day or, if chosen to sit on a jury, for a single trial. JURY TRIAL INNOVATIONS § II-2 (Thomas Munsterman et al. eds., 1997).

17. RAYMOND BAUMHART, S.J., AN HONEST PROFIT 4-5 (1968); Steven N. Brenner & Earl A. Molander, *Is the Ethics of Business Changing?*, HARV. BUS. REV., Jan.-Feb. 1977, at 57, 64.

18. MORRIS ROSENBERG, CONCEIVING THE SELF 274-75 (1986).

19. Bruce Headey & Alex Wearing, *The Sense of Relative Superiority—Central to Well-Being*, 20 SOC. INDICATORS RES. 497, 497 (1988).

20. Bernard Guerin, *What Do People Think About the Risks of Driving? Implications for Traffic Safety Interventions*, 24 J. APPLIED SOC. PSYCHOL. 994, 1017-18 (1994); Ola Svenson, *Are We All Less Risky and More Skillful Than Our Fellow Drivers?*, 47 ACTA PSYCHOLOGICA 143, 143 (1981).

21. Laurie Larwood, *Swine Flu: A Field Study of Self-Serving Biases*, 8 J. APP. SOC. PSYCHOL. 283 (1978).

22. Ruth C. Wylie, 2 THE SELF-CONCEPT: THEORY AND RESEARCH ON SELECTED TOPICS 675-76 (1979).

23. David M. Messick et al., *Why We Are Fairer Than Others*, 21 J. EXPTL. SOC. PSYCHOL. 480, 497-99 (1985).

24. Roger Rosenblatt, *The 11th Commandment*, FAM. CIRCLE, Dec. 21, 1993, at 30, 30.

of our fellow citizens requires us, as respondents, to think that we—with no evidence about the particulars of the case and without benefit of the applicable legal instructions—can nevertheless make the judgement that our fellow citizens (who, as jurors, do have the benefit of that particularized information) generally get it wrong. Implicit in this judgment, of course, is the assumption that we would make the award lower and get it right, while they made it higher and got it wrong.

One of the most likely explanations for this paradox is the publicity given to assertions that the civil justice system is "spinning out of control," giving exorbitant awards, and so on.[25] The average citizen hearing this is faced with a dilemma. If the charges laid against juries are correct, then they implicate all citizens who are represented on juries. There are only two escapes from being guilty of such mis- or malfeasance. Either there must be credible counter-evidence and counter-arguments to the charges—but the mass media carry little or none of these.[26] Or we ourselves must join in the condemnation of those perverse jurors—even if the line between them and us is invisible.

If the preceding paragraph does contain the explanation for these paradoxical survey results, then it is quite a tribute to those who have waged the campaign against the civil jury, because the challenge has been nothing less than to convince members of the public that they themselves are incompetent and irrational. It would appear that the effort has succeeded.[27]

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25. The various charges made against juries are reviewed in STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM (1995); NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY (1995); Saks, *supra* note 11. The phrase "spinning out of control" was one of former Vice President Dan Quayle's favorite ways of describing the civil justice system. *See, e.g.*, Henry J. Reske, *Presidential Policies and the Law*, A.B.A. J., Nov. 1992, at 66, 70 (1992) (quoting Dan Quayle).

26. Interest groups assert these charges and supportive anecdotes or data with abandon. The media repeat them credulously. Rejoinders showing that many of the anecdotes and much of the data are distortions or falsehoods are deemed not newsworthy. And the interest groups continue offering the uncorrected "evidence." For a discussion of such anecdotes, see Saks, *supra* note 11, at 1159-62. Also see the American Tort Reform Association's web site, <http://aaabiz.com/atra/ath.htm>, which as of this writing continues to have a section devoted to casually gathered anecdotes, called *Horror Stories: Stories That Show A Legal System That's Out of Control.* One advocate repeatedly presented misleading data, but the data were camouflaged on repetition, so that the data became harder to unmask. *See* Saks, *supra* note 11, at 1164-66 & nn.42-46.

27. Polls dating from before the mid-1980s also reflected a belief that jurors were not very good at deciding damages. *See infra* Appendix, Gallup 1982. So this is not a recent phenomenon.

ATTITUDES WITHOUT INFORMATION

Much like answering questions about the intellectual capabilities of little green aliens from space, when survey respondents are called upon to answer survey questions about juries, courts, or the law of torts or damages, they know little about those topics. Were we to ask respondents to provide some harder estimates of the behavior of the tort litigation system, including the behavior of juries, we would be likely to find them as ill-informed as my own law students, who, during the first week of class, filled out questionnaires showing that they:

- overestimate by a factor of more than eleven the amount of money that is returned through the tort system to victims of non-fatal injuries;[28]
- overestimate by a factor of ten the proportion of medical malpractice injuries that result in filed claims;[29] and
- think that only fifteen people die from medical accidents for every 100 who actually do.[30]

The fact that opinions about the justice system do not depend heavily on knowledge about the justice system has been amply demonstrated in various contexts. Yankelovich, Skelly & White, Inc.[31] compared the views of members of the public in states that had undergone extensive court reform and those that had not, and found no differences.[32] Word spreads slowly about whether reform has even occurred, and the details of such reforms spread more slowly, if at all. For example, nearly a decade after parole was abolished in the federal system, my incoming law students remained largely oblivious to such a dramatic change.[33]

One study found that even during a period of high (one might say frenzied) interest in tort reform, not only average citizens, but even those who were deeply concerned about the debated reforms—legislators, attorneys, and physicians—were in considerable error about ba-

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28. Their median estimate was $80 billion. The actual figure is around $7 billion. DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 31 (1991). The total loss to be compensated is $176 billion. *Id.* at 52.

