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THE SHARED ASSUMPTIONS OF THE JURY SYSTEM AND THE MARKET SYSTEM

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[The] common sense of twelve honest men gives a still better chance of just decision [than any other trial method].—Thomas Jefferson[1]

The idea of irrational buyers or of impulsive buying behavior is a myth.—George D. Downing[2]

Assumptions are necessary, powerful, and potentially deceptive. They direct our thinking from the shadows, moving our perspective toward the intended conclusion. Bringing them out from the dark is a healthful activity in the main because it permits us to be more self-conscious and reflective about the conclusions we hold.[3]

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1. JOHN GUINTHER, THE JURY IN AMERICA 209 (1988).

2. GEORGE D. DOWNING, BASIC MARKETING: A STRATEGIC SYSTEMS APPROACH 422 (1971).

3. Identifying and evaluating these assumptions facilitates discussion about change in the legal community. *See* Jeffrey J. Rachlinski, *Heuristics and Biases in the Court: Ignorance or Adaptation?*, 79 OR. L. REV. 61, 102 (2000) ("[T]he adjudication process is better served when courts are aware of the cognitive biases that influence decision making than when they disregard them or fall prey to them. Courts might overreact to the perception that illusions cloud judgment, but identifying a bias in judgment allows for public debate on the appropriate remedy."). The importance of assumptions in the law can be seen by their pervasive significance in many aspects of the law. *See* Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 405, 413–16 (2005) (depicting the role of human behavioral assumptions in the law); Paul C. Pritchard, *Our National Parks: Assumptions, Metaphors and Policy Implications*, 8 FORDHAM ENVTL. L.J. 421, 421 (1997) (on how assumptions "shape public policy"); Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5, 12–15 (1997) (describing the influence of assumptions in comparative law); Kyle D. Logue, *Legal Transitions, Rational Expectations, and Legal Progress*, 13 J. CONTEMP. LEGAL ISSUES 211, 221 (2003) (on how assumptions influence legal transitions, particularly in liability law); JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 1–16 (1983).

The American legal community tends to assume the overwhelming merit of both (1) the jury's role in the adversary system of "justice" and (2) the distribution of resources and power associated with fealty to market outcomes. This support is not surprising; the market system and the adversary system are two fundamental American institutions. Because they are bedrock components of our dominant intellectual culture, we often fail to evaluate the shared assumptions of these systems. While these assumptions may hold true in some situations, they cannot be presumed accurate in individual, or even typical, instances.

For example, when we rely on jury decisions as an arbiter in the adversary system, we reflexively make specific assumptions about the skills of certain cohorts of citizens to listen, integrate, and evaluate evidence. Curiosity about the quality of those skills is crucial for efforts to legitimate the decisions of juries. Similarly, the skills of consumers in understanding and assessing product information must be proficient for us to revere the putative "laws" of supply and demand. In short, neither juries nor markets function as advertised unless very complicated cognitive processes are habitually deployed by jurors and consumers.

Then where do we get the idea that these skills are commonplace for jurors and consumers? The adversary system and the market are American institutions with deep-rooted histories. As the first section of this Article will detail, these ancient origins are in part responsible for the unquestioned authority of these systems. In other words, the assumptions of these systems are entrenched in tradition. They are cemented into our thinking such that we rarely question them. The first section will describe the long history of each; the second section will identify a common set of fundamental assumptions on which both the jury system and market processes lean heavily. After identifying the core assumptions of both, the Paper concludes with an assessment of a particularly tenuous assumption of both systems: the belief in a rational decision maker who can be depended on to fulfill the promise of juries and market exchange. The attractiveness of these assumptions is deeply embedded in the American embrace of individualism. Hence, any weaknesses in these two primary decision-making institutions can be foreshadowed by recalling the major indictments against individualism.[4]

4. *See* M. Neil Browne & Michael D. Meuti, *Individualism and the Market Determination of Women's Wages in the United States, Canada, and Hong Kong*, 21 LOY. L.A. INT'L & COMP. L.J. 355, 357–72 (1999) (indictments against individualism in labor law); Nancy Kubasek et al., *It Takes an Entire Village to Protect an Endangered Species: Individualism, Overlapping Spheres, and the Endangered Species Act*, 10 FORDHAM ENVTL. L. J. 155, 157–61 (1999) (indictments against individuals in labor law); Carlos A. Ball, *Communitarianism and Gay Rights*, 85 CORNELL L. REV. 443, 447–48 (2000) (indictments against individualism in sexuality law).

I. ORIGINS

A. The Adversary System

Although the adversary system and the market process share several assumptions, their specific origins are very different. The earliest roots of the adversary system were the ancient modes of proof, including "ordeal, battle, and wager of law."[5] Each of these three methods relied upon divine intervention as the primary determinant of proof.[6] Consequently, ancient forms of proof were irrational and unpredictable, as the methods of proof were very easy to manipulate, relying not on the strength of an argument, but instead on the physical strength and stamina of the accused.[7]

These three ancient methods of proof waned in the thirteenth century,[8] as the Fourth Lateran Council no longer permitted clergy participating in ordeals.[9] With the decline of these three medieval methods of proof, one of the earliest forms of the "jury" trial emerged, as sheriffs would often rely upon selected citizens to provide testimony about any knowledge they had that was relevant to a particular case.[10] Alternatively, if these selected citizens did not know about the facts in dispute, they played an active role in "finding" facts related to the case. Hence, the earliest "jurors" played a very active role in the judicial process, acting in a manner more similar to modern-day witnesses than passive

5. Ellen E. Sward, *Values, Ideology and the Evolution of the Adversary System*, 64 IND. L.J. 301, 320 (1989). Sward explains that in ordeal, the party with the burden of proof would have to swear an oath, after which a priest would require that the individual undergo a test of his oath. *Id.* Frequently, individuals would have their hands covered in leaves and would have to carry a red-hot iron. *Id.* If the individuals could show that the iron did not burn them, their cases were effectively proven. *Id.* Sward explains that battle was another alternative to resolve disputes. *Id.* However, if parties opted not to battle against each other, they could hire champions to fight on their behalf. *Id.* at 320–22. Assuming God would intervene, the victor proved his case. *Id.* Finally, a party could swear an oath under wager of law, while also producing other citizens who would make oaths of their own. *Id.* at 320–21. By demonstrating the accuracy of one's oath with the support of community members, an individual could prove his case. *Id.* Similarly, other forms of ordeal included placing one's arm in boiling water or immersing oneself in water. Stephan A. Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 718 (1983). In the former method of ordeal, a party proved his case if his arm was not burnt. In the latter, an individual proved his case if he sank briefly. *Id.*

6. Landsman, *supra* note 5, at 719 ("Direct heavenly intercession was postulated for ordeal and battle, and eternal damnation was supposed to enforce the oath-taking mechanism.").

7. Sward, *supra* note 5, at 321.

8. *Id.*

9. Edward L. Rubin, *Trial by Battle. Trial by Argument.*, 56 ARK. L. REV. 261, 272–73 (2003). Rubin explains that in 1215, the Fourth Lateran Council forbade ordeals because they were concerned about the theological implications of humans' requiring miracles of God. *Id.* Furthermore, the Council abolished ordeals in response to allegations that priests were being bribed to heat the irons to lesser or greater degrees. *Id.*

10. Sward, *supra* note 5, at 320–22.

jurors.[11] This early form of the jury marked a crucial shift from trial-by-battle to trial-by-argument, as judicial processes relied more heavily on the strength of evidence than acts of God.[12] If we stopped at this point in the evolution of juries, we would, we think, feel very warmly toward a jury trial. At least people will not be hacking away in some barbaric conflation between physical prowess and truth.

Between 1200 and 1700, lawyers occupied a much more prominent role as advocates and officers in the King's court.[13] With increased technicality of the laws, judicial power shifted from the King's appointed civil servants to elite advocates, who occupied full-time positions as judges.[14] Following the greater reliance on advocates, witnesses also began to play a more significant role in the judicial process in the sixteenth century, as voluntary and compelled witnesses replaced the inquisitive jurors as the primary source of information.[15]

11. *Id.* at 321–22.

12. *Id.* at 324. Sward comments that the rise of science and the scientific method in the seventeenth century more firmly established a rational decision-making process, replacing the medieval methods based on physical strength and God's intervention. *Id.* Philosophers such as Descartes and Spinoza, Sward explains, provided a useful model for the judiciary's reasoning on the basis of physical evidence. *Id.* Sward states,

> The notion that there is an objective truth that can be discovered through reason is quite different from the irrational ancient modes of proof, which appealed to magic—if the right formula is used, or the right ordeal is prescribed, or if God is invoked properly, there is no need to think through the factual evidence. Rather, God and the system will provide the answer. The modern adversary system still has magical elements, but it is essentially a rational system.

Id.; *cf.* Richard A. Posner, *Legal Pragmatism*, 35 METAPHILOSOPHY 147 (2004). Similar to the problems related to the medieval reliance on God as a method of proof, Posner cautions that a strict reliance on the "system," or on fixed rules, is equally as problematic. *Id.* at 148–49. Posner argues for an extension in the scientific method as it is used in legal reasoning. *Id.* at 148, 154–55. Instead of our relying on deductive reasoning, from which we make decisions on the basis of "given" rules, Posner advocates legal pragmatism. *Id.* This theory of legal analysis involves our consideration of the social consequences of a judge's decision, whereby judges are afforded greater discretion in their rulings. *Id.* at 152. Legal pragmatism, in Posner's words, is "a forward-looking, empiricist, even in a broad and nonpartisan sense a *political* approach, as distinct from the backward-looking, rationalistic, rules-oriented approach of conventional legal thinking." *Id.* at 148. In response to concerns raised by his critics, Posner contends that his version of legal pragmatism does not threaten the significance of precedent, as reliance upon precedent promotes stability in the law. *Id.* at 151. However, a judge relying on precedent must continue to be forward-looking, using precedent as a source of valuable information for what ought to be considered in new cases. *Id.* But Posner cautions, "[U]ltimately precedent to the pragmatist is a tool rather than a master." *Id.* at 152.

13. *See* Landsman, *supra* note 5, at 724–25. Landsman notes that advocates eventually formed Inns of Court, which were organizations that trained advocates in the courtroom procedures and governance of the bar, leading to lawyers' eventual role in their acquiring and presenting evidence. *Id.* at 725.

14. *Id.* at 725.

15. *Id.* at 726.

Because of their awareness that witnesses may provide misleading or unreliable evidence, English courts established rules of evidence, including an early version of the hearsay rule,[16] which provided an adequate foundation for a more thorough set of adversarial rules in the eighteenth and nineteenth centuries.[17]

In the early eighteenth century, greater neutrality and passivity of jurors and judges solidified the adversarial system, as jurors were free to make decisions that conflicted with judges' opinions.[18] Hence, the jury functioned as

16. *Id.*

17. *Id.* at 727. Despite the more prominent reliance upon judges, juries, and witnesses, English courts before the eighteenth century were still not adversarial for several reasons. First, although the accused had increased access to legal representation for civil cases, English courts prohibited the defendant's using lawyers in serious criminal trials. John H. Langbein, *The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors*, 58 CAMBRIDGE L.J. 314, 314 (1999). The accused was expected to provide his own defense. *Id.* Langbein cites a seventeenth-century judge who argued that the court's requiring a defendant to testify on his own behalf constituted the most effective method for uncovering truth, as opposed to the court's reliance on "artificial" testimony from a lawyer. *Id.* at 315.

Second, earlier English courts were not yet fully adversarial because defendants were not permitted to call witnesses to testify on their behalf until 1702. Rubin, *supra* note 9, at 276. Defendants were expected to present their arguments before a judge and jury, and the prosecution at times would compel witnesses to testify against the defendant.

Third, judges and jurors were not necessarily impartial or passive. For instance, judges would frequently conduct the court proceedings by asking questions of the defendant, summarizing the case for the jury, and at times, judges would even compel jurors to reach a particular conclusion, while jailing or fining jurors who did not follow the judge's instructions. Landsman, *supra* note 5, at 727–28. The judge's urging a verdict and punishing jurors who did not agree lasted until 1670. *Id.* at 728. Jurors also lacked the neutrality idealized by an adversary system, as jurors would conduct their own investigations before the trial even began, and were much more inquisitive in the courtroom. Kirsten DeBarba, Note, *Maintaining the Adversarial System: The Practice of Allowing Jurors to Question Witnesses During Trial*, 55 VAND. L. REV. 1521, 1526–27 (2002). DeBarba noted that jurors functioned like witnesses, and that by the fourteenth century, jurors could be removed due to bias. *Id.* at 1527; *see also* Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. KAN. L. REV. 347, 354 (2003) (commenting that the transition of the jury as an inquisitive body to an impartial body took several centuries, as there was not a clear and formal change in the role of jurors).

18. *See* Landsman, *supra* note 5, at 730. In earlier years, a judge could, and would, fine and imprison jurors who, in criminal cases, returned verdicts disagreeing with the judge's decision. *Id.* at 728. For example, in Penn's Case, William Penn and his co-preacher, William Mead, were arrested for disturbing the peace because they had gathered to preach and pray. *See* THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL 1200–1800, at 222 (1985). The jury returned a verdict that Penn was guilty of speaking on the street, but Mead was not guilty. *Id.* at 225. The recorder told the jurors: "Gentlemen, you shall not be dismissed till we have a verdict that the court will accept; and you shall be locked up, without meat, drink, fire, and *tobacco*; you shall not think thus to abuse the court; we will have a verdict, by the help of God, or you shall starve for it." WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 400 (1994). When the jury found both men not guilty, the bench fined Edward Bushel and the other dissident jurors for their verdict. GREEN, *supra*, at 225.

a check on government, thereby avoiding the pitfalls of an imperialistic government or judiciary.[19] For example, the seventeenth century marked a clash between efforts to establish impartial judicial processes and the self-interest of various governmental figures, namely the Stuart Kings, who attempted to remove or manipulate judges on the basis of political motivations.[20] In response, Parliament passed the Act of Settlement in 1701 to guarantee the protection of judges acting in good faith.[21] At the same time, England's Chief Justice repeatedly emphasized the importance of the court's ensuring a fair trial for defendants.[22] As the bar continued to expand throughout the eighteenth century in England and America, advocates of the adversary system implemented appellate review, where certain courts acted solely to determine whether there was error in particular trials, and thus whether the rulings should be reversed.[23]

Through the evolution of the adversary system, the right to a jury trial in the United States has become "a fundamental reservation of power in our constitutional structure."[24] Specifically, the Supreme Court states: "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."[25] In short, as a fundamental institution in the American legal community, the adversary system must exemplify the American values[26] of equality, individualism, and liberty;[27] the concept of an impartial jury makes that goal possible.[28]

Edward Bushel then sued under writ of habeas corpus in the Court of Common Pleas. *Id.* at 236. In deciding Bushel's case, Judge Vaughan determined that judges should not fine jurors, because the jury and judge "might honestly differ in the result from the evidence, as well as two judges may, which often happens." *Id.* at 243 (quoting Bushell's Case, (1670) 124 Eng. Rep. 1006, 1012 (C.P.)). Thus, the judge had to assume that the jury was telling the truth because juries were bound by oath to the good faith of their verdict. *Id.* at 245. Thus, the judge must accept the jury's decision as final. *Id.* at 246.

19. Landsman, *supra* note 5, at 731.

20. *Id*.

