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# EXPLAINING THE PUBLIC WARINESS OF JURIES

*Albert W. Alschuler\**

Michael Saks declares, "Negative public opinion about the jury is paradoxical, because those condemning juries in opinion surveys are sampled from essentially the same population from which juries are drawn. How can the public's judgments in the latter role be so wrong, and their judgments in the former role be so right?"<sup>1</sup>

A similar paradox infects Saks's paper, for this paper depicts the public as ignoramuses when they offer views about extraterrestrials and jurors to pollsters, and as sages once they enter the jury box. Of course the roles of the public as survey respondents and as jurors are different, and hearing the evidence at trial may transform the people whose opinions Saks discredits, the people he would entrust with the decision whether to bankrupt Texaco.

Saks lands nicely between the horns of his dilemma. I agree with his conclusions that the public is ill-informed about the civil justice system and that opinion polls provide a weak foundation for reshaping the role of the jury. Nevertheless, there are at least six reasons for believing that the polls merit more credit than Saks gives them.

## I.

First, the Supreme Court has said repeatedly over the course of more than fifty years, "[T]he proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community.'"<sup>2</sup> We like to think of the jury as the chorus in a Greek drama—a body chosen from the community to render the community's judgment. Because this body represents all of us, its pronouncements should command our respect. When mem-

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1. Michael J. Saks, *Public Opinion About the Civil Jury: Can Reality Be Found in the Illusions?*, 48 DEPAUL L. REV. 221, 240 (1999).

2. *Glasser v. United States*, 315 U.S. 60, 86 (1942) (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)); see *J.E.B. v. T.B.*, 114 S. Ct. 1419, 1424 (1994); *Ballew v. Georgia*, 435 U.S. 223, 237 (1978); *Carter v. Jury Comm'n*, 396 U.S. 320, 330 (1970).

bers of the public say, "Those bozos don't represent us," the jury falls short of what we hope it can accomplish.<sup>3</sup>

## II.

Second, public criticism of the jury's performance is not truly paradoxical. Saks suggests that members of the public may fail to see the jury as themselves. The people who talk to pollsters may believe that they are, like the children of Lake Woebegone, all above average. But as Saks appears to acknowledge, the public who serve as jurors *are* less educated than the norm,<sup>4</sup> and our skewing of the jury toward the less-informed segment of the population is most evident in the high-profile trials that most shape public impressions of the jury.<sup>5</sup> Many survey respondents may have little reason to see the jury as themselves.<sup>6</sup>

Moreover, public criticism of juries need not imply that the public fails to recognize jurors as themselves or that "chutzpah" leads them to believe that they could do better. Just as most members of the public probably doubt that they would be capable ballet dancers or capable Supreme Court justices,<sup>7</sup> they may doubt that they are the

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3. Saks suggests that opinion polls are most useful when opinion itself is what interests us—for example, when we want to know whether consumers are confused by a product's brand name. Saks, *supra* note 1, at 221-22. Saks apparently discounts opinion polls concerning the jury on the ground that our concern is the reality of the jury's performance rather than how the public perceives it. Because one commonly stated objective of the jury is reassuring the public that the courts do justice, however, public opinion is important in itself. Negative opinion concerning the jury may establish a jury failing even when this opinion is ill-informed.

4. See Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 28 ALA. L. REV. 441, 505 (1997).

5. See Albert W. Alschuler, *Our Faltering Jury*, PUB. INTEREST, Winter 1996, at 28, 32-33.

6. Saks doubts that the public knows much about who serves on juries. Saks, *supra* note 1, at 224. The public need not know the formal qualifications of jurors, however, to sense that their verdicts are sometimes odd and that the jurors themselves are sometimes odd in their post-verdict television appearances.

