



**Cambridge
Elements**

Philosophy of Law

The Philosophy of Legal Proof

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~~Aiming to convict only on the basis of evidence that makes it rational to believe something is the best way to make sure this happens. Statistical evidence often fails to generate a full belief; rather, it just elicits a probabilistic estimate. So, there is a natural argument for why courts might refuse to rely on mere statistics – mere statistics don't tend to support a full belief in guilt in the mind of the community. Still, this argument might not rule out statistics in every case. Perhaps DNA evidence, involving such tiny chances of error, does tend to elicit full belief in the guilt of the accused (compared to regular proof paradox cases involving much shorter odds).~~

~~My general view is that discussions of the proof paradox should look at the details of the case at hand. There may be no single resolution to the question of whether we should rely on statistical evidence alone; rather, there will be some cases where it is acceptable and others where it is not. Whether we should be probabilists or anti probabilists is a case dependent matter and must be approached by looking at contextual considerations of justice and policy.~~

5 Who Should Decide?

We now turn to our final question: *who* should decide the outcome of a trial? What person or group should be trusted with deciding whether the standards of proof have been met, thus determining whether the accused is guilty or not?⁹⁹

In some periods of history, communities seemed to leave the decision to God. 'Trial by combat' (letting the disputants fight it out) and 'trial by ordeal' (having the accused perform some risky or wounding task) were both seen as ways as testing the sincerity – the 'oath' – of those accused of wrongdoing. If their oath was good, according to the official story, God would intervene to ensure that they prevailed.¹⁰⁰

But even in these times, communities were not content to entirely separate proof from the available evidence. Trial by ordeal, for example, was often ambiguous. One ordeal was to pluck a stone from a cauldron of boiling water. If the inevitable wound healed cleanly, it was a sign of innocence; if it festered, it was a sign of guilt. But determining whether a wound is on its way to healing cleanly is a matter of interpretation – one that must be made by humans, even those claiming to interpret on behalf of a supernatural entity. Given what local people knew about the evidence, this would influence their decision.

Legal systems today answer the 'who should decide' question in strikingly different ways. Some leave the decision entirely in the hands of a professional judge who makes judging their career. Others continue the now ancient practice

⁹⁹ Jurors are also occasionally used in civil trials, for example in assessing defamation cases.

¹⁰⁰ For example, see [Baker 2019](#).

of using a jury of randomly selected members of the community, outsiders who are not members of the legal profession. And others still adopt hybrid models, using a mix of professional and ‘lay’ members when adjudicating. The way in which legal systems decide trials is often as much a matter of historical circumstance as conscious design. The choice about ‘who should decide’ raises fundamental philosophical questions about expertise, democracy, and the limits of state power.

This section focuses on assessing trial by *jury* as a way of understanding what is at stake when choosing who decides the outcome of a trial. Of course, our real interest in the jury is *comparative* – whether juries are better or worse than other ways of deciding the results of trials. The main competition (if we suppose that God is not to be disturbed) is trial by professional judge.

5.1 Reliability versus Moral–Political Value

I want to introduce a rough distinction between two criteria against which you can evaluate mechanisms for deciding trials:

- (i) How morally or politically valuable the mechanism is.
- (ii) How accurate/reliable the mechanism is.

Accuracy – correctly identifying the guilty and the innocent – is obviously of immense importance. But it isn’t the only thing that matters. Juries might have value independently of their reliability. For instance, using juries might be defended on political grounds even if they happened to be a bit less reliable than using a professional judge (in the same way as selecting political leaders through election is probably defensible on political grounds *even if* it would be more reliable to have a panel of benign technocrats appoint public officials).

Although juries can have moral–political value beyond accuracy, there is clearly a close relationship between the two values. It is a moral and political problem when trial decision-making is inaccurate. Why? Well, one type of inaccuracy is saying that an innocent person is guilty. Such mistakes lead to an innocent person being wrongfully condemned and punished. It is also morally and politically problematic if a jury decides to acquit a guilty person. For one thing, this type of mistake often leads to the release of someone who might do further harm. Moreover, many think that states have an obligation to punish the guilty. So, irrespective of what *other* strengths trial by jury may have, there is presumably some threshold of accuracy juries must cross in order for them to be acceptable. An argument for the political value of juries would not convince the sceptic if it turned out that juries were creating miscarriages of justice on a massive scale. Accuracy is among the most

important moral–political values that a mechanism for deciding trials can have, even though it is not the only one.

Before moving on to what I think are the most convincing arguments for the jury, I want to mention some interesting *moral and political* defences of juries that I do not find fully convincing. One idea is that serving on a jury is character-enhancing. The idea that civic participation is good for us has a long pedigree. John Stuart Mill, for example, argued that providing people with power and responsibility for public decisions develops their faculties and cultivates a sense of appreciation for the public interest.¹⁰¹ Whether jury service does improve character in this way is ultimately an empirical question. However, given that serving on a jury is something that people do very infrequently, it's unlikely that these character-enhancing benefits (if they exist) alone justify juries – rather, they will be a happy bonus, if juries are justified on other grounds.

Another idea often mentioned is that the jury serves as a type of *symbol*. For example, perhaps the jury is symbolic of democracy or of the importance of the community. While this is a common thought, I am not sure focusing on symbolism alone is a promising way to go. What matters is whether the jury actually *is* democratic or whether it *does* involve the community in the right way, not whether it is a symbol for these things. If juries are not justified on other grounds, then perhaps we should rethink our symbolic attachment to them?¹⁰²

One concrete way the symbolic role of juries could matter is to bolster the perceived link between criminal justice and the interests of the community. Professional judges are often seen as members of the institutional firmament, representing the state or those with power, rather than representing the community. (In some jurisdictions the horsehair wig remains a common sight.) The presence of the jury as a community representative could make a positive difference in how the accused or the victim experiences the case. If the jury does change the experience of the accused, helping them see their blame as rooted in their community, this would be morally significant. However, there are some problems with this suggestion. First, juries are clearly subordinate to the judge during the trial. Second, juries typically play no role in deciding what punishment should follow conviction. If juries are really meant to significantly change the experience of the accused or the victim, we may need to enhance their role.

