

NOBODY'S PERFECT

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We owe Chris Guthrie, Jeffrey Rachlinski, and Andrew Wistrich our gratitude. They have singly, and as a team, expanded our knowledge of the workings of judges' minds.¹ They have shown us that judges are subject to hindsight bias,² can be manipulated by anchoring,³ will sometimes fall prey to the lure of inappropriate evidence⁴ and suffer a number of other "blindnesses."⁵ They have, in a sustained, thoughtful, and thorough way moved us well beyond the anecdotal. They are not the first to use social science methods to try to understand judicial behavior. They were preceded by Harry Kalven and Hans Zeisel who, despite the fact that they concentrated most of their attention on jurors in their great work *THE AMERICAN JURY*, tried to puzzle out why judges so much more frequently than jurors vote to convict criminal defendants in cases where judge and jury disagree on a verdict.⁶ Guthrie and colleagues have introduced rigor where those who came before them proceeded in a desultory fashion.⁷ Chris Guthrie now seeks to use the newfound insights about the judicial psyche to fashion a broader argument about the merits (or demerits) of the American justice system, at least in its classical adversarial form.

In this short piece I will suggest that Professor Guthrie's work is part of a historical trend that has increasingly focused on judicial fallibility. Having documented judges' flaws, Professor Guthrie champions what he considers a better solution, one he finds within the world of alternative dispute resolution ("ADR"). I will argue that this assessment fails to take into consideration

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¹ See Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) [hereinafter Guthrie et al., *Inside the Judicial Mind*]; Chris Guthrie et al., *Judging by Heuristic: Cognitive Illusions in Judicial Decision Making*, 86 JUDICATURE 44 (2002); Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post ≠ Ex Ante: Determining Liability in Hindsight*, 19 LAW & HUM. BEHAV. 89 (1995); Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165 (2003); Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation*, 79 OR. L. REV. 61 (2000); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005).

² See Chris Guthrie et al., *Inside the Judicial Mind*, *supra* note 1, at 802-03.

³ *Id.* at 791-92.

⁴ See Wistrich et al., *supra* note 1.

⁵ Chris Guthrie, *Misjudging*, 7 NEV. L. J. 420, 420-427 (2007).

⁶ HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 121-90 (Univ. of Chicago Press 1971) (1966) [hereinafter Kalven & Zeisel].

⁷ See, e.g., Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry Into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113 (1994). As the title suggests this was but a preliminary look at one sort of judicial behavior. Little other material was generated before Guthrie et al. came on the scene.

either the precautions taken in the judicial process to address judges' shortcomings or the weaknesses in the ADR approach.

I think before considering Professor Guthrie's arguments it might be useful to place his important psychological work in a broader intellectual and political context. When Kalven and Zeisel started their exploration of the collective mind of American jurors in the late 1950s, they began by assuming that the decisions of judges were the yardstick or standard by which juror performance was to be measured.⁸ Judges were assumed, at least generally, to be the decision makers likely to get things "right."⁹ This assumption appeared to reflect a general social consensus that judges were wise and reliable decision makers. In light of then current complaints,¹⁰ the question confronting Kalven and Zeisel was whether the jury could measure up or whether it should give way to more professional factfinders.

So high was American confidence in judicial competence that throughout the 1960s, 1970s, and into the 1980s, ever more procedural and substantive power was ceded to the judiciary, especially in the federal courts.¹¹ Judges were transformed from "umpires" who oversaw the courtroom contest and interpreted the law to "managers" who were afforded control over every step in the litigation process.¹² They were given enhanced authority to cut off trial through summary judgment,¹³ to shape and control the direction of the litiga-

⁸ See KALVEN & ZEISEL, *supra* note 6, at 10 ("[W]e study the performance of the jury measured against the performance of the judge as a baseline.").

⁹ *Id.* at 86 ("The judge presumably does not draw the jury's distinction between adult and child victims in [certain] cases because the formal law does not draw it, and he is bound by tradition and role to stay within the sentiments of the formal law.").

¹⁰ *Id.* at 5-6 (detailing critics' charges against the jury).

¹¹ Judith Resnik argued in 1997 that:

[T]he history of these past decades is one of growing judicial discretion over civil process, of judicial care to guard its own discretionary authority, of ongoing variation between national and local rules and between rules and practice, and of declining discussion by trial judges of their roles as adjudicators. Thus far, the judiciary has generally succeeded in convincing Congress that expansive judicial discretion over civil case processing is appropriate.

Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 136 (1997). On the issue of substantive judicial power, see Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1810 (2004). In 1994, one scholar referred to federal judges as "the proverbial 800-pound gorilla." Thomas E. Baker, *The Inherent Power to Impose Sanctions: How a Federal Judge is Like an 800-Pound Gorilla*, 14 REV. LITIG. 195, 197 (1994).

¹² See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 425 (1982).

¹³ In 1986, the Supreme Court decided a trilogy of cases on summary judgment: *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, *Celotex Corp. v. Catrett*, 477 U.S. 317, and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242. The Court emphasized the value of using summary judgment for screening weak cases before trial. Robert Gregory argues that:

The Supreme Court's decisions on summary judgment corresponded with broader concerns about the ability of courts to manage an increasingly burdensome caseload. The 1983 amendments to the Federal Rules of Civil Procedure facilitated changes in the summary judgment procedure by granting district courts unprecedented case management powers. Even before the Supreme Court trilogy, there were signs that lower courts were moving toward a more expansive use of the summary judgment procedure. Some courts and commentators "thought the time [was] ripe for recognizing the potential of summary judgments to deal with increasingly crowded

tion through pretrial conferences,¹⁴ and to overturn jury judgments both at the trial¹⁵ and appellate level.¹⁶ The imperial judiciary came into flower¹⁷ and with it a sort of judicial visibility and responsibility not experienced before.

At the same time that judicial power was expanding, social scientists were beginning to assemble a dossier on the judges' constitutionally mandated partner – the jury. The research disclosed a body that had both great strengths and serious weaknesses. Kalven and Zeisel found that juries generally got criminal cases right¹⁸ and handled complexity remarkably well.¹⁹ Later researchers would refine the portrait but generally agreed with these conclusions.²⁰ Yet the jurors were never viewed as a match for the judges who, it was *assumed*, possessed superior wisdom and acumen. Jurors, it was discovered, were likely to stumble over statistics,²¹ to be lured astray by certain categories of irrelevant or misleading evidence²² and to be vulnerable to a number of “blindness” like hindsight bias²³ and anchoring.²⁴ Since judges were not being studied, there were

dockets and rising litigation costs.” The trilogy solidified this trend and paved the way for the “modern era” of summary judgment practice.

Robert J. Gregory, *One Too Many Rivers to Cross: Rule 50 Practice in the Modern Era of Summary Judgment*, 23 FLA. ST. U. L. REV. 689, 691 (1996).

¹⁴ In 1983, Federal Rule of Civil Procedure Rule 16 was expanded to give judges more power for pretrial management. See Charles R. Richey, *Rule 16 Revisited: Reflections for the Benefit of Bench and Bar*, 139 F.R.D. 525, 526 (1992) (“Rule 16 contains enormous potential as a device for developing creative case management strategies. I believe that Rule 16 is the most important rule of civil procedure for a trial judge, because, along with our inherent power, it is the specific repository of the authority of a federal trial judge to manage the judicial calendar.”). Robert B. McKay points out that “Rule 16 was amended in 1983 to make specific what had probably been intended from the beginning – that the trial judge was indeed the ruler, not only of the pretrial conference, but of the entire pretrial process.” Robert B. McKay, *Rule 16 and Alternative Dispute Resolution*, 63 NOTRE DAME L. REV. 818, 823 (1988).

¹⁵ See Stephan Landsman, *Appellate Courts and Civil Juries*, 70 U. CIN. L. REV. 873, 893-900 (2002).

¹⁶ *Id.*

¹⁷ Michael A. Rebell and Robert L. Hughes indicate that:

Beginning in 1954 with the U.S. Supreme Court's landmark school desegregation decision, *Brown v. Board of Education*, the federal courts have become increasingly involved in remedial oversight of basic functions of state and local governments. This unprecedented judicial remedial involvement accelerated in the 1960s and 1970s as numerous judicial decrees implemented the desegregation mandate, and others called for reform of such institutions as state mental health facilities, prison systems, and housing projects. This new judicial role was vigorously attacked in some quarters as unwarranted “judicial activism” which was said to reflect the arrogance of “an imperial judiciary” and to violate established canons of the separation of powers.

Michael A. Rebell & Robert L. Hughes, *Efficacy and Engagement: The Remedies Problem Posed by Sheff v. O'Neill – and a Proposed Solution*, 29 CONN. L. REV. 1115, 1120 (1997).

¹⁸ See KALVEN & ZEISEL, *supra* note 6, *passim*.

¹⁹ *Id.* at 149-62.

²⁰ See VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 97-148 (1986).

