UNEXPLORED ASPECTS OF THE THEORY OF THE RIGHT TO TRIAL BY JURY*

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There was a time—quite a long time, in fact—when members of the legal profession viewed legal institutions as self-contained, virtually hermetically sealed organisms whose purposes could be ascertained and furthered by internal self-examination. During this time doctrine reigned supreme, and its grip extended over the entire domain, ranging from those engaged in the most mundane practice to those engaged in the most theoretical speculations about the legal system. To be sure, the realists during the early part of this century mounted an assault upon the traditionally narrow conception of the legal system. Their efforts did not much shake the legal system loose from this view of legal reality, however, and the realists were soon overwhelmed by the resurgence of positivism with its primary message that "the rule's the thing" while all else is secondary.[1] The pervasiveness of the narrow conception of the legal system is captured in an extraordinary way in a recent article by Judge Richard Posner:

> Such was the atmosphere of the Harvard Law School when I was a student. With a handful of exceptions . . . the faculty believed, or at least appeared to believe, that the only thing law students needed to study was authoritative legal texts—judicial and administrative opinions, statutes, and rules—and that the only essential preparation for a legal scholar was the knowledge of what was in those texts, and the power of logical discrimination and argumentation that came from close and critical study of them. The difference from Langdell's day—a difference that was the legacy of Holmes and the legal realists—was that law now was recognized to be a deliberate instrument of social control, so that one had to know something about society to be able to understand law, criticize it, and improve it. The "something," however, was what any intelligent person with a good general education

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1. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW (1961).

> and some common sense knew; or could pick up from the legal texts themselves (viewed as windows on social custom); or, failing these sources of insight, would acquire naturally in a few years of practicing law: a set of basic ethical and political values, some knowledge of institutions, some acquaintance with the workings of the economy.[2]

The narrow conception of the law has come increasingly into disfavor in the last two decades for a number of reasons. The first, and perhaps most important, is the increasing democratization of virtually all institutions in the United States, including legal institutions. On the one hand, this is the inevitable result of the law extending further and further into everyday affairs. As that occurs, the law not only affects, but is affected by, everyday life, which reduces its insularity. On the other hand, the democratization of the legal system is simply another example of the increasing skepticism with which claims of privilege are met in our society. Doctors no longer behave in a dictatorial fashion towards their patients; rather, they explain in detail the treatment options that are available and assist the patient in making a choice. The claims of organized religion of having superior access to wisdom and godliness carry less weight. The Catholic church in the United States in particular is learning this fact as a result of the lay revolt against its teaching on various issues. Similarly, the legal system, and its claims of special privilege, are subject to increasingly intense scrutiny by the lay public and by its representatives in the legislative branches of government. Tort reform is the most current, but by no means the only, example of exogenous forces being brought to bear upon the legal system.

There are other factors at play, as well. Related academic disciplines have expanded their reach and provided insightful analyses of legal institutions. Economics, literary theory, and philosophy are the most influential disciplines right now, but political theory, psychology, game theory, history and sociology, among many others, also have made, and are continuing to make, important contributions to our understanding of legal institutions. The interdisciplinary barriers between law and related disciplines are breaking down, and an educated lawyer must now have a thorough grounding in subject matters that a short time ago would have been viewed as unnecessary for, if not alien to, the study of law.

One might wonder what this has to do with the right to trial by jury. After all, the great battles between the economists and their adversaries

2. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 763 (1987).

are being fought over such issues as anti-trust policy and the nature of the tort system, not over matters dealing with provisions in the Bill of Rights providing for jury trials. Similarly, scholars who use philosophy and political theory to address the debate over competing conceptions of the constitutional vision do so on a grand scale. Their implications have not reached the level of such housekeeping matters as the form of trial.

While the right to trial by jury, in both its sixth and seventh amendment forms, may be primarily a matter of housekeeping, certain intriguing aspects make it ripe for consideration from a broader perspective that is evident in much legal scholarship today. The right to trial by jury is one of our most democratic institutions, and it complements—perhaps even sustains—the continuing democratization of the country. More intriguing still, the right to trial by jury occupies one of the important intersections of law and common affairs. Its existence breaks the isolation of the law by mandating that outcomes in trials be determined by individuals extraneous to the system. Consequently, the law must explain itself to such individuals, and is affected by the decisions that they reach.

