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IMPANELED AND INEFFECTIVE: THE ROLE OF LAW SCHOOLS AND CONSTITUTIONAL LITERACY PROGRAMS IN EFFECTIVE JURY REFORM

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ABSTRACT

Trial by jury may be a constitutional right, but the jury system in practice does not always successfully carry out its duty. Jury reform has been a viable, active field of study since at least the mid-1990s, with some of the most significant advances made in Arizona. This Article analyzes one aspect of jury reform by considering the impact of civic education on jury success. Studies have cited juror participation, jury instructions, and hung juries as points of failure in the jury system. In particular, hung juries have reported questions about the quality of evidence and sentiments about the fairness of the law as critical reasons for not reaching a verdict. One solution that has been proposed is to provide a mini-course in legal procedures once a jury is impaneled. In this Article, we examine the possibility of constitutional literacy provided in the public education system as a solution for the aforementioned aspects of jury failure. Good citizenship is no less important to the democracy and health of our nation than are science and math. Frankly, good citizenship is a right and a responsibility. As a nation, we need to equip our people with the basics. Through a successful civic education program, the legal system could also have an impact on other vital interests, such as encouraging minorities to become attorneys and engaging a diversity of views.

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INTRODUCTION

"The law is not the private property of lawyers, nor is justice the exclusive province of judges and juries."[1] Juries, though, are the most, and often the only, meaningful interaction that laypersons will have with the judicial system.[2] Indeed, to serve as a juror is a sacred trust, a means by which an individual citizen can help uphold the social contract and maintain the fabric of a democratic society.[3] Unfortunately, the effectiveness of the jury as both a safeguard and a tool of justice has been brought into question due to a number of factors, with juror participation, jury instructions, and hung juries cited as points of failure in the jury system.[4] Jury reform has only truly been an active effort since the mid-1990s,[5] despite the landmark study by Harry Kalven Jr. and Hans Zeisel three decades earlier.[6] Although a number of novel solutions have been suggested and tried,[7] the struggles of the jury system reflect a greater failing in America to equip our citizens with the knowledge to fully participate in civic society.

We propose that the jury could again become an effective, vital part of our justice system through civic education. Furthermore, we propose that this education could and should be provided through a working partnership between our nation's schools and its attorneys and law students. Indeed, as future officers of the court, law students have a moral duty to "promote justice and to make justice equally accessible to all people."[8] One of the most fundamental contributions law students could make would be through participation in a robust civic education program,

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1. Proclamation No. 4565, 3 C.F.R. 22 (1978).

2. *See* Sherman J. Clark, *The Juror, the Citizen, and the Human Being: The Presumption of Innocence and the Burden of Judgment*, CRIM. L. & PHIL. 1–2 (July 25, 2013) (discussing jurors' personal growth throughout the jury deliberation process).

3. *See* Rubey M. Hulen, *"Twelve Good Men and True": The Forgotten Men of the Courtroom*, 38 A.B.A. J. 813, 813 (1952).

4. *See* PAULA L. HANNAFORD-AGOR ET AL., NAT'L CTR. FOR STATE COURTS, ARE HUNG JURIES A PROBLEM? 1, 5, 8 (2002).

5. *See* B. Michael Dann & Valerie P. Hans, *Recent Evaluative Research on Jury Trial Innovations*, 41 CT. REV. 12, 12 (2004).

6. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 3–11 (3d prtg. 1966); *see, e.g.*, Valerie P. Hans & Neil Vidmar, *The American Jury at Twenty-Five Years*, 16 LAW & SOC. INQUIRY 323, 323 (1991).

7. *See, e.g.*, MICHAEL A. YARNELL, THE ARIZONA JURY: PAST, PRESENT AND FUTURE REFORM 13–21 (2005); *see also Jury Selection, Trial and Deliberations, Resource Guide*, NAT'L CENTER FOR ST. CTS., http://www.ncsc.org/Topics/Jury/Jury-Selection-Trial-and-Deliberations/Resource-Guide.aspx (last visited Mar. 12, 2013) (providing several resources that discuss jury trial innovations).

8. A.B.A. Standing Comm. on Pro Bono and Pub. Serv., *Pro Bono Publico*, A.B.A., http://www.americanbar.org/groups/legal_education/resources/pro_bono.html (last visited Mar. 9, 2013).

bringing their specialized knowledge and passion for justice to our nation's young citizens and creating a framework within which those young citizens will acquire the knowledge and commitment to be effective jurors, active participants in our society, and perhaps even future attorneys themselves.

I. JURY REFORM

A. The Problem: Background on the Jury System in the United States

Rather than being seen as a right of the citizenry, jury duty is often viewed in the United States as a burden to be avoided.[9] Although the impact of this viewpoint reverberates negatively throughout the judicial system, its root cause is a failure to inculcate a sense of civic duty in our citizenry. A consideration of the failures of the system, in light of this lack of constitutional literacy, will clarify the urgent need for reform throughout the system, not just at the level of the judiciary but down to the civic education of our young people.

Juries are an established mainstay of legal systems across the globe.[10] In the United States, a criminal trial by jury is a constitutional right for crimes punishable by incarceration for longer than six months[11] and made applicable to the states under the Fourteenth Amendment and state constitutions.[12] Furthermore, juries determine not only guilt but also any fact used to increase the sentence, such as aggravating factors.[13] Federal civil jury trials are also constitutionally preserved for certain controversies.[14] Although most states guarantee a trial by jury in most types of civil lawsuits, many disallow jury trials for certain types of civil cases, such as divorce or child support modifications.[15]

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9. *See* ARIZ. SUPREME CT. COMM. ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12, at 33 (1994) [hereinafter ARIZ. SUPREME CT.].

10. *See* Valerie P. Hans, *Jury Systems Around the World*, 4 ANN. REV. LAW & SOC. SCI. 275, 276 (2008).

