

Race, Rationality, and Religion, and the US Jury in Civil Cases:

What Does Love Have to Do With It?

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The United States is the sole remaining common law jurisdiction that provides parties with the right to have facts in dispute in civil cases determined by a jury.² This paper considers whether a religious critique in a postmodern era provides insight into and is itself informed by examining the question whether juries in civil cases are a “good” thing, or whether they have overstayed their welcome. How might such a critique provide perspective on the apparent racism, or at least the nonrational attributes of the practice [or tradition] of civil juries? Moreover, what might a religious critique teach us about the relationship of process, empiricism, and religious principles in modern tort law?

Let’s start by asking whether a Christian perspective might enhance this moral, philosophical discussion: asking not only whether many ideas in legal philosophy—and tort theory in particular—can enhance our understanding of the Christian faith but also whether a Christian perspective might, in turn, contribute to a better understanding of where tort law came from, and even where it might need correction. For example, one might ask what insights can be gained from examining how tort law deals with age-old questions long debated by Christian theologians—for instance, how to comprehend the problem of evil, or why bad things happen to good people. Then again, what insights might be gained

¹ I am grateful for the close read and helpful edits of my Emory/CSLR colleague, Dr. Gary Hauk.

² Australia also provides for a jury in civil cases, but at the discretion of the court. England has done away with it, except in defamation cases.

Amendment VII to the US Constitution provides: In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

In Australia it depends on the type of remedy sought, and whether the judge concurs with the need for a jury.

from asking how common law could establish legal obligations to encourage affirmative duties of care or to teach Christ-like agape. How does the law deal consistently with religious concerns for the oppressed, the stranger, the minority, the child, the widow, and the orphan? How and when should law obligate one to come to the aid of another in need?¹

To complicate the questions a bit, what insights can be gained about the relationship between justice and mercy from examining tort law processes? How do these concepts of justice and mercy enter into questions of law (for the court) and questions of fact (for the jury) in arriving at decisions designed to settle disputes between individuals? How do Christian concepts of mercy and forgiveness, on the one hand, and the limits of common-law adjudication, on the other, inform each other? What are the advantages and limitations of using economic theories, “realism,” or “pragmatism,” empiricism, and social science to help resolve private disputes? What assumptions do these theories make that may raise concerns for Christians? In other words, how does faith inform experience, and experience inform faith.

What starts to emerge is a clearer understanding of the common, nonrational, *foundationalist* beliefs of both the law and Christianity that are at times in sync with each other and at other times in contradiction or in competition with each other. The hope and promise of Christianity is that in and through the conversation between reason and faith there lies a way forward: a way that is compatible with the legal theory imbedded in common law. I will say more about what I mean by *compatibilism* in my concluding section.

Looking through the lens of these questions at the jury presents a different type of religious critique of law, one that focuses on legal process rather than legal doctrine. Indeed, understanding tort

law can be greatly enhanced when it is seen as a process for resolving disputes.³ This understanding will remind us of the inherent limitations in human processes that attempt to make determinations about what happened between disputing parties. It will teach us not only the limitations of empirical and social science research but also the tools these disciplines offer as we examine whether we have become blinded to our own biases, and whether our systems or rhetorical tools need some correction. How does the jury system in civil disputes fashion a resolution that fits religious admonitions to love God, love neighbor, and love self, and yet needs correction and refinement if and when its flaws are revealed?

This paper will start with a brief description of the current crisis in the US legal system over how the jury deals with questions of racism. After pointing out the less-than-perfect epistemology in how jurors deal with race, I will examine the jury system's foundationalist assumptions with an eye toward determining how well these remain relevant in our postmodern world.⁴ To understand where these foundationalist assumptions come from, I will briefly review the role that juries played in the Revolutionary War through the period after the Civil War, and what changes occurred through the civil rights movement of the 1960s. We will see in this history how the jury might provide a correction to the "tyranny of majority," and yet also combat against *despotism* that democracy can also create.

³ James Hederson, Richard N. Pearson and Douglas A. Kysar, in their case book entitled: *The Torts Process*, (Aspen, 8th ed. 2012) explain:

The Torts Process is premised on the view that tort law is more than a collection of doctrines and policies, and that it cannot realistically be understood apart from the processes by which tort disputes are resolved.

⁴ Lawrence Cahoon, in the Introduction to his anthology, *From Modernism to Postmodernism*, (Blackwell Publishers, Cambridge Mass., 1996) p. 13-19, dates the fall of "Modernity" to the reactions in culture and philosophy to post World War II, and the Holocaust, in particular. What was also clearly at work post WWI, was an understanding of how truly evil and irrational otherwise apparently rational nation states could become. As a result Post Modernists critiqued modern theories from five perspectives. Four of these are objects of its criticism and the fifth is its positive method. It critiques 1) presence or presentation (versus representation and construction), 2) origin (versus phenomena), 3) unity (versus plurality), and 4) transcendence of norms (versus immanence). It typically offers an analysis of phenomena through *constitutive otherness*.

Part II examines the process by which jurors decide civil cases, particularly tort cases. I conclude that while the jury system continues to work as a second-best solution in cases where the parties cannot work out their disputes informally, it can withstand a religious critique. For while it may be the case that where the parties are willing, they might better heed the biblical admonition to try to work things out in mediation rather than run to court to resolve their disputes,⁵ it is also the case that the tort process approximates a neutral process that shows great respect (and love) for parties who demand formal secular processes. In fact, this paper concludes that the tort process bridges the divide between religion and the secular, providing room for religious reasoning and sensitivities within the cover of the jurors' fact-finding role. In its role, the jury serves to allow religious input to tort fact finding, as the jury teaches and is taught by its processes. In so doing juries serve society by hearing, caring, and empathizing with the parties, and yet holding parties responsible for their actions, replicating a process with many of the attributes of agape.

Part II also discusses the warning to the process provided by recent empirical analysis of the tort system. I will show that the system needs to be vigilant in testing its results through empirical tools. This testing can teach the players and their advocates how to better fill their advocacy roles. It is through this testing that religious critique and the postmodern critique can join forces, providing needed correction to our jury system.

Part I. Recent Racism and Historical Foundationalist Assumptions.

Recent jury verdicts in the criminal context raise serious questions about how well juries make decisions, with implications for juries in civil disputes. These events [verdicts? cases?] reveal the

⁵ The transformative and loving relationships sought in Biblical accounts of the "new kingdom" might more likely to occur in these informal settings, where parties can choose to forgive, reconcile, and transform their relationships between each other according to principles of agape. We will save a full examination of mediation to another time.

imperfections in the process of jury decision-making that seem to provide too much room for the impact of bias and prejudice on decisions. Contemporary opinions about how well juries deal with race have been volatile, even provoking religious condemnation. In an apparent avalanche of decisions involving black victims killed by police officers, juries have seemed to ignore their own racial biases and have exonerated (or found not guilty) the police officers.⁶ These cases have caused some clergy to call upon

⁶ The cases of Trayvon Martin, Eric Garner and Michael Brown are the most widely known. Simon Vozick-Levinson, *Black Lives Matter: 11 Racist Killings with No Justice*. December 4, 2014
<http://www.rollingstone.com/politics/news/black-lives-matter-11-racist-police-killings-with-no-justice-served-20141204>

Others include,

1. Amadou Diallo (1999). Four NYPD officers notoriously rained 41 bullets down onto Diallo in the Bronx, killing the unarmed Guinean immigrant as he tried to enter his apartment building. They later claimed to have seen Diallo reaching for something that looked like a weapon; in fact, all he had in his hand was a wallet. The incident sparked national headlines and civil rights marches, as well as Bruce Springsteen's protest song "[American Skin \(41 Shots\)](#)" – but all four police officers were acquitted of all charges in the case. One of the killer cops, Kenneth Boss, remained on the force [and was allowed to carry an NYPD gun again](#) in 2012.