Those decisions, presumably, are the product of the values and the thought processes that individual jurors bring to their task, but this statement opens up the institution of trial by jury to the probing eyes of all the law's sister disciplines. What, exactly, are the values that jurors bring to their task? How should they affect the outcome of cases? Should jurors bring those values to the fore in deliberations or should they be encouraged to suppress their personal values and apply instead the values of the legal system as explained to them by judges? Does it even make sense to talk about the jurors' suppressing their own values? How does rational thought progress if not from a stable matrix formed from the experiences and beliefs of particular individuals? What does it mean to deliberate and how does it occur? Does it matter how it occurs or is this an issue that is better left unexamined? What if we discovered, for example, that the views of women are less forcefully presented in juries with a mix of males and females than they would be in a group composed of all females?

Numerous issues integral to the right to trial by jury may be enlightened from a perspective extraneous to the law, and indeed work is proceeding on many of these issues. I will discuss some of that work here. In addition to arguing that lawyers have much to learn from other disciplines that will enlighten us about the implications of the right to trial by jury, I will press the related point that the failure to think carefully about

this right and to employ all the tools available within our culture has resulted in the legal system reaching some curious positions, if not making outright mistakes. The deep structure of my argument, though, should by now be clear. The right to trial by jury poses fundamental questions about the nature and structure of the legal system.

I want to explore briefly two areas. The first is the nature of evidence, and the second is the nature of deliberation.

Beginning an analysis of the right to trial by jury with an inquiry into the nature of evidence may seem a bit odd, but it is the best place to begin. Under the current conception of trial by jury, jurors hear evidence and decide cases based upon that evidence. Thus, the nature of evidence is a crucial variable underlying the right to have a trial by jury based upon that evidence.

Evidence is that which the parties produce at trial, and based upon what is produced—and *only* what is produced—the jurors are to decide the case. Such is the standard conception of evidence, but how convincing or powerful a concept is it? Take a somewhat crude, but nonetheless interesting example. When witnesses testify at trial, they normally do so through the spoken word. To understand what the witness says, one must understand what the words mean that the witness is employing. Yet, the meaning of the various words spoken by witnesses will rarely itself be the subject of evidence at trial. How, then, is it possible for the jurors to decide the case based solely upon what is produced as evidence? Obviously, it is not. Instead, the decision matrix must include the language skills of the jurors, and only in the unusual case will the language of witnesses be the subject of inquiry at trial. This recognition, though, requires a significant modification of the general principle that the jury decides based only upon what is produced at trial.

Press the matter further. Suppose a witness testifies that the light was red when the defendant's car went through it, and suppose further that the case is one of negligence premised upon the running of a red light. Does this testimony establish the plaintiff's case so that a decision in the plaintiff's favor can now be rendered? Of course not, but why not? The answer is that for an untold number of reasons this testimony may be false, meaning not consistent with objective reality. Yet how is a jury to know whether the testimony is true or false? Again, the answer seems obvious, but its obviousness hides a profound point. The jury will judge this testimony in light of the jury's experience and background. Does the witness appear to know what the word "red" means? Is there anything

about this witness that suggests he is lying? Was he squirming on the stand, or does he have an interest in the case? Does his testimony make sense from the perspective of the jury? And of course the opposing side must have an opportunity to demonstrate that the witness is in error for one reason or another. That will be done by the presentation of further evidence that, like the evidence of the plaintiff, will be assessed in light of the jurors' backgrounds and experiences in life.