11. *See* U.S. CONST. art. III, § 2, cl. 3, amend. VI; Baldwin v. New York, 399 U.S. 66, 73–74 (1970).

12. *See, e.g.*, ARIZ. CONST. art. II, § 23; CAL. CONST. art. I, § 16; COLO. CONST. art. II, § 23; ILL. CONST. art. I, § 13; MASS. CONST. pt. I, art. XV; TEX. CONST. art. I, § 15.

13. *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

14. *See* U.S. CONST. amend. VII. This is not absolute in all cases. Judges can serve both functions in the absence of a jury, or states may allow juries to determine matters of law, often through jury nullification, which will be discussed briefly later in this Article. For a more detailed discussion on jury nullification, see Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 U. CHI. L. REV. 1133, 1133 (2011); B. Michael Dann, *"Must Find the Defendant Guilty": Jury Instructions Violate the Sixth Amendment*, 91 JUDICATURE 12, 12–14 (2007); Alan Scheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51, 75 (1980).

15. *See, e.g.*, TEX. FAM. CODE ANN. § 105.002(b)–(c) (West 2003) (prohibiting jury trial in suit for adoption or in adjudication of consent to adoption, of child support, of terms or conditions of possession or access, or of rights or duties of a conservator, except the determination of which joint managing conservator has the exclusive right to designate a child's primary residence); Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 422 (1996) (explaining civil trials by jury under common law matters of equity).

Typically, the jury determines matters of fact, whereas the judge determines matters of law.[16] The generally acknowledged exception to this order is jury nullification, whereby a jury can determine that under an unjust law, the defendant cannot be found guilty.[17] Juries are selected from a pool of juror candidates that have been randomly summoned for jury duty based on voter-registration or driver-license lists.[18] Eligible jurors may then be screened based on speaking English, citizenship, or disabilities that might hamper them from fulfilling their duties as jurors.[19] Once summoned and eligible, jurors are randomly assigned to a particular case or court; then, the attorneys screen jurors under a strict process called voir dire.[20] There have been frequent criticisms made about the current jury system, from juror summons and screening to jury decisions and nullification.[21]

> [C]oncerns and complaints about jury trials, and how such trials impact and empower juries in deciding cases, continue to abound. Most critics focus on juror competence, doubting the ability of the average juror to understand, remember, and integrate all the information (evidence and law) given to them in modern-day litigation.[22]

Attorneys sometimes view a trial by jury as a game of chance with the resulting decisions seemingly arbitrary and capricious.[23]

But the jury process was not always this way. The original concept of the juror as a witness and fact finder to make decisions of law was inherited from the Norman conquest of England.[24] Even as English juries evolved, leading to a trial system in which many of the jury's previous responsibilities were assumed by judges, jurors remained responsible for questioning witnesses, victims, and defendants.[25] Often, the victims or claimants were jurors, as well as the individuals who brought charges against the accused.[26] There was not a system where the Government brought charges on behalf of the victims. Victims brought their accusations to the local representative charged with maintaining order in the community; over time this process expanded into an active jury system, where the community members played active roles in the trial. In the

16. *See* U.S. CONST. amend VII.

17. *See* Shari Seidman Diamond, *Dispensing with Deception, Curing with Care: A Response to Judge Dann on Nullification*, 91 JUDICATURE 20, 20 (2007).

18. *See, e.g.*, YARNELL, *supra* note 7, at 10–11.

19. *See id.* at 11.

20. *See id.* at 14.

21. *See* B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 IND. L. J. 1229, 1229–30 (1993).

22. *Id.* at 1229 (emphasis omitted).

23. *See, e.g.*, Royal Furgeson, *Civil Jury Trials R.I.P.? Can It Actually Happen in America?*, 40 ST. MARY'S L.J. 795, 804–05 (2009) (discussing the view of some attorneys that jury deliberations are an imperfect procedure for delivering justice that results in error).

24. *See* Dann, *supra* note 21, at 1231–33.

25. *Id.* at 1232–33.

26. *Id.* at 1231–32.

early American colonies, juries devolved into passive listeners only, forced to make determinations based solely on the evidence that advocates or judges chose to present.[27]

Over the years, as the jury's role in the legal system changed, so too has the jurors' ability to satisfactorily perform the duties charged to the jury. As noted above, modern U.S. juries are plagued with issues surrounding both the jury decision-making process and the decisions themselves. In response, multiple states initiated jury reform actions starting in the mid-1990s, with Arizona and New York leading the charge.[28] Jury reform has now been prominent across the nation for approximately two decades.[29] In addition to Arizona and New York, some of the states known for their active jury reform efforts include Massachusetts, Colorado, New Jersey, and Hawaii.[30] Of these, Arizona—discussed in more in Part I.C—was most prominent in its comprehensive jury reform efforts. America started paying attention to Arizona's jury reform, perhaps most notably due to the public scrutiny of the criminal murder trial involving defendant O.J. Simpson.[31] Although this trial was not the first televised trial, it comprised variables that when combined, resulted in the one of the most famous trials in U.S. history, lasting from January through October of 1995.[32] The trial of a famous African-American professional football player accused of murdering his Caucasian ex-wife was so popular that businesses lost over $25 billion due to workers neglecting their work in favor of following the trial.[33] For perhaps the first time in U.S. history, the general population was fixated on trial minutiae. Over 142 million people listened for the long-awaited jury verdict.[34] Many viewers vehemently disagreed with the acquittal, causing many Americans to question the reliability of jury determinations.[35] The timing of this widespread disdain of jury decision making coincided with Arizona's public jury reform efforts, subjecting Arizona's endeavors to unexpected scrutiny.

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27. *Id.* at 1235.