Amadou Diallo AP

2. Patrick Dorismond (2000) Dorismond was hanging out in Manhattan with a friend when an undercover cop approached and asked where he could score some weed – blatant profiling based on Dorismond's appearance. A confrontation ensued, and another officer shot him fatally in the chest. Then-Mayor Rudy Giuliani released the 26-year-old security guard's sealed juvenile legal records in an effort to smear his police force's latest victim, infamously saying that the dead man was no "altar boy"; it was later revealed that Dorismond had attended the same Catholic school as the mayor, and served as an altar boy in his youth. A grand jury chose not to indict the officer who shot Dorismond to death.

3. Ousmane Zongo (2003) The NYPD crossed paths with Zongo at a storage facility in Manhattan during a raid on a counterfeit CD ring. Zongo, an unarmed 43-year-old immigrant from Burkina Faso who repaired art, had nothing to do with the raid, but police shot him four times when they saw him in a corridor. The officer who killed Zongo was convicted of criminally negligent homicide – but a judge sentenced him to no more than five years of probation and 500 hours of community service for taking an innocent man's life.

4. Timothy Stansbury (2004) NYPD Officer Richard Neri fatally shot Stansbury, an unarmed 19-year-old, during a late-night patrol of a Bedford-Stuyvesant housing project. Neri said it was an accident, and a grand jury believed him, declining to return an indictment. The only punishment he faced was a 30-day suspension from the force. Neri was later elected to a prestigious position in a New York police union.

5. Sean Bell (2006) The night before his wedding, Bell and some friends went to a strip club in Queens for his bachelor party. When they left the club around 4:15 a.m. the next morning – Bell's wedding day – they ran afoul of a group of undercover and plainclothes NYPD cops, who fired an astonishing 50 bullets into the 23-year-old's car, killing him instantly. The case led to major protests, but all three police officers charged in the case were acquitted.

Sean Bell NY Daily News/Getty

6. Oscar Grant (2009) On New Year's Day, 2009, Bay Area transit officer Johannes Mehserle detained Grant on a subway platform after reports of a fight. The unarmed 22-year-old was lying face-down on the ground when Mehserle shot and killed him, as captured on video by many bystanders. Mehserle was charged with murder, but the jury convicted him of a lesser crime, and he ended up serving less than a year for killing Grant.

7. Aiyana Stanley-Jones (2010) Aiyana Stanley-Jones was just seven years old when a Detroit SWAT team took her life. Late at night, searching for a suspect in her neighborhood, the police threw a flash grenade through her

their communities to criticize these results and have called their communities to repentance for racism.⁷

family's window, stormed the house and shot the little girl in her sleep. The raid occurred while the SWAT team was accompanied by a camera crew from the reality show *The First 48*. There have been two trials so far, both ending in mistrials.

8. Ramarley Graham (2012) Plainclothes narcotics cops chased 18-year-old Graham into his family's home in the Bronx for unclear reasons. They shot and killed him at the door of his family's bathroom. A tiny quantity of marijuana was later found in the toilet – hardly enough to justify an instant death sentence for a teenager. The cop who killed Graham was not indicted, but a federal investigation is ongoing.

9. Tamon Robinson (2012)

An NYPD patrol car collided with Robinson at a Brooklyn housing project, killing him, after responding to a report that Robinson was digging up paving stones to sell them for some extra cash. He was unarmed. A police report claimed that Robinson caused his own fatal injuries by running into a stationary patrol car, but eyewitnesses said the cops rammed their vehicle into the 27-year-old; a few months later, the department had the gall to try and bill Robinson's grieving family for \$710 for damage to the car. Two years later, the case has yet to go before a grand jury.

Tamon Robinson NY Daily News/Getty

10. Rekia Boyd (2012) Off-duty Chicago cop Dante Servin opened fire from his car into a group of people on the street, claiming he perceived a threat to his life. 22-year-old Rekia Boyd was among the people on the scene; she died after taking a bullet to the head. Servin has been indicted (making him the first Chicago police officer in many years to face trial for a fatal shooting), but his case was recently delayed to 2015.

11. Kimani Gray (2013) Plainclothes NYPD officers confronted the 16-year-old Gray in Brooklyn. Police claimed that he pulled a gun before they shot him to death on the street, but Gray's family disputed this allegation. Prosecutors announced this summer that they are not pursuing charges against the officers who killed the teenager. Id.

Others don't see the cases as primarily about race, but about either the power of police (Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, Washington Post, April 11, 2015, <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/>) or perils of policing, See, Jason Hanna, Ralph Ellis and Steve Visser, CNN, Tue December 13, 2016, *Fallen Officers: 64 Shot Dead in the Line of Duty in 2016*, <http://www.cnn.com/2016/08/14/us/police-officers-fatal-shooting-line-duty-nationwide/>.

Yet opinions have run in both directions for how well the jury deals with questions of race. For example, for some, the jury reached exactly the right verdict in these cases. Police officers needed the support of the community for the work they did to combat violence and drug dealing that threaten our inner cities. Other cite results like that reached in the OJ Simpson case. They argue that juries reach the right results in their communities, despite accusations that counsel might play the race card. For others in LA, their experience of oppression by LA police resonated with treatment they say OJ receive. Reaction to the verdict seemed to rest in the "eye of the beholder." In any event, despite one's view of the outcome, the case showed that the jury could permissibly draw on their feelings about racism generally, in exercising their discretion to decide the case based on reason and evidence. Racism, then, ran in the opposite direction of our historical experience, condemning the white system for its past acts and letting the guilty go free.

⁷ One such call hit very close to home, in a sermon by Molly McGinnis, at Central Presbyterian Church, Atlanta. (Sunday July 14, 2013).

Important to our discussion is the recognition by prosecutors and defense attorneys alike as to the role that a juror's experiences may play in the outcome of these cases. Jurors may lack the experience with racism that might bring understanding to the harm caused and maliciousness routinely intended by the defendants. On the other hand, the jurors' own views, stereotypes, and racist attitudes may make them too likely to either condemn or exonerate the defendants.

Social science studies have backed up these concerns. Blacks seem to disproportionately receive the death penalty in capital cases. A number of states have suspended capital punishment as they study more why this is so.⁸ In addition, through the use of new DNA tools, the "Innocence Projects"⁹ have demonstrated that jurors often convict innocent defendants by putting too much weight on eye-witness testimony and too much emphasis, despite the court's admonitions, on a defendant's failure to testify.¹⁰

Related to these perceptions that jurors make less-than-rational decisions is the public reaction to the failure of the government to bring to justice corporate executives for their role in the economic crisis of 2007–09. Bank executives and Wall Street bond traders, some of whom made millions selling worthless mortgage-backed securities, seemed to escape accountability [prosecution?] completely. Prosecutors often excused their failure to prosecute by blaming jurors, arguing that juries will not convict unless they have overwhelming evidence of criminal intent.¹¹ Jurors were thought to be

⁸ In recent years, New Mexico (2009), Illinois (2011), Connecticut (2012) and Maryland (2013) have legislatively abolished the death penalty, replacing it with a sentence of life imprisonment with no possibility for parole. The Nebraska Legislature also abolished capital punishment in 2015, but it was reinstated by a statewide vote in 2016. Additionally, courts in Delaware recently ruled that the state's capital punishment law is unconstitutional. See, National Council of State Legislatures, <http://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx>

⁹ The Innocent Project, <https://www.innocenceproject.org/>

¹⁰ Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 Cornell L. Rev. 1353 (2009).