Like language, the jurors' experiences and perspectives are crucial variables in determining the effect of the words that a witness speaks at trial, and like language they will not be the subject matter of evidence themselves. In fact, jurors are typically instructed to take their experience into account in deciding cases and to exercise their judgment. Yet another large qualification must now be added to the principle that the jury is to decide the case based upon what is produced at trial. What is produced at trial is but the tip of a very large iceberg, and while important, it is no more so than the great bulk of the iceberg lying below the surface. Indeed, has not our basic conception of evidence been thrown into doubt? Our initial conception focused on the act of producing something at trial, yet now we are driven to see evidence not as a thing produced at trial but instead as the result of an interactive process between what is produced at trial and the jury. Evidence, in other words, is whatever influences a jury on propositions material to a case. What will influence a jury, however, is a function of how each juror uses his or her background and experience to analyze what the parties produce.

Interestingly enough, the law recognizes this point. It does so by permitting the parties to litigate a case at virtually any level of generality they like. Thus, if the plaintiff in our hypothetical was concerned that the jury may doubt whether the witness knows the difference between red and green, he may produce evidence on the matter. In such a fashion, the parties may decide how much to particularize the case. The more they particularize the case, the larger the tip of the iceberg becomes; and the less they particularize the case, the smaller the tip is.

Redefining the concept of evidence as I have done poses some very difficult problems directly related to the concept of trial by jury. If evidence is whatever influences a jury, the only way to know whether something is evidence or not is to present it to the jury and see what happens. If that is so, however, a substantial portion of the law of evidence becomes obsolete, including what many consider its most important aspect, the requirement of relevancy.

Under the rules of evidence, only relevant evidence is admissible, and the judge determines relevancy as an initial matter. Relevancy, in turn, is defined as evidence which increases or decreases the chance of some legally operant (material) proposition being true. If, however, one can know the effect of evidence only by observing how the jury responds to it, what warrant is there for judges to exclude evidence from trial? Relevancy can only be determined in light of what a jury does; what a judge thinks, ironically, is irrelevant.

There seems to be a substantial incompatibility between the role of the judge and the jury. This incompatibility stems from the interesting fact that we apply quite different epistemological theories to these two actors in the legal system. The jury system is based upon a relativistic or communitarian theory of knowledge. Community consensus determines what is true for purposes of after the fact determinations. Knowledge emerges, in a sense, from shared norms and the community structure. This, by the way, is not a new idea. During the period of Jacksonian democracy, considerable strictures were placed upon the judiciary, particularly in the states, with respect to fact finding. This was done explicitly because of the concern that judges, being an elite, would bring their peculiar perspectives to bear upon the fact finding process. Thus, even if only unconsciously, fact finding would be skewed toward the values and views held by an elite body. To discourage that from happening, states required that fact finders be drawn from an ever widening pool and thus the judges' ability to affect the process of fact finding was seriously reduced. At a very early time in our history, we recognized, in the context of right to trial by jury, what philosophers of science such as Ernest Nagel and Thomas Kuhns,[3] and students of epistemology such as Richard Rorty, Mary Douglas and W.V. Quine,[4] have pressed upon us during this century. Knowledge emerges from community discussion and consensus.

We apply a quite different theory of knowledge to judges, however. The only justification for permitting judges to exclude evidence on relevancy grounds is to advance accuracy in outcome. Whether the doctrinal reason for exclusion is a lack of probative value, waste of time, or any of the other criteria contained in Federal Rules of Evidence 401 or 403,

3. E. NAGEL, THE STRUCTURE OF SCIENCE (1961); T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1970).

4. R. RORTY, CONSEQUENCES OF PRAGMATISM (1982); W.V. QUINE & J.S. ULLIAN, THE WEB OF BELIEF (1978); M. DOUGLAS, HOW INSTITUTIONS THINK (1986).

the basis for exclusion is factual accuracy. The admission of evidence is a waste of time, for example, only when its admission will not influence the jury toward a factually accurate outcome. Yet stringent conditions must be satisfied before a judge can exclude evidence upon this or any other ground. The judge must first know the correct outcome of the trial. Second, he or she must accurately gauge how the jurors will react to this bit of evidence in light of how they have reacted to all the other evidence in the case.

