

Thinking Clearly About Guilt, Juries, and Jeopardy[†]

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The jury is probably the least understood branch of our system of government. *Rethinking Guilt, Juries, and Jeopardy*, by George C. Thomas III and Barry S. Pollack,¹ is a salutary effort to redress this situation. Unfortunately, however, their reexamination of the criminal petit jury is both incomplete and incoherent. After summarizing the two authors' argument, I will identify the most important respects in which their project remains unfinished.

Thomas and Pollack begin by endorsing the positivist view that guilt is a social judgment about the evidence in a criminal case,² a view they find echoed in Supreme Court decisions on jury size and decisional rules.³ As they see it, a defendant is guilty if a majority of the members of the electorate—society in its sovereign capacity—would have so voted had the polity decided the case.⁴ The jury's job, in Thomas and Pollack's view, is to represent society by rendering the same verdict that this majority would have returned. Even though each juror casts a vote in accordance with his or her personal feelings about what the evidence shows, the authors recognize that juries can do this quite well if they are randomly picked from the polity⁵ and the right jury size and decisional rules are employed.⁶

Thomas and Pollack then turn to probability theory to assess how far jury size and majority voting rules may be reduced without jeopardizing too greatly a jury's ability accurately to express society's opinion.⁷ Invoking the social science convention that a five percent risk of error is statistically significant, this analysis leads them to conclude that the Supreme Court has

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1. George C. Thomas III & Barry S. Pollack, *Rethinking Guilt, Juries, and Jeopardy*, 91 MICH. L. REV. 1 (1992).

2. See *id.* at 6-10.

3. See, e.g., *id.* at 10-12.

4. See *id.* at 12-15. Thomas and Pollack also analyze these rules under an alternative model in which a defendant is said to be guilty if a supermajority of this societal jury would have so voted. *Id.* at 14-15. My comments are equally applicable in both contexts; however, in the interest of simplicity, I shall proceed as though only the authors' preferred, majority rule model exists.

5. See, e.g., *id.* at 8, 11-12, 18, 21-23.

6. In a previous article, I referred to these practices as the "free agency" style of juror voting and the "mirror" model of community representation by juries. See Stanton D. Krauss, *Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing*, 64 IND. L.J. 617, 617-18 & n.3, 627 (1989). They characterize the manner in which American juries are supposed to operate in virtually every criminal case. See *id.* at 627 n.46. By way of contrast, judges in bench trials generally vote as free agents and represent a community only in the sense that they act in its name. See *id.* at 657-64. My 1989 article examines each of these models of community representation, as well as the unique voting style and theory of representation employed in obscenity trials.

7. See Thomas & Pollack, *supra* note 1, at 15-27.

properly approved 9-3 and 6-0 guilty verdicts, rejected 5-1 convictions, and questioned the validity of convictions rendered by a 7-5 vote.⁸ Indeed, it leads them to conclude that the Court should also reject guilty verdicts based on votes of 6-2, 7-2, and 8-3.⁹

Finally, the same line of thought brings Thomas and Pollack to the novel insight that statistically reliable not guilty votes, such as 11-1 or 8-2, must be treated as acquittals, even if rendered in a jurisdiction which allows convictions only upon the unanimous vote of a jury of twelve.¹⁰ Thus, they maintain, the Double Jeopardy Clause¹¹ prohibits the retrial of a defendant whose first prosecution ends in a hung jury if (for example) eleven of twelve jurors voted for acquittal.¹²

At each of the three critical steps in their argument, Thomas and Pollack's analysis is woefully inadequate. Their definition of guilt does not specify the political entity whose opinions are to be the benchmark for measuring verdicts. This omission renders their computations arbitrary, like the conclusions which the authors draw from them. Finally, their argument in favor of recognizing nonunanimous acquittals ignores the emphasis that the relevant decisions have placed on the intent of the authors and ratifiers of the Sixth Amendment.

To begin with, Thomas and Pollack never identify the "society" whose judgment a jury is supposed to effectuate. They do say that this "society" is the sovereign, the electorate of some political entity. But which one, and why?

