

JURY IGNORANCE AND POLITICAL IGNORANCE

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TABLE OF CONTENTS

INTRODUCTION	1168
I. VOTER KNOWLEDGE VS. JUROR KNOWLEDGE	1170
<i>A. The Problem of Rational Political Ignorance</i>	1171
<i>B. Rational Irrationality</i>	1173
<i>C. Implications for Juries</i>	1174
II. THE EVIDENCE ON JURY IGNORANCE AND BIAS	1178
<i>A. Favorable Evidence on Jury Knowledge and</i> <i>Objectivity</i>	1179
<i>B. Negative Evidence on Jury Knowledge and</i> <i>Objectivity</i>	1181
<i>C. Implications</i>	1188
III. IMPLICATIONS FOR THE USE OF JURIES BEYOND THE COURTROOM	1190
CONCLUSION	1193

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INTRODUCTION

For centuries, juries have been hailed as a model of popular participation in government. In the nineteenth century, Alexis de Tocqueville famously praised the American jury as “both the most effective way of establishing the people’s rule and the most efficient way of teaching them how to rule.”¹ Modern defenders of the jury have also often emphasized its role as a tool for democratic participation in the justice system.²

But even as he praised the jury’s role as a political institution, de Tocqueville worried that jurors might lack the knowledge needed to perform their judicial function properly:

The jury system arose in the infancy of society, at a time when only simple questions of fact were submitted to the courts; and it is no easy task to adapt it to the needs of a highly civilized nation, where the relations between men have multiplied exceedingly and have been thoughtfully elaborated in a learned manner.³

Another nineteenth-century writer, Mark Twain, expressed the same concern in much blunter terms:

The jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity and perjury.... I desire to tamper with the jury law. I wish to so alter it as to put a premium on intelligence and character, and close the jury box against idiots, blacklegs, and people who do not read newspapers.⁴

1. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 276 (J.P. Mayer ed., George Lawrence trans., 1969).

2. *See, e.g.*, JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 8-13, 139-41 (First Harvard Univ. Press rev. ed. 2000) (defending the jury as a tool for implementing “deliberative democracy”); AKHIL REED AMAR, *THE BILL OF RIGHTS* 83-88, 94-96 (1998) (defending the role of the jury in the Bill of Rights as a popular check on the power of political elites); ANDREW GUTHRIE FERGUSON, *WHY JURY DUTY MATTERS: A CITIZEN’S GUIDE TO CONSTITUTIONAL ACTION* 12-13 (2013) (praising the jury for promoting “popular sovereignty”).

3. DE TOCQUEVILLE, *supra* note 1, at 271.

4. MARK TWAIN, *ROUGHING IT* 321-22 (Edgar Marquess Branch & Harriet Elinor Smith eds., 3d ed. 1993).

Today's society is arguably even more "highly civilized" than that described by de Tocqueville in the 1830s, or at least more complex. And today's trials often require jurors to evaluate evidence and testimony far more complicated than that of de Tocqueville's time or Twain's.⁵ These changes make it all the more vital that jurors "possess intelligence and honesty," while avoiding "ignorance and stupidity," as Twain put it.⁶ It is therefore essential to ask whether jurors have the knowledge and cognitive abilities needed to cope with the challenges of modern trials.

A great deal of evidence suggests that voters often fail to acquire the knowledge needed to cope with the enormous size, scope, and complexity of modern government.⁷ The majority of the public is often ignorant of very basic political information, and voters also often do a poor job of evaluating the political information they do know.⁸ Given the oft-made analogy between jury service and political participation, it is important to ask whether jurors are prone to similar pitfalls. Do they also often make poor decisions out of ignorance or illogical evaluation of evidence?

This Article considers that question. My tentative conclusion is that jurors are likely superior to voters in terms of both acquiring knowledge and utilizing it in a rational way. But ignorance and irrationality do sometimes compromise jury decision making, especially in complex cases. They are even more likely to bedevil

5. See *infra* Part II.

6. TWAIN, *supra* note 4, at 321.

7. For evidence demonstrating the widespread nature of political ignorance, see, for example, SCOTT L. ALTHAUS, *COLLECTIVE PREFERENCES IN DEMOCRATIC POLITICS* (2003) (summarizing evidence of extensive voter ignorance); MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* (1996) (same); RICHARD SHENKMAN, *JUST HOW STUPID ARE WE? FACING THE TRUTH ABOUT THE AMERICAN VOTER* (2008) (same); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1290-1304 (2004) (same); Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 CRITICAL REV. 413, 413-19 (1998) (same). For a detailed recent review, see ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* ch. 1 (2013) [hereinafter SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE*]. See also GEORGE F. BISHOP, *THE ILLUSION OF PUBLIC OPINION: FACT AND ARTIFACT IN AMERICAN PUBLIC OPINION POLLS* (2004) (explaining how polls often overstate the true degree of public knowledge).

8. On the latter point, see BRYAN D. CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES MAKE BAD DECISIONS* (2007); SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE*, *supra* note 7, at 62-89.

efforts to use jury-like institutions to make broad public policy decisions, as opposed to merely decide discrete cases.

Part I summarizes the problem of political ignorance in the case of voters, and explains some theoretical reasons why we would expect jurors to acquire greater relevant knowledge than voters do and to use it more wisely. Jurors have stronger incentives to both acquire political information and analyze it in a rational way. Unlike voters, who have only an infinitesimal chance of influencing electoral outcomes, jurors presumably realize that their individual votes are likely to make a decisive difference to the outcome of a trial.

Part II discusses the relevant empirical evidence on jury knowledge and rationality. Much of that evidence shows juries performing fairly well. But it also suggests that ignorance and bias undermine the quality of jury decisions in unusually complex cases, such as ones involving scientific evidence, punitive damages, and complex jury instructions. Overall, juries perform better than voters in large part because of the ways in which trials differ from elections. Unlike voters, jurors usually decide only a narrow, specific case rather than a broad set of policy issues, and they are required to listen to extensive evidence from both sides before making a decision.

Finally, Part III expresses skepticism about the possibility of using jury-like mechanisms to help decide broad policy questions. Such proposals break down some of the key differences between jury service and voting that make the former function more effectively than the latter.

I. VOTER KNOWLEDGE VS. JUROR KNOWLEDGE

Widespread political ignorance among voters gives us some reason to worry that similar ignorance might impair jurors. At the same time, however, there is reason to believe that the problem of jury ignorance during trials is likely less severe than that confronting voters in elections.

