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The Jury Is Still Out

Dennis Hale, *The Jury in America: Triumph and Decline*. Lawrence: University Press of Kansas, 2016, xvi + 464 pp., $39.95 (cloth).

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In *Democracy in America* Alexis de Tocqueville famously described the American jury as a political, rather than merely judicial, institution. Without claiming that jury decisions tended to be juster or sounder in either criminal or civil cases than those made by a judge (as was and remains the practice in the Continental system) would be, Tocqueville identified the jury as a preeminent means by which the democratic populace exercised its sovereignty, since its decisions constituted a more direct and meaningful exercise of political authority than voting, taken by itself, would. Additionally, particularly in civil trials, jury service was an experience that deepened ordinary people's understanding of, and appreciation for, the law, thanks especially to the instruction that they received from the presiding judge, thus heightening their disposition to respect the constitutional system and the legal rights of their fellow citizens. (In this respect the jury system also served in Tocqueville's account as a primary check on the tyranny of the majority.)

In *The Jury in America* political scientist Dennis Hale takes up Tocqueville's view of the jury as a political institution. However, partly in light of the recent "decline" of the jury—that is, the steep decrease in the frequency of jury trials, in proportion to the number of cases that are settled through plea

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bargains (in criminal cases) or negotiated settlements (in civil ones), that has occurred in recent decades, Hale's outlook on the institution is less sanguine. While noting various factors that have encouraged this decline—including the vast increase in the number of crimes listed in federal statute books, generating an overload of the judicial system; the capacity of prosecutors to pile up numerous criminal charges for the same offense, giving defendants a strong incentive to plead guilty; and the expansion of rights-based and class-action lawsuits—Hale also identifies changes in policy and political outlook, including the Progressive stance favoring resolution of disputes by administrative experts rather than by courts, and the subsequent change of emphasis in composing jury pools from choosing well-qualified jurors to selecting those who would "represent" their community (in terms of race, class, and gender) that have furthered the trend. Although the decline of the jury is "the product of policies supported by both political parties, both houses of Congress," and "the leadership of the American bar," Hale aims "to sow a few doubts about the wisdom of this trend" (416). To every thoughtful reader, his thoroughly researched, well-argued, and nonpartisan study will inevitably have this effect.

Hale's order of presentation is historical. He traces the Anglo-American jury from its common-law origins in medieval England and the American colonies; through its restructuring in the early period of the American republic; then to its gradual transformation during the nineteenth and early twentieth centuries, followed by the "postmodern" jury, based on the "representative" principle embodied in the Jury Selection and Service Act of 1968; to its contemporary near "vanishment." The last chapter culminates in an analysis of four widely publicized jury trials from recent years in which Hale defends the jury system against common criticisms of it.

The most interesting aspect of Hale's account of the development of the English and colonial jury system concerns the manner in which juries came to defy the "official" division of labor between judges and jurors, according to which jurors' role was limited to matters of fact, while it was up to the judge alone to decide issues of law. Especially in criminal cases carrying the severest penalties, juries came to be seen as expressing "the community's sense of justice," not merely the letter of the law. Hence, for instance, "juries effectively abolished the [legally mandated] death penalty for adultery" in seventeenth-century Massachusetts (56). (In this regard, Hale confirms Tocqueville's observation that despite the "profuse" provision for the death penalty in the colonists' laws, their "enlightened" spirit and "mild" mores minimized the

application of that punishment.)[1] It is also significant, in view of later developments, that while the colonial jury system was in principle a democratic one, it was selective: each town meeting was authorized "to choose as many 'able and discreet' men as would be needed for jury duty" (57).

As Americans' conflict with their British rulers sharpened during the eighteenth century, Hale observes, they focused on "English juries' dramatic resistance to Crown persecutions for seditious libel," dating back to the reign of the Stuarts, and exemplified by the 1735 acquittal of New York printer John Peter Zenger (60). In civil cases as well, juries began to claim the right to return verdicts "'contrary to the mind of the court'" (i.e., the judge), a practice that John Adams enunciated as a "duty" when jurors perceived a judge's interpretation of the law as violating the law's "fundamental principles," as understood by the citizenry at large. Even Tory magistrates, Hale points out, denied their own authority to serve "too absolutely" as judges of law as well as of fact (61–62). In sum, "the early American legal system existed for a century and a half as a partnership among literate citizens whose knowledge of the law was based on familiar common-law principles," rather than as the exclusive purview of a professional clerisy authorized to dictate the law to unschooled laymen (63–64).[2] Hence British authorities' extension in 1767 of the jurisdiction of admiralty courts (which heard cases without juries) to the criminal prosecution of smugglers, along with Massachusetts Governor Thomas Hutchinson's threat to prosecute cases of seditious libel in a "summary" manner, were a prime precipitant of the American Revolution (65–66).

Following independence, the omission of a guarantee of jury trials in civil cases from the original Constitution was a major concern of the Anti-Federalists, leading to its addition in the Seventh Amendment. "Federalist concerns over whether civil juries could handle complex cases," Hale observes, "were somewhat beside the point," since "the jury was how the common people participated in government" (76) (corresponding to Tocqueville's account of it as a political, not merely judicial, institution). In response to the fear Hamilton expressed in *Federalist*, No. 83 that erroneous decisions in civil cases by jurors unequipped to comprehend complex commercial agreements or issues relating to foreign policy would bring even the use of criminal juries into disrepute, Anti-Federalists defended both sorts of

[1] Alexis de Tocqueville, *Democracy in America*, trans. Harvey C. Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2000), 1.1.1, 38.

[2] Cf. Thomas Hobbes's critique of the latter view in his *Dialogue between a Philosopher and a Student of the Common Laws of England*.

jury as means of civic education (again anticipating Tocqueville), compelling jurors "to take responsibility for their decisions and for the actions of others," learning "to distinguish between justice and vengeance" and how "to rule responsibly" (81, 83). Not surprisingly, the constitutional amendments fortifying and extending the right to jury trial in state and federal courts appear to have passed the first Congress with "very little controversy" (85).