I also want to mention a few interesting arguments concerning the *accuracy or reliability* of juries that I don't think are decisive either. There are various philosophical arguments for thinking that larger groups tend to be more reliable than smaller groups. This could be one reason to prefer using a group of jurors

¹⁰¹ Mill 2010. ¹⁰² See Brennan and Jaworski 2015 for discussion of semiotic arguments.

rather than a professional judge. According to a famous proof due to the French mathematician Marquis de Condorcet – ‘Condorcet’s jury theorem’ – groups can become more accurate simply by increasing the number of people that are in them, provided that certain conditions apply. One of these conditions is assuming that the average person is better than a coin flip (i.e. better than random) at getting the right answer.¹⁰³

It may be plausible to think that the average person is better than random at working out whether a witness is telling the truth, since detecting dishonesty is a skill we practice during the course of our normal lives. So perhaps it is reasonable to think that the average person is better than a coin flip at working out whether someone is guilty of a crime or not. However, where Condorcet’s jury theorem falls down is in the fact that jurors are not like coin flips. Another condition required for the jury theorem to hold is that the group members cast their vote independently. But trial juries make decisions by collectively debating and discussing the case. Even if the average juror is initially better than chance at getting the right answer, this doesn’t prevent a charismatic or stubborn juror with the wrong view from infecting the group. Given that many jury systems require unanimity or near unanimity for conviction, this can be a fatal problem to the idea that juries are reliable just because their average member tends to be reliable.¹⁰⁴

Another argument is that intellectual diversity – rather than size – can make a group more reliable.¹⁰⁵ Having different people in a group provides a larger number of perspectives and ideas than any individual would have alone. Some claim that this diversity can be even more important than cognitive ability – that diversity can ‘make up for’ shortcomings in ability. Professional judges often decide cases alone and the judiciary is not particularly diverse; judges are overwhelmingly middle class, from the same ethnicity, and educated at the same institutions. Perhaps the mere diversity of juries makes them better at making decisions? This is hard to assess. While the idea of diversity being epistemically beneficial has some plausibility, it isn’t universally true that diversity beats ability. Diversity doesn’t help much for topics that are technical or require specific knowledge or experience; for example, two professors of nuclear physics will outperform even 10,000 members of the public in answering questions about nuclear physics. But, technical crimes like fraud aside, many trials concern people’s motivations and likely behaviour. Perhaps these are questions where having different ordinary perspectives is helpful?

¹⁰³ For a very brief introduction, see [Siscoe 2022](#).

¹⁰⁴ See [Hedden 2017](#) for a discussion of possible solutions.

¹⁰⁵ For example, [Landemore 2013](#) has defended this argument for random selection of representatives.

Regardless of whether this argument is plausible, it is not really an argument for using members of the public rather than a *group* of professional judges (and diversifying the judiciary). To be sure, juries are cheaper than having a large staff of professional judges. Nevertheless, economy is not really a satisfying vindication of the jury system. I want to investigate whether there is a deeper reason for involving the public.

5.2 Questions of Law versus Questions of Fact

Let's continue to think about the skills needed to make legal decisions. To do this, we can try and separate different types of questions that arise during a trial. One basic distinction often made by lawyers is between *questions of law* and *questions of fact*.

Questions of law are technical issues about 'what the law is'. This includes substantive law that regulates our conduct outside the courtroom and procedural law that regulates what happens during a trial. Let's focus on an example – the crime of murder. The legal definition of murder is a matter of law. Depending on where you are, the definition will be found in legislation, or a written judgement made by a judge or other respected source. This definition tells us what needs to be proven – in schematic terms – to convict someone of murder. To take the jurisdiction where I studied law, Scotland, the classic definition of murder is 'a wilful act causing the destruction of life'.¹⁰⁶ Law also regulates what evidence can prove that someone committed a murder. A confession obtained through torture is not admissible, for example. Various legal questions about the definition of wrongs and what is required to prove something arise during trials. Some of these questions can be extremely complex, requiring knowledge of technical legal matters. While murder might seem like a common-sense concept, some areas of the law – like fraud, tax, or shipping law – are such that even understanding the relevant laws and concepts takes considerable training and experience.

A common view is that questions of law are best left to a professional judge. After all, the person on the street will not tend to know the precise definition of different legal concepts, where to find these definitions, or how to resolve difficulties in interpreting the law.

Questions of fact – so the traditional story goes – are rather different. Questions of fact roughly concern 'what happened'. During a trial, we need to work out whether certain things happened in the real world before we can apply the law. To return to murder – in order to apply the law of murder correctly, we need to know whether certain alleged facts are true or not. For example, suppose

¹⁰⁶ McDonald 1948, 89.

Harry is found dead. To know whether this was murder, we might need to decide whether Sally stabbed Harry or whether Harry just had an unfortunate accident. The role of settling these factual questions is called being the ‘fact-finder’ in a legal trial. In trials with a jury, the jury is the fact-finder – they decide whether the conditions for legal proof have been met by applying the standard of proof (beyond reasonable doubt) to the factual claims made during the trial.

Answering many ‘real-world’ questions does not require legal expertise. Professional judges might be legal experts, but they aren’t experts on everyday factual questions. Someone with a law degree (attainment of which requires reading textbooks, drinking a lot of coffee, and sitting legal exams) is not taught how to work out whether someone was carrying a knife or held a grudge. Rather, these are questions that anybody can try to answer once they have considered the evidence. Using a jury of a dozen people, you might think, is a reasonable way of harnessing the power we all have to tell apart the plausible from the implausible.

Unfortunately, a neat distinction between strictly legal and strictly factual questions is hard to maintain. This is because fact-finders in trials are routinely asked to make decisions that are not straightforwardly factual. As discussed in [Section 1](#), criminality requires both an action (*actus reus*) and a mental state (*mens rea*). In a criminal murder trial, the fact-finder might have to answer the following question:

Actus Reus: Did the accused shoot and kill the victim?

This is often straightforwardly factual – either *x* shot *y* or not; *y* either died or lived.

But when it comes to the *mens rea*, things aren’t so easy. Simply being *causally* responsible for somebody’s death is not sufficient to be guilty of murder (after all, perhaps *x* was an actor and reasonably assumed the gun was loaded with blanks, or maybe *x* was hallucinating because they had been unwittingly drugged). To be criminal, you must also have a blameworthy mental state. One classic *mens rea* for murder is:

Mens Rea 1: Did the accused *intend* to kill?

Perhaps intention is also a broadly factual question – one about the psychology of the accused. Either *x* intended to kill or not. Whether this is a merely factual question is, I think, less straightforward.

Still, most jurisdictions have a second *mens rea*, different from intention, yet still regarded as sufficiently blameworthy to be criminalised. For example, someone might deliberately shoot someone in the heat of the moment without

ever thinking about whether they might kill them. Here is a second *mens rea* for murder:

Mens Rea 2: Was the accused *reckless* as to the consequences, not caring whether the victim lived or died?

