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Volume 64

Issue 2 Winter 2014: *Twentieth Annual Clifford  
Symposium on Tort Law and Social Policy -  
Symposium: In Honor of Jack Weinstein*

Article 7

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## Recommended Citation

Shari Seidman Diamond & Francis Doorley, *What a (Very) Smart Trial Judge Knows About Juries*, 64 DePaul L. Rev. (2015)  
Available at: <http://via.library.depaul.edu/law-review/vol64/iss2/7>

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## WHAT A (VERY) SMART TRIAL JUDGE KNOWS ABOUT JURIES

*Shari Seidman Diamond\**  
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In courtrooms across the country, trial judges meet the citizens who are called for jury duty and have an opportunity to watch as those citizens serve as jurors. Judge Weinstein has used his vantage point in the courtroom to good effect. His response to the jury reflects the deep and nuanced understanding of an attentive and very smart trial judge—an understanding reflected in his scholarly commentary about the jury, his decisions, and the procedures he uses with juries in his courtroom.

It is no coincidence that the wise Judge Weinstein is a trial court judge: the vantage point of a trial judge for analyzing the jury is distinctive. In the course of presiding over jury trials, trial court judges see juries face-to-face. In contrast, appellate court judges review jury decisions from a distance and only when one of the parties has appealed. These two different opportunities to view the jury have important consequences for what judges can learn about juries. The trial court judge sees not merely the jury firsthand, but also the live trial, which includes the witnesses and parties who the jury evaluates in reaching its verdict. In contrast, the appellate court judge has only the words of the trial record. This more limited resource explains why, with good reason, appellate courts are expected to defer to trial courts in reviewing issues that touch on witness and juror demeanor.<sup>1</sup>

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1. “[Appellate judges] should take into account the fact that the trial judge is likely much more familiar with the case than they are . . . . [As an appellate judge,] you defer to the lower court because you think they know more about what’s going on, which is true.” *A Conversation with Associate Justice Stephen Breyer and Professor Stephan Landsman*, YOUTUBE (Apr. 28, 2014), <https://www.youtube.com/watch?v=yBMD7hN9wRc>; see also *State v. Johnson*, 199 A.2d 809, 817 (N.J. 1964) (stating that an appellate court “should give deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the ‘feel’ of the case, which a reviewing court cannot enjoy”). Authority for this deference is also reflected in Federal Rule of Civil Procedure 52(a)(6) (“Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the

A second and less appreciated difference between trial and appellate judges also puts appellate courts at a disadvantage in understanding and evaluating juries. Although all verdicts disappoint one of the parties, jury verdicts lead to appeals only when one of the parties is unwilling to accept the verdict. Thus, appellate cases constitute only a small and biased sample of jury cases, those in which one party believes it has an argument worth pursuing that the jury got it wrong.

It should not be surprising, therefore, that prominent Second Circuit Judge Jerome Frank was one of the most aggressive critics of the jury (although he was also critical of judges).<sup>2</sup> Judge Frank handled corporate reorganizations when he was in practice, and was appointed to the Second Circuit from his position as the head of the Securities and Exchange Commission. He never served as a trial court judge, and it is unclear whether he ever saw a jury trial firsthand. Of course, we cannot know whether such experience would have altered his view, but his perspective on the jury and its role as a decision maker contrasts sharply with the perspective of federal district court judge Jack Weinstein. Judge Weinstein's writings on the jury reflect his rich repertoire of jury trial experience, and express his deep appreciation for the jury's abilities and performance.

Judge Weinstein is a prolific and distinctively scholarly judge. In preparing this Article, we reviewed cases in which he referred to the jury, as well as published articles in which he discussed the jury and its role in the legal system. His analyses almost always match the findings of empirical scholarship on the jury, and his opinions often refer to those findings. But Judge Weinstein also describes innovative uses of juries and jury decisions, and offers hypotheses about juries that scholars have not yet tested. He not only reflects current knowledge about the jury, but also offers proposals and a research agenda for the future. In a few instances, we disagree with Judge Weinstein's views on the jury, but our disagreements are only at the edges.

Part I begins with an overview of Judge Weinstein's perspective on the appropriate behavior of jurors and his evaluation of what juries actually do. Part II discusses Judge Weinstein's views on the way to conduct an optimal jury trial that flow from his perspective on the jury. In Part III, we evaluate three innovative, albeit controversial, approaches that Judge Weinstein has championed to take advantage of unique strengths the jury can offer: the advisory jury, the nullifying

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reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.").

2. JEROME FRANK, *Defenses of the Jury System—Proposed Reforms*, in *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 126 (1949).

jury, and the use of jury verdicts in other cases as a reference point for reviewing appropriate damages. Part IV compares Judge Weinstein's views of the jury with those of other trial court judges, highlighting his leadership role among trial judges.

### I. IDEAL AND REAL JURIES

One view of the jury sees the ideal juror as a blank slate. According to an early image of the jury, jurors "should be as white paper."<sup>3</sup> This picture of an empty page has some appeal: the hypothetical juror who has no prior expectations or beliefs about the world, let alone the particular facts of the case, should have no predisposition to favor one side or another. As Judge Weinstein has concluded, however, this hypothetical "blank slate" juror is a fanciful image. "Every juror brings values and information into a courtroom," and "that shapes how the evidence will be interpreted."<sup>4</sup> Empirical research provides ample corroboration for this view,<sup>5</sup> and in his typical scholarly fashion, Judge Weinstein draws on both social psychology and philosophical writings for support.<sup>6</sup>

Judge Weinstein not only rejects this empty vessel image of the jury as a descriptive matter; he also sees the prior experiences and beliefs that jurors bring to the courtroom as a *necessary* feature of the jury. As Judge Weinstein has observed: "[J]urors must come into the courtroom with enough experience to provide the hypotheses from real life necessary to decide issues of fact."<sup>7</sup>

But Judge Weinstein goes further: he views the input that jurors provide based on their backgrounds and experiences as a key strength of the jury. Many courts, including the United States Supreme Court, praise the jury for its common sense;<sup>8</sup> instructions often tell jurors to

3. *Mylock v. Saladine*, (1781) 96 Eng. Rep. 278 (K.B.) 278; 1 Black. W. 480, 481.

4. *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 138 F. Supp. 2d 357, 369 (E.D.N.Y. 2001).

