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Justice by Lot: The Taboo of Chance Verdicts in America

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I. INTRODUCTION

In the winter of 1908, an Irish immigrant named John Casey walked into a New York City Supreme Court courthouse for jury duty. He was a big burly man, an ironworker, and was pleased to have been called as a juror by his adopted city. His family had wished him well as he went out the door that morning. He was assigned as a juror to a wrongful death case where the victim was a little girl. As the jury deliberated and deadlocked, another man on the jury grumbled that he had $6,000 in his pocket and was eager to leave the courthouse to close an important real estate deal. The jury could not agree on a proper resolution. The foreman of the jury, an accountant, suggested they flip a coin. Unsure of the proper procedure in American courts, Casey agreed, and the coin came up for the defendant.

As Casey filed out of the jury room with the rest, he had no idea that he and his fellow jurors were soon to be humiliated in newspapers all across America for deciding a case in such a way. He had no idea that he was about to be fined $50 (equivalent to $1,300 in 2018 after adjusting for inflation) for his mistake. He had no idea that he would be dead within months from chronic renal failure, likely exacerbated by his drubbing in the court of public opinion. He would die of shame, reported one newspaper, beset by grief at the thought that he had failed the little girl’s family and his adopted country. The Casey narrative is just one example of a phenomenon that can be observed throughout American history.

Trial by jury has been a hallmark of the English and American legal tradition for centuries. A trial by one’s peers reinforces the notion that justice will be administered to defendants impartially by a group of community members who are disinterested. They will be neutral, drawn from the community at large, and possess “ordinary” sensibilities that will allow them to divine “truth” from the presentation of facts at trial. Of course, even as the jury has remained prominent in the justice system of the United States, the composition of juries has changed markedly. As old prejudices began to
lose the force of law (but not wither away), different members of society began to join the jury pool. Thus, the jury has changed with the United States as it has grown. This tinkering with the jury system has remained constant even as the role of the jury has receded, as fewer and fewer cases proceed to trial.

The debate over the role of juries in our society, far from atrophying, is still unsettled and contentious. Recently, in the case of *Peña-Rodríguez v. Colorado*, the Supreme Court tackled the question of whether to allow jurors to testify as to the racial bias of their co-jurors during deliberations. Under the present formulation of the jury system, jurors at the federal level are only permitted to testify as to the content of their deliberations in very limited circumstances. Justice Kennedy, writing for the majority, held that post-trial juror testimony regarding racial bias was admissible as a judicially articulated exception to Federal Rule of Evidence 606. He noted that racially tinged verdicts have a unique history and reiterated that cases would arise in which faith in the jury system would be sorely tested. In such cases, exceptions to the no-impeachment rule would have to fall away.

Living in the shadow of—and sometimes walking hand in hand with—that history of racially motivated outcomes is another form of defective verdict. Under the *Peña-Rodríguez* schema articulated by Justice Kennedy, a “racially tinged verdict” is an explicit category of undesirableness. Its

4. See Fed. R. Evid. 606(b). The rule has three narrow exceptions—in other words, the rule spells out quite clearly the only circumstances where a juror may testify about the deliberations that he or she witnessed. The first exception applies where a jury reviewed, received, or used extraneous prejudicial information. Fed. R. Evid. 606(b)(2)(A); see also Bulletin Displays, LLC v. Regency Outdoor Advert., Inc., No. SACV 05-1083-CJC(ANx), 2012 WL 12950708, at *3 (C.D. Cal. Apr. 9, 2012). The second exception applies where an outside influence improperly influenced the jury; bribery and threats fall under this umbrella. Fed. R. Evid. 606(b)(2)(B); see also United States v. Rutherford, 371 F.3d 634, 644 (9th Cir. 2004). The third and final exception applies where the jury made a mistake on the verdict form, like entering “Guilty” instead of “Not Guilty” or incorrectly noting a damage figure. Fed. R. Evid. 606(b)(2)(C); see also TeeVee Toons, Inc. v. MP3.Com, Inc., 148 F. Supp. 2d 276 (S.D. N.Y. 2001). In the context of this paper, it should be noted that the legislative drafters of Federal Rule of Evidence 606 contemplated the inclusion of quotient verdicts in the rule and did not. See *Peña-Rodríguez*, 137 S. Ct. at 877 (Alito, J., dissenting); Reyes v. Seifert, No. 2:01-cv-08666-PA-MAN at *18 n.6 (C.D. Cal. Apr. 10, 2003).
5. Peña-Rodríguez v. Colorado, 137 S. Ct. 855, 869 (2017) (“[W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror’s statement . . . .”).
6. Id. at 868 (“This Court’s decisions demonstrate that racial bias implicates unique historical, constitutional, and institutional concerns.”).
7. Id. at 865–66 (“In addressing the scope of the common-law no-impeachment rule before Rule 606(b)’s adoption, the *Reid* and *McDonald* Courts noted the possibility of an exception to the rule in the ‘gravest and most important cases.’” (citing United States v. Reid, 53 U.S. 361, 366 (1851); McDonald v. Pless, 238 U.S. 264, 269 (1915))).
ugliness is self-evident, and a competent jurist will reflexively cast it aside. The line between a verdict based on truth and a verdict premised on what the community wants has always been porous, if not entirely illusory. This dissonance is demonstrated by the history of chance verdicts in America, which explicitly fits the bill of verdicts implicating "unique historical, constitutional, and institutional concerns."

So-called “chance verdicts” have appeared in the legal literature under many different names since the nation’s founding. Some sources speak of “verdict by lot” or a verdict made with “resort to the determination of chance.” Others speak of “gambling verdicts,” invoking the image of a vice infringing on the civic realm. In short, a chance verdict is a term that describes several different kinds of juror misconduct, ranging from flipping a coin to decide a case, to averaging different jurors’ preferred damage figures.

Chance verdicts are a unique and troubling phenomenon because so much of what jurors discuss and debate is closed from the view of the justice system. Attorneys package their cases as neatly as possible, the judge ensures the proceeding is fair and comports with precedent, and then the jury makes a decision based on the facts before it. Chance verdicts throw that process into chaos. Why even bother with a trial if one could simply flip a coin to decide a dispute or declare a defendant guilty or innocent?

8. Peña-Rodríguez, 137 S. Ct. at 868. This paper is not trying to show that the history of racial animus and chance verdicts are somehow equivalent (nor could it). Rather, this paper uses the logic of Peña-Rodríguez to assess another area of the law implicating similar concerns. Indeed, if one understands Peña-Rodríguez as posing a question—how far can juries go?—and then answering that question as to one dimension of the problem (racist jurors), then this paper seeks to explore an adjacent, smaller dimension: chance verdicts. In Peña-Rodríguez, Justice Kennedy noted that, “[j]urors are presumed to follow their oath . . . and neither history nor common experience show that the jury system is rife with mischief of these or similar kinds.” Id. (emphasis added). This paper challenges that statement’s reference to history because chance verdicts are more than a historical curiosity. Understanding their impact and how society responded to them can only further a rigorous assessment of when one inevitably recurs. Cf. id. at 871 (“It is the mark of a maturing legal system that it seeks to understand and to implement the lessons of history.”).


10. See, e.g., Wilson v. Berryman, 5 Cal. 44 (1855).

11. In 2007, the Virginia Supreme Court removed a Juvenile Court judge for deciding a custody issue by a coin flip. Judicial Inquiry & Review Comm’n of Va. v. Shull, 274 Va. 657, 674 (2007) (“A judge’s act of tossing a coin in a courtroom to decide a legal issue pending before the court suggests that courts do not decide cases on their merits but instead subject litigants to games of chance in serious matters without regard to the evidence or applicable law.”). This public indignation at the use of chance is not limited to the legal field. In a recent season of the popular show “The Bachelor” in New Zealand, a public uproar ensued when it was revealed that the final choice was made by a coin toss. See Alex Casey, EXCLUSIVE: Jordan Mauger Flipped a Coin to Decide the Winner of The Bachelor NZ, The Spinoff (Apr. 26, 2017), https://thespinoff.co.nz/tv/26-04-2017/exclusive-jordan-mauger-flipped-a-coin-to-decide-the-winner-of-the-bachelor-nz (“Mauger did not make any mention of his methodology on screen, leaving viewers with the impression that he had followed his heart, rather than a small metal disc.”). In another recent episode in the public sphere involving coin flips, several police officers were terminated after flipping a coin to decide whether to arrest or release a driver caught speeding. See Jacey Fortin,
Conversely, because a coin flip is statistically fair, some commentators have even proposed integrating lotteries into certain aspects of the judicial system. Chance verdicts make lawyers and the public question how safe the system of trusting community members with defendants’ fates really is. If the ideal juror brings good judgment and common sense to a proceeding, a chance verdict exposes how far away our society is from that ideal. It makes the whole legal system seem like a pretense to justice rather than a set of procedures by which justice may be sought and realized.