29. Their median estimate was that claims are filed for about 50% of malpractice injuries, while the actual proportion is closer to 5%. PAUL WEILER ET AL., A MEASURE OF MALPRACTICE 62 (1993).

30. Their estimate was 22,000 deaths. The best available data put the figure at around 150,000 deaths. *Id.* at 55.

31. Yankelovich, Skelly & White, Inc., *Highlights of a National Survey of the General Public, Judges, Lawyers, and Community Leaders*, *in* STATE COURTS: A BLUEPRINT FOR THE FUTURE 5 (Theodore J. Fetter ed., 1978).

32. *Id.* at 9.

33. In 1994, 78% of my class of first year law students thought that parole still existed in the federal corrections system.

sic empirical facts regarding the functioning of their own state's tort system (grossly over-estimating the incidence of litigation and the size of awards).[34] The good news, perhaps, is that those who truly needed to know, namely, members of the legislature's judiciary committees, did have the most accurate information.[35]

If the public's knowledge were as far off the mark as these data suggest, how much confidence should be placed in their opinions that rest on such knowledge? Put differently, if the public had accurate information—instead of no information, vague impressions, or clearly erroneous information—how might their beliefs and opinions about the jury change?

Survey results suggest that the public feels that, in general, judges have more knowledge and are better qualified to apply the law,[36] particularly when it comes to applying the law in cases requiring the weighing of difficult issues.[37] The public is especially dubious about the ability of average citizens—as compared to judges—to assess the proper amount of damages,[38] perhaps especially non-economic damages. No doubt the task is a difficult one. Jurors hunger for more guidance than the law gives them.[39] Survey respondents think jurors would benefit from more guidance from judges.[40] But respondents must be assuming that there is more guidance to be given (and in believing that, reveal further ignorance about the law's goals and methods).

What might happen if respondents learned that the reason lay jurors were asked to determine the amount to be awarded for general damages was that the law recognizes the absence of markets for such losses; that consequently there was an absence of any "objective" guidance on the value to be placed on such losses; and that the best substitute for the values that would be provided by such a market that

34. Donald R. Songer, *Tort Reform in South Carolina: The Effect of Empirical Research on Elite Perceptions Concerning Jury Verdicts*, 39 S.C. L. REV. 585, 586-89, 603 (1988).

35. One can still worry about whether a political decision-maker can stand up to pressure applied by the mass of the misinformed, armed only with accurate knowledge. Or stand up to those who know better, but who also know that it is in their own interest to continue to insist that the sky is falling. *See* Special Issue, *A Dialogue on Tort Litigation in the States: The Williamsburg Report*, 18 ST. CT. J. (1994) (summarizing the proceedings of a conference at which corporate executives declared that data about the legal system were not relevant to the asserted problems of the tort system, but that anecdotes were).

36. *See infra* Appendix, Zuger 1983.

37. Joe C. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 733-44 (1991).

38. *See infra* Appendix, Harris 1986; *infra* Appendix, Public Pulse 1991.

39. Roselle L. Wissler et al., *Instructing Jurors on General Damages in Personal Injury Cases: Problems and Possibilities*, PSYCHOL. PUB. POL'Y & L. (forthcoming 1999).

40. *See infra* Appendix, Harris 1987.

anyone could think of was the community's estimate of the value of such losses?[41] A sample of the community—the jury—is in a better position than any other decision-maker to say what these losses were worth. I suspect that if survey respondents were better appraised of the nature of the problem, they would have a more sober assessment of the law's solutions, and would be less Pollyannaish about the possibility that a judge could provide a better answer than the jury.

PUBLIC BELIEFS VERSUS ACTUAL DATA ON THE TORT SYSTEM

Are the beliefs commonly expressed by the public in national polls accurate? If the beliefs underlying the attitudes are not accurate, should that not affect our view of the resulting attitudes? How well are the most widespread beliefs about the civil justice system supported by empirical data about the system? Even a fleeting acquaintance with the relevant literature[42] suggests that a wide gap separates the public's stereotypical beliefs about its civil justice system and its own role as jurors in that system, from the empirical facts about the system.[43]

Litigiousness:

Myth: There are too many frivolous suits; Americans sue at the slightest provocation.[44]

Data: Every study that has examined the question has concluded that, except for automobile accidents, only a small percentage of those who could properly bring a claim for an actionable injury in fact do so.[45]

Pro-Plaintiff Bias:

Myth: Jurors are biased in favor of plaintiffs, out of sympathy toward victims of injury, while judges are much less prone to finding liability.[46]

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41. *See* George L. Priest, *Justifying the Civil Jury*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 103, 109 (Robert E. Litan ed., 1993); *see also* Ted R. Miller, *Willingness to Pay Comes of Age: Will the System Survive?*, 83 NW. U. L. REV. 876, 877-79 (1989) (concerning the non-market problem); W. Kip Viscusi, *Pain and Suffering in Product Liability Cases: Systematic Compensation or Capricious Awards?*, 8 INT'L REV. L. & ECON. 203, 203-04 (1988) (same).

42. Much of that literature is reviewed in DANIELS & MARTIN, *supra* note 25; VIDMAR, *supra* note 25; Saks, *supra* note 11.