²¹ See Brian C. Smith et al., *Jurors' Use of Probabilistic Evidence*, 20 LAW & HUM. BEHAV. 49 (1996); William C. Thompson, *Are Juries Competent to Evaluate Statistical Evidence?*, 52 LAW & CONTEMP. PROBS. 9 (1989).

²² See Landsman & Rakos, *supra* note 7.

²³ See Jonathan D. Casper et al., *Juror Decision Making, Attitudes, and the Hindsight Bias*, 13 LAW & HUM. BEHAV. 291, 308-09 (1989) (noting that jurors generally have difficulty disregarding ultimate outcomes even when instructed to do so).

no data suggesting that they experienced similar difficulties. Matching experimentally scrutinized jurors with idealized judges led jury critics to argue for the curtailing of juror authority especially in "complex" cases. Although the Supreme Court flirted with such a step, it did not embrace it,²⁵ declining to follow up on the suggestion advanced in *Ross v. Bernard* to create a complexity exception to the Seventh Amendment right to jury trial.²⁶

Gibbon suggested that it is the fate of all empires to decline and fall.²⁷ And such has been the fate of the judicial empire. By the 1990s, attacks on judicial "activism" and discretion became widespread and particularly popular among politicians.²⁸ By the turn of the millennium the judiciary was under significant pressure.²⁹ Its traditional virtually unfettered power over criminal

²⁴ See Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCHOL. 519, 526, 531 (1996); John Malouff & Nicola S. Schutte, *Shaping Juror Attitudes: Effects of Requesting Different Damages Amounts in Personal Injury Trials*, 129 J. SOC. PSYCHOL. 491, 494 (1989).

²⁵ Steven I. Friedland points out that jury failures in complex and lengthy civil litigation and in other contexts, such as understanding jury instructions, have created doubts about the efficacy of the jury as a competent decisionmaking body. Steven I. Friedland, *Legal Institutions: The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 191 (1990).

²⁶ See, e.g., Michelle L. Hartmann, *Is It a Short Trip Back to Manor Farm? A Study of Judicial Attitudes and Behaviors Concerning the Civil Jury System*, 54 SMU L. REV. 1827, 1852 (2001) ("In a footnote in *Ross v. Bernard*, [396 U.S. 531, 538 n.10 (1970)], the Supreme Court indicated that 'the practical abilities and limitations of juries' may affect the right to a trial by jury in civil cases. The Court declined to answer whether this language supported a Seventh Amendment exception to the right to a jury trial in complex civil cases.").

²⁷ EDWARD GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* (Random House 2003) (1776).

²⁸ William Wayne Justice, *The Two Faces of Judicial Activism*, 61 GEO. WASH. L. REV. 1, 1 (1992) ("'Judicial activism' is, more often than not, a code word used to induce public disapproval of a court action that a politician opposes, but is powerless to overturn."). Keenan D. Kmiec found that "[d]uring the 1990s, the terms 'judicial activism' and 'judicial activist' appeared in an astounding 3,815 journal and law review articles." Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism"*, 92 CAL. L. REV. 1441, 1442 (2004).

²⁹ Congress has enacted a number of pieces of legislation to curb judiciary power. The Civil Justice Reform Act and Sentencing Reform Act are prominent examples. Linda S. Mullenix argues that the Civil Justice Reform Act:

has effected a revolutionary redistribution of the procedural rulemaking power from the federal judicial branch to the legislative branch. Congress has taken procedural rulemaking power away from judges and their expert advisors and delegated it to local lawyers. By the expedient of declaring procedural rules to be substantive law, Congress has effectively repealed the Rules Enabling Act. Congress has by fiat stripped the judicial branch of a power that uniquely bears on the judicial function: the power to prescribe internal rules of procedure for the federal courts. By legislative stealth in enacting the Civil Justice Reform Act, Congress is continuing to transform the Advisory Committee on Civil Rules into a quaint, third-branch vestigial organ.

Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 379 (1992).

Lewis J. Liman argues that:

The Sentencing Reform Act violates the separation of powers in two ways. Locating the power to determine sentences in an administrative agency violates the nondelegation doctrine. At the same time, the requirement that three [A]rticle III judges sit on the Sentencing Commission, with

sentencing was challenged and then curtailed.³⁰ In the federal system a mechanical set of euphemistically entitled “guidelines”³¹ were established that ended much of the judges’ flexibility and discretion in sentencing. The challenge to the judiciary did not end there. Across a broad spectrum, judicial independence came under attack.³²

No single case better embodies this challenge than that of Terri Schiavo.³³ Congress saw fit to try to interfere with the operation of the Florida state courts

the possibility that the President might appoint – and discharge – up to six judges, compromises judicial independence and impartiality.