21. *Id*.

22. *Id*.

23. *Id*. at 735–36.

24. Blakely v. Washington, 542 U.S. 296, 306 (2004).

25. *Id.*

26. These American values can be contrasted with values of other cultures that inform their jury systems. For instance: while individualism, equality, and liberty have molded the American jury system, the Japanese equivalent, the lay assessor system, has been strongly influenced by traditional Japanese values such as collectivism and deference to authority. *See* Kent Anderson & Mark Nolan, *Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (*saiban-in seido*) from Domestic, Historical, and International Psychological Prescriptives*, 37 VAND. J. TRANSNAT'L L. 935, 987–89 (2004).

27. *See generally* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERCIA (Phillips Bradley ed., 1945). Touqueville described the manner in which the jury system exemplifies the American values of equality and liberty when he wrote,

B. The Market System

The market system, on the other hand, had a less conspicuous evolution, as humans have engaged in economic activities since the "dawn of civilization."[29] While the Romans looked favorably upon wealth and commerce, the traditions of classical Greece and Christianity frowned upon commerce and material acquisition.[30] Early writers such as Aristotle and Socrates (in Plato's *Republic*) suggested that there was a conflict between virtue and money-making.[31] The *Meno* is forceful in severing the link between financial well-being and virtue. However, Aristotle believed that being rich is a desirable position, but that trade as a means toward wealth threatened an individual's morality.[32] Furthermore, Aristotle viewed usury (using money to earn interest) as an unnatural activity.[33] Christians also opposed usury and many forms of commerce, claiming that such wealth-seeking activities posed a threat to one's salvation.[34] One of the fundamental beliefs at the time was that as one person

> The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged and with the notion of right. If these two elements be removed, the love of independence becomes a mere destructive passion. It teaches men to practice equity; every man learns to judge his neighbor as he would himself be judged. And this is especially true of the jury in civil causes; for while the number of persons who have reason to apprehend a criminal prosecution is small, everyone is liable to have a lawsuit. . . . It invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society and the part which they take in its government. By obliging men to turn their attention to affairs other than their own, it rubs off that private selfishness which is the rust of society.

Id. at 284–85; *see also* Nathan Glazer, *Individualism and Equality in the United States*, *in* MAKING AMERICA: THE SOCIETY & CULTURE OF THE UNITED STATES 292, 292–306 (Luther S. Luedtke ed., 1992); Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 53 (2001) ("To many supporters of the jury trial . . . . the American jury is as immutable as it is essential, an ironclad staple of just adjudication, right up there with mother and apple pie.").

28. The jury system, while heavily influenced by fundamental American values, still adheres to some of its own unique value preferences; impartiality, independence, and competence are notable in this regard. *See* Laura E. Little, *Adjudication and Emotion,* 3 FLA. COASTAL L.J. 205, 206–08 (2002).

29. HARRY LANDRETH & DAVID C. COLANDER, HISTORY OF ECONOMIC THOUGHT 23 (4th ed. 2002); *see also* Patricia H. Werhane, *Business Ethics and the Origins of Contemporary Capitalism: Economics and Ethics in the Work of Adam Smith and Herbert Spencer*, 24 J. BUS. ETHICS 185, 185 (2000) ("The origins of capitalism in the form of commerce and free enterprise can be traced to a prehistoric era when people began trading with each other.").

30. LANDRETH & COLANDER, *supra* note 29, at 23–24.

31. *Id*. at 31–32.

32. *See id.*

33. *See id.*

34. *Id.* at 36–39.

earned a greater profit, someone else incurred a greater loss.[35] Whether market activity is a zero-sum game, as is being assumed here, is still being debated, with market advocates positing the general gain in welfare from market exchange.[36]

Jerry Muller notes that Christians reconsidered their position with respect to the desirability of commerce, as the Late Middle Ages marked greater developments in the commercial economy.[37] Muller states, "In the centuries from about 1100 through 1300, the commercial economy of Europe began to grow, cities to develop, and new financial instruments were invented."[38] Although Christians were less hostile toward trade and private property, they still opposed usury and the pursuit of riches.[39] Consequently, Muller observes, "The renewed emphasis on the prohibition of usury led to a clash between religious claims and economic developments."[40] This clash was captured in the Italian wit Benvenuti de Rambaldis de Imola's commentary on Dante's *Divine Comedy*, where he wrote, "Those who engage in usury go to hell; those who fail to engage in usury fall into poverty."[41]

The gradual ascendancy of market logic as a standard by which much of human behavior, including the making of university curricular decisions,[42] must begin with *The Wealth of Nations*. Smith argues that the market provides public benefit, not only despite its being fueled by private greed, but because personal self-aggrandizement compels the businessperson to work on behalf of consumer sovereignty.[43] That Smith's logic was applied to a simpler world of mom-and-pop establishments,[44] where his logic had its strongest nest, has not deterred it from being deployed *mutatis mutandis* to defend the social legitimacy of the Microsofts of the modern global economy.[45]

35. *See* LANDRETH & COLANDER, *supra* note 29, at 36–39.

36. *See* ROY J. RUFFIN & PAUL R.GREGORY, PRINCIPLES IN ECONOMICS 248–49 (3d ed. 1996).

37. JERRY Z. MULLER, THE MIND AND THE MARKET: CAPITALISM IN MODERN EUROPEAN THOUGHT 7 (2002).

38. *Id.*

39. *Id.*

40. *Id.* at 9.

41. *Id*. at 9–10.

42. *See* DEREK BOK, UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION 1–17 (2003); David Robertson, *Students as Consumers: The Individualization of Competitive Advantage*, *in* HIGHER EDUCATION RE-FORMED 78–93 (Peter Scott ed., 2000). *See generally* NEAL RAISMAN, CUSTOMER SERVICE IN HIGHER EDUCATION (2002).

43. *See* 1 ADAM SMITH, THE WEALTH OF NATIONS (Everyman's Library ed. 1964) (1776).

44. *E.g.*, M. Neil Browne, *The Metaphorical Constraints to Pay Equity: Why So Many Economists Are Outraged by Comparable Worth*, 6 POPULATION RES. & POL'Y REV. 29, 41–42 (1987).

45. *See* U.S. v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

Prospective purchasers are said to face eager sellers in a market for the purpose of exchanging goods and services for money. Despite the social anodyne of surface courtesy, each buyer and each seller wants to do as well as he or she can. The consumer wants to maximize his utility with a given budget of money. Pursuing this maximization, he benefits by a low price for the goods and services. On the other hand, the firms that sell the products want to increase their profits.[46] Firms are interested in selling goods and services for a high price. Consequently, a key feature of all markets is a struggle over price and the attendant quality of any good or service. Markets are arenas for personal achievement. Domination is what is being sought. The fundamental idea of social benefit emerging from a vigorous clash of interests is native to the jury system and to market exchange as an institution.

The results from the struggle vary in important ways and in different contexts. These contexts or market structures create institutional opportunities and restrictions that move the struggle in particular directions.[47] In some market structures or forms, the struggle primarily benefits the buyers; in others the seller is the primary beneficiary. The contextual social legitimacy of struggle over price and quality in markets should warn us of the possibility of a similarly broad range of skills in various juries.

The market is a fundamental American institution. To be so, it must have social approval. But with the continuous conflict between the buyer and the seller, how can social legitimacy exist? To establish that legitimacy, mainstream economic thought and any legal theories derived therefrom make certain assumptions about "the market."[48] These assumptions align themselves

46. Economic profit is given by the difference between the revenue earned from total sales and the costs of all the production factors used by the firm, valued by their market price. James Thornton & B. Kelly Eakin, *Virtual Prices and a General Theory of the Owner Operated Firm*, 58 S. ECON. J. 1015, 1024 (1992). These costs include opportunity costs and lost revenue from not using production factors in their alternative uses. Had the firm employed those resources somewhere else, it would have received wage or rent payments that current production has thus denied it. "Profit" in this Article always refers to economic profits. *See* HAL R. VARIAN, INTERMEDIATE MICROECONOMICS 326–27 (1999), for an extended discussion of alternative conceptions of profit.

47. See generally DICK PELS, PROPERTY AND POWER IN SOCIAL THEORY: A STUDY IN INTELLECTUAL RIVALRY (1998), for a philosophical treatment of the market struggle that Pels refers to as the contest between power and property. An interesting leitmotif of his work is the argument that scholarly work is similarly a struggle where we are trying by argument to weaken the hold of our intellectual opponents on the minds of those whose judgment we respect. Pels quotes Aristotle in this regard: "This is a habit we all share, of relating an inquiry not to the subject matter itself, but to our opponent in argument." *Id.* at 1.

48. *See* DEBORAH STONE, POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING 17 (1997).

> A market can be simply defined as a social system in which individuals pursue their own welfare by exchanging things with others whenever trades are mutually beneficial. Economists often begin their discussions of the market by conjuring up the Robinson

with the democratic values of equality and autonomy so necessary for social legitimacy in our culture.[49] The most basic of these assumptions is consumer sovereignty: Consumers hold the power, permitting the invisible hand to guide market transactions toward socially acceptable results.[50] Consequently, a market structure is optimal only when it is consistent with the concept of consumer sovereignty. While it is necessary for legitimacy, the presence of consumer sovereignty in a market structure is not guaranteed. Therefore, consumer sovereignty should not be assumed to exist unless one first examines the particular market structure.

Where can we look to see the influence of consumer sovereignty in our culture? It is evident in legal reasoning.[51] Notice how Justice Cole's concurring opinion in *Dupré Transportation Inc. v. Louisiana Public Service*

> Crusoe society, where two people on a lush tropical island swap coconuts and small game animals. They trade to make each person better off, but since each person always has the option of producing everything for himself, trading is never an absolute necessity for either one.

Id. Stone continues,

> The theory of markets says that as long as exchanges meet these conditions of being both voluntary and fully informed . . . they lead to the goal of allocative efficiency: Resources always move in a direction that makes people better off. This is because exchanges are choices. . . . Since no one would voluntarily exchange in a trade that made him or her worse off, and people would engage in trades only when at least one side was made better off, all voluntary exchanges must lead to situations where at least one person is better off and no one is worse off.
>
> In the theory of markets, voluntary exchanges transform resources into something more valuable.

Id. at 68. *See generally* Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics*, 64 U. CHI. L. REV. 1197, 1197–98 (1997) (describing how the Law and Economics movement has been built on a specific set of conceptual foundations, which are from mainstream neoclassical economics).

49. See generally EVERETT CARLL LADD, THE AMERICAN IDEOLOGY: AN EXPLORATION OF THE ORIGINS, MEANING, AND ROLE OF AMERICAN POLITICAL IDEAS (1994), for a description of the basic value preferences that constitute allegiance to American culture.

50. For market logic to be compelling, the ultimate beneficiary of the economic process must be some surrogate for everyone; the consumer plays this role in market thought. *See* M. NEIL BROWNE & JOHN H. HOAG, UNDERSTANDING ECONOMIC ANALYSIS 81 (1983).

> [P]rices represent *consumer* signals to producers concerning how many resources should be devoted to production of a particular good or service. Prices also provide consumers with information concerning the availability of resources for production. Consumer sovereignty refers to consumer control over what is produced and the form the production will take.

Id.

51. *See* Robin Paul Malloy, *Framing The Market: Representations of Meaning and Value in Law, Markets, And Culture*, 51 BUFF. L. REV. 1, 10 (2003). Malloy details recent incorporation of economics into the law, particularly the increase use of economic vocabulary in legal reasoning. *Id.* at 6.

Commission[52] rests upon certain market assumptions. These assumptions underlie the reasoning and serve to grant legitimacy to the market as a solution to the issue in dispute. He opines that the State should grant a required permit to the motor carrier because "the economy and the public interest thrive when rational men and women are left free to choose."[53] What is the market structure of the Louisiana motor carriers? Justice Cole assumes, without justification, that the motor carriers operate in a competitive market,[54] allowing rational consumers[55] the opportunity to be "free to choose." However, were the resulting market structure less than competitive, then the public interest has been frustrated through the dominance of the motor carrier. When assumptions are made in legal reasoning about consumer sovereignty without evidence as to the market structure, the social legitimacy of "the market" should be strongly questioned. Indeed there is no version of capitalist theory that justifies market outcomes in situations where sellers have substantial market power.

Players in the market—the buyers and the sellers—are in constant conflict over price and quality; the assurance of consumer sovereignty is necessary to encourage social legitimacy of the results from this clash. But that assurance is not enough. In American culture, the ideal market system must appear to be conducive to the democratic traditions of liberty and equality. To portray this image, another assumption is relied on: "competition."[56] As the iconic market structure of capitalist theory, a competitive market is identified by the

52. 583 So.2d 475, 481–82 (La. 1991).

53. *Id*. at 482.

54. *Id*. "The public, in whose interest the legislature purports to speak, is best served when the forces of competition are allowed to dictate both the number of participants in a market and the prices they will charge for their services." *Id.* However, little is done to examine the extent of the "forces of competition" within the Louisiana motor carrier market.

55. If we assume that individuals have the capacity to make rational decisions, then it is reasonable to expect that particular market structures can create power disparities between buyer and seller, diminishing consumer sovereignty.

56. But see LESTER C. THUROW, BUILDING WEALTH: THE NEW RULES FOR INDIVIDUALS, COMPANIES, AND NATIONS IN A KNOWLEDGE-BASED ECONOMY (1999), for a very different, even conflicting, formulation of competition. The meaning of competition being used in this Paper is the one responsible for the attractiveness of capitalist thought, the one on which our system of antirust law is based, and the one responsible for the normative judgments about "the market" flowing from the discipline of economics. However, the term "competition" is increasingly being used as Thurow uses it to mean the capability of succeeding in the struggle with other firms, particularly now that many markets are global, rather than national. *See, e.g.*, *id.* at 237–38. The social legitimacy of this type of competitiveness is relatively tenuous. Who are the beneficiaries of such competitiveness? What is the model, either inductive or deductive, that demonstrates the social benefit of competitiveness that results in the survival of one firm instead of another? Not surprisingly, those who tout this newer form of competition seek relaxation in the legal impediments to what is often anticompetitive behavior under the guidelines for the form of competition used in this Paper.

following characteristics: when a market is competitive, (1) goods or services are produced by a large number of firms; (2) each firm produces only a small share of the products;[57] and (3) firms face no barriers to entry or exit.[58]

When the consumer is sovereign and when the market is competitive, then will the market structure be theoretically certified as legitimate? Not quite. The key to market optimality is the presumed existence of the calculating, well-informed, intensely rational consumer in a context where power relationships permit the rationality to function freely. In other words, to legitimize the market in American culture, it must be assumed that the consumer is an optimal decision maker.[59]

57. The market supply curve of a good is set like the market demand curve for a good. We can derive the market supply curve by adding the supply of all the firms in the industry. *See* ANDREW R. SCHOTTER, MICROECONOMICS: A MODERN APPROACH, 434–35 (2d ed. 1997).

58. *See* DAVID C. COLANDER, MICROECONOMICS 242 (5th ed. 2004).

> Barriers to entry are social, political, or economic impediments that prevent firms from entering a market. They might be legal barriers such as exist when firms acquire a patent to produce a certain product. Barriers might be technological, such as when the minimum efficient scale of production allows only one firm to produce at the lowest average total cost. Or barriers might be created by social forces, such as when bankers will lend only to certain types of people and not to other types.