In subsequent sections of his chapter on the "republican jury," Hale describes the dialectical relationship that developed between federal judges and jurors during the Constitution's early years, which was facilitated by Congress's requiring Supreme Court justices to serve on circuit courts, or "ride circuit," thus acting (in Ralph Lerner's phrase) as "republican schoolmasters"—familiarizing the people at large (particularly in the addresses with which they opened a term) with the principles of constitutional government. The relationship, Hale notes, was "not one-sided," as illustrated by a protest submitted to Congress by the grand jury of the Georgia circuit against the extent of the power claimed by the juryless admiralty courts (96).

Hale then traces the development of the relationship through two late eighteenth-century crises. The first was the treason trial of leaders of the Whiskey Rebellion, which required the presiding Justice Paterson to explain to a grand jury the difference between "rebellion against a tyrannical government" and "acts of violence against a government chosen by the people themselves" (97)—a distinction subsequently highlighted by Abraham Lincoln in response to the Confederate states' so-called secession.[3] The second was the trial of seventeen alleged violators of the Sedition Act of 1798, all but one of whom were convicted in federal or state courts. Despite its controversiality (then and now), Hale argues, the Sedition Act in some ways "clarified and even strengthened" the jury's authority, since it required that charges of seditious libel be supported by proof of defamatory intent (as well as of the falsity of the libel), as ascertained by the jury. In a charge to the Pennsylvania grand jury under the act, even the "irascible" Federalist Justice Samuel Chase affirmed jurors' right in criminal cases "to decide the law, as well as the fact," thus evincing "the nature of the partnership that both Republicans and Federalists understood to exist between judge and jury in the republican era"—although Chase did deny the claim made on behalf of one defendant that jurors had the right to acquit if they thought the act unconstitutional,

[3] Message to Congress in Special Session, July 4, 1861, in *Collected Works*, ed. Roy P. Basler (New Brunswick: Rutgers University Press, 1953), 4:439 ("when ballots have fairly, and constitutionally, decided, there can be no successful appeal, back to bullets"); also First Inaugural Address, in ibid., 267.

a practice that would have introduced intolerable uncertainty into the law, varying with the jurisdiction in which one resided. Nonetheless, the sedition trials also "exposed two difficulties" with the republican jury system over which controversy has continued ever since: establishing qualifications for jury service and the specific nature of the relationship between jury and judge (100, 102, 105–7).

In the remainder of his chapter on the republican jury, Hale traces the tug of war that continued throughout the nineteenth century between advocates and opponents of the doctrine that juries had the right to determine, within limits, matters of law as well as of fact, rather than the former being decided solely by judges. This controversy reached a seeming culmination in the 1895 case of *Sparf and Hansen v. United States*, wherein the Supreme Court denied juries' right to judge the law—despite extensive evidence marshaled by the lone dissenter on this point that for almost the first forty years of the Constitution's existence, not a single decision by the highest court of any state, or by any federal judge, had denied that right in criminal cases (138). The dissenting justice described the right as essential to the people's "permanent security"— even though, like John Adams before him, he stressed the jury's duty, and typical willingness, to give proper heed to the guidance of the judge on complex matters of legal interpretation (139).

For Hale, the *Sparf* decision marks the transition from the "republican" jury to the "modern" one. He adds, however, that the modern jury "was the product of several developments over many decades," including the democratization of the franchise (which broadened eligibility for jury service, but heightened questions about jurors' competence); the "emergence of a professional bar," which would now challenge judges' dominance over juries; judges' reciprocal assertion of a "new, more directive relationship with jurors," albeit under the increasingly centralized control of higher courts; a growth in the number of "highly complex commercial disputes," renewing doubts about jurors' capacity to resolve them properly; and the "triumph of Progressive legal doctrines," which aimed "to subordinate lay judgment to…the professional bar and (even better) the professional administrative tribunal" (140–46).

Space considerations require me to limit my scrutiny of Hale's highly informative account of these developments to the last two. While not rejecting some of the criticisms made of juries during the late nineteenth century—for instance, their tendency in civil suits to ignore well-established and reasonable legal doctrines like "contributory negligence," particularly "when the defendant was a 'deep-pockets corporation'" (anticipating the tendency of

some of today's juries to award outrageous punitive damages in suits brought against unsympathetic defendants like "Big Pharma") (155), Hale cites the observation of a couple of prominent critics that such problems were partly the fault of judges who neglected their duty to properly instruct jurors and of state legislators who improperly restricted judges' authority to issue instructions; as well as resulting from the failure properly to screen jurors, as had once been accepted practice, for intelligence, character, and "varied experience in the affairs of life" (159). Whatever the cause, Hale observes, whereas "during the republican era, the dominant question had been whether juries had the right to judge the law," by the late nineteenth century critics contended that jurors "were simply ignoring the law, especially in civil cases in which the defendant was a large corporation" (174). Partly in reaction to this perceived abuse, the American Bar Association urged reforms that would "increase the power of judges and decrease the power of juries" (181). But as articulated by such leading advocates as Roscoe Pound, the ultimate aim of those reforms was not simply to make the judicial system fairer or more efficient, but to overcome "the common law's fixation on individual and private rights," which obstructed (purportedly) needed "social reform." In the vision of Pound and other Progressive reformers, judges "should govern, not just settle cases," basing their decisions not on fixed rules but on a rational "weighing" of the consequences of "alternative social policies" (182). Ultimately, this entailed renouncing (as one leading Progressive put it) the entire, allegedly outdated, "system of Constitutional restraints" on government (184).