5. See, e.g., W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* (1981); Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOC'Y REV. 513, 557 (1992); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 519 (1991); Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. PERSONALITY & SOC. PSYCHOL. 189, 189 (1992); Vicki L. Smith & Christina A. Studebaker, *What Do You Expect?: The Influence of People's Prior Knowledge of Crime Categories on Fact-Finding*, 20 LAW & HUM. BEHAV. 517, 528-29 (1996).

6. *Blue Cross & Blue Shield*, 138 F. Supp. 2d at 367.

7. *Id.* at 369.

8. *Williams v. Florida*, 399 U.S. 78, 100 (1970) ("[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen . . .").

use their common sense,<sup>9</sup> and attorneys often echo that message.<sup>10</sup> It is less clear what “common sense” actually means.<sup>11</sup> Judge Weinstein provides examples that reflect an expansive understanding of the contours of common sense, although he may go further than many of his colleagues on the bench would feel comfortable doing. In *United States v. Chong*,<sup>12</sup> for example, he concluded “the jury can be expected to have general knowledge of mislabeling of some Chinese products,” noting that “[jurors] help bring knowledge of real world commerce into the courtroom.”<sup>13</sup> In *Braune v. Abbott Laboratories*,<sup>14</sup> he rejected the defendant’s claim that the statute of limitations entitled the defendant to summary judgment, concluding that a jury should determine when the plaintiffs discovered that their reproductive abnormalities were a result of their in utero exposure to diethylstilbestrol (DES) rather than to natural causes.<sup>15</sup> Judge Weinstein found that a jury might reasonably decide that a woman would initially suspect that her medical problem stemmed “from genetic or other non-fault based difficulties, rather than from human intervention.”<sup>16</sup> He concluded: “These are considerations particularly understood by our representative jurors whose practical common sense reflect the wisdom of a consensus of the community’s cross section.”<sup>17</sup>

More fundamentally, Judge Weinstein identifies the jury’s mixture of backgrounds and experiences as a prominent source of what the jury can offer that a judge cannot. Acknowledging as few judges do, at least publicly, the “rather sheltered background” of the typical judge, Judge Weinstein salutes the jury as the source “for knowledge of how life operates outside our courthouses and our social circle.”<sup>18</sup> He singles out, in particular, the advantages of the jury in employment

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9. See, e.g., CIVIL JURY INSTRUCTIONS COMM., REVISED ARIZONA JURY INSTRUCTIONS (CIVIL) 6 (3d ed. 1997) [hereinafter ARIZONA JURY INSTRUCTIONS] (“Consider all of the evidence in the light of reason, common sense, and experience.”); PATTERN JURY INSTRUCTIONS FOR CIVIL PRACTICE IN THE SUPERIOR COURT OF THE STATE OF DELAWARE § 3.2 (rev. ed. 2006) (“[U]se your common sense to reach conclusions based on the evidence.”).

10. Shari Seidman Diamond et al., *The “Kettleful of Law” in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537, 1555 n.63 (2012).

11. See generally Marilyn MacCrimmon, *What Is “Common” About Common Sense?: Cautionary Tales for Travelers Crossing Disciplinary Boundaries*, 22 CARDOZO L. REV. 1433 (2001).

12. 990 F. Supp. 2d 320 (E.D.N.Y. 2014).

13. *Id.* at 322.

14. 895 F. Supp. 530 (E.D.N.Y. 1995).

15. *Id.* at 537 (“[T]he statute of limitations is triggered when a plaintiff either discovered or reasonably should have discovered her ‘injury’ from DES.”).

16. *Id.* at 552.

17. *Id.*

18. Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 118 (2008).

discrimination cases. In one discrimination case, he denied summary judgment for the defendant, observing that “the inquiry into whether the plaintiff’s age, sex, national origin, or race caused the conduct at issue often requires an assessment of individuals’ motivations and state of mind,” and that “juries possess special advantages over judges in making this sort of assessment.”<sup>19</sup> Similarly, he denied summary judgment in another discrimination case in which an unmarried pregnant teacher was fired by a church-affiliated school and sued for gender discrimination under Title VII.<sup>20</sup> Acknowledging that differences in experience and outlook might well make a difference in how different jurors would evaluate the veracity of the witnesses and the honesty of the defendant’s proffered reason for dismissal, Judge Weinstein found that “a decision by a cross-section of the community in a jury trial” would be the appropriate way to resolve the matter.<sup>21</sup> Judge Weinstein has expressed the same appreciation for the jury’s added perspective in other opinions.<sup>22</sup> It is no wonder that in such cases, Judge Weinstein has called for a “sparing” use of summary judgment.<sup>23</sup>

We note that the benefit of the jury’s community perspective has a broader application. Many cases explicitly require an assessment of community standards. We would add those cases to Judge Weinstein’s examples of situations in which jurors, by pooling their experiences, can construct a better evaluation than the judge is likely to produce. Thus, when the plaintiff claims that the defendant intentionally or recklessly caused emotional distress to the plaintiff, the jury may be asked to determine whether the defendant’s behavior was “outrageous”<sup>24</sup> or “extreme and outrageous.”<sup>25</sup> If the definition of extreme and outrageous conduct is “conduct that an average member of the community would regard as atrocious and beyond all possible bounds of decency,”<sup>26</sup> how should the judge or jury determine whether the

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19. *Chapala v. Interfaith Med. Ctr.*, No. 04 CV 3458(JBW), 2006 WL 2882567, at \*4 (E.D.N.Y. Oct. 6, 2006).

20. *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 360 (E.D.N.Y. 1998).

21. *Id.* at 361.

22. *See, e.g., Gallagher v. Delaney*, 139 F.3d 338, 342 (2d Cir. 1998) (Weinstein, J., sitting by designation) (“A federal judge is not in the best position to define the current sexual tenor of American cultures in their many manifestations.”).

23. *Chapala*, 2006 WL 2882567, at \*4.

24. “‘Outrageous conduct’ is conduct so extreme that it goes beyond all possible bounds of decency. Conduct is outrageous if a reasonable person would regard the conduct as intolerable in a civilized community.” JUDICIAL COUNCIL OF CAL., CAL. CIVIL JURY INSTRUCTIONS (CACI) § 1602 (2013).