Id. (emphasis omitted); *see also* STONE, *supra* note 48, at 71. "In order for markets to yield efficiency, there must be numerous buyers and sellers of any resource, so that no person or firm can influence the market price." *Id.*

59. A rich trove of evidence casts doubt on consumers' ability to form meaningful demand curves in terms of their own considered self-interest, let alone to make decisions that have positive community effects. *See* ROBERT E. LANE, THE MARKET EXPERIENCE 139–45 (1991). Lane compiles the evidence suggesting that as environmental complexity increases, cognitive complexity exhibits a curvilinear relationship: "[C]ognitive complexity matches environmental complexity to higher and higher points, and then, when the environment becomes too complex, 'stress' or 'trauma' reduces cognition to simpler levels—perhaps even below the starting points." *Id*. at 139. Lane further points out the exceedingly complex stimuli that consumers face in the marketplace. *Id*. at 141–44. Thus, he concludes, in many cases, markets overstimulate market participants, leading to cognitive regression and a reduced ability to make instrumentally rational market decisions. *Id.* at 144–45; *see also* Kurt W. Fischer & Louise Silvern, *Stages and Individual Differences in Cognitive Development*, 36 ANN. REV. PSYCHOL. 613, 639 (1985).

Ralph I. Allison and Kenneth P. Uhl found that in a blind taste-test, males who drink beer at least three times a week could not distinguish differences among five different brands of beer in terms of taste, after-taste, aroma, bitterness, body, foam, lightness, strength, or sweetness. Ralph I. Allison & Kenneth P. Uhl, *Impact of Beer Brand Identification on Taste Perception*, J. Marketing Res., Aug. 1964, at 36, *reprinted in* CLASSICS IN CONSUMER BEHAVIOR 109 (Louis E. Boone ed., 1977). Moreover, when the participants in the study were grouped by the brand of beer they drank most frequently, none of the groups rated the taste of their preferred beer superior to all of the other beers. *Id.* at 113–14. The researchers conclude,

> [P]roduct distinctions or differences, in the minds of the participants, arose primarily through their receptiveness to the various firms' marketing efforts rather than through perceived physical product differences. Such a finding suggested that the physical

> product differences had little to do with the various brands' relative success or failure in the market . . . .

Id. at 116. The implication of this study is that consumers do not make many market choices based on price or product quality (characteristics that benefit them and, by extension, society); instead, they make these choices based on product marketing. *See also* TIBOR SCITOVSKY, THE JOYLESS ECONOMY: THE PSYCHOLOGY OF HUMAN SATISFACTION 5 (rev. ed. 1992) (pointing out that 2.5% of U.S. GNP is spent on advertising). Thus, rather than promoting the virtues often extolled by market advocates (thrift, economy, industry, and efficiency), consumers, by making market choices based on product marketing, encourage waste.

In a blind taste-test study of small, informal social groups of housewives, James E. Stafford found that the groups exert influence toward conformity on the members' brand preferences for bread. James E. Stafford, *Effects of Group Influence on Consumer Brand Preferences*, J. MARKETING RES., Feb. 1966, at 68, *reprinted in* CLASSICS IN CONSUMER BEHAVIOR, *supra*, at 249–50. Moreover, Stafford found that within each group, the "leader" of the group influenced the extent and degree of brand loyalty of the group members. *Id.* at 259–61; *see also* ELIHU KATZ & PAUL F. LAZARSFELD, PERSONAL INFLUENCE: THE PART PLAYED BY PEOPLE IN THE FLOW OF MASS COMMUNICATIONS (1955) (explaining the extent of the role of personal influence in shaping market decisions); GEORGE KATONA, THE MASS CONSUMPTION SOCIETY (1964) (arguing that market forces and psychological factors jointly determine consumers' economic behavior). This corpus of research suggests that consumers do not necessarily reward those firms who best cater to consumer interests; rather, consumers award firms on the basis of aleatory factors such as social group influences.

Robert H. Frank summarizes much of the scientific evidence suggesting that the correlation between income and happiness is extremely weak. ROBERT H. FRANK, LUXURY FEVER: WHY MONEY FAILS TO SATISFY IN AN ERA OF EXCESS 72–73 (1999). He writes, "One of the central findings in the large scientific literature on subjective well-being is that once income levels surpass a minimal absolute threshold, average satisfaction levels within a given country tend to be highly stable over time, even in the face of significant economic growth." *Id.* at 72. For example, "[a]lthough per-capita income [in the U.S.] was 39 percent higher in real terms [in 1991] than [in 1972], the proportion of people who considered themselves very happy actually declined slightly over the period." *Id.*; *see also* SCITOVSKY, *supra*, at 134–36; Richard A. Easterlin, *Does Economic Growth Improve the Human Lot? Some Empirical Evidence*, *in* NATIONS AND HOUSEHOLDS IN ECONOMIC GROWTH: ESSAYS IN HONOR OF MOSES ABRAMOVITZ (Paul A. David & Melvin W. Reder eds., 1974), *reprinted in* HAPPINESS IN ECONOMICS 5 (Richard A. Easterlin ed., 2002) (demonstrating that higher income in the U.S. between 1946 and 1970 was not systematically accompanied by greater happiness and concluding that economic growth does not improve the human condition); Richard A. Easterlin, *Does Money Buy Happiness?*, 30 PUB. INT. 3 (1973); DAVID G. MYERS, THE PURSUIT OF HAPPINESS: WHO IS HAPPY—AND WHY, 41–46 (1992) (showing that although real income per capita in the U.S. doubled from 1957 to 1990, only one in three Americans reported being "very happy"). Myers writes that "our becoming much better-off over the last thirty years has not been accompanied by one iota of increased happiness and life satisfaction. . . . Making more money . . . does not breed bliss." *Id.* at 44 (emphasis omitted). And, Frank writes, "[T]he average satisfaction level reported by survey respondents in Japan remained essentially unchanged between 1958 and 1986, a particularly striking finding in view of the fact that per-capita income rose more than five-fold during that period." FRANK, *supra*, at 72; *see also* RUUT VEENHOVEN, HAPPINESS IN NATIONS: SUBJECTIVE APPRECIATION OF LIFE IN 56 NATIONS (1993); Otis Dudley Duncan, *Does Money Buy Satisfaction?*, 2 SOC. INDICATORS RES. 267 (1975) (suggesting that although the real median household income in the Detroit area increased by 40% between 1955 and 1971, there was no

change in the satisfaction with the standard of living among wives in the Detroit area); *see also* Ronald Inglehart & Jacques-Rene Rabier, *Aspirations Adapt to Situations—But Why Are the Belgians So Much Happier Than the French? A Cross-Cultural Analysis of the Subjective Quality of Life*, *in* RESEARCH ON THE QUALITY OF LIFE 1, 46 (Frank M. Andrews ed., 1986) ("Income and happiness are correlated at the national level, but the linkage is surprisingly weak."); JONATHAN L. FREEDMAN, HAPPY PEOPLE 138 (1978).

> The rich are not more likely to be happy than those with moderate incomes; the middle class is not more likely to be unhappy than those with lower incomes. As long as the family has enough money to manage . . . their reported happiness is at most slightly related to how much money they have. For the majority of Americans, money, whatever else it does, does not bring happiness.

Id. For a defense against critiques of the surveys used to measure subjective well-being, happiness, and satisfaction, see MYERS, *supra*, at 23–30. Frank notes, however, that the absence of a relationship between income and happiness does not hold across all levels of income. He writes,

> [M]ost careful studies find a clear relationship over time between subjective well-being and absolute income at extremely low levels of absolute income. Thus, in a country in which most people lack minimally adequate shelter and nutrition, across-the-board increases in income appear, not surprisingly, to yield significant and lasting improvements in subjective well-being. In the same vein, average satisfaction levels are significantly lower in extremely poor countries than in rich ones.

FRANK, *supra*, at 73; *see also* MYERS, *supra*, at 44 ("Once beyond poverty, further economic growth does not appreciably improve human morale.") (emphasis omitted); *see also* Ed Diener & Carol Diener, *The Wealth of Nations Revisited: Income and the Quality of Life*, 36 SOC. INDICATORS RES. 275 (1995). Nevertheless, Frank argues, "[W]hat the data seem to say is that as national income grows, people do not spend their extra money in ways that yield significant and lasting increases in measured satisfaction." FRANK, *supra*, at 77. "[T]he evidence suggests that subjective well-being will be higher in the society with a greater balance of inconspicuous consumption." *Id.* at 90 (i.e., "freedom from traffic congestion, time with family and friends, vacation time, and a variety of favorable job characteristics").

For more evidence questioning the claim that consumers make rational choices, see generally RICHARD E. NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980); R.P. Abelson, *Social Psychology's Rational Man*, *in* RATIONALITY AND THE SOCIAL SCIENCES: CONTRIBUTIONS TO THE PHILOSOPHY AND METHODOLOGY OF THE SOCIAL SCIENCES (S.I. Benn & G.W. Mortimore eds., 1976); SCITOVSKY, *supra*, at 149.

> The economist's traditional picture of the economy resembles nothing so much as a Chinese restaurant with its long menu. Customers choose from what is on the menu and are assumed always to have chosen what most pleases them. That assumption is unrealistic, not only with respect to the economy, but of Chinese restaurants. Most of us are unfamiliar with nine-tenths of the entrées listed; we seem invariably to order either the wrong dishes or the same old ones. Only on occasions when an expert does the ordering do we realize how badly we do on our own and what good things we would otherwise miss.

Id. Thus, Frank's evidence strongly suggests that consumers are not able to anticipate what purchases will make them happiest. FRANK, *supra*, at 77. The implication of this conclusion is that consumer demand curves and indifference curves—exalted by neoclassical economics for their reflection of optimal private (and, by extension, community) resource allocation and distribution—are meaningless. But even if consumer preferences accurately reflect what will

As this Paper will further explore, this assumption is a required assumption before one can embrace either the market system or the adversarial legal system. The juror's rationality, like that of the consumer, must be acute for these institutions to deliver what their promoters promise. In the foreground for idealized versions of market logic and the adversary system is the competent, focused citizen/household member.[60]

make them happiest, the research of several economists, psychologists, and behavioral scientists suggests that consumers do not obtain sufficient information to make intelligent decisions in the market. *See* George Katona & Eva Mueller, *A Study of Purchase Decisions*, *in* CONSUMER BEHAVIOR 30 (Lincoln H. Clark ed., 1954). Katona and Mueller conducted a study of the purchases of major household appliances and found that most purchases of such goods were not made after careful consideration, nor were they preceded by a long planning period or shopping around or substantial information seeking. *See also* Joseph W. Newman & Richard Staelin, *Prepurchase Information Seeking for New Cars and Major Household Appliances*, J. MARKETING RES., Aug. 1972, at 249. Newman and Staelin conducted a study similar to Katona and Mueller and found that although information is accessible, the amount of information sought by most automobile buyers is small. *Id.*; *see also* GEORGE KATONA, PSYCHOLOGICAL ECONOMICS 220 (1975).

> If careful deliberation [is] defined as comprising . . . consideration of alternatives and of consequences, discussion with family members, information seeking, as well as concern with price, brand, quality, performance, special features, and gadgets[,] the conclusion [emerges] that almost all people proceed in a careless way in purchasing large household goods. . . . [A]bout one-fourth of the purchases of large household appliances were found to have lacked practically all features of careful deliberation.

Id.; Lewis Mandell, *Consumer Knowledge and Understanding of Consumer Credit*, J. CONSUMER AFFAIRS, Summer 1973, at 23. Mandell found that a large fraction of consumers are not aware of interest rates charged on items such as house mortgages and automobiles. *Id.* Moreover, Mandell found that a large proportion of consumers understand neither the credit market nor why different types of loans have different costs associated with them. *Id.*

Other research suggests that the structure of consumer wants does not yield transitive preferences necessary for instrumental market rationality. *See* FRANK M. ANDREWS & STEPHEN B. WITHEY, SOCIAL INDICATORS OF WELL-BEING: AMERICANS' PERCEPTIONS OF LIFE QUALITY 231–33 (1976). Andrews and Withey asked consumers to evaluate activities and objects in light of their resource use. *Id.* The survey respondents rarely referred to costs of "money, time, or energy," and when they did refer to those costs, the references were not substantially related to satisfaction levels. *Id.* "Wants have structures, but not the ones that make preference ordering the rational, transitive structure that satisfies market rationality." LANE, *supra*, at 456. This research is devastating to the assertion that consumers are adroit decision makers, for it suggests that they do not include costs when evaluating the extent to which alternatives satisfy their preferences.

60. Academics use many varieties of "rationality" in their analyses. To write about the assumption of rationality in the law and the market, we must first define what variety of rationality is appropriate in this context. Several options are applicable: As discussed in Kevin Quinn, *A Rhetorical Conception of Practical Rationality*, 30 J. ECON. ISSUES 1127 (1996), a person using practical rationality, or the rationality of action, would decide what the rational choice is by asking, "What is rational to do?" However, instead of asking what *action* is the most rational, some academics focus on the question what *belief* is most rational. The question "What is rational to believe?" is asked by adherents of a rationality called theoretical rationality, or

II. SHARED ASSUMPTIONS

When two institutions have origins as distinct as the jury system and market system, the question arises: for what creative purpose are the two juxtaposed? We aligned these two systems with the intention of fulfilling two objectives: (1) to illuminate shared assumptions and (2) to assess these same assumptions. Despite their different origins, these two institutions share a significant commonality: because of their pervasiveness in American culture, the shared assumptions inherent in these systems are rarely acknowledged and evaluated.

What are these shared assumptions of the adversary system and the market system? They include the belief in individual responsibility, equality among participants, and, as previously mentioned, a belief in the rational actor. Beginning with individual responsibility, this assumption is visible throughout the adversary system;[61] it is characterized by a party's control over the litigation process. A party is responsible for pursuing his own self-interest, by obtaining legal representation, defining the legal issues, and creating persuasive arguments before an uninformed judge and jury.[62] Even when a party selects legal representation, the lawyer is required to defer to the

epistemic rationality. *Id.* at 1129–33. In the same vein as epistemic rationality, critical rationality is once again concerned with how to decide what to believe. Credited to philosopher Karl Popper, a person who adheres to the concept of critical rationality would consider a decision as follows: in the process of deciding, he or she will understand that there is not one ultimate truth, but knowledge can still be acquired through critical analysis. See generally DAVID W. MILLER, CRITICAL RATIONALISM: A RESTATEMENT AND DEFENCE (1994)), for more details on Popper's contribution on the subject of rationality.

On the other hand, another variety of rationality, instrumental rationality, is more consistent with the tenets of practical rationality than epistemic rationality because of its pursuit of action. With the perspective of an instrumental rationalist, the most rational decision is the one which will best achieve the desired ends—without any evaluation of the propriety of those ends. *See generally* THE OXFORD HANDBOOK OF RATIONALITY (Alfred R. Mele & Piers Rawling eds., 2004) (providing an extensive overview of both the nature of rationality and the different conceptions of rationality in various disciplines of the university including philosophy, psychology, economics, legal studies, the natural sciences, and women's studies). For this Article, we chose to use practical rationality because the end results of the adversary and market processes are that the jury and consumer will *act* in such a fashion that the community will benefit. In the case of the jury, it is assumed that the members will make decisions on the basis of social justice. While market logic assumes that consumers are making price and quantity decisions on the basis of personal happiness, the community still benefits because the invisible hand process is alleged to transform that private rapaciousness into public gain.