As Hale proceeds to explain, this disparaging view of civil juries underlay the 1938 Federal Rules of Civil Procedure, partly designed by the dean of Yale Law School, which "avoid[ed] rather than abolished" such juries (thus preserving the formal Seventh Amendment guarantee) by "making it easier for judges to resolve cases" before a trial began through "extensive pretrial discovery and expanded summary judgment." Those rules, along with subsequent amendments, "are largely responsible for…the 'vanishing civil jury,'" with jury trials now reduced to less than one percent of all federal civil case dispositions, "from levels as high as 30 percent before the reforms" (185). However, 1938 also marked the issuance of a more moderate set of proposals by the American Bar Association for "improving the administration of justice" in the state courts. In particular, the ABA recommended that larger cities adopt the "Cleveland system" for creating jury pools whose members were "drawn from all walks of life" (relying on voter registration lists to achieve that goal), but using a process of interviewing prospective jurors to make it likely (in Hale's summary) that those actually impaneled to serve would possess average or

greater ability "to understand cases and come to reasonable conclusions based on evidence" (188–89). Achieving that goal also required refusing "to accept inadequate excuses" for declining jury service, so as to "kee[p] the administration of justice in tune with the community." Interestingly, the ABA report quoted at length from a 1935 report of the Boston Bar Association, which emphasized the jury's function as not merely one of deciding cases properly, but (as Tocqueville had stressed) "an educational institution" (190). Still, the Cleveland system, as applied, was a selective one, retaining part of the colonial and republican eras' concern for finding jurors who were not merely "average" but "exemplary" in intelligence and character (192–93).

A crucial change in the understanding of the jury selection process, as Hale reports, began with the Supreme Court's decision in the 1940 case *Smith v. Texas*. In *Smith*, while following a line of precedents dating to 1880 that denied the constitutionality of the widespread southern practice of excluding black people from jury service, Justice Hugo Black enunciated a new claim that he misleadingly asserted was an "established tradition" in American law, namely, "that the jury [must] be…truly *representative* of the community" (194, emphasis added). As Hale points out, while defendants had always been understood as entitled to a trial by an impartial jury, chosen in the district where a crime had been committed, it had never previously been held that a jury must "represent" different parts of the community. Representation, it was believed, "was a feature of a legislature, not a jury." "If anything," it had never been thought desirable that a jury "represent the least capable citizens," the "lazy," or "scofflaws looking to reach a quick verdict" so as to hasten home. And while the exclusion of potential jurors on grounds of race was a clear violation of the Fourteenth Amendment, it did not follow that a defendant had the right to be tried by a jury that included members of his race or class (194–95).

Nonetheless, Black's claim was elaborated only two years later in *Glasser v. United States*, a case having "nothing to do with race." In *Glasser*, the defendant objected to the fact that all of the six women on the jury "had been chosen from a list…supplied by the Illinois League of Women Voters," and "had attended a class on the jury system," which he alleged would give them a "good government" perspective "and therefore a bias in favor of the prosecution" (196). Favoring good government (in a case that involved the bribery of a government official), along with enhanced understanding of how juries worked, was now alleged to constitute unacceptable juror bias!

While denying the defendant's appeal, Justice Frank Murphy, speaking for the court, elaborated a new view of the jury (following Black's lead) which, he claimed, harmonized better with the "basic concepts of a democratic society" than the previous, common-law one: the claim that the jury selection process, rather than focusing on competence, should be based on prospective jurors' "social and demographic characteristics."[4] That view culminated in the Jury Selection and Service Act of 1968, which embodied the principle that "every man is fit" for jury service (198, 201–2). This historically novel claim, which soon became the "conventional wisdom," was already implicit in the Civil Rights Act of 1957, which in the process of "disentangl[ing] the federal courts from racially discriminatory state practices" of jury selection, proclaimed jury service to be a "right," and omitted any reference to the need for jurors to be intelligent (215–16). Thus Congress and the Supreme Court prepared the way for what Hale terms, in the next chapter, "The Postmodern Jury."

The core premise of the postmodern understanding of the jury Hale locates in the testimony of University of Chicago law professors Harry Kalven and Hans Zeisel, authors of the 1966 study *The American Jury*, before a 1967 Senate subcommittee whose work culminated in the Jury Selection and Service Act. It is that the notion of *truth* as the intended product of jury deliberation is a social construct, with people's judgments inevitably being shaped or determined by their class bias. Consequently, for many "reformers" whose opinions shaped the act, "the very idea of a jury chosen for its qualities of character and intelligence was inconsistent with the democratic ideal." (As Kalven put it, the endeavor to select intelligent jurors was inevitably "arbitrary.") Hence, under the principles of the act, as summarized by Attorney General Ramsey Clark, it became illegal to require any qualifications of federal jurors other than age, district residency, English literacy, the absence of any "incapacitating mental or physical infirmity," and the lack of a felony conviction. A central objection to the prior exclusive reliance on voter registration lists as the source of jury pools, as a consultant to the University of Chicago Jury Project put it, is that "it discriminate[d] against the

[4] Murphy's endeavor to impose a radically new view of the jury's function on the American judicial system on behalf of a supposed insight into the "basic concepts of a democratic society" anticipates the enterprise of Harvard professor John Rawls, whose 1971 book *A Theory of Justice* has enormously influenced American jurisprudence, demanding that all social and economic inequalities be re-arranged to serve the interest of "the least advantaged" (rather than the common good), on the ground that such an arrangement is "natural, given the ethos of a democratic society" (*A Theory of Justice*, 2nd ed. [Cambridge, MA: Harvard University Press, 1999], 280–81). In the name of "democracy," both the jurist and the professor exhibit a remarkably undemocratic disposition to remake the American constitutional order so as to satisfy their own idiosyncratic intuitions.

uneducated" as well as the poor, who were less likely to have registered. Seven years later the Supreme Court used the Fourteenth Amendment to extend to the states the act's requirement that juries be filled on the basis of representativeness rather than qualities of intelligence or character (236–44).