28. Randall T. Shepard, *State Court Reform of the American Jury*, 117 YALE L. J. POCKET PART 166, 168 (2008); *see* Gregory A. Mize & Christopher J. Connelly, *Jury Trial Innovations: Charting a Rising Tide*, 41 CT. REV. 4, 4–8 (2004).

29. *See* Mize & Connelly, *supra* note 28, at 4; Shepard, *supra* note 28, at 168, 170.

30. *See* Mize & Connelly, *supra* note 28, at 5–6 (providing general analysis of state jury reform efforts).

31. *See, e.g.*, Shelly Rosenfeld, *Will Cameras in the Courtroom Lead to More Law and Order? A Case for Broadcast Access to Judicial Proceedings*, 6 AM. U. CRIM. L. BRIEF 12, 12 (2010).

32. *See id.* at 12; Thomas L. Jones, *The Murder Trial of O.J. Simpson*, CRIME LIBR., http://www.trutv.com/library/crime/notorious_murders/famous/simpson/index_1.html (last visited Mar. 10, 2013).

33. Rosenfeld, *supra* note 31, at 17; *see also* Jones, *supra* note 32.

34. Jones, *supra* note 32.

35. *See* Daniel B. Wood, *O.J. Case Spurs Jury Reform Debate*, 87 CHRISTIAN SCI. MONITOR, Apr. 14, 1995, at 4, 4.

B. Why Juries Fail

The jury system is ripe for change.[36] With the advent of technology, high-profile cases are being scrutinized in real time.[37] Jurors are vocal about their dissatisfaction with the jury system and jury service itself.[38] Juries apparently welcome the changes offered by various jury reform efforts across the nation.[39] The flaws commonly found in jury decision making can be divided into two categories: decision-making processes or tools and the ultimate decision.

First, a jury is at its heart a group of individuals forced to work together, often against their preference, in dismal circumstances, perhaps in a situation of distrust, as discussed *infra*, and without the tools to perform the task given to them.[40] This situation sets the stage for the old adage: what can go wrong will. The role of the juror as contemplated by our legal system is rife with potential for error. Jurors are handicapped by such systemic expectations and limitations as: (1) fulfilling a passive role; (2) being limited to observation; (3) being empty vessels to be filled; (4) being objects of one-way, linear communication; (5) recording complete and accurate information; (6) suspending judgment on evidence and issues until end of case; (7) withholding feedback until verdict; (8) exercising "recall readiness" regarding final instructions; (9) considering all evidence; (10) being well served by the adversarial system; (11) effectively representing their community; and (12) enhancing participative democracy.[41] We place ambitious, daily demands on ill-equipped and unsupported jurors across the nation. With these demands come flaws, which are only amplified in a stressful group situation.[42] Jury decision making may be tainted by such flaws as group-hate, social loafing, missing jurors, toxic jurors, juror misconduct, improper speculation, and inappropriate leadership choices.[43] "Group-hate" describes how some people hate working in groups and subsequently bring negative emotions into the process, tainting their objectivity.[44] Social loafing occurs when a juror actively decides not to participate in the decision making and is satisfied to agree with the majority.[45] Jurors may be missing from the deliberating process, either by physically leaving the jury room or by being ignored by the other jurors.[46] Toxic jurors indicate

36. *See* Dann, *supra* note 21, at 1229.
37. *See* Rosenfeld, *supra* note 31.
38. *See* Wood, *supra* note 35.
39. *See* Dann & Hans, *supra* note 5, *passim* (discussing research that suggests higher juror satisfactions with jury reform efforts).
40. *See* Dann, *supra* note 21, at 1236–37.
41. *Id.* at 1240.
42. SUNWOLF, PRACTICAL JURY DYNAMICS 387–88 (2d ed. 2007).
43. *See id.* at 387–92, 395–97, 398.
44. *See id.* at 387–90.
45. *See id.* at 390.
46. *See id.* at 391–95.

just that: the individual may make such hurtful comments about the trial or the other jurors that the juror is toxic to the process.[47]

Juror misconduct may not rise to the level of toxicity but may still qualify as misconduct.[48] Misconduct occurs when jurors deliberately act against the court's instructions, such as discussing why the defendant did not testify, considering testimony that they were instructed to disregard, or investigating evidence on their own.[49] Such misconduct also includes improper speculation about irrelevant topics such as witness motivations, cost of the trial or salaries, or relationships of trial spectators to the participants, most commonly the defendant.[50] Perhaps one of the best-known facets about juries is that there is a jury foreman who is selected from among the impaneled jurors.[51] The flaws with leadership primarily involve the selection process; some courts select the leader randomly and others allow the jury to vote on a leader.[52] Either method is flawed. Someone may be chosen who is ill-equipped to be the leader yet now is placed in a position of authority over the other jurors. If made by election, the decision is the first one made by the jurors and by virtue of its formation (without thoughtfulness or careful deliberation, under pressure, and during a time of high tension), contaminates the subsequent decision-making processes.[53]

This decision-making process is further skewed by two particular phenomena that scholars dwell upon: hung juries[54] and jury nullification.[55] A hung jury is one that is unable to reach a unanimous or majority decision in a criminal trial.[56] Studies have shown that the average rate of hung juries is estimated anywhere from 5% to 33% of trials, with the wide discrepancy caused by a lack of empirical data.[57] Hung juries cost time, money, effort, and emotional distress to bring cases to trial again.[58] In the face of a hung jury, litigants often choose to settle rather than face a second trial.[59] Jury nullification, on the other hand, happens when the jury determines that it disagrees with the law's application in a particular