There are two problems with this view. The first is that it requires the judge to make decisions that no human is competent to make. The second is that it fundamentally rejects the epistemological basis of trial by jury by replacing the communitarian norms bolstering it with an objective theory of knowledge of the sort found in older writers such as Berkeley[5] and to some extent in the writings of Mortimer Adler.[6] In this view, the universe is knowable by human effort, and knowledge corresponds to what exists in fact.

I do not intend to mediate between these views here. I only intend to highlight their incompatibility and demonstrate some of the inconsistencies that have emerged in the treatment of these related institutions. The first such inconsistency has been mentioned already. From the point of view of the theory of juries, judges are never justified in excluding evidence.[7] In addition, no reason exists to consign juries to a passive role. The theory underlying trial by jury leads in the direction that the jury should be an active participant in the evidentiary process by informing the parties of what it wants to hear. After all, it is that body that will decide the significance of evidence in light of its background and experience. Accordingly, the jury should be in a feedback relationship with the parties, whereby evidence is received by the jury and feedback given to the parties that will generate more evidence in light of the jury's reaction to the first offer.[8]

Of course, if one is not convinced by this communitarian theory and

5. A. GRAYLING, BERKELEY: THE CENTRAL ARGUMENTS (1986).

6. M. ADLER, TEN PHILOSOPHICAL MISTAKES, 83-107 (1985).

7. *See, e.g.*, TILLERS, MODERN THEORIES OF RELEVANCY (*forthcoming*) (reprinting IA WIGMORE ON EVIDENCE, § 37 (Tillers rev. 1961)).

8. This process is somewhat akin to some descriptions of certain continental systems. *See, e.g.*, Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985). It is not clear to me, however, whether such descriptions can be taken at face value. Allen, Koeck, Riechenberg & Rosen, *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship* 82 N.U.L. REV. (*forthcoming*) (1988).

believes that the world really is concrete and knowable, and further believes that judges have a relative advantage over juries in appraising the conflicting stories of litigants, then why have juries?

This basic conflict between the theory of judges and the theory of juries, and the underlying conflict as to whether truth is objective or emanates from human beings, also affects the decision of cases. A perfect example is the recent decision by the Supreme Court in *Pope v. Illinois*.[9] The question in *Pope* was whether the jury should be instructed to employ community standards in deciding the third prong of the *Miller v. California*[10] test of obscenity. The test requires the trier of fact to determine whether the litigated work, taken as a whole, lacks serious literary, artistic, political, or scientific value. The Court said that: "The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole."[11]

This standard is virtually incomprehensible; and if it is not incomprehensible, it is inordinately silly. Jurors for the most part will be voluntary members of the community from which they are drawn, and presumably will generally share the values of that community. To the extent that is true, the values of the reasonable person from a community and community values will be virtually identical. Thus, as the dissent pointed out, the Court seems to be asking for a juror to find that ordinary members of his or her community are not reasonable.[12] To be sure, room exists within communities for reasonable disagreement about matters, including artistic value, but that raises more problems than it resolves. First, how does one know how large a segment of the population must hold a view for the view, or those holding it, to be reasonable? In a footnote, the Court said that "Of course . . . the mere fact that only a minority of a population may believe a work has serious value does not mean the 'reasonable person' standard would not be met."[13] Similarly, the dissent suggested that the first amendment applies if "some reasonable persons could consider it as having serious . . . value."[14] What if a

9. 107 S. Ct. 1918 (1987).
10. 413 U.S. 15 (1973).
11. *Pope*, 107 S. Ct. at 1921.
12. *Id.* at 1926 (Stevens, J., dissenting).
13. *Id.* at 1921 n.3.
14. Id. at 1927 (Stevens, J., dissenting).

minority of one—the author of the disputed work, for example—believes it has serious value? Is that enough to make the judgment reasonable? Or, better yet, what if the author does not think highly of the work, but some not yet extant being might? Indeed, who is to know how tastes may change over time? The point is, of course, that if one goes from a presumably majoritarian "community standard" to a standard based upon the views of a real or hypothetical minority, one has to know both how large a minority is sufficient to make views held by those individuals reasonable as well as how to identify the relevant minority.

