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Christopher E. Smith

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IMAGERY, POLITICS, AND JURY REFORM

by

CHRISTOPHER E. SMITH*

I. INTRODUCTION

The legal proceedings generated by Rodney King’s beating at the hands of Los Angeles police officers reminded politicians, commentators, and the American public about the power and importance of the American jury. In 1992, rioting triggered by the Simi Valley, California jury’s acquittal of King’s assailants left dozens of people dead and sections of Los Angeles in smoldering ruins. While economic inequality, police brutality, and criminal mischief were among the contributing causes of the Los Angeles riot, the jury’s decision was clearly the catalytic event that sparked the inferno. In 1993, the nation watched and waited as a Los Angeles federal jury considered civil rights charges against King’s assailants. Although there were highly publicized expressions of fear about a repeat of the 1992 riot, the jury’s guilty verdicts for two of the four officers effectively defused the potential for the violent outbursts of public dissatisfaction that ignited the city the previous year.

The Rodney King cases focused a public spotlight on the role and consequences of jury decisions at a moment in history when juries have become the objects of politically-motivated reform efforts. The juxtaposition of political reactions to the King cases and contemporary efforts to reform the power of juries provides an enlightening illustration of underlying issues about both the jury’s proper role in the American governing system and the political interests pushing for jury reform.

* Associate Professor of Criminal Justice, Michigan State University. A.B., Harvard University, 1980; M.Sc., University of Bristol (England), 1981; J.D., University of Tennessee, 1984; Ph.D., University of Connecticut, 1988.


2. See Seth Mydans, 11 Dead in Los Angeles Rioting; 4,000 Guard Troops Called Out as Fires and Looting Continue, N.Y. TIMES, May 1, 1992, at A1, A20.

3. See, e.g., David Ellis, L.A. Lawless: The Violence Sparked by the King Verdict Reveals Racial Divisions That Have Plagued the City for Years, TIME, May 11, 1992, at 26, 28 ("Though the King verdict clearly sparked the explosion, the black community’s rage had long been building. Citing numerous incidents, black leaders charged that local police forces had systematically brutalized and mistreated blacks.").

II. THE JURY AS SYMBOL AND SUBSTANCE OF DEMOCRACY

A. Symbols and Social Bonds

People within various communities, whether nations or subsets of a society, rely on common traditions, symbols, and beliefs to bind themselves together. In Great Britain, for example, many people look to the royal family as the symbolic embodiment of historic traditions that link the country's people together. As described by one close observer of the Windsors, "[t]he belief behind the British monarchy is that, as a nation, we look to our leaders to share and satisfy... emotional needs as well as the practical need to be properly governed, and... one of the jobs of the monarchy is to meet that collective national need." In other societies, shared religious traditions or myths may provide a focal point for commonality within a community. The United States, by contrast, was founded by people who came from several different religious traditions and who had a distinct aversion to monarchy. Thus the revered symbols needed to bind together American society had to be found in other sources, and one primary source was the fundamental elements of American law.

The United States Constitution was written by a legislative assembly in an effort to preserve a fragile, fledgling country that was fraying at its seams. Over time, however, the practical legislative compromises that comprise much of this fundamental legal document were overlooked as the Constitution gained the image and aura of a sacred text. The deification of the Constitution can be attributed, in large part, to Chief Justice John Marshall, whose famous opinions helped to strengthen the powers of national governmental institutions. In Marshall's interpretive hands, the Constitutional Convention was not merely a meeting of legislators trying to reach the compromises necessary to create a workable government after the failure of the Articles of Confederation. After Marshall, the Framers are esteemed as remarkably pre-

6. See Joseph Campbell, The Power of Myth 22-23 (1988) ("[T]here are two totally different orders of mythology. There is the mythology that relates you to your nature and to the natural world, of which you're a part. And there is the mythology that is strictly sociological, linking you to a particular society. You are not simply a natural man, you are a member of a particular group.").
8. See Sanford Levinson, Constitutional Faity 17 (1988) ("[The] message contained in the analogy of the Constitution to a sacred text or the Supreme Court to a holy institution. . . . emphasize[es] unity and integration. . . .").
scient visionaries who expounded timeless principles of government that could endure and adapt to a growing, changing, and increasingly complex society. As described by one scholar:

Marshall’s vision of the ‘spirit and true meaning of the Constitution,’ tidied up the clutter of history.... Union was hypostatized into Nation; the government of limited authority, so much a part of colonial and revolutionary constitutionalism became a government of sufficient power. The Constitution became the symbol of that Nation and the source of its vitality — a living, dynamic organism. . . .

The deification of the Constitution is a primary component of the development of public reverence for the symbols of law. In the words of one scholar, “courts and other things legal continue to be important symbols of government, undergirding the wish-fulfilling notions we have of impartial decision making.”