25. ARIZONA JURY INSTRUCTIONS, *supra* note 9, at 212.

26. *Id.*

standard has been met? In the Arizona Jury Project, in which we were permitted to videotape a set of real jury deliberations,<sup>27</sup> we watched one of the juries approaching this task by attempting to convince one member of the jury that, although the defendant's behavior had been reprehensible, it was not "beyond all possible bounds of decency."<sup>28</sup> The jurors recounted their work experiences in a variety of settings: an office, a construction site, a school, a home where one of the jurors worked as a housekeeper. Each of the jurors reported negative experiences they had seen or personally experienced in their job setting, some of them involving shouting and insulting behavior similar to that allegedly experienced by the plaintiff. The comparisons convinced the jurors that the plaintiff's treatment could not be characterized as extreme and outrageous. Thus, the jurors pooled their diverse experiences just as Judge Weinstein would have predicted.

Judge Weinstein has recognized that local knowledge can also appropriately inform the decision making of juries. In *Chance v. DuPont*,<sup>29</sup> a suit was brought on behalf of children injured by blasting caps against manufacturers of the caps for failure to place any warning on the individual caps.<sup>30</sup> Judge Weinstein, who would later pioneer large-scale uses of case consolidation,<sup>31</sup> ordered severance, transferring cases to the federal district courts where each of the injuries occurred. He gave an example of the likely advantage of subjecting the claims to "the critical scrutiny of local jurors with knowledge of local practice."<sup>32</sup> In West Virginia, a newspaper article reported that two of the plaintiffs were injured while playing with a blasting cap brought out of the mines by a worker. Deciding that the federal court sitting in West Virginia with a West Virginia jury would be best equipped to decide whether blasting caps are familiar articles around coal mines, he concluded, "Community standards are a vital element in assessing the actions of the parties in this suit."<sup>33</sup>

Do these examples indicate that the jury is the optimal decision maker for all disputes and offenses? Possibly, but we need not go that far to make the case for its general value, and for its unique advantages in many instances. As Judge Weinstein has said, the jury ensures

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27. See generally Shari Seidman Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1 (2003).

28. ARIZONA JURY INSTRUCTIONS, *supra* note 9, at 212.

29. *Chance v. E.I. Du Pont de Nemours & Co.*, 371 F. Supp. 439 (E.D.N.Y. 1974).

30. *Id.* at 449.

31. See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987).

32. *Chance*, 371 F. Supp. at 449.

33. *Id.*

that “the legal system is grounded in reality.”<sup>34</sup> Judge Weinstein is not alone in his appreciation of the jury. Surveys of U.S. citizens consistently show they prefer juries over judges.<sup>35</sup> Thus, as Judge Weinstein has suggested, a jury can enhance the sense of both the parties and the public that justice has been served.<sup>36</sup>

Yet in some academic and judicial circles, the advantage of a judge—an educated and expert decision maker—over a jury of laypersons seems self-evident. Particularly in complicated civil cases, some commentators have questioned the ability of laypersons to reach justifiable conclusions.<sup>37</sup> Judge Weinstein, informed by his years of attentively watching the juries in his courtroom, could not disagree more. He warns, expressing a view that is consistent with the empirical evidence, that “[t]he jury’s power and capacity to deal with complex facts and come to a reasonable resolution of a dispute should not be underestimated.”<sup>38</sup> Not surprisingly, given his assessment of the ability of juries and his appreciation of the advantages the jury has over the judge, he opposes the expansive use of summary judgment to take cases away from juries.<sup>39</sup>

This positive assessment of the jury should not be confused with naïve trust. Judge Weinstein appreciates that jurors have human frailties. Thus, he has recognized that jurors may use evidence of a criminal record to draw conclusions about the defendant’s probable guilt, despite an instruction not to do so.<sup>40</sup> Extensive empirical research supports this view.<sup>41</sup> He has expressed concern about the potential prejudice that may arise when an indictment includes a multiplicity of counts that may exaggerate the jury’s impression of the nature and

34. Weinstein, *supra* note 18, at 116.

35. See, e.g., Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens’ Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 *LAW & HUM. BEHAV.* 333 (1988); *Harris Poll #9: Just Under Three in Five Americans Believe Juries Can Be Fair and Impartial All or Most of the Time*, HARRIS INTERACTIVE (Jan. 21, 2008), <http://www.harrisinteractive.com/harrispoll/index.asp?PID=861>.

36. *City of New York v. Beretta U.S.A. Corp.*, 317 F. Supp. 2d 193, 196 (E.D.N.Y. 2004).

37. For a review of this commentary, see, for example, Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 *AM. U. L. REV.* 727, 733–36 (1991).

38. Weinstein, *supra* note 18, at 117 & n.557 (quoting *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1020 (E.D.N.Y. 2006)).

39. For agreement from others, see, for example, Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 *YALE L.J.* 73 (1990); Suja A. Thomas, Essay, *Why Summary Judgment Is Unconstitutional*, 93 *V.A. L. REV.* 139 (2007).

40. *United States v. Jackson*, 405 F. Supp. 938, 945–46 (E.D.N.Y. 1975).

41. See, e.g., HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966); Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision To Testify and on Trial Outcomes*, 94 *CORNELL L. REV.* 1353 (2009); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence To Decide on Guilt*, 9 *LAW & HUM. BEHAV.* 37 (1985).



scope of the defendant's criminal activity.<sup>42</sup> Empirical research on the related topic of joinder supports that concern.<sup>43</sup> And he has recognized that media exposure to prejudicial information cannot necessarily be cured through voir dire,<sup>44</sup> again a position with ample empirical support.<sup>45</sup> In general, however, his trust in the jury's good sense is warranted. One result of this trust is that Judge Weinstein has advocated loosening some of the strictures imposed by a narrow reading of relevance.<sup>46</sup> In doing so, he recognizes that there are dangers in this more relaxed view,<sup>47</sup> but he concludes that "it is best to err on the side of openness."<sup>48</sup> This approach would also comport with the way juries attempt to reach verdicts that are consistent with the evidence. When jurors are not provided with what they think they need to reach a defensible verdict, they may fill in the gaps with unreliable information.

Judge Weinstein's positive perspective on jury performance may influence and be strengthened by the way he conducts jury trials in his courtroom and the way he thinks jury trials should be conducted. We turn next to those features of a Weinstein-run jury trial.