Peña-Rodriguez and earlier cases contemplated that in unique circumstances, jurors could testify as to misconduct so egregious that it shocked the conscience. A narrower reading of the Peña-Rodriguez decision might be that because racial animus has a unique and tortured relationship with historical deprivation of people’s constitutional rights, history should unlock the gates of Rule 606(b). This paper posits that pure chance verdicts (that is, when the jury flips a coin to decide the case)—if not quotient verdicts as well—share some of that taint of mob justice, and thus jurors should be allowed to testify in federal court as to pure chance verdicts. With regard to the state system, this paper seeks to show that chance verdicts occur in a particular social context that will inevitably arise again. By tracing the evolution of state statutory and judicial decisions allowing such testimony—and by closely examining under-explored historical examples—this paper will argue that the seemingly-odd chance verdict could fit into the “gravest cases” exception to the no-impeachment rule.


13. From a litigant’s perspective, this is a difficult argument for several reasons. First, the text of Rule 606(b) is very broad, employing the word “any” and its variants several times in reference to evidence about which jurors are prohibited from testifying. Second, the rule’s legislative history indicates that a narrower rule was considered by Congress and rejected. Third, the opinion in Tanner v. United States, 483 U.S. 107, 108 (1987) and its progeny seems to preclude such testimony. But all is not lost. The Supreme Court has been willing, in past cases, to articulate exceptions to general rules, when applying them would result in an injustice. Cf. Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (“In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.”). In the case of a “full chance verdict” (defined infra Part I.A), the Court should hear credible evidence that the jury used a chance method in the interests of justice. Such verdicts defy the most basic tenets of the Constitution, including the rights to due process and an impartial trier of fact. U.S. Const. amends. V, VI, XIV. Jurors must base their conclusions on the evidence at trial. Neb. Press Ass’n v. Stuart, 427 U.S. 539, 551 (1976).

14. Indeed, the media frenzy surrounding the officers who flipped a coin is but a taste of the publicity that might accompany the uncovering of a chance verdict.
This paper also seeks to further develop the literature surrounding chance verdicts. The existing literature well documents the evolution of the rules governing juror misconduct as they specifically relate to chance. Specifically, the extant scholarly work documents the efforts of states to allow jurors to testify as to chance verdicts, the problem of agreeing to be bound in advance, the problem of proof, and the origins of the English common law rule. Given that the literature precedes the development of the internet, it is now possible to reconstruct the cases where a chance verdict actually occurred. This paper seeks to build upon the legal foundation built by these earlier authors and fit this newly discovered human element into a legal structure. That is, the episodes discussed by this paper suggest that chance verdicts will recur; this paper offers a schema for addressing them.

A. The Four Species of Verdict by Lot

The term “chance verdict” encompasses several species of offensive jury verdicts. Courts often use terms like “chance verdict,” “verdict by lot,” or “quotient verdict” interchangeably to refer to different situations where a jury has committed some form of misconduct involving chance. Distinguishing between these different forms of verdict is crucial to understanding how each fits into a larger social schema of juror abdication and judicial apprehension. This paper will employ the following categories to better assess what each verdict is and what problems it poses:

1. “Full Chance Verdict.” We might define a full chance verdict as a verdict in which the entire jury agrees to decide the case presented by using some form of chance. In other words, a “full chance verdict” relates to a binary choice of guilt in

15. See Comment, Impeachment of Jury Verdicts, 25 U. CHI. L. REV. 360, 370–72 (1958); A. V. J. P., Note, Chance and Quotient Verdicts, 37 VA. L. REV. 849 (1951); see also Note, Admissibility of Jurors’ Affidavits to Impeach the Verdict, 44 YALE L.J. 516 (1935); B. M. K., Note, Jurors—Impeachment of Verdict, 64 U. PA. L. REV. 86 (1915); Henry Wade Rogers, Impeachment of Verdicts for Misconduct, 13 CENT. L.J. 61 (1881), http://hdl.handle.net/2027/osu.32437010780340; see generally 75B AM. JUR. 2D Trial §§ 1539, 1545 (2019); 58 AM. JUR. 2D New Trial § 249 (2019); 89 C.J.S. Trial § 961 (2019). This paper leaves for another day, and for other commentators, discussion of the Iowa rule, which historically was a mode by which jurors could testify as to matters not inhering in the verdict. See Admissibility of Jurors’ Affidavits to Impeach the Verdict, 44 YALE L.J. 516, 518 (1935); see also Benjamin T. Huebner, Note, Beyond Tanner: An Alternative Framework for Postverdict Juror Testimony, 81 N.Y.U. L. REV. 1469, 1489–90 (2006) (discussing the remaining states where the Iowa rule retains vitality). Huebner has also assembled an analysis of how states’ rules of evidence resemble the federal rules. Id. at 1500 (Appendix A) (note that Huebner compares state rules of evidence corresponding to FED. R. EVID. 606(6), and does not survey other statutes outside of state rules of evidence discussing chance verdicts).


17. Id. at 854.

18. Id. at 856.

19. Id. at 856–57.
the criminal context or liability on the civil side. The form of chance employed could be flipping a coin to decide the question, drawing slips of paper marked “Guilty” or “Not Guilty” out of a hat, or the like. In these cases, the jury agrees to be bound by the result of the randomized instrument.\footnote{An example of an alleged full chance verdict is} Beakley v. Optimist Printing Co., 152 P. 212, 213 (Idaho 1915), where two jurors claimed that the whole jury tossed a dollar three times and agreed that the majority winner of the throws would win the verdict. It is important to note that counteraffidavits in this case disclaimed any involvement with the tossing of a coin. See id. at 215 (Sullivan, J., dissenting) (noting that “the affidavits in this case are ten to two that the verdict was not arrived at by pitching a dollar”). For another full chance verdict involving drawing names out of hats, see Mitchell v. Ehle, 10 Wend. 595, 595 (N.Y. Sup. Ct. 1833); see also Merseve v. Shine, 37 Iowa 253 (1873) (involving more hats).

2. “Partial Chance Verdict.” A partial chance verdict occurs when a smaller portion of the jury employs the tactics described above in a full chance verdict. One juror could rest his or her vote upon the outcome of a coin toss, or several jurors could do so. In these cases, jurors often comprise the swing or holdout vote. Thus, the element of chance is injected into the fuller jury’s deliberations, often without the knowledge of the “innocent” or “law-abiding” jurors.\footnote{An example of a partial chance verdict is} Dixon v. Pluss, 98 Cal. 384, 385 (1893). Another classic example is Schwindt v. Graeff, 142 N.E. 736, 737 (Ohio 1924), where a juror repeatedly flipped coins to determine whether to switch sides. See also Reyes v. Seifert, 125 Fed. App’x. 788, 789 (9th Cir. 2005) (holdout flipped a coin during lunch, discussed infra Part III.D).

3. “Full Quotient Verdict.” A full quotient verdict refers to a situation in which the entire jury agrees to use an averaging technique to arrive at a damages figure (civil) or the duration of imprisonment (criminal). Each juror writes his or her preferred figure on a slip of paper, and the numbers are averaged. Importantly, to comprise a full quotient verdict, the jury \textit{must} agree in advance to be bound by the result of the averaging, without further discussion, after the results are announced to the group. Thus, a single juror may throw off the average by inserting a very high or very low figure. For example, if the plaintiff in a civil case sought $50,000 in damages, and a single juror writes down $1,000,000, then that juror could theoretically manipulate the final damages figure to be higher than what the plaintiff sought. Conversely, if a juror is unconvinced that liability should attach, then he or she could throw off the average by writing $1.00.\footnote{An example of a full quotient verdict is} Flood v. McClure, 32 P. 254 (Idaho 1893). An example of a full quotient verdict where the jurors used extremely disparate figures is Marriner v. Dennison, 27 P. 927 (Cal. 1891), modified on reh’g, 27 Pac. Rep. 1091. See infra note 236 and note 239. See generally Pawnee Ditch & Improvement Co. v. Adams, 28 P. 662, 662 (Colo. 1891)
4. “Working Full Quotient Verdict.” This term refers to a jury that uses the method described above in subsection 3, but then uses that average as a platform for further discussion. The average, then, functions as a tool to show the jury the general consensus thus far. Most courts consider this sort of averaging as part and parcel of the negotiations that jurors are entitled to conduct.23

Distinguishing between these types of chance verdicts are often glossed over by courts,24 but, crucially, these subtle differences reveal major fault lines along which courts attempt to strike a balance between preserving a defendant’s rights and keeping the jury safe from the prying eyes of clever defense counsel. Hybrids of these four formulations of course exist.25

(“The proof was not disputed, and it clearly establishes an agreement to be bound by the result to be thus obtained, which should remain the verdict without further consideration of the issues which had been submitted.”).