B. The Jury and Democracy

Like the Constitution, the American jury is a revered symbol of government by law. In some respects, the jury can claim particularly important symbolic and substantive status because the tradition of the jury, inherited from the British system, is even older than the Constitution. And, moreover, while the Constitution outlines structures and processes for democratic decision making in the American governing system, the jury itself is a primary institutional embodiment of democratic decision making within the judicial branch of government. The jury is “one of the last refuges for the common [person] in having an input into the elite-dominated judicial process.” If it is true that “the rule of law constitutes an important component of democracy,” then the jury is especially important as the community’s primary link between law and democracy in the judicial branch. Through the jury, a collection of citizens speak on behalf of the community during judicial proceedings. Although both elected judges in state courts and judges nominated and confirmed by elected officials in federal courts provide indirect links

11. See 1 ROBERTS & ROBERTS, supra note 7, at 106 (“The true trial jury, or petty jury, first appeared [in England] about 1200, when justices gave the accused the option, on the payment of a small fee, of having his or her case decided by a jury. . . . During the thirteenth and fourteenth centuries trial by jury became the accepted method of deciding criminal cases.”).
12. STUMPF, supra note 10, at 95.
between democracy and judicial decision making, the jury provides the most direct and most democratic decision-making mechanism in the judicial process. This link rests not only on the jury’s symbolic voice in speaking on behalf of the community, but also on the essential democratic quality of representativeness as the jury is presumed to speak for the entire community rather than for just one segment of the community.

The functions that the jury serves for the United States are well-recognized. As summarized by the report on the American Bar Association/Brookings Institution symposium on civil juries, the jury is:

1) An effective means to resolve fairly disputed facts;
2) A means to protect against abuses of power by legislatures, judges, prosecutors, businesses, and other powerful political elites;
3) A vehicle for bringing community values into dispute processing;
4) A check against the bureaucratization and professionalization of the legal system; and
5) A means for legitimizing the outcome of dispute processing and facilitating citizens’ knowledge about the legal process.

Although juries serve these functions, much of their value and impact are symbolic because they do not determine outcomes in the vast majority of criminal and civil cases which are, respectively, terminated through plea bargaining or processed through settlement negotiations. Despite the relative rarity of juries actually determining case outcomes, as demonstrated by


In theory, democratic accountability is maintained in judicial appointment systems because the voters can oust the appointing officials, namely the president, governor, or legislature, if the electorate is unhappy with the judges. Thus, new elected officials in government would fill subsequent judicial vacancies with different appointees who would be more attuned to society’s values. This indirect accountability mechanism simultaneously ensures that even appointed judges, as a group, do not move too far from the mainstream of society, and it insulates individual judges from direct political pressures which might interfere with their decision making.

Id. at 91.


16. National Center For State Courts, State Court Caseload Statistics: Annual Report 1988 54-55 (1989). For example, in 1988 out of 1,618,012 criminal cases completed in state courts, only six percent went to trial and many of these trials were bench trials. Id.

17. Out of 2,835,491 civil case dispositions in state general jurisdiction courts in 1988, only 9.2 percent of these cases went through a trial and fewer than 13 percent of these trials were jury trials. Id. at 54, 59-60.
the Rodney King cases and similar cases before them, the jury’s function for legitimizing judicial outcomes assumes monumental importance when public order and social stability hinge on popular acceptance of and reverence for the jury’s symbolic and substantive sacredness.

III. THE NECESSITY OF REVERENCE AND THE EXPEDIENCE OF REFORM

A. The Rodney King Case and Reverence for Juries

The first Rodney King case verdict acquitting the defendant police officers triggered a large scale spasm of violence that both reflected and illuminated, albeit briefly, such problems as poverty, discrimination, police brutality, and urban decay. The King case was not unique. As noted by the news media, “it is no accident that nearly all the great ghetto riots since the 1960s have been triggered by some incident involving arrested blacks and white cops.” In 1980 and 1990, Miami experienced violent civil disorders when juries, one petit and one grand, failed to hold police officers accountable for the beating deaths of an African-American motorist [1980] and a Puerto Rican drug suspect [1990]. Instead of providing legitimacy for controversial legal decisions, the jury’s decision can become the focal point and catalyst for public protests, including violent forms, that reflect the dissatisfaction and victimization of politically powerless segments of society. Given the enduring nature of the underlying sources of societal dissatisfaction that become manifested through violence, namely, poverty, inequality, and discrimination, one might expect such public disorders to burst forth regularly, if not continuously, in cities throughout the United States. The fact that such recent explosions have been both relatively infrequent and triggered by jury decisions may reflect high public expectations among the politically dispossessed about the jury’s ability to achieve justice.

The immediate reaction of politically powerful elites to the first Rodney

18. See Ellis, supra note 3, at 28.
21. U.S. BUREAU OF THE CENSUS, SERIES P-60, NO. 163, POVERTY IN THE UNITED STATES: 1987, (1989). For example, in 1987, 32.5 million people, comprising thirteen percent of Americans, had incomes that placed them below the government’s poverty line. Id. at 1. Because only 66 percent of the people living below the government’s poverty line are white, racial minorities, who comprise just 15 percent of the population, are clearly overrepresented, in that they constitute 34 percent of the poor. Id. at 2, 7-8.
King verdict was to emphasize the need for social stability. This reaction is, in many respects, both rational and laudable. Violent social disorder, as manifested in the Los Angeles riot, does not merely threaten the interests of the propertied and the politically powerful. It also imposes human suffering on the victims of social inequality who reside within the areas that are inevitably cordoned off by law enforcement and military personnel as a means to create geographic containment of disorder in the course of authoritatively extinguishing any threatening chaos. While the desire to regain social stability and peace is understandable, the rhetoric about reverence for juries that is advanced to cool passionate public dissatisfaction can sound hollow and jarring when the jury itself is the very catalyst for disorder.