In subsequent pages Hale traces the ways in which the new understanding of the jury as chiefly a representative institution, rather than an instrument for properly resolving questions of criminal guilt or innocence, or civil liability, has been pushed by the Supreme Court to further extremes. For instance, in *Campbell v. Louisiana* (1998), the court "agreed that a white defendant charged with killing a white victim could make an equal protection challenge" to his conviction on the ground that the selection of the jury foreman had been tainted by "a bias against blacks" (278). Then, in a section titled "The Paper Chase," Hale surveys cutting-edge proposals from law professors for "perfecting" the jury selection process on the basis of postmodern principles. One scholar rejects the notion of choosing jurors on a "color-blind" basis, since "color blindness leads society to understand inequality produced by individual and structural bias as the exception rather than the rule." Hence the author advocates a policy of "affirmative action in jury selection" so as to achieve the goal espoused by Justice Thurgood Marshall of heightening jurors' awareness of their "conscious or unconscious racism" (281). A *Yale Law Journal* contributor argues that black defendants should be tried only by all-black juries. More generally, reflecting apparent doubts in the legal community that any juror can "suspend judgment" in advance of "a fair consideration of the evidence," as he is duty bound to do, two other scholars propose a "cumulative voting" model for jury selection aimed at increasing the likelihood that a case involving a minority defendant would be tried by a juror including at least one member of his group (281–83). (But if each member of the jury is assumed to adhere firmly to his preexisting attachments or biases, how could it ever arrive at a unanimous verdict?)

Yet another scholar laments the court's failure to extend its list of "distinctive groups," whose exclusion from a jury requires "special scrutiny," beyond women and racial minorities, to include the poor. Other groups whose exclusion or relative absence from juries has been criticized by legal scholars include "the young, the old, the handicapped, the poorly educated, the overweight [!], noncitizens, and even felons."[5] Such demands, Hale

[5] With all but two or three states having restored voting rights to convicted felons who completed their sentences (typically with the exclusion of murderers and sex felons), their exclusion from state juries (which are drawn largely from voting lists) has also been repealed in some or many states ("Do

observes, would exacerbate the process of turning jury selection into what Justice William Rehnquist feared amounted to a "constitutional numbers game" wherein "concern for the categories in the [jury] venire has driven out the question that was once at the heart of the jury selection enterprise," that is, whether the jurors possessed the requisite "intelligence, honesty, impartiality, and integrity" to perform their task well. Beyond this problem, one reason the courts have refrained from extending the list of protected categories in these ways is that people's economic status (to say nothing of obesity) "is not 'binary'" (unlike race and gender) and "can change" while being "relative," and persons belonging to that category "do not necessarily share 'common experiences or beliefs'" (282–86). (Of course, one might equally question how far gender or race is the chief determining factor in the beliefs and judgments of most women or members of racial or ethnic minorities, respectively. Does not such an assumption amount to the sin of reifying human identity rather than acknowledging its "fluidity"?)

Not surprisingly, as Hale reports, the transformation of the jury system on the basis of representativeness over the past fifty years has hardly stilled the qualitative complaints that were made about it prior to 1968, with jurors being "described as unserious, reluctant to serve, unable to process complex information, biased…and reluctant to follow" the judge's instructions, as well as "being unsympathetic to large corporations and eager to award 'outrageous'" damages against them in civil trials, as in the Texaco-Pennzoil takeover case, "in which a jury awarded Pennzoil $10.5 billion, including an additional $1 billion (according to one juror) 'for each of the Texaco witnesses [the jury] had most despised.'" Such punitive-damage awards have renewed doubts about the capacity of jurors to comprehend or fairly resolve complex civil cases, especially now that potential jurors' intellectual capacities, patience, or integrity can no longer be taken into account (except through the limited number of peremptory challenges awarded to each side) (291–94, 299). Meanwhile, an unanticipated new problem has developed in the form of "scientific" jury consulting, through which defendants like O. J. Simpson, who can afford (or for political reasons are donated the services of) the most expert consultants, can have their counselors stack juries, by the astute use of peremptory challenges, so as to greatly increase their chances of victory. ("The final Simpson jury had eight African-American women, all twelve jurors were Democrats, and nine

Felons Get Jury Duty?," *Jobs for Felons Hub*, https://www.jobsforfelonshub.com/do-felons-get-jury-duty/#ixzz5fShO6Rw0, accessed Feb. 12, 2019; Patricia Mazzei, "Florida Felons Once Denied Rights Begin Registering to Vote," *New York Times*, January 8, 2019). The way thus seems to be clear for the appeal of some future felony conviction on the ground that the jury failed to include a felon.

of them believed that a successful football player was unlikely to commit murder.") As Hale concludes, "if it is possible for consultants to put together a jury that will not deliberate—because it is already convinced that the prosecution is unjust or that the defendant is guilty, regardless of the evidence entered into the record…it may be possible to buy a jury." (So a reform intended to "democratize" the jury may actually heighten the advantages enjoyed by rich defendants over poor ones—just as eliminating SAT scores as a requirement for admission to prestigious colleges has generated advantages to applicants whose parents can afford to hire professional application-essay writers.) This possibility has in turn "led to the introduction of a new idea masquerading as an old one: jury nullification" (298–304).

Contrary to the claims of its defenders, Hale distinguishes the contemporary assertion of jurors' right to "nullify" laws with which they disagree and the older, common-law and republican understanding that jurors had a right to share in the *interpretation* of a law as well as the facts. Nullification, as a scholar Hale quotes observes, being "rooted in a bias either against the prosecution or in favor of the defendant, and…impervious to evidence… poses a threat to the rule of law." Yet other scholars have justified the practice as reflecting citizens' supposed "right to enact their communal or personal norms in direct contravention of formally enacted laws." In effect, they seize the right of lawmaking from the people's elected representatives in order to favor their own particular whims or prejudices (304–10). But Hale cites studies suggesting, as one might expect, a link between the recent increase in jury nullification and the postmodern rejection of attempts to assess the qualifications of potential jurors: not only do "prosecutors find it more difficult to secure convictions of minority defendants in districts with large numbers of black or Hispanic jurors," but "up to a quarter of all criminal jury trials" now result in "mistrials due to jury deadlock" (versus a historical "baseline" of 5.5 percent), suggesting a growing incapacity or unwillingness of jurors to participate in genuine collective deliberation, as opposed to sticking to their preexisting or quickly formed biases to the end. (When a judge removed a juror who remarked that since he disagreed with drug laws he would never vote to convict an alleged violator, the defendant's conviction was overturned on appeal [310–12].)