A. The Problem of Rational Political Ignorance

Extensive evidence suggests that political ignorance is widespread among voters. Over sixty years of survey data reveal that most of the public has a fairly low level of political knowledge.⁹ That has not changed in recent years. Soon after the important 2010 congressional midterm election, only 46 percent of adults knew that the Republican Party had won control of the House of Representatives, but not the Senate.¹⁰ In 2003, 70 percent of the public was unaware of the enactment of President George W. Bush's massive prescription drug plan, the biggest federal program in almost forty years.¹¹ In 2009, only 24 percent of Americans realized that the important "cap and trade" proposal then recently passed by the House of Representatives as an effort to combat global warming addressed "environmental issues."¹² Forty-six percent believed that it was either a "health care reform" or a "regulatory reform for Wall Street."¹³

This kind of ignorance extends beyond specific issues to structural features of American politics, the nature of political ideology, and the activities of prominent individual politicians.¹⁴ For example, a 2006 Zogby poll found that 58 percent of Americans cannot name the three branches of the federal government: executive, legislative, and judicial.¹⁵ Only 28 percent can identify two or more of the five rights protected by the First Amendment.¹⁶

9. See sources cited *supra* note 7, especially DELLI CARPINI & KEETER.

10. *Public Knows Basic Facts About Politics, Economics, But Struggles with Specifics*, PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS (Nov. 18, 2010), <http://people-press.org/reports/pdf/677.pdf>.

11. Ilya Somin, *When Ignorance Isn't Bliss: How Political Ignorance Threatens Democracy*, CATO INSTITUTE: POLICY ANALYSIS 1, 5-6 (Sept. 22, 2004), <http://www.cato.org/publications/policy-analysis/when-ignorance-isnt-bliss-how-political-ignorance-threatens-democracy>.

12. *Toplines-Cap & Trade: National Survey of 1,000 Lively Voters*, RASMUSSEN REPORTS (May 7-8, 2009), http://www.rasmussenreports.com/public_content/politics/toplines/pt_survey_toplines/may_2009/toplines_cap_trade_i_may_7_8_2009.

13. *Id.*

14. For a detailed summary of the evidence, see SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE*, *supra* note 7, at ch. 1.

15. Brit Hume, *Zogby Poll: Most Americans Can Name Three Stooges, But Not Three Branches of Gov't*, FOX NEWS (Aug. 15, 2006), <http://foxnews.com/story/0,2933,208577,00.html>.

16. MCCORMICK TRIBUNE FREEDOM MUSEUM, *Americans' Awareness of First Amendment Freedoms*, THE FORUM FOR EDUC. & DEMOCRACY (Mar. 1, 2006), <http://www.forumforeducation.org/node/147>.

Right before he was nominated for the vice presidency in the summer of 2012, 43 percent of Americans had never heard of Representative Paul Ryan and only 32 percent knew that he was a member of the House of Representatives, as opposed to a senator, governor, or secretary of state.¹⁷ This degree of ignorance was striking in view of the fact that Ryan had been a prominent figure in national politics for several years and the GOP's leading spokesman on entitlement policy and spending issues.¹⁸

Pollsters and public opinion scholars have found numerous other examples of widespread political ignorance.¹⁹ Such ignorance is not of recent origin, but has been a common finding of public opinion research for many decades.²⁰ It is not merely an artifact of recent generations and has persisted despite major increases in education levels and intelligence as measured by IQ scores.²¹ The rise of the Internet and other electronic media has also had little impact on political knowledge levels.²²

Political ignorance persists at least in large part because it is rational. Because the chance of any one vote influencing the outcome of an election is infinitesimally small, there is little incentive to become knowledgeable about politics if the only reason for doing so is to increase the likelihood of casting a "correct"

17. Ilya Somin, *Public Ignorance About Paul Ryan*, VOLOKH CONSPIRACY (Aug. 11, 2012), <http://www.volokh.com/2012/08/11/public-ignorance-about-paul-ryan/>.

18. *Id.*

19. See sources cited *supra* note 7; see also SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 7, at 17-33 (reviewing numerous examples).

20. See, e.g., ALTHAUS, *supra* note 7, at 3-4; ANGUS CAMPBELL ET AL., THE AMERICAN VOTER (1960); DELLI CARPINI & KEETER, *supra* note 7; SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 7, at 18-19.

21. See JAMES R. FLYNN, ARE WE GETTING SMARTER? RISING IQ IN THE TWENTY-FIRST CENTURY 6 (2012) (noting that the average American IQ rose fifteen points over the last half of the twentieth century); SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 7, at 171-73 (discussing failure of rising education levels to reduce political ignorance).

22. *What Americans Know, 1989-2007: Public Knowledge of Current Affairs Changed Little by News and Information Revolutions*, PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS (Apr. 15, 2007), <http://www.people-press.org/files/legacy-pdf/319.pdf> (showing little or no increase in political knowledge since the rise of the Internet and other modern media); see also BRUCE BIMBER, INFORMATION AND AMERICAN DEMOCRACY: TECHNOLOGY IN THE EVOLUTION OF POLITICAL POWER, 229-30 (2003); MATTHEW HINDMAN, THE MYTH OF DIGITAL DEMOCRACY 60-61 & fig.4.1 (2009); MARKUS PRIOR, POST-BROADCAST DEMOCRACY: HOW MEDIA CHOICE INCREASES INEQUALITY IN POLITICAL INVOLVEMENT AND POLARIZES ELECTIONS ch. 4, at 94-141 (2007); Markus Prior, *News vs. Entertainment: How Increasing Media Choice Widens Gaps in Political Knowledge and Turnout*, 49 AM. J. POL. SCI. 577, 577-78 (2005).

ballot.²³ In a presidential election, for example, one voter's odds of casting a decisive ballot are about one in sixty million or even less.²⁴ Even in smaller-scale elections at the state and local levels, the chance of casting a decisive ballot is still very low, albeit higher than in a presidential contest.²⁵

B. Rational Irrationality

In addition to having little incentive to acquire political information, most voters also have little reason to try hard to evaluate the political knowledge they do possess in an unbiased way. Indeed, the theory of rational ignorance implies that most of the political knowledge we have is likely to be acquired for reasons *other* than learning the truth about politics and public policy.²⁶ Such reasons include entertainment value, validating preexisting views, or cheering on one's preferred party or ideology.²⁷ This leads to what economist Bryan Caplan labels "rational irrationality"—a tendency to assess political information in a highly biased way that often leads to illogical and seriously misguided conclusions.²⁸

Just as sports fans evaluate new information about their favorite team and its rivals in a biased fashion, "political fans" tend to be similarly biased in favor of their preferred party and ideology.²⁹ This is individually rational behavior for the same reason that political ignorance is rational for most voters. Since there is little payoff to getting at the truth of political issues, biased "political fans" can enjoy following politics without suffering negative consequences for their cognitive errors. But such individually rational behavior is

23. Anthony Downs first developed the theory of rational political ignorance. ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 238-59 (1957). For recent defenses and extensions of the theory, see CAPLAN, *supra* note 8; SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE*, *supra* note 7, at 62-89; Ilya Somin, *Knowledge About Ignorance: New Directions in the Study of Political Information*, 18 *CRITICAL REV.* 255, 257-60 (2006).

24. See SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE*, *supra* note 7, at 70-71 (discussing alternative estimates of the probability of decisiveness).

25. *Id.* at 64.

26. See *id.* at 64-65 (discussing this issue in greater detail).

27. *Id.* at 78-79.

28. See CAPLAN, *supra* note 8, at 17-18; Bryan Caplan, *Rational Ignorance Versus Rational Irrationality*, 54 *KYKLOS* 3 (2001).