43. Indeed, the loudly asserted claims of tort reformers, and the resulting widely held beliefs of the public, have been the fuel propelling the dispute processing research industry within the law and social science world.

44. *See infra* Appendix, Hans 1991.

45. *See* Saks, *supra* note 11, at 1183-86 (reviewing these studies).

46. *See infra* Appendix, Zuger 1983.

Data: The most prominent study of jurors and judges found that on the question of liability in personal injury cases, judges and jurors agreed on liability in 79% of cases, with neither being more favorable to plaintiffs or defendants in the cases on which they disagreed.[47] More recent research on federal civil trials suggests that in most types of cases there is no difference between judge and jury findings, though in the most publicized cases, namely medical malpractice and product liability, judges appear to be more favorable to plaintiffs than juries are.[48]

Excessive Compensatory Awards:

Myth: Jurors give awards that are too large, and certainly larger than the awards given by judges or other experts.[49]

Data: More than a generation ago, Harry Kalven & Hans Zeisel found that although judges and jurors made decisions that were indistinguishable on liability, jurors made awards that were about 20% higher than those made by judges.[50] More recent research has found that jury awards undercompensate plaintiffs' actual economic losses by a considerable margin;[51] that in the most controversial categories of cases, plaintiffs will do better in front of judges than jurors;[52] that professional compensation boards make awards that are considerably higher than those made by the juries they were invented to replace;[53] and that jurors and arbitrators make remarkably similar awards.[54]

Punitive Damages:

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47. Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1063-68 (1964).

48. Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1126 (1992).

49. *See infra* Appendix, Metricus 1991; *infra* Appendix, PUBLIC PULSE 1991; *infra* Appendix, Harris 1987.

50. Kalven, *supra* note 47, at 1065.

51. *E.g.*, ALFRED F. CONARD ET AL., AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATION 248-52 (1964); JAMES K. HAMMIT, AUTOMOBILE ACCIDENT COMPENSATION: PAYMENTS BY AUTO INSURERS 45-46 (1985); JAMES S. KAKALIK ET AL., COSTS AND COMPENSATION PAID IN AVIATION ACCIDENT LITIGATION 86-95 (1988).

52. Clermont & Eisenberg, *supra* note 48, at 1126.

53. Eleanor D. Kinney & William P. Gronfein, *Indiana's Malpractice System: No-Fault by Accident?*, LAW & CONTEMP. PROBS., Winter-Spring 1991, at 169, 190-91.

54. The jurors' awards, however, tend to be smaller. *See* Michael Brady & Peter Cubanske, *The Judicial Arbitration System: Its Promise and Its Shortcomings*, FOR THE DEFENSE, Aug. 1993, at 29, 30; Neil Vidmar & J.J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 IOWA L. REV. 883, 884 (1993).

Myth: Juries award punitive damages routinely and in amounts that are far too high.[55]

Data: Every empirical study of the question has failed to find any dramatic increase (or even much increase) in the frequency with which juries impose punitive awards, and the amounts awarded do not appear to have grown out of proportion to the harm done and seem to be an amount reasonably calculated to punish the particular wrongdoer.[56]

In light of large divergence between public belief on these matters and the best available data, what should one make of the resulting public opinion?

SOURCES OF THE PUBLIC'S KNOWLEDGE

Where do members of the public gain their understanding of the institutions they are asked by public opinion surveys to judge? We cannot justifiably expect members of the public to go out and conduct their own systematic empirical studies to help them form their views. We cannot even expect them to read the research literature. We can, however, justifiably expect members of the public to offer opinions of their institutions based on their personal experiences. But it turns out that few respondents report that personal experience with jury service is the source of their beliefs and opinions—only 6% said so in one national poll;[57] in another, only 23% of respondents had served as jurors.[58] If we could disaggregate the data and compare what those who served as jurors had to say compared to those who had not served, we are likely to discover that the former have quite different and far more positive views of the justice system they served in, the role they played, and the quality of the work they did when they were jurors.[59] For example, 81% of former jurors say that if they were in-

55. *See infra* Appendix, Yankelovich March 1995; *infra* Appendix, Public Pulse 1991; *see also* Vice President Danforth Quayle, *Agenda for Civil Justice Reform in America, Address Before the American Bar Association (Aug. 13, 1991)*, 60 U. CIN. L. REV. 979, 984 (1992) ("Today . . . plaintiffs in civil lawsuits routinely ask juries to award . . . punitive damages. And juries are responding with enthusiasm.").

56. *See* DANIELS & MARTIN, *supra* note 25, at 237-38; MARK A. PETERSON ET AL., PUNITIVE DAMAGES: EMPIRICAL FINDINGS 12, 17 (1987); William M. Landes & Richard A. Posner, *New Light on Punitive Damages*, REGULATION, Sept.-Oct. 1986, at 33, 36; Michael Rustad, Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Verdicts (Papers of the Roscoe Pound Found. 1991).

57. Yankelovich, Skelly & White, Inc., *supra* note 31, at 9, 19 tbl.I.14.

58. *See infra* Appendix, Yankelovich January 1995.