Perhaps this numerical approach to the question is not the proper way to proceed. Rather than determining the size of the group that thinks that a work has value, the jury could decide if anybody held such a view and then decide if the person so holding that view is reasonable. How would the jury do that, though? The only way in which the jury could judge the reasonableness of some person is to judge that person by reference to some standard. Absent an instruction to the contrary, the standard employed will be the background and experience of the jurors, a background and experience that together with that of other community members forms the community standards that the Court was trying to avoid.[15]

Where did the Court go wrong? I cannot say for certain, of course, but my sense is that it failed to recognize that it was attempting to fashion a substantive rule designed to increase the protection for literary works by manipulating the thought processes of jurors. In other words, it appears as though the Court believes that obscenity is an objective fact that exists independently of communities, but it is attempting to provide first amendment protection through the mechanism of community decision making. The two are incompatible. If obscenity is a fact with a concrete reality, then its attributes need to be defined for and provided to the fact finder. If obscenity is a value of a community, then the only question is what is the relevant community. Had the Court, and more to the point the lawyers for the parties, attended more carefully to the underlying epistemological concerns, this mistake might have been avoided.

The second general area relating to the right to trial by jury that I wish to address is the nature of deliberations. It seems somewhat remarkable that there is virtually no law related to the deliberative process of juries.

15. This circularity may explain why Stevens just gives up the effort and concludes that the state cannot criminalize the possession of obscene material. *Id.* at 1927.

This is remarkable because the deliberative process is one of the most crucial aspects of trial by jury, and for that reason alone one would think that there would be periodic attempts to regulate it in one fashion or another. To the contrary, though, the country has a uniform rule that what goes on in the jury room is inviolate from both ends. We don't instruct the jury on how to deliberate, and we don't inquire into how they did so when they have finished.

The traditional approach to deliberations certainly is supported by weighty considerations. There is a great value in having a black box into which we can pour our problems and out of which we can get decisions. Nonetheless, I wonder if that black box should remain inviolate even from advancing knowledge that may raise serious concerns about the nature of the deliberative process. It is one thing to impose a blanket imposition of inquiry or direction on an institution when there is no reason to doubt its fairness (even if there is no reason but experience to trust it). But it is another to do so when data begins to collect that casts some doubts on the matter. Such data has begun to collect, although it has for the most part been studiously ignored to date by the legal system. The most striking data has to do with the interactions of males and females in small groups, and it is to that issue that I direct my remarks.[16]

Suppose you wanted to construct a deliberative process that involved widespread participation, the goal being to involve all the members of the relevant group. Suppose further that you discovered that within the relevant group there were at least two identifiable subgroups the members of which tended to approach problems from quite different perspectives, and thus tended to appraise the same evidence in quite different ways frequently drawing different inferences. Perhaps your initial thought would be that such a finding reconfirms the value of your primary goal of encouraging widespread participation by the group. Because you define the group as a single unit and want a group decision, that decision should be an amalgam of the constituent parts of the group. Thus, to the extent there are different ways of approaching problems within the group, open and thorough deliberations are to be encouraged in order to obtain a decision that emerges from the blending of the various views. Indeed, so far it sounds like this is a prescription for trial by jury, but what if you found out that it doesn't work this way? What if you found out that the

16. I am indebted to the excellent student piece Note, *General Dynamics and Jury Deliberations*, 96 YALE L.J. 593 (1987) for having been the catalyst to my thoughts on this problem.

members of one of those two groups tends to be overly deferential to the other, or at least do not pursue their own views as aggressively? Or, what if you found out that the members of one group tend to speak considerably less when in contact with the other group than they would if deliberating by themselves? Would you view such matters as problems to be corrected? If so, we must modify trial by jury, because very good evidence supports the view that men and women react to each other along these lines.

