

FOREWORD

The Survival of the Jury

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Welcome to the Symposium issue of *The George Washington Law Review*. The topic, “The Survival of the Jury,” was inspired by my book, *The Jury: A Very Short Introduction*.¹ The book represents the fruits of decades of study. Its scope is broad: It discusses civil, criminal, and grand juries throughout history and around the world. Following suit, the scope of the Symposium is similarly broad. Distinguished judges, academics, and trial lawyers participated in three panels: one on the civil jury, one on the criminal jury, and a judges’ panel. Out of this Symposium came a rich fund of ideas for reform of the jury and templates for how that reform can be achieved. The Dean of the law school, Dayna Bowen Matthew, lays out the scope of the conversation in her opening

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¹ RENÉE LETTOW LERNER, *THE JURY: A VERY SHORT INTRODUCTION* (2023).

remarks. Legal systems around the world try to ensure the participation of ordinary persons in court decisions, especially in criminal cases. And yet, in many countries, rates of jury trial have been declining. The use of jurors has difficulties and disadvantages, to be sure, but it also has benefits. Jurors help to improve the public legitimacy of the legal system, encourage judges to clarify the law, and protect against biased or corrupt judges. Serving as a juror also provides training for participation in a democracy. But as jury trial rates diminish, legal systems lose those benefits. The decline is steepest in the United States, which ironically has one of the most robust formal rights to jury trial in the world. As Judge Stephanos Bibas explains in his contribution, “federal courts ‘conducted half as many civil trials in 2016 as they did in 1962,’” despite handling five times the number of cases.² Civil jury trials now constitute 0.7% of cases reaching disposition in U.S. federal courts.³ And as Professor Carissa Byrne Hessick describes in her contribution, two percent of U.S. federal criminal cases proceed to a trial of any kind.⁴ The numbers are similar for state courts.⁵ Although the United States boasts a multitude of federal and state constitutional provisions guaranteeing the right to jury trial in civil and criminal cases, juries have become vanishingly rare.

To discuss this problem and provide possible solutions, the Symposium brought together a range of prominent participants from across the legal profession. Celebrated trial lawyer Benjamin Chew, who represented actor Johnny Depp in the 2022 trial of *Depp v. Heard*,⁶ gives the keynote address. The panel on the civil jury includes Professor Philip Hamburger of Columbia Law School. Professor Hamburger is no stranger here; he was a member of The George Washington University Law School faculty from 1992 to 2000 and a cherished colleague. He has worked deeply on the history of jury trial and its relation to the administrative state.⁷ In 2017, he founded the New Civil Liberties Alliance, a nonprofit public-interest law firm dedicated to challenging unlawful uses of administrative power.⁸ Professor James Oldham of Georgetown University Law Center is the premier scholar of the jury

² Stephanos Bibas, *How to Revive the Jury: One Judge's Observations*, 93 GEO. WASH. L. REV. 1377, 1382 (2025) (quoting Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 510 (2004)).

³ Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, but Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does It Matter?*, JUDICATURE, Winter 2017, at 26, 28.

⁴ Carissa Byrne Hessick, *The Right to a Jury and the Rise of Guilty Pleas Across Common Law Countries*, 93 GEO. WASH. L. REV. 1299, 1309 (2025).

⁵ See Smith & MacQueen, *supra* note 3, at 31–32.

⁶ No. CL-2019-0002911, 2022 WL 2342058 (Va. Cir. Ct. June 24, 2022).

⁷ See, e.g., PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 143–56 (2014).

⁸ See *Our Mission*, NEW C.L. ALL., <https://nclalegal.org/who-we-are> [<https://perma.cc/5SRX-RWG2>].

in eighteenth-century England. This period is central to the American understanding of the institution because of originalist methods of interpretation and particularly the Seventh Amendment's historical test for the use of civil juries.⁹ Professor Suja Thomas of the University of Illinois College of Law is a longtime scholar of the jury who has played a crucial role in modern debates about the institution.¹⁰ She is currently working on a film documentary about the jury. We were fortunate to have distinguished trial lawyer and The George Washington University Law School alumnus Bobby Burchfield as the moderator of the panel on civil juries. Mr. Burchfield was the Editor-in-Chief of *The George Washington Law Review* and is proud of the work the publication is doing today.

The criminal jury panel includes my treasured mentor Professor Akhil Reed Amar of Yale Law School and Yale College. Professor Amar has devoted much of his illustrious career to emphasizing the role of the people in interpreting the Constitution and participating in the legal system.¹¹ In addition to his many books and articles, he has found another way to reach a popular audience: his podcast *Amari-ca's Constitution*. Professor Carissa Byrne Hessick is a top scholar of the criminal jury with a vital book about plea bargaining in the United States, *Punishment Without Trial: Why Plea Bargaining Is a Bad Deal*.¹² The comparative work on plea bargaining in her contribution here is, in a sense, a continuation of that project. Thanks to a Fulbright grant, she was able to travel to Australia, New Zealand, and the United Kingdom for her research. Professor Anna Offit's work for the Symposium is a mirror image of Professor Hessick's. Whereas Professor Hessick usually focuses on the United States but here presents comparative work, Professor Offit, of Southern Methodist University Dedman School of Law, is an important comparativist specializing in the jury who here concentrates on the United States—as she does in her fascinating book, *The Imagined Juror: How Hypothetical Juries Influence Federal Prosecutors*.¹³ Professor Offit's deep knowledge of other legal systems allows her to see the U.S. system more clearly and propose creative reforms. We were delighted to welcome back to the law school Professor Paul Butler of Georgetown University Law Center as the moderator of the criminal jury panel. Professor Butler was long a beloved member of the

⁹ See JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 1 (2006).