¹¹H. David Kotz, The Berkeley Research Group, *The Yates Memo, its Background and Impact*, Thompson Reuters, January 2016, <https://d3kex6ty6anzzh.cloudfront.net/uploads/09/095f0cd250fdc40455df254b2fb370c80f6089dd.pdf>; The same type of an excuse was given by Jim Comey regarding Hillary Clinton's emails.

incapable of correctly discerning the questions of scienter or criminal intent when presented only with statistical evidence or with circumstantial evidence of what these actors knew or did not know. If jurors cannot be trusted to decide criminal conduct of powerful bankers and Wall Street tycoons, and if they cannot seem to help themselves regarding decisions about capital punishment, why put up with such a system?

A. Unpacking Foundationalist Values: A Brief Intellectual History

This conference is no stranger to a wonderful book by Nicholas Wolterstorff, *JUSTICE IN LOVE*.¹² As Wolterstorff has said, in conducting a religious critique, one must examine the “foundationalist beliefs” that serve as the nonrational bases for any epistemology or justice system.¹³ Wolterstorff critiques the traditional form of foundationalism.¹⁴ In an earlier work, he describes such an approach as follows:

Simply put, the goal of scientific endeavor, according to the *foundationalist*, is to form a body of theories from which all prejudice, bias, and unjustified conjecture has been eliminated. To attain this, we must begin with a firm foundation of certitude and build the house of theory on it by methods of whose reliability we are equally certain.¹⁵

Wolterstorff points out that the *foundationalist* project has gradually collapsed in the past century. It first evolved into a weaker form, *probabilism*, by relaxing the rigid requirement of certitude. It then evolved into *falsificationism*, the idea that theories can never be known with certainty to be true, but some theories can with certainty be shown to be false. Today most scholars regard foundationalism as having completely collapsed. The principal reason for the collapse was the recognition that every

¹² *Justice in Love*, (Eerdmans, Grand Rapids, Michigan, 2011).

¹³ *Id.*, at 28.

¹⁴ This is the approach to knowledge that we would encounter in any discussion of both Hans Kelsen’s and HLA Hart’s formalism.

¹⁵ Wolterstorff, *Reason Within the Bounds of Religion*, 2d ed. (Grand Rapids, Eerdmans, 1984) p. 28. For the Greeks, the firm foundation was intuitively apprehended principles analogous to the axioms of mathematics (plane geometry), and reliable method was deductive reasoning. Later empiricists extended this to include empirically obtained principles.

theorist approaches the world with an extensive interdependent web of theoretical and nontheoretical beliefs. That is, the very process of weighing a theory requires beliefs about the entities within its scope, and these beliefs themselves are [often?] unable to meet the requirement of certitude that even falsificationism demands.¹⁶

Wolterstorff distinguishes three types of beliefs that scientists bring to their work: data beliefs, data background beliefs, and control beliefs. By data beliefs, he means the minimal beliefs one must have about the object under study even to begin investigating it. For instance, suppose we are studying a certain impact of a tort law on the effect that using car seats has on injuries to children. Examples of data beliefs are “I exist,” “the tort law affects parents’ decisions to use car seats,” and “the observations of data sets showing injuries to children occurring after the laws have been put into effect actually occurred.” Data background beliefs depict those conditions needed for accepting as data what one observes. For instance, “no one here was trying to deceive me,” and “the computer that recorded the data was functioning properly and did not distort the record of occurrence of injuries to children following the enactment of car seat laws.”¹⁷

Control beliefs are a person’s cognitive framework as to what constitutes acceptable theory.

According to Wolterstorff they

include beliefs about the requisite logical or aesthetic structure of a theory, beliefs about the entities to whose existence a theory may correctly commit us, and the like. Control beliefs function in two ways. Because we hold them we are led to reject certain sorts of theories—some because they are inconsistent with those beliefs; others because, though consistent with our control beliefs, they do not comport well with those beliefs. On the other hand, control beliefs also lead us to devise theories. We want theories that are consistent with our control beliefs. Or, to put it more stringently, we want theories that comport as well as possible with those beliefs.¹⁸

¹⁶ Id.

¹⁷ Id. ____.

¹⁸ Wolterstorff, *Reason Within the Bounds of Religion*, 2d ed. (Grand Rapids, Eerdmans, 1984) p. 67

Thus the insistence on carefully crafted, rigorous arguments based on axioms and precise definitions, confidence in the reliability of logic, and the notion that law, properly understood, should include the story of the mistakes judges made and pursued. Judicial mistakes must be examined with care, as the cases themselves may omit the original motivation for judicial decisions. Often these very omissions are themselves evidence of examples of control beliefs about how judicial decision making ought to be done. Even where the judges are using frameworks that are widely held by contemporary legal philosophers, the judges' decisions may yet be based on fundamental beliefs to which the judges are blind, and which may ignore conflicts with other fundamental beliefs.

We might start with an understanding of the jury in the context of its intellectual history in the United States. We will confront some control beliefs about juries' capabilities. These beliefs derive from the Enlightenment but have been informed by American democracy and liberalism and then challenged by modern science and, finally, by postmodern philosophy. We could then engage in a postmodern critique of the jury. Finally we could ask whether there is anything gained by using religious perspective to evaluate the need for a jury in civil cases. We could end then with a discussion of a title of this conference and ask, "What does love have to do with it?"

Elsewhere, I have described the Enlightenment roots of the US jury system.¹⁹ What bears repeating for our discussion is the unique understanding of the capabilities of the jury that is embedded in the Scottish Enlightenment understanding of the concept of reason. Where modern understandings of reason often contain belief in empiricism and data-driven decision-making, the Enlightenment thinkers saw reason as a uniquely human ability to make judgments about character, facts, and intent. Human reason could provide practical knowledge if decision makers were educated to the situation, could suppress their emotions (biases, sympathies, and prejudices), and discussed and analyzed matters

¹⁹ Paul J. Zwier, *God, Man and Jury*, 1989 Utah L. Rev. 433 (1989).

in a dispassionate manner and mature (as opposed to immature) way.²⁰ God-given abilities that put humans in charge of the creation would guide them to “right” decisions.²¹

In the context of jury decision-making, jurors were viewed as being fully capable of judging the truth-telling abilities of witnesses. Yet while the courts would give great discretion to a jury once it was given a case, courts also would use evidence law (predetermining what was admissible) to restrict what jurors could consider from witnesses. Witnesses must testify based on what they saw and heard, not on hearsay, so all evidence could be confronted and subjected to cross examination.

Important to this understanding of reason was what came from the witnesses themselves. Witnesses swore before God to tell the truth. Who would not tell the truth after having sworn to God to do so? The belief in reason meant that jurors were to use their ability to observe the witnesses to determine witnesses’ ability to observe, as well as any interest or bias the witnesses might have, and then to judge the witnesses’ credibility. Jurors were instructed to give whatever weight [they thought appropriate?] to a witness’s evidence and then use their own God-given common sense to determine the witness’s credibility. Using reason, disciplined by instructions for impartiality, the jurors were seen as acting *rationaly* in making determinations of fact. Jurors were given authority over deciding questions of causation, breach of duty, and the amount of damages to be awarded.

B. From Criminal to Civil

²⁰ See, Immanuel Kant, “An Answer to the Question: What is Enlightenment?” in Kant’s Political Writings, trans. H.B. Nisbet, ed. Hans Reiss (Cambridge: Cambridge University Press 1970). Pp. 54-60. Kant writes:

Enlightenment is man’s emergence from his self-incurred immaturity. Immaturity is the inability to use one’s own understanding without the guidance of another. This immaturity is self-incurred if its cause is not lack of understanding, but lack of resolution and courage to use it without the guidance of another. The motto of enlightenment is therefore: *Sapera aude!* Have courage to use your own understanding! Id. at 54.

²¹ Id.