Deciding whether someone is ‘reckless’ is not like deciding whether they pulled a trigger. Making a judgement about recklessness is an inescapably normative choice. You are deciding not just what happened, but also about the norms or expectations that we should impose on our fellow citizens. For instance, suppose somebody causes death by throwing a single punch in a bar fight, by purposefully shoving someone onto a cycle lane, or by hitting a golf ball at them from a great distance. Are any of these a reckless attitude sufficient for murder? Are all of them? This isn’t a straightforwardly factual question. Indeed, there are various other examples in criminal law of this type of ‘normative’ fact-finding. For example, juries also have to decide whether force used in self-defence is ‘proportionate’ to the threat. Again, this is not a merely factual question but rather one about the norms we expect our fellow humans to uphold. Normative fact-finding appears in the civil law too. For example, various civil cases depend on working out whether one party has been ‘negligent’ or ‘unreasonable’, terms that are clearly normatively loaded.

John Gardner has a nice way of describing the legal role of these evaluative terms.¹⁰⁷ Gardner calls terms like *reckless* or *unreasonable* ‘all purpose buck-passers’. It would be impossible, Gardner suggests, for the law to specify *all* the conditions under which someone is reckless or unreasonable. The list would simply run forever, given the dizzying number of ways that humans can behave. Rather, we need to work out whether someone was reckless or unreasonable in conjunction with looking at the specific details of each case. Normative terms like ‘reckless’, Gardner suggests, passes responsibility (‘the buck’) for making such decisions to the fact-finder and away from the formal law, thus allowing us to avoid the impossible task of specifying in advance all the types of behaviour that count as reckless or unreasonable.

But, of course, this doesn’t (yet) provide any argument for the use of juries. After all, the fact-finder we pass the buck to could just as well be a judge as a jury. We have found that the simple story about judges (as legal experts) only deciding legal questions and the jury (as people with experience in everyday factual questions) only deciding factual questions doesn’t quite work. But now we are left asking: why should we leave normative choices – about recklessness, reasonableness, negligence, and so on – to a jury rather than a judge?

¹⁰⁷ See Gardner 2015.

5.3 The Democratic Jury?

One attempt at answering this question might appeal to the idea, often heard, that juries are a democratic way of making decisions.¹⁰⁸ While the argument that juries are democratic is common, it is not obvious what this means. After all, in a democratic *state*, laws are passed through the consent of citizens in general.¹⁰⁹ The democratic mandate of lawmakers, ideally, is derived from the entire citizenship – usually millions of people. It's a very non-standard type of democracy where we take laws that have been passed with the mandate of many millions and make their application subject to a further small-scale democracy that depends on the views of only a dozen jurors!

It is true that we should hope that criminal laws enjoy the democratic support of the community. However, even if the criminal law *does* enjoy democratic support in general, we should bear in mind the point we just made. Namely, it is not possible for the law to codify in advance *all* of the situations in which someone is in breach of the law. For example, it is not possible to write down every single situation in which someone is so reckless for it to be fair to charge them with murder (rather than with a lesser offence). This is true even if the law against murder enjoys general democratic support. So, perhaps the democratic argument for the jury is that when we arrive at one of these 'indeterminate' cases, where the law has not specified exactly what should happen, we should leave it to the community to decide how the law should be applied. It is obviously unfeasible to have a referendum every time such a case occurs, so the next best thing is to rely on a citizen jury in the hope of reaching a representative decision. This is one way to understand the claim that juries are democratic – they aim to ensure that laws are applied in line with the 'conscience of the community'.¹¹⁰ More accurately, most jury systems are not democratic in the regular 'majoritarian' sense. Rather, in many jurisdictions, there are rules that require a jury to be unanimous (or near enough) before convicting someone. So, the jury, even if democratic in the sense of representing community opinion, is skewed towards making sure that people aren't convicted *against* the conscience of the community. This is in line with the characteristic focus of criminal justice that prioritises protecting the accused from wrongful conviction.

¹⁰⁸ For discussion of this idea, see [Abramson 1993](#).

¹⁰⁹ Although common law countries complicate this picture since some aspects of law result from judicial decisions rather than legislative bodies.

¹¹⁰ See [Lee 2018](#) on different ways to interpret this idea, particularly on whether the juror should decide according to their own conscience or on what they think the values of their community are.

To sum up. The idea of the jury as a democratic institution is viable, but only after considering some intricate problems in legal philosophy. Whether this is enough to fully justify the jury is not yet clear. To deepen the argument for juries, I now turn to another way the jury might be said to be the conscience of the community.

5.4 Jury Nullification

Here's a question. What happens if the jury decides to acquit someone for reasons other than the evidence they have heard in court? Answer: nothing. They simply announce their decision and the trial ends. Jury decisions are final.¹¹¹ Since the jury does not have to justify their decision (and because they deliberate in secret) they are not answerable for the reasons behind it.¹¹² Their reasons could be entirely idiosyncratic. Perhaps surprisingly, this deep lack of transparency and accountability could be a *strength* of the jury. This is due to the phenomenon of 'jury nullification', where juries decide based on their own sense of what is right rather than only by attending to the evidence introduced in court.¹¹³

In Anglo-American legal systems, the power of the jury to nullify trials emerged centuries ago, partly in response to censorious prosecutions. Famous cases involve the jury refusing to convict when the law was being used to trample freedom of religious assembly and freedom of expression.¹¹⁴ In *Bushel's Case*, the judge ordered the jury to convict a Quaker man for public preaching. Factually, it was clear that the person had been preaching in public. Yet, the jury refused to convict on grounds of conscience. The judge responded by making the following order against the morally squeamish jurors: 'You shall be locked up, without meat, drink, fire, and tobacco; you shall not think thus to abuse the court; we will have a [guilty] verdict by the help of God, or you shall starve for it.' The foreman of the jury appealed, and English law eventually did away with the idea that the judge was entitled to command and censure the jury. Legal historians debate whether these cases support the *legal right* of the jury to nullify in the modern age. But this is merely an academic debate – juries certainly have the

¹¹¹ Of course, cases can be appealed, but typically only on matters of law rather than on the jury's assessment of the facts.

¹¹² This discussion focuses on common law jurisdictions. Some jurisdictions in the Civil tradition use verdicts accompanied by some type of reasoning. See *Burd and Hans 2018* for discussion.

¹¹³ See also *Brooks 2004*.