Lewis J. Liman, *The Constitutional Infirmities of the United States Sentencing Commission*, 96 YALE L.J. 1363, 1369 (1987). Richard B. Hoffman and William M. Lucianovic indicate that in the early 1980s “the goal of criticism from the other branches, and in particular from Congress, was to reduce federal court jurisdiction. One congressional commentator described the federal courts as ‘under siege.’” Richard B. Hoffman & William M. Lucianovic, *Long Range Planning: A Reality in the Judicial Branch*, 44 AM. U.L. REV. 1599, 1603 n.14 (1995) (quoting Charles C. Mathias, Jr., *The Federal Courts Under Siege*, 462 ANNALS AM. ACAD. POL. & SOC. SCI. 26, 26 (1982)).

³⁰ Congress established new federal sentencing policy through the Sentencing Reform Act of 1984, 28 U.S.C. §§ 991-998 (2006). According to Andrew G. Deiss, “[t]he Federal Sentencing Guidelines . . . represent the culmination of a reform movement aimed primarily at curbing judicial discretion in sentencing.” Andrew G. Deiss, *Making the Crime Fit the Punishment: Pre-Arrest Sentence Manipulation by Investigators Under the Sentencing Guidelines*, 1994 U. CHI. LEGAL F. 419, 419 (1994). For a comprehensive history of the Sentencing Guidelines, see Thomas N. Whiteside, *The Reality of Federal Sentencing: Beyond the Criticism*, 91 NW. U. L. REV. 1574 (1997).

³¹ Daniel J. Freed describes the *Federal Sentencing Guidelines Manual* as:

a code of changing regulations that substantially constrain the wide ranges within which judges formerly exercised discretion. It prescribes a starting point for each case, rules for determining criminal history and for adjusting sentences upward and downward, tight ranges for each sentence unless the judge finds a basis for departure, and a sequence for carrying out these steps.

Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1697 (1992).

³² Stephan O. Kline points out:

[U]ltraconservatives in the 104th and 105th Congress have launched a particularly broad array of attacks that pose a threat to judicial independence. The Republican majorities considered constitutional amendments that would eliminate life tenure for federal judges. They passed bills which limit the jurisdiction of courts and considered other legislation which would strip judicial remedies. They convened hearings to study and control “judicial activism.” The Senate has brought gridlock to the judicial confirmation process, and senior Republicans have even articulated their desire to impeach and “intimidate” judges because of distaste for particular judicial decisions.

Stephan O. Kline, *Judicial Independence: Rebuffing Congressional Attacks on the Third Branch*, 87 KY. L.J. 679, 679 (1999). Paul L. Friedman argues that “[i]n the current climate, maintaining and preserving . . . independence has become increasingly difficult even for federal judges who have been appointed for life.” Paul L. Friedman, *Taking the High Road: Civility, Judicial Independence, and the Rule of Law*, 58 N.Y.U. ANN. SURV. AM. L. 187, 199 (2001).

³³ Terri Schiavo had been in a persistent vegetative state for more than ten years. Her husband, Michael Schiavo, wanted her feeding tube removed, and claimed it was what Terry wanted.

Her parents ha[d] steadfastly opposed any such action. It [took] over six years for the courts to resolve this end of life decision-making dispute, but within six days of the removal of the feeding tube . . . Governor [Jeb] Bush signed into law a bill that allowed him to order the feeding tube reinserted . . .

Glenn Cohen, *Negotiating Death: ADR and End of Life Decision-Making*, 9 HARV. NEGOT. L. REV. 253, 254 (2004).

and then, shamelessly, turned on the federal judiciary when it would not do Congress's bidding.³⁴ The politicians only abandoned their reprehensible machinations when a disgusted public began to voice its anger at the legislators who had chosen to use a family tragedy for partisan posturing.³⁵

As these events were unfolding, some social scientists began to explore new topics with respect to the delivery of justice. A number focused empirical attention on the judges who had previously been assumed to set the gold standard. To no one's great surprise³⁶ experimental data indicated that judges are human.³⁷ They, like jurors, were found to suffer from hindsight bias and the effects of anchoring. Comparisons between judges and jurors were transformed. Now flawed human beings were featured on both sides of the equation. Not surprisingly, judges looked a whole lot like jurors.³⁸ This is not to say that no differences were identified. In some ways judges, as a group, performed more effectively.³⁹ Be that as it may, the research demonstrated that judges, like jurors, are prone to a range of psychological weaknesses in evaluating the cases before them.