Further exacerbating the difficulty of obtaining fair, reasonable, and open-minded jurors, as Hale goes on to observe, is the increased role played by trial lawyers (as opposed to judges) at both federal and state levels in the *voir dire* (the proceeding in which prospective jurors are questioned, officially with a

view to weeding out those with a preexisting bias)—reversing reforms enacted in 1938 and 1946 to reduce the lawyers' role. As attorneys admit, their purpose in conducting *voir dire* is to impanel not an impartial jury, but one that will be sympathetic to their client. The decline in judges' authority to supervise the *voir dire* thus goes hand in hand with the postmodern denial that the purpose of a jury trial is (or can be) the discovery of objective truth (314–26).

Hale begins his chapter "The Vanishing Jury" by citing statistics on the vast decline in the percentage of civil and criminal cases at both federal and state levels that were decided by jury trials over the past half century (e.g., from 8.1 percent of federal criminal cases in 1960 to 2.3 percent in 2013, with nine out of ten defendants entering pleas of guilty or nolo contendere; from 5.5 percent of civil cases in 1962 to 1.1 percent in 2013). By contrast, during "the republican era and well into the modern era, one-fifth to one-third of all civil cases were decided by trials" (327–30).

Hale cites several causes contributing to this decline. One is "the enormous increase of the workload of the state and federal courts, especially on the civil side, over the past half century." Not only did federal case filings multiply sixfold from 1962 to 2010, but their nature "changed in response to civil rights legislation and liberalized class action rules." Reflecting the "rights consciousness" of the 1960s and 1970s, the number of civil rights cases mushroomed "from just over 300 cases in 1962 to more than 50,000 cases in 2010," partly as the result of "statutes governing elementary and secondary schools, employment law, the rights of the disabled, the rights of shareholders," and colleges' "admissions and athletic policies." A second cause was the Supreme Court's 1966 adoption of the recommendations of the Judicial Conference's Advisory Committee on Civil Rules, aimed at making class actions on behalf of large numbers of plaintiffs easier to file. One result of the 1966 amendments' "facilitating the prosecution of small claims susceptible to group adjudication but otherwise uneconomical to litigate," although Hale does not spell this out, is the notorious practice of attorneys' creating huge classes of plaintiffs who have suffered barely noticeable "injuries" (e.g., in one instance experienced by this reviewer, having purchased a popular brand of laptop computer which had a slight software glitch that *might* adversely affect some files on rare occasions), then winning "settlements" that offer plaintiffs trivial compensation (in this case, minor discounts on future computer purchases) while the attorneys pocket many thousands if not millions of dollars in fees. (Such settlements of course will ultimately be paid by future purchasers of the company's products.) And as Hale does point out, the 1998

multistate tobacco settlement that put $247 billion into state coffers (based on a questionable theory of legal liability, I note) netted the plaintiffs' attorneys a windfall of "between $10 billion and $30 billion" (335–40). The potential cost of losing such cases if they go to trial—especially given juries' tendency to award disproportionate punitive as well as "actual" damages—along with the cost of litigation itself, powerfully increases the pressure on defendants to settle, regardless of their degree of guilt.[6]

Other causes listed by Hale pertain specifically to the decline of trials in criminal cases. One was Congress's "federalization of crime," adding some three thousand crimes to the federal criminal code just between the 1960s and the 1990s— including not only drug and firearms offenses, but such trivial misdeeds as "tampering with odometers." Another was the Sentencing Reform Act of 1984, which balanced a reduction in the variation of sentences that could be imposed for a crime depending on the locale where it was committed (a concern of liberals) with an increase in the severity of mandated penalties for the most serious crimes (a goal of conservatives). The "most notable consequence" of the sentencing guidelines "was to enable prosecutors to threaten draconian sentences in order to extract plea bargains from defendants who might otherwise have chosen to go to trial" as well as offering them "additional opportunities to multiply counts for what was, in essence, a single crime," with the same effect (342, 372).

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[6] Consider the suit recently filed under the Americans with Disabilities Act against dozens of New York art galleries for failing to make their websites accessible to *blind people*: Elizabeth A. Harris, "Galleries from A to Z Sued over Websites the Blind Can't Use," *New York Times*, Feb. 18, 2019. The two lawyers bringing the suit are reported to be "among the most prolific in the country" in initiating such actions, having previously "filed reams of complaints" against such companies as "CorePower Yoga, the Honey Baked Ham Company and Camp Bow Wow Franchising, a day care for dogs." As the *Times* reports, given defendants' typical wish to avoid litigation, "most [such] lawsuits are quickly settled, with the visually impaired plaintiffs earning a few hundred dollars per lawsuit and their lawyers pocketing thousands in legal fees." Similarly, in 2018 a blind man sued fifty colleges under the ADA for "compensatory damages" as well as injunctive relief for failing to make their websites sufficiently accessible to the visually impaired; the College of the Holy Cross arrived at an undisclosed financial settlement with him three months later, following the lead of at least five other colleges. The suit maintained that the college had deprived "visually-impaired customers" the opportunity to "fully and equally use or enjoy the facilities" offered to the public on its website. While such lawsuits, initiated by a "boutique" law firm operating on a contingency-fee basis, are "widely seen as a means to get a quick settlement, rather than improve accessibility," a Syracuse University law professor, reflecting current canons of judicial ethics, defends them on the ground that whether the plaintiff (who in 2017 sued a coffee company, among other targets) is a true disability-rights advocate or merely an opportunist is irrelevant, since all such lawsuits encourage inclusivity (Lindsay McKenzie, "50 Colleges Hit with ADA Lawsuits," *Inside Higher Ed*, Dec. 10, 2018, https://www.insidehighered.com/news/2018/12/10/fifty-colleges-sued-barrage-ada-lawsuits-over-web-accessibility, accessed March 13, 2019; Scott O'Connell, "Holy Cross Settles Suit over Website," *Worcester Telegram and Gazette*, March 13, 2019).