23. An example of a working quotient verdict is Hunt v. Elliott, 20 P. 132, 133 (Cal. 1888). There, the California Supreme Court noted that the jury’s discussion after the quotient method was used made the verdict viable because the jury had not agreed to be bound by the blind quotient process. Id. at 133–34.


25. In Clark v. Foster, 391 P.2d 853, 856 (Idaho 1964), the jurors used a quotient method to compute which party had been more negligent. The court noted that this method had corrupted the entire verdict, “not just one cause of action.” Id. at 858. In another example, jurors could not agree on a damages figure and flipped a coin as between two figures. Crawford v. Consol. Underwriters, 323 S.W.2d 657, 658 (Tex. Civ. App. 1959) (“The jurors had become deadlocked over whether the amount was to be $1,250 or $1,450. To resolve the question, they agreed to flip a coin and to abide the result. A coin was flipped and it favored an award of $1,450.”). The Texas appellate court reversed. Id. Another unusual example is Memphis & C. R. Co. v. Pillow, 56 Tenn. 248, 254 (1872), where the jury selected three representatives of each “damages” camp within the jury (one was for extreme damages, one for medium damages, and the third for minor damages), and agreed to abide by whatever they came up with. The Tennessee Supreme Court reversed, saying “[t]hey surrendered their own judgment and their own will and voice in the settlement of this important question, and were mere instruments for the registration of the judgments of the three jurors selected . . . .” Id. The takeaway here is that juries devise all kinds of methods for advancing deliberations. Just because a method used by a jury does not perfectly fit into past patterns does not mean that such verdicts should be free from scrutiny.
B. Modes in Which Courts Analyze These Verdicts

By that same token, courts adopt different perspectives when examining the implications of juror misconduct. Categorizing these approaches is valuable because it enables perception of the changes in discussion of chance verdicts over time. In general, the four approaches are:

1. **“The Public Order Perspective.”** Some judges frequently characterize chance verdicts as dangerous to public order.26

2. **“The Rules Perspective.”** Some courts view the question of chance verdicts as a test of whether to bend the no-juror-impeachment rule from the perspective of *stare decisis*.27

3. **“The Rights Perspective.”** Other decisions imply that a defendant holds a fundamental due process right to a trial in which jurors fairly consider and debate the case at hand.28

4. **“The Practical Perspective.”** Some decisions speak of quotient verdicts as part of the inevitable give and take that juries must conduct.29

26. An example of this phenomenon is *Goins v. State*, 21 N.E. 476, 482 (Ohio 1889), where the Ohio Supreme Court opined that verdicts like the hybrid considered “may present a spectacle so credible to our jury system” as to call a universal application of the no-impeachment rule into doubt.

27. See, e.g., *Schwindt v. Graeff*, 142 N.E. 736, 737 (Ohio 1924). Justice Robinson opined for the majority that the no-impeachment rule must stand:

> While this cause presents a situation which strains the rule almost to the breaking point, and demonstrates that every hard and fast rule, whatever its origin, will not further the ends of justice in all cases, yet, so long as we are to continue to be governed by law, rather than by men, a rule must be adhered to which is designed to accomplish justice in the greatest number of cases . . . .

*Id.* (emphasis added). Chief Justice Marshall, dissenting, took a different tack, and challenged the underlying logic of the rule itself. *Id.* at 738 (Marshall, C.J., dissenting); *see also id.* at 740 (“Like Caesar’s wife the administration of justice must be above suspicion. Any rule of long standing should generally be followed, but when it clearly appears that the rule is wrong there should be no hesitation in reversing it.”).

28. An example of this approach is *Beakley v. Optimist Printing Co.*, 152 P. 212, 214 (Idaho 1915), a full chance verdict case. There, the Idaho Supreme Court said:

> Litigants are not presumed to take chances in submitting their differences to a jury by the tossing of a dollar or by any other gambling method; and, while such conduct might be innocent on the part of the jurors, it is nevertheless contrary to law, and should not be encouraged. Parties to a suit have a right to have their differences carefully and conscientiously considered by the jury, and jurors are bound to return verdicts according to the evidence and the instructions of the court.

*Id.* (emphasis added).

29. One example is the California Supreme Court’s approach in *Mirabito II*. See infra note 247. In discussing another quotient verdict, a later court in New York opined:

> Realistic reflection forbids indulging in the vagary that the 12 good men and true who walk into a jury room to evaluate pain and suffering can do so objectively and by application of any common norm or reason. We can arrive at no other conclusion but that a great deal of “arithmeticking” goes on in the jury room in situations of this kind. For the determination of each member of the jury is susceptible to and influenced by his own individual experiences relative to pain and suffering and to his own ability to sustain, endure and tolerate it.

These perspectives often shape the outcomes of chance verdict cases. Precisely because a chance verdict challenges the integrity of the jury system, responses to one often strike at the heart of the author’s beliefs about jurors and the justice system.

C. Jury Nullification

A critical perspective on chance verdicts is jury nullification. In one sense, a chance verdict is diametrically opposed to the concept of jury nullification. Jury nullification occurs when a jury acts deliberately to defy or contravene the law to arrive at a result that the jury considers just. Chance verdicts occur when a jury refuses to deliberate or abdicates their responsibility to adjudicate. In that sense, a chance verdict cannot simultaneously constitute jury nullification because the jury is leaving the realm of engaging with the law and the facts of the case completely.

But in another sense, we might understand some chance verdicts as a sub-species of jury nullification. This is because in some forms of chance verdicts, the jury believes that the choice they are presented with is too charged to render a decision. As community members, they are unwilling to act to punish someone for an illegal act. Rather than explicitly nullify the proceedings, they resort to a chance method either to decide the case or compute damages. This reduces the level of individual juror responsibility for the result of the whole. In this manner, an unwilling juror can relieve discomfort with the proceeding (either the substance of the case or the burden of working with other, more stubborn jurors) by leaving the decision up to a method that in the moment seems fair. Thus, the juror nullifies the proceedings by washing his or her hands of the appointed task.

Juries are an attractive tool for dispute resolution because they are both “secret and definitive.” The jury verdict is the ultimate exercise in discretion based on facts. But the notion of the jury has taken on significance as a particularly American symbol of democratic justice, and some commentators view jury nullification as an extension of that duty to administer justice. Others subscribe to the notion that a jury is beyond such crude instruments as compromise. “[T]he paramount and sworn duty of jurors is


31. Most accounts of chance verdicts—as discussed infra Part II—reflect that they occur in pressured situations.


to serve the truth as a higher goal than even consensus or agreement. 34
When juries take an oath, they commit themselves to serving something
greater than themselves. 35 Juror oaths often speak of the requirement that
juries render a “true” verdict. 36 In that sense, then, a verdict where chance
is involved represents the civic equivalent of an uninvited guest, whereas jury
nullification is—depending on the observer—the logical extension of, or
abdication of, the oath. 37 But for verdicts using chance methods, it is clear
that they undermine the proceeding and call into question the very notion of
community justice; with jury nullification, the issue is disputed. For this
reason, chance verdicts have particular significance for jurists and policy-
makers because of the threat they pose to the integrity of the system itself.

D. Ideal Jurors

The problem with uncovering a chance verdict is that airing juror mis-
conduct could destroy the jury system. Chance verdicts are so captivating
and divisive because they capture people’s insecurities about community-
based judgment. Can we trust juries? Can we trust each other? Justice
O’Connor in Tanner answered, in the main, that if we lift the curtain ob-
scuring the jury’s deliberations, what we see will drain trust from the sys-
tem. 38 But Judge Reinhardt in dissent in Reyes (discussed infra Part III.D)
answered that policing misconduct can maintain that trust. 39 When must the
legal system shield a jury—no matter its crime?

Courts answering these questions in the context of a chance verdict
must simultaneously contend with different apprehensions. First, many
courts invoke the unwelcome prospect of a cascade of intrepid defense law-

34. Jeffrey Abramson, Jury Deliberation: Far and Foul, in J U R Y  E T H I C S 186, 186 (John
Kleinig et al. eds., 2006). Abramson argues that political compromise is the stuff of legislative
deliberation rather than jury deliberation.

35. See CONRAD, supra note 30, at 240 (discussing the juror oath in different states and
different examples of jurors breaking oaths).