A number of scholars, disappointed with the judiciary, the jury, and the rest of the adversarial apparatus, set out to find a new group of heroes who could wisely, impartially, and compassionately resolve disputes. These scholars claimed that they had found their champions in the ranks of the arbitrators and mediators who operated alternate dispute resolution ("ADR") mechanisms.⁴⁰ As with the claims made on behalf of judges in the '60s and '70s, the

³⁴ Ross Silverman suggests that:

Congress engaged in a number of actions raising . . . ethical and legal concerns. The U.S. House of Representatives Committee on Government Reform . . . issued subpoenas ordering Ms. Schiavo and her husband, as well as the nutrition and hydration-related equipment and several physicians, to appear at a hearing before the committee. This same committee . . . submitted petitions to the Florida Supreme Court and the U.S. Supreme Court seeking relief on Ms. Schiavo's behalf. Over Palm Sunday weekend, Congress passed and the President signed Public Law No. 109-003, "A bill to provide for the relief of the parents of Theresa Marie Schiavo," which raised numerous Constitutional and policy questions . . .

Symposium, *Foreword: The Mass Media's Influence on Health Law and Policy*, 5 Hous. J. HEALTH L. & POL'Y 175, 175-76 (2005).

³⁵ George J. Annas noted that:

Overwhelming majorities of Americans in every major poll taken after Congress passed the Theresa Schiavo Act found that Americans d[id] not want Congress involved in life-and-death medical decisions, but believe[d] these should be made by families . . . Moreover, the public agreed with the determination of the courts in the Schiavo case itself.

George J. Annas "I Want to Live": *Medicine Betrayed by Ideology in the Political Debate Over Terri Schiavo*, 35 STETSON L. REV. 49, 78 (2005).

³⁶ See Landsman & Rakos, *supra* note 7.

³⁷ Guthrie et al. made this point in 2001. Guthrie et al., *Inside the Judicial Mind*, *supra* note 1, at 784.

³⁸ For a direct comparison making this point, see Landsman & Rakos, *supra* note 7.

³⁹ Chris Guthrie and his colleagues concluded that judges "were much more attentive than other experts to base-rate statistics" and were better able to "consider a case from multiple frames." Guthrie et al., *Inside the Judicial Mind*, *supra* note 1, at 818, 822.

⁴⁰ See, e.g., Kevin R. Casey, *Alternate Dispute Resolution and Patent Law*, 3 FED. CIR. B.J. 1, 5 (1993) (arbitrators are superior because they may be selected for their particular expertise); Frank A. Cona, *Application of Online Systems in Alternative Dispute Resolution*, 45 BUFF. L. REV. 975, 985 (1997) (same); Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems? Repeat Players in ADR*, 15 OHIO ST. J. ON DISP.

assertions of extraordinary skill made on behalf of ADR adepts were mostly based on idealizations rather than research. Over the course of the last decade some of these idealizations have been challenged. Arbitrators are today often viewed as flawed adjudicators, prone to a number of weaknesses including bias, inefficiency, and greed.⁴¹ Even mediators who, at least in theory, are not imposing decisions but simply assisting disputants to find their own solutions have come in for criticism.⁴² Most particularly that form of mediation referred to as “evaluative,” because the mediator supplies his or her own opinion about an appropriate outcome, has increasingly been criticized as potentially coercive and dependent on mediator attitudes that may be biased in favor of one disputant or another.⁴³ Since the fall of the arbitrators and evaluative mediators, a new ADR hero has been proclaimed, the “facilitative” mediator who, at least in theory, relies only on the parties’ own views in constructing a solution.⁴⁴ That “facilitative” mediators only listen and help is an article of faith rather than a matter of social science evidence, leading one to suspect that upon closer examination they, too, will be found to have feet of clay.

This brief and over-simplified history suggests that decision maker hagiography is generally the product of idealization rather than close scrutiny or psychological examination. Such was the case when judges were lionized and

RESOL. 19, 59 (1999) (“[T]he repeat player mediator or arbitrator who is expert in a particular field (like discrimination law) actually may provide not only ‘better’ quality resolutions, but more efficient and claimant sensitive services.”).

⁴¹ See Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593 (2005) [hereinafter *Compulsion*].

⁴² Ellen A. Waldman indicates that “many mediators employ a ‘trashing’ style, dissecting the flaws and weak points in each disputant’s case according to prevailing legal norms.” Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703, 734 (1997) (citing James J. Alfini, *Trashing, Bashing, and Hashing it Out: Is this the End of “Good Mediation”?*, 19 FLA. ST. U. L. REV. 47, 66-68 (1991)).