59. *See* Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra* note 41, at 287.

volved in litigation, they would be confident in submitting their own cases to a jury.[60]

The single most important source of knowledge about the civil justice system, survey respondents say, is the news media, which surely is not unexpected.[61] If the news media are the source of such knowledge, and the basis of opinions, we can justifiably expect them to provide accurate information to the public about the performance of the public's institutions. How well do the media do? The news on the news is not comforting. Daniel Bailis and Robert MacCoun's content analysis of several major publications reveals that their choice of stories to report systematically distorts the impression created of the types of cases that are litigated and the outcomes of the cases, especially the amounts awarded.[62] Surely this, too, is not unexpected. Who wants to write about one more fender-bender settled for a few thousand dollars? But how is the public going to acquire a more complete and representative picture of the workings of the legal process, and learn enough so they would not be surprised to learn that 80% of automobile accident cases were resolved for damages involving less than $15,000? How is the public to learn the larger reality, and not only about the highly filtered, shocking, and amazing cases that are the preferred reportage?[63]

A year ago I put this question to experienced journalists enrolled in a graduate journalism course I was invited to address. I presented the findings of Bailis and MacCoun's content analysis, and juxtaposed them against the best available data describing the actual workings of the litigation system. I asked if there were not a way to inform the public of the overall typical, tamer, actual picture, in addition to the shocking and outrageous. They nearly unanimously responded by saying that the individual stories were the news, and the "trend" article I was implicitly advocating was: (a) not news; (b) not of interest to many readers; and (c) therefore not worth publishing.

I also submitted to several publishers a prospectus of a book that Neil Vidmar and I plan to write. The contemplated book would synthesize all of the best, most complete, and accurate empirical research

60. *Id.* at 286 (citing Joyce E. Tsongas et al., The Ninth Circuit Courts: A View from the Jury Box (1986) (unpublished manuscript)).

61. Yankelovich, Skelly & White, *supra* note 31, at 19 tbl.I.13.

62. Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks With the Media as Your Guide*, 80 JUDICATURE 64, 64-67 (1996).

63. For an analysis and interpretation of the organized campaigns to make the civil justice system more favorable to defendants, 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 269.

on the behavior of the tort litigation system. I approached several publishers who had published misleading polemical works whose aim it was to convince the public that the civil justice system is a major disaster.[64] If they published in this area, I reasoned, they might want another book on the subject, albeit with a contrasting conclusion. One editor wrote back, explaining their lack of interest: The kind of book you propose is what we call "the Bermuda Triangle explained," and we do not publish those. That is, while readers will buy books telling them the sky is falling, they do not buy as many books that calmly explain the data and show that nothing so catastrophic is really going on after all. I wrote back and acknowledged that they were in the business of selling books, rather than providing truth to the public. But, I asked, if the preferences he described to me were invariably followed, how was the public ever going to acquire the knowledge it needs in order to live in the real world and have an informed understanding of their institutions? He responded with a compromise. They might publish our book, but only if we put a spin on it to condemn the justice system for the opposite disaster—that is, that it fails to meet the needs of litigants by being inaccessible and under-vigilant, and that it under-deters, and under-compensates.[65]

Beyond unrepresentative reporting and a sky-is-falling book publishing ethic, there are the systematic public relations efforts of lobbyists waging war on the existing civil justice system. Press conferences, advertising campaigns, organizations formed to "reform" the civil justice system, and so on, have been created and paid for by those interests that feel they can raise their profits by effecting certain changes in the civil justice system.[66] The problem is not so much that we should, or can, expect these interest groups to neutrally inform rather than to strongly advocate on behalf of themselves and their clients.[67] They

64. *See* PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988); WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991).

65. All of that is much closer to the truth.

66. For example, consider the millions of dollars spent promoting the agenda of tort reform, advanced by ATRA, the Manhattan Institute, and various other such organizations. *See* DANIELS & MARTIN, *supra* note 25, at 24-26 and sources cited therein.

67. For example, on being asked to respond to a review of relevant empirical data on the existence of a litigation explosion, which found little evidence of one,

> Martin F. Connor, president of the Washington, D.C.-based American Tort Reform Association, agrees that data is difficult to obtain, especially at the state court level. However, he has little use for reports such as this. "There's always somebody writing an article like this," he says. "I think all of this is just show biz." He says that there is no relationship between the tort reform movement and the perception or reality of a litigation explosion. "We're concerned with the efficiency and fairness of the American justice system," he says. "We don't sit here counting lawsuits."

have a right to lobby and persuade and, perhaps, even to mislead, in order to reduce their expenditures and thereby increase their profits. The problem is that no effective countervailing information source exists to present the actual data, or even equal and opposite prevarication.

Ironically, when the media take a breather from regaling the public with stories of the litigation system "spinning out of control," "individuals suing everyone in sight whenever the slightest thing goes wrong," they report the "tragedy of medical errors," the "outrage of growing neglect" of patient needs driven by managed health care or of harmful products—and then rail against the legal system for failing to act to keep those latter problems in check.

The effects of the disconnect between public beliefs and legal system reality are perhaps most clearly illustrated by studies of criminal sentencing. When a sample of citizens is asked if they think the sentences meted out by judges are too harsh, too lenient, or about right, a large percentage of respondents say "too lenient."[68] By contrast, when asked what sentence they feel is the "appropriate sentence" for a given type of offense and offender, on average they specify a sentence that is less than that which judges already give. How can the public regard judges as too lenient if the judges impose sentences that are *longer* than the sentences that the respondents think are proper? This paradoxical state of opinions results from abstract and superficial opinions unconnected from concrete details. Its consequence is that sentences can spiral ever upward, as legislatures and judges continually ratchet up penalties in response to public opinion seeming to show public dissatisfaction with the leniency of sentences. But no amount of increase in sentences will be enough,

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Ken Myers, *Professor's Study of Tort System Finds No "Litigation Explosion,"* NAT'L L.J., Sept. 7, 1992, at 4, 4.