36. See id.

37. DUXBURY, supra note 12, at 46 (“In fiction, the lottery frequently represents tyranny: to
decide randomly is very often to engage in capricious, unnerving, malevolent behavior.”); see also id. at 20 (discussing chance verdicts). Courts have also picked up on this problem of oath break-
ing. See Goodman v. Cody, 1 Wash. Terr. 329, 331–32 (Wash. 1871) (“The same defects exactly
occur in a verdict got by average of sums furnished by individual jurors. In neither case is the
verdict made valid by the oath of the jury, since in both cases it is got in a manner incompatible
with submission to their oath.”).

38. Tanner v. United States, 483 U.S. 107, 120 (1987) (“It is not at all clear, however, that
the jury system could survive such efforts to perfect it.”).

39. Reyes v. Seifert, 125 F. App’x 788, 789 (9th Cir. 2005) (Reinhardt, J., dissenting). Reyes
is typical of the divide that courts often encounter in managing these problems.
not as an instrument of justice, but as an instrument of anarchy, or—perhaps worse—of mob violence. Third, there is a fear of letting a verdict stand that undermines the judicial system by disrobing its unfairness. There is a tension in chance verdict cases between an “ideal” jury (sober, disinterested, attentive, and fair) and the “scalawag” jury (predisposed, prejudiced, lazy, and arbitrary). Judges are palpably afraid of a jury predestining an outcome or agreeing to be bound to a damages figure that one juror could throw off with a high average. The simple reality is, and always has been, that juries bring a great deal of predisposition and prejudice into their deliberations. The question is what to do about it when reliable evidence of misconduct surfaces.

Given the import of these questions, chance verdicts are a useful lens in assessing a community’s perspective on the jury’s power. Jurists throughout American history have come to different conclusions on these problems. As we delve into the history of chance verdicts, it is important to remember that we might conceptualize “chance” as the unstable element that has been improperly introduced into the sanctity of the jury room. But this is an illusion, and one that judges frequently invoke. The truth is that chance is not the unstable element when a jury contemplates using chance methods—it is the community itself that is unstable.

II. CHANCE VERDICT VIGNETTES

Four vignettes in the history of chance verdicts illustrate how and why these troubled verdicts tend to crop up in court reporters every ten or so years. Far from the outlandish and isolated incidents portrayed in the decisions, these individual stories demonstrate that when conditions are ripe, some juries will turn to chance methods to resolve some or all of their differences. In extreme cases, this means deciding the whole case with a flip of a coin. It could also mean drawing names out of a hat to decide between two alternatives or using a quotient method to satisfy different stubborn elements of the jury. These are not freak occurrences. As long as jurors are deciding cases, these vignettes suggest that chance verdicts will occur sporadically. They also suggest that chance verdicts have been poorly understood as an outlier in the American justice system rather than as an integral—if infrequently proven—component of the history of juries. Each story, to some degree, fits a schema.

A. Crafting a Schema for Assessing Historical Episodes

First, each verdict occurred amidst some sort of upheaval within the community. The upheaval could relate to the facts of the particular case, or

the case itself could relate to larger changes that the community was experiencing. These upheavals put pressure on these juries to use chance methods to either shy away from their role as deciders—or, in the alternative, to express their disapproval at the process.\footnote{It is also important to concede here that some jurors simply use chance methods out of pure apathy. While examining these vignettes through the lens of sloth may help explain these outcomes, it does nothing to aid us in using these events to gain insight into the jury system.} In the \textit{Dickson} case, the upheaval was the massive changes in tort liability at the beginning of the twentieth century, as courts wrestled with how to deal with new liabilities like streetcars. That upheaval related directly to the facts of the case, producing a sympathetic plaintiff that inflamed the jury’s passions and brought them to a deadlock. In the \textit{Tharp} case, the trial took place in the context of a campaign in Arkansas to restore the image of the state’s justice system as meting out punishments without the interference of local mobs. Simultaneously, \textit{Tharp} itself was a case of extrajudicial violence; the community sought to protect one of its own who had “acted like a man.” The \textit{Perkey} and \textit{Goins} cases, meanwhile, were part and parcel of a struggle in which racial tensions boiled over in local communities. The bar fight in \textit{Perkey} and the election riot in \textit{Goins} were each racially motivated events, and there was pressure on the jury to act a certain way.

Second, these cases are important because their facts were fairly clear. In other words, there was little doubt in each case of what had happened. The trials occurred in communities already convinced of what had transpired, and the only question to be resolved was what the community wanted to do about the violence. Because that question was a charged one, these juries acted rashly under pressure. The \textit{Dickson} jury punted and flipped a coin to decide the case, the \textit{Tharp} and \textit{Perkey} juries used quotient methods, and the \textit{Goins} jury drew lots as between two different measures of guilt. In each case, it is self-evident that these methods were used because the jury could not agree on a just outcome, even if they agreed on what had happened.

Third, in each case, the media played an outsized role in publicizing and scandalizing the result. Indeed, the only reason that records of some of these cases survive is because the newspapers at the time felt that the cases were newsworthy. It might be more accurately said that the newspapers felt the story would generate profits and promote sales. Either way, the papers followed these cases closely and contributed to public outrage when a result based on chance occurred. In some instances, the papers even misstated the kind of chance method used by the jury to make the story sound more salacious.

This schema shows that chance verdicts do not occur in a vacuum. They occur amidst social strife or when the jury is under pressure. In other words, the schema demonstrates that these kinds of verdicts are likely to...
recur at least once in a generation. They are rare, but they reappear. This makes understanding them and planning for them all the more important for legislators and jurists.

B. “It is Too Bad Mr. Casey Did Not Live to Qualify Again as a Juror”: Dickson and The Grief of Mr. Casey

Chance verdicts appear in records of New York courts since the earliest days of our republic. In 1805, the Supreme Court of New York considered a full quotient verdict case; Chief Justice Kent and Justice Livingston delivered opinions on the relationship between chance verdicts and quotient averaging. In another quotient verdict case, the court noted that as long as the jurors did not bind themselves to the quotient result, the proceeding was proper. In 1833, the jurors in a slander case put ballots marked “prize” in a hat with blank ballots, and agreed that more “prize” ballots drawn would mean a verdict for the plaintiffs; the state supreme court struck down the verdict in a two sentence order. Chance verdicts were already well-docu-

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43. Or, it might be said that a provable chance verdict will come to light only now and then.
44. Justice Kent’s opinion is remarkable because it clearly identifies the problems courts hundreds of years later would encounter with chance verdicts: (a) whether chance and quotient verdicts were similarly problematic; (b) the dilemma of allowing jurors to testify as to their own conduct in the face of a rule as strong and old as the no-impeachment rule; and (c) the interloper problem, where a quotient verdict is corrupted by one juror using an unreasonably high figure. He wrote:

If the jury cast lots for whom they shall find, it would no doubt vitiate the verdict . . . . The charge here, is not that the jury cast lots whether they should find for the plaintiff or defendant, but only that in ascertaining the amount of the damages, they took the average sum deduced from the different opinions of each other. This has no analogy to the case of casting lots, or determining by chance, for whom they shall find. The liquidation of damages must always, in a certain degree, be the result of mutual concession, since the amount of the injury is not susceptible of being ascertained with mathematical precision.

Cheetham, 3 Cai. at 60 (Kent, C.J.) (internal citations omitted) (emphasis added). Justice Livingston took a different tack:

Every verdict should be the result of reflection, and not the effect of chance or lot. Jurors being sworn to determine according to evidence, suitors have a right to expect that they will examine and decide upon it to the best of their ability and discernment. But if lot is to be substituted for judgment, if deliberation and reflection are to yield to the cast of a die, parties instead of exposing themselves to a heavy and useless expense, will gamble away their rights, or have recourse to more intemperate means of ascertaining them. The practice, therefore, cannot be too promptly nor strongly discomfited . . . . Indeed, not many centuries back, our superstitious ancestors considered this equivocal mode of ending a controversy as a direct and legitimate appeal to heaven, and as a certain way of discovering the divine will. Here, the method of deciding as effectually precluded a proper exercise of judgment, as that of chance; and, what is worse, put it in the power of any one juror, from prejudice, passion, or other bad motive, to ruin a defendant. He is only to set down a sum sufficiently large, and, if his fellows adhere to their promise, a most outrageous verdict will be the consequence. Thus no one can tell, at the time of pledging himself, what sum he will finally agree to.

Id. (Livingston, J.) (emphasis added).