¹⁰ See generally, e.g., Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007) (arguing that summary judgment violates civil litigants' Seventh Amendment right to a jury trial).

¹¹ See generally, e.g., AKHIL REED AMAR, BORN EQUAL (2025) (discussing developments in the constitutional ideal of birth equality in the late nineteenth and early twentieth centuries).

¹² CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL (2021).

¹³ ANNA OFFIT, THE IMAGINED JUROR (2022).

faculty at The George Washington University Law School, and his work includes influential and striking arguments concerning race-based jury nullification.¹⁴

In discussing juries, the views of judges are crucial. The judges' panel assembles a range of eminent jurists, including trial and appellate judges from state and federal courts. They all approach the subject of the jury from multiple levels of experience. Before she was appointed to the bench, Chief Judge Penney Azcarate of the Circuit Court in Fairfax County, Virginia, was a state prosecutor. From there she entered private practice, in which she continued to try jury cases. Judge Stephanos Bibas of the U.S. Court of Appeals for the Third Circuit was appointed to the bench after service as a federal prosecutor and then as an outstanding academic. Even as a federal appellate judge, he makes a point of presiding over jury trials. Chief Judge Jennifer Walker Elrod of the U.S. Court of Appeals for the Fifth Circuit likewise has decades of experience with juries—first as a practitioner trying jury cases and later as a Texas state trial judge. She too continues to preside over jury trials as a federal appellate judge. Chief Judge Elrod is also probably the only member of the Symposium who has starred in a musical comedy about the jury. Judge Paul Friedman of the U.S. District Court for the District of Columbia has long been viewed as one of the most accomplished federal trial judges in the United States. He previously served as a federal prosecutor and in the U.S. Solicitor General's Office, as well as in private practice. He has presided over many notable trials and cases. It was a privilege—indeed, a dream fulfilled—for me to moderate the panel. This Symposium issue includes an edited transcript of the panel discussion.

The Symposium fostered a marvelous dialogue between judges, lawyers, and scholars. For example, the judicial work of several of the judges is the subject of commentary by other participants in the Symposium. Chief Judge Azcarate presided over the trial of *Depp v. Heard*, in which Benjamin Chew was a lead counsel.¹⁵ Their different perspectives contribute to a full understanding of how to conduct a successful trial. Chief Judge Elrod authored the Fifth Circuit's opinion in *Jarkesy v. SEC*,¹⁶ which the U.S. Supreme Court affirmed.¹⁷ Professor Hamburger focuses his contribution on that case.

My purpose in this Foreword is to draw out some of the major themes and to emphasize the deep connections among the participants'

¹⁴ See generally, e.g., Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995) (arguing that in criminal trials of Black defendants, African American jurors can legally and morally consider race in refusing to convict).

¹⁵ *Depp v. Heard*, No. CL-2019-0002911, 2022 WL 2342058 (Va. Cir. Ct. June 24, 2022).

¹⁶ 34 F.4th 446 (5th Cir. 2022), *aff'd*, 603 U.S. 109 (2024).

¹⁷ *SEC v. Jarkesy*, 603 U.S. 109 (2024).

ideas. Along the way, I will highlight some direct interactions. Several key themes emerge from the presentations and discussions. Most fundamental are the twin questions of the rationale for the jury and when juries should be used; these are not self-evident. Then comes how to make the jury trial workable so that it can be used when desired. Many contributors emphasized the importance of streamlining methods of jury selection. The conduct of trials received much attention, including the necessity of simplifying cases for the jury and telling a story together with the desirability of judicial comment on evidence to the jury. Professors Thomas and Hessick performed important research into foreign legal systems and emerged with critical information about how to increase lay participation by using different forms of the jury and modifying legal culture. Participants not only generated solutions for the problem of the disappearing jury, but they also mapped out strategies for how to make these solutions a reality.