President Bush’s initial statements during the Los Angeles riot typified a reflexive elite response. Instead of discussing or developing policies to address the underlying and seemingly intractable social problems that produced the riot, Bush initially sought to encourage restoration of order by implicitly pointing to the jury, a traditionally revered symbol of law, as a legitimating institution. This rationalization was made in spite of the fact that the entire nation had seen, via videotape, strong evidence of the acquitted police officers’ guilt. As Los Angeles burned, Bush said, “The court system has worked. What’s needed now is calm, respect for the law.” Later, after meeting with civil rights leaders, Bush criticized the verdict. Other political elites echoed Bush’s initial sentiments as, for example, when William Safire wrote following the riot in a column entitled “LA Verdict [Is a] Triumph for Our Rights” that “[t]he bulwark of civil liberty is the jury system.”

In essence, this message seemed to be that so great is the American faith in the jury as the vehicle for liberty and justice that we should accept evident injustice produced by the revered institution’s decision. Thus, although the jury “will occasionally err,” its importance as the democratic decision-making mechanism within the judicial process requires that society automatically respect its authority and decisions.

B. The Political Expedience of Jury Reform

Ironically, President Bush’s purported reverence for jury decision mak-

23. Church, supra note 19, at 25.
26. Id.
ing was absent when he expressed his views on juries in civil cases. When criticized by political opponents for failing to produce any health care reform plan, the Bush administration’s first announced initiative to provide broader health coverage for Americans consisted essentially of limiting the democratic processes of jury decision making in civil cases by proposing caps on medical malpractice awards.27 Vice President Quayle’s Council on Competitiveness took the lead in urging limitations on the authority of juries by, among other things, proposing caps on punitive damage awards in order to “reduce the threat of runaway jury verdicts.”28 In addition, the Council advocated greater use of Alternative Dispute Resolution, thus reinforcing prior recommendations of the Federal Courts Study Committee29 and advancing contemporary dispute-processing trends that, as one scholar observes, serve to diminish the authority of juries:

If we think about twentieth century tort law issues, they relate to political attempts to limit or broaden the power and authority of lay participants. For example, workers compensation took away the right of injured workers to use the legal system. It simultaneously took away the jury’s right to determine the appropriate value for a worker injury. Current no fault [insurance] plans and limits on damages are of the same type. The political message seems to be that citizen participants in the legal system cannot be trusted to act for the common good.30

If citizen jurors “cannot be trusted to act for the common good,” then why should we revere the jury and respect the unjust decisions that it may produce? Any genuine effort to seek a coherent answer to this question requires that one take seriously the apparent contradiction illuminated by the Bush administration’s purported reverence for juries amid the violent chaos of the Los Angeles riot and the same administration’s highly-publicized effort to, in effect, reduce the power of civil juries. It is difficult to address the Bush administration’s apparent contradiction as reflecting principled choices because political interests and expediency so clearly motivated the conflicting characterizations of juries. In the middle of social disorder, it is rational and laudable to seek quick restoration of stability and peace. The reverential

31. Id.
characterization of the jury is motivated by the necessity of seeking social stability and by the recognition that the jury is a component of the potent symbols of democracy and the rule of law that help to bind American society together. In the civil context, attacks on civil juries serve the interests of the Republicans' corporate constituencies and, in the medical context, those of the insurance industry and medical lobby that seek to diminish the costs and loss of profit associated with juries' malpractice awards. The political motivations are even more apparent in light of social science evidence that civil juries generally have not become "threatening" and "runaway" entities as suggested by the Bush administration. Indeed, the monetary figures (i.e., $80 billion) frequently bandied about to show the purportedly exorbitant financial cost of civil litigation were later shown to have come from "an apparent off-the-cuff estimate during a round-table discussion of insurance costs by a group of executives" rather than from any systematic study. Thus, the Bush administration's characterizations of the jury in the criminal and civil contexts are, not surprisingly, easily explainable in terms of, respec-

32. See, e.g., HOWARD L. REITER, PARTIES AND ELECTIONS IN CORPORATE AMERICA 297-99 (1987) (mobilization of business interest groups has contributed to greater national political success for conservatives and Republicans).


The proponents of crisis labeling have included the insurance industry, the Reagan Administration, and various business and professional groups (most prominently, the American Medical Association). This coalition clearly blames the civil justice system and calls for fundamental reform as the only solution to current insurance problems. By doing so, they divert attention away from the causal role of the [insurance] industry's boom and bust cycle, and from the solution of substantially greater industry regulation. The attacks on jury competence are a key part of this strategy. In short, if the crisis-labelers prevail, policy initiatives will focus exclusively on civil justice reform, thereby defusing any effort to impose potentially damaging regulations on the insurance industry. If the opponents prevail, such regulations would be compelled.

Id. at 277.

34. See Neil Vidmar, The Unfair Criticism of Medical Malpractice Juries, 76 JUDICATURE 118, 124 (1992) ("In summary, aggregate empirical evidence drawn from multiple sources lends no support to claims that juries are consistently pro-plaintiff, incompetent, or deliver unjustifiably generous awards. Of course, there may be instances where juries behave irresponsibly or incompetently, but the findings indicate that such instances are the exception").