29. For this comparison and data supporting it, see SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE*, *supra* note 7, at 78-82 and Somin, *supra* note 23, at 261-62.

collectively harmful, as voter bias influences public policy and electoral results.³⁰

Ironically, those most interested in politics may be most prone to this kind of bias.³¹ Just as the most committed sports fans tend to be both the most knowledgeable about the sports they watch and the most biased in favor of their preferred teams, so too the most dedicated political fans are also the ones least receptive to evidence that cuts against their preexisting beliefs. Indeed, they even tend to discuss politics only with those who agree with them³² and read political media that reinforces rather than challenges their ideology.³³

C. Implications for Juries

Does the rational ignorance and irrationality that afflicts voters also undermine the quality of jury decisions? In some ways, jurors are similar to voters. Both juries and the electorate are largely made up of ordinary citizens who, in their daily lives, have little incentive to acquire information about the issues they are supposed to decide when they cast their votes. Just as most voters spend little time studying public policy, most jurors probably devote little effort to studying law or learning how best to evaluate evidence.

In addition, both jurors and voters have little or no self-interested stake in the decisions they make. Even if a voter has a strong interest in, for example, electing the candidate that will adopt policies that will increase the voter's income, the chance that his or her vote will determine the outcome is vanishingly small. Jurors, if anything, have even less in the way of self-interested stakes in their decisions than voters. A juror with even a modest financial interest in the outcome of a case is likely to be removed for cause. The lack of a self-interested stake may reduce jurors' incentives to learn

30. This is the key thesis of Bryan Caplan's *The Myth of the Rational Voter*. See CAPLAN, *supra* note 8, at 2.

31. See, e.g., DIANA C. MUTZ, HEARING THE OTHER SIDE 32-34 (2006) (explaining how the most knowledgeable and committed citizens also tend to be more closed-minded and unwilling to consider alternative views).

32. *Id.* at 32.

33. See, e.g., Shanto Iyengar & Kyu S. Hahn, *Red Media, Blue Media: Evidence of Ideological Selectivity in Media Use*, 59 J. OF COMM. 19, 33-35 (2009).

necessary information and evaluate it rationally, although it does eliminate the possibility of bias caused by the self-interest itself.

Finally, it is obvious that both voters and jurors are potentially subject to a wide range of biases that might prevent them from evaluating information rationally. Just as voters are subject to partisan and ideological biases, among others, jurors might be susceptible to racial, ideological, and other prejudices of their own.

These similarities are potentially significant. But they coexist with major differences that cut in favor of jurors, making it likely that they will be more knowledgeable and less biased than voters. The biggest information-related difference between jurors and voters is that the decisions of individual jurors are far more likely to make a real difference. Elections typically have thousands or millions of voters, each of whom has only a tiny chance of casting a decisive ballot. By contrast, state civil and criminal juries have six to twelve members.³⁴ The Supreme Court has ruled that six-person juries are permissible, but refused to go as low as five in criminal cases.³⁵ Federal criminal juries are still required to have the traditional number of twelve.³⁶

In a small group of six to twelve, each individual vote has a high likelihood of affecting the outcome. In cases where juries must reach unanimous verdicts, a single vote virtually *always* has the power to change the outcome.³⁷ Even in cases where only a majority or supermajority verdict is required,³⁸ a single juror's vote is far more likely to be decisive than that of any single voter in an election.

34. Shari Seidman Diamond et al., *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. EMPIRICAL LEGAL STUD. 425, 427-30 (2009).

35. See *Ballew v. Georgia*, 435 U.S. 223, 243-45 (1978) (ruling that five-person juries in criminal cases are unconstitutional); *Colgrove v. Battin*, 413 U.S. 149, 158-60 (1973) (permitting six-person juries in federal civil trials); *Williams v. Florida*, 399 U.S. 78, 86 (1970) (permitting six-person juries in state trials).

36. With respect to federal criminal cases, the Supreme Court has never overturned the holding of *Thompson v. Utah* that the Constitution requires twelve-member juries. 170 U.S. 343, 350-51 (1898), *overruled on other grounds* by *Collins v. Youngblood*, 497 U.S. 37, 47 (1990).

37. Though, if a lone holdout causes a hung jury, there is always the possibility that a retrial will result in the same outcome favored by the majority in the first trial.

38. See Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201, 203 (2006) (noting that twenty-nine states require only supermajority verdicts in civil cases, while three accept nonunanimous verdicts if a jury remains deadlocked after six hours of deliberation). Only two states allow nonunanimous verdicts in criminal felony cases. *Id.*

Obviously, the small size of juries also makes it easier for any one juror to try to influence the votes of others than it is for voters in an election to do so. In electoral politics, only a tiny fraction of the population has the kind of influence necessary to have more than a miniscule chance of swinging enough other voters' decisions to affect the outcome. Jurors have a much better chance to influence others through argument and deliberation. The far greater ability of jurors to influence outcomes gives them a stronger incentive to acquire knowledge than voters.

This incentive would not matter if jurors were narrowly self-interested. Potential jurors with a clear financial or other similar stake in the outcome of a case are likely to be excluded. But, if jurors are even mildly altruistic and care even modestly about providing impartial justice for their fellow citizens, the greater likelihood of decisiveness is likely to be a significant incentive to pay attention. Once the juror has been empanelled on a trial, the opportunity costs of paying attention and making a serious effort to deliberate are relatively low, since there is little else that she can do with her time during that period. Thus, only a relatively modest degree of altruism or sense of civic duty would be needed to lead jurors to respond to the incentive for effort provided by a greater likelihood of decisiveness. Such moderate altruism is relatively common, as indicated by various types of evidence.³⁹ For example, the average American household donates about 4 percent of its income to charity.⁴⁰

In elections, moderate altruism is often enough to incentivize voters to pay the relatively small costs of going to the polls, despite the low probability of casting a decisive ballot. But, for most voters, it is *not* enough incentive to devote the much greater amount of time and effort necessary to acquire information on the many complex policy matters at issue.⁴¹

In theory, the much lower probability of decisiveness for an individual vote in an election, as opposed to a jury verdict, could be offset by the much greater impact of an electoral decision. But, for

39. See SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 7, at 67-68.

40. ARTHUR C. BROOKS, WHO REALLY CARES? THE SURPRISING TRUTH ABOUT COMPASSIONATE CONSERVATISM: AMERICA'S CHARITY DIVIDE—WHO GIVES, WHO DOESN'T, AND WHY IT MATTERS 3 (2006).

41. See SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 7, at 63-71.

a moderately altruistic juror, the expected value of a “correct” jury vote is still much higher than that for a correct vote in an election. For example, a moderately altruistic voter who values benefits to fellow citizens at 1/1000 of the value he would place on a similar benefit to himself would likely estimate the value of casting a “correct” vote in a presidential election at somewhere around fifteen dollars, assuming he perceived a substantial difference in quality between the two candidates.⁴² By contrast, if the stake in a trial is, say, \$100,000 or its equivalent value in prison time, the same 1/1000 discount rate yields an expected value of fifty to one hundred dollars,⁴³ because the probability that any one vote will be decisive is very high—is nearly certain in the case of a jury with a unanimity requirement. And, obviously, many civil and criminal cases involve stakes far greater than \$100,000. In criminal cases, a prison sentence of even two or three years probably imposes far greater costs on the defendant and society than that. Imprisoning an inmate for a year costs the government \$25,000 or more on average, and that, of course, does not include the costs inflicted on the prisoner himself, including lost income and the psychological burden of incarceration.⁴⁴ Obviously, few jurors know the exact costs that imprisonment imposes on society or defendants. But they are at least likely to have an intuitive sense that the stakes are high. The same goes for verdicts in all but very small-scale civil suits.