47. *See id.* at 392.
48. *See id.* at 396–97.
49. *See id.* at 395–97.
50. *See id.* at 395–96.
51. *Id.* at 398–99.
52. *See id.* at 398.
53. *See id.* at 398–99.
54. *See generally* HANNAFORD-AGOR ET AL., *supra* note 4, at 1; KALVEN & ZEISEL, *supra* note 6, at 56–57, 453.
55. *See generally* HANNAFORD-AGOR ET AL., *supra* note 4, at 1; KALVEN & ZEISEL, *supra* note 6, at 56–57, 453; Bressler, *supra* note 14 (discussing the history and evolution of jury nullification); Diamond, *supra* note 17 (discussing whether jurors should be informed about jury nullification).
56. *See* HANNAFORD-AGOR ET AL., *supra* note 4, at 1.
57. *See id.* at 6, 8.
58. Dann, *supra* note 21, at 1269–70; Shepard, *supra* note 28, at 169–70.
59. *See* HANNAFORD-AGOR ET AL., *supra* note 4, at 7–8 (emphasizing the necessity of better pre-trial decisions by attorneys because of the increased likelihood of a hung jury when prosecutors charge cases with weak evidence).

case and finds the defendant innocent in direct disregard of the law.[60] The jury makes such a finding, despite evidence that the law as written applies to the parties at hand, and effectively steps outside its bounds by making determinations of law rather than fact.[61] Both of these outcomes, hung juries and jury nullification, are linked to the passivity of the traditional jury system that demands decisions be made in an environment least conducive to thoughtful deliberation and contemplation.[62]

C. How Juries Succeed

To improve jury decision making, we need to engage in widespread jury innovation and stop looking at juries through the eyes of the legal system. We must look through the eyes of educators, psychologists, and social scientists, whose fields have progressed rapidly through abstract, empirical, and even translational research. Law, in contrast, has remained comparatively stagnant.

> [Lawyers] stop[ped] progressing intellectually about the law itself right after they drafted the Declaration of Independence and the Constitution. . . . If the doctor from 1776 walked into a modern-day medical center, he wouldn't know where the hell he was. But if John Adams walked out of that courtroom in Boston and into [a modern court], he'd know exactly where he was, know what everybody's name was, what their duties were and the jury would be the same.[63]

The problems with the jury system run throughout the life cycle of a jury, from initial summons to juror polling after a verdict.[64] Because the purpose of this Article is to address reform in jury decision making, we shall not consider those problems that are completely outside the control of the jurors themselves, such as juror privacy, status of the facilities, or juror pay. However, this Article shall address tools that actively engage jurors in decision-making processes, such as the ability to take notes or ask questions.

Although jury failure has been under siege for at least a century,[65] the battle advanced significantly when B. Michael Dann, then-presiding judge of the Maricopa County Superior Court in Arizona, wrote a thesis paper for his Master of Judicial Studies degree about how to create educated and democratic juries.[66] He discussed four main topics pertinent to

60. *See id.* at 14.
61. *See id.*
62. *See* Dann, *supra* note 21, at 1236–43.
63. Tim Eigo, *O' Pioneer: Michael Dann Shapes Jury Reform for a New Century*, ARIZ. ATT'Y, Feb. 2001, at 22, 22 (quoting Judge Michael J. Brown).
64. *See, e.g.*, ARIZ. SUPREME CT., *supra* note 9, at 3; KALVEN & ZEISEL, *supra* note 6, at 8; Dann, *supra* note 21; Mize & Connelly, *supra* note 28, at 4.
65. *See, e.g.*, Austin Wakeman Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 669 (1918).
66. Dann, *supra* note 21, at 1230–31, 1279 n.a.

jury reform: (1) the decline from an active juror role to one of passivity, (2) how established psychological and educational principles apply to juror decision making, (3) commonly suggested techniques to improve juror participation, and (4) two obscure techniques.[67] Soon thereafter, in April 1993, Arizona Supreme Court Chief Justice Stanley Feldman established the Committee on More Effective Use of Juries and charged it with five actions: to study the use of juries and trial conduct, to make recommendations to improve juries and their verdicts, to propose the mechanism to implement recommended changes, to suggest training programs for the legal profession, and to evaluate the new changes.[68] This committee recommended fifty-five changes emanating from the five stages of the juror lifecycle (i.e., summons, selection, trial, deliberations, and post-verdict), plus public awareness and a juror bill of rights, most of which have been formally adopted in Arizona.[69] Furthermore, scholars studied 200 jury trials in Arizona over a period of six months and found that one of the most controversial reform measures, permitting juror discussions during trial, may actually promote effective jury decision making.[70]

Since Arizona began its ambitious jury reform efforts in 1993, numerous states have engaged in some level of jury reform efforts.[71] Out of the thirty-eight states reportedly engaged in jury reform, the majority of efforts are centered on juror summons, yield, and utilization, technology, and facilities.[72] Less than a third of the states' reforms include jury instructions or improving juror comprehension.[73] In addition to reforms by state court systems, the American Bar Association eventually entered the fray. In 2005, one of the most successful advances to jury reform came from the American Bar Association House of Delegates, which adopted

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67. *Id.* at 1230–31. Dann writes:

> Finally, I propose and discuss two techniques that have received only modest or, in one instance, no attention in the otherwise nearly exhaustive literature on this subject. Both ideas deserve and require further evaluation, such as field testing where results can be quantified and compared to control groups. Both procedures hold much promise: (1) permitting jurors to discuss the evidence as it is received, but only among themselves and after being instructed to withhold any decision on the outcome; and (2) asking jurors who are at an impasse and heading toward deadlock whether court or counsel can be of help to them in reaching a verdict by addressing issues of fact or law that divide them. These procedures have the potential for increasing juror understanding and recollection of evidence and, in the latter case, avoiding needless and costly mistrials due to juries that hang. If we give jurors an opportunity to ask for and receive help, they might be able to conclude such cases accurately and fairly.

Id. at 1231.