I. RATIONALES FOR THE JURY AND APPROPRIATE USE

On the fundamental question of what the jury is for, participants have enlightening observations. Mr. Chew discusses the value of the jury in certain kinds of cases: those involving “human relationships.”¹⁸ He believes that in appropriate cases, the jury is a good factfinder. In his oral remarks, he suggested that juries were not so desirable in technical cases. *Depp v. Heard* was a defamation action that actor Johnny Depp had brought against his former wife, Amber Heard, who had accused him of domestic abuse. The case deeply concerned intimate human relationships. Mr. Chew points to the importance of such a case being tried to a jury, with its multiple perspectives and attention to different parts of the evidence based on live testimony.¹⁹

Professor Thomas believes that employment discrimination cases likewise benefit from lay participation. Here, she examines a special form of lay participation in such cases in the United Kingdom that could prove to be of great utility in the United States.²⁰ I discuss her study in Part V on different forms of the jury.

Juries have advantages, but they also have disadvantages. Interestingly, the judges emphasize that juries have special difficulty determining damages in civil cases.²¹ Juries prefer to apply clear rules, and as Chief

¹⁸ Benjamin G. Chew, Keynote, *Reflections on Depp v. Heard: A Testament to the Role of the Jury*, 93 GEO. WASH. L. REV. 1485, 1486 (2025).

¹⁹ See *id.* at 1495–96.

²⁰ See Suja A. Thomas, *Employment Discrimination in the U.S. Versus the U.K.: Dismissals Prior to Jury Trials Versus Hearings on the Merits by Employment Tribunals That Include Lay Participation*, 93 GEO. WASH. L. REV. 1327, 1340–42 (2025).

²¹ Penney S. Azcarate, Chief Judge, Cir. Ct. of Fairfax Cnty., Va., Stephanos Bibas, Judge, U.S. Ct. of Appeals for the 3d Cir., Jennifer Walker Elrod, Chief Judge, U.S. Ct. of Appeals for the

Judge Azcarate explains, often there are no clear rules for determining damages.²²

Several participants refer to the ideas of Alexis de Tocqueville in his famous passages about the jury in the 1830s classic *Democracy in America*.²³ Professor Amar, Judge Bibas, and Professor Hamburger all refer to Tocqueville's comment that the jury is not necessarily good for the parties—that is, the jury is not necessarily the best institution to decide a case correctly.²⁴ However, Tocqueville presses the notion that the jury is very good for the jurors. According to him, the jury exists *for the jurors*. The jury provides training for democracy.²⁵ All the judges at the Symposium stress the latter idea. But they provide a new twist on Tocqueville's concept of the jury as a school for democracy. Rather than emphasizing the jury receiving guidance from the judge as teacher, as Tocqueville did,²⁶ the judges at the Symposium stress the importance of a diverse group of ordinary citizens gathering together to make a decision and learning how to cooperate with persons of different backgrounds and views.²⁷

Professor Hamburger views the jury as a critical check on government power, including agency action.²⁸ In this, he is in good company: Many of the Founders, Chief Judge Elrod, and the majority of the U.S. Supreme Court in *SEC v. Jarkesy* agree with him.²⁹

Professor Hamburger resists the idea that efficiency should be paramount in procedure³⁰—I would point out that in the eighteenth century, when juries heard many cases and the federal constitutional guarantees of jury trial were adopted, jury trials were extremely efficient. To give

5th Cir., Paul L. Friedman, Judge, U.S. Dist. Ct. for D.C. & Renée Lettow Lerner, Donald Phillip Rothschild Rsch. Professor of L., The George Washington Univ. L. Sch., Judicial Perspectives on the Jury, Panel Discussion at The George Washington Law Review Symposium: The Survival of the Jury (Oct. 25, 2024), in 93 GEO. WASH. L. REV. 1464, 1468–70 (2025).

²² See *id.* at 1468.

²³ See ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270–76 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835).

²⁴ See Akhil Reed Amar, Sterling Professor of L. & Pol. Sci., Yale Univ., Revisiting Suggested Jury Reforms, Remarks at The George Washington Law Review Symposium: The Survival of the Jury (Oct. 25, 2024), in 93 GEO. WASH. L. REV. 1481, 1481–82 (2025); Azcarate et al., *supra* note 21, at 1467–68; Philip Hamburger, *The Value of Jury Rights*, 93 GEO. WASH. L. REV. 1283, 1295–96 (2025).

²⁵ See TOCQUEVILLE, *supra* note 23, at 275.

²⁶ See *id.* at 274–75. For an explanation of Tocqueville's idea of the judge as a teacher of the jury, see Renée Lettow Lerner, *The Surprising Views of Montesquieu and Tocqueville About Juries: Juries Empower Judges*, 81 LA. L. REV. 1, 47–49 (2020).

²⁷ See Azcarate et al., *supra* note 21, at 1466–67.

²⁸ See Hamburger, *supra* note 24, at 1295–98.

²⁹ See Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL RTS. J. 811, 817–19, 824–26 (2014); *Jarkesy v. SEC*, 34 F.4th 446, 451–52 (5th Cir. 2022), *aff'd*, 603 U.S. 109 (2024); *SEC v. Jarkesy*, 603 U.S. 109, 121–22 (2024).