Saks also contends that "as the one-day one-trial system of jury selection spreads across the country, any discrepancy between the eligible community and those serving as jurors shrinks." *Id.* at 224-25. I would be surprised, however, if the shrinkage were great. Especially when the "one trial" for which veniremen are eligible is likely to be lengthy, the most educated prospective jurors may be the ones most anxious to escape. Judges may accommodate them. Moreover, the most informed jurors are the ones most likely to have received disqualifying information through the media. Finally, one party or both may eliminate the most knowledgeable jurors through peremptory challenges. Cf. Letter from Oliver Wendell Holmes to Lady Pollock, Apr. 11, 1897, in 1 HOLMES-POLLOCK LETTERS 74 (Mark DeWolfe Howe ed., 1941) ("The man who wants a jury has a bad case . . .").

7. Senator Roman Hruska's defense of Supreme Court nominee G. Harold Carswell was not Hruska's finest hour: "[T]here are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance?" HERMAN SCHWARTZ, PACKING THE COURTS 48 (1988) (quoting Sen. Roman Hruska).

appropriate judges of some issues now entrusted to juries. After giving their verdicts in complex cases, jurors themselves sometimes note that they were not well equipped for the tasks assigned to them. These jurors have emerged from their courtroom experience confused, shell-shocked, and angry.<sup>8</sup>

Even in less challenging cases, members of the public may sense that they would confront a problem of first-order and second-order preferences as jurors—the sort of problem that confronts an addict who craves heroin but regrets craving it.<sup>9</sup> If they confronted a plaintiff whose suffering and whose needs were great and a defendant whose pockets were deep, they might be tempted to overlook minor defects in the plaintiff's case or to award excessive damages. Affected by the pulls and emotions of a trial, these members of the public might care less than they think they should about the effect of their awards on taxes, budget deficits, insurance rates, and America's position in the global economy. Although circumstances other than the depth of the defendants' pockets may account for this phenomenon,<sup>10</sup> jury awards appear to be influenced greatly by whether the defendant is an individual, a government agency, or a corporation.<sup>11</sup> Awards also appear to be influenced by the extent of the jurors' identification with the plaintiff even when this identification rests partly on the plaintiff's race.<sup>12</sup>

### III.

Third, public criticism of jury verdicts need not imply a negative view of *jurors*. As Saks observes, one does not find in the polls any

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8. See, e.g., STEVEN ADLER, *THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM* 116-44 (1994).

9. Or that led Ulysses to order his sailors to bind him to the mast whenever the band played the Paul Simon hit, "The Sounds of Sirens." (Sorry about that.) For an examination of the significance of first-order and second-order preferences, see Cass R. Sunstein, *Legal Interference With Private Preferences*, 53 U. CHI. L. REV. 1128 (1986).

10. See Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327, 328 (1999) (suggesting that jurors do not consider the wealth of defendants but do hold organizations to higher standards of responsibility than individuals); Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 DUKE L.J. 217 (1993).

11. See AUDREY CHIN & MARK A. PETERSON, *DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS* at viii-ix, 37-41 (RAND Inst. for Civil Justice, 1985); Randall R. Bovbjerg et al., *Juries and Justice: Are Malpractice and Other Personal Injuries Created Equal?*, LAW & CONTEMP. PROBS., Winter 1991, at 5; James K. Hammitt et al., *Tort Standards and Jury Decisions*, 14 J. LEGAL STUD. 751 (1985). But see Vidmar, *supra* note 10.

12. See CHIN & PETERSON, *supra* note 11, at 43 tbl.4.5.

significant support for scrapping the civil jury.<sup>13</sup> The public probably attributes flawed verdicts less to the failings of jurors themselves than to lawyers' adversarial game-playing, the frequent truth-distortion worked by evidentiary rules, the passive role assigned to jurors at trial, the strange combination of silence and gobbledegook given jurors in instructions, and the undue refinement of our courtroom procedures, especially our jury selection procedures.