68. ARIZ. SUPREME CT., *supra* note 9, at 5–6.

69. *Id.* at 3; YARNELL, *supra* note 7, at 17.

70. Dann & Hans, *supra* note 5, at 17; Shari Seidman Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1, 76 (2003).

71. GREGORY E. MIZE ET AL., NAT'L CTR. FOR STATE COURTS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 1 (2007).

72. *Id.* at 9, 17.

73. *Id.* at 17.

the nineteen Principles of Juries and Jury Trials as guidance for state courts.[74]

These nineteen principles are to be viewed as the aspirational standards by state committees evaluating potential jury reform efforts.[75] Nine of these principles directly address juror decision making and behavior occurring during the trial, whereas another one directs courts to facilitate the opportunity for citizens to participate in the jury system.[76] Citizen education can address these ten principles of jury reform; although the current research does not contemplate it, this education could be delivered through schools as well as courts. No legal imperative limits juror education to the courtroom, other than with regard to the facts of a particular case. Otherwise, essential aspects of a jury trial, the fundamentals of law, how to understand the law, how to deliberate, impartial deliberations, breaking deliberation impasses, group decision making, and other basic tenets of the jury process can be taught outside the bounds of an individual case. For purposes of this Article, the focus is on the potential of initiating jury reform from a grassroots perspective. Specifically, this Article addresses the usefulness of civic education as a means to advance both the legal literacy and the decision-making skills necessary to help citizens become effective jurors. As such, civic education can serve as a vehicle for jury reform.

II. CIVIC EDUCATION: A SACRED TRUST

Just as each generation—since at least the times of ancient Greece[77]—has bemoaned the moral and educational failings of its youth,

74. AM. BAR ASS'N, PRINCIPLES FOR JURIES AND JURY TRIALS 2 (2005).

75. *Id.*

76. *Id.* at 4–9, 17–24.

77. Although complaints about the decline of the youth of every society are common, one of the most well-documented comes from ancient Greece:

> I will, therefore, describe the ancient system of education, how it was ordered, when I flourished in the advocacy of justice, and temperance was the fashion. In the first place it was incumbent that no one should hear the voice of a boy uttering a syllable; and next, that those from the same quarter of the town should march in good order through the streets to the school of the Harp-master, naked, and in a body, even if it were to snow as thick as meal. Then again, *their master* would teach them, not sitting cross-legged, to learn by rote a song, either [*pallada persepolin deinan*], or [*teleporon ti boama*], raising to a higher pitch the harmony which our fathers transmitted to us. But if any of them were to play the buffoon, or to turn any quavers, like these difficult turns the present artists make after the manner of Phrynis, he used to be thrashed, being beaten with many blows, as banishing the Muses. And it behoved the boys, while sitting in the school of the Gymnastic-master, to cover the thigh, so that they might exhibit nothing indecent to those outside; then, again, after rising *from the ground*, to sweep *the sand* together, and to take care not to leave an impression of the person for their lovers. And no boy used in those days to anoint himself below the navel; so that their bodies wore the appearance of blooming health. Nor used he to go to his lover, having made up his voice in an effeminate tone, prostituting himself with his eyes. Nor used it to be allowed when one was dining to take the head of a radish, or to snatch from their seniors dill or parsley, or to eat fish, or to giggle, or to keep the legs crossed.

ARISTOPHANES, *The Clouds*, *in* THE COMEDIES OF ARISTOPHANES 115, 157–58 (William James Hickie trans., 1902).

so too have Americans fretted about the lack of civic attachment among our young people.[78] However, current research shows that civic attachment is lower not only among young people as compared to their elders but also among young people as compared to previous young generations.[79] As compared to previous generations of eighteen- to twenty-nine-year-olds, today's youth vote less, are less interested in following politics, and perhaps more fundamentally, demonstrate a deep lack of knowledge of our governmental and legal systems.[80] Former Supreme Court Justice Sandra Day O'Connor declared, "[W]e have a crisis on our hands when it comes to civics education."[81]

How ignorant of civics must our students be for us to have a crisis? According to the National Assessment of Educational Progress, 97% of high school students study civics.[82] Yet only a quarter of students assessed demonstrated proficient or advanced knowledge of our government;[83] they lack such basic knowledge as traits of a constitutional democracy or the powers granted to Congress by the Constitution.[84] These soon-to-be voters, jurors, and participants in society simply do not possess the knowledge necessary to be successful participants in our jury system or civic life in general.[85]

Admittedly, juror education is tailored to the narrow needs of the jury, whereas civic education encompasses "the cultivation of the virtues, knowledge, and skills necessary for political participation." [86] If one looks at various nonprofit organizations dedicated to civic education, one repeatedly finds mission statements like that of the Center for Civics Education: "The Center is dedicated to promoting an enlightened and responsible citizenry committed to democratic principles and actively engaged in the practice of democracy in the United States and other countries."[87] Similarly, in calls to align common core educational requirements (standardized criteria for American students of a particular grade level and subject) with the civic educational needs of the United States, authors reiterate that "it is vital to the health and future of our democracy that our schools also prepare students for a lifetime of knowl-

78. *See, e.g.*, William A. Galston, *Civic Education and Political Participation*, 37 POL. SCI. & POL. 263, 263 (2004).

79. *Id.*

80. *Id.*; Sam Dillon, *Civics Education Called National Crisis*, N.Y. TIMES, May 5, 2011, at A23.

81. Dillon, *supra* note 80 (internal quotation mark omitted).

82. U.S. DEP'T OF EDUC., CIVICS 2010: NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS AT GRADES 4, 8, AND 12, 39 (2011).

83. *Id.* at 35.

84. *Id.* at 40.

85. *See, e.g.*, *id.* at 4, 35.