A second key difference between jurors and voters is the scope and complexity of the issues they consider. Most elections involve an extremely wide variety of issues, many of them complicated. For example, the President and Congress deal with issues as varied as the appointment of judges, defense policy, environmental policy, taxation, and international trade. State and local governments also often have a wide range of complex functions. Even the most knowledgeable voters may find it difficult or impossible to inform themselves on all the issues at stake in many elections.⁴⁵

42. *Id.* at 67 & n.17.

43. I assume, roughly, that the probability of casting a decisive vote ranges from 50 percent to 100 percent.

44. JOHN SCHMITT ET AL., THE HIGH BUDGETARY COST OF INCARCERATION 11 (2010), available at <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf>.

45. I elaborate this point in greater detail in SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 7, at 140-41.

By contrast, most jury trials focus on a relatively narrow, discrete set of questions. A typical criminal trial tries to determine whether defendant X committed crime Y; a typical civil trial assesses whether the defendant is liable for some specific harm that has occurred. This narrowness of focus reduces the cognitive burden on jurors and also the amount of knowledge they need to possess to make an informed decision. Obviously, as discussed below,⁴⁶ there are complex cases that impose much greater information burdens on jurors. Most jury trials, however, deal with fewer and less complex issues than elections do.

A third major difference between jurors and voters is that the former are required to listen to the evidence and arguments presented by both sides in a trial and also to consider the views of other jurors in deliberation. By contrast, most voters devote little if any effort to acquiring political information, and those that have an unusually high interest in politics often consider only sources in line with their preexisting views.⁴⁷

Finally, it is possible that jury trials usually involve issues that are less likely to trigger strong ideological biases than elections. Voters often have strong preexisting ideological or partisan biases about the issues at stake in elections. By contrast, such biases are less likely to play a role in most jury trials, especially those that primarily focus on narrow factual questions about particular incidents between parties who the jurors have never heard of.

Overall, there are plausible theoretical reasons for believing that jurors are less likely to suffer from problems of ignorance and irrationality than voters. Part II considers the extent to which this is actually true.

II. THE EVIDENCE ON JURY IGNORANCE AND BIAS

The available evidence on jury ignorance and bias suggests that jurors perform somewhat better than what we know of voters. But they do nonetheless have information problems in complex cases involving scientific evidence and expert testimony.

46. See *infra* Part II.

47. See discussion of these points *supra* Part I.A-B.

A. Favorable Evidence on Jury Knowledge and Objectivity

There is considerable evidence supporting the view that, in most cases, juries do not suffer from a serious knowledge deficit. A variety of studies conducted over a period of almost fifty years find a high rate of agreement on case outcomes between juries and judges. By assumption, the latter are presumed to be relatively knowledgeable; therefore, if juries reach similar results to those of judges, they are likely to have adequate information or at least no worse than that possessed by legal professionals.

Harry Kalven and Hans Zeisel's classic 1966 study, *The American Jury*, found that jurors reach the same decisions as judges would have in 78 percent of cases.⁴⁸ Several more recent studies have reached similar results.⁴⁹ It is also important to note that the cases where judges and juries disagree do not seem to be disproportionately those that are unusually complex, as measured by the amount of evidence involved in the case.⁵⁰

Some studies that specifically focus on complex cases also find a high level of jury performance. These include patent cases,⁵¹ medical malpractice cases,⁵² and case studies on medical drug cases.⁵³ An important recent study by Shari Seidman Diamond, Beth Murphy, and Mary Rose concludes that civil juries deliberate carefully and usually pay close attention to the instructions given by judges, on average developing a good understanding of the relevant law.⁵⁴ As discussed below, I have a somewhat less optimistic view of this study's findings.⁵⁵

48. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 58 (1966).

49. See NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 148-54 (2007) (summarizing and discussing studies over the last twenty-five years).

50. *Id.* at 148-49; see also Richard Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 181, 182 (Robert E. Litan ed., 1993) ("[T]he jury often appears to do surprisingly well in the face of complexity, particularly insofar as complexity is defined by length of trial and the introduction of massive arrays of evidence.").

51. Kimberly A. Moore, *Judges, Juries, and Patent Cases—An Empirical Peek Inside the Black Box*, 99 MICH. L. REV. 365 (2000).

52. NEIL VIDMAR, *MEDICAL MALPRACTICE AND THE AMERICAN JURY* 121-44 (1995).

53. VIDMAR & HANS, *supra* note 49, at 153.

54. Shari Seidman Diamond et al., *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537, 1552-57 (2012).

55. See *infra* Part II.B.

The evidence on judge-jury agreement is impressive. If juries, on average, perform as well as judges, that suggests they achieve a fairly high degree of competence. But this conclusion is subject to important caveats. First, agreement between judges and juries may sometimes be the result of ignorance among the former as much as knowledge among the latter.⁵⁶ Most American judges are generalists who may lack expertise in particular types of cases, especially complex cases involving difficult policy issues or scientific evidence. As Judge Richard Posner emphasizes, “A judge is a generalist who writes an opinion under pressure of time in whatever case, in whatever field of law, is assigned to him.”⁵⁷ Posner’s analysis focuses primarily on appellate judges.⁵⁸ But the same point applies to most trial judges at both the state and federal level, who also hear a wide range of cases. Judges nonetheless know more than jurors do about legal doctrine. But their superiority in judging scientific evidence and other complex issues may be far less clear.

Second, the fact that the cases where judges and juries disagree are not disproportionately those with the most evidence does not necessarily prove that there isn’t a greater divergence in more complex cases. Quantity of evidence is not the same thing as complexity. A case could turn on a large amount of simple evidence or, conversely, a small amount of complex evidence. For example, a standard “whodunit” could turn on the testimony of numerous different eyewitnesses. It may be time-consuming to figure out which witness is telling the truth. But doing so is not inherently complicated and arguably does not require specialized knowledge. On the other hand, a case could turn on just one or two pieces of extremely complex evidence or testimony. Examples might include an environmental tort case that turns on a single piece of scientific data, or an antitrust case that turns on economists’ testimony about the effects on competitiveness of a single business decision.

Judges also enjoy a number of advantages over jurors that are not easily measured, but could turn out to be significant. For example, they can take account of precedents created by previous cases (which jurors usually cannot do). Similarly, judges, but not jurors, usually have to justify their decisions in written opinions; the

56. This possibility was brought to my attention by David Bernstein.

57. RICHARD A. POSNER, *HOW JUDGES THINK* 206 (2008).

58. *See id.* at 205.

process of drafting an opinion might help judges consider the issues more carefully and weed out some potential errors. Judges might also avoid some errors because the fear of being overruled by a higher court might lead them to consider the issues more carefully.⁵⁹

Finally, as discussed below, more narrowly focused studies show greater evidence of bias and ignorance by jurors, especially in more complicated cases. It may be that jury knowledge is sufficient to deal with run of the mill cases, but not those that address unusually complex issues or have complicated scientific evidence.