46. Mitchell v. Ehle, 10 Wend. 595, 595 (N.Y. Sup. Ct. 1833) (“The verdict was manifestly the result of the lottery, and not of the deliberations of the jury. It must be set aside; costs to abide the event.”).
mented phenomena in New York by the time that an Irish immigrant named John Casey was empaneled on a Manhattan jury in 1908.

The case was a sad one. A young girl of four, Lily Dickson, was crossing Columbus Avenue with her mother on June 25, 1905 and ran into an oncoming streetcar. The girl’s father, Thomas Dickson, sued the New York City Railway Company for damages; the jury returned a verdict for the defendant company. Dickson was represented by Louis Steckler, a well-known trial lawyer and foe of Tammany Hall. Upon being asked how the jury arrived at such a verdict, the foreman, Timothy S. Yale, ironically an accountant, admitted that the jury had flipped a coin. Stunned, the judge, Justice Guy, fined each juror $50, about $1,300 in 2018 dollars.

The basic story of the Dickson case is remarkable. First, the jury as a whole confessed to having used the chance method:

When Foreman Timothy S. Yale announced the verdict, Justice Guy was plainly amazed at it.

‘However did you arrive at such a verdict?’ he asked.

‘By the flip of a coin,’ answered Foreman Yale.

When Justice Guy had recovered from his surprise he learned from the foreman that it was an understanding between the jurors that if the coin came down heads they would give the verdict to the plaintiff. If it turned up tails, then the defendant was to win. Each of them when questioned jurymen acknowledged this version to be correct . . . .

One of the jurors, in speaking of what happened in the jury room, said they were so hopelessly divided that it was decided to flip the coin, especially as one of their number had $6,000 in his pocket, with which he was going to close a deal, and wanted to get away quickly.

47. Spin Coin to Get Verdict, N.Y. TIMES, Feb. 26, 1908, at 3, http://www.newspapers.com/image/20580289. It is important to note that this headline in The New York Times appeared alongside other vice-related headlines. Another article on the same page was titled “Era of Conscience Advances Morals – Uprising Against Gambling” and “Demands Law to Stop Racetrack Gambling.” Id.

48. Id.

49. See $50 Fines Shocked a Jury, EVENING POST (New York) Feb. 25, 1908, at 1, http://nyshistoricnewspapers.org/lccn/sn83030384/1908-02-25/ed-1/seq-1.pdf (referencing Steckler); see also Senior Member of Law Firm, Foe of Tammany Hall, Dies at 76, N.Y. TIMES, June 7, 1941, at 17, https://nyti.ms/2v2eqM.

50. Id. Unfortunately, the case file has been lost. Thus, the only record of this case that exists is the highly sensationalized and questionably accurate newspaper record. The account, however, is highly detailed, lending credence to the tale.


52. THE INFLATION CALCULATOR, https://westegg.com/inflation (input “50” in the “enter amount” category, “1908” in the “initial year” category, and “2018” in the “final year” category).

53. Spin Coin to Get Verdict, supra note 47.
Given the ensuing media firestorm, it is difficult to believe that the jury simply confessed in open court together to using this method. The newspaper account, however, seems to imply that each juror was questioned individually. It is possible that the judge questioned the foreman privately and proceeded to each juror in turn. It is also possible that the jury was simply unaware of the taboo it had broken. The jury, as it was, consisted of an accountant, an insurance broker, a second broker, a “dealer in meats,” a grocer, a man of “real estate,” an ironworker (Casey), a publisher, a liquor salesman, a watchman, an agent, and a Baker.54 It is also possible that in the heat of the moment, when two sides in the jury room were deadlocked, a coin flip may have seemed the fairest way to resolve the case. It is also important to note that this case presents the rare full chance verdict with no quotient component.

A second phenomenon is that The New York Times was not afraid to name names. The paper published the jury register in full and even gave each juror’s address. The public shaming could not have been more humiliating, as the article appeared alongside other missives against vice and gambling. Further, the paper framed the story as that of justice gambled away from a grieving father. The paper also reprinted Justice Guy’s admonition word for word:

You have arrived at your verdict by a most improper method, by one contrary to law, in contempt of this court, and in direct violation of your oaths as jurors. I cannot adequately express my indignation at such conduct on the part of jurors in so serious an issue. I therefore impose a fine of $50 upon each of you for contempt of court.55

The fine was compounded by the fact that the jurors were forced to return for jury duty each day until the end of the term, though they would not be serving on any panels.

As chance verdicts go, Dickson is classic. It took place with a sympathetic plaintiff and a deadlocked jury. If the newspapers’ account is to be believed, one juror wanted to leave to close his $6,000 deal. The case occurred in the height of the new era of tort when streetcars were new to New York City. The judge certainly thought the case was an easy one. It is not surprising then that the newspaper painted the jurors as corrupting the public sphere. Other newspapers jumped to print a story so sensational. The Brooklyn Eagle printed a narrative similar to The New York Times but clarified that the chance verdict had been revealed when the judge spoke to the

54. Id.
55. Id.
foreman. The Evening Post poked fun at the jurymen, calling them the “mulcted dozen,” writing:

Justice Guy levied the tax upon the talesmen [term for jurymen] after one of the most severe impromptu scoldings that twelve men have ever received in a public court room. It all happened because they had settled a case for damages, on account of the killing of a little girl, by the sporting expedient of ‘flipping up a coin.’ Frankly each man admitted that he had agreed to decide the dispute in this manner. Equally frankly and promptly the twelve men were declared in contempt of court.

Over the next few weeks, the story spread to papers as far away as Spokane, Washington, Bennington, Vermont, Caldwell, Kansas, Pine Bluff, Arkansas, Johnson City, Tennessee, and Wilmington, Delaware. Local

The story might have ended there, as a mere curiosity, but what happened next shows the stigma with which chance verdicts were regarded in the public sphere. In late March of 1908, the newspapers again exploded with a shocking new twist: one of the jurors, John W. Casey, an ironworker, “died of grief” because he could not bear the shame of the chance verdict.\footnote{67. \textit{Juror Dies of Grief}, \textit{BUFFALO ENQUIRER}, Mar. 31, 1908, at 10, http://www.newspapers.com/image/325495269 (“Casey actually died of grief because of the scathing censure of the jury by Justice Guy before whom the damage suit was brought in the Supreme Court. His family believed that he died of a broken heart, firmly convinced that he had been disgraced forever.”).} One newspaper reported that Casey had been excited to serve on a jury for the first time, but that, after being reprimanded by Justice Guy, he told his family, “My heart is breaking. Soon, if I cannot forget, I shall die.”\footnote{68. \textit{Juror Dies From Grief}, \textit{PITTSBURGH POST-GAZETTE}, Mar. 31, 1908, at 1, http://www.newspapers.com/image/85914189.} \textit{The New York Times} felt the story so significant (or sensational) that it printed Casey’s obituary on the front page.\footnote{69. \textit{Grieved to Death Over Court Rebuke}, \textit{N.Y. TIMES}, Mar. 31, 1908, at 1, https://www.newspapers.com/image/20365384. \textit{The New York Times} was not the only paper to print Casey’s obituary on its front page. \textit{See Juror Dies From Grief}, \textit{INDEPENDENCE DAILY REP.} (Independence, Kansas), Apr. 2, 1908, at 1, https://newspapers.com/image/93939940.} \textit{The New York Times} reported that Casey was distraught at the castigation he received from Justice Guy.\footnote{70. \textit{Grieved to Death Over Court Rebuke}, supra note 69.} “I know I was ignorant . . . and they told me that cases were often settled that way. But I know better now,” the newspaper reported Casey saying.\footnote{71. \textit{Id.}} The newspaper’s depiction of Casey’s descent into despondency is almost comical.\footnote{72. The newspaper wrote: He neglected his business and spent his days wandering aimlessly around the house, his nights in a continually unsuccessful struggle to sleep. He could not forget what he himself termed his disgrace, and a week ago he took to his bed. From a very heavy man of 296 pounds, he wasted in a month to 200 pounds. \textit{Id.}} The newspaper painted the shame of the chance verdict as some kind of haunting visited upon Casey. As an immigrant,\footnote{73. \textit{See Coin Flipped; Verdict Given; A Juror Dies}, \textit{ST. LOUIS POST-DISPATCH}, (St. Louis, Missouri), Mar. 31, 1908, at 20, http://www.newspapers.com/image/138903474.} the abdication of his civic duty was all the more sensational. This portrayal of civic distress bleeding into actual affliction demonstrates the potency of the taboo Casey broke. It was a crime so severe that the sheer shame of having committed it would kill the wrongdoer.