68. *See* ANTHONY N. DOOB & JULIAN V. ROBERTS, AN ANALYSIS OF THE PUBLIC'S VIEW OF SENTENCING 10-11 (1983); Anthony N. Doob & Julian V. Roberts, *Public Punitiveness and Public Knowledge of the Facts: Some Canadian Surveys*, *in* PUBLIC ATTITUDES TO SENTENCING: SURVEYS FROM FIVE COUNTRIES 111, 111-13 (Nigel Walker & Mike Hough eds., 1988); Julian V. Roberts & Anthony N. Doob, *News Media Influences on Public Views of Sentencing*, 14 LAW & HUM. BEHAV. 451, 460 (1990) [hereinafter Roberts & Doob, *News Media Influences*]; Loretta J. Stalans & Shari Seidman Diamond, *Formation and Change in Lay Evaluations of Criminal Sentencing: Misperception and Discontent*, 14 LAW & HUM. BEHAV. 199, 199-202 (1990). For example, 67% of those surveyed in an Illinois study believed that persons convicted of residential burglary received sentences that were too lenient. *Id.* at 206. When asked what their own sentence for residential burglary would be, however, only 11% or 26% (depending upon the form of the question) suggested a sentence that exceeded the minimum that convicted burglars actually spent in prison in Illinois. *Id.*

because the public's platitude that "judges are too soft" is unconnected to actual sentencing behavior.

COMPARED TO WHAT?

Good researchers, including survey researchers, know that meaningful answers rarely come from measuring absolute levels of any variable but usually come only from comparisons. Thus, it is not enough to know what the public thinks of juries. To understand what those opinions really mean, we need to compare them to other opinions, such as what the public thinks of comparable institutions. If the public holds executive and legislative branches of government, and judges, the press, corporate management, and managed health care in equal or lower regard than the jury, then we know, in a comparative sense, what the public's estimation of the jury is.

Alternatively, instead of comparing attitudes toward different institutions, perhaps we should compare what citizens think of their own skills in the role of jurors to what they think of their own skills in other significant life tasks, such as making decisions on child-rearing, health care, and financial planning.

The conclusions and actions that seem to be urged upon us based on public opinion about juries should be tempered by findings about the public's opinions in other areas. Are we urged to severely restrict or abolish judges and legislatures, corporations, and managed health care? Or substitute experts for family members as the ones who can best make child-rearing, health care and financial decisions?

Another source of comparison is what other "publics" think of juries. Perhaps most notably, Hans reports that "[a]ll the surveys of judges' attitudes toward the civil jury show virtually unanimous support for the institution."[69] Why do judges think so much more highly of juries than the public at large does? Perhaps it results from judges having the advantage of comparing their own judgments about a case with the verdict returned by the jury. When they find the juries' verdicts usually are the same as, or not unreasonably different from, their own, they find validation not only in their own thinking about the cases, but in the jury as well. We might wonder what the public would think of the jury if it could observe them as judges have the opportunity to observe them.

Or, in contrast to public opinion, perhaps we should compare the *performance* of juries to other legal decision-makers. One comparison is provided by Kalven and Zeisel's *American Jury* research, showing a

69. Hans, *supra* note 3, at 262.

considerable degree of similarity between the conclusions of juries and those of judges.[70] More recent surveys of judges find that judges continue to regard jury decisions as highly similar to their own in the large majority of cases.[71] Recent research on the precise question of deciding pain and suffering awards finds striking similarities between the decision processes of jury-eligible citizens, judges, and lawyers in their perceptions of injuries and their efforts to translate these perceptions into dollar awards.[72] We might wonder what the public would think of the jury if it were informed of such empirical findings that indicate a considerable degree of equivalence between these differing factfinders.

STRENGTHS AND WEAKNESSES OF OPINION AND BELIEF SURVEYS

Self-report surveys have important strengths and amusing weaknesses. They can provide estimates of an infinite variety of behavior far more easily and cheaply than can be obtained by trying to directly observe the behavior of interest.[73] They can provide as direct a measure as any imaginable for some questions, such as who consumers perceive the maker of a product to be (for the purposes of trademark litigation).[74] Note, particularly in the last example, that what the respondents typically are asked to do is examine some object and state their perception of and inferences about it right then and there.[75]

But survey respondents also give systematically misleading answers in a variety of contexts.[76] Answers can be shaped by the form and content of the questions used to elicit the answers. Questions that resemble bumper sticker slogans and fail to probe for reasons or test the knowledge base can elicit responses that hide more than they uncover. Memories become distorted. Socially desirable, rather than

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70. HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY 55-65 (1966); Kalven, *supra* note 47, at 1064.

71. *See* Ellen L. Rosen, *The View from the Bench: A National Law Journal Poll*, NAT'L L.J., Aug. 10, 1987, at S1.

72. These findings are from a study conducted by Roselle L. Wissler, Allen J. Hart, and myself, under a grant from the National Science Foundation, about which we are in the process of writing an article.

73. For example: How many walks do people take in a year? You can ask a sample for an estimate or you can have researchers follow people around for the year.

74. *See* BEVERLY W. PATTISHALL & DAVID C. HILLARD, TRADEMARKS (1987).

75. This should strike the reader as resembling the present sense impression exception to the hearsay rule, suggesting that it is the sort of situation where self-report survey research is considered to be particularly good hearsay. FED. R. EVID. 801(1).