## II. JUDGE WEINSTEIN'S VIEWS ON OPTIMIZING JURY TRIALS

In acknowledging that jurors are active, rather than passive, decision makers, Judge Weinstein sees the implementation of some trial procedures as simple common sense:

Jurors must be treated with great respect and common sense by being supplied with the following: pen and paper to take notes in the courtroom; the right (seldom utilized) to question witnesses through a writing presented to the judge; explanations of courtroom proceedings; clearly written instructions on the law; precisely and simply phrased verdict sheets; lists of witnesses and exhibits; and, when called for during deliberations, the evidence and such aids as calculators. Testimony requested by a deliberating jury can be read in court or sent into the jury room in redacted form (now available

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42. *United States v. Polouizzi*, 687 F. Supp. 2d 133, 160–61 (E.D.N.Y. 2010).

43. See Kenneth S. Bordens & Irwin A. Horowitz, *Joinder of Criminal Offenses: A Review of the Legal and Psychological Literature*, 9 *LAW & HUM. BEHAV.* 339 (1985).

44. *In re NBC Universal, Inc.*, 426 F. Supp. 2d 49, 58 (E.D.N.Y. 2006) ("Jurors' assurances that they have not been influenced by media reports are not necessarily dispositive.").

45. See Nancy Mehrkens Steblay et al., *The Effect of Pretrial Publicity on Jury Verdicts: A Meta-Analytic Review*, 23 *LAW & HUM. BEHAV.* 219 (1999).

46. *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 138 F. Supp. 2d 357, 367 (E.D.N.Y. 2001).

47. *Id.*

48. *Id.* at 371. For empirical support on the costs of jury blindfolding, see Diamond & Casper, *supra* note 5, at 513; Shari Seidman Diamond et al., *Blindfolding the Jury*, 52 *LAW & CONTEMP. PROBS.* 247 (1989); Diamond et al., *supra* note 27, at 1.

almost instantaneously from the court reporter). In the future, video recordings should be available in some cases.<sup>49</sup>

It turns out that this judicial common sense is far from universally shared among the judiciary. Although more than two-thirds of modern courts permit juror note-taking<sup>50</sup> and provide a copy of the written jury instructions,<sup>51</sup> the jury instructions themselves, including verdict forms, are far from models of clarity. Jury instructions frequently include unnecessarily opaque language, but they also present structural challenges: the piecemeal construction of jury instructions may leave jurors confused about how the pieces fit together, that is, how to interpret one instruction in light of others.<sup>52</sup> Instructions also avoid mentioning subjects like insurance that may naturally arise in jury deliberations, on the unrealistic assumption that silence in the instructions means that the jurors will not spontaneously introduce those topics.<sup>53</sup> Analysis of the Arizona Jury Project deliberations shows that jurors spend considerable effort in parsing jury instructions, that a majority of the comments about legal issues (approximately 79%) are consistent with the law, but that inaccurate statements occur.<sup>54</sup> Although nearly half (approximately 47%) of these legal errors were explicitly corrected during deliberations,<sup>55</sup> Judge Weinstein's call for clearer instructions remains a goal that courts still need to pursue.

Judge Weinstein also calls for permitting jurors to submit questions for witnesses. Here he is a leader, but although the trend is in his direction, the 2006 National Center for State Courts State-of-the-States survey found that jurors were permitted to ask questions in only one out of ten federal trials.<sup>56</sup> Similarly, few judges followed Judge Weinstein's practice of providing jurors with a list of witnesses and exhibits.<sup>57</sup> Finally, Judge Weinstein, appreciating that jurors may find it useful to review testimony during deliberations, calls for mak-

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49. Jack B. Weinstein, *The Roles of a Federal District Court Judge*, 76 BROOK. L. REV. 439, 445 (2011).

50. GREGORY E. MIZE ET AL., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 32 tbl.24 (2007) (reporting that in 71.2% of federal trials and 69.0% of state trials, the jurors were permitted to take notes).

51. *Id.* (reporting that a copy of the written instructions was provided in 79.4% of federal trials, although in only 68.5% of state trials).

52. Diamond et al., *supra* note 10, at 1564–75.

53. *Id.* at 1575–86.

54. *Id.* at 1555–56.

55. *Id.* at 1558.

56. MIZE ET AL., *supra* note 50, at 32 tbl.24 (reporting that written juror questions for witnesses were permitted in 11.4% of federal criminal trials and 10.9% of federal civil trials, and in 15.1% of state criminal trials and 16.1% of state civil trials).

57. *Id.* at 32 tbl.24, 34 n.61 (reporting that jurors were given a notebook, which often contains lists of exhibits and expert witnesses, in 11.2% of federal trials and 5.8% of state trials).

ing that evidence available to jurors when they request it.<sup>58</sup> And why not? Such requests are typically denied by other courts, but Judge Weinstein, recognizing that the technology needed to comply with these requests exists, is prepared to update courtroom procedures with approaches that can assist the jurors.<sup>59</sup>

Respect for the jury underlies most of the approaches Judge Weinstein takes in his courtroom. It also shows up in his review of trial court procedures used by other courts. *Monroe v. Kuhlman*<sup>60</sup> involved a habeas petition in which the defendant claimed that the court had violated his right to judicial supervision of his trial by permitting the jurors to examine evidence during breaks in the trial, instructing them not to discuss it.<sup>61</sup> Judge Weinstein found no violation and, in fact, found the trial court's approach in this case "a commendable example of new procedures that are increasing the effectiveness of the modern jury."<sup>62</sup> Contrasting the literacy and education levels of today's jurors with those of the past, Judge Weinstein observed: "Today's jurors are not the largely illiterate plebians of the old English system . . ."<sup>63</sup> Noting the practice of permitting civil juries to take home documents and examine them over the weekend or during court recesses, he concluded, "Jurors must not be insulted by having their time wasted with inefficient and unnecessary procedural formalities."<sup>64</sup> The scholarly Judge Weinstein is also a practical man.

### III. THREE CONTROVERSIAL APPROACHES THAT JUDGE WEINSTEIN ADVOCATES

Most of the procedures that Judge Weinstein uses in his jury trials discussed in Part II have received a favorable response from a growing number of other trial courts, both state and federal. The approaches discussed here are more controversial.

#### A. *The Advisory Jury*

As jury skeptics seek ways to cabin jury influence by, for example, curtailing the nature of the cases that juries decide,<sup>65</sup> and as trials have

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58. See Weinstein, *supra* note 49, at 445.