The language of the Sixth Amendment, which requires that a jury be drawn from "the State and district wherein the crime shall have been committed,"¹³ suggests that federal juries are expected to express a local view of the facts,¹⁴ which may or may not be in accord with the view of most Americans. This arrangement (which parallels the practice in most states)¹⁵ might protect local groups against unreliable factfinding by culturally different or hostile majorities in a larger society.¹⁶ However, it would conflict with

8. See *id.* at 2, 26-27, 32. This logic also proves that the Court erred in *Ballew v. Georgia* in condemning 5-0 convictions. See 435 U.S. 223 (1978). For no apparent reason, Thomas and Pollack appear uncomfortable with this notion. Compare Thomas & Pollack, *supra* note 1, at 26 n.104 (excusing *Ballew* as based on the Court's concern about the "dwindling opportunity for minority participation in smaller juries") with *id.* at 11 ("Despite *Ballew*'s focus on jury dynamics [previously defined to include concern about reduced minority participation], we believe that risk of error lay at the heart of the Court's rationale."). They refuse to say that *Ballew* was wrongly decided.

9. See Thomas & Pollack, *supra* note 1, at 26-27, 32.

10. See *id.* at 27-32.

11. The Double Jeopardy Clause provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

12. See Thomas & Pollack, *supra* note 1, at 27-32.

13. U.S. CONST. amend. VI. For the most thorough scholarly analysis of this provision, see Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 801 (1976) [hereinafter *Vicinage I*], and Drew L. Kershen, *Vicinage*, 30 OKLA. L. REV. 1 (1977).

14. See Kershen, *Vicinage I*, *supra* note 13, at 833, 837.

15. Under the law of most states, the county in which the crime occurred is the proper vicinage. See 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 22.2(e) (2d ed. 1992).

16. The use of local juries might also protect majority groups against treacherous or simply misguided agents in the legislature. But this would not be because local juries might find facts more accurately than judges or, say, juries staffed exclusively by residents of the capital city. Cf. WILFRED

Thomas and Pollack's intuition that every American adult was part of the true, societal jury in the first trial of the police officers charged with beating Rodney King, an intuition which lies at the heart of their argument for a social conception of guilt.¹⁷ Nonetheless, some of their language hints that criminal petit juries should represent some non-national political community. Although one of the two passages in question hints that this community is the state, it is not clear whether the authors mean them to reject countywide, citywide, or still more provincial groups of people as the relevant society.¹⁸

Most of the time, however, Thomas and Pollack seem to imply that the relevant society is national in scope.¹⁹ In the aftermath of the Civil War and

RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE 6 (1990) (noting that contemporary state court practice caused some opponents of the Constitution to fear that Article III's provision for appellate jurisdiction over "Law and Fact" envisioned retrial before a jury drawn from the nation's capital, not from where the crime occurred). Rather, it would be because local juries might be more willing to refuse to enforce laws that the polity does not support.

17. Thomas and Pollack mention this trial several times in the course of their discussion of the meaning of guilt. See Thomas & Pollack, *supra* note 1, at 5-6, 7-9. For them, it epitomizes the many "sensational jury trials" upon which the American public lavishes so much attention. *Id.* at 8. The authors interpret this phenomenon, which includes the rendition of popular judgments on the "correctness" of the verdicts rendered in these cases, as a manifestation of an underlying public understanding that "society reserves for itself the ultimate decision on the defendant's guilt, with the jury merely functioning as a convenient way of attempting to express the societal judgment." *Id.* (footnote omitted). This perceived social consensus represents the authors' main argument in favor of their view of guilt.

18. These two passages are found in the same paragraph of the article. See *id.* at 9. This paragraph presents two "other reasons"—that is, reasons other than the one discussed in the previous footnote—why "society is the appropriate benchmark for evaluating whether a trial jury reached the 'right' verdict." *Id.* (footnote omitted). One such "reason" is that "the society-as-jury concept parallels the Greek understanding of juries." *Id.* The authors then remark that modern juries, unlike Greek juries, do not include "a discernible percentage of even the smallest state's adult citizenry." *Id.* Since society is equated with the adult citizenry earlier in the same paragraph, this passage suggests that Thomas and Pollack regard "society" as a statewide entity.

The other argument made in this paragraph in favor of their social conception of guilt is that "[t]he entity that bears the systemic consequences of trial jury decisions ought to provide the ultimate standard by which these decisions are evaluated." *Id.* (footnote omitted). From the broadest perspective, the whole world suffers when guilty defendants are set free or innocent defendants are found guilty. But the systemic consequences of erroneous verdicts are doubtless felt most acutely in the community which rendered them and in which the crimes occurred. This logic suggests that Thomas and Pollack may have in mind a vision of a "society" that is to some extent less than national in scope.