76. See discussions of these problems in EARL BABBIE, SURVEY RESEARCH METHODS (1973); FLOYD FOWLER, SURVEY RESEARCH METHODS (2d ed. 1993); HANDBOOK OF SURVEY RESEARCH (Peter H. Rossi et al. eds., 1983); SEYMOUR SUDMAN & NORMAN BRADBURN, RESPONSE EFFECTS IN SURVEYS (1974); Diamond, *supra* note 6, § 5-4.0.

true, answers are offered. And survey respondents are notoriously poor at prognosticating about their own behavior, as many disappointed marketing researchers have discovered. Respondents also are willing to offer opinions about that which they know little or nothing. Giving opinions comes remarkably easy to all of us, especially when the stakes and consequences at least *appear* to be zero. I have little doubt, however, that if an identical sample was formed into a legislative committee with the responsibility to convert their opinions into policy actions, they would proceed more cautiously. They would try to inform their opinions before arriving at them and before acting on them.

Where, in this spectrum of situations from the least to the most valid surveys, do opinions about legal institutions, such as the jury, fit in? The question practically answers itself. If this paper is a critique of anything, it is a critique of loosey-goosey, quick-and-dirty surveys that reveal only the most superficial and poorly considered impressions of respondents, and then are offered to the public as though they were meaningful statements about what that public thinks about its own institutions, or worse, meaningful statements about the institutions themselves.

Imagine that survey questions such as the following were given to a representative sample of the public, instead of the questions provided in the Appendix.

1. Who do you think would be a better factfinder in a complicated case between two high technology corporations: A judge who took as little math, science, and business as possible and still managed to graduate from college, or a dozen citizens of varied backgrounds (perhaps an electrician, an accountant, a math teacher, an engineer, an assembly-line worker, etc.)?

2. What amount of money should be paid to the innocent victims of others people's negligence: An amount calculated to compensate each individual's losses? Or an arbitrary amount set in advance by the legislature?

3. Granted that it is not really possible to put a dollar value on the ability to see or walk or have a baby, who do you think is in the best position to guesstimate the worth of such losses: A judge? A poet? A doctor? A bureaucrat? The collective judgment of the entire community? The collective judgment of a sample representing that community?

4. What amount of money would you want from someone in exchange for granting him or her permission to put out your eyes, cripple you, or burn your face unrecognizably?

5. When a person or company knows it is doing something dangerous that has a high potential to hurt people, but it goes ahead and does it anyway and causes serious physical harm to people, what should be the law's response to that injurer? Should the law have a set fine unrelated to the extent of wrongdoing? Or should the punishment fit the crime?

I do not argue that these are the most probing or the most fair questions one could ask citizens about the tort system, though I think they are no worse, and perhaps are better than many that are asked. But even if they are no better than the usual sorts of questions asked, that fact in itself demonstrates that the existing questions are not likely to produce much real knowledge and may be pre-ordained to lead to responses that damn the tort system and the jury's role in that system.

ACTOR-OBSERVER ATTRIBUTIONS

When people who served as jurors are asked why they decided a matter as they did, they tend to explain their decisions in terms of the characteristics of the evidence and arguments placed before them.[77] When we ask observers of juries—or of judges—why those decision-makers decided a matter as they did, the observers tend to explain the decisions in terms of the characteristics of the decision-makers.[78] Actors make external attributions (that is, to the situational surround); observers make internal attributions (that is, to the attributes supposed to inhere in the decision-maker).[79] The more remote the observer, the more superficial the view, the more internal the explanatory attributions.[80]

One relevant demonstration of this phenomenon is found in some of Anthony Doob and Julian Roberts' other research about public opinions of judges' sentencing.[81] On being shown a brief news clipping about a judge's sentence in a case and asked to evaluate the pro-

77. The reader is invited to ask anyone who has served on a jury to explain why he or she personally chose the verdict. The answer will focus on the evidence and the law presented at the trial, not the juror's attitudes, personalities, demographics, etc.

78. Examples are provided in Neil Vidmar, *The Unfair Criticism of Medical Malpractice Juries*, 76 JUDICATURE 118 (1992).

79. Edward E. Jones & Richard E. Nisbett, *The Actor and the Observer: Divergent Perceptions of the Causes of Behavior*, *in* ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR (E.E. Jones et al. eds., 1972).

80. This is not to say that survey respondents do not recognize the absence of basic tools of factfinding when asked about them. In one survey, 79% of respondents endorsed a reform allowing jurors to ask questions of witnesses, and 90% favored allowing jurors to take notes. *See infra* Appendix, Yankelovich January 1995. Nevertheless, respondents do not think of situational factors when asked in the abstract what they think of the performance of juries; rather, they think of jurors.

81. Roberts & Doob, *News Media Influences*, *supra* note 68, at 451, 460.

priety of the sentence, most respondents regarded the sentence as being far too lenient. On being shown progressively more complete descriptions of the facts of the case and the offender, culminating in a statement that reflected all of what was in the pre-sentence report on which the actual trial judge based the sentence, more and more respondents evaluated the sentence to be more and more appropriate. In other words, the closer the respondents came to knowing what the judge knew, the more they agreed with the judge's sentence.

Thus, as the knowledge of opinion poll respondents approximates that of the juries concerning the cases those juries decided, presumably the greater would be the degree to which the respondents would agree with the decisions made by the juries in those particular cases—though, paradoxically, the respondents still would make a very different judgment about cases in the aggregate.