61. *See* Sward, *supra* note 5, at 306, 317–18 ("[T]he adversary system best preserves the autonomy of the individual by allowing him free rein in making his case to the court. Only by giving the litigants the fullest voice possible can individual dignity be preserved.").

62. *See id.* at 312 (noting also that one danger of the court's permitting parties to argue selfishly is that there is an incentive to distort or hide evidence).

individual's interests.[63] An adherence to the principles of individual responsibility in the adversary system implies that a person is responsible for the outcome of the trial. The money he or she invests, the attorney he or she hires, the time invested and other factors all produce a verdict that the individual deserves based on his or her choices.

This assumption of individual responsibility is similarly significant in the market system. Individuals are considered the basic units of society; society is nothing more than the aggregate of individuals.[64] The individual focuses on his own rights and utility, caring little about the interests of others apart from the ways in which society (other individuals) can help the individual increase his utility.[65] The means to happiness (or utility) is consumption, and to consume more is better, as an individual is thereby able to increase his utility. Most importantly, the individual is responsible for his or her increase or decrease of utility; after all, he or she possesses the means to consume and produce.[66]

Individual responsibility in the market system and the jury system is characterized by the presumption that the individual makes choices carefully and adroitly.[67] In a market system, for example, an unemployed individual is

63. *See* Katherine R. Kruse, *Lawyers Should Be Lawyers, but What Does That Mean?: A Response to Aiken & Wizner and Smith*, 14 WASH. U. J.L. & POL'Y 49 (2004). Kruse describes the role of lawyers as follows:

> Because they prioritize client autonomy, lawyers give significant deference to a client's preferences on questions not relating directly to the lawyer's legal expertise. The ABA Model Rules of Professional Conduct codify the division of decisionmaking authority between lawyer and client by requiring that the lawyer "abide by the client's decisions concerning the objectives of representation" and "consult with the client as to the means by which they are to be pursued."

Id. at 74–75 (quoting MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002)); *see also* Robert F. Cochran, Jr., *Crime, Confession, and the Counselor-at-Law: Lessons from Dostoyevsky*, 35 HOUS. L. REV. 327 (1998). Cochran explains that this role of the deferring lawyer fits with his description of the "liberal lawyering model": "[T]he lawyer is neutral, the autonomy of the client is the highest good, and the state procedure (i.e., the adversary system) is trusted to yield the good." *Id*. at 330; *see also* Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 90–91 (1997) (explaining that the idea that zealous advocacy is designed to protect the rights of the represented parties). She states, "In a rights-based system, the client, as a separate and autonomous individual, is the subject of concern. The lawyer cannot, according to principles of professional responsibility, do anything which would diminish the 'rights' of the client." *Id*. at 91.

64. *See* Werhane, *supra* note 29, at 188.

65. *See id.*

66. *See id.* at 188–89.

67. *See id.* at 188. Citing the work of Herbert Spencer, Werhane expands the notion of choice in a market economy. *Id*. Individuals should be permitted to pursue their own ends, for individuals have much control over their own lives. Werhane summarizes part of Spencer's theory, stating:

presumed to look for a new job in a variety of locations, and in this sense eventually to choose where he will work.[68] Consequently, when the market is left alone from governmental intervention, unemployment no longer remains a problem when individuals have the choice whether and where they want to be employed.[69] These choices move prospective workers to locations where they benefit from receiving the highest returns, and society benefits from having employees deployed in their most productive locales. The selfish ends of workers assist them and us, or so the market story goes.[70] But individual

> [T]he evolution of the human being entails the development of complex mental abilities. Along with this mental development we have developed a notion of free will, thus we are able to direct our own individual destinies. If particular societies should be left alone to evolve or devolve as they are fit, so too, the individual, who makes up the basic unit of any society, should be left alone to develop her resources and strengths.

Id.

68. *See* Marianthi Rannia Leontaridi, *Segmented Labour Markets: Theory and Evidence*, 12 J. ECON. SURVEYS 63, 64 (1998) ("Neo-classical theory assumes that individual workers can freely make a choice among a wide range of job options in the labour market, based upon their personal tastes, preferences, abilities and skills and thereby receive rewards on the basis of their human capital endowments.").

69. *See* Gregory T. Papanikos, *Methodological Individualism, Economic Behaviour and Economic Policy*, 25 INT'L J. SOC. ECON. 1342, 1348 (1998) (citing the work of Friedrich Augustus Hayek).

70. *See* Werhane, *supra* note 29, at 188. To ensure individuals' abilities to pursue their own ends, a market system, according to Herbert Spencer, should resist government intervention. *Id*. at 189–90. In other words, a just society promotes individuals' negative freedoms. *Id.* at 188. As Werhane explains,

> The ideal just society grants and protects equally these negative rights . . . . Every individual has the equal natural right to be left alone, the right not to be harmed or interfered with by others or by society. As a result, individuals have the equal liberty to pursue their own ends as they are able and desirous of doing, so long as they do not interfere with others' pursuits. Importantly, freedom is the absence of restraints, not self-determination.

Id. Spencer believes that a laissez-faire economy is best for society, meaning that the government should intervene only in rare instances, for a government's intervening almost always poses a threat to the treasured individualism of a market economy. *Id.* at 188–90. Werhane characterizes Spencer's theory in the following passage:

> Spencer concludes that the best society is a laissez-faire private enterprise political economy with almost no government except to protect us from deliberately harming or interfering with each other. A laissez-faire economy best permits individual entrepreneurial economic development where each individual can control her economic life and receive the full benefits of her labor, and industrialization, as Smith pointed out, creates economic growth and contributes to the positive social evolution of a political economy. Indeed, he argues, community priorities supersede those of individuals only when rights are violated or in times of war. Roads, schools, money, mail services, land, parks, and utilities should all be private; taxes should be the minimum possible, and, to borrow a phrase from Robert Nozick, government should be in the form of a "night watchman."

responsibility is not only reflected in a market system through the actions of individuals, but also through the actions of corporations. The purpose of a corporation is to "create and keep a consumer."[71] The corporations' actions—their attention to the needs and desires of individual consumers—will lead to increased sales and higher profits. If they do not attend to those needs and desires, the negative consequences to their bottom line are deserved.

A second assumption of the adversary system and the market system is equal power among participants. In the adversary system, both parties in a dispute are assumed to have substantially equal power. When both sides create and present their best arguments, while relying on the relevant facts and applying the rules of law, a judge or jury is expected to make the "right" decision.[72] As previously discussed, the decision-maker is assumed to be neutral and passive, allowing the parties to control the packaging of their arguments. Because each side is assumed to have equal opportunity for legal representation, resources, and a fair trial, the adversary system assumes that both parties have almost equal power.[73] In theory, the party that presents the

Id. at 189–90 (citing HERBERT SPENCER, MAN VERSUS THE STATE (1884); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974)).

71. *See* Tevfik Dalgic, *Dissemination of Market Orientation in Europe: A Conceptual and Historical Evaluation*, 15 INT'L. MARKETING REV. 45, 45 (1998) (citing THEODORE LEVITT, THE MARKETING MODE (1969)). As Dalgic stated: "Being market-led is about putting the customer at the top of the management agenda and list of priorities. It is about focus on the customer, specializing on the customers' unique needs, finding better ways of doing what the customer values, educating and informing the customer, commitment and care." *Id*. at 57.

72. *See* Sward, *supra* note 5, at 302 ("The adversary system is characterized by party control of the investigation and presentation of evidence and argument, and by a passive decision maker who merely listens to both sides and renders a decision based on what she has heard."); *see also id*. at 316–17 ("When each side presents its best case, the decisionmaker has all the information he needs to reach a just result. When presentation of the case is left in the hands of the parties, the information and motive-based rationales both suggest that each side will, indeed, present its best case.").

73. *See id.* at 329. Sward acknowledges that one of the primary assumptions of the adversary system is equality of power. *Id.* She states the following:

> The assumption of equality became part of the adversary system some time after it was recognized that magic could not determine victors. If God does not decide who wins, the system must do so; but the system can do so only if the parties are equal—in resources, analytical skill, creativity, advocacy skill, and information. In other words, the adversary system itself is the magic that replaces God's intervention. Discovery is a subtle admission that the system does not do what it is intended to do.
>
> . . . .
>
> . . . Procedure came to be treated as a science—a methodology that, if done right, would enable a court to arrive at the right answer, whether the dispute was one of fact or one of law.

Id. at 329, 354. *See contra* Rubin, *supra* note 9, at 284.

> Both medieval and modern people know that in any commercial, or even proto-commercial culture, the best champions will hire themselves out to the person who offers

best argument on the basis of the relevant facts and rules of law will be victorious. Hence, justice is served when decision makers consider the arguments from both sides and render the court's unbiased decision.[74]

Similarly, the market system assumes equal power among individuals. Consistent with the ideals of individualism, mainstream economics assumes that individuals have equal power in terms of their choices. The market, according to this theory, acts as a leveling device, allowing individuals to have equal access to a variety of goods.[75] In some ways, this notion of equal power is similar to equality of opportunity; the market is open to everyone and individuals are permitted to pursue their selfish ends.[76] No one individual or

> them the highest pay. As a result, a person's ability to prevail in a trial will be powerfully affected by their financial resources, regardless of the justice of their cause. . . . We know that a party's chances of success are greatly improved by money and disastrously damaged by the lack of it.

Id.; Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-modern, Multi-cultural World*, 1 J. INST. STUDY LEGAL ETHICS 49, 61 (1996).

> In litigation, the hierarchy of opposition will often be determined by the unequal resources of the parties. In its ideal and abstracted form the adversary system clearly contemplates adversaries of equal skill and economic support—the result should not depend on the resources, or "skill" of the argument's representative, but on the merits of the argument, yet we all know "the haves come out ahead."

Id. (citations omitted).

74. *Cf*. David Barnhizer, *The Virtue of Ordered Conflict: A Defense of the Adversary System*, 79 NEB. L. REV. 657 (2000). Although he does not explicitly discuss equality of power, Barnhizer seems to agree that the adversary system promotes this kind of equality, specifically in his discussion of balance. Barnhizer believes that the adversary system achieves a state of balance with the conflicting claims of opposing parties despite the complexity of many of these claims. *Id.* Therefore, Barnhizer does more than just imply that parties have equal power; he also suggests that the adversary system equalizes previously unequal relations. He asserts: "The adversary system is the mechanism by which we balance the inevitable and often healthy disputes between factions." *Id.* at 660.

> The legal system is not a self-contained theoretical construct of ideal justice, but reflects, diffuses, and balances competing claims for political and economic power. In this vein, Roscoe Pound told us that "[c]onflict and competition and overlapping of men's desires and demands and claims, in the formulation of what they take to be their reasonable expectations, require a systematic adjustment of relations, a reasoned ordering of conduct, if a politically organized society is to endure."

Id. at 662 (quoting Roscoe Pound, *The Paths of Liberty*, *in* NEW PATHS OF THE LAW 3 (1950)). "The adversary system is an integral tool through which our democracy achieves what Pound called 'a systematic adjustment of relations.'" *Id*. at 683 (quoting Pound, *supra*, at 3).

75. *See* Werhane, *supra* note 29, at 195 (noting that Adam Smith argued for this ideal of the market, stating, "Smith goes so far as to claim that the ideal is a 'level playing field.'") (citation omitted).

76. *See id*. at 189 (summarizing Spencer's argument that "by granting the greatest equal freedom, each individual is free to pursue his or her own ends and achieve (or fail to achieve) happiness"); *cf*. Robert Sugden, *Living with Unfairness: The Limits of Equal Opportunity in a Market Economy*, 22 SOC. CHOICE & WELFARE 211, 211 (2004). Sugden argues that there is a

group of elites has the power to decide what to produce. Markets decide through the price mechanism and consumer sovereignty how to allocate goods in an efficient manner.[77] Under this theory, known as the invisible hand, the selfish interests of aggregate individuals are channeled into the best allocation of limited resources, thus assuring that no one individual or small group possesses the majority of power. In short, the market is in charge, promoting equal authority and strength among individuals (and corporations), in competitive markets.[78]

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conflict between the negative liberties of a market and the ideal of equality—in terms of power or opportunity. *Id.* at 211–12. Although he does not believe that the market achieves equality, he does explain the ideal notion of equality, as this equality relates to individuals' opportunity and power. He states, "The ideal is that every person should have an equally rich range of options from which to choose the life he actually leads." *Id.* at 211. "[O]n grounds of justice or fairness, it is said, each person can legitimately demand the same amount of opportunity as other people enjoy, but what he does with those opportunities is up to him." *Id*. at 212.

77. *See* ROBERT KUTTNER, EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS 11 (1996). Kuttner describes the mainstream thinking of the "market's magic," stating,

> At the very core of the market system is the price mechanism. Prices indicate what millions of individual goods and services are "worth" to willing sellers and willing buyers. Prices thereby function to apportion economic resources efficiently: they signal sellers what to produce; consumers what to buy; capitalists where to invest.
>
> . . . .
>
> . . . Markets, therefore, can claim to embody and express freedom of choice, as well as efficient allocation of scarce resources.

Id. But see Diane Elson, *Labor Markets as Gendered Institutions: Equality, Efficiency and Empowerment Issues*, 27 WORLD DEV. 611, 618 (1999).

> [F]ree markets only lead to the most efficient use of resources to satisfy human needs under very special conditions. Unregulated labor markets could only guarantee the most effective use of labor if, among other things, *all* work were subject to a market-based calculus of costs and benefits; everyone in the markets were equally well informed and had complete knowledge about all possible characteristics of the labor force and all alternative uses of labor, both now and in the future; all uses of labor were renegotiable and reversible, so that "history doesn't matter"; and all participants in the market were motivated to make the most effective use of labor. Clearly, no real economy can ever meet these conditions and so the question of what arrangements are most conducive to efficient use of resources must ultimately be a matter of judgment and not a matter of mathematical proofs. . . . [W]e need to ask "costs for whom?" "efficiency for whom?" . . .
>
> Neoclassical welfare economics rejects these questions in favor of definitions of efficiency which gloss over distributional questions, and gloss over the question of who has the power to define efficiency.

Id.

78. *Cf*. Jesus M. Zaratiegui Labiano, *A Reading of Hobbes'* Leviathan *with Economists' Glasses*, 27 INT'L J. SOC. ECON. 134 (2000). Although the author does not explicitly discuss equal power in his analysis of Hobbes' ideas, he does suggest that individuals' power is at the mercy of the market. He writes,

> This is a society in which each participant competes with others to gain power. Each looks to take the powers of the others and avoid the transference of his to them, and this not by

A third assumption shared by the adversary system and market logic is the belief in rationality—a value intimately tied to individual responsibility. In the adversary system, rationality leads to a just result in litigation, if the system works as intended. For instance, when both parties present their best possible arguments to the neutral, rational decision-maker—the judge or jury—the decision-maker is expected to make the rational (and just) decision.[79] Hence, the adversary system is relatively predictable; there are substantive rules governing individuals' behavior, and there are procedural rules to which a judge is expected to adhere in litigation. The outcome is a decision arrived at in

brute force but by an "operation of the market" that situates the value of each person in the measure he obtains it by his power.