First let's examine the history of the jury in criminal context and then turn to how it is seen in the civil context. The history of the role that juries have played in the US justice system in the criminal context has been widely examined from the system's roots in the American Revolution through the Civil war and to the civil rights movement. Juries were seen during and following the Revolutionary War as a way that the community stood up against first the British and then the state.²² The importance of the jury in criminal cases following the Civil War played out in the context of slavery and racism. Juries were the means by which whites tested their ability to protect themselves from lawsuits by blacks. In the antebellum criminal context, defendants, regardless of race, were prohibited from testifying before juries. The assumption was that their testimony (especially from blacks) would be perjured in their defense of their own liberty.²³

In the criminal context first and then later in the civil context, these prohibitions would work against whites who wanted to testify in their own defense. Following the Civil War, this practice changed. The right to testify, originally forbidden to all defendants, became allowed when whites were accused by blacks, and eventually the right was opened to all defendants in both criminal and civil cases.²⁴ What followed from Jim Crow laws embedded in Southern states was that race would dictate who had the right to sit on juries. All-white juries had no trouble convicting blacks in crimes against whites but had more difficulty convicting whites when the victims were black. The remedy was obvious. For blacks to get fair treatment, blacks needed to sit on juries. All-white juries gave way under court rulings in the civil rights era of the 1960s to the right of blacks to serve on juries.²⁵ Even then, prosecutors could excuse black jurors if they thought they would be too sympathetic to a defendant.

²² Ronald J. Bacigal, *A Case for Jury Determination of Search and Seizure Law*, 15 U. Rich. L. Rev. 791 (1981).

²³ George Fisher, *The Jury's Rise as Lie Detector*, 10 Yale L.J. 575, 669-74, 684-85, 693-96 (1997).

²⁴ Id. California, Nevada, Nebraska, Iowa, Minnesota, Michigan, Indiana, Ohio, Mississippi, New York, Delaware, Rhode Island, New Jersey, Connecticut, Massachusetts, Vermont, New Hampshire, and Maine, and all made the switch to allow defendant's to testify before the end of the Civil War. The rest of the 48 made the switch between 1964 and 1881

²⁵

Eventually the US Supreme Court weighed in and prohibited prosecutors from challenging jurors and seeking their removal on the basis of race.²⁶

In an important way, historical racism has prevented consideration of the question whether jurors are still considered “the hallmark of liberty” in criminal cases. This is because the civil rights movement has seen that the remedy for combating racism is in including minorities on juries. The civil rights movement had prioritized the need for equal treatment under the law. In addition to voting rights, civil rights leaders advocated not for the end to jury decisions but for the inclusion of blacks on juries.

Yet despite the victory for inclusion of blacks on juries, other questions and concerns about how juries handle questions of race continue to plague the system today. Important to our discussion is the recognition by prosecutors and defense attorneys alike that a juror’s experiences may impact the outcome of a case. Jurors may lack the experience with racism that might bring appreciation for the harm caused and maliciousness routinely intended by a defendant. On the other hand, the jurors’ own views, stereotypes, and racist attitudes may make them too likely to either condemn or exonerate defendant.

Perhaps what justifies juries instead are the other fundamental values embedded in the system that augur for their use. What might some of those values be? The jury survived in the US perhaps because of its [reference? The jury’s or the country’s?] unique history. As Tocqueville observed, the US version of democracy was an outgrowth of its large population of immigrants, which led to a sameness, lack of status, and equality of citizenship that was missing in other democracies formed after monarchies fell.²⁷ “US version of democracy had rendered its people gentler in their habits, and less

²⁶ Batson.

²⁷ Tocqueville, *Democracy in America?* (II.iv.6[661-665]).

cruel and indifferent to human suffering than other democracies.”²⁸ Yet Tocqueville also observed that US citizens were more pliant and subject to manipulation. He called it “democratic despotism.” Citizens were held in the tutelage of government, or bureaucracy, or the regulatory state. Even the judge and the lawyers were tools of the state, infusing the citizens with its values. In a society without nobility, the legal profession became the closest thing to nobility.

Tocqueville saw the jury as providing some degree of protection from this despotism.²⁹ In juxtaposition to the law and the regulatory state, the common-law [Generally “Chicago Manual of Style” still prefers phrases like ‘common-law’ to be hyphenated when used as compound adjective rather than noun.] jury could be seen as standing as a buffer from the regulatory state’s despotism.³⁰ Each party to

²⁸ Id.

²⁹ Tocqueville, *Democracy II*, **Chapter XVI: Causes Mitigating Tyranny In The United States – Part II Trial By Jury In The United States Considered As A Political Institution**

I am so entirely convinced that the jury is pre-eminently a political institution that I still consider it in this light when it is applied in civil causes. Laws are always unstable unless they are founded upon the manners of a nation; manners are the only durable and resisting power in a people. When the jury is reserved for criminal offences, the people only witnesses its occasional action in certain particular cases; the ordinary course of life goes on without its interference, and it is considered as an instrument, but not as the only instrument, of obtaining justice. This is true a fortiori when the jury is only applied to certain criminal causes.

When, on the contrary, the influence of the jury is extended to civil causes, its application is constantly palpable; it affects all the interests of the community; everyone co-operates in its work: it thus penetrates into all the usages of life, it fashions the human mind to its peculiar forms, and is gradually associated with the idea of justice itself.

³⁰ Id.

The institution of the jury, if confined to criminal causes, is always in danger, but when once it is introduced into civil proceedings it defies the aggressions of time and of man. If it had been as easy to remove the jury from the manners as from the laws of England, it would have perished under Henry VIII, and Elizabeth, and the civil jury did in reality, at that period, save the liberties of the country. In whatever manner the jury be applied, it cannot fail to exercise a powerful influence upon the national character; but this influence is prodigiously increased when it is introduced into civil causes. The jury, and more especially the jury in civil cases, 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 is reduced to 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, whilst the number of persons who have reason to apprehend a criminal prosecution is small, everyone is liable to have a civil action brought against him. The jury teaches every man not to recoil before the responsibility of his own actions, and impresses him with that manly confidence without which political virtue cannot exist. It invests each citizen with a kind of

a dispute could get the reaction of a jury of peers to the rules and requirements of the state or community, and could express the values embedded in the jury's findings of liability or the amount of damages awarded.³¹

In addition, the jury was viewed as more independent, less jaded, and more open to consideration of the reasons and motivations of the parties for their actions.³² In each case, the jurors saw the parties afresh. Perhaps because so many jurors were themselves immigrants, they were open to hearing the explanation individuals would give for their conduct. Jurors might easily see that but for the grace of God, they might be one of the parties. Seeing things through naïve eyes, so to speak, kept jurors open to the possibility of the injustice or tyranny that could result in a too exact application of the law. "Jury nullification" of the law was and continues to be a feature of the jury system.³³ It provides for the expression of the community's mercy. In its compromises with regard to damages, the jury itself also provides for some consideration of the immaturity of the actors, both moral and mental.

What Tocqueville saw in the US version of democracy was the way the jury moderated the tyranny of the elites. He saw the jury as serving two "political" purposes. First, it allowed for a radical role for the commoner in deciding questions of fact and intent. In the trade [different word?], the jurors became educated, or even indoctrinated, to the laws of the state.³⁴ They learned tort law by serving on the jury. For example, jurors learned that they could be held contributorily negligent if they did not "stop, look, and listen" before crossing a railroad track. They learned that they could be found negligent

magistracy, it makes them all feel the duties which they are bound to discharge towards society, and the part which they take in the Government. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society.

³¹ Id.

³² Id.

³³ See e.g., *U.S. v. Thomas*, 116 F.3d 606 (2d Cir. 1997).

³⁴ Tocqueville, *Democracy II*, **Chapter XVI: Causes Mitigating Tyranny In The United States – Part II Trial By Jury In The United States Considered As A Political Institution**

if they stacked their hay in a way that caused a fire. They were directed to use their knowledge of local customs in making these determinations. Yet they were told that they could use their common sense in making determinations of whether a person was exercising the care of the ordinary prudent person in similar circumstances.