86. AMY GUTMANN, DEMOCRATIC EDUCATION 287 (2d ed. 1999).

87. *Basic Facts About the Center for Civic Education*, CENTER FOR CIVIC EDUC., http://new.civiced.org/about/about-us (last visited Feb. 21, 2013).

edgeable, engaged, and active citizenship."[88] Clearly, then, civic education contemplates creating citizens, whereas jury service is but one role that jurors play as citizens.[89] However, jury service, properly executed, encapsulates all of the highest duties and responsibilities of a participant in civil society.

The importance of the layperson in the American system of government in general, and in American jurisprudence in particular, cannot be overstated.[90] Indeed, the jury system is considered a safeguard, not just against injustice but also against tyranny and usurpation itself.

> The people themselves have it in their power effectually to resist usurpation, [the wrongful seizure of authority,] without being driven to an appeal to arms. An act of usurpation is not obligatory; it is not law; and any man may be justified in his resistance. Let him be considered as a criminal by the general government; yet only his fellow citizens can convict him. They are his jury, and, if they pronounce him innocent, not all the powers of congress can hurt him; and innocent they certainly will pronounce him if the supposed law he resisted was an act of usurpation.[91]

One finds throughout American jurisprudence that although the jury is ostensibly the trier only of fact, juries often take it unto themselves to decide questions of law as well.[92] Presumptively, questions of fact belong to the jury and questions of law belong to the court, yet our jurisprudence makes clear that the truth is much more complicated.

> In every criminal case, upon the plea of not guilty, [members of] the jury may, and indeed they must, unless they choose to find a special verdict, take upon themselves the decision of the law, as well as the fact, and bring in a verdict as comprehensive as the issue; because, in every such case, they are charged with the deliverance of the defendant from the crime of which he is accused. . . .
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> . . . .

88. L.A. CNTY. OFFICE OF EDUC., PREPARING STUDENTS FOR COLLEGE, CAREER, AND CITIZENSHIP: A CALIFORNIA GUIDE TO ALIGN CIVIC EDUCATION AND THE COMMON CORE STATE STANDARDS FOR ENGLISH LANGUAGE ARTS AND LITERACY IN HISTORY/SOCIAL STUDIES, SCIENCE AND TECHNICAL SUBJECTS 2 (2011) (citing CAMPAIGN FOR THE CIVIC MISSION OF SCHOOLS, EDUCATING FOR DEMOCRACY, EDUCATION FOR DEMOCRACY: A CALL TO RESTORE THE CIVIC MISSION OF SCHOOLS (2010)).

89. *See, e.g.*, Clark, *supra* note 2, at 2.

90. *See, e.g.*, Jerome Hall, *The Challenge of Jurisprudence: To Build a Science and Philosophy of Law*, 37 A.B.A. J. 23, 25 (1951).

91. Sparf v. United States, 156 U.S. 51, 144 (1895) (Gray, J., dissenting) (quoting 2 JONATHAN ELLIOT, DEBATES OF THE STATE CONVENTIONS, ON THE FEDERAL CONSTITUTION 111 (2d ed. 1836) (internal quotation marks omitted)).

92. *See, e.g.*, Horning v. District of Columbia, 254 U.S. 135, 138–39 (1920); United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969); United States v. Hutchings, 26 F. Cas. 440, 442 (C.C.D. Va. 1817); United States v. Poyllon, 27 F. Cas. 608, 611 (D.N.Y. 1812).

> . . . The law must, however, have intended, in granting this power to a jury, to grant them a lawful and rightful power, or it would have provided a remedy against the undue exercise of it. The true criterion of a legal power, is its capacity to produce a definitive effect liable neither to censure nor review. And the verdict of not guilty, in a criminal case, is, in every respect, absolutely final. [Members of t]he jury are not liable to punishment, nor the verdict to control. . . .
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> . . . [I]n human institutions, the question is not, whether every evil contingency can be avoided, but what arrangement will be productive of the least inconvenience. And it appears to be most consistent with the permanent security of the subject, that in criminal cases [members of] the jury should, after receiving the advice and assistance of the judge, as to the law, take into their consideration all the circumstances of the case, and the intention with which the act was done, and to determine upon the whole, whether the act done, be, or be not, within the meaning of the law. This distribution of power, by which the court and jury mutually assist, and mutually check each other, seems to be the safest, and, consequently the wisest arrangement, in respect to the trial of crimes.[93]

Clearly, then, the role of juror is one of a sacred trust. The juror is protector of the liberty of his fellow man, of the integrity of our courts, and of our very democracy.[94] Although we certainly do not expect our jurors (or our citizenry) to all be lawyers, they need to have the knowledge to fulfill their oath and uphold their office.

III. JUSTICE, JUSTICE YOU SHALL PURSUE: WHAT DO OUR JURORS NEED?

In *People v. Croswell*, Chief Justice Kent opined that "[t]o judge accurately of motives and intentions, does not require a master's skill in the science of law. It depends more on . . . knowledge of the passions, and of the springs of human action, and may be the lot of ordinary experience and sagacity."[95] Kent believed it is enough to be part of humankind to serve as a juror, no further training is needed.[96] And whereas one must understand the motivations and intentions of one's fellow man to be an effective juror, that alone is insufficient, based upon the findings of jury misconduct and flawed jury decision making.[97] Kent wrote at a time when only a small fraction of Americans was enfranchised;[98] those select

93. People v. Croswell, 3 Johns. Cas. 337, 366, 368, 376 (N.Y. Sup. Ct. 1804) (emphasis omitted).

94. *Id.* at 346.

95. *Id.* at 376.

96. *Id.*

97. *See, e.g.*, Dann, *supra* note 21, at 1230.

98. Jennifer L. Hochschild, *If Democracies Need Informed Voters, How Can They Thrive While Expanding Enfranchisement?*, 9 ELECTION L.J. 111, 113 (2010).