¹¹⁴ See *Bushel's Case* (1670) 124 E.R. 1006 and the trial of John Peter Zenger, respectively (for information on the latter, see the Encyclopaedia Britannica entry: www.britannica.com/biography/John-Peter-Zenger).

power to nullify trials by refusing to convict the accused irrespective of what the facts are.¹¹⁵

Indeed, legal history has numerous examples of juries ameliorating overly harsh legal codes. The death penalty was mandatory for a wide variety of crimes in English medieval common law. There were some ways to escape this sentence, with one being to ‘plead the belly’ – to claim to be pregnant. If the pregnancy claim was contested, it would be considered by a jury of women, the ‘jury of matrons’.¹¹⁶ Legal historians describe these matrons as a frequently sympathetic bunch, declaring pregnancy even when there was no such baby (a ‘pious perjury’) to spare the accused from the excessive rigours of capital medieval criminal law. Arguably, jury nullification is deeply woven into the history of criminal law. The question is whether we still need it now, if we grant that today’s law is more humane and democratic.

There are at least three types of nullification. One is for juries to block the application of *laws they believe to be unjust* (e.g. the jury thinks that certain narcotics laws are unfair). Second, the jury can block the *unjust application* of a law they believe to be otherwise just. One example might be laws of criminal damage applied to scenarios of civil disobedience. In 2021, members of the environmental protest group ‘Extinction Rebellion’ were acquitted of criminal damage against the London headquarters of the petroleum company Shell.¹¹⁷ The evidence was overwhelming. But, clearly, the jury did not want them punished for their consciousness-raising environmental protests. Third, juries can nullify not because they disagree with a law or its application to a particular case, but because they *disagree with the type of punishment* the accused is likely to suffer if found guilty. For example, a jury might decline to convict because they think the punishments for unlawful abortions are currently too harsh (despite agreeing that *some* penalty is appropriate).

Taking a larger view, the power of the jury to nullify trials can be viewed as a protection against state oppression. On the presumption that judges – paid employees of a state institution who can face professional repercussions or even removal – are less likely to nullify unjust laws, this can be seen as an argument for the jury. Jurors only serve temporarily, so they are not concerned about professional reprisals that may result from their decision to nullify in a given case.

Of course, jury nullification is double-edged. A jury that can make a choice for morally admirable reasons can also make a choice for morally bad reasons too. The same secrecy that preserves the ability of juries to counteract

¹¹⁵ Here, I won’t talk about the (less discussed) converse case – where a jury finds someone *guilty* despite not thinking the evidence satisfies the standard of proof.

¹¹⁶ For discussion, see [Butler 2019](#). ¹¹⁷ For comment, see [McConnell 2021](#).

oppression and immoral criminalisation also enables it to make morally repugnant choices. For example, a jury might acquit someone of a racist crime because the jury itself has racist members. Indeed, this is something that bedevilled attempts to bring racist criminality to justice in Jim Crow-era America.

When assessing nullification, it's important to separate two different questions – (i) should jurors use the power to nullify, if they have it, versus (ii) should the law prevent jurors from nullifying or facilitate it? Whether jurors should nullify unjust laws (if they can) is a question of moral philosophy.¹¹⁸ Even if the answer in some cases is 'yes' – as it probably is – this does not mean that the state should support or facilitate nullification as a practice. (Consider an analogy. Whether an individual should use a firearm against a violent attacker is a question of moral philosophy. But even if the answer is 'yes', it still might be incumbent on the state to remove the right to bear arms.)

One point in favour of allowing nullification is that there may not be non-oppressive ways to prevent it. Perhaps an official could sit in the deliberation room to ensure juries do not rely on extra-evidential considerations, or the judge could refuse to put the case to the jury if they believe that the evidence is utterly decisive. But these would be controversial measures. Arguably, the power of the jury to nullify might be an unavoidable consequence of a jury system free from state interference. Whether states should go further than permitting the current grey zone around nullification – by, for example, instructing juries about their power to nullify, or entrenching it as a legally recognised right – is a more delicate question. Currently, acquittals due to jury nullification are not differentiated from other types of acquittal. This is arguably a drawback, since no signal is sent to the state about the extent to which prosecutions are failing due to the fact that people disagree with their laws. If we think back to the earlier section on non-binary verdicts (Section 3.1), you might wonder whether having additional verdicts that explicitly involve a declaration of nullification is a good idea.

5.5 Bias, Rape, and 'Jury Science'

There are various other abstract arguments for and against the jury that we might consider. But it is also natural to ask whether we have strong *empirical* evidence about how juries tend to perform and whether we should generally trust their judgement.

We have returned time and again to the worry about a 'justice gap' in sexual offence cases. In England and Wales, it has been claimed that under 2 per cent of

¹¹⁸ See [Huemer 2018](#) for discussion.

rape allegations terminate in a criminal conviction.¹¹⁹ There has been a lot of debate about why this is. Some of the problems occur pre-trial: for example, in mishandling of complaints by the police. Another issue is that rape is prosecuted less than other crimes, partly because securing knock-down evidence can be more difficult given the typically private nature of the crime. But one possibility – and this is only a possibility – is that juries mistakenly tend to convict less often than a judge would.¹²⁰ There are different reasons why this might be. One is that juries just tend to be more credulous and tend to believe the accused more often.¹²¹ Another is that juries tend to take a view different to judges about consent and when belief in consent is reasonable. But most important for our purposes is the possibility that jurors tend to be afflicted by various *biases* that lead their reasoning astray when considering sexual allegations.¹²²

This last possibility is especially worrying for the credibility of jury trials. Most of us probably think that some people in our community have various biases and prejudices. Juries are a sample of people in the community. So, we should expect some jury members to have biases and prejudices. This seems like a reasonable argument. Indeed, some have even argued that the threat of prevalent ‘rape myths’ among jurors is so great as to justify doing away with juries in trials about sexual criminality, even if we retain juries more generally.¹²³ Of course, an immediate question is whether legal professionals are any different in their vulnerability to bias. However, as a professional group susceptible to selection and training, one *might* hope that it is easier to fight bias in professional judges rather than in a random sampling of the community.

This worry about sexual biases is just one example of a range of worries about whether jurors tend to make the right decision. Here is a fuller list of such worries:¹²⁴

- (I) Jury decisions are influenced by interpersonal biases, most prominently:
- racial bias against out-groups/in favour of in-groups
 - gendered biases – for example, associating gender with criminality; misogynistic myths about sexual consent
 - socio-economic biases – for example, associating ‘class’ with criminality

¹¹⁹ See [HM Government 2021](#), 7.