The same reasons that prompt Saks to question opinion polls may lead others to question jury verdicts. As Saks emphasizes, one reason for discounting the polls is the manipulation of public opinion through the electoral process. Public officials, who can no longer count on the backing of stable coalitions, no longer attempt to lead or to educate. Their goal is short-term approval, and they seek issues that promise immediate payoffs and that already have strong public support. These politicians please whom they must to obtain the money to purchase television time; they hire experts to tell them how to push our hot buttons; then they push them.<sup>14</sup> As Saks notes, similar competitive pressures lead the media to emphasize the immediate and engaging rather than the informative and educational.<sup>15</sup>

Money does not just talk in the political process; it screams. And money is increasingly influential in the courtroom as well. Trial lawyers now attempt to program and maneuver jurors in the same sorts of ways that candidates for public office seek to maneuver voters. When clients have enough money, these lawyers hire consultants to survey community attitudes and to determine which demographic characteristics indicate favorable jurors. They draft pages of complex, multiple-part questions probing attitudes, histories, beliefs, memberships, driving records, criminal records, reading habits, viewing habits, and more, and judges order prospective jurors to answer these privacy-invasive questions upon penalty of perjury.

The courts then give the lawyers an opportunity that the politicians must envy. In the most engaging lawyers' contest of all—one in which every lawyer considers herself a world-class player—each side tries to stack the tribunal in her favor. A familiar wisecrack is that in England the trial begins when the jury is selected;<sup>16</sup> in America, that is when the trial is over. Because the trial is not truly over, however, lawyers

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13. Saks, *supra* note 1, at 241. Stephen Adler comments, "We love the idea of the jury but hate the way it works." ADLER, *supra* note 8, at xiii.

14. Political scientists say that we live in the time of the "plebiscite Presidency." See THEODORE J. LOWI, *THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED* 97 (1985).

15. Saks, *supra* note 1, at 232.

16. The criminal trial, that is. England has virtually abolished the civil jury.

sometimes hire shadow juries to observe the proceedings and debrief the lawyers at the end of each court day.

The founder of America's largest jury consulting firm tells lawyers not to attempt to change jurors' opinions with evidence and argument but instead to "anticipate which of the jurors' basic beliefs are consistent with, and which conflict with, various views of the case. The lawyer should adopt a view . . . linked to the jurors' attitudes . . . consistent with what the jurors already believe."<sup>17</sup> Other consultants suggest that "logic plays a minimal role" in advocacy and that a lawyer's goal must be to find the jurors' "psychological anchors."<sup>18</sup> This process is unlikely to inspire confidence. We sense that things are slipping from our grasp and that well-funded experts truly can push our buttons. Our democratic institutions are foundering, and the jury is among them.

#### IV.

Fourth, the public has especially good reason for mistrusting damage awards. Saks notes that the determination of damages attracts more public criticism than any other jury task. He writes:

Survey respondents think jurors would benefit from more guidance from judges. But respondents must be assuming that there is more guidance to be given (and in believing that reveal further ignorance about the law's goals and methods).

What might happen if respondents learned that the reason lay jurors were asked to determine the amount to be awarded for general damages was that the law recognizes the absence of markets for such losses; that consequently there was an absence of any "objective" guidance on the value to be placed on such losses; and that the only substitute for the values that would be provided by such a market that anyone could think of was the community's estimate of the value of such losses? A sample of the community—the jury—is in a better position than any other decision-maker to say what these losses were worth.<sup>19</sup>

Despite the absence of a market for criminal punishment, we have managed to construct sentencing guidelines for judges.<sup>20</sup> Judges need these guidelines less than jurors need damages guidelines, for jurors

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17. JEFFREY ABRAMSON, *WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 153-54 (1994) (quoting Donald Vinson).

18. *Id.* at 153; see George Fisher, *Review Essay: The O. J. Simpson Corpus*, 49 *STAN. L. REV.* 971, 993 (1997) ("As a medium, jury trials are hostile to subtlety. Young lawyers are taught to wrap their cases around a theme and to drop nonconforming facts or contort them to make them fit.").

19. Saks, *supra* note 1, at 228-29.

20. In the discussion that follows, I set aside the claim of economists that market measures might in fact aid the assessment of damages for pain and suffering. See, e.g., Mark Geistfeld,

know nothing about past cases. They also lack the judges' ability to attend conferences and to consult experienced colleagues.