Id. at 143. *But see* Eric Schutz, *Markets and Power*, 29 J. ECON. ISSUES 1147 (1995). Mainstream economics suggests:

> Regardless of how unequal they may be in other spheres of social life—family, polity, community, culture—people are equally free to choose among alternatives available in markets and to exit from the market sphere if they wish. . . . As a system of allocation then, a market economy amalgamates many individuals' free choices into a coherent coordination of production and consumption without any major instances of domination by some over others—there is command, but it occurs in a roughly "democratic" aggregation of the preferred preferences of all market transactors. There may remain great inequality of status in other spheres of human life, but the inexorable expansion of the market economy will provide an ever-widening space for the development of more congenial social relations.
>
> Yet that vision depends on the supposition that people meet as equals in markets. They do not: even in the hypothetical world of "perfect" markets, people are unequally conferred with "prior property endowments" and hence are unequally subject to the need to work for subsistence. Thus, some must work, while others need not, and the latter dominate the former . . . .

Id. at 1165.

79. *See* Sward, *supra* note 5, at 313. Sward argues that the impartial decision-maker contributes to the predictability in litigation, as both parties have the opportunity to present their evidence as convincingly as possible. *Id.* If the decision-maker were inquisitive, Sward suggests that the decision maker may not consider all relevant evidence, and thereby make a hasty and less rational decision. *Id.* However, the impartiality of the decision-maker promotes rationality in the adversary system, as this rationality is reflected in the predictability of a judge or jury's decision. Sward explains,

> The passive decisionmaker may also help make the litigation more predictable: If the decisionmaker is confined to reasoning from admissible evidence presented by the parties in open court, the parties, who control the evidence, can predict the outcome somewhat better than if they must wait to see what inquiries the decisionmaker pursues.

Id. See contra Menkel-Meadow, *supra* note 73, at 50. Menkel-Meadow disagrees with Sward's conclusion that parties' opposing arguments result in a rational and just outcome. Instead, Menkel-Meadow asserts that this adversarial form of litigation actually impedes rationality. *Id.* She writes, "Binary, oppositional presentations of facts in dispute is not the best way for us to learn the truth. Polarized debate distorts truth, leaves out important information, simplifies complexity and obfuscates where it should clarify." *Id.* (footnotes omitted).

a rational manner.[80] Similarly, the assumption that precedent will be applied in a rational manner produces a predictable outcome. Cases with similar fact patterns should serve as maps for subsequent cases.[81] In addition, discovery contributes to rationality in the adversary system. When parties share more information before a trial, the facts are more clearly understood, from which the parties can create their legal arguments.[82]

The market system also places a strong emphasis on practical rationality. To pursue clearly defined utility functions, consumers must possess and use abundant and accurate product information, or their decisions will be a measure of their ignorance as much as a reflection of what they truly desire.[83]

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80. *See* Sward, *supra* note 5, at 309.

> The second feature of fair adjudication is that the decision rendered by the court must have a rational basis. There are elements of irrationality in all human institutions, of course, because we are not wholly rational beings. But predictability, which is a feature of rational decisionmaking, is essential to a fair system of adjudication. Our system of dispute resolution must be reasonably predictable, or people will not know how to order their affairs. No legal system is perfectly deterministic, however, so predictability is never perfect. But people must be able to make some reasonable calculation of the likely legal effect of their actions.

Id. See contra Barnhizer, *supra* note 74, at 701. Barnhizer does not believe that the legal process promotes rationality, as the process involves numerous complex factors. He explains,

> Legal cases of any complexity are incompatible mixtures of fact, rationality, values, judgment, analogy, scientific assumption, metaphysics, and doctrinal principle.
>
> It is within this context that the judge must exercise judgment to answer many questions that cannot be scientifically or rationally answered. The subject matter of legal doctrine involves factors that resist being compressed into conveniently rational compartments. These kinds of incommensurable and incompressible elements make up the core essences of the difficult doctrines through which we seek to balance and resolve our fundamental value conflicts.

Id.

81. *See* Sward, *supra* note 5, at 324–26.

> Common law development is highly rational, moving step by step, analyzing small differences in cases and determining the likely social impact of a given decision. . . . The modern adversary system still has magical elements, but it is essentially a rational system. It depends on proof being presented by the two sides, and on a judge's or jury's power to reason from the evidence to a conclusion.
>
> . . . .
>
> . . . The "right" procedure will produce the "right" result. The system becomes God, and it is the system that is invoked to answer the substantive question about who should win.

Id.

82. *See id*. at 327–29 (arguing that discovery, while the process contributes to rationality, is also an admission that the legal process involves the inequality of information; hence, discovery promotes greater rationality than what could be attained without this process).

83. But do consumers know what they desire and how to make decisions based on those desires? Most economists are eager to defend the assumptions of rationality and independence of the consumer. *See, e.g.*, LIONEL ROBBINS, AN ESSAY ON THE NATURE & SIGNIFICANCE OF

Because individuals are interested in maximizing their utility, their most rational decisions are those decisions that increase their utility.[84] For an individual to make a rational decision, he must evaluate the costs and benefits of various alternatives.[85] These decisions require abundant prescience because an individual's calculations must necessarily include consideration of future events.[86] The most rational and motivated individual is able to make the best predictions, which results in his acquiring more wealth, allowing him to consume more, thereby increasing his utility.[87] Successful market participants

ECONOMIC SCIENCE 78–79 (2d ed. 1935) ("The main postulate of the theory of value is the fact that individuals can arrange their preferences in an order, and in fact do so. . . . We do not need controlled experiments to establish their validity: they are so much the stuff of our everyday experiences that they have only to be stated to be recognised as obvious."); DOWNING, *supra* note 2, at 422 ("The idea of irrational buyers or of impulsive buying behavior is a myth."). These claims supporting the rationality and independence of consumers are assumptions that are necessary for markets to be respected. However, the assumptions are arguably tenuous and generally unsupported by social studies of human behavior.

84. *See* Leontaridi, *supra* note 68, at 63 ("Rational economic agents constantly strive to maximise their economic well-being.").

85. *See* AMITAI ETZIONI, THE MORAL DIMENSION: TOWARD A NEW ECONOMICS 1 (1988) ("The neoclassical paradigm . . . . sees individuals as seeking to maximize *their* utility, rationally choosing the best means to serve their goals. They are the decisionmaking units; that is, they render their own decisions. The coming together of these individuals in the competitive marketplace, far from resulting in all-out conflict, is said to generate maximum efficiency and well-being.").

86. *See* Dennis C. Mueller, *Capitalism, Democracy, and Rational Individual Behavior*, 10 J. EVOLUTIONARY ECON. 67 (2000). Although Mueller disagrees with the neoclassical explanation of human behavior, he describes the neoclassical theory of rationality, stating, "The key behavioral assumption of neoclassical economics is, of course, that all individuals are rational egoists." *Id.* at 68. He continues,

> Rational agent models in their purest forms assume that individuals are forward looking optimizers correctly calculating which strategy promises the highest payoffs in each situation. When making a decision, each actor contemplates only the future payoffs from each possible action. Past payoffs are relevant only to the extent that they help the forward-looking rational agent to accurately predict the future.

Id.

87. *See id.* at 70 ("Consumers are rewarded with greater consumer's surplus for each dollar spent, firms with greater profits. In an unchanging environment market competition tends to maximize the rewards to consumers."); *see also* Guo Ying Luo, *Market Efficiency and Natural Selection in a Commodity Futures Market*, 11 REV. FIN. STUD. 647, 647–648, 649 (1998) (explaining the common economic theory of informational efficiency, stating, "If traders are rational, in the sense that they maximize expected utility and form rational expectations, then informational efficiency can be achieved. . . . As more and more speculators enter the economy, at any point in time, whoever acts upon better predictions makes profit at the expense of his or her trading counterparts who act on less reliable predictions."). *But see* Herbert A. Simon, *Barriers and Bounds to Rationality*, 11 STRUCTURAL CHANGE AND ECON. DYNAMICS 243 (2000) (book review). Simon disagrees with the mainstream theory of rationality, claiming instead that the mainstream notion of rationality is beyond our capabilities as humans. Instead, there are "bounds" to our rationality, for human behavior includes a plethora of factors. *Id.* at 251–53.

act on their expectations of what they think will occur in an economy and modify them regularly as new predictions reach their consciousness.[88]

III. ASSESSMENT OF SELECTED SHARED ASSUMPTIONS: THE QUALITY OF JURIES

While a comprehensive evaluation of these shared assumptions is far beyond the scope of this Paper, the outline for such an appraisal is visible through an examination of the validity of the last of these shared assumptions. The adversarial legal system, like market ideology, is dependent on the assumption that decision-makers are rational. But what if substantial evidence indicates that few jurors, the common arbiters of the adversary system, resemble the picture of a reasonable, unbiased thinker?

How would we recognize a rational juror when we see her? She would possess several characteristics: when deliberating with her fellow rational jurors, she would decide a verdict based solely on the evidence. This ability depends on another assumption: that when listening to the adversaries throughout the trial, she would be able to recognize logos, rather than being unduly influenced by pathos and ethos.[89] She must be able to understand, recall, and integrate evidence. She would be able to reach a verdict with an appropriate understanding of the law and the judge's instructions in the law. Does such an exemplary juror exist? While legal commentators in the United States are generally friendly to the adversary system,[90] data from studies of jury behavior[91] are much less sanguine.[92]

Simon contends that the complexity of human behavior creates difficulty in our having certainty with respect to such behavior and decision-making. *Id.* He concludes:

> There is not a unique valid model of human behavior, but a whole range of models, whose applicability may depend on the availability and cost of information, the intelligence, education, and patience of human actors, and goodness knows what other factors. Once one introduces into the SEU maximization Eden the snake of boundedness, it becomes difficult to find a univocal meaning of rationality, hence a unique theory of how people will, or should, decide. Economics, and social sciences generally, will never have the certainty of natural science.

Id. at 251.

88. Papanikos, *supra* note 69, at 1347 ("[I]ndividual economic behaviour is a process of continuous planning. Expectations, information and judgments play an important role and they have an important time dimension.").

89. *See generally* LANE COOPER, THE RHETORIC OF ARISTOTLE 7–9 (1932). These terms were coined by Aristotle to describe the art of rhetoric, or persuasion. Logos is characterized as the logic of the argument ("the argument proper"); Pathos describes the emotional reaction the persuader is attempting to illicit from the listeners; Ethos is the character and history of the person persuading.

90. A recent article in the *National Review* provides an example of the common attitude of most supporters of the jury system. *See* Theodore Dalrymple, *Trial by Human Beings*, NAT'L REV., Apr. 25, 2005, at 30, 31 ("The assault on juror objectivity is, at the bottom, a consequence of the dehumanization of man by sociological determinism. It is an assault, if not quite on the

The first characteristic attributed to the "rational juror" is the ability to reach a verdict based solely on the evidence presented in trial. In an ideal world, only admissible evidence would sway a jury.[93] In reality, proponents of the jury system fail to recognize that rival causes may significantly influence

possibility of rationality itself . . . at least an assault on the possibility of the rationality of the common man."); *see also* NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS 142 (1995) ("[M]ost jurors [have] a clear understanding of the adversary process and [evaluate] witnesses accordingly."); Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL. AND L. 788, 788–89 (2000). Ellsworth and Reifman note the generally unconcerned attitude of proponents of the jury system when social scientists recommended serious reforms: "'[S]ocial science that is at odds with "common knowledge" is likely to be ignored' and common knowledge was that juries were in no particular need of reform." *Id.* (citation omitted) (quoting J. Alexander Tanford, *Law Reform by Courts, Legislatures, and Commissions Following Empirical Research on Jury Instructions*, 25 L. & SOC'Y REV. 155, 167 (1991)); B. Michael Dann & Valerie P. Hans, *Recent Evaluative Research on Jury Trial Innovations*, 41 CT. REV. 12, 12 (2004).

> Traditional adversary jury trial procedures often appear to assume that jurors are blank slates, who will passively wait until the end of the trial and the start of jury deliberations to form opinions about the evidence. However, we now know that jurors quite actively engage in evidence evaluation, developing their opinions as the trial progresses. It makes sense to revise trial procedures so they take advantage of jurors' decision-making tendencies and strengths.

Id.

91. In this section of the Article, our evidence is primarily derived from studies in the fields of psychology and sociology. For a more detailed description of the methods behind these studies, see Dann & Hans, *supra* note 90, at 12–13 (describing various approaches such as mock jury experiments, field experiments, and non-experimental studies).

92. *See, e.g.*, Brief for Neil Vidmar et al. as Amici Curiae Supporting Respondents, Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167 (1998) (No. 97-1709) (arguing that jurors have difficulty assessing statistical and economic evidence); JEFFREY O'CONNELL & C. BRIAN KELLY, THE BLAME GAME: INJURIES, INSURANCE, AND INJUSTICE 23–32 (1987) (arguing that juries are incompetent in assessing evidence). *But see* Valerie P. Hans & Stephanie Albertson, *Empirical Research and Civil Jury Reform*, 78 NOTRE DAME L. REV. 1497, 1500–09 (2003). Hans and Albertson suggest that juries are perceived as incompetent, pro-plaintiff, and anti-business; however, they argue that the empirical evidence suggests that the problems with juries are overstated; *but see also* Richard Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 181, 223–35 (Robert Litan ed., 1993); VIDMAR, *supra* note 90, at 175–82 (arguing that jurors' verdicts in medical malpractice cases were generally defensible).

93. *See* Phoebe C. Ellsworth, *Some Steps Between Attitudes and Verdicts*, *in* INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 42, 61 (Reid Hastie ed., 1993) ("[W]e . . . know that juries are rarely unanimous on the first ballot, and thus, because the evidence is presented the same for all the jurors, individual differences must make a difference. The evidence presented is the same, but the evidence perceived by the jurors is not.").

jurors' decisions.[94] These extralegal influences include the media,[95] the personalities of the defendant and lawyers,[96] the race, religion, and ethnic background of the defendant and the victim, and other compounding factors. Proponents of the jury system claim that these factors have little influence on the final decision of a jury.[97] The following paragraphs will detail the social research debunking the claim that jurors are capable of reaching a verdict based exclusively on admissible information presented in court.

While a juror is bound by law to carefully consider the evidence being presented, research indicates that it is far too easy for her to be swayed by a defendant's good looks. A study conducted by behavioral scientist Robert J.

94. *See* Jonathan D. Casper & Kennette M. Benedict, *The Influence of Outcome Information and Attitudes on Juror Decision Making in Search and Seizure Cases*, *in* INSIDE THE JUROR, THE PSYCHOLOGY OF JUROR DECISION MAKING, *supra* note 93, at 65, 65. The authors write,

> A juror's decision is the product of a complex set of factors including, at a minimum, the juror's personal history, character, and social background; attitudes, ideologies and values; limits and proclivities of his or her cognitive processes; the nature of the evidence presented at trial; and legal rules that are supposed to govern the ways in which the evidence is interpreted, weighted, and applied to the decision.

Id.

95. *See* Michael Chesterman, *OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury Is Dealt with in Australia and America*, 45 AM. J. COMP. L. 109, 124–31 (1997) (detailing the lax methods by which the American legal system prevents and responds to the problem of juries' encounters with prejudicial publicity).