Psychologists using mock juries have found that men make considerably more contributions to deliberations than women,[17] a finding consistent with the implications of research done in the field of small group dynamics:

> . . . studies show that men speak more often, at greater length, and are more likely to interrupt other speakers than women. One effect of this male behavior is that women's silences lengthen as men interrupt, overlap, or give a delayed or minimal response to the female speaker. One obvious way to maintain power in a group is to monopolize and control discussion. Those who have the power can do the talking; those who lack power must do the listening.[18]

In the context of juries, the male exercise of control is furthered by the selection of the foreman, which is virtually always a male.

If the gender bias were just a gender bias carrying with it no secondary consequences, it would be bad enough, but there are secondary consequences here. Men and women tend to interact differently, have differing perspectives on the same event, and share those perspectives in differing ways. Data show, for example, that men tend to overestimate a witness' ability to identify a suspect more than women do, women tend to recall better than men information about female victims, and women attempt more than men to accommodate differing points of view among members of a group.[19] Most important of all, in all women groups the more active speakers attempt to draw out the more reticent, whereas in all male groups the more active participants ignore the less active, and "[i]n mixed groups . . . the women consistently [become] more silent."[20] Thus, important perspectives on "reality" may be lost or slighted in jury deliberations.

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17. *Id.* at 595-596.
18. *Id.* at 597-598.
19. *Id.* at 601-603.
20. *Id.* at 603.

I cannot rehash here all the wonderfully complex findings that the social sciences are now generating, but it is becoming increasingly well-documented, and it certainly seems intuitively correct, that jurors do not undergo mystical transformations when they enter the jury room. Rather, they take a good part of their cultural baggage with them. In many respects that may be precisely what we want them to do. But do we want matters of social hierarchy and status to affect deliberations over facts? Should males, or any other segment of society have their views overrepresented on juries as they are in other aspects of life? Or, should we attempt to compensate for such matters in some way?

We could, for example, instruct jurors on small group dynamics, and by doing so encourage the more aggressive to pay more attention to the less aggressive among them. We could actively encourage the selection of women as fore"men." Or, we could even affect the environment within which jurors deliberate. Jury rooms invariably have rectangular tables, but rectangular tables are both a sign of and conducive to hierarchy. Those in authority sit at the ends of such tables, and those who are more submissive sit elsewhere. Jury studies have found, for example, that men almost always sit at the end of the tables, and the women sit in the middle.[21] Why not use circular tables? Indeed, why not use circular tables and encourage the jury to periodically canvass the views of each member by going around the table?

One reason we may not want to do so is that it would inject what some might call "artificialities" into the jury process, and if an "artificiality" is anything that differs from what would occur if some variable is not influenced, then indeed such proposals would be guilty of the charge. Nonetheless, the same would be true of any variable at any time. Before the jury room is furnished, it has neither a circular nor a rectangular table. Before the jury is instructed, it has no instructions. Before the jury enters the room, it is appropriate, it seems to me, to think about whether we want to encourage or discourage its members from mirroring society in all respects.

There are numerous issues still to be considered that would emphasize the fact that the jury system is a crucible for the development of knowledge in our society. For example, consider the remarkable strains on the system imposed by the recent development of toxic tort litigation and the

21. *Id.* at 595.

resultant epidemiological studies relevant to causation.[22] How are such issues to be resolved, and can juries be expected to be able to provide "rational" answers in such cases? If they can not, how is such a conclusion to be rationalized with the increasing democratization of our institutions? Such conflicts are already evident in the legal system. Indeed, on the one hand the Federal Rules of Evidence eliminate virtually all barriers to the admission of evidence, and on the other, Judge Weinstein, in the Agent Orange Litigation, refused to give a very important, controversial, and complex case to the jury.[23] I am not suggesting that either the Federal Rules or Judge Weinstein was wrong, but only that we should think about this issue and many others as well. In doing so we should employ whatever tools we are fortunate enough to find, regardless of whether they traditionally have been found in the workshop of the law or elsewhere.

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22. *See, e.g., In re* Agent Orange Product Liab. Litig., 611 F. Supp. 1267 (E.D.N.Y. 1985) *aff'd*, 818 F.2d 187 (2d Cir. 1987), discussed *infra*, text accompanying note 23.

23. *Id.*