In a more recent article, Thomas and Pollack again suggest that "society" is not a national entity, but a more local one. See George C. Thomas III & Barry S. Pollack, *Saving Rights from a Remedy: A Societal View of the Fourth Amendment*, 73 B.U. L. REV. 147, 186-187 & n.166 (1993). However, they do so in a discussion of the use of juries to determine the reasonableness of searches and seizures under the Fourth Amendment, and they mention neither the Sixth Amendment nor the Seventh Amendment in connection with this point. Nor do they say precisely how local this "society" is. In any event, in *California v. Greenwood*, the Supreme Court rejected Thomas and Pollack's suggestion, holding instead that the reasonableness of a person's expectations of privacy is to be judged by national, not local, standards. 486 U.S. 35 (1988); see also Krauss, *supra* note 6, at 632 n.68.

19. A few examples will suffice. First, there is the authors' suggestion that the entire American electorate is the true jury in sensational cases like the first Rodney King trial. Thomas & Pollack, *supra* note 1, at 8. Second, the authors say that society is "the largest possible" jury panel. *Id.* at 9-10. Third, when discussing the majority by which society must find a defendant guilty in order for the law to regard that defendant as guilty, they posit "a society of 200,000,000 adults." *Id.* at 13. In the same context, they also remark, "While we do not know what percentage required for guilt would make societal votes of guilty acceptably common, it would probably have to be sufficiently low to

the sea change in our conception of federalism which accompanied it, it may seem natural to insist that national policies be enforced in accord with the views of "We the People of the United States."²⁰ But why should juries hearing prosecutions under state or local criminal laws have to give voice to the opinions of outsiders?

Maybe Thomas and Pollack believe juries should not have to do that. Maybe they believe that the sovereign bringing the prosecution should be the one represented by the jury. That would certainly be an intellectually defensible philosophical and constitutional position. However, it would contradict their intuition that the entire American electorate was the true jury in the first Rodney King trial.

The authors' failure to be specific about which "society" juries are supposed to represent has serious consequences in the second stage of their argument. As Thomas and Pollack recognize, their calculations of the odds that various jury size and decisional rules will yield inaccurate verdicts²¹ can reveal "the risk of error for systems that permit the configuration"²² only if juries in those systems are randomly drawn from the relevant society. Real juries, however, are commonly chosen from areas that are neither coextensive with, nor microcosms of, any of the polities that Thomas and Pollack could possibly have in mind.²³ Thus, the authors' computations—the significance of which would in any event be dubious—are meaningless.

Consider federal juries. Although federal prosecutions are brought on behalf of all Americans, the Sixth Amendment prohibits the selection of federal

accommodate millions of not guilty votes." *Id.* at 14 n.67. Finally, the very fact that they constantly refer to "society," rather than "a society" or "the society in question," suggests that it is, for Thomas and Pollack, a single entity.

20. See Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1266-68, 1272-84 (1992), on the possible relevance of the Civil War amendments to a proper reading of the Bill of Rights.

21. For Thomas and Pollack, verdicts that do not express the will of the majority of the relevant societal jury are "inaccurate."

22. Thomas & Pollack, *supra* note 1, at 22-23.

23. Moreover, juries are not randomly selected from the adult populace of the relevant territory. Particularly in a jurisdiction where jury venires are chosen by the key man system, *see* JON M. VAN DYKE, *JURY SELECTION PROCEDURES* 86-87 (1977), there is every reason to expect that venires will not approximate random samplings of the area's electorate. Beyond this, disqualifications, exemptions, excuses, and challenges guarantee that juries are not (literally) random samplings of that populace. While the first three of these practices may not have a systematic effect on the accuracy of jury verdicts, I believe, contrary (it seems) to Thomas and Pollack, *see* Thomas & Pollack, *supra* note 1, at 18 n.84, that challenges for cause at least sometimes do. For example, people who express an unwillingness to consider voting to impose the death penalty are subject to challenge for cause in capital cases. *See* Stanton D. Krauss, *The Witherspoon Doctrine at Witt's End: Death Qualification Reexamined*, 24 AM. CRIM. LAW REV. 1 (1986). As a result, I think, the accuracy of juries' capital sentencing decisions, as well as their guilt/innocence decisions, is reduced. *See* Krauss, *supra* note 6, at 628-32. And then there is the ubiquitous peremptory challenge. Despite *Batson v. Kentucky*, 476 U.S. 79 (1986) (banning race-based peremptories), and *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994) (banning gender-based peremptories), peremptory challenges allow the systematic exclusion of minority voices (including opponents of capital punishment) from the jury room. The net effect of these practices on the ability of juries accurately to represent "society" is unlikely to be nonexistent, or constant from case to case. But they suggest that Thomas and Pollack's computations may well underestimate the risk of error. *Cf.* Thomas & Pollack, *supra* note 1, at 24-25 (claiming that their figures "reflect[], with reasonable accuracy, the upper bounds of the risk of error in various verdicts").