59. *Id.*; see also *Verizon Directories v. Yellow Book U.S.A. Inc.*, 331 F. Supp. 2d 136, 142–43 (E.D.N.Y. 2004).

60. 436 F. Supp. 2d 474 (E.D.N.Y. 2006).

61. *Id.* at 475.

62. *Id.*

63. *Id.* at 481.

64. *Id.*

65. See, e.g., Mark A. Lemley, *Why Do Juries Decide if Patents Are Valid?*, 99 VA. L. REV. 1673 (2013) (arguing that the Constitution does not require that juries decide patent validity).

become increasingly rare occurrences in federal court,<sup>66</sup> Judge Weinstein, in his typical independent fashion, has been swimming against the tide. Drawing on his admiration for the unique perspective a jury of laypersons can offer, he has advocated the use of advisory juries. A federal judge can impanel an advisory jury “to enlighten the conscience of the court” even when the parties have no right to trial by jury under the Seventh Amendment to the United States Constitution.<sup>67</sup> As in a bench trial, the judge must enter findings of fact and law, and the judge retains full responsibility for the verdict in the trial,<sup>68</sup> but, as Judge Weinstein suggests, the reactions of the advisory jury can provide a perspective that reaches beyond that of a judge.

In *NAACP v. Acusport Corp.*,<sup>69</sup> Judge Weinstein impaneled an advisory jury to advise the court on whether defendant gun manufacturers and distributors had created a public nuisance and, if so, to provide guidance on the nature of appropriate injunctive relief.<sup>70</sup> Judge Weinstein might have simply cited Federal Rule of Civil Procedure 39(c), which authorizes the court to try any issue with an advisory jury in any case in which there is no right to trial by jury. He did, of course, cite to the rule.<sup>71</sup> But the scholarly Judge Weinstein did not stop there. Reviewing the early history of the advisory jury in the English Chancery Court, he traced the roots of Rule 39(c) to the right of the chancellor in equity to “have its ‘conscience enlightened.’”<sup>72</sup> Judge Weinstein then showed that nearly every state, as well as the federal courts, authorizes use of an advisory jury.<sup>73</sup>

This was not the first time Judge Weinstein employed an advisory jury. He used one twenty-five years earlier in a case with an eerily modern resonance. In *Birnbaum v. United States*,<sup>74</sup> several American

66. Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1257 fig.2 (2005).

67. JENNER & BLOCK LLP, MOORE’S ANSWER GUIDE: FEDERAL CIVIL MOTION PRACTICE § 11.25 (2014).

68. Federal Rule of Civil Procedure 52(a) states: “In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusion of law separately.” FED. R. CIV. P. 52(a).

69. 226 F. Supp. 2d 391 (E.D.N.Y. 2002).

70. *Id.* at 396–97.

71. *Id.* at 397. Federal Rule of Civil Procedure 39(c) provides: In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury, or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right. FED. R. CIV. P. 39(c).

72. *Acusport*, 226 F. Supp. 2d at 397.

73. *Id.* at 398.

74. 436 F. Supp. 967 (E.D.N.Y. 1977), *remedy modified*, 588 F.2d 319 (2d Cir. 1978).

professors alleged that the Central Intelligence Agency (CIA) had intercepted their mail, and they brought a claim for damages caused by the CIA's unlawful surveillance activities within the United States under the Federal Tort Claims Act (FTCA).<sup>75</sup> Trial by jury is specifically prohibited in FTCA cases, but use of an advisory jury is permitted,<sup>76</sup> and the court impaneled an advisory jury. As required, Judge Weinstein reported that he arrived at an independent decision in finding for the plaintiffs,<sup>77</sup> but acknowledged that the reaction of the jurors "served to affirm the opinion of the court that the emotional distress these plaintiffs suffered was the sort that would be experienced by reasonable people under the almost unprecedented circumstances of these cases."<sup>78</sup> The opinion recounts different damages awards apparently suggested by different jurors, so it is unclear how the advisory jury was instructed or whether it was asked to reach a group verdict.<sup>79</sup>

Critics of the advisory jury have raised the concern that the very broad discretion courts have when they choose to impanel an advisory jury is not without its dangers. Because the judge's own findings entirely displace any advice from the advisory jury, the advisory jury is invisible on appeal. This invisibility, some have argued, "allows the trial judge to be informal, experimental, or even sloppy with the advisory jury without risk of reversible error."<sup>80</sup>

By the time Judge Weinstein impaneled an advisory jury in *NAACP v. Acusport, Inc.* in 2003, he had developed procedures for handling a trial with an advisory jury. In his opinion in the case, he described in detail the procedures he used, which closely resembled those he uses in trials involving a constitutional jury.<sup>81</sup> This case involved a six-week trial of sixty-eight defendants; the evidence included complex statistical evidence and expert testimony.<sup>82</sup> Following Judge Weinstein's standard practice, he provided each juror with a notebook that contained selected exhibits.<sup>83</sup> At the end of the trial, following summations, he instructed the jury on the law.<sup>84</sup> The jury verdict form asked the jury to decide whether each defendant was liable or not

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75. *Id.* at 970–71.

76. 28 U.S.C. § 2402 (2012).

77. FED. R. CIV. P. 52(a).

78. *Birnbaum*, 436 F. Supp. at 988.

79. *Id.*

80. Note, *Practice and Potential of the Advisory Jury*, 100 HARV. L. REV. 1363, 1365 (1987).

81. *NAACP v. Acusport, Inc.*, 271 F. Supp. 2d 435, 464–76 (E.D.N.Y. 2003).

82. *Id.* at 465.