Different periodicals drew different lessons from Casey’s story on behalf of their readers. For the \textit{Wilkes-Barre Times Leader} in Pennsylvania,
the incident was an opportunity to reflect on the constitution of the ideal citizen:

The pathos of the incident has a certain quaintness of its own – Mr. Casey took his rebuke more seriously than the average man would, too seriously indeed, and yet disclosed a sensitiveness in which was material for the finest sort of citizenship [sic]. If on the public men open to accusation for negligence and favoritism, the numerous brood of officials impeached, presented, indicted, and who sometimes blush, the whole world of officialdom showed half the sensitiveness poor Casey did, it would be better for city, county and State. It is too bad Mr. Casey did not live to qualify again as a juror – he would have made a good one – but even in death he teaches a lesson worth teaching.74

In other words, the “wrongness” of the incident could have endowed Casey with precisely the demeanor desired of jurors—careful contemplation and sensitivity. By his misconduct, the paper reasoned, Casey could have become an even more “valuable” citizen; his judgment in a hypothetical later case would have drawn wisdom from the experience.

Seeming to back off of its earlier obituary, The New York Times took a different tack, and in a later article cerebrally considered the merging of cause and effect in the evaluations of Casey’s death, noting that people saw Casey’s death as they wanted to: as a signifier for civic decay taking a toll on physical health.75 Far from a man who had abdicated his duties, this portrait of Casey transitions into someone who, quite ironically, was simply the victim of bad luck in drawing such comrades amongst the wider jury pool. The article perceptively noted that observers ascribed to Casey a ravaging and unshakeable disease of mental guilt that precipitated (rather than coincided with) his physical decline. People saw what they wanted to see—the notion of a chance verdict was so aberrant that when Casey expired, the connection between his public shaming and his death was not just obvious: it was instructive. Casey’s official death record held by the state of New York lists the causes of death as pneumonia and chronic nephritis.76 Later that spring, the Dickson family won $1,250 in a second jury trial, and the papers went back to lumping the news in with fanciful musings on coin flips in literature and days of yore.77

74. **Supersensitive**, Wilkes-Barre Times Leader, Evening News (Wilkes-Barre, Pennsylvania), Apr. 2, 1908, at 6, https://www.newspapers.com (search “supersensitive” in search bar and add additional information: “Pennsylvania” as location and “1908” and date range; then click on the fifth search result).


76. Certificate and Record of Death of John W. Casey (1908) (on file with author).

The Dickson case fits the trend of chance verdicts: a case with a sympathetic party (be it a plaintiff with a tragic story, or a defendant considered innocent by the community) goes to a jury, and at least some of the jury, feeling overwhelmed, abdicate their duties and resort to a chance verdict. We may also observe the media firestorm around the case as evidence of the position that chance verdicts occupy in the American consciousness: they lay bare, more than any legal argument ever could, the failures of the justice system.

C. “The Professional Traducers of the South Will Not Obtain Much Comfort from the Verdict of this Jury”: Murder in the Ozarks

The next chapter in the history of verdict by lot brings us to Arkansas in the early 1890s. As has been well documented, Arkansas society during this period was rife with extrajudicial violence, particularly directed against African Americans. As the Democratic party reassumed power in a post-Reconstruction world, school board elections became a focal point for political violence. The murder of Thomas Mason in 1893 took place against a backdrop of violence in a culture of white supremacy that was reasserting itself. As far as chance verdicts were concerned, Arkansas law contained a similar statutory exception to California (discussed infra Part III.A) allowing jurors to testify as to verdicts by lot.

The facts of Thomas Mason’s murder are difficult to pinpoint precisely, given how sensationalized the account in the media was. It may well


79. Lancaster, supra note 78, at 35–36; see also William Fishback, Reconstruction in Arkansas, in Hilary A. Herbert et al., Why the Solid South? Or, Reconstruction and its Results 294, 313 (1890) (“If this review were not already too long, I could show that the various county and school debts were equally fraudulent. In many of the counties script was forged and then bonded.”).

80. As discussed infra Part III, Arkansas politicians and notables were terribly concerned with the presentation of their state in the national press. One paper in 1895 printed the account of a Baltimore man who explored Arkansas and heaped praises on the state’s wonderous climes. See William H. Edmonds, Truth About Arkansas, Monticellonian (Monticello, Arkansas), Feb. 22, 1895, at 1, https://newspapers.com/image/288001182 (“No state in the Union has greater or more varied resources, industrial and agricultural, in climate and health than Arkansas, and nowhere else is there a higher degree of refinement.”). Even buried in this sycophantic account is the murmur of the state’s treatment at the hands of less kind periodicals. Id. (“In spite of all that the state has suffered at the hands of traducers and thoughtless writers, it is undergoing a wonderful development.”) (emphasis added). The word “traduce” will become relevant infra Part II.C.

81. See Wilder v. State, 29 Ark. 293, 298 (1874); see also Fain v. Goodwin, 35 Ark. 109, 113 (1879) (referencing the same statute). For a later analysis, see Blaylack v. State, 370 S.W.2d 615, 616 (Ark. 1963), and Martin v. Blackmon, 640 S.W.2d 435, 437 (Ark. 1983) (noting statutory history of the exception).
be that readers were aware of more going on beneath the surface.\textsuperscript{82} In the small town of Pleasant Plains in the spring of 1893, a school board election was held.\textsuperscript{83} During the election, a divorced man\textsuperscript{84} named Thomas Mason slandered the wife of a man named H.L. Tharp. The paper hinted at the character of the statements without explicitly mentioning sexual conduct, noting that they “reflected very much on his (Tharp’s) wife as a virtuous lady.”\textsuperscript{85} Tharp confronted Mason, and demanded “a retraction.”\textsuperscript{86} When Mason refused, Tharp “walked away a few paces, then suddenly turned, walked up to Mason and fired two bullets into his body. Mason dropped dead.”\textsuperscript{87} The \textit{Daily Arkansas Gazette} went on to note that “Tharp is a high-toned gentleman and his wife is an estimable lady, against whose reputation as a wife and lady the breath of scandal HAS NEVER BLOWN until the present unfortunate occasion.”\textsuperscript{88}

The \textit{Daily Arkansas Gazette}’s account suggests several conclusions. First, there was no doubt as to the facts of the murder. Indeed, the language suggests that the almost-Shakespearean characters were well-known to the community. Second, the perpetrator is immediately absolved by the periodical of any blame; indeed, every mention of Mason is couched in terms of blame for bringing death upon himself. Other newspapers took a similar tack.\textsuperscript{89} He is no victim—he is a divorced slanderer who got what was coming to him. The local community rallied quickly around Tharp.\textsuperscript{90} The news-

\textsuperscript{82} In the southern legal tradition, proceedings in the earlier part of the century were characterized as a creature of local imperatives, traditions, and actors. \textit{See Edwards, supra note 78}, at 65 (“Often, the deciding factors were so obvious to the participants that they never made their way into the court records: they were the elephant in the room that everyone saw but no one acknowledged.”).


\textsuperscript{84} \textit{See id.} The paper was quick to insert this particularly damning piece of information about the victim.

\textsuperscript{85} \textit{Id.}

\textsuperscript{86} \textit{Id.} The journalistic jargon made the story all the more colorful.

\textsuperscript{87} \textit{Id.}

\textsuperscript{88} \textit{Id.} (emphasis in original).

\textsuperscript{89} The \textit{Mountain Educator} characterized the incident in two sentences that the editors apparently felt explained the situation perfectly. \textit{See Mountain Educator} (Marshall, Arkansas), June 1, 1893, at 8, http://www.newspapers.com/image/284301263 (“Prof. H.L. Tharp shot and killed Thomas Mason near Pleasant Plains, Independence Co., on the 22ult [sic]. The trouble was over some talk Mason used about Tharp’s family.”). The \textit{St. Joseph Weekly Gazette} described the murder as a “fearful tragedy” and stated that Mason “made some damaging remarks about his [Tharp’s] wife, which, if true, would seriously compromise her reputation.” \textit{Killed for Slandering a Woman}, \textit{St. Joseph Wkly. Gazette} (St. Joseph, Missouri), June 1, 1893, at 7, http://www.newspapers.com/image/246196352.

\textsuperscript{90} \textit{See An Arkansas Tragedy, Mountain Echo} (Yellville, Arkansas), June 9, 1893, at 2, http://www.newspapers.com/image/174628762 (“The sympathy of the entire town is with Prof. Tharp and his wife, who is regarded by all who know her as a true and faithful wife.”). The Southern tradition of localized justice as a “literal rendering of popular sovereignty” has been well-documented. \textit{See Edwards, supra note 78}, at 65; \textit{see also id.} at 79 (“[S]outherners ignored or challenged those verdicts with which they did not agree precisely because they had enough confidence in the idea of law to believe that it could be engaged and changed.”).
papers themselves clue us into the mindset: slander of a married woman’s sexuality was a taboo for which severe consequences would attach to the traducer.