The foundationalist value embedded in the jury system was the Enlightenment belief in one's *common sense* to reach good decisions regarding liability. The jury system relied on belief in the ability of common citizens to know right from wrong. In addition, the system served to educate the community about what was expected regarding reasonable care. Belief in common sense served as a two-edged sword. It would serve as an opening or invitation for the jury to talk about whether they were being too harsh in their judgments, or too punitive in the award of damages. The belief also could provide an opening for being merciful to the poor, the minority, the immigrant, the uneducated. On the other hand, it could provide invitation to stereotype and biased or racist reasoning in determining the credibility of a witness or a party. Belief in common sense could serve as a vehicle for nonrational, anecdotal reasoning as a substitute for proof. If blinded by these experiences, including a community's possible racism, such faith could serve the racist and oppressive attitudes of the majority community.

All this serves as a backdrop for one of the questions posed by this conference: that is, how well the tort system and its historical foundationalist beliefs stand up to a religious critique. After all, if the system provides too much room for and encouragement of racism against minority groups, it becomes, for many in the religious community, an oppressive system that needs to hear the prophetic voice that calls the society to repentance. On the other hand, if it opens up the possibility of justice being tempered at times by understanding and empathy, it seems to be more in line with religious values of mercy and forgiveness.

II. The Torts Process: The Jury and the Law/Fact Distinction

Before getting to these issues, we must look more carefully at the civil jury and what role it actually plays in resolving questions of tort liability. We start with the Constitution itself.

In suits *at common law*, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and *no fact* tried by a jury, shall be otherwise reexamined in any court of the United States, *than according to the rules of the common law*.³⁵

But what exactly is provided [meant?] by the phrases “at common law” or “according to the rules of the common law,” and the limitation to questions of “fact.” How would these words limit the types of cases a jury would hear, and yet allow the courts to expand or retract which questions or elements of a claim the jury needed to decide?

Under the Seventh Amendment, a court will impanel a jury if a party chooses (only one need demand it) but only in nonequity cases. More recently, what has turned out to be implied by the phrase “at common law” was the number of jurors required in civil cases. The “at common law” language freed the courts to reduce the number of jurors required in a civil case to six from twelve, and lowered the vote requirements from unanimous to five of six in some jurisdictions.³⁶ Note that the amendment says nothing about the need for the jurors to be impartial. Early on, jurors were picked because they knew the parties well, and could hear the facts in the light of their knowledge of each in the context of their

³⁵Amendment VII: In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

³⁶ Hans Zeisel, "The Verdict of Five out of Six Civil Jurors: Constitutional Problems," 1982 American Bar Foundation Research Journal 141 (1982). Such a vote is now standard civil jury in the courts of general jurisdiction in four of states: Michigan, Minnesota, New Jersey, and New York. In the courts of limited jurisdiction, the 5-out-of-6 member jury is standard in six states: Arizona, Kentucky, Nebraska, Oklahoma, Oregon, and Texas. In Montana 4 out of 6 jurors can find a verdict, and in Utah 3 out of 4 jurors. In the Virginia courts of limited jurisdiction a jury of 5 must be unanimous.

lives in the community. Later, impartiality principles required that jurors be strangers to the parties and to the facts.

In addition, civil jurors are subjected to many of the same safeguards that have been used to guard against bias in criminal cases. While *voir dire* has diminished in use in federal courts, most civil cases still involve some version of it.³⁷ Jurors are placed under oath and asked questions to determine whether they have experiences or views that would make it difficult for them to be impartial. The parties can exercise both challenges for cause and a limited number of peremptory challenges to try to weed out jurors whose minds are already made up, despite what the facts would be.

The other safeguard [of jury rationality?] is evidence law, which restricts jurors from learning about irrelevant and prejudicial character evidence (FRE 404(b)) or evidence whose prejudice substantially outweighs its relevance, (FRE 403), or hearsay, (FRE 801-803), or expert opinions found to be unreliable or based on insufficient facts (FRE 802-803). Have these changes, brought about by the evolution of the common law and by statutes, done enough to curb the irrationality of the jury? Or is their continuing evidence of jurors' tendencies to be swayed by bias, prejudice, or undue sympathy as a part of their reasoning in matters left to their judgment? What is clear is that in the case of the jury, sometimes less is more. Just as in science, so for the jury, more data and big data seem better. Yet in both realms, the data or evidence needs to be filtered and examined for confounding variables or distractors. Still, the limitations on the jury are substantial, in that jurors are often removed from the facts by time, failures of the parties and witnesses regarding memory or resources to produce them, and by each juror's own distractors. Perhaps there has always been a recognition that the jury may not always get the "right" answer to the dispute before it.

³⁷ Anthony C. Vance, *Voir Dire Examination of Jurors in Federal Civil Cases*, 8 Vill. L. Rev. 76 (1962). Available at: <http://digitalcommons.law.villanova.edu/vlr/vol8/iss1/5>

It [The jury?] otherwise decides questions of *fact*, as opposed to law, as in criminal cases. State courts have varied in their understanding of what constitutes a question of fact as opposed to a question of law. Early on, the jury decided cases through general verdicts of liability or no liability. As we will see, the courts gradually refined what constituted questions of law and questions of fact, and thereby created a process for jury trials in civil tort cases that restricted the jury's discretion and sought to cabin its abuses, especially on matters of public policy, or where there might be ambiguity arising from the meaning of legal terms.

States also evolved in their views of the importance of jurors in deciding certain elements of liability claims. For example, courts differed over the jury's responsibility to decide whether a guest in a car has a right to sue the driver,³⁸ or whether the judge decides the question of status categories in premises liability cases.³⁹ Later state courts would differ over whether juries could decide the amount of damages where the legislature has instituted a cap,⁴⁰ or, depending on the type of damages, the burden of proof required. Some states would require clear and convincing evidence before awarding punitive damages.⁴¹ In some jurisdictions only the court would decide the existence of a duty in affirmative duty cases.⁴²

While it is widely held that the parties have the right to a jury decision on the questions of their breach of duty and cause in fact in a negligence case, even these questions the jurors can be restrained or cut out of all together by civil procedure rules involving motions to dismiss, motions for summary

³⁸ Are guest statutes constitutional?

³⁹ Rowland v. Christian

⁴⁰ Are caps constitutional?

⁴¹ Limits place on jurors by Due Process. State Farm v. Campbell.

⁴² Tarasoff, and Alameda County

judgment, or *Daubert* motions, which prohibit testimony from certain experts and end the case by denying the parties the evidence to prove causation.

How strange to the modern jurists is this epistemology, which is still embedded in our judicial assumptions about the role the jury serves.⁴³ How does anyone “know” what someone intends at a particular time?⁴⁴ The problem of dual intent, primary intent, can be seen as fiction, or a recreation [re-creation?]. Yet the common law oral adversarial system requires the jury to make decisions involving a party’s intent, motivation, knowledge, or considerations before and during the making of various choices that create risks for others. While troubling to a scientific perspective because of the lack of certainty in proving causation, the jury, supported by foundationalist beliefs in its expanded “abilities to act rationally,” is still viewed by the law as preferable to the tyranny of expert and elite decision-making. A religious perspective and postmodern perspective share the view that a jury may not be perfect at finding truth, as the divine might be, but it is a second-best human solution⁴⁵ supported by community values.

In the context of tort cases, the jurors are asked to determine whether someone was using due care. There are two parts to this inquiry. First, did the person have a duty to take care with regard to the person injured? We will get back to this question. For now, we will focus on the second question: assuming there was a duty, did the defendant breach that duty? Tort law asks the jury to hold the actor to the standard of care of the “reasonable” person. This is otherwise defined as the “ordinary” person.

⁴³ For example in capital murder cases justice O’Conner assumes that jurors are fully capable of making judgments about whether a defendant deserves to die for what they did. The jurors are to give, in Justice O’Connor’s words, a “reasoned moral response” to evidence about the offense and the offender.