83. *Id.*

84. *Id.* at 465–66.

liable.<sup>85</sup> Testimony and other evidence were made available to the jury during its deliberations on its request.<sup>86</sup>

Procedures for the advisory jury were distinctive in only two ways. First, the advisory jurors were not told they were sitting in an advisory capacity.<sup>87</sup> This omission gave the advisory jurors no reason to view their decision as any less important than their decision would have been had it been issued by a constitutional jury. Second, although unanimity is required of federal constitutional juries in both civil and criminal cases, Judge Weinstein instructed the advisory jury merely that “[u]nanimity is desirable.”<sup>88</sup> When the jurors reported on their third day of deliberations that they were unable to reach a unanimous verdict, the judge told them that a verdict agreed to by at least ten jurors would be accepted.<sup>89</sup> Following that instruction, the jury found forty-five of the defendants not liable, but remained in disagreement on the other twenty-three.<sup>90</sup> Although Judge Weinstein did not explore what happened during jury deliberations,<sup>91</sup> he concluded that a 10–2 requirement “should leave the court with a comfortable feeling of consensus.”<sup>92</sup> In this perspective, he is aligned with the United States Supreme Court in *Johnson v. Louisiana*,<sup>93</sup> approving nonunanimous decision rules in state criminal trials based in part on the assumption that allowing less than unanimous verdicts will not affect the quality of the deliberations.<sup>94</sup> Here, based on empirical evidence—some of which Judge Weinstein cites—we would disagree.<sup>95</sup> If maximally robust deliberations are as important for an advisory jury as for a constitutional one, why should unanimity not be required? On the other hand, if an advisory jury is simply a group of court advisors, why not follow deliberations with a discussion between the judge and jurors in order to provide the court with a fuller understanding of the nature of that advice? If such an advisory jury were treated like a technical court advisor on community reaction, such discussion would

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85. *Id.* at 466.

86. *Id.*

87. *Acusport*, 271 F. Supp. 2d at 465.

88. *Id.* at 466.

89. *Id.*

90. *Id.*

91. *Id.* at 477.

92. *Id.* at 475.

93. 406 U.S. 356 (1972).

94. *Id.* at 361–62.

95. See, e.g., JOHN GUINTEHER, *THE JURY IN AMERICA* 83 (1988); REID HASTIE ET AL., *INSIDE THE JURY* (1983); Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201 (2006); Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 DEL. L. REV. 1, 25–26 (2001).

presumably have to be on the record to enable the parties to learn what the jurors had to say and to facilitate appellate review of the trial court's decision.<sup>96</sup> If jurors would have to be told in advance to expect that post-deliberation discussion, would that notice affect the jury's deliberation? The advisory jury and its potential expansion invite study, and Judge Weinstein has opened the door.

The advisory jury in any form is a rarely used, but potentially attractive, institution with a long history and a statutory pedigree. Its potential value in bringing jury sensibilities into the courtroom was palpably demonstrated in a recent case in which no jury, either constitutionally mandated or in an advisory form, was impaneled. The plaintiffs in *Floyd v. City of New York*<sup>97</sup> claimed that the stop-and-frisk policy of the New York City Police Department violated the Fourth Amendment's guarantee against unreasonable searches and seizures, as well as the Fourteenth Amendment Equal Protection Clause's guarantee against discrimination.<sup>98</sup> The plaintiffs had originally demanded a jury trial, and sought damages and remedial action.<sup>99</sup> In late 2012, the plaintiffs dropped their demand for monetary damages, which entitled them to have Judge Shira Scheindlin, who had been handling the case, conduct the trial and decide the case without a jury.<sup>100</sup> Over the course of two pretrial hearings, Judge Scheindlin questioned the wisdom of not having a jury because it was "important to hear from the community, so to speak."<sup>101</sup> "That's what jurors are," she said.<sup>102</sup> "I obviously will do my best at the trial to be fair and impartial to both sides. . . . But I'm only saying you're not getting many points of view."<sup>103</sup> In fact, Judge Scheindlin could have addressed her expressed concern by impaneling an advisory jury. Fortuitously, Judge Scheindlin was a speaker at the Clifford Symposium at DePaul University College of Law in honor of Judge Weinstein that stimulated this Article. When asked if she had considered impaneling an advisory jury in the *Floyd* case, she said that she wished she had thought of doing it.<sup>104</sup> The availability of advisory juries to enhance

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96. See, e.g., *TechSearch, L.L.C. v. Intel Corp.*, 286 F.3d 1360, 1371 (Fed. Cir. 2002).

97. 861 F. Supp. 2d 274 (S.D.N.Y. 2012).

98. *Id.* at 278.

99. Benjamin Weiser & Joseph Goldstein, *Without Jury, Judge Warned That Stop-and-Frisk Ruling Would Be Disputed*, N.Y. TIMES, Jan. 3, 2014, at A15.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. Conversation with Judge Shira Scheindlin, S.D.N.Y., in Chi., Ill. (Apr. 25, 2014). After the symposium, Judge Scheindlin says she gave further thought to the question of an advisory jury. She doubts in retrospect, for several reasons, that an advisory jury would have been suitable.

the perspective (as well as the perceived legitimacy) of a judicial decision, advocated so eloquently by Judge Weinstein, is worthy of greater attention from both the scholarly and judicial communities.

### B. *The Nullifying Jury*

Judge Weinstein's trust in the jury is most evident when he writes about nullification.<sup>105</sup> Although he would not instruct jurors on their power to nullify, an approach that some favor,<sup>106</sup> he urges judges to "exercise their discretion to allow nullification by flexibly applying the concepts of relevancy and prejudice and by admitting evidence bearing on moral values,"<sup>107</sup> applauding nullification as "one of the peaceful barricades of freedom."<sup>108</sup> His expressed attitude toward nullification is diametrically opposed to that of most appellate courts. For example, the Second Circuit, citing the Federal Judicial Center's Benchbook for United States District Court Judges, defined nullification as a violation of a juror's oath to "render a true verdict according to the law and the evidence."<sup>109</sup> The court "categorically" rejected the notion that jury nullification is desirable or that a court is permitted to allow it to occur when the court can prevent it.<sup>110</sup>

Judge Weinstein's focus on a particular form of nullification and his sense of how often it occurs underlie his favorable attitude toward nullification. Although he acknowledges that an unacceptable form of nullification occurs if a jury convicts when the law would have required acquittal, he sees that possibility as remote, despite some empirical evidence that it can happen.<sup>111</sup> But he also sees the kind of nullification he favors—that is, the nullification that leads to an acquittal of a legally guilty but morally sympathetic defendant—as an uncommon occurrence. Under his approach of allowing nullification without fostering it by explicitly instructing jurors about their right to

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ble in the *Floyd* case. Email from Judge Shira Scheindlin to Shari Diamond (Mar. 27, 2015) (on file with author).

105. See Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law To Do Justice*, 30 AM. CRIM. L.J. 239 (1993).

106. See, e.g., B. Michael Dann, "Must Find the Defendant Guilty" *Jury Instructions Violate the Sixth Amendment*, 91 JUDICATURE 12 (2007).