35. PRESIDENT'S COUNCIL ON COMPETITIVENESS, supra note 28, at 23.

36. See PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 4 (1988) ("[Tort liability] directly costs American individuals, businesses, municipalities, and other government bodies at least $80 billion a year, a figure that equals the total profits of the country's top 200 corporations.").

tively, political necessity and political expedience. In the criminal context, praise for the jury was necessary to quell a civil disorder, but in the civil context, criticism of juries advanced the interests of Republicans' constituents in the corporate, insurance, and medical businesses. The Bush administration was not alone in having its political motivations generate its viewpoints about the role of the jury because the jury's defenders, including the plaintiff bar, have their own self-interest involved in defending the authority of civil juries to determine damages. 38

IV. CONCEPTIONS OF THE JURY AND JURY REFORM

A. Distinguishing Civil and Criminal Juries

Although Bush's public expressions concerning the jury at the time of the first Rodney King case indicated that the Bush administration's views were based on political expedience, those views are useful for raising important underlying questions about how the United States should proceed with proposals for jury reform.

The approach that Bush's statements apparently endorse is to treat criminal and civil juries differently for purposes of reform. This approach requires viewing criminal and civil juries differently with respect to their functions, social benefits, and deservedness for reverence. In some respects, this is a plausible approach. Criminal cases provide the context in which the coercive power of the state is manifested in deprivations of individual liberty and even the ending of individuals' lives. The jury performs an important traditional function by checking potential abuses of governmental power by prosecutors and judges that might lead to unjust incarceration or executions. By contrast, civil cases arguably concern less important matters because individual liberty is not at stake.

We are accustomed to treating criminal and civil judicial processes differently in several respects for precisely these reasons. For example, the right to trial by jury contained in the Sixth Amendment 39 has been incorporated to apply to the states 40 while the Seventh Amendment's right to a civil jury trial 41

38. Daniels, supra note 33, at 277. "[T]he opponents of crisis labeling are primarily consumer groups and trial lawyers' associations," because these interests benefit from the availability of large financial awards in medical malpractice, product liability, and other injury cases. Id.

39. U.S. CONST. amend. VI. According to the Sixth Amendment, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." Id.


41. U.S. CONST. amend. VII. According to the Seventh Amendment, "In suits at common
applies only against the federal government. Similarly, indigent criminal defendants facing incarceration have a right to be represented by legal counsel but "no comparable right to legal assistance for indigent parties" exists with respect to civil proceedings.

Developments in 1993 were an especially telling indication that the civil jury, unlike the criminal jury, is neither revered nor even viewed as a necessary mechanism for bringing democracy into the judicial process. Although speedy trial requirements ensure that the federal courts continuously process criminal cases, budgetary problems led many federal judges to announce that as of April there would be no more civil trials scheduled for 1993 because of a lack of funds to pay jurors. It is difficult to imagine that other traditional democratic mechanisms for involving citizens in authoritative decision making, such as elections, would so readily face cancellation for lack of funds.

Despite the many examples showing how criminal matters are distinguished from putatively less important civil matters, the distinction between criminal and civil judicial processes is by no means compelling. There are grave risks that government, business, and other powerful entities may abuse their power concerning issues in civil cases if juries and their power to award damages were not available to deter and punish harmful conduct. Personal injuries, product safety, and other civil matters are arguably as important as individual liberty in the criminal context, because they can result in deaths and crippling injuries if responsible parties are not held accountable and deterred from unsafe practices.

The difference between civil and criminal jury decisions stems not from the importance of the respective decisions for individual human beings’ lives but from the broader societal policy consequences of civil case decisions. Criminal jury decisions determine the fates of individuals and do not usually

law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ."  
47. See Richard L. Abel, The Crisis Is Injuries, Not Liability, printed in NEW DIRECTIONS IN LIABILITY LAW 31 (Walter Olson ed. 1988). Some scholars have argued that the United States does not have a problem with excessive litigation but rather a problem of excessive injuries in the workplace and elsewhere that require compensation through the litigation process.  

Id.
threaten the economic interests of politically powerful corporate interests. By contrast, because civil verdicts actually entail a reallocation of resources within society, affect the availability and price of products and services, and serve as a 'yardstick' for negotiated outcomes in civil litigation, civil jury decisions have a broader impact and can motivate political counterattacks by threatened interests.


Tort law cases are significant for public policy because they can change the rules for behavior of individuals and businesses and also redistribute wealth throughout society. For example, in October 1991 a jury in Chicago awarded a man $127 million because he lost his left eye when a doctor injected the eye with a synthetic steroid drug. The award included $3.1 million in actual compensatory damages for the loss of the eye and $124.5 million in punitive damages to punish the manufacturer of the steroid. Although the award subsequently may be reduced or overturned on appeal, if it holds it may have significant cumulative effects upon other people in American society. The drug company may have to sell its factory and thereby jeopardize its employees' jobs in order to pay the award. The company may seek to avoid additional lawsuits by ceasing production and sales of the drug. In addition to affecting employees' jobs, such a decision would suddenly make less available and perhaps even unavailable a drug that had been used effectively in treating medical problems in parts of the body other than the eye. A reduction in the drug's availability would probably raise the price of the drug for patients who would have to obtain it from other manufacturers. If other American companies were frightened away from producing the drug because of their fear that they could be subject to similar lawsuits, the drug may become prohibitively expensive as people seek to obtain it from foreign manufacturers or it may simply become completely unavailable in the United States. The jury award may cause insurance companies to raise the premiums that they charge to drug manufacturers in order to guard against liability in other lawsuits and drug manufacturers would then raise the prices of all of their products in order to pay for the increased premiums. Insurance companies may also raise the premiums that they charge all customers, including individuals, in order to pay for significant awards in medical tort cases. In sum, the result of a tort case between a single individual and a drug manufacturer may affect everyone in American society by raising the prices for various products and potentially reducing or eliminating the availability of products that may be useful or even necessary in the treatment of specific medical conditions.