Another byproduct of the sentencing guidelines, resisted by some Supreme Court members including Justices Scalia, Ginsburg, and Thomas, who were concerned to preserve the right to trial by jury, was the enhanced opportunity it sometimes offered judges to impose harsher penalties on a convicted defendant than the jury had recommended, based on facts not brought before the jury (369–70, 374–75). (Interestingly, the enhanced fact-finding power of judges was applauded by Justice Stephen Breyer, normally a member of the court's "liberal" bloc, on the Progressive ground that the complexity of the contemporary world renders "jury-centric" criminal justice impracticable [371].) A further unintended consequence was to increase the workload of federal judges, who were now required to justify their sentences with "extensive factual findings and legal conclusions" as well as "spend[ing] more time supervising" released prisoners (344–48). For this among other reasons, when it comes to civil suits, "contemporary judges are far more amenable to settlement than their predecessors were," and "efficient case management" is thought to entail "prevent[ing] trials unless they are absolutely necessary"—an understanding reflected in the Civil Justice Reform Act of 1990, which encouraged federal courts to develop their own dispute-resolution programs as an alternative to "expensive and time-consuming trials" (358–59).

Meanwhile, when civil cases go to trial, federal judges have made increasing use of "rule 50" (authorizing them to remove an issue from the jury when they find that "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue") as well as summary judgments (dismissing claims that have no evident factual basis). Hale worries that as a consequence, "the marginalization of the civil jury in modern America is almost as stark as it has been in those regimes [such as Britain] where constitutional rights are trumped by the principle of parliamentary supremacy" (360–65).

Elaborating a core concern of Justice Scalia, Hale argues that the "vanishing" of the jury trial matters because of its long-recognized centrality to the operation of republican government. Hale identifies as the deepest cause of this decline a change in the legal community's understanding of "the jury system and the law itself." As a consequence of "the increasing reliance, since the 1930s, on administrative government in preference to the old regime of 'courts and parties,' in which administrators played a decidedly subordinate role and courts were willing to defer to the judgment of legislatures" except in rare constitutional emergencies, "since the 1960s most graduates of American law schools have been instructed in" the doctrines of "legal realism and

progressive jurisprudence." While "the legal community's doubts about the jury system were deepened" by recollecting "the civil rights movement as a series of lawsuits punctuated by demonstrations," in which southern juries and legislators were "the villains," and the heroes were "lawyers and judges," "the American administrative state grew apace,"[7] generating doubts among legal scholars about the very utility of juries (377–78). In consequence, as one law professor acknowledges, "the United States may be moving in a 'continental' direction, toward 'an inquisitorial judiciary superintending'" the determination of facts (382).

For Hale, even though "the jury system comes at a cost," justifying the traditional assignment of certain specialized sorts of cases to professional judges, its (near) abolition entails a troubling *political* cost. "Unlike agency-employed bureaucrats," he observes, jurors do not derive their livelihood from government and consequently face no pressure to obey public officials' dictates. Moreover, in the process of serving as jurors, as Tocqueville had emphasized, ordinary citizens "learn the art of judgment" and collectively "give a particular shape to the public order" (381). When as many as thirty percent of adults could report having served as jurors a least once, as they did in a 2004 survey (the figure had been forty-five percent in the 1990s), they "leavened" the public as a whole with "experience in the art of judgment" (405). This function is all the more important, Hale maintains, given the withering of other civic obligations (thanks to the abolition of the draft and the facts that "two-fifths of the population pays no taxes" and "one-third of the public does not bother to vote") (381–83). (To fortify Hale's claim, one might argue that there is a possible connection between France's reliance on a civil-law rather than common-law system, in which determinations of guilt and innocence are left to professional judges, and the sense of alienation from the political and legal order manifested in the French people's reliance on periodic riots, massive strikes, and other acts of uncivil disobedience to protest government policies—despite the democratic character of their political system.)[8]

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[7] For an extended recent critique of the elevation of bureaucratic government, at the expense of judicial enforcement of constitutional rights, as a consequence of Progressivism, see Joseph Postell, *Bureaucracy in America: The Administrative State's Challenge to Constitutional Government* (Columbia: University of Missouri Press, 2017).

[8] See *Democracy in America*, 1.1.5, 91, where Tocqueville contrasts the American people's disposition to identify with the legal order, thanks to their playing an active role in the administration of justice, with Europeans' tendency to sympathize with criminals, regarding public officials as their common enemy.

To illustrate the civic value of jury trials, Hale examines four relatively recent, widely publicized trials (two civil, two criminal) in which "public discussion of 'the facts'… was often widely off the mark," reflecting the fact that "the jury, unlike the general public, is exposed to evidence in a controlled environment where fact claims must be supported by evidence and cross-examination"; and "the moral difficulties" that juries have to address "go well beyond the questions that dominate" the debate about juries. In each instance Hale concluded that "the jury made the right decision," contrary to his own original expectation in some cases (383–84).

The four cases Hale treats include *Apple Computer v. Samsung Electronics* (2011), involving a claim of patent infringement; the better-known *State of Florida v. George Zimmerman* (2012), in which Zimmerman, a "white" resident of a gated community, was acquitted of murder for shooting a black teenager with whom he became involved in a fight after tracking him as a potential burglar; the celebrated *Liebeck v. McDonald's Resturants*, in which an elderly customer won a settlement of approximately a half million dollars against the fast-food chain for burns she suffered from spilling hot coffee on herself; and *Massachusetts v. Louise Woodward*, in which a nanny was convicted of second-degree murder for having "dropped" or physically abused an infant in her care, only to have its verdict vacated (controversially) by the trial judge. In the roughly five pages that Hale devotes to each case (384–404), he shows the jurors making an earnest effort to weigh evidence fairly and set aside any preexisting biases. Even though three of the four cases raised complex technical or medical issues, Hale observes, those issues involved perplexities that even experts might have found it difficult to resolve (though it helped that the Apple case was tried in Silicon Valley, where the "representative" jury was unusually well educated and versed in the sort of problems the case involved). And in both the McDonald's and Zimmerman cases, he shows that media portrayals seriously distorted the issues. (Of course, there is some tension between Hale's favorable portrayal of juries' performance in these cases and his lament at the decline in the use of qualitative criteria for the selection of jurors.)