THE LIGHTNING ROD THEORY OF JURIES

The intense focus on juries is in itself somewhat peculiar. After all, in civil cases, jury verdicts are, as a practical matter, little more than advisory opinions. A jury's verdict in a civil case, regardless of its direction, can be set aside; the award can be increased or decreased by the trial judge or by a court of appeals; and the award is subject to continuing negotiation by the parties as they await the trial court's, and then the appellate court's, response to post-trial motions and appeals. It follows, then, that if the civil justice system has problems, juries are the least of them, because obviously erroneous decisions made by juries can easily be set right by judges.

Perhaps public opinion about the jury is an indication that the lightning rod theory is working. That theory is that the jury exists in part to draw public ire to itself and away from judges. Judges are permanent fixtures of courts. If a judge makes an unpopular decision, public hostility to him or her, and to the judiciary as a whole, can linger and grow, eventually damaging the judicial process itself. But juries are temporary and fluid. They make their decisions and fade back into society. And jurors are the citizens themselves. What better sign of the success of this jury function than finding that the public is so unhappy with juries and has so much confidence in judges that it wishes that fewer decisions were made by juries and more by judges?

Jurors are thought to be inconsistent and irrational.[82] No doubt they sometimes are, or at least seem to be. No doubt judges would eventually be viewed by the public as inconsistent and irrational[83] if juries were not there as the lightning rods to protect the judges. What appears in the surveys to be a "problem" may actually be a measure of the jury's success in its lightning rod function. Were the public's eternal displeasure with juries translated into eventual abolition of the jury, very soon no one would be more distressed by that turn of events than judges.[84]

If we put together the fact that judges usually agree with jury decisions and voice strong support of juries, with the survey data showing widespread public complaints about juries and not about judges, it is hard not to conclude that, at least as lightning rods for judges, juries are working quite well.

CONCLUSION

We have been reflecting on the views of juries as expressed in public opinion surveys. Negative public opinion about the jury is paradoxical, because those condemning juries in opinion surveys are sampled from essentially the same population from which juries are drawn. How can the public's judgements in the latter role be so wrong, and their judgments in the former role be so right? The public is ill-informed about major aspects of the behavior and performance of juries in the tort litigation system; the known empirical facts of jury behavior contradict, to a considerable extent, the beliefs about juries expressed in public opinion surveys. The public's knowledge is not based on direct experience, but results mainly from exposure to the news media. News media reports have been found to present a highly unrepresentative (read: distorted) picture of the cases that come to court and how juries decide them.[85] Are the results of public opinion

82. Reviews of sources asserting that juries are inconsistent and irrational can be found in DANIELS & MARTIN, *supra* note 25; VIDMAR, *supra* note 25; Saks, *supra* note 11. *See* Daniels, *supra* note 63.

83. They already are by those who read large numbers of judicial opinions.

84. Perhaps that is one of the reasons that judges show so much stronger support for juries than the general public does. Recall that, "[a]ll the surveys of judges' attitudes toward the civil jury show virtually unanimous support for the institution." Hans, *supra* note 3, at 262.

85. The reported cases do exist—at least sort of. *See supra* note 26 and accompanying text (demonstrating that sometimes cases reported in the news are described in highly distorted fashion). The implication is that it is not unreasonable for citizens to evaluate the system based on those reports of what they believe to be real cases that were badly decided. But does it really make sense to condemn a whole system based on a handful of aberrant cases? Can we sensibly judge those cases one way (judge them to be wrongly decided) and to judge the overall system a different way (judge it to be functioning sensibly)? Perhaps the system works well for a large

polls about the jury teaching us something about the sad state of the jury as an institution? Or the sad state of public knowledge about the institution? Or misleading news reporting? Or about the success of campaigns to "reform" the civil justice system?

On the one hand, uninformed and speculative beliefs, reflected in the received "public opinion" of surveys, are not the reality of the matter under examination. On the other hand they are a reality of sorts: what people believe is true often drives policy more than what is actually true. For example, public attitudes toward judicial sentencing in the abstract drive sentences upward, even though we also know that the public's sentencing recommendations in particular cases or categories of cases often are *lower* than the sentences already being meted out and served.

On the other hand, in terms of "bottom lines," it is easy to find public opinion support for improvements in the decision-making situation of the jury and hard to find support for outright abolition of juries.[86] Interestingly, then, despite the ready acceptance of unsupported summary criticisms, people seem conservative enough to reject the radical "solution" of abolishing the jury.

We pay attention to public opinion out of democratic habit. Yet public opinion can be manufactured by those who believe that achieving their corporate goals involves changing the law governing liability and trial procedures; that changing the law requires public support; and that such support can be obtained through media manipulation. Fortunately for those interests, the way the media report news provides a natural assist to the development of poorly informed and superficial opinions. And, also fortunately for them, major national opinion polling is conducted in a way that taps superficial opinions and imbues them with the appearance of substance.

If public opinion matters—and in a democracy it surely does—we as a society must find better ways to better inform that opinion. And

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majority of cases, but it cannot adequately deal with a small number of unusual cases. Or must we condemn any system that is not adapted to the extremes with which it will be confronted—much as biological organisms are adapted to the extremes of their environments? If the latter, I wonder if we will begin to close hospitals because of the 1% of cases that result in malpractice injuries? Or close corporations because some of their products proved to be harmfully defective? Or end the insurance industry because of instances of bad faith? In the criminal justice system, we have lately discovered in a dramatic way that erroneous convictions for very serious crimes are a very real problem. *See* CONNORS, LUNDREGAN, MILLER & MCEWEN, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996). Why not avoid these dreadful mistakes by abolishing trials? Why would it make sense to be intolerant of one of these areas because of its shortcoming, but tolerant of the others despite their serious shortcomings?