Id. at 127-28 (footnotes omitted).
49. Id. at 136.

Jury awards also serve to create local standards for settlement decisions in civil litigation. For example, when an errant police bullet went through the wall of a house in Barberton, Ohio and killed an innocent homeowner sleeping inside, the city's agreement to settle any potential lawsuit for the man's death by paying the family $1.2 million was not based upon the city's altruistic evaluation concerning how much money they ought to pay for causing the death. The amount was determined through an assessment by the city's attorney about how much a jury might award if the case were to go to trial. In fact, the Barberton city attorney's letter to the city council concerning the settlement justified the amount by specifically discussing the likely jury award in a trial. By assessing the potential jury award and arriving at a negotiated settlement, the city — or any other defendant — can resolve their potential liability while avoiding the significant litigation expenses (e.g., attorneys' fees, court costs, discovery costs, etc.) that would be incurred if the case were to proceed through the entire judicial process.

Id. (footnotes omitted).
B. The Jury and Democratic Decision Making

Because of the policy ramifications of decisions by civil juries, there are legitimate concerns about whether juries have access to sufficient and appropriate information and whether jurors are competent to make good policy-shaping decisions.\(^{50}\) Such questions have also been directed, however, at more established and accepted policy-making actors, such as legislators and judges.\(^{51}\) The judicial process, including jury trials, may provide a flawed forum for deciding public policy issues,\(^{52}\) but given that other policy-making institutions are flawed, do the jury’s flaws justify removing its traditional authority over legal decisions and thereby diminishing the application of democratic decision making within the judicial branch? If the jury truly deserves to be revered as a democratic mechanism for decision making, as it apparently is supposed to be in criminal cases, why not apply that reverence to the civil context and seek reforms to improve the jury as a democratic decision-making entity? Because this would require a conceptualization of the jury’s role which differs from the contemporary concept that distinguishes criminal from civil juries,\(^{53}\) it would lead to an entirely different approach to jury reform. Indeed, Bush’s tactic of encouraging reverence for the jury’s decision in the first Rodney King case was ineffective because it reflected a failure to recognize that the jury’s inability to legitimize the police officers’ acquittal was not simply due to a perception that the verdict was erroneous and unjust. People in Los Angeles reacted against the verdict because the nearly monochromatic jury\(^{54}\) lacked the democratic attribute (i.e., representative-

\(^{50}\) See Vidmar, supra note 34, at 123 (“[Jury competence] is one of the most problematic issues in assessing jury performance, because it is difficult to obtain even expert consensus on what constitutes negligence.”).

\(^{51}\) See Stephen L. Wasby, Arrogation of Power or Accountability: ‘Judicial Imperialism’ Revisited, 65 JUDICATURE 209 (1981). For example, legislators and judges lack expertise on many policy issues over which they have authority. Furthermore, in all branches of government, information available to decision makers may be incomplete or skewed because of the reliance on interest group lobbyists, lawyers, and other partisan advocates to provide relevant information. Id.

\(^{52}\) See DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 22-67, 255-98 (1977). Courts are viewed as flawed policy-making forums for a variety of reasons. The adversarial litigation process may not provide complete information to the relevant decision makers (i.e., judges and juries). The decision makers lack expertise on the issues that they decide. The decision makers are removed from the social context of the issues that they decide. Judicial decision makers cannot adequately anticipate the broad consequences of the decisions which they develop by focusing on two specific contending litigants. Id.

\(^{53}\) See supra notes 39-46 and accompanying text.

\(^{54}\) Less Than a Day to Decide to Acquit, N.Y. TIMES, April 30, 1992, at D22. Although the alleged crime against the African-American motorist by the white police officers occurred in Los Angeles, a city whose population is comprised of significant percentages of African-American and Hispanic citizens, the trial was moved to “mostly white, middle-class Ventura
ness) necessary to persuade people that the verdict was a fair and thoughtful judgment reflecting the consensus of a spectrum of diverse viewpoints. Thus Bush, if genuinely concerned about the accuracy of his characterization of the jury as an institution deserving of reverence, should have proposed reforms that would enhance the democratic-ness of juries.

Reform efforts intended to support the jury’s idealized role as a revered democratic institution would presumably focus on strengthening juries’ democratic attributes. Rather than seek to diminish the civil jury’s power, reforms would attempt to improve the quality of jury’s democratically-produced decisions, with one primary criterion for “quality” being the representativeness of the jurors who speak on behalf of the community in rendering a verdict. The nearly homogenous Simi Valley jury in Rodney King’s first case (when the police officers were acquitted) received endorsements from Bush and others as a democratic entity deserving of reverence, despite the fact that the Simi Valley jury lacked the quality of representativeness that may be regarded as the *sine qua non* for recognition of a jury as a democratic decision-making institution within American society. The endorsements were obviously motivated by political necessity in a crisis situation, but they served to illuminate the question of whether juries are inherently deserving of reverence simply for being composed of citizens from a community or whether reverence for juries as democratic institutions should depend on their democratic attributes, such as representativeness in the context of the community and incident at issue in the case.