⁴⁴ E.g., why are you here at this conference? Is it because you have nothing better to do? You wish to hear what John Witte has to say? You wish to learn more about your faith? You are bored? You want to see Malibu?

⁴⁵ First best would be if God, who knows all things and sees into the human heart, would make the decision, and then somehow, communicate it to his people. And so the “sassywood,” and trials by ordeal, sought God’s judgments, until they were shown to be human manipulations.

Jurors are told not to ask what they would have done, but to measure the actor against the standard of an objective (not subjective, not whether the particular actor was doing the best they could), reasonably prudent person.

It did not take long for judges and commentators to note some problems with the oral adversarial system. Jurors could reach inconsistent results.⁴⁶ For example, some might hold the railroad responsible for not blowing its horn loudly enough at a crossing, while others might say the driver of a car hit by the train had the obligation to get out of the car and stop, look, and listen before crossing the track. Those who studied jury decision-making came to see a need for the court to weigh in where the jury might be too sympathetic to the injured party. Holmes would write that this is precisely the role that a judge should play in the common-law system and step in and declare a rule, where the judge had more experience and, therefore, a more rational, less emotional basis for making a more just decision. Holmes, the pragmatist, was confident that the judge could use reason gained from experience to “find” a more just rule of decision.

Holmes would see that the life of the law is experience. A judge’s experience with the resolution of disputes will give rise to greater specificity in the law’s understanding of itself, and a set of principles for guiding future jury decision-making. As a result, as a judge he felt free to make exceptions to the definition of the reasonable prudent person, to take into account the age of the actor (except where a child is engaged in an adult activity), or for an actor’s physical characteristics (holding the person to the standard of a reasonably prudent blind person, or a drunk person), while making no amends for those with mental disabilities.

⁴⁶ Holmes, in *THE COMMON LAW*. And in *Baltimore & Ohio RR v. Goodman*, 275 US 66 (1927).

Other judges noticed a tension that existed when judges would weigh in based on their experience and take a case from the jury.⁴⁷ In such situations, judges would make legal determinations that would make rules fixed and incapable of application in circumstances not initially contemplated by the judge: for instance, advancements in technology that would give rise to doing away with the locality rule, or multiple railroad tracks in urban areas making it impossible to stop, look, and listen before every track. Cardozo famously held that judges should not weigh in on questions of breach of duty, except where it would be “unreasonable” for a jury to conclude otherwise.

Commentators also noted that judges were not immune from their own biases and prejudices. Faced with incomplete information and the limitations of the oral adversarial system (only parties before the court presenting evidence), judges might similarly be led to reach results that were governed more by protecting the status quo than by reaching a “just” result. One of the strongest arguments for the continued use of a jury is the public skepticism concerning whether a judge is any better than a jury in making these decisions. God save us from the tyranny of the elites (and experts). So while jurors might be inconsistent in their findings, so might judges.

What we must note here is that our faith in reason has been replaced by a more pragmatic and realist set of rationales. Our faith in the ability of human decision makers has been shaken by evidence that they are influenced by political contributions, or by biases that make them blind to cultural differences. And so, despite our skepticism that jurors are always acting rationally, we worry that the options are even more unattractive: to put the power to resolve disputes in the hands of the legislature or regulatory agency (industry capture); or to rely on a civil system where “expert” judges apply outdated regulations, not adequately sensitive to the parties’ situations, and create inefficient and

⁴⁷ Cardozo, *Pokora v. Wabash RY.* 292 U.S. 98 (1934).

voluminous rules that end up paralyzing the efficiency of the citizenry. Holmes and pragmatism and realism.

A. Empiricism and the Civil Jury

American realism became infatuated by empiricism, especially in the legal academy. Empiricists argue that what the system needs is a better understanding of how jurors actually make decisions in tort cases. Indeed, these empirical studies have enriched our understanding of the ways jurors can vary their results in reaching their decisions. For example, juries seemed to vary in the likelihood of finding liability if the defendant is a corporation. They actually seem more likely to decide in favor of a doctor where the doctor is a defendant. They tend to decide in favor of the plaintiff concerning difficult questions of causation in cases where the plaintiff is severely injured. They also seem to ignore legal guidelines in awarding punitive damages in cases where they feel the defendant's behavior warrants more punishment. Evidence that there is a relationship between compromises on the amount of damages awarded and difficult liability questions is also often explained by the limitations of proof, the ambiguity in the law, (what is reasonable in the circumstances), and the need for a decision.

There is some empirical work concerning the jury that sharpens our understanding of what is at stake when jurors make decisions.⁴⁸ This work has the potential to help understand the limits of the rationality of ascribing liability to the failure of a person to take requisite care in the protection of another from harm. For example, can a manufacturer have warned a consumer about only those dangers it actually know about from the testing or use of its product?⁴⁹ Or should the manufacturer be

⁴⁸ See, Shari Seidman Diamond and Jessica M. Salerno, *Empirical analysis of juries in tort cases*, Research handbook on the economics of torts (2012)(summarizing empirical research up to that date).

⁴⁹ Sunstein, Cass R., David Schkade & Daniel Kahneman (2000), *Do People Want Optimal Deterrence?*, Journal of Legal Studies, 29, 237–53.

held liable for harm caused by its product's defects that could have been known if more testing had been done? The law itself is ambivalent about whether there is "hindsight" liability (liability for risks that in fact caused harm regardless of the manufacturer's actual knowledge of these risks—for example, the risk that gel packs used in breast surgery might leak and cause harm to a patient years after their insertion).⁵⁰ Even where there is a duty, it turns out to be hard for the jury to find its breach.⁵¹ The empirical research signals that the jury is itself ambivalent regarding hindsight liability. It [reference?] argues that results and consequences do matter. When the harm is great, and where the person injured is unprotected, then the jury seems to want the defendant to be held responsible if they had some (even unspecific) knowledge of the risk of harm.

Researchers also conclude that jurors do equally well in making determinations with other "law-trained" decision makers.⁵² Inherent in any case are the nonrational limitations that cannot but factor into determinations of liability.

Yet, as postmodernists are quick to point out, it is hard to know what to make of these data. First they often are not measuring actual juror decision-making but only mock decision-making, where the problems are hypothetical and the parties not present. Even when measured against the judge's judgment of the jury result, it is hard to determine whether the judge is independent or is confirming the value of his or her own role in the trial. Second, any results can only be descriptive and not normative. To say that jurors might be overly hard on corporations says nothing about whether corporations as profit-seeking entities need more deterrence than human beings who must live with the

⁵⁰ Debates about the right standard turn on interpretations of the 2d Restatement, 402(a), and Barker, and the 3rd Restatement.

⁵¹ See, Shari Seidman Diamond and Jessica M. Salerno, *Empirical analysis of juries in tort cases*, Research Handbook on the Economics of Torts, 413, 433 (). For example, an omission bias leads people to judge action more harshly when action causes the harm than when inaction causes the same harm (Baron & Ritov, 1994). The omission bias may reflect ambivalence embedded in the law about what is appropriate (indeed, the law itself on some occasions denies responsibility for failure to prevent harms). *Id.*

⁵² *Id.*

guilt and remorse of their decisions. Yet the research is important to a “religious” critique. Our research that examines legal results in the light of personal characteristics of the parties point us to a careful and continuing examination of these results in order to better understand the quandary of proof the jury is facing. As time passes, the plaintiffs often get better at presenting their cases. The common law allows for that progression, where the element in play is a question of fact.