Constructing damages guidelines would in fact be easier than constructing sentencing guidelines. Tort damages serve one clear, primary purpose, while criminal punishment serves many conflicting purposes and may depend upon an assessment of innumerable circumstances including the offender's character. Damages, moreover, consist simply of money. Unlike a sentencing commission, a "damages commission" would not be required to draw lines among various types of sanctions—fines, probation, community service, home detention, boot camp, and prison. In England, the judiciary has developed reasonably precise standards for damage awards,<sup>21</sup> and if a "damages commission" based its guidelines on past jury verdicts, these guidelines could reduce capriciousness while still reflecting community sentiment.<sup>22</sup>

Jurors themselves sometimes resent their conscription as croupiers in a damages casino. After awarding \$8.5 million in a personal injury case, one juror complained, "It was ridiculous to determine damages without any guidelines. We did muddle through it, but we had no clue."<sup>23</sup> I respect jurors and believe that this one was right. On this issue, the public is right too.<sup>24</sup>

## V.

Fifth, the public, although ill-informed on many issues, is not quite as ignorant as Saks maintains. Saks attributes opinion poll results to a "campaign against the civil jury" waged by insurance companies and other profit-seeking business interests. He declares, "The problem is that no effective countervailing information source exists . . . ."<sup>25</sup>

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*Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CALIF. L. REV. 773, 791-92 (1995).

21. See Albert W. Alschuler, *Mediation With a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1827 n.80 (1986).

22. In Anglo-Saxon England, a system of "bots" specified the compensation owed for various injuries, see HENRY ADAMS ET AL., *ESSAYS IN ANGLO-SAXON LAW* 271-73, 278-79 (London, MacMillan 1876), and workers' compensation schemes provide schedules for financial awards today. Damages guidelines might be administered in a substantially more flexible manner than these precursors, for jurors could be instructed to depart from the guidelines when the guidelines did not seem appropriate in the circumstances of particular cases.

23. ADLER, *supra* note 8, at 175.

24. For a fuller argument in favor of damages guidelines, see Edward J. McCaffrey et al., *Framing the Jury: Cognitive Perspectives on Pain and Suffering*, 81 VA. L. REV. 1341 (1995).

25. Saks, *supra* note 1, at 234.

I would like to introduce Saks to Robert Clifford and other members of the personal-injury plaintiffs' bar. I hope someday he will meet Ralph Nader. Opponents of the "campaign against the civil jury" are not voiceless in America, the principal remaining bastion of the civil jury, and I see no danger that the civil jury is about to disappear.

Moreover, the public probably does not obtain its impressions of juries primarily from the pronouncements of partisans in the tort reform debate. It probably reacts more to the verdicts in the trials it has followed. These publicized trials are almost all criminal, but people are unlikely to assume that the jury's performance in civil cases is very different.

Some highly publicized verdicts allow the public to do what all of us want to do—cheer the jury. One thinks of Timothy McVeigh, O. J. Simpson II (the civil trial), Rodney King II (the federal court trial), and Eric and Lyle Menendez II (the retrial).<sup>26</sup> Frequently, however, jury verdicts are less reassuring. One thinks of O. J. Simpson I (the criminal trial), Rodney King I (the state court trial), Eric and Lyle Menendez I (the mistrial),<sup>27</sup> Louise Woodward (the murder verdict), Terry Nichols (the manslaughter verdict), and Marion Berry (the misdemeanor verdict). One also thinks of Oliver North, Damian Williams, Jack Kevorkian,<sup>28</sup> Lorena Bobbitt, John Bobbitt, El-Sayyid Nosair (the man acquitted of killing Meir Kahane in a verdict that the presiding judge called "against the overwhelming weight of the evidence and devoid of sense and logic"),<sup>29</sup> and Lemrick Nelson, Jr. (acquitted of killing Yankel Rosenbaum although Rosenbaum had, before dying, identified Nelson as his murderer and although the murder weapon had been found in Nelson's possession).<sup>30</sup>