In an even more stark example than the Rodney King case, juries in the southern United States prior to the 1970s were composed of citizens, but because of the categorical and politically-motivated exclusion of certain segments of the community, especially African-Americans and women, such juries could not possibly deserve reverence as democratic institutions. As Gunnar Myrdal observed in the 1940s:

> The American jury system, while it has many merits, is likely to strengthen th[e] dependence of justice upon local popular opinion. If, as in the South, [African-Americans] are kept out of jury service, the democratic safeguard of the jury system is easily turned into a means of minority subjugation. . . .

County” and resulted in the selection of a jury containing “10 whites, one Hispanic, and one Asian juror.” *Id.*

55. *Id.*

56. See Hoyt v. Florida, 368 U.S. 57 (1961) (in 1961 the Supreme Court endorsed a Florida statute that automatically exempted women, but not men, from jury service unless they specifically expressed their desire to serve on juries by registering with the local government).
The extreme democracy in the American system of justice turns out, thus, to be the greatest menace to legal democracy when it is based on restricted political participation and an ingrained tradition of caste suppression.\textsuperscript{57}

The first Rodney King jury and Myrdal's assessment of the pre-civil rights movement in the South serve as reminders that if juries are to be regarded as democratic institutions deserving of reverence, they must be structured to advance the democratic ideals and attributes that they are presumed to embody.

If court reform is to enhance the jury as a revered democratic institution, rather than to seek to diminish the power of civil juries in particular, then reform proposals should focus on the size and composition of juries. With respect to jury size, the U.S. Supreme Court's decisions set guidelines for constitutionally acceptable size and unanimity requirements.\textsuperscript{58} In determining that juries can be smaller in size than twelve jurors and do not have to be unanimous, the Court overlooked significant social science research raising concerns about the risks of biased decision making in small and split juries.\textsuperscript{59}

The underlying issue concerns whether a jury, in order to fulfill its mission as a democratic decision-making entity, has sufficient size to prevent the persuasive dominance of a single member or faction and has enough members to represent a reasonable range of varying viewpoints that might approach the determination of facts and application of law in different ways. Obviously, in contemporary practice and conceptualization, criminal juries are frequently treated differently (i.e., with greater emphasis on this democratic consideration) than are civil juries. For example, "a substantial majority of states, as well as most federal district courts, use smaller-size juries in civil cases,"\textsuperscript{60} although relatively few states use such juries for criminal felony cases.\textsuperscript{61}

These reform efforts are motivated by state and local governments' concerns with cost and convenience. Smaller juries can entail smaller jury pools, as well as fewer financial costs associated with compensating jurors, and fewer time costs associated with jury selection processes. The contemporary practice and trend of relying on juries of fewer than twelve members for civil cases

\textsuperscript{57} Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy 524 (1944) (emphasis in original).


\textsuperscript{59} See Peter W. Sperlich, And Then There Were Six: The Decline of the American Jury, 63 Judicature 262 (1980).

\textsuperscript{60} Levine, supra note 20, at 29.

\textsuperscript{61} George F. Cole, The American System of Criminal Justice 479 (6th ed. 1992). Only six states permit juries with fewer than twelve members to decide felony cases, but nearly twenty states permit small juries in misdemeanor cases. Id.
diminishes the "democratic-ness" of the jury as a decision-making institution and parallels other trends that emphasize efficiency over "due process" and "justice." 62

The democratic quality of juries as decision-making entities depends on the representativeness of jury composition. Various states' heavy reliance on voter registration lists to create jury pools is commonly known to skew jury pool composition in favor of the white, middle-class, and older people who are most likely to be registered voters. 63 Consequently, the values and experiences represented in jury verdicts effectively diminish or exclude perspectives from other segments of a local community and thereby create risks of discriminatory decisions. 64 When state legislatures seek to broaden the jury pool, the potential success of their efforts is affected by whether their state laws merely permit 65 or actually require 66 the use of lists other than those of reg-

62. See Christopher E. Smith & Avis Alexandria Jones, The Rehnquist Court’s Activism and the Risk of Injustice, 26 CONN. L. REV. 53 (1993). For example, the Rehnquist Court’s efficiency-based efforts to reduce prisoners’ habeas corpus petitions in the federal courts and thereby expedite the executions of convicted murderers on death row have increased the risks that trial errors, inadequate representation by counsel, racial discrimination, and other undesirable influences will infect decisions in state criminal justice cases. Id. at 60-61.

63. VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 54 (1986). The Supreme Court has approved the use of voter registration lists as the exclusive source for the names of potential jurors. Because poor people, members of racial minority groups, and young people are less likely than other people to be registered voters, these demographic groups are underrepresented on juries. Id.