In his conclusion, without denying the legitimacy of criticisms sometimes levied against present-day juries—for "huge punitive-damage awards in civil cases; 'outrageous' verdicts in homicide cases, often with racial overtones[9]…

[9] Surely the O. J. Simpson verdict is the most egregious of these in recent decades, rivaling in its outrageousness the acquittals of white racist murderers in the old, segregationist South. But to condemn the latter as they deserve, no less than the former, presupposes the existence of an intelligible, objective standard of justice which juries should be expected to strive for—the very thing that today's

for nullifying statutes they disagree with," as well as "the growing problem of hung juries"—Hale reminds us of the countervailing political benefits of the jury system, while suggesting that the criticisms are overblown: "juries are as likely to find for defendants as for plaintiffs in civil cases, and truly outrageous punitive-damage awards are rare, though not so rare as to put them beyond the reach of hungry lawyers," and "most criminal trials are determined on the basis of evidence, rather than emotion…regardless of the demographic makeup of the jury panel or the race or ethnicity of the defendant" (405–7). However, Hale emphasizes the danger posed to the honest and serious deliberative practice in which juries still typically engage by the relativistic view of justice that continues to be advanced by leading legal theorists (who in turn shape the outlook of lawyers, judges, and lawmakers), reflecting the "nonjudgmental" attitude now encouraged among citizens generally by the soi-disant intellectual or cultural elite—as if any political or social order could survive without making judgments (including the judgment that intolerance is wrong). While Hale laments the replacement of the old system of jury selection that aimed to screen jurors for intelligence, character, and judgment by the "representative" one, he also cites a book by the distinguished Yale humanities professor Norma Thompson describing her unhappy experience serving as jury foreman in a New Haven murder trial, in which a jury composed of "educated and experienced professionals," including four Yale professors, deadlocked—thanks in part to one juror, a scientist, who seemed unable to grasp the concept of reasonable doubt, and another who clung to what she called "reasonable doubts" but was unable to explain them. Such cases, Hale concludes, exhibit a decline in "political virtue" in our time, a development that no return to the older selection system by itself could reverse (407–9). (This situation is likely to get worse with the restoration of eligibility for jury service to convicted felons, noted above. And it is interesting to note a parallel to Hale's account of the vanishing jury in the title of a new book by an experienced political observer, *The Vanishing Congress*.[10] These accounts, combined with the merest glance at the behavior of America's current chief executive—noted for his limited attention span— along with that of his leading Democratic rivals, who propound vast, utopian policy schemes, all tailored to "social media" sound bites, attest to the

postmodern or "critical race theorists" deny. See Jeffrey Rosen, "The Bloods and the Crits," *The New Republic*, Dec. 9, 1996, 32; James Q. Wilson, *Moral Judgment: Does the Abuse Excuse Threaten Our Legal System?* (New York: Basic Books, 1997), 110–12.

[10] Jeff Bergner, *The Vanishing Congress: Reflections on Politics in Washington* (Norfolk, VA: Rambling Ridge, 2018).

alarming overall decline in the role of deliberation in the country's political and civic institutions, as well as a lack of genuine civic concern and education among the electorate.)

The Jury in America is a truly impressive work of scholarship, eminently worthy of the attention of members of the legal profession, lawmakers, and citizens generally. In conclusion, however, I wish to add some thoughts on reasons for the decline in regard for the jury system, or for the American system of justice generally, that Hale only indirectly alludes to in his conclusion, or does not cite at all. One is the deterioration in the conception of legal ethics that is publicly propounded as well as exemplified by our most prominent attorneys, especially criminal defense lawyers. Even if most juries do their jobs diligently, the public performance of the Simpson legal team that won its client an acquittal surely lent support in the public mind, rightly or not, to the view that there exist two systems of justice in America, one for the wealthy minority (who can often, it seems, literally get away with murder), another for the rest of us. (The ability of some rich clients—or defendants whose political views can elicit pro bono services—to escape punishment in some cases for serious crimes is only exacerbated by the rise of "jury consultants," discussed by Hale [300–303], who in the age of "representative" juries can guide lawyers in using the *voir dire* to select jurors whose prejudices and even incapacities are most likely to favor the defense.)

The cynical view of the jury system has been openly expressed by one of America's most renowned defense lawyers (recently retired, a former Harvard law professor, and a public-spirited citizen in his nonprofessional life), Alan Dershowitz. Hale quotes Dershowitz as attributing the verdict in the Simpson trial (in which he formed part of the defense team) to the jury's having had "reasonable doubts" based on suspicions about sloppy police work, so that it acquitted Simpson because it believed the government was trying "to frame a guilty man" (312). Dershowitz apparently sees nothing wrong with this abuse of the jury's function to let a vicious murderer go free, just to "punish" the police (if not "white" society more generally). Indeed, in an earlier book reviewing some of his most celebrated cases, Dershowitz, who acknowledges that nearly all his clients were guilty,[11] asserts it to be a "reality" of America's judicial system that "nobody" in it—including judges and

[11] Alan Dershowitz, *The Best Defense: The Courtroom Confrontations of America's Most Outspoken Lawyer of Last Resort* (New York: Random House, 1982), xiv. In a later book Dershowitz (perhaps out of a heightened sense of prudence?) expresses only a suspicion that "some" of his clients were guilty (*Taking the Stand: My Life in the Law* [New York: Crown, 2013], 230).