Americans were, on the whole, educated in a system that was intended to prepare them "for financial independence and for positions of leadership in society."[99] Furthermore, these select men were educated for such roles through the informal culture and mechanisms of the time.[100] Fortunately, America has become a much more pluralistic society; almost all citizens are enfranchised potential jurors, regardless of racial, socioeconomic, ethnic, or religious background.[101] This deeper pool of jurors should improve the jury system by bringing a broader understanding of "the springs of human action" to the jury pool.[102] Unfortunately, it has not. Education is the missing critical element of today's modern jury pool. Today's jurors lack an education regarding their role in the body politic.[103] This type of education is already being addressed by numerous civic education programs around the nation[104] but could perhaps be adapted to include focused instruction on jury decision making along with the fundamentals of trial behavior and law. The fundamentals of our approach to civic education can be traced back to the ancient Greeks,[105] whose influence on American concepts of democracy is undeniable.[106]

Plato posited, "[A]sk in general what great benefit the state derives from the training by which it educates its citizens, and the reply will be perfectly straightforward. The good education they have received will make them good men."[107] Civic education for the Greeks was not merely a facet of education.[108] Civic education was the goal of all education, formal and informal, and every person was a teacher, inculcating in the next generation the virtues that would allow it both to rule and to be ruled for the commonwealth and health of the polis.[109] Although the jury itself is believed to have its antecedents in Northern England, the Greek view of democracy, virtue, and *civitas* is fundamental to the American conception of democratic society.[110]

Indeed, Madison had in mind this sense of civic virtue, rather than the more common meaning of virtue as ethical behavior, when he wrote: "Is there no virtue among us? If there be not, we are in a wretched situa-

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99. Phillip Hamilton, *Education in the St. George Tucker Household: Change and Continuity in Jeffersonian Virginia*, 102 VA. MAG. HIST. & BIOGRAPHY 167, 167 (1994).

100. *Id.* at 167–68.

101. 28 U.S.C. § 1862 (2012).

102. Hochschild, *supra* note 98, at 114–15.

103. *See* U.S. DEP'T OF EDUC., *supra* note 82.

104. Consider, for example, such programs as iCivics, the Marshall–Brennan Constitutional Literacy Project, and Street Law, Inc. *See infra* notes 119–26 and accompanying text.

105. *See* Jack Crittenden, *Civic Education*, STANFORD ENCYCLOPEDIA PHIL. (Dec. 27, 2011), http://plato.stanford.edu/archives/win2011/entries/civic-education/.

106. *Id.*

107. Plato, *Laws*, *in* PLATO: COMPLETE WORKS 1335 (John M. Cooper ed., Trevor J. Saunders trans., 1997) (360 B.C.).

108. Crittenden, *supra* note 105.

109. *Id.*

110. *See* WILLIAM FORSYTH, A HISTORY OF TRIAL BY JURY 1–5, 290–94 (Law Book Exchange, Ltd. ed., 1994) (1875).

tion. No theoretical checks, no form of government can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea."[111] Our democracy—and its creations, including jury trials—relies upon the citizenry being nurtured and educated into civic virtue.[112] Although one can find much debate in the literature as to what the specific virtues of a good citizen are,[113] civic virtue is critical for a democracy to survive.[114]

Fundamental to the sense of civic virtue we wish to inculcate in our jurors, and in all citizens, is a deep sense of attachment to the political structures of our society, in particular the rule of law and our system of deliberative democracy.[115] Lawyers and law students, with their deep study and long familiarity with the legal system, should understand better than any others how our legal system, despite its flaws, stands as a safeguard against tyranny.[116] With the benefit of their training and knowledge, legal professionals have both the ability and the obligation to educate and even excite their fellow citizens about our legal system.[117] Concepts such as procedural justice, which seem self-explanatory to an attorney and are so critical to understanding our legal system, are foreign to a public where "[n]early two-thirds of Americans cannot name all three branches of government. Yet three in four people can name all of the Three Stooges."[118]

Fortunately, some legal professionals have taken up the mantle of civic educators. Both the Marshall–Brennan Constitutional Literacy Project (Marshall–Brennan) and Street Law, Inc. provide law students and attorneys the opportunity to devote pro bono hours educating people about, as Street Law puts it, "law, democracy, and human rights."[119] Indeed, Street Law has been engaging youth in experiential, engaging lessons for forty years, and has expanded internationally.[120] Rigorous evaluation by outside professionals has shown that Street Law's programs

111. James Madison, Virginia Convention Speech (June 20, 1788), *in* SELECTED WRITINGS OF JAMES MADISON 157 (Ralph Ketcham ed., 2006).

112. Crittenden, *supra* note 105.

113. *See, e.g.*, William Galston, *Political Knowledge, Political Engagement, and Civic Education*, 2001 ANN. REV. POL. SCI. 217, 220 [hereinafter Galston, *Political Knowledge*]; William Galston, *Civic Education in the Liberal State*, *in* LIBERALISM AND THE MORAL LIFE 89, 90 (Nancy Rosenblum ed., 1989). *But cf.* GUTMANN, *supra* note 86 (arguing for very different virtues in a good citizen).

114. Galston, *supra* note 78, at 264–65.

115. *See The Civil Jury*, 110 HARV. L. REV. 1408, 1417 (1997).

116. Hall, *supra* note 90, at 86.

117. Phil C. Neal, *De Tocqueville and the Role of the Lawyer in Society*, 50 MARQ. L. REV. 607, 608 (1967).

118. Arne Duncan, U.S. Sec'y of Educ., The Next Generation of Civics Education, Remarks at the iCivics Educating for Democracy in a Digital Age Conference (Mar. 29, 2011), *available at* http://www.ed.gov/news/speeches/next-generation-civics-education (as submitted to the U.S. Senate Appropriations Comm.).