The postmodern critique of the American jury system is then telling, on a number of levels. It exposes the lack of definition in the meaning of the word “reasonable.” Does it simply mean to have reasons? What sort of reasons count? How will jurors guard against reason based on emotions that blind them, from making decisions based on experience, common sense, and intuitions of right and wrong deeply fundamental to the cultures and communities from which they come? If the system isn’t after the truth or just results, but only declares winners and losers based on their lawyers’ ability to sway emotions, the system is morally bankrupt, merely political, and most likely rigged to favor elites. In other words, the postmodern critique subjects the jury system to the same critiques the critical theories (the “crits”—critical race, critical feminist, critical gender) have of law decisions generally. These schools of criticism often are empowered by empirical studies. Do women plaintiffs receive less than men when injured by identical behaviors?⁵³ Is this simply a product of wages?⁵⁴ Moreover, are wages reflective of discrimination in the work place?⁵⁵ Or of undervaluing of child caring?⁵⁶ Do minorities receive less?⁵⁷ The advocates (and experts) in these cases are informed by data, which impacts the way cases are presented.

⁵³MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW (2010) [hereinafter THE MEASURE OF INJURY].

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ The Measure of Injury. Martha Chamallas, Discrimination and Outrage: The Migration From Civil Rights to Tort Law, 48 Wm. & Mary L. Rev. 2115 (2007), <http://scholarship.law.wm.edu/wmlr/vol48/iss6/2>

What we are left with is a set of beliefs in an oral adversarial system that we must evaluate as best we can. What does undergird jury decision-making that gives up on making determinations about the truth of what happened in a particular case? It [reference?] does not require tests for truth, but forces the fact finder to make judgments based on probabilities, on the belief that something is more likely true than it is not true. In other words, it [reference?] provides for a margin of error, which might be off by as much as 49 percent. Standards of proof guide the jury into the amount of uncertainty their decisions require. They are told that they should find fact based on their judgment that it is more likely a fact than not.

What undergirds the “value” of the decision is the need for a decision that is fixed and final, at least for that one case. These values take precedence over getting the decision exactly right in every case. The system [?] values certainty and finality over truth. It is pragmatic and realistic. It might initially get the facts wrong, but later, with better facts and more information, it might then get the facts right in future cases.

Second, once we give up on requiring truth, we also make room for a set of compromises that juries might make during their deliberations. These might be based on reasoned-based experiences and values, for good and bad. Jurors might compromise on issues of intent, causation, and damages. With respect to the issue of intent, jurors make judgments about human responsibility that sits right at the heart of the paradox about free will and determinism. How much are a person’s actions governed by their God-given abilities, and how much is subject to a person’s free will? Embedded here are fundamental beliefs about one’s ability to rise above circumstances, the environment, and genes, to make “good” reasoned, careful decisions. Are actors motivated by how they have been treated as a child, or treated by their spouse, or by their boss? Are they angry, distracted, frustrated, or tired, and would any reasonable person in similar circumstances (one who lived with that person’s experiences) have been distracted? Are their reaction times slowed as a result of how their brain is wired to react?

How much jurors are truly able to separate their judgments about intent or recklessness from questions of subjectivity hits at the heart of the free-will debate. The jury is told to make judgments about a person's credibility based on their judgment about the person while testifying (Did the witness seem sincere, forthright, look the jurors in the eye while testifying, looked confident, in control, yet not a perfectionist or overly prepared?). Do the jurors like the person, identify with that person, believe that they "intended" no harm, or "were doing the best that they could"?

What if the jurors make allowances for the plaintiff's lack of care or mature judgment based on the harm they have suffered, and the likely existence of insurance to compensate for the harm they suffered? These nonrational values undoubtedly affect the compromises the jurors reach with each other. These compromises are necessitated by imperfect information and the limitations placed on jurors by the process. They may make allowances for inexperience, immaturity. They may decide to hold the defendant with more resources to a higher standard in order not to unduly punish the plaintiff for the plaintiff's human failings.

Jurors then struggle with why bad things happen to good people. From a religious perspective, this question has some similarities to what a pastor may say to loved ones at the death bed of a parishioner. What one says, the judgments made, are highly contextual. It often seems cruel to blame the person, or the parent, or even God. Leave God out of it? Except in the merciful sense of God, not God the judge? Why? Because of deep ambivalence to the power of God and the existence of evil?

More important to our discussion, jurors might compromise on the question of the care required by the individual actor. This is a more important issue because the question of care is closest to the question of love. What is required of us in our dealings with others? What level of care is required when we drive our car, operate on a patient, sell a product, dump our waste? And how might a jury decide the question of care, without invoking the Golden Rule or the Biblical story of the Good

Samaritan? A religious perspective might tempt the juror to draw on his or her fundamental value of what it means to love neighbor as self, and to answer the question, "Who is your neighbor?" with reference to the Good Samaritan.⁵⁸

Yet to try to line up these scripture passages with tort doctrines or specific results would also present problems. First, imposing Good Samaritan principles may create dependencies (Tocqueville's democratic despotism). In a given case, it might unduly restrict a party's freedom;. If taken as the standard for the society at large, it might have significant impact on one's ability to choose a life consistent with one's own meaning and vocation (for example, requiring a doctor to treat one patient and neglect obligations to others).

Second (as I have argued elsewhere),⁵⁹ determining breach of duty presents paradoxes for jury decision-making. In finding breach, they may create unintended consequences for others not before the court that argue against making this finding. To take societal consequences into account may end up causing the jury to forgo a particular party's getting compensation. (For instance, if a jury finds a Good Samaritan doctor liable, future doctors might not stop to help for fear of being held liable). This result seems to violate *agape* principles taught by the story of the Good Samaritan, that if one is to love another, one must do so even if the cost to oneself is more than one's personal benefit.

The same paradox is present in determining causation.⁶⁰ As with any determination of causation, one would need to figure in different types of causes. For the religiously minded, one cause may be divine. To the extent that God is the cause of harm between two individuals, it seems to suggest

⁵⁸ Knowing Christ might seem to require that one takes special care be taken for the poor, the hungry, the oppressed, the stranger, the widow, the orphan, and those in prison.

⁵⁹ Paul J. Zwier, The Consequentialist/Non-consequentialist Ethical Distinction: A Tool for the Formal Appraisal of Negligence and Economic Tort Analysis, 26 Boston College L. Rev. 905 (1985).

⁶⁰ Paul J. Zwier, Cause in Fact" in Tort Law - A Philosophical and Historical Examination, 31 DePaul L. Rev. 769 (1982).

there is little or no responsibility for the harm caused. On the other hand, to the extent to which the divine seems to require responsible loving actions between parties, it would seem that the divine requires holding each other responsible for intended, needless, reckless, unduly risky, even negligently caused harm. Tort law buries this paradox within the ambiguity of causation doctrine, requiring jurors to make the determination of whether a cause is a *substantial factor* in bringing about harm; in multiple-cause cases, this ambiguity may even shift the burden to show that the actor was not the cause.

In the light of these epistemological paradoxes, the jury process does seem to have much in its favor. It approaches the question of requiring agape, but by way of process. It asks that we act toward each other with due care. Due care means acting as a reasonably prudent person in similar circumstances. The jury is asked not to make the determination subjectively but objectively, in light of a hypothetical reasonably prudent person, who embodies the values of agape, and yet operates in the real world, where the consequences of rules, certainty, notice, and foreseeability of risk must be weighed to determine the circumstances under which the actor was acting. In making its determination, the jury must listen to the witnesses, judge their credibility, and without undue sympathy (and yet with empathy) or prejudice make a determination or finding of fact. This is not a bad image for an ideal judge, who is trying to slow down his or her thinking, to insure that they are not blinded by bias to the injustice of the situation. Admonitions to the jury—to keep an open mind, to discuss carefully, and to listen with respect to each other in trying to reach a verdict—punt the paradoxes into a process of care. The jurors' neutrality supports the process's good faith.