In the cases of Nosair and Nelson, the juries' verdicts brought thousands of protesters to the streets.<sup>31</sup> Unlike most protesters, these marchers had no agenda for change; they simply mourned the denial of justice. Within the past decade, several other American jury verdicts also have sparked public protests, and nothing like these protests

26. Note the Roman numerals. Our justice system often is able to get things right the second time around.

27. Although this trial did not end in a verdict, some members of the two hung juries were ridiculed for accepting the defendants' abuse excuse.

28. You may put as many Roman numerals after this case-name as you like. I am not sure, however, that most of the public was troubled by the jury nullification that occurred in these prosecutions.

29. See GEORGE FLETCHER, *WITH JUSTICE FOR SOME* 85 (1995).

30. See *id.* at 86, 102.

31. See *id.* at 85, 103.



has occurred anywhere else in the world.<sup>32</sup> No other justice system—at least none in any democratic nation—generates the same outrage that ours does. On a number of occasions, moreover, the protests have been violent. The initial Rodney King verdict led to the worst race riot in American history—two days of civil disorder that claimed fifty-eight lives and cost nearly one billion dollars in property damage.<sup>33</sup> The American jury system is distinctive in its ability to enrage people.<sup>34</sup>

When a jury verdict differs from our predilections, it is comforting to say, "The jury heard much more of the evidence than we did. We must have been wrong." This response has become increasingly difficult, however, in the age of Court TV and closely watched trials. Mayor Tom Bradley of Los Angeles voiced the sentiments of many when, following the Rodney King verdict, he said of the videotape evidence in that case, "We saw what we saw. What we saw was a crime."<sup>35</sup> The public today seems better informed about jury performance than it was a few decades ago, and respect for the jury appears to be declining.

## VI.

Sixth (my final point), the public may evaluate the jury on a more sensible basis than many social scientists. I know the likely response of many social scientists to what I just said. I have heard this response before: "Tut, tut, good grief, and my heavens, man—those media cases are not *typical*." Social scientists then may report that the typical jury verdict in a criminal case does not acquit an obviously guilty defendant, that the typical verdict does not depart from what the judge who presided at the trial would have done, that the typical determination of civil liability does not reflect pro-plaintiff sympathy, and that from a sound economic perspective the typical jury-determined award of damages does not overcompensate. That is all the social scientists need to know.

Empiricists are mostly in the business of assessing the central tendency—means, medians, modes, and typical cases. The information they develop is useful and sometimes important. Too often, however, the empiricists assume it is the only information that matters. I once

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32. More accurately, these protests have occurred only after the conclusion of American trials. Thousands of Jews in Israel took to the streets following the Nosair acquittal. *Id.* at 103.

33. See Neal R. Peirce, *Look Homeward, City of Angels*, 24 NAT'L L.J. 1250 (1992); Seth Mydans, *Prosecutor Seeks Retrial of Officer in King Beating*, N.Y. TIMES, May 14, 1992, at A20.

34. In large part, this paragraph repeats a central thesis of FLETCHER, *supra* note 29.

35. Bill Boyarsky, *Ashes of a Mayor's Dream*, L.A. TIMES, May 1, 1992, at B2.

heard a respected academic refer to even the deaths that followed the Rodney King verdict as “merely anecdotal evidence.” Without pausing to consider when measures of the central tendency are useful and when they are not, social scientists adopt a mode of thought that I have called “the bottom-line, collectivist, statistical, empirical mentality.”<sup>36</sup>

Like typical cases, atypical cases have serious consequences. One verdict may prompt rioting in Miami, and another may lead to a company’s bankruptcy or to the discontinuance of a possibly beneficial product. Peter Huber uses the Bendectin cases as an illustration.<sup>37</sup> He maintains that Bendectin, an anti-nausea drug used during pregnancy, does not cause birth defects. Whether he is correct or not I cannot say, but most of the juries that have considered the issue have agreed with him. They have returned verdicts for the defendant again and again.