prosecutors—"really wants justice." Yet while implicitly having included himself among those who lack a concern for justice, to the point of feeling no sense of guilt at "helping a murderer to go free," even given the possibility that the client will repeat his offense, Dershowitz inconsistently rails at the widespread practice of plea bargaining as unjustifiable (although one might wonder whether his concern in this regard as a trial lawyer is entirely disinterested).[12] It is enlightening (and troubling) to contrast Dershowitz's now-typical, if unusually frank, disclaimer of moral responsibility for the consequences of his activity with an older view that once prevailed, at least at the higher levels of the American legal profession (however much it may have operated in practice), as discussed in a relatively recent study by Kansas law professor M. H. Hoeflich.[13]

Related to this decline in the publicly acceptable ethical standards to which attorneys are expected to adhere is another potential cause of decreasing public respect for the criminal justice system: the extension by the Supreme Court in the 1960s of the exclusionary rule (originally applied at the federal level in *Weeks v. United States* [1914]) to the states. The court thus brought about the overturning of state criminal convictions the validity of which was not in question, simply because prosecutors had relied on evidence acquired without a search warrant (*Mapp v. Ohio* [1961]); and similarly the reversal of convictions based on confessions obtained by police through non-coercive means, but without the defendant having been given opportunity to consult a lawyer prior to making the incriminating remarks (the *Escobedo* and *Miranda* cases of 1964 and 1966, respectively). Thereby the court, in its quest to improve police practices, added tools enabling skilled attorneys who agree with Dershowitz that the defense lawyer's job, "especially when representing the guilty," is "to prevent, by all lawful means, 'the whole truth' from coming out" or prevailing to better succeed in their quest.[14] In the ironic formulation of Judge Benjamin Cardozo in the 1926 New York case of *People v. Defore*, under the exclusionary rule, "the criminal is to go free because the constable has blundered.… The privacy of the home has been infringed [by a warrantless police search], and the murderer goes free." (In one of Dershowitz's most famous or notorious cases, he had the conviction

[12] Dershowitz, *The Best Defense*, xvi–xvii.

[13] M. H. Hoeflich, "Legal Ethics in the Nineteenth Century: The 'Other Tradition,'" *University of Kansas Law Review* 47 (1999): 793–817. Of course, it should be added that ethical standards among the contemporary tort plaintiffs' bar are not obviously any more elevated than those professed by Dershowitz: see note 6 *supra*.

[14] Dershowitz, *The Best Defense*, xix.

of Claus von Bülow for effectively murdering his wife, through an injection that left her in a permanent coma, overturned largely on the ground that the police had obtained the damning evidence through a warrantless search of his medical bag.)

Such outcomes surely tend to weaken Americans' belief that our criminal justice system reliably works to punish the guilty and defend the innocent. Consequently, as a rejoinder to Hale's criticism of the tendency of the Sentencing Reform Act to provide prosecutors with additional tools to plead guilty, one might respond that these tools serve to partly counterbalance the deleterious effects of the exclusionary rule in making it harder to win convictions from guilty persons in the first place by the use of noncoercive means of interrogation, or through evidence secured as the result of on-the-spot hunches by experienced police officers.[15] (The court reaffirmed the exclusionary rule in the 2000 case of *Dickerson v. United States*, despite what it acknowledged was the rule's lack of constitutional grounding.)[16]

Finally, in response to Hale's account of how factors like legislative "reforms" in the judicial process have contributed to an overload of judges' workloads, thus heightening their incentives to avoid jury trials when possible, another possible cause of that overload at the higher levels of the judiciary should be considered: the relaxation by judges themselves of rules that traditionally limited the sorts of cases that came before them, specifically the rules of standing (requiring that the plaintiff in a civil case be able to cite a demonstrable personal injury, rather than a merely abstract or generalized interest, such as harm to the environment; consider note 6 above) and the "political questions" doctrine, first enunciated by John Marshall in *Marbury v. Madison*, which prevented courts from intervening in policy controversies that the Constitution leaves to the political branches of the government. The disregard of those rules—leading courts to consider, for instance, suits brought by state governments against the immigration limitations or

[15] The classic manual for noncoercive interrogations, the usefulness of which was greatly reduced by the Supreme Court's *Miranda* ruling (in which the book was singled out for criticism for its explanation of the techniques by which arrestees who were unaware of the advisability of remaining silent until after they had obtained a lawyer could be coaxed into confessing their guilt, e.g. through use of the "good cop/bad cop" routine) was Fred E. Inbau and John E. Reid's *Criminal Investigation and Confessions*, 4th ed. (Gaithersburg, MD: Aspen, 2001).

[16] On the ineffectuality and unjust consequences of the exclusionary rule, and the alternative legislative means available to ensure that the rights of innocent parties would not suffer from its absence, see Steven R. Scheslinger, *Exclusionary Injustice*: *The Problem of Illegally Obtained Evidence* (New York: Marcel Dekker, 1977). Schlesinger also reprints Chief Justice Burger's dissenting opinion in the 1971 case *Bivens v. Six Unknown Named Agents*, which calls for the creation of such a new system.

immigration-related "national emergency" declarations made by the Trump administration, even though state officials could hardly demonstrate a distinctive interest that their states would suffer *as states* as a result—not only increases judges' workload (as did the Supreme Court's liberalization of class-action rules) but also heightens popular suspicions of the judiciary as a partisan institution. (These changes brought about or at least encouraged by activist judges parallel the politicization of the jury selection process under the influence of postmodernism.) Today's judges would do well to revisit Yale law professor Alexander Bickel's account, in his 1962 classic *The Least Dangerous Branch*, of the "passive virtues" that help the judiciary to overcome the "countermajoritarian difficulty."[17]

Despite these additional reflections, or differences of emphasis or judgment between Hale and me, I want to reaffirm in conclusion that his book is a most illuminating work of political science and legal scholarship, one that also represents a real contribution to the cause of preserving and defending the cause of constitutional government in our time. I am confident that Tocqueville would share my admiration for it.

[17] Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs Merrill, 1962), chap. 4.