96. *See* David L. Wiley, Comment, *Beauty and the Beast: Physical Appearance Discrimination in American Criminal Trials*, 27 ST. MARY'S L.J. 193, 211–14, 233 (1995) (considering how jurors discriminate according to physical appearance and arguing that remedies should be made to ensure that defendants are judged on their actions rather than their appearance).

97. *But see* ROBERT B. CIALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION (1993). Cialdini argues that the principles of social proof and liking serve as two powerful tools that affect an individual's response to certain situations. *Id.* at 116. Cialdini asserts that to some extent an individual determines what is correct by finding out what other people view as correct. *Id.* Thus, it follows that if a reporter interviews five people about a murder trial on the local news and all five say that they think the defendant is guilty, then a potential juror who sees the interview may be predisposed to think that the defendant is guilty before hearing the evidence. Additionally, Cialdini asserts that individuals tend to "like" physically attractive individuals and individuals who are socially similar to themselves. *Id*. at 171–72. If this assertion is true, then it would follow that a physically attractive, well-dressed defendant with a background similar to the juror's backgrounds would be more likely to be acquitted than an unattractive, dissimilar defendant, even if the same evidence had been presented.

See also Linda A. Foley & Minor H. Chamblin, *The Effect of Race and Personality on Mock Jurors' Decisions*, 112 J. OF PSYCHOL. 47 (1982). Foley and Chamblin conducted a study exploring juror responses to different types of defendants and victims in a mock trial setting. *Id.* Foley and Chamblin conclude that similarity of the defendant to the juror and the predispositions of the juror have significant effects on a juror's determination of guilt or innocence. *Id.* at 48–50. If the results of this case study are true, then one could conclude that factors other than the evidence influence a juror's decision.

MacCoun substantiates this point. MacCoun found that in close cases, mock juries are significantly more likely to acquit the defendant when that person is physically attractive than when the defendant is physically unattractive.[98] In addition, he found that individual jurors became more lenient toward attractive defendants than toward unattractive defendants during deliberation.[99] In close cases involving attractive defendants, "jurors favoring acquittal tend to be more influential than jurors favoring conviction."[100] In cases with unattractive defendants, jurors were just as likely to convict as to acquit.[101] What possible link is there between (1) the logic and evidence presented on behalf of a defendant and (2) the physical attractiveness of the defendant? If there is such a connection, it is well hidden. Because a person's attractiveness is not relevant to a legal decision, yet influences juries, MacCoun's research suggests that believing juries are rational is a tenuous assumption at best.

The defendant's appearance and demeanor are not the only extralegal influences that affect a jury. The charming smile of the person who defends him is unduly important as well.[102] Research conducted by psychologists Martin F. Kaplan and Lynn E. Miller examines the influence of the behavior and appearance of the attorney on the jurors' decision-making.[103] They found that mock jurors were more likely to find the defendant guilty when his attorney was annoying or obnoxious than when the prosecutor exhibited the same traits.[104] When both lawyers were inoffensive, the jury was not

98. Robert J. MacCoun, *The Emergence of Extralegal Bias During Jury Deliberation*, 17 CRIM. JUST. & BEHAV. 303, 311 (1990); *see also* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 193–218 (1966). In another study of forty-four cases of spousal homicide in which the judge convicted the defendant, Kalven and Zeisel found that the sex of the defendant played a significant role in determining the jury's verdict. *Id.* at 202. In these cases, the jury convicted male defendants 82% of the time, while it convicted female defendants only 59% of the time. *Id.* These researchers also concluded that juries are more likely to acquit defendants when they are very young or very old, attractive, remorseful, or when they are military veterans. *Id.* at 202–05, 207.

99. MacCoun, *supra* note 98, at 311–12.

100. *Id.* at 311.

101. *Id*.

102. This is contrary to the assumptions of jury system proponents who hold opinions like the following: "[I]ndividual [attorney] attributes like style or personality do not seem to matter as much as is suggested in the trial advocacy literature . . . . [J]urors pay more attention to substantive aspects of the trial—the nature of testimony by witnesses and how they withstand cross-examination." Shari Seidman Diamond et al., *Juror Reactions to Attorneys at Trial*, 87 J. CRIM. L. & CRIMINOLOGY 17, 43 (1996). If attorney style or personality affects jurors' verdicts, then juries do not render decisions based on the evidence presented during the trial. If juries are to be respected, claims like the one above must be accurate. The evidence indicates otherwise.

103. Martin F. Kaplan & Lynn E. Miller, *Reducing the Effects of Juror Bias*, 36 J. PERSONALITY & SOC. PSYCHOL. 1443 (1978).

104. *Id.* at 1451–52.

affected.[105] Legally, the level of obnoxiousness of a person's attorney should not be a deciding factor in a case. But the evidence suggests that it is.

The active participants in a trial—the attorneys and witnesses—are not the only means of confusion to a jury. The attitudes and habits of the jurors themselves may also affect their ability to produce a verdict based solely on admissible evidence. A jury is composed of a group of individuals, not twelve identical John Does.[106] Because individual jurors vary in their levels of moral and intellectual development,[107] it is unreasonable to assume that jurors make verdicts based solely on evidence. For instance, a factor influencing some jurors is their inability to suspend emotional involvement[108] and personal biases to arrive at a conclusion. The Supreme Court itself has recognized the differing levels of ability in people when it noted that citizens, as voters, have differing levels of engagement as well as varying decision-making abilities.[109] Moreover, a low level of intellectual development may negatively affect a

105. *Id.*

106. *See* Donna Shestowsky, *Improving Summary Jury Trials: Insights from Psychology*, 18 OHIO ST. J. ON DISP. RESOL. 469, 477–79 (2003). When describing the benefits of *multiple* summary jury trials (abbreviated mock trials used to come to settlements), Shestowsky states, "[T]he unique personalities and biases of the jurors deciding the case are especially likely to impact jury outcomes." *Id.* at 478.

107. MORRIS E. CHAFETZ, THE TYRANNY OF EXPERTS: BLOWING THE WHISTLE ON THE CULT OF EXPERTISE 117–18 (1996).

> [A]mong 170 million adult Americans, 27 million read below the fifth-grade level. Some 60 to 65 million read below the ninth grade level. To comprehend public policy discussions on the op-ed pages of the *New York Times*, the *Washington Post*, or the *Wall Street Journal*, a reader needs at least a twelfth-grade reading level. In other words, nearly two out of five Americans are ill-equipped to participate fully in public life. They do not have the resources available to them should they wish to question the scientists and would-be prognosticators.

Id. *But see* Michael B. Lupfer et al., *The Influence of Level of Moral Reasoning on the Decisions of Jurors*, 127 J. SOC. PSYCHOL. 653 (1986) (finding close connection between a juror's level of "moral reasoning," as determined by Rest's Defining Issues Test, and his or her decision to acquit or convict).

108. *Contra* Little, *supra* note 28. Little argues that "the role of emotions in adjudication is . . . no longer a subversive enterprise, but one consistent with the dominant canons in legal scholarship." *Id.* at 205. She goes on to detail how emotions such as empathy, loyalty, jealousy, and disgust can play a substantive role in adjudication. *Id.* at 208–18. However, when describing each emotion and its potential benefits, she makes the important concession regarding the dangerous implications of these emotions gone awry in the courtroom, as they often do. *Id.*

109. *See* Daniel R. Ortiz, *The Engaged and the Inert: Theorizing Political Personality Under the First Amendment*, 81 VA. L. REV. 1, 4 (1995) (arguing that the Supreme Court has two different views of voters' behavior: civic slobs and civic smarties. Civic slobs "are passive and uninformed. They do not bother to acquire and evaluate the same kinds or amounts of political information but instead vote largely on the basis of images, feelings, and emotions. Cognitive deliberation plays a limited role in political choice under the civic slob model.").

juror's ability to pay attention to evidence, especially during a long trial.[110] A juror's unique experiences, ranging anywhere from having read a relevant article to having a victim in the family, or even having a family at all, influences a juror's perception of the facts of the case.[111] Additionally, a juror will emphasize evidence consistent with her own views and attitudes while she will discount or ignore evidence inconsistent with her attitudes.[112]

Ceteris paribus, jurors are above all individuals, and as such are affected by their own biases. However, if a jury is composed of a representative sample of the community, these biases should be largely compensated for by other jurors.[113] Unfortunately, lawyers complicate the situation by intentionally

110. *See* Ellsworth, *supra* note 93, at 42–43. "[M]any trials are long and any given juror's level of attention is likely to vary considerably." *Id.* at 42. Ellsworth suggests that because different jurors will be attentive or inattentive to particular parts of a witness's testimony, the final impression of the testimony will vary. *Id.* "As an academic, for example, I will probably be especially attentive to the testimony of experts, particularly other psychologists, while the attention of my fellow jurors may wander. When it comes to testimony about the identity and trajectory of a bullet, a hunter may be a more attentive witness than I." *Id.* at 42–43; *see also* JAMES P. LEVINE, JURIES AND POLITICS 12 (1992).

> The trial ran from April 1987 to January 1990, and featured testimony from 124 witnesses, produced 800 exhibits, and included reels of videotaped interviews with the children who described their experiences. It resulted in 60,000 pages of transcripts and cost the taxpayers $13 million. And where did this copious outpouring of information leave jurors? One juror said, "When I went into the jury room I was as confused and uncertain as I was on the first day of the trial." The jury could not reach agreement, and after another trial a second jury deadlocked. One frustrated juror stated "I felt like I went in there [the jury room] with more questions than evidence."

Id. (citations omitted).

111. Ellsworth, *supra* note 93, at 47–48. Ellsworth states,

> Our observations suggest that jurors concentrate on comprehending trial events, constructing a fact sequence, evaluating credibility, and relating the evidence to a legal category. However, they do not seem to spend a great deal of time trying to define the legal categories, evaluating the admissibility of evidence they are using, or testing their final conclusions against a standard of proof. In fact, many jurors simply appear to select a sketchy stereotyped theme to summarize what happened (e.g., "cold-hearted killer plots revenge," "nice guy panics and overreacts") and then choose a verdict on the basis of the severity of the crime as they perceive it.

Id.

112. *See* Loren J. Chapman & Jean P. Chapman, *Genesis of Popular but Erroneous Psychodiagnostic Observations*, 72 J. ABNORMAL PSYCHOL. 193, 193 (1967) (suggesting that ambiguous or incomplete information will be interpreted in a manner consistent with the person's initial attitudes and expectations); *see also* Ellsworth, *supra* note 93, at 50. For example, Ellsworth suggests that jurors in favor of the death penalty evaluate evidence in a manner more favorable to the prosecution than do jurors opposed to the death penalty. *Id.*

113. That jurors are a representative sample of the community is an entirely separate tenuous assumption. To further examine the instability of that assumption, see James M. Gleason & Victor A. Harris, *Race, Socio-Economic Status, and Perceived Similarity as Determinants of Judgements by Simulated Jurors*, 3 SOC. BEHAV. & PERSONALITY 175, 179–80 (1975). *But cf.*

selecting unrepresentative jurors in the voir dire process. Knowing that similarity in race, gender, religious belief, socioeconomic status,[114] and the ability to empathize with either the defendant or the victim can subconsciously cloud a member of the jury's ability to reason,[115] attorneys seek jurors most favorable for their side.[116] In other words, winning a jury trial does not necessarily depend on presenting the most convincing evidence to a jury; rather the attorney must present the evidence to the *right* jury, i.e., her client's ideal jury.[117] Selecting the ideal juror through purposeful qualification or

Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1104 (2005) (detailing an argument not just for proportional minority representation in juries but an even more extensive inclusion of minorities in the institution).

114. See Rob Walters et al., *Are We Getting a Jury of Our Peers?* 68 TEX. B.J. 144, 145–46 (2005), for a description of the lack of diverse socioeconomic representation in the state that provides the least compensation for jurors: Texas. The organizer of a study on jury diversity stated, "It is literally true that we have certain segments of our society who have to make a choice: Do they fulfill their constitutional obligation to be a juror or do they go to work so they can barely make enough money to pay the rent and feed their children?" *Id*. at 146. *See generally* Evan R. Seamone, *A Refreshing Jury COLA: Fulfilling the Duty to Compensate Jurors Adequately*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 289 (2002) (discussing the current status and history of jury compensation). Seamone then presents an argument for an increase in jury compensation with elements consistent with the previous citation: an increase in compensation would create a more economically representative jury pool. *Id.* at 369–72.

115. VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 133 (1986); *see, e.g.*, CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 4 (1997) (suggesting that social norms and irrationality affect decision making). "People's choices are a function of the distinctive social role in which they find themselves, and we may act irrationally or quasi-rationally." *Id.* at 7.

116. *See* Ellsworth & Reifman, *supra* note 90, at 792. We expect the voir dire process to expel "bad jurors." "The problems with the jury system are blamed on the inclusion of bad jurors, whose misbehavior subverts an otherwise admirable system, or, in the words of Judge James Rant, 'the obstinate loner, the obsessive individual, the morally-challenged individual.'" *Id.* (citations omitted). However, instead of expelling these "bad jurors," voir dire is used to include them. "[A]ttorneys are not using voir dire to identify and challenge biased jurors but to identify and challenge the intelligent, rational, and unbiased jurors in an effort to 'hand pick' juries that will favor their side." *Id*. at 793. Alas, the authors seem to suggest that it is by no mistake that bad jurors find themselves on juries.

117. *See, e.g.*, Constance L. Hays & Leslie Eaton, *Martha Stewart, Near Trial, Arranges Her Image*, N.Y. TIMES, Jan. 20, 2004, at A1.

> Long before Martha Stewart steps into a courtroom today to watch the selection of a jury for her federal trial, she and her legal team will have carefully tested the government's case—and her own reputation—before a sampling of the kind of people who will be deciding her fate.
>
> At one point last fall, jury experts and public relations advisers convened focus groups in Manhattan on Ms. Stewart's behalf to assess reactions to her accusations against her while her lawyer looked on. The focus groups were part of a million-dollar campaign that also includes polling, a Web site devoted to her side of the story, and two carefully planned television interviews that allowed Ms. Stewart to proclaim her innocence to larger audiences.

Id.

disqualification from jury duty has contributed to numerous instances of unrepresentative juries and consequently increased the weight of this slight flaw.[118]

So, based on the powerful effect of external factors influencing a verdict, the assumption that juries decide verdicts based exclusively on evidence and argumentation is highly questionable. Even if every juror decided a verdict based only on the evidence, they still would not be the rational jurors the adversary system requires for effectiveness. Proponents of the adversary system also must assume that jurors can understand, recall, and integrate the evidence presented in the courtroom. The following paragraphs will address each of these three requirements for interpreting evidence in turn. This analysis will suggest how each assumption—the ability to understand, ability to recall, and ability to integrate—is quite simply not supported by relevant evidence from the social sciences.

First, proponents of the adversary system assume that jurors understand the evidence presented in a courtroom.[119] Consider the following scenario. In a patent case, a lawyer shows the jury blueprints that the defendant claims are the originals. The average juror—a nurse, a high school math teacher, a retiree—has no training in blueprint authenticity. Only an individual trained in

118. *See, e.g.*, Walter F. Becker, Jr., *How to Use a Jury Consultant: A Guide for Trial Attorneys*, 50 LA. B.J. 426 (2003).

> Jury research assists the trial attorney in two basic ways. First, it tests how jurors are likely to react to the case so that the attorney can develop trial themes accordingly. Second, it identifies jurors who possess attitudes, experiences, and beliefs which will resist, oppose or reject the attorney's theory of the case.