Huber has no quarrel with the “typical” verdict in Bendectin cases or with the performance of the overwhelming majority of jurors. A few outlying verdicts against Bendectin’s manufacturer, however—in one case for \$95 million—have made the average Bendectin award \$100,000. Huber writes, “Whichever side you believe on the toxicity of Bendectin, a median jury verdict of \$0, a mean of \$100,000, and a high verdict of \$95 million cannot be just.”<sup>38</sup>

Apart from the fact that atypical cases have serious consequences, evaluating institutions like the jury at the mid-point rather than the margin is misguided. I propose an experiment. Make me Czar of the American justice system and empower me to determine, among other things, all civil damage awards. Allow me to make these awards without regard to any rules of evidence, any rules of procedure, or any substantive law, and subject my rulings to no review. Then, after a year or so, conduct an empirical study.

I am a decent person, and I will try hard. Economists may discover that my typical award does not overcompensate plaintiffs. Other social scientists may conclude that this award does not differ significantly from those of the jurors who preceded me.

Accordingly, once the public gets beyond misleading media propaganda and understands the hard empirical facts, it is likely to abandon its reservations about Czar-administered justice. Indeed, because I

36. See Albert W. Alschuler, “Close Enough for Government Work”: *The Exclusionary Rule After Leon*, 1984 S. CT. REV. 309, 346.

37. Peter Huber, *Junk Science and the Jury*, 1990 U. CHI. LEGAL F. 273.

38. *Id.* at 285.

will provide the same bottom-line statistics as juries at a fraction of the cost, rational policy analysts ought to crown me Czar for life.

I am concerned, however, that social scientists may study the Iraqi justice system too. They may discover in Baghdad that the typical Iraqi tribunal does not treat the typical fender-bender differently from the typical American tribunal. Upon learning of these research findings, the public may be tempted to substitute Iraqi justice for mine and the jury's. Yet an empirical finding that America and Iraq reach similar results in typical cases would be mostly beside the point. Even if every justice system resolved its typical cases perfectly, all justice systems would not be just the same. Aggregating data and examining the central tendency can be useful, but this methodology can hide more than it reveals. Most legal procedures exist because we care about atypical cases.

Evaluating an institution like the jury at the margin is difficult; there is no scientific formula for doing it. Every enterprise conducted by human beings fails on occasion and may generate some troubling stories. Condemning an institution like the jury simply on the basis of a few horror stories would be as foolish as shunting all horror stories aside on the ground they are atypical. One must ask again and again a question that Saks emphasizes: Compared to what? When an institution seems to do poorly, would either a mildly or a radically reformed institution be likely to do better? What costs and risks would the alternatives pose?

Mixed questions of empirical and normative judgment are not amenable to precise answers. In evaluating the jury, one person may cite the O.J. Simpson verdict as a horror story while another cites it as a triumph of popular justice. Even if our concepts of justice were alike, moreover, we would rarely have sufficient experience with alternative arrangements to answer the "compared to what" question quantitatively.

In shaping and evaluating institutions, we cannot avoid messy speculation about counterfactual conditionals: Would the jury system work better with damages guidelines or without them? Who would draft the guidelines? What sources might these drafters consult? What goals would they pursue? With luck, we might gain some insight from experience elsewhere—English appellate decisions on damages or American sentencing guidelines. In the end, however, we would draw on a range of knowledge about our own psyches, about the behavior

of other human beings, and about the effects of differing institutional arrangements. We would make a holistic judgment.<sup>39</sup>

I suspect that the public understands the need to blend the normative and the empirical and to include in the mix anecdotes (especially those that may illuminate the inherent characteristics of an institution), personal evaluations of specific outcomes, and quantitative research. Most of the people who respond to opinion polls may not be above average, but they do seem smarter than some social scientists.

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39. "Holistic" is the academic word for "punt."