³⁰ Hamburger, *supra* note 24, at 1288–89.

a sense, in the Old Bailey, the main criminal court in London, a single judge presided over “an average of twelve to twenty” felony jury trials a day.³¹ Jurors faced deprivations that moved trials and deliberations along smartly. From the time the jury was sworn in until the time they brought in their verdict, jurors were not allowed food, drink, heat, or light.³² In addition, many jurors, including the powerful foremen, were repeat players, so they needed less help understanding the law and evidence.³³ In those days, Alexander Hamilton aptly described jury trials as characterized by “simplicity and expedition.”³⁴

Professor Hessick’s study of comparative plea bargaining among common law countries shows that efficiency in procedure is a huge concern. She illustrates the stakes of failure to move jury trials along expeditiously. She reports that strong formal rights to criminal jury trial do not mean higher rates of jury trial.³⁵ The United States, which has the strongest formal right to jury trial, has the lowest rate of actual use of juries.³⁶ She finds that across the common law world, legal systems have taken up efficiency as a driving force in procedure and justify plea bargaining as enhancing that goal.³⁷ The United States has traveled furthest down this path, offering the steepest discounts for pleading guilty and giving huge discretion to prosecutors in determining how to offer the discounts.³⁸ Among the jurisdictions studied, England and Wales has the highest rate of trial, at seventeen percent, compared with two percent in U.S. federal court.³⁹

Professor Hessick’s comparative work shows that even in other common law countries, the possibility of jury trial is largely limited to the most serious criminal offenses.⁴⁰ These systems have made the calculation that if potential terms of imprisonment are long, the expense and inconvenience of jury trial are worth it—but not otherwise. These countries have virtually eliminated the civil jury.

Professor Hamburger explains that juries can have a salutary effect on law. Juries encourage judges to separate law from fact, thus clarifying legal rules, and to keep the law comprehensible so that juries can grasp it.⁴¹ Not to be missed is Professor Hamburger’s utterly persuasive

³¹ John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 277–78 (1978).

³² See LERNER, *supra* note 1, at 76–78.

³³ See *id.* at 78–79.

³⁴ THE FEDERALIST No. 83, at 438 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

³⁵ See Hessick, *supra* note 4, at 1309–10.

³⁶ See *id.* at 1307, 1309–10.

³⁷ See *id.* at 1323–24.

³⁸ See *id.* at 1318–19, 1321.

³⁹ *Id.* at 1307–09.

⁴⁰ See *id.* at 1302–07.

⁴¹ See Hamburger, *supra* note 24, at 1294–95.

explanation of the twenty-dollar threshold for civil jury trial in the Seventh Amendment, which baffles many modern readers.⁴²

Professor Amar reimagines the jury. In effect, he aims to demystify it, to make it less mystical and more democratic, by analogizing it to other institutions of democracy: legislatures, voters, and judges.⁴³ His analogies to other democratic institutions have important implications for jury unanimity, which I will take up in discussing the jury's verdict in Part IV.

II. PEREMPTORY CHALLENGES AND JURY SELECTION

To achieve the varied goals described by participants, jury trial must be workable. A major obstacle to holding more jury trials is the length and expense of jury selection. In many jurisdictions in the United States, jury selection takes a long time. And that amount of time and money does not include the elaborate preparation for jury selection, which often involves expensive jury consultants and mock trials before mock jurors.⁴⁴ This expenditure of resources is a significant factor in making jury trial unwieldy, such that litigants try hard to avoid it by settling or inducing plea agreements.⁴⁵ Notably, jury selection takes very little time in England, thanks to the absence of peremptory challenges and limited voir dire.⁴⁶ Not coincidentally, as Professor Hessick describes, England has the highest rates of jury trial in the common law world.⁴⁷ Many participants in the Symposium recommend streamlining jury selection.

In his proposal to make jurors more like judges, Professor Amar advocates for eliminating peremptory challenges and many for-cause challenges.⁴⁸ He asks that we rethink the notion of juror impartiality.⁴⁹

Professor Offit has boldly taken up the challenge to rethink juror impartiality in her contribution. A skilled comparative scholar of the jury, she turns her attention to a domestic U.S. problem. She points out the incoherence of courts' standards for juror impartiality.⁵⁰ She also observes the conflict between striking jurors for impartiality and achieving other goals of the jury system, such as representing the community.⁵¹

⁴² See *id.* at 1291–93.

⁴³ See Amar, *supra* note 24, at 1481–82.

⁴⁴ See LERNER, *supra* note 1, at 67.

⁴⁵ See Hessick, *supra* note 4, at 1310.

⁴⁶ See LERNER, *supra* note 1, at 64–65.

⁴⁷ See Hessick, *supra* note 4, at 1310.

⁴⁸ See Amar, *supra* note 24, at 1483.

⁴⁹ See *id.*

⁵⁰ See Anna Offit, *Rethinking Juror Impartiality*, 93 GEO. WASH. L. REV. 1386, 1389–1401 (2025).

⁵¹ See *id.* at 1399–1400.