B. Negative Evidence on Jury Knowledge and Objectivity

Despite the extensive positive evidence on juror knowledge, there is also a substantial amount of evidence cutting the other way. Much of it deals with complex cases and cases involving expert testimony where ignorance is particularly likely to be a problem. There is also significant evidence that jurors, like voters, often allow bias to influence their evaluation of evidence.

Many studies find that jurors do a poor job of evaluating expert evidence.⁶⁰ While the adversarial process can help engender skepticism about biased testimony by paid experts, the result may make jurors equally skeptical about the experts on both sides rather than enable them to tell the difference between high-quality and low-quality expert testimony.⁶¹ A leading study of one major series of mass tort cases concludes that “[i]f there is one lesson to be drawn from these cases, one single overarching problem revealed by the Bendectin litigation, it is that in cases involving complex scientific evidence juries have a difficult time reaching the truth.”⁶² Other

59. See, e.g., Steven Shavell, *The Appeals Process and Adjudicator Incentives*, 35 J. LEGAL STUD. 1 (2006) (arguing that the threat of reversal on appeal is likely to lead to better decision making by lower court judges).

60. See, e.g., Bradley D. McAuliff & Margaret Bull Kovera, *Juror Need for Cognition and Sensitivity to Methodological Flaws in Expert Evidence*, 38 J. APPLIED SOC. PSYCHOL. 385, 402-03 (2008); see also Bradley D. McAuliff et al., *Can Jurors Recognize Missing Control Groups, Confounds, and Experimenter Bias in Psychological Science?*, 33 LAW & HUM. BEHAV. 247, 253-55 (2009).

61. For studies reaching this conclusion, see JOSEPH SANDERS, *BENEDICTIN ON TRIAL: A STUDY OF MASS TORT LITIGATION* 120-30 (1998); Lora M. Levett & Margaret Bull Kovera, *The Effectiveness of Opposing Expert Witnesses for Educating Jurors About Unreliable Expert Evidence*, 32 LAW & HUM. BEHAV. 363 (2008).

62. SANDERS, *supra* note 61, at 193.

studies have reported more positive results about jurors' comprehension of expert testimony and conclude that jurors effectively evaluate experts despite their own lack of scientific expertise.⁶³

Overall, however, jurors still find it difficult to evaluate expert evidence, in part because they must evaluate disagreements between experts on issues about which they themselves have little knowledge. Even relative optimists about jurors' abilities recognize that they often differentiate between experts based on such dubious factors as how much money the experts had been paid and whether the experts used "concrete examples" rather than summaries of research findings in their presentations to juries.⁶⁴ Richard Lempert, author of a leading optimistic assessment of jurors' ability to deal with complex cases, nonetheless cautions that "[a] special problem of understanding arises when there is a conflict of expert testimony," because "when the two sides provide different interpretations of a situation, a person who previously knew nothing about the issue may have little basis for choosing between them."⁶⁵ As Scott Brewer puts it, the underlying issue is this: "if a judge or a jury does not have the requisite scientific training, how can that judge or jury make a warranted choice between competing ... claims by putative experts?"⁶⁶

Jurors have similar problems understanding and following legal instructions given to them by judges. Even scholars generally optimistic about the performance of juries find that such problems are common.⁶⁷ A major recent study of fifty actual jury deliberations by Shari Seidman Diamond and her colleagues found that about 19 percent of juror comments referencing the instructions they received

63. See VIDMAR & HANS, *supra* note 49, at 179 (summarizing several such studies); see also Sanja Kutnjak Ivković & Valerie P. Hans, *Jurors' Evaluations of Expert Testimony: Judging the Messenger and the Message*, 28 LAW & SOC. INQUIRY 441 (2003) (finding that jurors generally assess expert testimony well); Phillip G. Peters, Jr., *Doctors & Juries*, 105 MICH. L. REV. 1453, 1492-95 (2007) (same); Neil Vidmar, *Are Juries Competent to Decide Liability in Tort Cases Involving Scientific/Medical Issues? Some Data from Medical Malpractice*, 43 EMORY L.J. 885, 906 (1994) ("Anecdotes about the widespread malperformance of juries do not stand up to systematic data.").

64. The higher paid expert was trusted less. VIDMAR & HANS, *supra* note 49, at 180.

65. Lempert, *supra* note 50, at 192.

66. Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1552-53 (1998).

67. See, e.g., Lempert, *supra* note 50, at 201-05.

from the judge were inaccurate.⁶⁸ Some 83 percent of these mistakes were due to failures of comprehension, and such failures occurred in all but two of the fifty cases.⁶⁹ Only about 47 percent of the mistakes were corrected by either the judge or another juror.⁷⁰

Many of these mistakes were a result of jurors misunderstanding simple language in the instructions or misstating legal standards of proof, rather than failing to understand words that were used in a special, legal sense distinct from their colloquial meaning.⁷¹ Yet both kinds of error are examples of potentially damaging jury ignorance. Indeed, failure to properly understand simple terms or burdens of proof is in some ways a more damning example of ignorance than failure to understand complex technical language. It suggests that some jurors fail to pay proper attention, possibly even in much the same way as voters ignore a high percentage of the political information available to them.

The authors suggest that their findings indicate that jurors “do not exhibit the abysmal failure in understanding the law that standard comprehension tests show.”⁷² It does indeed seem to be true that jurors’ understanding of instructions is better than abysmal. But the incidence of error revealed in their data is nonetheless relatively high.

Professor Diamond and her coauthors found that these kinds of jury errors affected damage awards in only seven of the fifty cases studied and did not affect the verdict in any of them.⁷³ The relatively small sample size makes it difficult to tell whether this error rate is representative of the legal system as a whole. But if it is, the result that jury ignorance has substantive effects on damages in 14 percent of cases is not a comforting one.

It is fair to note, as the authors do, that some of these errors might have been prevented if judges had given jurors better instructions or clarifications in response to questions.⁷⁴ But, given the large number of legal points that lay jurors are likely to be

68. Diamond et al., *supra* note 54, at 1556.

69. *Id.* at 1557-58.

70. *Id.* at 1558.

71. *Id.* at 1558-61.

72. *Id.* at 1540.

73. *Id.* at 1593.

74. *See id.*

ignorant about, it may be unrealistic to expect judges to fully account for and correct all potential errors of this type.

Other studies of juror understanding of instructions also find that mistakes are common.⁷⁵ This is, perhaps, not surprising, given that most jurors have little or no previous experience with trial procedure and legal standards. An additional factor may be that, even with respect to words used in their colloquial sense, most people are not used to following detailed instructions with the exactitude and precision required in a legal setting. Everyday colloquial language is understandably often more fluid and less precise than legal terminology.