⁴³ Lela P. Love argues that “an ‘evaluative’ mediator gives advice, makes assessments, states opinions – including opinions on the likely court outcome, proposes a fair or workable resolution to an issue or the dispute, or presses the parties to accept a particular resolution.” Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 938 (1997) (arguing that these “activities are inconsistent with the role of a mediator.”).

⁴⁴ According to Professor Leonard L. Riskin, a “facilitative mediator assumes that his principal mission is to clarify and to enhance communication between the parties in order to help them decide what to do.” Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 24 (1996). Samuel J. Imperati stresses that:

The facilitative model of mediation is premised on the assumption that the mediator is totally neutral and does not present personal views on the merits of the case. In other words, a facilitative mediator is theoretically the least interventionist and, at most, would offer an option for settlement only after it becomes clear that the parties cannot generate one on their own. For a facilitative mediator, a “good” settlement is one that the parties can accept, even if one side should or could achieve a better result in a courtroom. Such a mediator is not apt to remedy a substantive power imbalance between the parties by giving the weaker party helpful factual or legal information. However, a facilitative mediator will ensure that both parties have a full opportunity to be heard on all issues.

Samuel J. Imperati, *Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation*, 33 WILLAMETTE L. REV. 703, 709-10 (1997).

jurors criticized. It happened again with ADR providers whose virtues were extolled while judges were damned on the basis of their all too human traits. The pattern seems to be repeating itself in the comparisons being made between evaluative and facilitative mediators. I think that there is good reason to doubt that any group of decision makers or facilitators is free of those biases and mental stumbling blocks that seem to characterize the human condition.

Despite Professor Guthrie's claim that judges' limitations are "largely unacknowledged by the legal system,"⁴⁵ judicial fallibility is not a new discovery. Blackstone was concerned with the issue two-and-one-half centuries ago when he declared:

The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity; it is not to be expected from human nature that *the few* should be always attentive to the interests and good of *the many*.⁴⁶

If it is the case that every dispute resolution mechanism is flawed by the all too human mental weaknesses of those who run it, what is to be done? British lawyers and their progeny, the drafters of the American Constitution, concluded that the only answer was a system of checks and balances that allowed no participant in the process unfettered power. The check to the judges in the Anglo-American system is the jury of twelve citizens called from their daily lives and charged to do justice on a one-time basis. These citizen jurors are free of the judge's biases. They bring the common sense of the community into the courtroom and thereby insulate the process from the judicial predispositions that Blackstone described. Of course, jurors, too, are human, but their numerosity generally serves to counterbalance the strong opinions of any one juror.⁴⁷ When the jury mechanism fails, the courts, both trial and appellate, are available to review the decision and set things right. This is neither a speedy nor inexpensive solution. It can be defeated by widely-shared prejudices and corrupted in a number of other ways but has proven remarkably serviceable in fostering the slow but palpable expansion of the rule of law.⁴⁸

It is remarkable that in thinking about courts and in advising disputants that the courthouse may not be "the best place to resolve their disputes,"⁴⁹ Chris Guthrie makes virtually no mention of the jury. The jury was teamed with judges because, long before the rise of social science, citizens understood that judges are subject to biases and to the sorts of mental shortcomings experienced by all human beings. The balance struck in the Constitution bespeaks an

⁴⁵ Guthrie, *supra* note 5, at 447.

⁴⁶ WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND *379.

⁴⁷ See Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 706 (2001); Phoebe C. Ellsworth, *Are Twelve Heads Better than One?*, 52 LAW & CONTEMP. PROBS. 205, 205 (1989).

⁴⁸ See E. P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 258-69 (1975).

⁴⁹ Guthrie, *supra* note 5, at 460.

awareness of the problem and a thoughtful effort to address it.⁵⁰ To consider judges alone when evaluating the worth of American courts is to miss the crucial check that the system provides. If it is argued that jury trials are rare,⁵¹ the answer may be that we should encourage their growth rather than abandon the courts and chase after new and unproven solutions. If the concern is voiced that jury trials are too costly, then we should explore ways to make them more affordable.⁵² If it is argued that jurors are intellectually ill-equipped for the job, then those making the charge have failed to read the myriad studies that suggest otherwise.⁵³ This is not to say that juries are the solution to all our problems. There are a variety of disputes better settled through ADR. But as lawyers and laymen have known for centuries, not all cases can or should be settled without trial.⁵⁴