¹²⁰ However, see [Thomas 2023](#) for empirical analysis suggesting that jurors do not have markedly low conviction rates for various sexual offences.

¹²¹ Judges might undergo a process of ‘case-hardening’ where they are less likely to believe an accused because they have been exposed to so many cases.

¹²² See [Leverick 2020](#) for a summary of research on rape myths.

¹²³ For example, see [Slater 2023](#). ¹²⁴ This list has been adapted from [Ross 2023c](#).

- intra-jury bias, where interpersonal biases affect the quality of deliberation (for example, jurors sidelining or being dominated by certain participants).
- (II) Jurors fail to understand their legal role or the legal parameters constraining their decision. For example, they might not understand judicial directions, the standard of proof, or the distinction between the *actus reus* and *mens rea*.
- (III) Jurors are susceptible to misunderstand the evidence presented in court, especially when it is complex (as in a fraud trial) or contains statistical components (as with DNA evidence).
- (IV) Jurors are susceptible to ‘manipulation’ – for example, by lawyerly rhetoric, gruesome evidence, and other aspects of trial strategy that do not reliably uncover the truth.

We might hope that we can rely on empirical evidence to know the extent to which juries exhibit these failings, perhaps hoping that psychologists and other researchers can tell us how well or badly jurors typically perform. However, although there is much written on the performance of the jury, there are good reasons to be cautious about relying on much extant evidence.

As we noted in our discussion of nullification (Section 5.4), jury deliberations are secret. In some jurisdictions, it is a criminal offence to reveal what happens in the jury room. Elsewhere, institutional barriers prevent researchers from working with real juries.¹²⁵ Apart from a few small exceptions, no jurisdiction has conducted substantial research into live deliberation of real jurors.¹²⁶

This means that a striking fact about jury research is that, for the most part, it is not being carried out on real juries engaged in live deliberation about genuine trials. The most common alternative to this problem is to conduct research on what are called ‘mock juries’ instead.¹²⁷ Mock juries are members of the public who actively volunteer to take part in faux trials. The faux trials range in sophistication; the most common involve having participants read a written story and fill in a questionnaire, while the most realistic involve partial re-enactments of trials involving actors.¹²⁸ From these studies, researchers try to work out how juries might perform under real trial conditions.

¹²⁵ For example, see Horan and Israel 2016. ¹²⁶ But see Vidmar et al. 2003.

¹²⁷ Another type of research, which is less common, surveys real jurors about their experiences after the trial has finished. For an illustrative example, see Thomas 2020. See Chalmers, Leverick, and Munro 2021 for a methodological discussion of this approach.

¹²⁸ Mock jury studies can be realistic; for example, see Thomas 2010 or Ormston et al. 2019. But these are rare.

Should we worry about the fact that jury research does not involve real trials?¹²⁹ There are different views, with some arguing that mock juries and other indirect methods are suitably reliable indicators of real-life performance, while others remain sceptical that we can learn about the real thing through mere simulations. There are some advantages to the use of mock juries, the most important being that they allow for investigators to change variables in a targeted way. For example, you might try to work out whether there are gender differences in reactions to trials by exposing differently composed juries to the exact same material. You couldn't do this with a real jury – you just have to make do with the trials as they occur naturally. But there are also some serious objections to mock-jury research.¹³⁰

The most important concern is about what psychologists call 'ecological validity': the extent to which we should expect behaviour under the artificial conditions of an experiment to generalise to real-world behaviour. I think there are reasons to be pessimistic about how much we can learn from mock-jury studies.¹³¹ The big difference between mock-jury studies and real juries is that real juries are making decisions that have genuine – sometimes literally life-and-death – importance, while mock juries are just engaging in hypothetical discussion. Indeed, in a mock-jury study, there will typically not be a 'right' answer. Do people use different decision-making strategies when their decision has real-world importance? If the answer is 'yes', then we should not be confident that mock-jury studies reflect the behaviour of real-life juries.

The solution to this problem would be for governments to facilitate research into real juries deliberating live about genuine criminal trials. Such research could be relatively unobtrusive, such as transcribing deliberations, making it anonymous, and allowing researchers to have access after a few years. Some worry that even such modest steps would be too much interference with the jury and infringe the right of the accused to a fair trial. I find these arguments hard to understand. After all, the choice about whether to keep, reform, or abolish trial by jury is a long-term decision of deep social significance. Given the importance of criminal justice, it seems there is a moral imperative to make the decision about who should decide trials based on the best possible evidence.

¹²⁹ These worries are deepened by the fact that psychology has been facing a crisis concerning the reliability of empirical studies.

¹³⁰ I develop this argument in [Ross 2023c](#). For a brief summary, see [Ross 2023d](#).

¹³¹ I have recently argued for a new type of research into jury deliberation where mock juries are exposed to real trials as they occur (rather than to faux trial reproductions). This would significantly improve on many current studies by making for a maximally realistic experimental subject experience. For details and comprehensive discussion of jury research, see [Ross in press](#).

Of course, if it did turn out that juries were somewhat biased, misunderstood legal concepts, or exhibited other ‘unreliable’ tendencies, we would need to work out how to react. One way might be to offer better guidance or training to juries (if we thought that such training would work and be sufficiently value-neutral). But at some point we could be confronted with the questions with which we began this section, questions that are more philosophical. To what extent do the other strengths of the jury – for instance, as a safeguard against state oppression or as the ‘conscience of the community’ – compensate for other errors juries may be disposed to make? These are truly hard questions.

Overall, I am an optimist about trial by jury. But juries are rightly controversial and legal systems can function effectively without them. The values at stake are hard to weigh against each other. The reader should expect the debate on the use of juries to remain a central question in applied philosophy of law.