In addition to evidence of ignorance, there is also considerable evidence of juror bias in evaluating the information they do know. In some respects, these biases are similar to those of voters, though probably not as pervasive or severe.

Historically, the most notorious form of bias among American jurors was racial bias against African-American defendants. There is a long and sordid history of such bias, especially in southern states that practiced Jim Crow segregation and excluded nearly all African-Americans from juries until the 1960s.⁷⁶ Over the last several decades, African-Americans have increasingly gained access to juries on equal terms with whites. Racial prejudice among the latter has also declined to the point where racially biased convictions are far less common than in the past, though some racial bias by jurors still persists.⁷⁷ In many cases where it still occurs, that bias may be the result of unconscious stereotyping or prejudice rather than deliberate hostility to a particular racial group.⁷⁸

Even if racial bias has diminished, other forms of biased evaluation of evidence persist. Most strikingly, a recent study by economist Scott Wentland finds that jurors may be influenced by ideological bias, with juries in relatively Democratic areas awarding

75. See VIDMAR & HANS, *supra* note 49, at 158-64 (summarizing many studies, most of which conclude that jurors often misunderstand instructions and relevant legal standards); see also ABRAMSON, *supra* note 2, at 91 (summarizing the conventional wisdom that “jurors do not fathom the instructions [given by judges] and fall back on their own gut reactions or common sense in deciding how the case should come out”).

76. For a review of this tragic history, see RANDALL KENNEDY, RACE, CRIME, AND THE LAW 169-80 (1997); see also ABRAMSON, *supra* note 2, at 61-62.

77. See ABRAMSON, *supra* note 2, at 104.

78. See *id.* at 273 n.19 (citing various studies on the impact of race on juries).

far higher punitive damages in tort cases than those in Republican ones.⁷⁹ A one standard deviation increase in the percentage of Democrats in the area from which the jury pool is drawn leads to an average increase of \$238,000 in damages.⁸⁰

Such biases may not constitute a deliberate effort to “punish” ideological enemies regardless of the facts of the case or comparable deliberate attempts to let ideologically sympathetic defendants get off lightly. Rather, as with rational irrationality among voters, the problem may be that jurors have ideological preconceptions that affect their evaluation of the evidence presented to them, and then do not try very hard—if at all—to de-bias their judgments.⁸¹ Both jurors and voters may sincerely believe they are judging the facts objectively, without actually doing so.

Some evidence also suggests that jurors may be biased against foreign litigants. In a study of litigation in patent cases, foreign litigants were far less likely to prevail in cases decided by jurors than judges.⁸² It is notable that patent cases are often highly technical in nature, and may be more susceptible to xenophobic and other biases than relatively simple cases would be.

Other biases may also affect jury decision making. A well-known study by Professor Cass Sunstein and several colleagues found that emotional “outrage” responses lead jurors to make “erratic” and inconsistent damage awards, often with little reference to the actual magnitude of the harm inflicted by the defendants’ actions.⁸³ Other studies find that jury awards of punitive damages are more erratic and less clearly related to compensatory damages than are awards determined by judges.⁸⁴ Law and economics scholar Frank Buckley

79. See Scott Wentland, *Political Beliefs and Tort Awards: Evidence of Rationally Political Jurors from Two Data Sets*, 8 REV. L. & ECON. 619, 628-29 (2012).

80. *Id.* at 620.

81. I discuss this point in regards to voters in greater detail in SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 7, at 78-82; cf. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1135-68 (2012) (describing the ubiquity of implicit bias in influencing legal decision making).

82. Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497, 1504 (2003).

83. CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURORS DECIDE 31-32, 36-37, 39-41 (2002). For a critique of some of these conclusions, see Neal R. Feigenson, *Can Tort Juries Punish Competently?*, 78 CHI.-KENT L. REV. 239 (2003).

84. Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1, 13-17 (2004); see W. Kip Viscusi, *How Do Judges Think About Risk?*, 1

argues that the Canadian civil litigation system is superior to that of the United States, in part because Canada makes little or no use of civil juries, whereas in the United States “juror ignorance and passion” may deserve “much of the blame for outrageous damages awards.”⁸⁵

A 2001 survey by economist Kip Viscusi compared judges’ and juries’ assessments of risks in hypothetical tort cases and found that judges were less likely to make errors in applying legal negligence standards and also less likely to err in analyses of risk estimates.⁸⁶ Most strikingly, jurors tend to actually “punish” defendant firms for conducting risk analyses in advance.⁸⁷ This is perverse behavior because advance weighing of risks is part of what a well-functioning tort system is intended to achieve.⁸⁸ Jurors in such cases also ignore the costs of precautions per life saved, even though, in a society where it is impossible and undesirable to reduce risk to zero, this should be a crucial consideration in determining whether failure to take a given precaution was negligent.⁸⁹ Jurors may engage in similar dubious risk assessments in criminal cases, where surveys show they are willing to tolerate much higher risks of error than conventional wisdom would consider acceptable.⁹⁰

Another common problem is hindsight bias, as a result of which jurors determine liability based on the consequences of the defendant’s actions rather than based on the reasonableness of decisions at the time he or she acted.⁹¹ This kind of bias affects judges and

AM. L. & ECON. REV. 26, 58-59 (1999) (finding that although judges make cognitive errors in assessing risks and punitive damages, they make fewer errors than juries).

85. Frank H. Buckley, *The Rule of Law in America*, in *THE AMERICAN ILLNESS: ESSAYS ON THE RULE OF LAW* 3, 18 (Frank H. Buckley ed., 2013). *But cf.* Michael Trebilcock & Paul-Erik Veel, *A Tamer Tort Law: The Canada-U.S. Divide*, in *THE AMERICAN ILLNESS: ESSAYS ON THE RULE OF LAW* *supra* at 229, 236-37 (noting conflicting evidence on this issue).

86. W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by Courts*, 30 J. LEGAL STUD. 107, 111-15 (2001); *see also* David E. Bernstein, *Learning the Wrong Lessons from “An American Tragedy”: A Critique of the Berger-Twerski Informed Choice Proposal*, 104 MICH. L. REV. 1961 (2006) (arguing that jurors are not competent to make complex risk assessments).

87. Viscusi, *supra* note 86, at 120-24.

88. *See id.* at 111-12.

89. *Id.* at 124 tbl.6.