In a range of situations, a binding determination by an outsider is necessary both to the litigants and society. When those cases arise, as they do with unceasing regularity, American tradition, history, and experience indicate that judges working with juries are likely to arrive at the most socially satisfactory solutions. Moreover, settling disputes in this way – in open court, with contending parties offering their best proof under the watchful eye of a judge sworn to uphold both substantive and procedural law – is likely to lend legitimacy not only to the decision made but to the whole adjudicatory process.⁵⁵ Social science informs us that these effects touch litigants and onlookers alike.⁵⁶

Professor Guthrie does not agree. He has opted for the idealized ADR provider as hero. Unfortunately, he has not exposed his hero to the same level of scrutiny that he has applied to judges. Even without experimental data there are a series of considerations that should give one pause before endorsing the general superiority of ADR and its practitioners. First, ADR processes are, for the most part, secret.⁵⁷ They are not open to public observation. While secret proceedings may have their value, our society generally adheres to the view that open and public processes lend integrity to the institutions that rely on them.⁵⁸ This is so because public disclosure is likely to serve as a check on misconduct and to place pressure on all the participants (litigants and decision

⁵⁰ Chris Guthrie and his colleagues have noted the superiority of jury trial, at least in some contexts. See Wistrich et al., *supra* note 1, at 1259.

⁵¹ On the paucity of jury trials, see Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 app. at 532 (2004).

⁵² *Id.* at 477-81.

⁵³ See, e.g., Devine et al., *supra* note 47.

⁵⁴ See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995).

⁵⁵ See Stephan Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. EMPIRICAL LEGAL STUD. 973, 978 (2004).

⁵⁶ See generally E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

⁵⁷ See *Compulsion*, *supra* note 41, at 1628-29.

⁵⁸ See, e.g., AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 119 (1997). (“[T]he public trial was designed to infuse public knowledge into the trial itself, and, in turn, to satisfy the public that truth had prevailed at trial.”).

makers alike) to behave fairly.⁵⁹ Closed processes are inferior in terms of lending legitimacy to the bodies that rely on them. If the history of recent events, from Guantanamo⁶⁰ to governmental consultations on national energy policy,⁶¹ teaches us anything it is that secrecy poses grave risks and often indicates actors with something to hide.

The problem of secrecy is compounded in the ADR setting by the absence of appellate review.⁶² Professor Guthrie criticizes the courts because of the weakness of appellate review in catching judicial errors.⁶³ That criticism loses its force if the favored alternative (ADR) offers no review whatsoever. Again, recent events counsel us that the absence of appellate oversight can lead both to grave injustices and the appearances of an unjust system. Scholarly condemnation of the hermetically sealed processes under consideration by the American military to review enemy combatant status powerfully illustrates this point.⁶⁴

Professor Guthrie contends that one of the more serious shortcomings of the courts is that:

Because disputants in litigation settle in the shadow of legal rulings, agreements reached while immersed in the litigation process might very well reflect the potentially distorted judgment of the judge rather than the underlying merits of the case.⁶⁵

Putting aside all the qualifiers that render this statement hard to pin down, it seems to be asserting that interim judicial rulings are, because of the judge's mental infirmities, likely to drive litigants away from the "merits" as they seek to settle their cases. This is not only a claim that cries out for empirical verification but is as much a justification for getting judges back on the bench trying

⁵⁹ JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1834 (3d ed. 1976) ("In acting under the public gaze, [the officers of the court] are more strongly moved to a strict conscientiousness in the performance of duty."); see also *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) ("[The public has a right to] monitor the functioning of [the] courts, thereby insuring quality, honesty, and respect for [the] legal system.").

⁶⁰ In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773 (2006), the Supreme Court rejected the Bush Administration's secretive and unreviewable military tribunals, joining the world in the condemnation of the Guantanamo approach. For criticisms from Danish, Swedish, and Saudi Arabian officials, see Suzanne Goldenberg et al., *Guantanamo Suicides: 'Killing Themselves Was Unnecessary. But It Certainly Is a Good PR Move': Bush Officials' Hard Line Provokes Condemnation: US Ally Admits Prison Is Hampering War on Terror*, THE GUARDIAN (London), June 12, 2006, at 3.

⁶¹ For a detailed description of the litigation surrounding the Bush Administration's refusal to divulge records of those who had been in contact with the National Energy Policy Development Group (allegedly including Enron's Kenneth Lay, among others), see Bradley Pack, *FOIA Frustration: Access to Government Records Under the Bush Administration*, 46 ARIZ. L. REV. 815, 837-38 (2004).

⁶² ADR lacks judicial procedural protections and sharply curtails appellate review. The process is confidential, outside of public or judicial scrutiny, and lacks enforcement mechanisms to address participant misconduct or abuse of the process. See Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591, 603-04 (2001).