64. For example, results of experimental studies indicate that when simulated jurors are confronted with identical factual situations but with different cues about defendants’ socioeconomic status, they are more likely to find poor defendants rather than affluent defendants guilty of criminal offenses based upon the same evidence and behavior. See James M. Gleason & Victor A. Harris, Race, Socio-Economic Status, and Perceived Similarity as Determinants of Judgments by Simulated Jurors, 3 SOC. BEHAV. & PERSONALITY 175 (1975); James M. Gleason & Victor A. Harris, Discussion and Defendant’s Socio-Economic Status as Determinants of Judgments by Simulated Jurors, 6 J. APPLIED SOC. PSYCHOL. 186 (1976).

65. For example, under Minnesota’s state statute “[t]he jury commissioner for each county shall . . . compile and maintain . . . copies of all lists to be used in the random selection of prospective jurors; the voter registration lists for the judicial district shall serve as the source list but may be supplemented with names from other lists of persons resident therein, such as lists of utility customers, property and income taxpayers, motor vehicle registrations, and drivers’ licenses, and welfare recipients, which may be specified in the county juror selection plan.” Minn. Stat. § 593.37 (1988) (emphasis added) repealed by Laws 1990 ch. 553, § 15.

66. Under Alaska’s statute, the jury list shall be based on a list prepared by the Department of Revenue of all persons who filed an application for a distribution of Alaska permanent fund income under AS 43.23 during the current calendar year that shows an Alaskan address, and of all persons who volunteer for jury duty under (d) of this section. Alaska Stat. § 09.20.050(b)(1993). If considered necessary by the administrative director of the Alaska Court System, the jury list shall incorporate a list prepared by the Department of Public Safety of all persons who hold a valid Alaska driver’s license § 09.20.050(b).
istered voters. Even if alternate lists are utilized which are intended to pro-
vide greater representation within the jury pool of poorer and younger people, 
various practical barriers, such as lack of access to and resources for transpor-
tation and child care, can limit the cooperation and participation of less afflu-
ent people. In a society in which inexpensive public transportation and child 
care were more readily available, these practical barriers to jury service might 
have less of a detrimental impact on jury composition. In the United States, 
however, a forceful effort to enhance the democratic quality of jury decision 
making would require the expenditure of government resources to specifically 
redress these practical barriers. Neither the public commitment nor the re-
sources will be forthcoming for such efforts, in part, because the American 
conception of juries merely seems to require a group of citizens as decision 
makers rather than a group of citizens that truly reflects the diversity of the 
local community. Many states have statutes concerning the issue of jury rep-
resentativeness, but these statutes are merely statements forbidding discrimi-
nation and expressing a policy favoring “a fair cross section” without mandat-
ing active steps to ensure that representative diversity is achieved within jury 
composition.67

Jury composition may be further skewed through the use of peremptory 
challenges. Attorneys employ peremptory challenges with the hope that the 
viewpoints and values represented on the jury will favor one side or the other 
in the legal proceedings. Although defended by Justice Antonin Scalia as an 
“ages-old right”68 and an “important . . . [and] necessary” part of the Ameri-
can jury system,69 one might consider abolishing peremptory challenges 
because such challenges invite attorneys to manipulate jury composition with 
the self-interested intention of enhancing favorable bias. Indeed, social sci-
entists have raised concerns about how peremptory challenges are used, 
especially in the criminal context by prosecutors who seek to exclude younger 
people and members of minority groups in order to obtain conviction prone 
middle-class juries.70 The use of peremptory challenges is usually justified by 
claiming that they contribute to the selection of a more impartial jury:

67. MISS. CODE. ANN. § 13-5-2 (1993). For example, Mississippi’s statute includes the 
very same language typically contained in similar laws enacted by other states: “It is the 
policy of this state that all persons selected for jury service be selected at random from a fair 
cross section of the population of the area served by the court, and that all qualified citizens 
have the opportunity in accordance with this chapter to be considered for jury service in this 
state and an obligation to serve as jurors when summoned for that purpose. A citizen shall 
not be excluded from jury service in this state on account of race, color, religion, sex, national 
origin, or economic status.” § 13-5-2.
70. HANS & VIDMAR, supra note 63, at 75. Studies indicate that prosecutors
Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of "eliminating extremes of partiality on both sides," thereby "assuring the selection of a qualified and unbiased jury." However, because such challenges are based on attorneys' hunches and "beliefs," there is little reason to expect that peremptory challenges necessarily enhance impartiality. Moreover, given their application against poorer and younger potential jurors in criminal cases, there are many reasons to expect peremptory challenges to enhance bias. Despite the apparent problems and Justice Clarence Thomas's as-yet-unsubstantiated belief that the Supreme Court's decisions have "ventured down a road that inexorably will lead to the elimination of peremptory strikes," any efforts to reform (or abolish) peremptory challenges as devices that potentially detract from the democratic quality of juries will require a direct attack on a long-standing tradition that has political defenders among both litigators and the purveyors of scientific jury selection.

V. DEMOCRATIC IMAGERY AND POLITICAL REALITY

The foregoing examples illustrate how jury reform might be aimed at enhancing the democratic quality of juries. In reality, however, these types of reforms do not appear to be high on anyone's political agenda. Resource scarcity and an emphasis on judicial efficiency encourage the use of smaller juries and selection mechanisms that draw middle-class jurors who are willing and able to serve without undue personal inconvenience or hardship. Because the U.S. Supreme Court has constrained attorneys' visible racial and gender motivations — but not other motivations — in applying peremptory
disproportionately use peremptory challenges to exclude members of racial minority groups and young people. Id.