Id. at 426. For example:

> In the Birmingham bombing case, jury research by jury consultants working for the prosecution revealed that potential jurors who strongly supported Dr. Martin Luther King's birthday as a national holiday or who had visited the 16th Street Baptist Church or who had seen Spike Lee's movie Four Little Girls tended to favor the prosecution.
>
> By contrast, in the O.J. Simpson criminal case, jury research revealed that potential jurors who did not read the newspaper regularly, or got most of their news from tabloid news, tended to favor the defense.

Id. at 428.

119. "[T]here is nothing so extraordinary in many of the cases that most or all of a group of 12 laypersons could not understand them." VIDMAR, *supra* note 90, at 143. "Jurors, if properly instructed and treated with deserved respect, bring collective intelligence, wisdom, and a dedication to their tasks, which is rarely equaled in other areas of public service." *In re* U.S. Financial Securities Litigation, 609 F.2d 411, 430 (1979). "[W]e do not believe any case is so overwhelmingly complex that it is beyond the abilities of a jury." *Id.* at 432.

If evidence at a trial is too complex for jurors to understand, then they cannot render a verdict in favor of the party presenting the strongest evidence. They must instead base their judgment on irrelevant and unpredictable factors. But verdicts in favor of the party presenting the strongest evidence are exactly what arguments for juries purport to offer. Hence, these claims must be accurate for juries to be respected. A panoply of social studies, however, denounce the claims as inaccurate.

identifying original blueprints could accurately interpret the evidence.[120] Hence, without training in specific areas, members of a jury could potentially have difficulty separating the truth and misleading evidence just as the untrained consumer has difficulty identifying counterfeit money that a trained financial security agent could identify immediately.[121]

Similar evidence of the inability of jurors to understand evidence in a courtroom is provided by varied social studies indicating the inappropriate influence of expert witnesses. These studies indicate that juries are influenced not by *what* the experts say, but rather *how* they say it. Psychologists Irwin A. Horowitz, Kenneth S. Bordens, Elizabeth Victor, Martin J. Bourgeois, and Lynne ForsterLee found, for example, that the technicality of language used in expert witness testimony had a significant positive effect on mock jurors' perceptions of their credibility.[122] The researchers also found that, somewhat fortuitously, when the evidence clearly favored the plaintiff, increasing the technicality of the language in expert witnesses' testimony increased the likelihood that mock jurors would produce a verdict in favor of the plaintiff.[123] Because the technicality of expert witnesses' language, independent of the content of their testimony, is logically irrelevant to the facts of the case, the researchers' work raises serious questions about jurors' cognitive functioning.

The inappropriate influence of expert testimony was again exposed through the research of psychologists Gretchen B. Chapman and Brian H. Bornstein. In civil cases, the researchers found that jurors' numerical judgments are excessively influenced by arbitrary numbers presented to them.[124] As the monetary damages requested by the plaintiff increased, the

120. *See* Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970). *See generally* Jennifer F. Miller, Comment, *Should Juries Hear Complex Patent Cases?*, 2004 DUKE L. & TECH. REV. 4, ¶44 (2004), http://www.law.duke.edu/journals/dltr/articles/2004dltr0004.html (questioning whether a jury could understand complex legal issues within the confines of a trial).

121. *See* SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 129–31 (1988). As Kassin and Wrightsman detail, the inability to understand evidence is substantiated by the restrictions on jurors to ask clarification questions. *Id. Compare* Judge John R. Stegner, *Why I Let Jurors Ask Questions in Criminal Trials*, 40 IDAHO L. REV. 541 (2004), *with* Judge N. Randy Smith, *Why I Do Not Let Jurors Ask Questions in Trials*, 40 IDAHO L. REV. 553 (2004) (detailing the common arguments for increasing juror understanding in situations such as the one described above by allowing them to ask clarification questions). *See also* Dann & Hans, *supra* note 90, at 15.

122. Irwin A. Horowitz, Kenneth S. Bordens, Elizabeth Victor, Martin J. Bourgeois, & Lynne ForsterLee, *The Effects of Complexity on Jurors' Verdicts and Construction of Evidence*, 86 J. APPLIED PSYCHOL. 641, 649 (2001).

123. *Id*.

124. Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCHOL. 519, 538 (1996) .

compensation awarded by the mock jurors increased.[125] Psychologists Allan Raitz, Edith Greene, Jane Goodman, and Elizabeth F. Loftus found that mock jurors consistently match the figures suggested by expert witnesses when determining damages.[126] They found that nearly half of mock jurors awarded a damage amount which *exactly* matched the amount suggested by experts who testified for the plaintiff.[127] Another scholar, J.J. Zuehl, conducted a mock juror study in which he varied the monetary amount of damages requested but kept the facts of the case constant.[128] He found that the damages awarded closely matched the damage requests, even when the damage requests varied greatly.[129] If jurors were able to understand evidence, as the adversary system assumes, then the suggestions of the expert witnesses would not be so powerful.

A final example of the improper influence of expert witnesses is noted in the research of psychologists Saul M. Kassin, Lorri N. Williams, and Courtney L. Saunders. Their study found that mock jurors' views of expert witnesses were influenced by the negative implications of baseless, yet incriminating, cross-examination questions.[130] These results persisted even when the witness's attorney objected to the question, even when the witness denied the implications, and even when the jurors claimed that they did not believe the

125. *Id.* at 526–27. It is important to note that we are not arguing that jurors are especially prone to these or any cognitive errors. Rather, human beings are all susceptible to deficiencies in judgment. *See* Rachlinski, *supra* note 3, at 61–66.

> The human brain is extremely efficient, but it is not a computer. The brain has a limited ability to process information but must manage a complex array of stimuli. In response to its natural constraints the brain uses shortcuts that allow it to perform well under most circumstances. Reliance on these shortcuts, however, leaves people susceptible to all manner of illusions: visual, mnemonic, and judgmental.

Id. at 61 (citations omitted); *see also* Samuel N. Fraidin, *Duty of Care Jurisprudence: Comparing Judicial Intuition and Social Psychology Research*, 38 U.C. DAVIS L. REV. 1, 1–2 (2004). This article describes the legal action that ought to be taken when corporate directors seemingly violate "duty of care" legislation that requires directors to make informed and careful decisions. *Id.* Many of the same expectations placed on jurors are also placed on well-educated corporate directors, and many of the same reforms have been discouraged—such as note-taking and question-asking—and the result has been equivalent. *Id.* In the same vein of Rachlinski, if educated corporate directors struggle with rational decision-making, what can we expect from juries?

126. Allan Raitz, Edith Greene, Jane Goodman & Elizabeth F. Loftus, *Determining Damages: The Influence of Expert Testimony on Jurors' Decision Making*, 14 LAW & HUM. BEHAV. 385, 393 (1990).

127. *Id*. at 390.

128. *Id.* at 387 (citing J.J. Zuehl, The Ad Damnum, Jury Instructions, and Personal Injury Damage Awards (1982) (unpublished manuscript, on file with the University of Chicago)).

129. *Id.* (citing Zuehl, *supra* note 128).

130. Saul M. Kassin, Lorri N. Williams, & Courtney L. Saunders, *Dirty Tricks of Cross-Examination: The Influence of Conjectural Evidence on the Jury*, 14 LAW & HUM. BEHAV. 373, 378 (1990).

implications.[131] In short, these observations are significant because the baseless negative implications of cross-examination questions are logically irrelevant to expert witnesses' credentials and testimony. The crossing attorney's tactic of asking irrelevant or unfounded questions serves to distract the jury from the goal: coming to a verdict based on admissible evidence from credible witnesses. Unfortunately, the tactic often works.

Expert witnesses are not the only witnesses who confuse juries, incapacitating their ability to understand the evidence. The very existence of an eyewitness, regardless of the accuracy of his or her testimony, improves the odds of a prosecutorial victory.

The work of psychologist Elizabeth Loftus found that mock jurors rely too heavily on the testimony of eyewitnesses.[132] Her research details scenarios when no eyewitness was provided to confirm the defendant's guilt and mock jurors found the defendant guilty just 18% of the time.[133] Take the same case and add one eyewitness who confirms the defendant's guilt. Then the jurors found the defendant guilty 72% of the time.[134] The problem, according to Loftus, is that even when overwhelming evidence was presented that discredited the eyewitness, mock jurors nevertheless returned guilty verdicts 68% of the time.[135] Loftus critiques jurors' behavior by concluding that they rely too heavily on eyewitness testimony.[136] If the assumption that jurors accurately understand the evidence were true, then a discredited eyewitness should have the same logical effect on the case as no eyewitness at all. However, as Loftus' research indicates, this outcome is but wishful thinking in actual jury practice.

Jurors often are confused by witness testimony; they cannot distinguish between what is logically relevant and irrelevant, thereby inhibiting their ability to understand evidence presented at a trial. Even more disturbing, though, is that even if they did understand, jurors cannot recall the evidence, despite the assumption of proponents of the jury system that jurors are indeed able to recall. Because of the limitations of the human brain relating to neuron firing and information processing, physiologists estimate that only 1% of all the information that comes into a person's consciousness is stored as long-term memory.[137] This biological estimation indicates that if no juror took notes on

131. *Id*.

132. Elizabeth Loftus, *Reconstructing Memory: The Incredible Eyewitness*, PSYCHOL. TODAY, Dec. 1974, at 116, 117–18.

133. *Id.* at 118.

134. *Id.*

135. *Id.*

136. *Id.* at 119.

137. GERARD J. TORTORA & SANDRA REYNOLDS GRABOWSKI, PRINCIPLES OF ANATOMY AND PHYSIOLOGY 520 (10th ed. 2003).

the evidence presented,[138] and if each juror could recall and analyze 1% of the evidence presented each day, then collectively the jury may only discuss a small portion of what was presented in the courtroom.[139] This estimation discredits the assumption that jury decisions are based on complete and accurate evidence presented during the trial.

Even if jurors were able to fully understand and recall all of the evidence from an extensive and complicated trial, they still lack the ability to integrate the evidence into an appropriate ruling.[140] This ability is yet another tenuous assumption made about juries. One example of the inaccuracy of this assumption is the tendency to be influenced by inadmissible evidence when deciding a case. The experiments of psychologists Saul M. Kassin and Holly Sukel note the tendency of jurors to be affected by hindsight bias.[141] They found that mock jurors were more likely to convict a defendant on trial for murder when the trial contained a confession ruled inadmissible by the judge

138. *See* KASSIN & WRIGHTSMAN, *supra* note 121, at 128 ("[O]ne wonders how much of the proceedings jurors can possibly recall with or without the aid of taking notes."); Terry Carter, *The Verdict on Juries*, ABA J., Apr. 2005, at 41 ("More states are adopting jury reforms, freeing jurors to take notes and ask questions. But some judges are slow to embrace the changes."). The American Bar Association now strongly recommends that "[j]urors should be instructed at the beginning of the trial that they are permitted, but not required, to take notes in aid of their memory of the evidence . . . ." *Id*. at 44. The Bar Association also recommend that jurors receive "trial notebooks" that include "the court's preliminary instructions, and certain exhibits and stipulations." *Id*. Carter reports that only half of the courtrooms in the country allow jurors to take notes. *Id*.; *see also* Dann & Hans, *supra* note 90, at 13–14, 16–17; *cf.* Shari Seidman Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1, 4 (2003) (describing a controversial and experimental way to encourage recollection among jurors: allowing jurors permission to discuss the trial during recesses); Dann & Hans, *supra* note 90, at 17–18.

139. *See* Ellsworth & Reifman, *supra* note 90, at 790. The severity of this problem increases significantly when one takes into account the *type* of information recalled. In this segment of the article, the authors describe another flaw in memory that inhibits jurors from recalling evidence accurately: the mind has a tendency to remember a few descriptive examples more than other varieties of evidence. *Id.* In other words, "vivid, unreliable information is more persuasive than the boring, reliable information." *Id.* So 1% of information recalled during deliberations may only be the flashy examples, not the legally substantive aspects of the case.

140. *Id.* at 790–93.

141. Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule*, 21 LAW & HUM. BEHAV. 27, 30–31 (1997); *see also* Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 288 (1975). Fischhoff found that individuals supplied with information about the outcome of an event overestimate what they would have known about the context of the situation had they not been supplied with the outcome information. *Id.* at 292. In addition, Fischhoff found that individuals supplied with outcome information overestimate what other individuals without outcome information knew. *Id.* at 297.

than when they heard no confession.[142] This higher conviction rate persisted even when jurors saw the confession as coerced,[143] even when it was stricken from the record, and even when jurors said it had no influence.[144] Legally, the confession had no weight, but de facto, the confession decided the case.

The research of psychologists Edith Greene, Michael Johns, and Alison Smith support the argument that juries cannot effectively integrate evidence into a ruling.[145] In civil cases, damage awards ought to be compensation for the plaintiff, not punishment for the defendant. However, their evidence suggests that mock jurors do not appropriately separate the defendant's conduct from their compensatory damage awards.[146] They found that, in mock jury trials, the reprehensibility of the defendant's conduct inappropriately influenced jurors' assessments of the plaintiff's harm.[147] Similarly, they found that jurors who heard evidence about the defendant's conduct gave larger monetary awards to the plaintiff than jurors who had no evidence of the defendant's conduct.[148] Deliberation did not redress jurors' use of the inappropriate evidence.[149] In short, the only evidence that legally should have been integrated into the damage awarded was the damage sustained. Once again, the research indicates otherwise.

Evidence is not the only element considered when the jury begins deliberation. After all of the evidence is presented, after every witness has testified, a juror hears one last thing before she leaves—the law. When a judge instructs the jury about the law, courts presume that jurors understand and will

142. Kassin & Sukel, *supra* note 141, at 42.

143. *Id*. at 38.

144. *Id*. at 42.

145. Edith Greene, Michael Johns & Alison Smith, *The Effects of Defendant Conduct on Jury Damage Awards*, 86 J. APPLIED PSYCHOL. 228 (2001).

146. *Id.* at 228–37 (2001). Through their research, Greene, Johns, and Smith predict the results of hindsight bias when a jury is deciding a verdict. According to the hindsight principle, people cannot easily disregard information that they already have heard, nor can they easily reproduce the judgments they would have made without such information, although they believe that they can disregard this information. *Id*. at 236. Thus, the researchers hypothesize that jurors have difficulty ignoring evidence regarding the defendant's behavior. *Id*. The researchers hypothesize that by using inappropriate evidence in rendering damages, jurors may return verdicts they intuitively perceive as more equitable. *Id*. They note that "[t]his reasoning reflects the just-world belief that people who behave worse should be punished more severely." *Id*. at 237; *see also* Kamala London & Narina Nunez, *The Effect of Jury Deliberations on Jurors' Propensity to Disregard Inadmissible Evidence*, 85 J. APPLIED PSYCHOL. 932, 932–39 (2000). Psychologists Kamala London and Narina Nunez found that although inadmissible evidence significantly affected mock jurors' verdicts, the mock jurors did not cite the inadmissible evidence as an important factor in their decisions. *Id*. at 937. This research suggests that jurors actually are not fully aware of the factors that influence their decision-making.

147. Greene, Johns & Smith, *supra* note 146, at 236.

148. *Id.* at 232–34.