90. Hal R. Arkes & Barbara A. Mellers, *Do Juries Meet Our Expectations?*, 26 LAW & HUM. BEHAV. 625 (2002).

91. *See, e.g.*, Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 589-91 (1998) (presenting a study demonstrating the effects of hindsight bias); Alison C. Smith & Edith Greene, *Conduct and Its Consequences: Attempts*

other decision makers, as well as jurors.⁹² But jurors may be more susceptible to it because—relative to judges or other experts—they are less likely to know much about the full universe of possible outcomes and may only be presented with the result in the case immediately before them: which may be highly atypical and a low-probability event.⁹³

Many of the studies documenting mistakes by juries are based on survey data, rather than actual jury deliberations.⁹⁴ It is likely that deliberation with better-informed or less-biased jurors could moderate the impact of these errors in real-world cases. However, deliberation can also accentuate biases and errors rather than moderate them.⁹⁵ This is especially likely when the deliberation occurs within groups whose preexisting biases are relatively homogenous.⁹⁶ Juries with homogenous biases are likely to be common because jurors are usually selected on a geographic basis and political ideology is often highly correlated with residence.⁹⁷ But such deliberation-induced polarization can occur even within mixed groups, as participants may become entrenched in their preexisting views.⁹⁸

In some cases, however, deliberation with better-informed participants does lead jurors to moderate their biases and make better decisions. In their contribution to this symposium, Shari Seidman Diamond, Mary Rose, and Beth Murphy show that many juries include participants with expertise relevant to the case, and that their contributions to deliberations sometimes sway other jurors.⁹⁹ At the same time, they also show that such “embedded experts” do not seem to have significantly more influence on

at *Debiasing Jury Judgments*, 29 LAW & HUM. BEHAV. 505, 506 (2005) (describing the bias).

92. See Rachlinski, *supra* note 91, at 588.

93. This key difference between judges and jurors is emphasized in Viscusi, *supra* note 86, at 109-10.

94. See, e.g., *id.* at 109.

95. See David Schkade, Cass R. Sunstein & Reid Hastie, *When Deliberation Produces Extremism*, 22 CRITICAL REV. 227, 245-46 (2010).

96. *Id.* at 229-39.

97. See, e.g., BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* 9-10 (2009) (documenting increasing ideological homogeneity within geographic regions).

98. See Schkade et al., *supra* note 95, at 239-40 (citing studies that suggest this).

99. See Shari Seidman Diamond et al., *Embedded Experts on Real Juries*, 55 WM. & MARY L. REV. *905-07, *919-26 (2014) (documenting such effects).

outcomes than jurors who lack such expertise.¹⁰⁰ Indeed, juror experts were disproportionately likely to end up as isolated holdouts on a jury, which suggests resistance to their expertise by other jurors.¹⁰¹

Professor Diamond and her coauthors emphasize a positive implication of these findings: that expert jurors are not exercising disproportionate influence on trial outcomes,¹⁰² thereby obviating the supposed need for judicial intervention to exclude them from juries, as advocated by some scholars.¹⁰³ But the findings might also be interpreted more pessimistically—as evidence that nonexpert jurors are *too little* influenced by their more knowledgeable fellows.

C. Implications

Despite their limitations, it is significant that jurors still reach decisions similar to those of judges in the vast majority of cases.¹⁰⁴ This suggests that their knowledge levels and use of information are, in most cases, roughly on par with that of knowledgeable professionals, albeit ones that are often not experts on the issues involved in the specific case at hand.

On the other hand, jury knowledge and objectivity is less impressive in cases that call for more complex judgment, such as evaluation of risk, punitive damages, and scientific evidence.¹⁰⁵ Jurors also often misunderstand judges' instructions on the law.¹⁰⁶

The situations where jury knowledge and objectivity are more likely to break down are, for the most part, those where their

100. See *id.* at 913-14, 926 (concluding that there is “surprisingly little evidence that as a group the juror experts exerted a particularly powerful influence” on the trial outcome “based on an aura of authority stemming from their greater expertise”).

101. *Id.* at 915-16. In Arizona, where the Diamond et al. study was conducted, civil juries need only a majority of six out of eight participants in order to reach a verdict. ARIZ. REV. STAT. ANN. § 21-102(D) (2012). The “holdouts” referred to in the study were jurors who dissented from a final verdict. Diamond et al., *supra* note 99, at 915-16.

102. Diamond et al., *supra* note 99, at 926.

103. For examples of such proposals, see Paul F. Kirgis, *The Problem of the Expert Juror*, 75 TEMP. L. REV. 493, 535-36 (2002) and Michael B. Mushlin, *Bound and Gagged: The Peculiar Predicament of Professional Jurors*, 25 YALE L. & POL'Y REV. 239, 270-72 (2007).

104. See discussion *supra* Part II.A.

105. See *supra* Part II.B.

106. See *supra* Part II.B.

advantages over voters are less likely to compensate for their prior ignorance of the issues at stake in a case.

The more complex and technical the issues, the more difficult it is for laypeople to understand them simply by listening carefully to testimony presented in court. The more rigorous the analysis required to consider the relevant evidence in a case, the more difficult it is to overcome cognitive biases in assessing it. Jurors' primary advantages over voters are the limited scope of the inquiry they must perform and the greater incentive to perform it well caused by the much higher likelihood that their votes will be decisive. In complex, technical cases, however, putting in a greater effort than that made by the average voter may not be enough to really grasp the issues or consider them in an unbiased way.

It is also worth noting that cases involving such issues as punitive damages and corporate risk assessment implicate broad public policy concerns that go beyond the narrower "whodunit" questions at stake in more conventional cases. Not surprisingly, the former may stimulate ideological and other biases of the sort that also bedevil voters.¹⁰⁷

Problems such as these have led some scholars to propose limiting the use of juries in complex cases,¹⁰⁸ or alternatively, using juries specially selected for education or expertise.¹⁰⁹ Not surprisingly, better-educated jurors on average have a better understanding of scientific evidence.¹¹⁰

The juror shortcomings described here fall short of definitively proving that such proposals should be adopted. Knowledge and bias are not the only factors that need to be considered in determining whether a given task in the legal system should be entrusted to ordinary jurors, specialized ones, or judges. For example, even if

107. See *supra* Part II.B; see also Wentland, *supra* note 79, at 629.

108. See, e.g., SUNSTEIN ET AL., *supra* note 83, at 242-43 (advocating increased oversight of juries by judges in punitive damages cases and moving away from punitive damages to civil fines).

109. See, e.g., Kristy Lee Bertelsen, *From Specialized Courts to Specialized Juries: Calling for Professional Juries in Complex Civil Litigation*, 3 SUFFOLK J. TRIAL & APP. ADVOC. 1, 15 (1998) (arguing for the use of specialized professional juries in such cases); Franklin Strier, *The Educated Jury: A Proposal for Complex Litigation*, 47 DEPAUL L. REV. 49, 50 (1997) (arguing that complex cases should have a minimum number of highly educated jurors).

110. Valerie Hans et al., *Science in the Jury Box: Jurors' Comprehension of Mitochondrial DNA Evidence*, 35 LAW & HUM. BEHAV. 60, 69 (2011).

judges are more knowledgeable and less biased than jurors, it is possible that the latter are preferable on other grounds, such as their greater ability to reflect the values of the community or their greater willingness to “nullify” unjust laws.¹¹¹ Similarly, the knowledge shortcomings of voters do not prove that we should abandon the use of democracy for all political decisions or that the electorate should be limited to the most knowledgeable and best-educated citizens.¹¹² Nonetheless, the problem of jury ignorance and bias at least strengthens the case for institutional reforms that transfer decision-making authority to more knowledgeable hands, even if it does not decisively clinch it.