juries from a nationwide pool.²⁴ Juries could be chosen randomly from the electorate of the state where the crime occurred, and Thomas and Pollack's figures might reflect the odds that, for example, 9-3 verdicts handed down by such juries would be inaccurate. But because the populace of every state is different, there is no reason to suppose that juries selected randomly in different states would be equally likely to return 9-3 verdicts that a majority of the national electorate would have supported. In fact, since no state is a microcosm of America, if we expect federal juries to decide cases like a national "societal" jury would, Thomas and Pollack's computations do not identify the risk of error associated with any jury configuration in any jurisdiction that picks juries in this manner.

While those computations might reveal the odds that 9-3 guilty verdicts will occur when a state's electorate would have acquitted the defendant, federal juries in many states are not chosen on a statewide basis. Those states are divided into federal judicial districts,²⁵ which often are subdivided into divisions,²⁶ and federal juries are chosen from the district or division in which the court sits.²⁷ Because districts and divisions are not demographically identical, there is no basis for assuming that 9-3 verdicts rendered by juries randomly selected from two different districts or divisions have the same odds of correctly expressing the views of a majority of the state's electorate, let alone a 95.4% chance of being right.²⁸ Nine-three verdicts in each jurisdiction may have a 95.4% chance of expressing the true view of their respective district or division, but that geographic unit may not even be a political entity,²⁹ in which case its electorate cannot be a "society" for the purposes of Thomas and Pollack's analysis.³⁰ Thus, given their definition of guilt, there is simply no reason to assume that the statistics presented by Thomas and Pollack bear any resemblance to the risks of error involved in the use of federal juries.³¹

24. See *supra* text accompanying note 13.

25. See 28 U.S.C. §§ 81-131 (1988).

26. Some divisions are created by the statutes cited in the previous footnote and others are created pursuant to statutory authorization. See 28 U.S.C. § 1869(e) (1988).

27. See 28 U.S.C. § 1861 (1988).

28. Thomas and Pollack's calculations indicate that the risk of error for 9-3 guilty verdicts is 4.6%. See Thomas & Pollack, *supra* note 1, at 24.

29. For example, the Western District of New York consists of 17 of the state's 62 counties. See 28 U.S.C. § 112. The western division of this District, the seat of which is the city of Buffalo, encompasses eight of these counties. The other nine counties are part of the eastern division, the seat of which is Rochester. Telephone Interview with court clerks, by Christina DeLucia, reference librarian, Quinnipiac College School of Law (Jan. 5, 1995). None of these vicinages is a political entity.

30. Indeed, even if Thomas and Pollack did not define "society" as the electorate of a political entity, I cannot see how any of the three areas mentioned in the previous footnote could possibly be said to be a "society."

31. The same kind of situation exists with respect to state court juries. Even though state criminal prosecutions are brought on behalf of all of the state's residents, the typical state court vicinage is the county. See *supra* note 15. Nonetheless, some juries are drawn from subdivisions of the county which are not discrete political entities. Los Angeles County's Superior Court is an example. That court is divided into 11 districts, with a court sitting in each one. See *Williams v. Superior Court*, 781 P.2d 537, 538 n.2 (Cal. 1989). Juries for each district are chosen by a computer program which draws venirees from a twenty-mile radius around the courthouse. Telephone Interview with Court Jury Selection Bureau

Beyond this, the claim that a 4.6% risk of error is acceptable, but a 5.5% risk (the figure given for 7-2 guilty verdicts)³² is not, is pure *ipse dixit*. Although a 5% margin of error might be tolerable in a social science study, why is it acceptable in deciding a capital case? Why is a 0.2% margin of error (which characterizes 11-1 and 8-0 verdicts) acceptable?³³ Why should anything less reliable than the unanimous judgment of twelve impartial jurors—an arbitrary, but historically based, standard—do? Surprisingly, Thomas and Pollack make no effort to answer these questions.