119. *About Us*, STREET LAW, INC., http://www.streetlaw.org/en/about/who_we_are (last visited Mar. 11, 2013).

120. *Id.*

leave high school students better able to discuss public issues, to identify multiple viewpoints, and to become more interested in legal careers.[121] Marshall–Brennan has a narrower objective than does Street Law, focusing instead on cases most important to the rights and obligations of students under the Constitution.[122] Like Street Law, however, Marshall–Brennan engages young Americans in the vital discussion about citizenship and its rights, obligations, and challenges.[123] Both programs inculcate civic virtue, using the enthusiasm, knowledge, and status of lawyers and law students to educate and inspire.[124] However, Marshall–Brennan is still small, with only eighteen chapters nationwide,[125] whereas Street Law reached forty countries in 2011 despite only $2.1 million in total revenue for the year.[126] To successfully develop Americans into citizens who can rule, be ruled, and approach jury service with the skills and dedication to be successful, these programs and others like them must expand and extend.

One might question what role, if any, lawyers should play in civic education. After all, education, with all of its pedagogical requirements, is properly the role of professional educators.[127] However, as Alexis de Tocqueville pointed out, "When the rich, the noble, and the prince are excluded from the government, the lawyers then step into their full rights, for they are then the only men both enlightened and skillful, but not of the people, whom the people can choose."[128] If, as Aristotle posited in *The Politics*, a good citizen is one who can both rule and be ruled,[129] it is rational that those who currently rule shall teach the next generation. Having stepped into the legal role, lawyers in our democratic society carry a duty of *noblesse oblige*, the obligation of the nobility to care for those beneath them socially, by virtue of their training and skill, which was historically the conscience of the aristocracy in another time.[130]

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121. PATRICIA G. AVERY ET AL., THE EXPANDING DELIBERATING IN A DEMOCRACY PROJECT: EVALUATION REPORT; YEAR 3, at 4 (2010); *see also* NAT'L ASS'N FOR LEGAL CAREER PROF'LS & STREET LAW INC., NALP/STREET LAW LEGAL DIVERSITY PIPELINE PROGRAM: EVALUATION REPORT 6–7 (2011), http://www.streetlaw.org/en/about/evaluation_findings

122. Marshall–Brennan Constitutional Literacy Project, *"We the Students,"* AM. U. WASH. C.L., http://www.wcl.american.edu/marshallbrennan/curriculum.cfm (last visited Mar. 12, 2013).

123. *The Marshall–Brennan Constitutional Literacy Project*, AM. U. WASH. C.L., http://www.wcl.american.edu/marshallbrennan/ (last visited Mar. 12, 2013).

124. *See id.*; STREET LAW, INC., http://www.streetlaw.org/en/home (last visited Mar. 12, 2013).

125. Marshall–Brennan Constitutional Literacy Project, *Teaching Partners*, AM. U. WASH. C.L., http://www.wcl.american.edu/marshallbrennan/partners.cfm (last visited Mar. 12, 2013).

126. STREET LAW INC., 2011 ANNUAL REPORT 2, 7–8 (2011).

127. David F. Labaree, *Power, Knowledge, and the Rationalization of Teaching: A Genealogy of the Movement to Professionalize Teaching*, 62 HARV. EDUC. REV. 123, 124, (1992).

128. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 266 (J.P. Mayer ed., George Lawrence trans., First Perennial Classics 2000) (1835).

129. ARISTOTLE'S POLITICS 104–09 (H.W.C. Davis ed., Benjamin Jowett trans., Clarendon Press 1908) (350 B.C.).

130. DE TOCQUEVILLE, *supra* note 128.

CONCLUSION AND RECOMMENDATIONS

The American jury system is struggling. To properly address failings that have been ingrained over centuries, the legal system must look beyond its own boundaries. Given the proclivity of jury reform scholars to look towards principles of education, it is imperative to now look towards civic education in the public schools as a route to creating better citizens and thus developing better juries. The study of jury reform is not new, and empirical data is available from surveys, field studies, mock juries, and other experiments.[131] Additionally, study after study affirms the impact of civic education on good citizenship.[132] This Article presents civic education as a platform for jury reform. To know whether civic education in the public school system would fix the flaws plaguing the jury system, we must conduct studies. Ideally, a long-term project within a contained geographic area would occur in which civic education is provided in the schools and then the effects on juries within that area would be evaluated over a couple of decades or more. Alternatively, one could engineer mock jury experiments using separate groups of high school seniors and adults, with civic education as the independent variable.

The importance of this goal—and the responsibility of the legal profession towards it—cannot be overstated.

> To regard the jury simply as a judicial institution would be taking a very narrow view of the matter, for great though its influence on the outcome of lawsuits is, its influence on the fate of society itself is much greater still. The jury is therefore above all a political institution, and it is from that point of view that it must always be judged.[133]

The jury cannot continue to be seen as the dusty child of the crone civics. Rather, we must reawaken our citizens to the fact that the jury is part of the very lifeblood of our democracy, and that the ability to serve on a jury is a right to be embraced and celebrated.

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131. *See, e.g.*, Dann & Hans, *supra* note 5, *passim*; Diamond et al., *supra* note 70, *passim*.

132. *See, e.g.*, CHILDHOOD, YOUTH, AND SOCIAL WORK IN TRANSFORMATION: IMPLICATIONS FOR POLICY AND PRACTICE *passim* (Lynn M. Nybell et al. eds., 2009); Sigal Ben-Porath, *Citizenship as Shared Fate: Education for Membership in a Diverse Democracy*, 62 EDUC. THEORY 381 *passim* (2012); Galston, *Political Knowledge*, *supra* note 113, *passim*.

133. DE TOCQUEVILLE, *supra* note 128, at 272.