Importantly, at least one segment of the local community thought that the law deserved satisfaction. As the State began to prosecute its case against Tharp in May of 1893, Judge Butler set bail at $3,000.91 Tharp was indicted by a grand jury for first degree murder, which was carried out “with premeditation and deliberation.”92 In his bail application, Tharp’s attorneys stated that “[Tharp] does not believe that he is guilty as charged in the indictment.”93 At trial, it seems that Tharp tried to claim insanity provoked by Mason’s slander of his wife.94 This claim—that Tharp was so disturbed by the attack on his wife that he did not know right from wrong—is important because it conveys the level of seriousness with which the community viewed an allegation of sexual impropriety. Mason violated a norm of the community by insulting Tharp’s honor. The court record also contains the testimony of a witness, Junius Saddler, the deputy sheriff of Pleasant Plains, although the testimony is undated.95 Saddler testified that he was with Tharp when Tharp confronted Mason. Allegedly, Mason said, he saw Saddler and Mrs. Tharp at the post office looking “too friendly.”96 Mason refused to recant his story and told Tharp in the presence of several witnesses that “I would be suspicious of her.”97 Tharp threatened to take down Mason’s words as testimony,98 yelled something to the effect of “My God, how can I stand that,” and then shot Mason as Saddler tried to inter-

91. The court records of the Tharp matter were sent to the author by the Circuit Clerk of Batesville, Arkansas. The records of the 1893 and 1895 trials seem to have been consolidated. The file is not paginated; where a document contained a date, the author has included it, and will cite to the record as [Document-Type] [at pincite], State of Arkansas v. H.L. Tharp, [date]. The document where Judge Butler set bail is dated May 21, 1893.
94. Jury Instructions, State of Arkansas v. H.L. Tharp. The jury instructions are difficult to assess, because the file contains several documents that clearly are jury instructions, but it is not clear whether these instructions were submitted by the State or Tharp’s attorneys, or were read by the judge to the jury. Some of the instructions contain a notation on the left side of the page that may read “Given,” but the word is not perfectly legible. One of these documents reads:

- The jury are instructed that if they believe from the evidence in the case that some time in 1888 the mind of the defendant was so affected as to dethrone his reason and destroy his will power and that by reason thereof his mind would be more easily influenced and excited his reason be more easily dethroned and his will power more easily destroyed or over come [sic] and if they further believe from the evidence that at the time of the killing the mind of the defendant was so excited or over-come as to dethrone his reason [illegible] . . . to the extent that he did not know right from wrong or destroy his will power or that at the time of the killing he was incapable of controlling his action then he would not be guilty[.]

Id.
96. Id. at 4.
97. Id.
98. Id.
vene. The testimony is fascinating because it shows clearly that Tharp murdered Mason in the presence of multiple witnesses.

According to Tharp’s motion for new trial, the jury rendered a verdict of sixty-two days in prison after agreeing to use a quotient method. In the motion, Tharp’s attorneys characterized the quotient verdict as a chance verdict, claiming that the verdict “was decided by lot and was not expressive of the opinion of the jury” and that the jury had agreed to abide in advance by the quotient. The Motion for New Trial also alleged that Tharp had been prevented from showing that Mason was a member of “the Populite political organization.” Later, Tharp alleged that because the jury had settled on convicting the defendant of involuntary manslaughter, the State could not recharge Tharp with any offense above that grade.

After Tharp’s conviction, prominent citizens of Batesville rallied around him. The Daily Arkansas Gazette reported in October of 1893 that two men, George W. McCauley and Frank Denton, came to Little

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99. Id. at 5.
100. Motion for New Trial, State of Arkansas v. H.L. Tharp, Fall Term 1893.
101. Id.
102. Id.
103. Plea of Former Acquittal, State of Arkansas v. H.L. Tharp, Fall Term 1894. The Plea of Former Acquittal offers a detailed account of the jury’s deliberations:

That said jury after due consideration of all the degrees of homicide embraces in the charge against him, all agreed that the defendant was guilty of “Involuntary Manslaughter” and so rendered their verdict, thus acquitting the defendant of all the grades of homicide embraced in said indictment, except said charge of “Involuntary Manslaughter”; the record of which said verdict is here referred to and made a part hereof.

That after such verdict and agreement was reached by the jury, the several members of the jury then differed as to the length of time which the defendant should serve in the penitentiary for said offence of “Involuntary Manslaughter”, some being in favor of assessing or fixing his punishment at Six months in the State Penitentiary, and others for a less time, and none for a less time than one day.


Rock to appeal to the Governor of Arkansas, William Fishback, to pardon Tharp. 106 The Gazette reported that “Mr. Denton says nearly every citizen, man and woman in Batesville ask the pardon; that the Judge, prosecutor and jury are also in favor of his pardon.”107 In reciting the history of the case, the paper identified Mason as the “traducer” of Tharp, again implying guilt on the part of the victim. 108

William Fishback was a poor fit for the petition to overturn a chance verdict. A Democrat who had supported both secession and Unionism during the Civil War, he took office during a Democratic wave election in 1892 that swept all sitting African American state legislators from office. 109 His brief tenure was largely focused on “public relations activities designed to restore the image of the state.” 110


107. Id. The inclusion of the judge and jury in this list raises a troubling question: when is punishment warranted when a community is unanimous in its belief that a criminal act is unproblematic? But if the paper is to be believed, then the community was united in its belief that Mason’s transgressions were properly punished by Tharp. See Edwards, supra note 78, at 90 (“Law was the arena where southerners went when they wanted to restore harmony—as they conceived of it—to the social order.”). The mention of the judge and jury also suggests a kind of “community jury nullification” effort by the local authorities acting in concert.

108. Pardon Wanted, supra note 106, at 8. The word “traducer” is defined as a “defamer” or a “slanderer.” Traducer, The Oxford Eng. Dictionary (3d ed. 2015), www.oed.com/view/Entry/204322; see also Traduce, The Am. Heritage Dictionary (4th ed. 2000) (defining “traduce” as “to cause humiliation or disgrace by making malicious and false statements.”). The use of this word in the context of Tharp was part of the media’s efforts to paint Mason as deserving of what he got. In another instance of a man slandering another man’s wife, the Pine Daily Bluff Graphic reported approvingly that “[t]he judgment of the court was that Shank [the traducer] got what he deserved, but that Gosh [the husband] was technically guilty of assault, and he was fined 5c,” Thrashed His Wife’s Traducer, Pine Bluff Daily Graphic (Pine Bluff, Arkansas), Mar. 2, 1894, at 2, http://www.newspapers.com/image/273398056; see also Killed His Traducer, Southern Standard (Arkadelphia, Arkansas), Aug. 25, 1893, at 4, http://www.newspapers.com/image/280299344 (discussing yet another instance where a man killed a man who slandered his wife). The word also carried a particular resonance for Southerners who perceived their culture and dignity as besieged by the North as Reconstruction ended. See Daily Ark. Gazette (Little Rock, Arkansas), Jan. 25, 1895, at 4, http://www.newspapers.com/image/132655846 (“A WHITE [sic] constable at Vicksburg has been sentenced to imprisonment for life for shooting a negro. The professional traducers of the South will not obtain much comfort from the verdict of this jury.”) (emphasis added). The papers even used the word when discussing the efforts of Governor Fishback to defend the South’s honor. See Osceola Times (Osceola, Arkansas), July 1, 1893, at 1, http://www.newspapers.com/image/274143442 (“[Governor Fishback] is the right man in the right place. Doing much, not only, towards the advancement of the material interests of his own State; but, in conferring lasting benefits upon our common South, by delivering her against the ignorance and malice of her traducers.”).

to help dispel the perception that Arkansas was still a wilderness peopled by ignorant squatters.”

Fishback was hugely invested in rehabilitating the South’s reputation after Reconstruction. In short, McCauley and Denton came to Fishback seeking the precise type of relief—ratification of community values over the law—that Fishback was trying to publicly disdain. But their request may not have been completely doomed.

The *Daily Arkansas Gazette* reported on October 19, 1893, that Denton and McCauley had failed. The article made no mention of a chance or quotient verdict. But the governor issued a passionate response to the petition, where he ironically endorsed the outcome of a quotient verdict in the name of upholding the rule of law. Fishback wrote:

> The large number of ladies and gentlemen who were led by their generous, and I may add, their ennobling sympathies, to sign the petition for the pardon of H.L. Tharp recently found guilty of involuntary manslaughter and sentenced to sixty-two days in the Penitentiary, have evidently not sufficiently reflected upon what they ask of the Governor.