107. Weinstein, *supra* note 105, at 241.

108. *Id.* at 254.

109. *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997) (quoting FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 225 (4th ed. 2000)).

110. *Id.*

111. Weinstein, *supra* note 105, at 239 n.2 (acknowledging evidence that this form can occur, but characterizing the possibility as remote in practice). *But see* Irwin A. Horowitz et al., *Chaos in the Courtroom Reconsidered: Emotional Bias and Juror Nullification*, 30 LAW & HUM. BEHAV. 163 (2006).



nullify, he expects nullification to be rare. Judge Weinstein trusts the jury to generally try to follow the law, tempering it only on occasion with mercy. The empirical record supports his view.<sup>112</sup>

*C. Jury Verdicts as a Reference Point for Reviewing  
Appropriate Damages*

Juries are frequently criticized as unpredictable in their damage awards.<sup>113</sup> The evidence of unpredictability is ambiguous. The impact of relevant legal factors on the compensatory damages that juries award is well documented, accounting for more than half of the large variation in awards with a small number of predictor variables.<sup>114</sup> The strongest predictor of awards is typically the legally relevant severity of injury, as measured somewhat crudely on an eight- or nine-point scale. Nonetheless, with substantial variation in damage awards unaccounted for, some portion of it can no doubt be explained by the lack of standards provided by the legal system on damages—particularly general damages. Jurors complain about the lack of guidance,<sup>115</sup> and mock jurors show substantial variation in the damages they award for pain and suffering in response to identical case facts.<sup>116</sup> The variability of awards drops when the mock jurors deliberate, so that jury awards show substantially less variation than individual mock juror awards, but it remains higher for pain and suffering than for economic damages, consistent with the greater difficulty of that decision.<sup>117</sup>

Against this backdrop, how should a judge determine, in reviewing a jury verdict, whether a compensation award “deviates materially from what would be reasonable compensation”?<sup>118</sup> Judge Weinstein was faced with this task in a diversity case involving repetitive stress injuries, in which New York law called upon him to evaluate a jury verdict by applying that standard.<sup>119</sup> He responded by creatively asking the parties to have their experts identify sets of what they would

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112. See, e.g., Diamond et al., *supra* note 10, at 1537.

113. See generally Valerie P. Hans & Theodore Eisenberg, *The Predictability of Juries*, 60 DEPAUL L. REV. 375 (2011).

114. Michael J. Saks et al., *Reducing Variability in Civil Jury Awards*, 21 LAW & HUM. BEHAV. 243, 244–45 (1997); see also David Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109 (1995).

115. Nicole L. Mott et al., *What’s Half a Lung Worth? Civil Jurors’ Accounts of Their Award Decision Making*, 24 LAW & HUM. BEHAV. 401, 408–09 (2000).

116. See generally Saks et al., *supra* note 114, at 243.

117. Shari Seidman Diamond et al., *Juror Judgments About Liability and Damages: Sources of Variability and Ways To Increase Consistency*, 48 DEPAUL L. REV. 301, 313–17 (1998).

118. N.Y. C.P.L.R. § 5501(c) (McKinney 2014).

119. *Geressy v. Digital Equip. Corp.*, 980 F. Supp. 640, 653 (E.D.N.Y. 1997).

characterize as comparable cases for the judge to use as potential benchmarks for the pain and suffering awards of the three plaintiffs.<sup>120</sup> Judge Weinstein used these cases to inform his opinion, describing in detail his method and the cases he used in the appendix to the opinion.<sup>121</sup> Scholars have suggested using similar approaches to inform jury awards for pain and suffering,<sup>122</sup> and attorneys turn to jury verdict reporters to suggest “going rates” as they negotiate settlements. Although no consensus has developed about the optimum way to identify relevant comparable cases, Judge Weinstein’s approach in *Geressy* clearly invites consideration and evaluation of the general strategy.

#### IV. HOW OTHER TRIAL JUDGES VIEW JURIES

As this brief overview of his rich record shows, Judge Weinstein has a clear-eyed and nuanced appreciation of the jury. And he recognizes that his admiration is shared by most trial judges.<sup>123</sup> Significant majorities of trial judges in numerous surveys report that the jury is capable of understanding complex legal issues in the cases they hear.<sup>124</sup> They believe that neither bias nor miscomprehension is responsible when their verdict would have been different than the one reached by the jury.<sup>125</sup> In addition, trial judges generally report that they usually agree with the jury on the ultimate outcome of the trial.<sup>126</sup>

In a 2000 survey of Texas state and federal trial judges, the judges were “very complimentary” of juries.<sup>127</sup> Almost 1,000 judges responded to the survey,<sup>128</sup> including 70% of all Texas state trial judges and 65% of all federal trial judges.<sup>129</sup> Those surveyed were nearly unanimous in believing that jurors did at least “moderately well” in reaching a “just and fair” verdict.<sup>130</sup> The judges also had faith in the jury to deliver a correct verdict; 77% of the judges surveyed re-

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120. *Id.* at 657.

121. *Id.* at 660–66.

122. See Ronen Avraham, *Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*, 100 NW. U. L. REV. 87 (2006); see also Diamond et al., *supra* note 117.

123. See, e.g., Weinstein, *supra* note 105, at 241.

124. R. Perry Sentell, Jr., *The Georgia Jury and Negligence: The View from the Bench*, 26 GA. L. REV. 85, 114 (1991); see also Allen Pusey, *Judges Rule in Favor of Juries*, DALL. MORNING NEWS, May 7, 2000, at 1J.