Importantly, she highlights the incentives of lawyers. In striking jurors, lawyers are not aiming for juror impartiality; on the contrary, they are aiming for a jury that is partial to their side. As she aptly puts it, current jury practices are “more likely to introduce partiality than to dispense with it.”⁵² She eviscerates the idea that somehow the adversarial competition between sides will result in an impartial jury. One side may be much better than the other at choosing which jurors to strike.⁵³ And the jury pool may make it easier for one side than the other—for instance, if there are few educated persons in a pool and one side wants to eliminate educated jurors. Like Professor Amar, Professor Offit recommends eliminating peremptory challenges. Instead, she recommends eliminating jurors only for the reasons a judge would need to be recused.⁵⁴ These recommendations, particularly the latter, are similar to the system followed in some civil law countries.⁵⁵

The idea of eliminating peremptory challenges prompted fruitful exchanges among the participants. Judge Friedman explains he initially opposed eliminating peremptory challenges when he came to the Symposium, but discussions at the Symposium caused him to think more profoundly about the question.⁵⁶ Judge Bibas agrees with eliminating peremptory challenges, partly to further representation of the community.⁵⁷ Chief Judge Elrod questions whether eliminating peremptory challenges might not result in judges allowing more for-cause challenges.⁵⁸ Chief Judge Azcarate says that as a judge, she thought eliminating peremptory challenges could be fine, but as a defense lawyer, she liked to have them.⁵⁹ Professor Butler warns that the right to choose a jury, including through peremptory challenges, is important to a criminal defendant.⁶⁰ He suggests that criminal defendants view the justice system as more legitimate because they are allowed to use peremptory

⁵² *Id.* at 1388.

⁵³ *See id.* at 1399–1400.

⁵⁴ *See id.* at 1401–02.

⁵⁵ *See* John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. BAR FOUND. RSCH. J. 195, 208 (explaining that after German lay judges are assigned to appear in court, they may “be challenged by prosecution or defense only on those grounds of relationship or prejudice for which professional judges may be recused; this happens with the greatest rarity” (footnote omitted)).

⁵⁶ *See* Azcarate et al., *supra* note 21, at 1473.

⁵⁷ *See id.* at 1474.

⁵⁸ *See id.* at 1473.

⁵⁹ *Id.* at 1474.

⁶⁰ Akhil Reed Amar, Sterling Professor of L. & Pol. Sci., Yale Univ., Paul Butler, Albert Brick Professor in L., Georgetown Univ. L. Ctr., Carissa Byrne Hessick, Anne Shea Ransdell & William Garland “Buck” Ransdell, Jr. Distinguished Professor of L., Univ. of N.C. Sch. of L. & Anna Offit, Assoc. Professor of L., S. Methodist Univ. Dedman Sch. of L., Criminal Jury Panel Discussion at The George Washington Law Review Symposium: The Survival of the Jury (Oct. 25, 2024).

challenges. Professor Butler's argument resembles Montesquieu's in *The Spirit of the Laws*.⁶¹ In response, Professor Amar proposes first eliminating peremptory challenges for prosecutors only.

Professor Offit and Judge Bibas each recommend judge-conducted voir dire, albeit for somewhat different reasons. Professor Offit praises the more neutral stance of judges, as opposed to the parties' lawyers, and the standardization that is more likely with judicial questioning.⁶² Judge Bibas observes that judge-conducted voir dire is usually considerably faster, which serves the goal of making jury trials more workable.⁶³

The trial of *Depp v. Heard* demonstrates how speed in voir dire can be achieved, even with questioning by counsel. In his oral remarks, Mr. Chew expresses amazement at the swiftness of jury selection in the case—it took only one day.⁶⁴ Chief Judge Azcarate explains how she accomplished it: by requiring the lawyers to hash out their basic voir dire questions ahead of time with her.⁶⁵ In effect, the judge and the lawyers together developed a script for voir dire. She also required the lawyers to ask narrow questions on voir dire: “Have you heard about this case?” rather than “Have you heard of Johnny Depp?”⁶⁶ With the latter question, every hand would have gone up, and voir dire would have taken much longer. The judge taking the initiative proved highly effective in moving trial along.

Together, these recommendations and practices would simultaneously speed jury selection and help to make the jury more representative of the community.

III. CONDUCT OF THE TRIAL

Jury selection is one piece of the conduct of the entire trial. Many trials today are long and immensely tedious, increasing expense and tiring and confusing the jurors.⁶⁷

It may seem counterintuitive, but according to many Symposium participants, the judge taking charge of the conduct of trial is key to a jury trial's success. That is the major theme of Judge Bibas's written

⁶¹ See MONTESQUIEU, *THE SPIRIT OF THE LAWS* 158 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748); Lerner, *supra* note 26, at 18 n.76.

⁶² See Offit, *supra* note 50, at 1405–06.

⁶³ See Bibas, *supra* note 2, at 1383.

⁶⁴ See Chew, *supra* note 18, at 1491; Azcarate et al., *supra* note 21, at 1475.

⁶⁵ See Azcarate et al., *supra* note 21, at 1475.