71. Holland, 493 U.S. at 484.
72. Id.
73. HANS & VIDMAR, supra note 63, at 75.
74. Georgia v. McCollum, 112 S.Ct. 2348, 2360 (Thomas, J., concurring in judgment).
75. See Shari Seidman Diamond, Scientific Jury Selection: What Social Scientists Know and Do Not Know, 73 JUDICATURE 178 (1990). In "scientific jury selection," attorneys hire jury experts to advise them about the demographic profiles (i.e., age, occupation, gender, etc.) of the jurors most likely to be sympathetic to their arguments. Lawyers can then use their peremptory challenges strategically in an attempt to exclude jurors with "unfavorable" demographic characteristics and thereby keep presumptively sympathetic jurors on the jury. Such techniques have produced mixed results for attorneys seeking to create a favorable decision-making environment during a trial. Id.
challenges,\textsuperscript{76} traditional peremptory challenges remain securely in existence as tools for attorney manipulation of jury composition. Although it is the democratic decision-making entity in the judicial process, the jury has yet to fulfill its potential for “democratic-ness,” especially with respect to the quality of representativeness. Moreover, the apparently predominant view among policy makers that the civil jury is not only expendable but actually threatening to socially beneficial dispute processing demonstrates that there is no consistent, prevailing conception of the jury as an essential democratic institution. Despite the mixed image of the jury, as President Bush illustrated in the aftermath of the first Rodney King case,\textsuperscript{77} political elites can seek symbolic benefits from using the jury’s presumptively revered status as the democratic institution embodying both the rule of law and citizen decision making in the judicial process.

Given that prevailing practices and contemporary reforms generally detract from, rather than enhance, the jury’s democratic qualities, especially with respect to ensuring representational diversity, politically-motivated efforts to portray the jury as an institution deserving of reverence might seem patently disingenuous. However, Americans are accustomed to overlooking inconsistencies and gaps between their political rhetoric and their political reality. The reverential language about democracy directed at other American governing institutions fits the same inconsistent pattern as that produced by the defenders of the unrepresentative (and therefore not-entirely-democratic) first Rodney King jury.

Americans frequently hold their governing system out to the world as a model of workable democracy.\textsuperscript{78} Moreover, it is certainly true that, unlike the younger governing systems in many other countries, the American constitutional system has evolved, survived, and functioned for more than two hundred years. The perceived success of the system for achieving a measure of stability, individual liberty, and citizen participation in choosing leaders has contributed to the system’s revered status as an exemplary democracy. Lurking behind the image, however, are a variety of distinctly undemocratic elements ranging from the Electoral College\textsuperscript{79} to, most glaring of all, the lack of


\textsuperscript{77} See supra note 23 and accompanying text.

\textsuperscript{78} See CHARLES W. KEGLEY, JR. & EUGENE R. WITTKOPF, THE FUTURE OF AMERICAN FOREIGN POLICY (1992). The Bush administration, for example, “often extolled the need to promote democracy abroad.” \textit{Id.} at 11.

\textsuperscript{79} U.S. CONST. amend. XII. Under the Constitution, Americans to do not vote directly for presidential candidates, but instead select “electors” who officially select the president
equal voting representation in Congress for the 600,000 citizens who reside in Washington, D.C. Thus the pervasive, reverent rhetoric about the American democracy obscures the strikingly undemocratic attributes of the governing system.

Although both juries and the governing system itself fall short of fulfilling their democratic potential, especially with respect to equal representation in decision making, they are each purported to be deserving of reverence as embodiments of democracy. Such imagery presumably contributes to social stability by providing shared beliefs to bind together the American citizenry. Unfortunately, consistent efforts to cultivate, promote, or utilize the reservoir of reverence for juries, whether by U.S. presidents or by eighth grade civics class teachers, may distract the public from recognizing apparent problems and contradictions that separate rhetoric from reality. For example, policy makers have not treated civil juries as revered and essential democratic institutions in the course of seeking to remove power from such juries at the behest of political interests who wish to limit their own legal liability for harms produced by products and services. As long as Americans remain accustomed to hearing that criminal and civil juries are fundamentally distinguishable, there is little likelihood that even the intense attention to juries generated by the Rodney King cases can produce a broader reconsideration of the jury's proper role in the American governing system. Moreover, potential reforms to preserve and enhance, rather than diminish, the power and democratic-ness of juries as decision makers in the judicial process currently have little political support in an era of resource scarcity in which influential interest groups advance opposing reforms.

after the presidential election. Id.

80. THE WORLD ALMANAC AND BOOK OF FACTS: 1991, at 644 (1991). The District of Columbia's representative in Congress has, since 1970, been permitted to vote in legislative committees but the representative may not vote for final legislation on the floor of the House of Representatives. The District's citizens have no representation in the U.S. Senate and only gained the ability to vote in presidential elections through the Twenty-third Amendment in 1961. By contrast, there are three states (i.e., Alaska, Vermont, Wyoming) with smaller populations than that of Washington, D.C. and two other states comparable in size to the District (i.e., North Dakota, South Dakota). Id. at 591-608. Each of these states has at least three voting representatives in Congress, two in the Senate and one in the House. Id.

81. See supra notes 32-33 and accompanying text.