The process is optimistic: not that every result will be perfect, but that in the context of the common law, as knowledge about the circumstances improves, the results will improve. Lawyers will learn how to present their cases better and to overcome jury prejudice with arguments, stories, and

rhetoric.⁶¹ The jury will progress in its ability to understand its own prejudices and will better protect against them. At least these are the hopes and values embedded in the jury system that continue to support its existence.

B. Conclusion and Suggestion for Evangelicals

So we return to where we started. The presence of apparently imperfect, racist, biased results is a continual reminder that the system is not perfect. In fact, the social science studies and DNA tools help show us that society can be blinded by its own racism. So what is one to make of this second-best process?

The postmodernism of our age points us to a religious compatibilism. By compatibilism I mean that we recognize the inherent and apparent contradictions in life.⁶² This includes and starts with the paradoxes of religious (Christian) belief. For example, Christian evangelicals believe in a Creator God and free will. They believe in an all-powerful and omniscient God and in the existence of evil. They believe that God is a God of love and forgiveness, and yet that there is such a thing as God's law. They believe that God is both just and merciful and that believers should also be both just and merciful.

In the context of law, how can the law of love possibly be a law of punishment (and violence)? And so evangelicals struggle with how God can be a god of love without insisting on a particular way of being in time. The logic of faithful living, informed by religious belief, is based on making distinctions, judgments. Its logic invokes the punishments of the law, or violence. Or is the Law of love merely voluntary directives for particular people in a community of faith? But then this invites a life of withdrawal or separation. How is this a life of love? Or is the law of love merely a strategy for making

⁶¹ Rachlinski, Jeffrey J., *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 Oregon Law Review, 62–102 (2000).

⁶² Compatibilism is the term first coined in a book from the Calvin Institute, edited by Russell W. Howell & W. James Bradley, *Mathematics in a PostModern Age: A Christian Perspective*, Eerdmans, (2001), at 383.

one's religious world view "Lord" or the law of life. Again, how can this be done without restricting the freedoms of others who do not share the same beliefs? ⁶³

Many evangelicals press on as optimists, confident that the source of these contradictions is their own limitation of understanding. They strive to live out their religious convictions in their decision-making, both private and public. Many then share the thinking of Pascal in *Pensées*, when he writes:

What sort of freak, then, is man! How novel, how monstrous, how chaotic, how paradoxical, how prodigious! Judge of all things, feeble earthworm, repository of truth, sink of doubt and error, glory and refuse of the universe! ... Know then, proud man, what a paradox you are to yourself. Be humble, impotent reason! Be silent, feeble nature! ... Listen to god. ... Is it not as clear as day that man's condition is dual? The point is that if man had never been corrupted, he would, in his innocence, confidently enjoy both truth and felicity, and, if man had ever been anything but corrupt, he would have no idea either of truth or bliss. But unhappy as we are (and we should be less so if there were no element of greatness in our condition) we have an idea of happiness but we cannot attain it. We perceive an image of the truth and possess nothing but falsehood, being equally incapable of absolute ignorance and certain knowledge: so obvious is it that we once enjoyed a degree of perfection from which we have unhappily fallen.

⁶³ Nietzsche's challenge is indeed formidable: that the will to power inherent in human action requires violence. He might say that even our rhetoric of peace (and Love) is by definition duplicitous, for when it is subjected to deconstruction, it often conceals an overwhelming impulse for control. Take, for example the call to build a new world. It speaks of the power of sin, the power of gospel, that Christ is The Way, The Truth, the Life, but also urges Christ's followers to work toward the building of a peaceable "**kingdom.**"

If we don't claim truth of our religious beliefs, do we claim, instead their beauty? See, David Bentley Hart, *The Beauty of the Infinite: The Aesthetics of Christian Truth*, Eerdmans, (2005). Hart shows that the sublime aesthetic of the market — this age's chief principality — can be disrupted by (and perhaps only by) the gospel's radiant beauty.

These apparent paradoxes of belief are deeply embedded in the American legal system, including on the civil side. It is common wisdom that the American jury is the hallmark of its justice system, with its emphasis on freedom and liberty and on due process of law for all members of society, be they from the majority or the minority, regardless of gender, creed, or color. It [justice? jury system?] is neutral, and yet is the place where the society expresses its values, holds parties responsible, exercises mercy, [and provides room for the development of maturity.]

Yet what is often left unexamined is how it [reference? the jury system?] insures this neutrality and provides room for mercy and compassionate application of law. The American legal system is based on an oral adversarial process. Depending not just on written evidence, it requires the parties to appear before one another and present oral testimony. Unless the parties waive a jury, the jury determines the facts and the judge instructs on the law. And yet, because the jury often does not need to explain its findings, it can “nullify” the law by deciding that a fact does not exist. The jury can find there was no intent, or find no “substantial causal relationship between Defendant’s acts and Plaintiff’s harm.[close quote? Are capital D and P used in quote?] It can find that the defendant’s acts do not constitute a breach of duty. Jurors are encouraged to reach their verdicts based on their assessment of the credibility of the witnesses. They are instructed to make these determinations as follows:

In evaluating the believability of any witness and the weight you will give the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

I have attempted [Office1] to ask whether religious compatibilism provides a lens that helps in a critique of the American litigation system, and in particular the American jury in civil cases. I endeavored to trace religious compatibilism in the thinking of key intellectuals whose thinking influenced the emergence of the oral adversarial system, and the role that the jury plays in that system. It then described the current state of law, including both its fluidity and its uncertainty, and then sought to uncover the hidden foundational beliefs⁶⁴ that are in conflict in the law or legal process that attempts to resolve disputes where people are injured as a result of another's actions. Alternatively, I have attempted to describe a deeper level of understanding of the paradoxes embedded in the legal processes. I have tried to engage, with a certain amount of epistemological humility, in a dialogue with others.

While I have aimed for consistency and completeness, I also have tried to be honest and admit where I am not consistent or complete, confessing where I land somewhere in between—between consistency and completeness. I have argued that the jury system serves as a place where religious compatibilism can and should continue to function in resolving civil disputes, despite the paradox that it strives to be consistent in a world that lacks capacity to ever be complete. In that regard, I have tried to remind the reader that many religious thinkers have lived with and in that tension, striving to consistently do the divine will, in a time when knowledge of divinity and the divine will is never close to being complete. I have drawn a connection between compatibilism, pluralism, and jury decision-making. I have concluded that the jury system provides the place for an unhappy relationship between the inadequacies of liberal progressivism and the Enlightenment, between modernity and postmodernity. It is a quasi-institutional response to our “composite civilization,” made up of strands of modernity and postmodernity that has made the liberating influences of reason and science seem all the more empty.

⁶⁴ Wolterstorff,

The litigation system reveals the illusory nature that our regulatory state and its experts are providing the liberation and flourishing that modernity promises. I have tried to provide a place where parties can “gnaw at our manifold discontents,” in the hope that progress is ultimately still emerging.

Empirical tools, with all their limitations serves in this critique. These tools slow down our belief in our foundationalist assumptions to ask whether the system has become blinded to its own flaws. How well is the system providing “just” results for the poor, minorities, women, orphans, and the “stranger” in our midst. Have we become blinded to our economic foundationalist beliefs in efficiency, and pareto optimality? Do those beliefs clash with other religious principles and obligations to love and care for each other? Our experience, informed by social science research, can raise some red flags. These in turn can cause us to examine the arguments and rhetorical frames that can blind the jury to its own prejudices. Informed by experience, we can make a better determination for ways that our processes (jury selection, *voir dire* questions) can both challenge for cause jurors too blind to see, and teach jurors how to guard against their biases, in order to truly see the other in the community. The system is an interactive process, conscious of its limitations, and humbled by the paradoxes of life, yet still striving to do right by others, love mercy, and walk humbly with God.

As such I present a position that mirrors the “hope” of religious belief that the divine is not through with creation but is active in the hearts and minds of humanity, prodding us and proving us until, case by case, the arc of history bends toward justice. Or until Christ comes again.