86. *See infra* Appendix, Yankelovich January 1995.

to be more serious about measuring that opinion in ways that are more meaningful and revealing. A more constructive approach might be to ask the public about its goal and value preferences with respect to its legal institutions—what ought they accomplish? And then use empirical data on the performance of those institutions to test the extent to which they are meeting those goals. This would be a more meaningful way to take public opinion seriously, while not being misled by it.[87] The alternative of throwing aside, or radically altering, our legal institutions on the strength of opinions based on nothing is not a particularly wise, or even a sane, approach to making legal policy.[88]

87. "Where mass opinion dominates the government, there is a morbid derangement of the true functions of power. The derangement brings about the enfeeblement, verging on paralysis, of the capacity to govern." WALTER LIPPMANN, ESSAYS IN THE PUBLIC PHILOSOPHY § 4 (1955).

88. None of this is to say that the jury system does not have real flaws that deserve real repairs. *See, e.g.*, Stephan Landsman et al., *Be Careful What You Wish For: The Effects of Bifurcating Claims for Punitive Damages in Product Liability Cases*, 1998 WIS. L. REV. 297; Michael J. Saks et al., *Reducing Variability in Civil Jury Awards*, 21 LAW & HUM. BEHAV. 243 (1997). But solutions can be found that are tailored to the problems. We should prefer fine tuning and constructive innovation to the meat axe.

APPENDIX

ATTITUDES TOWARD JURIES: SELECTED PUBLIC OPINION SURVEY RESULTS

1982 Gallup—Gallup Organization (1982), *available in* Westlaw, ROPER CTR. FOR PUB. OPINION RES., Question ID: USGALLUP.1201. n=1519	Where the amount of damages sought exceeds $20,000, do you think it would be a good idea or a poor idea if the person or company being sued were to have the right to ask that the case be decided by a panel of three judges rather than by a jury?	Good idea: 46% Bad idea: 38%
1983 Zuger—MARTIN ZUGER, PUBLIC ATTITUDES TOWARD CIVIL JUSTICE (1983).	Judges thought to have more knowledge and be better qualified to apply the law	Agree: 62%
	Does plaintiff have a better chance of winning if the factfinder is a judge or a jury?	Jury: 52% Judge: 16%
1986 Tsongas—Joyce E. Tsongas et al., The Ninth Circuit Court: A view from the Jury Box 1986 (unpublished manuscript, results described in Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors, in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM (Robert E. Litan ed., 1993)). n=1186	Former jurors who would be confident in submitting their own cases to a jury [if they were involved in litigation]	Yes: 81%

1987 Harris—LOUIS HARRIS & ASSOCS. ET AL., PUBLIC ATTITUDES TOWARD THE CIVIL JUSTICE SYSTEM AND TORT LAW SYSTEM (reporting survey conducted for Aetna Life and Casualty Co. by Louis Harris & Associates in March of 1987). n=2008	Does the civil justice system enable those who have been injured to obtain adequate compensation from those responsible?	Yes: 75%
	Size of awards	Excessive: 45% About right: 28% Not enough: 16%
	Among reasons for the increase in the "overall cost of lawsuits": "juries which hand out awards that are too big"	A major reason: 56% A minor reason: 31%
	Having the judge give the jurors specific guidelines about how much in damages should be awarded in cases of a particular type	Very acceptable: 39% Somewhat acceptable: 34%
	After a jury has decided a lawsuit, having the judge—instead of the jury—set the amount of damages awarded	Very acceptable: 29% Somewhat acceptable: 33%
1991 Hans—Valerie P. Hans, *Attitudes Toward the Civil Jury, in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 259 (Robert E. Litan ed., 1993). n=450	"[T]here are far too many frivolous lawsuits today"	Agree: 91%

1991 PUBLIC PULSE—*To Sue or Not to Sue? Public Backs Liability Reform*, PUB. PULSE, Aug. 1991, at 6.	Cap awards for punitive damages	Agree: 70%
	Cap awards for lost income	Agree: 50%
	Cap awards for pain and suffering	Agree: 67%
	Cap awards for medical expenses	Agree: 47%
1991 Metricus—Jeanne J. Fleming & Leonard C. Schwarz, *Juror Opinion Survey Reveals Obstacles for Litigators*, INSIDE LITIG., Dec. 1991, at 21. n=500	Juries today are awarding too much money	Agree: 68%
Yankelovich, January 1995—Yankelovich Partners & Talmey-Drake (Jan. 1995), *available in* Westlaw, ROPER CTR. FOR PUB. OPINION RES., Question ID: USYANKP.95TORT. n=1001	Proposed reform: Allowing jurors to ask questions during trial	Right direction: 79% Wrong direction: 15%
	Proposed reform: Allowing jurors to take notes during trial	Right direction: 90% Wrong direction: 5%
	Have you ever been on a civil jury?	Yes: 23% No: 77%
Yankelovich, March 1995—Time, CNN, & Yankelovich Partners (Mar. 1994), *available in* Westlaw, ROPER CTR. FOR PUB. OPINION RES., Question ID: US USYANKP.040395.	Proposed reform: Limiting the amount of punitive damages a jury can award in civil cases to $250,000	Favor: 61% Oppose: 34%