References

- Abramson, Jeffrey. 1993. 'The Jury and Democratic Theory'. *Journal of Political Philosophy* 1, no. 1: 45–68.
- Adams, N. P. 2023. 'Bare Statistical Evidence and the Right to Security'. *Journal of Ethics and Social Philosophy* 24, no. 2. <https://doi.org/10.26556/jesp.v24i2.1650>.
- Angwin, Julia, Jeff Larson, Lauren Kirchner, and Surya Mattu. 2016. 'Machine Bias'. *ProPublica*. www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing, accessed 27 April 2023.
- Baker, John. 2019. *Introduction to English Legal History*. Fifth edition. Oxford: Oxford University Press.
- Beccaria, Cesare. 1995. 'Beccaria: "On Crimes and Punishments" and Other Writings'. Edited by Richard Bellamy. Translated by Richard Davies. Cambridge Texts in the History of Political Thought Cambridge: Cambridge University Press. <https://bit.ly/3Or7mfa>, accessed 5 February 2024.
- Bindler, Anna, and Randi Hjalmarsson. 2018. 'How Punishment Severity Affects Jury Verdicts: Evidence from Two Natural Experiments'. *American Economic Journal: Economic Policy* 10, no. 4: 36–78.
- Blackstone, William. 1827. *Commentaries on the Laws of England*. Philadelphia, PA: J. Grigg.
- Blome-Tillmann, Michael. 2017. 'More Likely Than Not'. In Adam Carter, Emma Gordon, and Benjamin Jarvis, eds., *Knowledge First: Approaches in Epistemology and Mind*. Oxford: Oxford University Press, 278–92.
2020. 'Statistical Evidence, Normalcy, and the Gatecrasher Paradox'. *Mind* 129, no. 514: 563–78.
- Bolinger, Renée Jorgensen. 2020. 'The Rational Impermissibility of Accepting (Some) Racial Generalizations'. *Synthese* 197, no. 6: 2415–31.
- Bray, Samuel. 2005. 'Not Proven: Introducing a Third Verdict'. *University of Chicago Law Review* 72, no. 4: 1299–329.
- Brennan, Jason, and Peter Martin Jaworski. 2015. 'Markets without Symbolic Limits'. *Ethics* 125, no. 4: 1053–77.
- Brooks, Thom. 2004. 'A Defence of Jury Nullification'. *Res Publica* 10: 401–23.
- Buchak, Lara. 2014. 'Belief, Credence, and Norms'. *Philosophical Studies* 169, no. 2: 285–311.
- Burd, Kayla A., and Valerie P. Hans. 2018. 'Reasoned Verdicts: Oversold?' *Cornell International Law Journal* 51, no. 2: 319–60.

- Butler, Sara M. 2019. 'More than Mothers: Juries of Matrons and Pleas of the Belly in Medieval England'. *Law and History Review* 37, no. 2: 353–96.
- Chalfin, Aaron, and Justin McCrary. 2017. 'Criminal Deterrence: A Review of the Literature'. *Journal of Economic Literature* 55, no. 1: 5–48.
- Chalmers, James, Fiona Leverick, and Vanessa Munro. 2021. 'Why the Jury Is, and Should Still Be, out on Rape Deliberation'. *Criminal Law Review* 9: 753–71.
2022. 'Beyond Doubt: The Case against "Not Proven"'. *Modern Law Review* 85, no. 4: 847–78.
- Coen, Mark, and Jonathan Doak. 2017. 'Embedding Explained Jury Verdicts in the English Criminal Trial'. *Legal Studies* 37, no. 4: 786–806.
- Cohen, Laurence Jonathan. 1977. *The Probable and the Provable*. Oxford: Oxford University Press.
- Conee, Earl, and Richard Feldman. 1998. 'The Generality Problem for Reliabilism'. *Philosophical Studies* 89, no. 1: 1–29.
- Di Bello, Marcello. 2020. 'Proof Paradoxes and Normic Support: Socializing or Relativizing?' *Mind* 129, no. 516: 1269–85.
- Ebert, Philip A., Martin Smith, and Ian Durbach. 2018. 'Lottery Judgments: A Philosophical and Experimental Study'. *Philosophical Psychology* 31, no. 1: 110–38.
- Enoch, David, and Levi Spectre. 2019. 'Sensitivity, Safety, and the Law: A Reply to Pardo'. Hebrew University of Jerusalem Legal Research Paper 20–28. <http://dx.doi.org/10.2139/ssrn.3462424>.
- Enoch, David, Talia Fisher, and Levi Spectre. 2021. 'Does Legal Epistemology Rest on a Mistake? On Fetishism, Two-Tier System Design, and Conscientious Fact-finding'. *Philosophical Issues* 31, no. 1: 85–103.
- Enoch, David, Levi Spectre, and Talia Fisher. 2012. 'Statistical Evidence, Sensitivity, and the Legal Value of Knowledge'. *Philosophy & Public Affairs* 40, no. 3: 197–224.
- Epps, Daniel. 2015. 'The consequences of Error in Criminal Justice'. *Harvard Law Review* 128, no. 4: 1065–1151.
- Fisher, Talia. 2021. 'Half the Guilt'. *Theoretical Inquiries in Law* 22, no. 1: 87–109.
- Full Fact. 2019. 'How Many Rapists Reoffend?' Website. <https://fullfact.org/crime/how-many-rapists-reoffend/>, accessed 6 March 2024.
- Gardiner, Georgi. 2017. 'In Defence of Reasonable Doubt'. *Journal of Applied Philosophy* 34, no. 2: 221–41.
2019. 'The Reasonable and the Relevant: Legal Standards of Proof'. *Philosophy & Public Affairs* 47, no. 3: 288–318.
- Gardner, J. 2015. 'The Many Faces of the Reasonable Person'. *Law Quarterly Review* 131, October: 563–84.

- Gendler, Tamar Szabó. 2011. 'On the Epistemic Costs of Implicit Bias'. *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition* 156, no. 1: 33–63.
- Hedden, Brian R. 2017. 'Should Juries Deliberate?' *Social Epistemology* 31, no. 4: 368–86.
- Hedden, Brian, and Mark Colyvan. 2019. 'Legal Probabilism: A Qualified Defence'. *Journal of Political Philosophy* 27, no. 4: 448–68.
- HM Government. 2021. *The End-to-End Rape Review Report on Findings and Actions*. <https://bit.ly/4a16ara>.
- Horan, Jacqueline, and Mark Israel. 2016. 'Beyond the Legal Barriers: Institutional Gatekeeping and Real Jury Research'. *Australian & New Zealand Journal of Criminology* 49, no. 3: 422–36.
- Huemer, Michael. 2018. 'The Duty to Disregard the Law'. *Criminal Law and Philosophy* 12, no. 1: 1–18.
- Kaplan, John. 1968. 'Decision Theory and the Factfinding Process'. *Stanford Law Review* 20, no. 6: 1065–92.
- Kim, Brian. 2017. 'Pragmatic Encroachment in Epistemology'. *Philosophy Compass* 12, no. 5: e12415. <https://doi.org/10.1111/phc3.12415>.
- Kitai, Rinat. 2003. 'Protecting the Guilty'. *Buffalo Criminal Law Review* 6, no. 2: 1163–87.
- Krauss, Sam Fox. 2020. 'Against the Alleged Insufficiency of Statistical Evidence'. *Florida State University Law Review* 47: 801–25.
- Lackey, Jennifer. 2021. 'Norms of Criminal Conviction'. *Philosophical Issues* 31, no. 1: 188–209.
- Landemore, H el ene. 2013. 'Deliberation, Cognitive Diversity, and Democratic Inclusiveness: An Epistemic Argument for the Random Selection of Representatives'. *Synthese* 190, no. 7: 1209–31.
- Laudan, Larry. 2003. 'Is Reasonable Doubt Reasonable?' *Legal Theory* 9, no. 4: 295–331. <https://doi.org/10.1017/S1352325203000132>.
2006. *Truth, Error, and Criminal Law: An Essay in Legal Epistemology*. Cambridge: Cambridge University Press.
2011. 'The Rules of Trial, Political Morality, and the Costs of Error: Or, Is Proof Beyond a Reasonable Doubt Doing More Harm than Good?' In Leslie Green and Brian Leiter, eds., *Oxford Studies in Philosophy of Law*. New York: Oxford University Press, 195–227.
- Lee, Youngjae. 2018. 'The Criminal Jury, Moral Judgments, and Political Representation'. *University of Illinois Law Review*, 1255–91.
- Levanon, Liat. 2022. *Evidence, Respect and Truth*. Oxford: Bloomsbury Publishing. www.bloomsbury.com/uk/evidence-respect-and-truth-9781509942657/, accessed 27 April 2023.