125. Pusey, *supra* note 124, at 10J.

126. *Id.*

127. John B. Attanasio, *Foreword: Juries Rule*, 54 SMU L. REV. 1681, 1684 (2001).

128. Pusey, *supra* note 124, at 1J.

129. *Id.*

130. *Id.* at 10J (reporting that 98% of judges surveyed agreed with this sentiment).

sponded that if they were personally a defendant in a criminal case, they would prefer to have a jury decide their case, and a majority said that in a civil case, they would also prefer a jury trial.<sup>131</sup>

A significant minority of the judges surveyed did not view the jury in such a positive light, however.<sup>132</sup> Among the Texas judges, 30.1% of state trial judges and 27.4% of federal trial judges believed that juries should decide fewer cases,<sup>133</sup> and 19.7% of state trial judges stated the right to a jury trial should be either reduced or eliminated altogether.<sup>134</sup> It is not clear whether this pattern would generalize beyond Texas, which uses juries in an unusually broad range of cases (e.g., the right to a jury trial is provided for in divorces<sup>135</sup> and juvenile cases<sup>136</sup>). Ultimately, however, only 1% of the judges gave the jury system “low marks.”<sup>137</sup>

Further, most judges across various surveys report that they agree with the jury’s verdict in most of the cases before them. In the Texas survey, 96% of state and federal trial judges reported that they agreed with the jury’s verdict in their cases “most or all of the time.”<sup>138</sup> In a 1991 survey of Georgia state judges, 86% of the judges surveyed reported they agreed with the jury in at least 79% of their negligence cases.<sup>139</sup> Nearly 10% of the surveyed judges reported even higher levels of agreement.<sup>140</sup>

Studies of judge–jury agreement in both criminal and civil trials reveal substantial agreement levels. In Kalven and Zeisel’s classic study of the American jury, judges filled out questionnaires in over 3,500 criminal jury trials and approximately 4,000 civil trials, indicating how the jury decided the case and how they would have decided it if it had been a bench trial.<sup>141</sup> In 78% of the criminal cases, the judge and jury agreed on the verdict.<sup>142</sup> In disagreement cases, the judge would have convicted when the jury acquitted in 19% of the cases and the jury

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131. Attanasio, *supra* note 127, at 1684.

132. *Id.* at 1685.

133. *Id.*

134. *Id.*

135. *See, e.g.*, Mann v. Mann, 607 S.W.2d 243, 246 (Tex. 1980).

136. TEX. FAM. CODE ANN. § 54.03(c) (West 2014).

137. Pusey, *supra* note 124, at 10J.

138. *Id.*

139. Sentell, *supra* note 124, at 98 (“Of the 99 [judges answering the question], 86 judges estimated their experience to be . . . that they agreed with the jury . . . in at least 79% of their negligence cases.”).

140. *Id.* at 99 (“Of the [99 judges], 10 . . . emphasize[d] a ‘significantly higher percentage of agreement.’”).

141. KALVEN & ZEISEL, *supra* note 41, at 58–68.

142. *Id.* at 58–59.

convicted when the judge would have acquitted in 3% of the cases, a net leniency of 16%.<sup>143</sup> These data were collected in the late 1950s, but despite many changes in the make-up of the jury pool and the bench, a nearly identical pattern—with 75% agreement—was found more recently in a partial replication that surveyed judges for their verdict preferences in criminal cases that produced 290 nonhung jury verdicts in four locales.<sup>144</sup> Unfortunately, only a few small studies have used a similar methodology to assess judge–jury agreement in civil cases. The agreement rate from these studies ranges from 63% to 77%, based on samples of 40 to 83 cases.<sup>145</sup>

The earlier Kalven and Zeisel study found no difference in agreement rate based on the judge’s rated complexity of the case.<sup>146</sup> Similarly, the Eisenberg et al. study found no significant difference in agreement rate for cases rated as low, medium, or high on legal complexity.<sup>147</sup> These results reflect what Kalven and Zeisel called a “stunning refutation of the claim that the jury does not understand.”<sup>148</sup> The judges in the Texas survey mirrored this assessment: nine of ten judges said that jurors show considerable understanding of the legal issues involved in the cases they hear.<sup>149</sup> Finally, in the Georgia survey, nearly 94% of the judges surveyed reported the jury had little trouble understanding negligence cases.<sup>150</sup> One judge in the Georgia survey stated, “If a jury fails to grasp the issues, it is usually because the attorneys have failed in their presentations. . . . Juries are far more intelligent than many attorneys want to admit.”<sup>151</sup>

Significant majorities of trial judges see juries as capable of delivering correct results, even in complex legal cases.<sup>152</sup> That, of course,

143. *Id.*

144. See Theodore Eisenberg et al., *Judge–Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel’s The American Jury*, 2 J. EMPIRICAL LEGAL STUD. 171, 172–73, 180–82 (2005); see also Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Effects*, 18 LAW & HUM. BEHAV. 29, 48 (1994) (reporting approximately 73% agreement across 77 criminal trials).

145. Diamond et al., *supra* note 27, at 19, 67 (reporting 77% agreement in 46 civil trials, and 74% agreement in 41 trials in which liability was contested); Valerie P. Hans, *The Illusions and Realities of Jurors’ Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327, 342 tbl.1 (1998) (reporting approximately 73% agreement in 83 trials in which the judge said the evidence either favored the plaintiff or favored the defendant); Heuer & Penrod, *supra* note 144, at 48 tbl.13 (reporting approximately 63% agreement in 67 civil trials).

146. KALVEN & ZEISEL, *supra* note 141, at 157.

147. Eisenberg et al., *supra* note 144, at 191.

148. KALVEN & ZEISEL, *supra* note 141, at 157.

149. Pusey, *supra* note 124, at 10J.

150. Sentell, *supra* note 124, at 113–14 (“Of the 98 [judges responding], 92 agreed that the jury generally experiences no difficulty in understanding the negligence case.”).

151. *Id.* at 114 (alteration in original).

152. Eisenberg et al., *supra* note 144, at 191.

does not mean that judges uniformly agree with each jury verdict. Some judges would prefer to reduce the use of the jury, but these judges are in the minority.<sup>153</sup> In the half century since publication of *The American Jury*, the jury system continues to receive strong support from those who see it in action every day: the trial judges.

#### V. CONCLUSION

Although other trial judges share Judge Weinstein's positive reaction to the jury, his insights about the institution set him apart. As this Article shows, his perspective on the jury includes an appreciation of its human limitations as well as its unique strengths. Remarkably, Judge Weinstein recognizes that judges too have limitations, and that juries are often able to fill in the gaps in experience and understanding of even the best judges. Could Judge Weinstein have become so wise about juries if he had spent all of his time on the bench as an appellate court judge? That is a thought experiment worth considering. If the trial court vantage point has contributed to the education of a decision maker as perceptive and thoughtful as Judge Weinstein, it is worth thinking about how valuable it would be to encourage all appellate court judges and would-be appellate court judges to obtain experience as trial court judges.

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153. Pusey, *supra* note 124, at 10J.