⁶³ Guthrie, *supra* note 5, at 447-48.

⁶⁴ See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 552 (2004).

⁶⁵ Guthrie, *supra* note 5, at 452.

cases (rather than “managing” them with a flurry of pretrial rulings) as it is a reason for shunning the court system.

At a deeper level, Guthrie’s claim raises difficult questions about defining what we mean by the “merits” of a case. In most branches of ADR, substantive law is not formally applied.⁶⁶ Hence, the “merits” are what ADR providers, most particularly arbitrators, define them to be. This does not get us to the parties’ opinion of the “merits.” Rather, it gets us to the arbitrators’ subjective understandings. No matter how badly a judge is doing her job, there are still objective legal standards that may be brought to bear. No such standards draw ADR providers back to socially defined “merits.” It may be urged that, at least in certain ADR contexts, like mediation, providers are trained to identify and honor the parties’ subjective views of the “merits.” Whether mediators achieve this objective is a fitting question for social science exploration. Professor Guthrie marshals no evidence that mediators actually identify and pursue the parties’ subjective notions of the “merits,” and, at least with respect to “evaluative” mediators, admits that many do not realize this objective.⁶⁷

In a number of different settings ADR processes have proven themselves hostile to the poor, the weak, and the one-shot players.⁶⁸ Courts, too, have faced this sort of criticism. In response, the judicial branch of government has adopted a range of procedures from discovery to legal aid. None of these has worked perfectly, but all express a clear concern to control the excesses of the powerful. A number of observers have remarked that ADR procedures, which often do not have these procedural protections, are, generally, advantageous to the strong. Richard Delgado and his colleagues so argued early in the ADR debate.⁶⁹ A study of informal divorce processes in the *Yale Law Journal* reached the same conclusion.⁷⁰ Similar difficulties have been identified in court-annexed mediation.⁷¹

Though anecdotes prove little, one seems illustrative of the problem in the court-connected ADR context. A California federal court employee-mediator facing a potentially unbalanced and clearly difficult litigant convened a mediation session in an effort to resolve a thorny property case. He pressed the session for fourteen hours without recess. At the end of that time the difficult litigant was worn down and agreed to a “settlement” that surrendered her only worldly assets and had the effect of putting her out on the street.⁷² That result might have been legally defensible,⁷³ but it raised the most serious questions

⁶⁶ See *Compulsion*, *supra* note 41, at 1608-09.

⁶⁷ Guthrie, *supra* note 5, at 454-55.

⁶⁸ See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985); Gary LaFree & Christine Rack, *The Effects of Participants’ Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & SOC’Y REV. 767, 789-93 (1996); Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. LEGAL EDU. 49, 54 (2004).

⁶⁹ See Delgado et al., *supra* note 68.

⁷⁰ Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549 (1991).

⁷¹ See *Compulsion*, *supra* note 41, at 1619-22.

⁷² See *Olam v. Cong. Mortgage Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999).

⁷³ *Id.* at 1149.

about mediator fairness and about the power wielded by ADR providers, often at the behest of the well-heeled.

Professor Guthrie has given us a lot to think about. Our intellectual lives are enriched by his work. Yet the old wisdom, won through centuries of experience, should not be forgotten because of the enchantment of new findings. Judges are and always have been human. Most of us understand that and the system has taken cognizance of it as well. Even in the days of Susanna and the Elders more than two thousand years ago, it was understood that judges might be corrupt.⁷⁴ Since we seldom have, as in this story from the Apocrypha, a hero like Daniel sent by the Lord to right the wrongs done by bad judges, we have developed a number of mechanisms to help safeguard proceedings. They include juries, open proceedings, clearly defined laws identifying the merits, and appellate review. They do not work perfectly but they help significantly. Moving away from them to secret, unregulated proceedings hardly seems the most promising avenue for improvement.

⁷⁴ See the Apocrypha story of Susanna and the Elders (*Daniel* 13). It recounts the travail of a lovely young Hebrew woman who is falsely accused by two lecherous elders (judges). As she bathes in her garden, having sent her attendants away, two lustful elders secretly spy on the lovely Susanna. When she makes her way back to her house, they accost her, threatening to claim that she has had a tryst with a young man in the garden unless she agrees to satisfy their lustful desires. *THE NEW OXFORD ANNOTATED BIBLE WITH THE APOCRYPHA* 213 (Herbert G. May & Bruce M. Metzger eds., Oxford Univ. Press 1973). The incident is the fulfillment of the Lord's prophecy when the two judges were appointed, "[i]niquity came forth from Babylon, from the elders who were judges, who were supposed to govern the people." *Id.*