⁶⁶ See *id.*

⁶⁷ See LERNER, *supra* note 1, at 89–93, 104–07; ROBERT CALLAHAN, JUSTYN RICHARDSON & ANNIE LEVERS, OFF. OF THE N.Y.C. COMPTROLLER, ENSURING TIMELY TRIALS 4–5 (2024); Brian H. Bornstein, Monica K. Miller, Robert J. Nemeth, Gregory L. Page & Sarah Musil, *Juror Reactions to Jury Duty: Perceptions of the System and Potential Stressors*, 23 BEHAV. SCIS. & L. 321, 322–23 (2005).

contribution.⁶⁸ He observes that judges have immense power to expedite proceedings that they often neglect. Instead of appropriately exercising their authority, they take the path of least resistance, granting continuance after continuance and if a case actually gets to trial, letting the trial drag on. He stresses the importance of the judge focusing on issues actually in dispute in discovery and at trial and getting stipulations on the rest.⁶⁹ He has pertinent suggestions for streamlining evidentiary issues and jury selection and for improving jury instructions. Much of his program strongly resembles what a German judge does in a civil case, quickly determining which relevant facts are actually in dispute and focusing on them like a laser.⁷⁰ Judge Bibas's motto is, quite rightly, "[j]ustice delayed is justice denied."⁷¹

Professor Hamburger emphasizes the importance of the judge assisting the jury in making its decision.⁷² And he endorses a return to judicial comment on evidence to the jury,⁷³ which has been a theme of my work.⁷⁴ On the judges' panel, Judge Bibas observes that at the time of the Founding and long after, judges routinely commented on evidence and had a "conversation with the jury."⁷⁵ Chief Judge Elrod expands on this, stating that federal judges still have that power and occasionally exercise it.⁷⁶

Professor Hessick's work not only supports the idea of the importance of the judge in conducting jury trials but also the importance of the lawyers. As mentioned, of the jurisdictions Professor Hessick studied, the United States has the lowest rates of jury trial, while England and Wales has the highest.⁷⁷ In her oral remarks, Professor Hessick offers an intriguing explanation for this difference: legal culture. English judges and barristers are not afraid of jury trial and do not seek to avoid it at

⁶⁸ See Bibas, *supra* note 2, at 1383–84.

⁶⁹ See *id.*

⁷⁰ See John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 830 (1985); James R. Maxeiner, Guiding Litigation: Applying Law to Facts in Germany 10–12 (Apr. 15, 2008) (unpublished manuscript), <https://ssrn.com/abstract=1230453> [<https://perma.cc/2DMD-VG4A>].

⁷¹ Bibas, *supra* note 2, at 1381.

⁷² Hamburger, *supra* note 24, at 1293–94.

⁷³ See *id.*

⁷⁴ See generally, e.g., Renée Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195 (2000) (describing the prevalent nineteenth-century practice of judges commenting on evidence and its eventual departure from U.S. courtrooms); Renée Lettow Lerner, *How the Creation of Appellate Courts in England and the United States Limited Judicial Comment on Evidence to the Jury*, 40 J. LEGAL PRO. 215 (2016) (arguing that the addition of appellate courts to the U.S. federal court and English court systems limited judicial comment on evidence).

⁷⁵ Azcarate et al., *supra* note 21, at 1472.

⁷⁶ See *id.*

⁷⁷ See Hessick, *supra* note 4, at 1309–10.

all costs. English legal culture is much more pro-jury trial than that of the United States.

Thus, the bar also plays a role in making jury trials effective. Bobby Burchfield stresses the importance of clearly eliciting facts for the jury.⁷⁸ The judges universally bemoaned the lack of experience among much of today's bar in trying jury cases.⁷⁹ Judge Friedman and Judge Bibas, especially, stress the necessity of counsel simplifying the case for the jury.⁸⁰ As Judge Friedman states: "simplify, simplify, simplify."⁸¹ This requirement of simplification for the jury explains why Mr. Chew was less enthusiastic about juries in technical cases. And the judges state that it is imperative for counsel to tell a coherent story.⁸²

Mr. Chew's keynote gives a master class in telling the jury—and his audience at the Symposium—a story. His remarks, gripping when delivered, make for compulsive reading. The plaintiff's story was that Johnny Depp, despite being an admittedly imperfect person, was not a domestic abuser.⁸³ In many other relationships with women, no one else had ever accused him of domestic abuse.⁸⁴ Mr. Chew and his team made a deliberate decision to "remove the sting" from damaging facts by discussing, for example, evidence of Mr. Depp's drinking and drug use.⁸⁵ Ms. Heard's lawyers took the opposite tack concerning their client, which ultimately led to them appearing less credible to the jury when harmful evidence about her came out.⁸⁶