- Leverick, Fiona. 2020. 'What Do We Know about Rape Myths and Juror Decision Making?' *International Journal of Evidence & Proof* 24, no. 3: 255–79.
- Lillquist, Erik. 2002. 'Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability'. *UC Davis Law Review* 36, no. 1: 85–198.
- Lippke, Richard. 2010. 'Punishing the Guilty, Not Punishing the Innocent'. *Journal of Moral Philosophy* 7, no. 4: 462–88.
- Littlejohn, Clayton. 2020. 'Truth, Knowledge, and the Standard of Proof in Criminal Law'. *Synthese* 197, no. 12: 5253–86.
- Loeb, Don, and Sebastián Reyes Molina. 2022. 'Standards of Proof as Competence Norms'. *Jurisprudence* 13, no. 3: 349–69.
- Loftus, Elizabeth F. 1996. *Eyewitness Testimony: With a New Preface*. Cambridge, MA: Harvard University Press.
- McConnell, D. 2021. 'A Jurors Guide to Going Rogue'. *Practical Ethics*, 14 May. <http://blog.practicaethics.ox.ac.uk/2021/05/a-jurors-guide-to-going-rogue/>, accessed 6 March 2024.
- McDonald, J. H. A. 1948. *Practical Treatise on the Criminal Law of Scotland*. Fifth edition. Edinburgh: W. Green.
- Melchior, Guido. 2019. *Knowing and Checking: An Epistemological Investigation*. New York: Routledge.
- Mill, John Stuart. 2010. *Considerations on Representative Government*. Cambridge: Cambridge University Press. <https://doi.org/10.1017/CBO9780511783128>.
- Mortini, Dario. 2022. 'Knowledge, Individualised Evidence and Luck'. *Philosophical Studies* 179, no. 12: 3791–3815.
- Moss, Sarah. 2022. 'Knowledge and Legal Proof'. In Tamar Szabó Gendler, John Hawthorne, and Julianne Chung, eds., *Oxford Studies in Epistemology: Volume 7*. Oxford: Oxford University Press, 176–213. <https://doi.org/10.1093/oso/9780192868978.003.0006>.
- Nagin, Daniel S. 2013. 'Deterrence in the Twenty-First Century'. *Crime and Justice* 42, no. 1: 199–263.
- Neumann, Nico, Ulf Böckenholt, and Ashish Sinha. 2016. 'A Meta-Analysis of Extremeness Aversion'. *Journal of Consumer Psychology* 26, no. 2: 193–212.
- Nunn, G. 2015. 'The Incompatibility of Due Process and Naked Statistical Evidence'. *Vanderbilt Law Review* 68, no. 5: 1407–33.
- Ormston, Rachel, James Chalmers, Fiona Leverick, Vanessa Munro, and Lorraine Murray. 2019. *Scottish Jury Research: Findings from a Large Scale Mock Jury Study*. Edinburgh: Scottish Government. <https://bit.ly/3whszSo>, accessed February 14, 2024.
- Pardo, Michael S. 2018. 'Safety vs. Sensitivity: Possible Worlds and the Law of Evidence'. *Legal Theory* 24, no. 1: 50–75.

- Paternoster, Raymond. 2010. 'How Much Do We Really Know about Criminal Deterrence?' *Criminal Law & Criminology* 100, no. 3: 765–823.
- Picinali, Federico. 2022. *Justice In-Between: A Study of Intermediate Criminal Verdicts*. Oxford: Oxford University Press.
- Pritchard, Duncan. 2009. 'Safety-Based Epistemology: Wither Now?' *Journal of Philosophical Research* 34: 33–45.
2022. 'In Defence of the Modal Account of Legal Risk'. *Synthese* 200, no. 290. <https://doi.org/10.1007/s11229-022-03693-z>
- Pundik, Amit. 2008. 'Statistical Evidence and Individual Litigants: A Reconsideration of Wasserman's Argument from Autonomy'. *International Journal of Evidence & Proof* 12, no. 4: 303–24.
2022. 'Should Murder Be More Difficult to Prove than Theft? Beccaria and Differential Standards of Proof'. In Antje du Bois-Pedain and Shachar Eldar, eds., *Re-Reading Beccaria: On the Contemporary Significance of a Penal Classic*. Oxford: Hart Publishing, 199–214. <https://bit.ly/49zaCNp>, accessed 14 February 2024.
- Rabin, Yoram, and Yaniv Vaki. 2023. 'Acquittal on the Basis of Doubt – A Call for its Abolition'. *Haifa Law Review* 17, no. 1. <https://bit.ly/3P9SP81>, accessed 6 March 2024.
- Rape Crisis Scotland. (n.d.). 'End Not Proven'. Website. www.rapecrisisscotland.org.uk/campaigns-end-not-proven/.
- Redmayne, Mike. 2008. 'Exploring the Proof Paradoxes'. *Legal Theory* 14, no. 4: 281–309.
- Ribeiro, Gustavo. 2019. 'The Case for Varying Standards of Proof'. *San Diego Law Review* 56, no. 1: 161–219.
- Ross, Lewis. 2020. 'Recent Work on the Proof Paradox'. *Philosophy Compass* 15, no. 6: e12667. <https://doi.org/10.1111/phc3.12667>.
- 2021a. 'Rehabilitating Statistical Evidence'. *Philosophy and Phenomenological Research* 102, no. 1: 3–23.
- 2021b. 'Legal Proof and Statistical Conjunctions'. *Philosophical Studies* 178, no. 6: 2021–41.
- 2021c. 'Justice in Epistemic Gaps: The "Proof Paradox" Revisited'. *Philosophical Issues* 31, no. 1: 315–33.
2022. 'Profiling, Neutrality, and Social Equality'. *Australasian Journal of Philosophy* 100, no. 4: 808–24.
- 2023a. 'The Foundations of Criminal Law Epistemology'. *Ergo* 9, no. 58: 1581–1603. <https://doi.org/10.3998/ergo.3583>.
- 2023b. 'Criminal Proof: Fixed or Flexible?' *Philosophical Quarterly* 73, no. 4: 1077–99. <https://doi.org/10.1093/pq/pqad001>.