149. *Id*. at 236.

follow these instructions.[150] The Supreme Court has stated, "[W]e adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions."[151]

Despite the Supreme Court's encomium to the skill of juries, little evidence exists to support the assumption that jurors follow and understand instructions.[152] For example, in one study, researchers determined that juror comprehension was less than 50%.[153] In another related study, psychologist Reid Hastie and management scholars David A. Schkade and John W. Payne presented mock jurors with summaries of cases in which trial and appellate judges had previously decided that the defendant was not liable.[154] After hearing instructions about liability, individual jurors found the defendant liable 63% of the time.[155] To explore the large disparity between the verdicts of the mock jurors and the judges, the researchers tested the mock jurors' ability to recall/comprehend the instructions they were given about liability. They found that the median mock juror was able to recall/comprehend only 5% of the instructions regarding liability.[156] Skepticism regarding the Supreme Court's assumption about juror perceptiveness in this realm seems justified.

150. *Contra* Anne Bowen Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 U. CIN. L. REV. 1377, 1383–84, 1392–97 (1994). Poulin argues that juries ought to be allowed to decide a verdict based on factors other than the law. "The jury offers relief from the unremitting rigor of the rule of law." *Id.* at 1383.

151. Francis v. Franklin, 471 U.S. 307, 324 n.9 (1985).

152. *See* Judith L. Ritter, *Your Lips are Moving . . . but the Words Aren't Clear: Dissecting the Presumption that Jurors Understand Instructions*, 69 MO. L. REV. 163, 164 (2004). Ritter examines five possible bases to support the presumption that jurors understand instructions: legal precedent, history, logic and rationality, empirical evidence, and policy. *Id.* at 183–204. She concludes that none of these bases support the presumption. *Id.*; *see* Dann & Hans, *supra* note 90, at 15–19; *see also* Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT. L. REV. 587, 616–23 (2002). Several solutions have been proposed to combat concerns regarding juror comprehension of legal instructions: (1) Giving preliminary instructions to the jury, (2) Giving final instructions prior to closing statements, and (3) Providing written copies of instructions to refer to during deliberations.

153. *See* Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1315–17 (1979).

154. Reid Hastie, David A. Schkade & John W. Payne, *A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages*, 22 LAW & HUM. BEHAV. 287, 287 (1998).

155. *Id.* at 292–93.

156. *Id.* at 295; *see also* Lynne ForsterLee, Irwin A. Horowitz & Martin J. Bourgeois, *Juror Competence in Civil Trials: Effects of Preinstruction and Evidence Technicality*, 78 J. APPLIED PSYCHOL. 14, 19 (1993). ForsterLee, Horowitz, and Bourgeois found that mock jurors were not able to distinguish among multiple plaintiffs in cases in which the evidence presented was highly technical. *Id.* In cases where the evidence was less technical, however, mock jurors' had less difficulty distinguishing among multiple plaintiffs. *Id.* In addition, the researchers found that when jurors were presented with instructions concerning compensation awards *after* hearing the

A juror's unwillingness or inability to follow the court's instructions is evident in the social science research that indicates that jurors are not able to disregard legally inadmissible evidence, even when they are instructed by the judge to ignore that evidence. Psychologists Kamala London and Narina Nunez found that mock jurors' verdicts were biased by inadmissible evidence presented in a criminal sexual assault case.[157] Research suggests that this tendency of jurors to be biased by legally inadmissible evidence is present in civil cases as well. Specifically, jurors do not obey judges' instructions to compartmentalize compensatory and punitive damages, according to behavioral scientists Michelle Chernikoff Anderson and Robert J. MacCoun.[158] In one experiment, they found that mock jurors who had no option to award punitive damages awarded compensatory damages that were on average 27% higher than mock jurors who had the option of awarding punitive damages.[159] This result suggests "either an inability of jurors to distinguish compensatory goals from punitive goals . . . or a conscious disregard for the law which calls for such compartmentalization."[160]

A second study by Anderson and MacCoun also documents the tendency in juries to either not understand the judges' instructions or to deliberately ignore them.[161] According to tort law, when the defendant has been found liable for negligence, jurors are to determine compensation based only on the extent of the plaintiff's injuries. The law implicitly precludes them from taking into account the reprehensibility of the defendant's conduct.[162] But in their second experiment, Anderson and MacCoun found that mock jurors who faced cases with plaintiffs exhibiting identical injuries awarded significantly higher compensatory damages when the defendant's behavior was highly egregious than when the defendant's behavior was less flagrant.[163]

In criminal law, the egregious nature of the alleged crime also influences the outcome of the verdict despite any instructions on the law, according to a study preformed by scholars Harry Kalven, Jr. and Hans Zeisel. They found that in 26 "simple rape cases"[164] in which the judge convicted the defendant,

case, they were significantly less likely to distinguish among multiple plaintiffs in their awards than when they were presented with instructions *before* hearing the case. *Id.*

157. London & Nunez, *supra* note 146, at 934–35.

158. Michelle Chernikoff Anderson & Robert J. MacCoun, *Goal Conflict in Juror Assessments of Compensatory and Punitive Damages*, 23 LAW & HUM. BEHAV. 313, 327–28 (1999).

159. *Id.* at 321.

160. *Id.*

161. *Id.* at 322–25.

162. *See id.* at 314.

163. Anderson & MacCoun, *supra* note 158, at 325.

164. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 250–53 (1966). The authors distinguish between aggravated rape and simple rape. The former includes cases in which one or more of three elements are present: evidence of extrinsic violence, evidence of several

the jury, faced with the same evidence, acquitted the defendant in 60% of the cases.[165] In sixty-four aggravated rape cases, however, in which the judge convicted the defendant, the jury agreed with the judge in more than 85% of the cases.[166] The researchers conclude that rather than considering the legality of the verdict, "the jury chooses to redefine the crime of rape in terms of its notions of assumption of risk."[167] In other words, to a juror, not all rapes are equal. Some victims are more responsible for their rape than others, despite the law's opinion on the subject.

Intentional or not, the juries' disregard for both the law and judges' instructions has caused some legal experts to argue against the assumption that the decision made by twelve individuals is more accurate and fair than the decision made by a judge.[168] These experts believe that since juries are unfamiliar with the law and untrained in how to deliberate about a complex issue,[169] they are more likely to err than a judge who, at minimum, understands the law and has had some formal training. Others, however, resort to another tenuous assumption: jury deliberation alleviates these concerns.

A few studies do support the assumption that jury deliberation compensates for juror irrationality and improves jurors' reasoning skills. For instance, psychologists Monica L. McCoy, Narina Nunez, and Matthew M. Dammeyer studied the effect of deliberation on jurors' reasoning skills. They found that mock jurors were more likely to reason at a higher level after

assailants involved, or evidence that the victim and the defendant are complete strangers. *Id*. at 252. Simple rape cases consist of cases in which none of the three elements are present. *Id*. The purpose of the distinction is to show that juries are significantly more likely to acquit a defendant accused of rape if there is evidence that the victim was engaged in questionable behavior—i.e., in situations of simple rape. *Id*. 250–53; *see* Cass R. Sunstein, *Probability Neglect: Emotion, Worst Cases, and Law*, 112 YALE L.J. 61, 70 (2002). Cass Sunstein identifies this behavior as "probability neglect"; this term refers to the human tendency to focus on adverse outcomes rather than the likelihood of these outcomes. *Id.* at 70. In terms of rape, if the victim is perceived to be somewhat responsible, then irrational fear is not induced in the jurors. Aggravated rape, however, does induce intense fear—–because people believe it could happen to anyone—therefore more irrational verdicts condemning defendants exist. *See id.* at 68–70.

165. KALVEN & ZEISEL, *supra* note 164, at 253.

166. *Id.*

167. *Id.* at 254.

168. *Contra* Rachlinski, *supra* note 3, at 100.

> Although it is possible that judges make better decisions than juries, there is little evidence to support this belief. . . . [J]udges encounter little or no feedback on the quality of their decisions, making it difficult for them to learn decision making on the job. Furthermore, research indicates that judges, like everyone else, are susceptible to illusions of judgment.

Id.

169. But see Edward V. Di Lello, *Fighting Fire with Firefighters: A Proposal for Expert Judges at the Trial Level*, 93 COLUM. L. REV. 473, 473–74 (1993), for an argument that even judges are not qualified to arbitrate highly technical trials.

deliberation in twelve-person juries than mock jurors who did not deliberate.[170] In addition to enhancing jurors' reasoning skills, deliberation attenuates extralegal biases, according to other research. A study done by Kaplan and Miller found that although mock jurors were significantly affected by extralegal factors in rendering verdicts, the effect of these factors on jurors' verdicts disappeared after deliberating in twelve member juries.[171] Similarly, scholars Jeffrey Kerwin and David R. Shaffer found that although predeliberation mock jury members were often biased by inadmissible evidence in rendering their verdicts, after deliberation they changed their verdicts and disregarded the inadmissible evidence.[172]

From the previous studies, it appears that deliberation attenuates extralegal biases. However, other researchers have found that the effect of deliberation on jurors' memories is minimal at best. Their research contests the legitimacy of the assumption that deliberation improves the rationality of jurors. Psychologists Mary E. Pritchard and Janice M. Keenan found that although deliberation did not significantly distort the facts in mock jurors' memories, deliberation improved mock jurors' memory accuracy only slightly.[173] Additionally, this small memory improvement effect held only for peripheral trial information, and not for the central facts of the case.[174] In a study using

170. Monica L. McCoy, Narina Nunez & Matthew M. Dammeyer, *The Effect of Jury Deliberations on Jurors' Reasoning Skills*, 23 LAW & HUM. BEHAV. 557, 570–71 (1999). McCoy et al. assessed jurors' reasoning competence as defined by Kuhn, Weinstock, and Flaton. *Id.* at 558. Kuhn, Weinstock, and Flaton have developed a reasoning continuum for juror competence. *See* Deanna Kuhn, Michael Weinstock & Robin Flaton, *How Well Do Jurors Reason? Competence Dimensions of Individual Variation in a Juror Reasoning Task*, 5 PSYCHOL. SCI. 289, 289 (1994). At the low-competence end of the continuum, jurors construct a single narrative based on the evidence presented and discount any evidence that does not mesh with this narrative. *Id.* At the optimal-performance end of the continuum, jurors use conflicting evidence to construct multiple narratives. *Id.* They then evaluate the extent to which the extant evidence is consistent with each narrative and evaluate each narrative–evidence combination against the alternative combinations. *Id.*

171. Martin F. Kaplan & Lynn E. Miller, *Reducing the Effects of Juror Bias*, 36 J. PERSONALITY & SOC. PSYCHOL. 1443, 1453–55 (1978).

172. Jeffrey Kerwin & David R. Shaffer, *Mock Jurors Versus Mock Juries: The Role of Deliberations in Reaction to Inadmissible Testimony*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 153, 159–61 (1994); *see also* London & Nunez, *supra* note 146, at 937 (corroborating Kerwin and Shaffer's findings).

173. Mary E. Pritchard & Janice M. Keenan, *Does Jury Deliberation Really Improve Jurors' Memories?*, 16 APPLIED COGNITIVE PSYCHOL. 589, 599–600 (2002).

174. *Id.* at 595. The researchers also found that the correlation between mock jurors' memory accuracy and their confidence in their memory accuracy was almost nonexistent. *Id*. at 597. Based on this finding, they hypothesize that deliberation has such a small effect on jurors' memories because those jurors who control deliberation do not always have the most accurate memories. *Id*. at 598. In addition, the researchers argue that the unexpectedly small deliberation effect on jurors' memories is a result of the jurors' general overconfidence in their memory

actual cases, Hastie, Schkade, and Payne found that deliberation actually slightly worsened juror decision-making.[175] They found that after deliberation, mock jurors were 2% more likely to find the defendant liable when a judge had previously found that the defendant was not liable.[176] The overall rate of post-deliberation verdicts of liability was 58%.[177]

Additionally, group pressures or personal agendas could negatively affect jury deliberations.[178] In 1996 when the Tyco Toy Company introduced the Tickle Me Elmo doll, parents tackled each other in the middle of department stores, argued in public, and waited for hours to purchase the $35.00 toy.[179] As publicity surrounding the toy increased, the demand for the product skyrocketed.[180] Social pressure to provide one's child with the most popular and "coolest" Christmas gift had driven otherwise reasonable adults into a frenzy. Similarly, an assertive and persuasive group of several jurors eager to return to work, the golf course, or a family function could pressure otherwise reasonable but more passive jurors into voting for a specific verdict in order to expedite deliberations.[181] For example, in 2002, after four days of deliberation in a perjury trial, a holdout juror sobbed and pleaded with the judge to release him from jury service because his fellow jurors were pressuring him to change his vote.[182] A day after the juror was released and the alternate juror was in place, the jury returned a guilty verdict.[183]

IV. CONCLUSION

Respect for the jury system and the market as an allocative and distributional device derives from shared dependence on certain foundational assumptions. The utility and moral legitimacy associated with these two core

accuracy; their inability to realize that they do not remember all precludes their asking for clarification during deliberation. *Id.* at 597–600.

175. Hastie, Schkade & Payne, *supra* note 154, at 287, 304.

176. *Id.* at 293.

177. *Id.* When hung juries were excluded, the rate of liable verdicts rose to 67%. *Id*.

178. *See* Ballew v. Georgia, 435 U.S. 223, 232–33 (1978); Duncan v. Louisiana, 391 U.S. 145, 157 (1968).

179. Joe Sharkey, *JERSEY; Elmo, the Spirit of Christmas*, N.Y. TIMES, Dec. 22, 1996, at 1.

180. *See id.*

181. *See* Alvin Zander, *The Psychology of Group Processes*, 30 ANNUAL REV. PSYCHOL. 417, 428–32 (1979).

182. *See* Mike McKee, *Real Jurors Don't Cry*, THE RECORDER, Aug. 18, 2004, http://www.law.com/jsp/article.jsp?id=109018035488. The judge determined that the man was suffering from "'real personal stress' because of his fellow jurors' pressure to make him change his vote." *Id.* However, on appeal, the appellate court stated that "[t]he fact that Juror 2 reached a conclusion different from that of the other jurors did not render him unable to deliberate . . . . Rather than being faced with a juror unable or unwilling to perform his duties, the court was faced with a jury that was deadlocked after lengthy deliberations." *Id.*

183. *Id.*

institutions resides in the validity of these assumptions. Primary among them are faith in the degree of cognitive acuity that it is fair to presume in typical aggregations of jurors and consumers. If jurors and consumers are curious, circumspect, overwhelmingly attentive to relevant evidentiary factors, and possessed of judgmental standards that we would ordinarily associate with good reasoning, then markets and juries promise to fulfill the aspirations of those who tout them.

But social science data does not support these assumptions. They give us a portrayal of human decision-makers who are, as Nietzsche famously said, "human, all too human."[184] Sometimes they are attentive to rational criteria; sometimes they are not. Wishing that humans were more proficient decision-makers does not make them so. When we see jurors and consumers as capable of rationality under the guidance of rules and procedures that take humans as they are and not as they might be, we are on the road to more effective use of juries and markets. If the social science portrayal of jurors is accurate, continued respect for the role of the jury in the adversary system of justice demands a search for just such rules and procedures.

184. FRIEDRICH NIETZSCHE, HUMAN, ALL TOO HUMAN: A BOOK FOR FREE SPIRITS (1879).