Thanks to the case being televised, Mr. Chew and his co-counsel were able to tell their story to the world. Mr. Chew and Chief Judge Azcarate give different perspectives on the decision to televise the trial. Mr. Chew gives an amusing account of his client's method of deciding what to recommend but also stresses the importance to Mr. Depp of transparency and vindicating his reputation.⁸⁷ Meanwhile, Chief Judge Azcarate discusses the many requests for media access to the trial, including by foreign media, and requests for accommodation of disabilities.⁸⁸ She points out that all of these could be solved by televising the

⁷⁸ Bobby Burchfield, Professorial Lecturer in L., The George Washington Univ. L. Sch., Philip Hamburger, Maurice & Hilda Friedman Professor of L., Columbia L. Sch., James C. Oldham, St. Thomas More Professor of L. & Legal Hist. Emeritus, Georgetown Univ. L. Ctr. & Suja A. Thomas, Peer & Sarah Pedersen Professor of L., Univ. of Ill. Coll. of L., Civil Jury Panel Discussion at The George Washington Law Review Symposium: The Survival of the Jury (Oct. 25, 2024).

⁷⁹ See Azcarate et al., *supra* note 21, at 1468–70.

⁸⁰ See *id.*

⁸¹ *Id.* at 1469.

⁸² See *id.* at 1477–78.

⁸³ See Chew, *supra* note 18, at 1491.

⁸⁴ See *id.*

⁸⁵ *Id.*

⁸⁶ See *id.* at 1492–95.

⁸⁷ See *id.* at 1490.

⁸⁸ See Azcarate et al., *supra* note 21, at 1474–75.

trial.⁸⁹ Jury trials are in part public morality plays, as Judge Bibas has discussed,⁹⁰ and often benefit from the transparency that television can provide.

IV. THE JURY'S VERDICT

Finally, after the lawyers and the judge have had their say at trial, the jury has to deliberate and make a decision. Professor Amar's analogies between the jury and three other democratic institutions—legislatures, voters, and judges—produce a powerful conclusion: Jurors could give majority verdicts. Amar would require a supermajority. These other institutions need not be unanimous, and so, he argues, juries need not be either.⁹¹ Any vote of a jury that is not sufficient for conviction should be deemed an acquittal.⁹² Therefore, there would be no hung juries, with their attendant waste.⁹³ This is exactly the method followed by almost all countries with civil law systems that use jurors.⁹⁴ The insistence on unanimity in some common law countries, including the United States today, originated in the medieval English idea of the jury replacing the ordeals, the judgment of God.⁹⁵ Today, the rationale of unanimity has shifted to a protection for the defendant—meaning an obstacle to conviction—and concern about minorities, especially racial minorities, on the jury being heard.⁹⁶ As Professor Amar points out, his proposal would require the U.S. Supreme Court to rethink the holding of *Ramos v. Louisiana*.⁹⁷

Today, jury deliberations are largely a black box. Professor James Oldham addresses the question of whether judges should accept juror affidavits about what went on during deliberations.⁹⁸ He describes the reasons why English judges, led by Lord Mansfield, rejected such affidavits. The opposite rule could allow a disgruntled juror to overturn a verdict or encourage tampering with a jury after the verdict came in. He discusses the case of *Peña-Rodriguez v. Colorado*,⁹⁹ which held that judges could accept juror affidavits alleging racial or ethnic bias among

⁸⁹ See *id.*

⁹⁰ See Stephanos Bibas, *Restoring Democratic Moral Judgment Within Bureaucratic Criminal Justice*, 111 NW. U. L. REV. 1677, 1678, 1691 (2017).

⁹¹ See Amar, *supra* note 24, at 1482.

⁹² See *id.* at 1484.

⁹³ See *id.*

⁹⁴ See LERNER, *supra* note 1, at 80.

⁹⁵ See *id.* at 76.

⁹⁶ See *Ramos v. Louisiana*, 590 U.S. 83, 87–88 (2020); JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, *HISTORY OF THE COMMON LAW* 75 (2009).

⁹⁷ 590 U.S. 83 (2020); see Amar, *supra* note 24, at 1484.

⁹⁸ See James Oldham, *When, if Ever, Are Unanimous Jury Verdicts Unimpeachable?*, 93 GEO. WASH. L. REV. 1457, 1457–59 (2025).

⁹⁹ 580 U.S. 206 (2017).

the jurors.¹⁰⁰ In a great gift to scholarship, he rounds up all cases that significantly rely on that holding and invites scholars to investigate what its effects have been.¹⁰¹

V. DIFFERENT FORMS OF THE JURY

Some of the most striking proposals for reform come from historical or comparative work. In the past and in other countries, lay participation in legal decisions takes a different form than our traditional twelve-person jury chosen from a pool randomly assembled from the population.¹⁰² These different forms can have considerable benefits.

Professor Hamburger recommends a return to historical practices such as the use of special juries in cases that would benefit from the use of expert decision-makers.¹⁰³ For example, in the eighteenth century, prominent English judges such as Lord Mansfield used juries of merchants in complicated commercial cases and juries of sea captains in marine insurance cases.¹⁰⁴ Today, patent infringement cases involving complex technologies might benefit from, say, juries of engineers.