III. IMPLICATIONS FOR THE USE OF JURIES BEYOND THE COURTROOM

In recent years, a variety of scholars have proposed using jury-like mechanisms to strengthen public participation in government and increase citizens’ political knowledge. Famed constitutional law scholar Bruce Ackerman and political scientist James Fishkin have developed a “Deliberation Day” proposal in which all voters will be incentivized to attend a one day session of presentations and discussions on public policy issues before each election.¹¹³ Professor Ethan Leib advocates the establishment of a “popular” branch of government in which groups of randomly selected citizens will participate in making new law.¹¹⁴ More recently, political philosopher Jamie Whyte proposed a system of “national juries” under which the task of voting in elections should be delegated to a randomly selected group of twelve voters per district who would “be spirited away to a place where they will spend a week locked away

111. For modern defenses of jury nullification, see, for example, ABRAMSON, *supra* note 2, at 57-95 and Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

112. See SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 7, at 181-85 (discussing these possibilities and noting some drawbacks).

113. BRUCE A. ACKERMAN & JAMES S. FISHKIN, DELIBERATION DAY 3 (2004) (describing Deliberation Day).

114. ETHAN J. LEIB, DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT 4 (2004).

with the candidates, attending a series of speeches, debates and question-and-answer sessions before voting on the final day.”¹¹⁵

Elsewhere, I have criticized the details of such proposals and argued that they cannot come close to properly informing the juror-voters about the full range of complex issues addressed by modern government.¹¹⁶ Here, I briefly consider the implications the literature on jury ignorance in the courtroom may have for them.

As discussed above, juror knowledge and objectivity seem to be adequate in relatively simple cases, but often break down in cases that involve complex evidence and have broad public policy implications.¹¹⁷ Obviously, the latter are far more akin to the political decisions that political juries would have to consider. Jurors’ difficulties in evaluating expert testimony also have implications for proposals that require political juries to make decisions based on presentations by partisan public policy experts.¹¹⁸ Citizen jurors may be poor evaluators of such expert testimony.¹¹⁹

If anything, the cognitive difficulties faced by public policy juries are likely to be far more severe than those facing conventional jurors in relatively complex legal cases. Even an unusually complex trial rarely, if ever, includes as many and as complicated issues as a presidential election. Consider that the federal government addresses such varied issues as environmental policy, inflation, unemployment, defense against terrorism, and federal subsidization of education, among many others.¹²⁰ Even state and local governments have far more varied functions than the range of issues that comes up in a typical trial. Consider, for instance, the vast range of

115. Jamie Whyte, *Fewer Voters Are Better Voters*, THE BIG QUESTIONS (Feb. 25, 2010), <http://www.thebigquestions.com/2010/02/25/fewer-voters-are-better-voters/>.

116. See SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 7, at 177-80; Ilya Somin, *Deliberative Democracy and Political Ignorance*, 22 CRITICAL REV. 253, 268-72 (2010) [hereinafter Somin, *Deliberative Democracy*]. For my critique of Whyte’s plan, see Ilya Somin, *Could National Juries Alleviate the Problem of Political Ignorance?*, VOLOKH CONSPIRACY (Mar. 9, 2010, 1:57 AM), <http://www.volokh.com/2010/03/09/could-national-juries-alleviate-the-problem-of-political-ignorance/> [hereinafter Somin, *National Juries*].

117. See *supra* Part II.A-B.

118. See *supra* note 113 and accompanying text.

119. See, e.g., Peter Glasner, *Rights or Rituals? Why Jurors Can Do More Harm than Good*, 40 PLA NOTES 43, 43-44 (2001) (arguing that expert testimony by scientists was overvalued in a Welsh citizen jury experiment).

120. For a discussion of the size of government as an obstacle to adequate voter knowledge, see SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 7, at 139-43.

functions that a state legislature is responsible for, such as economic development, infrastructure, environmental protection, law enforcement, primary and secondary education, funding of state universities, and land use policy.

Political jurors also face far more temptations to ideological and other forms of bias than do trial jurors. The issues that arise in public policy debates are, on average, more ideologically charged than those in all but a fraction of even the most complicated trials.

Jury-like systems for political decision making did sometimes work well in ancient Athens, most notably in the case of the Council of 500, also known as the Boule. The Council of 500 was comprised of a group of citizens annually chosen by lot to make certain significant policy and oversight decisions.¹²¹ But there are many crucial differences between ancient Athens and the modern democratic state that make the former a tenuous precedent for the latter. Most notably, the ancient Athenian government had many fewer and less complicated functions, and the members of the Council of 500 were selected from a class of citizens who usually had extensive personal experience with most of those functions, particularly warfare.¹²²

This does not prove that political juries are completely useless or that they should be categorically banned. They could be useful for gathering scientific data on the development of public opinion and possibly for making certain discrete small-scale policy decisions.¹²³ We should also consider experimenting with them in small local government institutions. There is some evidence suggesting that small New England town meetings have more and better-informed voter participation in government than larger jurisdictions with

121. See generally P.J. RHODES, *THE ATHENIAN BOULE* (1972) (detailing the history of this institution and its functions). For arguments that it functioned effectively, especially in terms of utilizing information, see JOSIAH OBER, *DEMOCRACY AND KNOWLEDGE: INNOVATION AND LEARNING IN CLASSICAL ATHENS* 143-56 (2008).

122. For discussion of these differences, see Ilya Somin, Book Review, 119 *ETHICS* 585, 589-90 (2009) (reviewing JOSIAH OBER, *DEMOCRACY AND KNOWLEDGE: INNOVATION AND LEARNING IN CLASSICAL ATHENS* (2008)); see also Somin, *National Juries*, *supra* note 116 (discussing a modern proposal similar to the Council of 500).

123. I briefly consider these possibilities in SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE*, *supra* note 7, at 190-91.

more complex governments.¹²⁴ Small-scale local political juries might be able to build on this success.

Overall, however, the experience of trial juries in complex cases is a cautionary tale for advocates of the large-scale use of political juries. Those who seek to alleviate the problem of political ignorance, strengthen democratic accountability in government, or achieve major improvements in public policy will probably have to look elsewhere.

CONCLUSION

The problems of rational ignorance and rational irrationality that bedevil voters are much less significant in the case of jurors. Relative to voters, jurors have substantially stronger incentives to become well-informed and assess relevant evidence in an unbiased way. They also usually decide less ideologically charged issues, which makes it easier to avoid bias.

At the same time, juror knowledge and objectivity are far less impressive in cases that involve complex evidence or have broad public policy implications. The more the decisions facing jurors begin to resemble those considered by voters, the more they seem to suffer from similar cognitive shortcomings. This has important ramifications for the advisability of relying on lay jurors in such cases. It also weakens the case for the use of jury-like institutions to make public policy outside the courtroom.

The argument of this Article does not prove that we should necessarily abandon the use of juries, even in the most complex cases. But it does show that juror ignorance is, in some key ways, a problem akin to that of political ignorance. Both dangers are real, and both require careful consideration of potential solutions.

124. See, e.g., FRANK BRYAN, *REAL DEMOCRACY: THE NEW ENGLAND TOWN MEETING* 123 (2004). *But cf.* Somin, *Deliberative Democracy*, *supra* note 116, at 270-71 (noting that the absolute level of public knowledge and participation in these jurisdictions is still low).