Of course, even if Thomas and Pollack's statistics justify the validation of some convictions rendered by smaller or nonunanimous juries, that need not require that we take the third critical step in their argument and treat similar not guilty votes as acquittals. The authors claim that the logic of the Supreme Court's decisions allowing such convictions requires this result,³⁴ but they have missed the beginning of whatever wisdom is to be found in those decisions.³⁵ The starting point for the Court's analysis in these cases is its judgment that the language and legislative history of the Sixth Amendment do not show that the Framers or Ratifiers intended to constitutionalize the common law requirement that verdicts in criminal cases be based on the unanimous vote of one dozen jurors.³⁶ However, nothing in the Amendment's text or history suggests that it was meant to banish this tradition from the federal courts. On the contrary, the Judiciary Act of 1789 plainly contemplated twelve-person juries,³⁷ and no one has ever voiced surprise over the fact that the common law jury size and unanimity rules were followed in the federal courts from the beginning.³⁸ In light of this historical record, it is easy to understand why Thomas and Pollack do not even try to argue that the

(Jan. 13, 1995). Needless to say, these often overlapping jury selection districts are neither political entities nor "societies" in any sense of the word.

I explored the problem of using local juries to express, by use of the mirror model, the views of a statewide electorate in my 1989 article. See Krauss, *supra* note 6, at 625-32, 646 & n.129. That piece also examines the ability of the voting style and representational model used in obscenity law to deal with this problem. See *id.* at 632-43.

32. See Thomas & Pollack, *supra* note 1, at 24.

33. See *id.*

34. See, e.g., *id.* at 2.

35. As I have previously indicated, I believe that these decisions (which are cited in the next footnote) were misguided, and that the Constitution should be read as giving criminal defendants the right to insist that convictions be based upon unanimous verdicts of twelve-member juries. See Stanton D. Krauss, *Death-Qualification After Wainwright v. Witt: The Issues in Gray v. Mississippi*, 65 WASH. U. L.Q. 507, 557-58 (1987).

36. See *Apodaca v. Oregon*, 406 U.S. 404 (1972) (plurality opinion) (holding that the common law unanimity requirement is not constitutionalized); *Williams v. Florida*, 399 U.S. 78 (1970) (holding that the common law requirement that juries consist of twelve members is not constitutionally required).

37. Judiciary Act of 1789, ch. 20, § 29, 1 Stat. 73, 88.

38. Indeed, in the earliest courtroom discussion of the question of which I am aware, defense lawyer Luther Martin (who attended the Philadelphia Convention) and United States District Attorney George Hay agreed that these common law attributes of jury trial were incorporated in Article III's jury trial mandate. See 2 DAVID ROBERTSON, *THE TRIAL OF COLONEL AARON BURR* 220-21, 343 (1808); see also 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 467 (Jonathan Elliot ed., 2d ed. 1888) (remarks of Edmund Randolph at the Virginia Ratifying Convention) ("There is no suspicion that less than twelve jurors will be thought sufficient [to constitute an Article III jury].").

Sixth Amendment was meant to require that 9-3 not guilty votes be deemed acquittals. However, the authors never confront the implications of this record, because they say as little about the language or intent of the Sixth Amendment on this question as they do on any other.

I do not want to insist that originalism or a rigid textualism is the only legitimate way to read the Constitution. Nor, for that matter, do I want to deny that mathematical models can help us to assess the rules governing jury functioning. I do, however, think that one cannot ignore the fact that there is a Constitution to construe, or the fact that statistics cannot be a substitute for clear thought about things like what (if anything) a "society" is. Thus, if Thomas and Pollack wish to read communitarian values or nonunanimous acquittals into the Sixth Amendment, they must tell us what community they want juries to represent, what the odds are that various jury verdicts will accurately speak its will, and why these things (as well as the social science convention on acceptable risks of error) are relevant to the proper interpretation of *our* Sixth Amendment. Until they have done so, they will not have finished their task of rethinking guilt, juries, and double jeopardy.