Professor Thomas elaborates on another method of reimagining the jury by looking abroad and examining the composition of the panel. Her comparative work here explores the use in the United Kingdom of a mixed panel to decide employment discrimination cases. The mixed panel consists of one professional judge and two laypersons, one from a management-employer background and the other from a union-employee background; a majority can decide a case.¹⁰⁵ She shows that employment discrimination claimants in the United Kingdom are far more likely to get a hearing on the merits before a mixed panel (seventeen percent) than a plaintiff in the United States is to get a jury trial (two percent).¹⁰⁶ The U.K. mixed panels she examines closely resemble the older German labor courts.¹⁰⁷ They also resemble the mixed panels of professional judges and lay jurors that many civil law countries use to decide criminal cases.¹⁰⁸

¹⁰⁰ See *id.* at 227.

¹⁰¹ See Oldham, *supra* note 98, at 1462–63.

¹⁰² See LERNER, *supra* note 1, at 69–75.

¹⁰³ See Hamburger, *supra* note 24, at 1294.

¹⁰⁴ See OLDHAM, *supra* note 9, at 154–63; LERNER, *supra* note 1, at 70.

¹⁰⁵ See Thomas, *supra* note 20, at 1339, 1343.

¹⁰⁶ *Id.* at 1342.

¹⁰⁷ See Langbein, *supra* note 70, at 856. Federal German labor courts of the first instance comprise one professional judge and two lay judges, one representing the employers' side and one the employees'. *Responsibilities of the Federal Labour Court*, BUNDESARBEITSGERICHT, <https://www.bundesarbeitsgericht.de/responsibilities/> [<https://perma.cc/D7FU-SQLS>]. For a comparison of the two courts, see generally Martin Schneider, *Employment Litigation on the Rise? Comparing British Employment Tribunals and German Labor Courts*, 22 COMPAR. LAB. L. & POL'Y J. 261 (2001).

¹⁰⁸ See LERNER, *supra* note 1, at 81–83.

Effectively using lay participation in deciding cases may well mean a shift in our understanding of the form that a jury can take. The United Kingdom has the advantage of not being bound by a written constitution with associated rigid rules concerning jury trial and, therefore, has the flexibility to experiment and to adapt.¹⁰⁹ Still, state constitutions in the United States are easier to modify than the Federal Constitution, and thus, states are more free to experiment.¹¹⁰ This is particularly true concerning civil juries, as the Seventh Amendment has not been incorporated against the states.¹¹¹

VI. IMPLEMENTATION OF REFORMS

This rich variety of proposals raises questions about how to implement the reforms discussed at the Symposium. As mentioned, Judge Bibas believes that judges have large powers to expedite jury trials, if they choose to exercise them.¹¹² Professor Amar provides a detailed description of possibilities in his remarks.¹¹³ First, he recommends that judges, lawyers, and academics gather together in conferences to discuss reforms face-to-face. That is exactly what the Symposium accomplished—though of course more such events should occur. He then looks to laboratory states to take the initiative in implementing reforms, much as Arizona has done in abolishing peremptory challenges. He recommends starting with misdemeanor cases, perhaps with a choice for the defendant to opt in, and moving on from there.¹¹⁴ Historically, significant reforms to criminal procedure have begun with misdemeanor cases, including representation by defense counsel.¹¹⁵ This flexible, piecemeal method may well bear fruit over time.

This Symposium is an ideal way to begin such reform. Many members of *The George Washington Law Review* contributed enormous amounts of time and effort to make this Symposium a smashing success. I would like to single out several. Christina Casey, the Senior Projects Editor for Volume 93, worked tirelessly and magnificently on every aspect. She had the able assistance of Tarra Olfat, the Membership and Projects Editor. Stephanie Sauer, the Editor-in-Chief, expertly guided the team through the process and gave unstinting time and support. Sara Kim, the Senior Projects Editor for Volume 94, provided superbly

¹⁰⁹ See Hessick, *supra* note 4, at 1303–05.

¹¹⁰ See Amar, *supra* note 24, at 1484.

¹¹¹ See *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217–18 (1916); René Lettow Lerner, *The Resilience of Substantive Rights and the False Hope of Procedural Rights: The Case of the Second Amendment and the Seventh Amendment*, 116 NW. U. L. REV. 275, 302 (2021).

¹¹² See Bibas, *supra* note 2, at 1384–85.

¹¹³ See Amar, *supra* note 24, at 1484.

¹¹⁴ See *id.*

¹¹⁵ See LANGBEIN, LERNER & SMITH, *supra* note 96, at 605.

careful and sensitive edits of transcripts and written contributions. They have made this a model for how a Symposium should be run and greatly contributed to its impact.

The George Washington University Law School, located as it is in the nation's capital, is a marvelous place to explore the possibilities of legal reform. This Symposium brought together distinguished guests from different branches of the legal profession and exposed us all to new ideas and methods of reform concerning one of the most venerable and celebrated legal institutions. The Symposium has helped to breathe new life into the jury.