- 2023c. ‘The Curious Case of the Jury-Shaped Hole: A Plea for Real Jury Research’. *International Journal of Evidence & Proof* 27, no. 2: 107–25. <https://doi.org/10.1177/13657127221150451>.
- 2023d. ‘Jury Reform and Live Deliberation Research’. *Amicus Curiae* 5, no. 1: 64–70. <https://journals.sas.ac.uk/amicus/article/view/5661/5325>.
- In press. ‘Mock Juries, Real Trials: How to Solve (Some) Problems with Jury Science’. *Journal of Law and Society*.
- Roth, Andrea. 2010. ‘Safety in Numbers – Deciding When DNA Alone Is Enough to Convict’. *New York University Law Review* 85: 1130–85.
- Sand, Leonard B., and Danielle L. Rose. 2003. ‘Proof beyond All Possible Doubt: Is There a Need for Higher Burden of Proof When the Sentence May Be Death?’ *Chicago-Kent Law Review* 78, no. 3: 1359–78.
- Shapiro, Barbara J. 1986. ‘To a Moral Certainty: Theories of Knowledge and Anglo-American Juries 1600–1850’. *Hastings Law Journal* 38, no. 1: 153–93.
- Siscoe, Robert W. 2022. ‘Condorcet’s Jury Theorem and Democracy’. *1000-Word Philosophy*, 20 July. <https://1000wordphilosophy.com/2022/07/20/condorcets-jury-theorem/>.
- Slater, Joe. 2023. ‘Just Judge: The Jury on Trial’. *American Philosophical Quarterly* 60, no. 2: 169–86.
- Smith, Martin. 2016. *Between Probability and Certainty: What Justifies Belief*. Oxford: Oxford Academic. <https://doi.org/10.1093/acprof:oso/9780198755333.001.0001>.
2018. ‘When Does Evidence Suffice for Conviction?’ *Mind* 127, no. 508: 1193–1218.
2020. ‘Against Legal Probabilism’. In Jon Robson and Zachary Hoskins, eds., *The Social Epistemology of Legal Trials*. Abingdon, UK: Routledge, 92–105.
- Solan, Lawrence. 1999. ‘Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt’. *Texas Law Review* 78: 105–47.
- Sosa, Ernest. 1999. ‘How to Defeat Opposition to Moore’. *Philosophical Perspectives* 13: 141–53.
- Spottswood, Mark. 2021. ‘Continuous Burdens of Proof’. *Nevada Law Journal* 21, no. 2. <https://scholars.law.unlv.edu/nlj/vol21/iss2/9>, accessed 14 February 2024.
- Sunstein, Cass R. 2021. ‘Governing by Algorithm? No Noise and (Potentially) Less Bias’. Harvard Public Law Working Paper no. 21–35. <http://dx.doi.org/10.2139/ssrn.3925240>.
- Thomas, Cheryl. 2010. ‘Are Juries Fair?’ Ministry of Justice Research Series 1/10. <https://bit.ly/437pCA1>.

2020. 'The 21st Century Jury: Contempt, Bias and the Impact of Jury Service'. *Criminal Law Review* 11: 987–1011.
2023. 'Juries, Rape and Sexual Offences in the Crown Court 2007–21'. *Criminal Law Review* 3: 200–25.
- Tribe, Laurence H. 1971. 'Trial by Mathematics: Precision and Ritual in the Legal Process'. *Harvard Law Review* 84, no. 6: 1329. <https://api.semanticscholar.org/CorpusID:14731357>, accessed 14 February 2024.
- Urbaniak, Rafal, and Marcello Di Bello. 2021. 'Legal Probabilism'. In Edward N. Zalta, ed., *The Stanford Encyclopedia of Philosophy*. <https://plato.stanford.edu/archives/fall2021/entries/legal-probabilism/>, accessed 27 April 2023.
- Vaki, Yaniv, and Yoram Rabin. 2021. 'Two Kinds of Acquittals – Different Kinds of Doubts'. *Criminal Law Forum* 32, no. 1: 97–123.
- Vidmar, Neil, Shari Diamond, Mary Rose, and René Ellis. 2003. 'Juror Discussions during Civil Trials: Studying an Arizona Innovation'. *Arizona Law Review* 45: 1–83.
- Volokh, Alexander. 1997. 'N Guilty Men'. *University of Pennsylvania Law Review* 146, no.2. <https://papers.ssrn.com/abstract=11412>, accessed 15 February 2023.
- Walen, Alec D. 2015. 'Proof beyond a Reasonable Doubt: A Balanced Retributive Account'. *Louisiana Law Review* 76: 355–456.
- Wasserman, David T. 1992. 'The Morality of Statistical Proof and the Risk of Mistaken Liability Decision and Interference Litigation'. *Cardozo Law Review* 13, no. 2–3: 935–76.
- Wells, Gary L. 1992. 'Naked Statistical Evidence of Liability: Is Subjective Probability Enough?' *Journal of Personality and Social Psychology* 62, no. 5: 739–52.
- Williamson, Timothy. 2000. *Knowledge and Its Limits*. Oxford: Oxford University Press.
- Woollard, Fiona, and Frances Howard-Snyder. 2022. 'Doing vs. Allowing Harm'. In Edward N. Zalta and Uri Nodelman, eds., *The Stanford Encyclopedia of Philosophy*. <https://plato.stanford.edu/archives/win2022/entries/doing-allowing/>, accessed 27 April 2023.
- Worsnip, Alex. 2021. 'Can Pragmatists Be Moderate?' *Philosophy and Phenomenological Research* 102, no. 3: 531–58.