> Who or what Tharp, or his wife, or Mason may be is not relevant. We live in a land of law and order. We must uphold both or we must relapse into anarchy and barbarism. The Governor is sworn to uphold the law.

> In all well regulated and civilized communities the law affords ample redress for wrongs.

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110. *Id.*


112. In 1890, politicians from thirteen southern states penned a book dedicated to the businessmen of the North; Fishback wrote the chapter on Arkansas. William Fishback, *Reconstruction in Arkansas, in Why the Solid South? Or, Reconstruction and Its Results* 294 (1890) (“Crimination and recrimination are as repugnant to good taste as they are to my own inclination.”).

113. Because Fishback’s tenure was so short, few records of his time in office have survived (or more likely, no one bothered to keep them). One letter that did survive was penned from Governor Fishback to Governor Matthews of Indiana. The letter stated: “I have referred your letter together with petition to the Judge by whom the case of J.H. Jones was tried. I know nothing of the facts as yet.” Letter from William M. Fishback, Governor of Ark., to Claude Matthews, Governor of Ind. (Apr. 28, 1894) (located at Rare Books and Manuscripts, Indiana State Library, Collection S0931, Folder 1). This letter implies that Fishback was willing to petition individual judges, if not issue pardons. Petitioning for executive clemency had been a routine component of the justice system in the South for decades. See Edwards, supra note 78, at 77–78 (discussing the history of executive clemency applications and community petitions post-trial). Further, Denton and McCauley probably believed they could leverage their relationships with Fishback to get Tharp off.

If a person slander another in Arkansas, the laws of the State affords the slandered party both civil and criminal redress. But the same law that protects the slandered also protects the slanderer. He has the inalienable right to a trial by a jury of his peers, to face his accusers before legally constituted tribunals and to prove his innocence if he can.

In this case Tharp took the law in his own hands, and, acting as a jury, judge and executioner shot Mason to death without any regard to his legal rights . . . .

To interfere with the sentence of the court in this case would be a betrayal of trust, and I feel quite sure that I do not over-estimate [sic] the intelligence and patriotism of the good people who, under the influence of a generous impulse, have signed this petition, when I predict that when their calmer judgment shall have asserted itself, they will thank me that I have protected, not only the social order but themselves from the results of their own undue, pardonable excitement, by declining to comply with their request.115

There are several important takeaways from this letter. First, there seems to have been no doubt in Fishback’s mind that Tharp committed the crime. Second, the language is rights-based, but the person entitled to that right is Mason. Third, the governor made no mention of the quotient method. Presumably, Denton and McCauley mentioned this during their meeting as a ground for the pardon.116 On the whole, the letter served to bolster Fishback’s image in the press as committed to the rule of law and to the processing by the justice system of extrajudicial killings. While there is no record of how the pardon letter was received back in Pleasant Plains, what happened next seems to suggest that the local judiciary was waiting to see what the governor’s move would be.

On October 25, 1893, less than a week after the governor’s letter appeared in the press, newspapers across the region reported that Tharp had been granted a new trial. The story stated that “[t]he verdict was set aside by the circuit Judge because the jury arrived at it by casting lots.”117 Undoubtedly, the conflation of the quotient verdict used by the jury and the specter of a full chance verdict raised Tharp’s profile in his hometown and

115. The Pardon of Tharp, supra note 114. Fishback’s characterization of the townspeople as the inflamed jurors of the situation rings oddly true. In defending the legal process, he was admitting that the community was the cause of the tension.

116. In some sense, Fishback could have issued a pardon and cited the miscreant jurors for contravening the rule of law had he thought the case worthy of executive clemency.

throughout the region. It certainly served the newspaper’s narrative well; the articles again used the word “traducer” to make Tharp more sympathetic. The quick turnaround also suggests that the judge was willing to at least give Tharp a second bite at the apple given the irregularity of the verdict and the lack of a pardon. The judge’s ruling on this issue—presuming one existed—does not appear in the case file. It is difficult to assess whether it was generally accepted that the statutory exception allowing jurors to testify as to chance verdicts encompassed quotient methods. In any case, the legal arguments may have been a secondary concern for the local bar relative to the outpouring of community support that Tharp received.

The final chapter of Tharp’s story supports this latter narrative. Two years later, in October of 1895, a retrial was held. Tharp was acquitted.118 The *Daily Arkansas Gazette* again discussed Mason’s conduct in condescending terms,119 and repeated the story that the initial jury arrived at the verdict by lot.120 The story also stated that the case had been continued through several terms of court and that the jury had acquitted after a two-day trial and roughly a full day and a half of deliberating. “[H]is many friends are greatly rejoiced at his acquittal.”121 This outcome is significant because there was never any doubt as to the facts of the case. It is clear that Tharp shot Mason in a fit of rage. It is also clear that the community and the media felt that the killing was justified.

The Tharp case is another classic chance verdict that shares many of the characteristics with the normative schema. A case with a sympathetic defendant comes to trial, and the pressure prompts the jury to use a quotient or chance method to arrive at a damages figure. The media treats the verdict as a scandal. In this case, the media and Governor Fishback fit the case in with larger concerns about the rule of law in Arkansas in the 1890s: the media connected the case to attempts to defame the South by using the word “traduce”; Governor Fishback fit the case into his project of persuading people that the state was not a lawless backwater. But in the end, the community’s belief that Tharp should not be punished for breaking the law won out.122

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119. *Id.* (“Prof. Tharp shot and killed one Mason, who had circulated slanderous reports against Mrs. Tharp and refused to retract them, although untrue.”).
120. *Id.*
121. *Id.*
122. As had been true decades earlier, “legal legitimacy belonged to the people who lived with the results.” EDWARDS, supra note 78, at 78; see also *id.* at 83 (“[T]he remedy for individual offenders was reintegration into the community, not expulsion from it.”).
D. “A Jury of Very Questionable Character”: Bar Fight in a Knoxville Dive

Tennessee courts were also no stranger to quotient verdicts. In 1839, Justice Turley of the Tennessee Supreme Court\textsuperscript{123} ruled twice in the same year on quotient verdict cases.\textsuperscript{124} Later decisions highlighted concerns about jurors deciding cases based on their judgment rather than based on an interloper’s numerical prejudice,\textsuperscript{125} but courts distinguished between full quotient and working quotient verdict cases.\textsuperscript{126} Tennessee is also a state where jurors may testify as to “quotient or gambling verdict” via an explicit exception to the state’s version of Rule 606(b), rather than solely via statutory exception.\textsuperscript{127}

The next chapter in the history of chance verdicts is crucial because it concerns a racially motivated murder. On June 27, 1884, the owner of a Knoxville dive, L.A.M. Perkey,\textsuperscript{128} stabbed an African American man, Sam Franklin, in the bar.\textsuperscript{129} The murder was particularly violent, with Franklin suffering six stab wounds to the abdomen and dying shortly thereafter.\textsuperscript{130}

\begin{itemize}
\item \textsuperscript{123} Russell Fowler, William B. Turley, TENN. ENCYCLOPEDIA (Oct. 8, 2017), https://tennesseeencyclopedia.net/entries/william-b-turley.
\item \textsuperscript{124} In the first case, Bennett v. Baker, 20 Tenn. 399 (1839), a single juror performed the quotient calculation and then suggested that number as the jury’s verdict; the jury agreed. Justice Turley wrote that because the jury knew the number they were voting on, there was no interloper problem and no agreement in advance to abide by an unknown. \textit{Id.} at 401. In the second case, Elledge v. Todd, 20 Tenn. 43 (1839), a classic full quotient verdict case, the plaintiff alleged damages of $500. One juror wrote down $250 on his slip of paper, and another wrote down $0. \textit{Id.} at 44. Justice Turley reversed and remanded in a short opinion. \textit{Id.} at 45.
\item \textsuperscript{125} See, e.g., Crabtree v. State, 35 Tenn. 302, 303 (1855) (“The defendant, as well as the state, is entitled to the unbiased judgment of the whole as well as every member of the jury, as to the amount of punishment to be inflicted for the crime of which the defendant is convicted.”). Crabtree is one of the very few decisions that speaks of a “right” that is held by both the defendant and the state.
\item \textsuperscript{126} See Glidewell v. State, 83 Tenn. 133, 136 (1885) (explaining that there was no agreement to abide by the quotient).
\item \textsuperscript{127} \textit{See} TENN. R. EVID. 606(b).
\item \textsuperscript{129} Sam Franklin, Colored, Killed in a Market Street Dive, DAILY AM. (Nashville, Tenn.), June 29, 1884, at 1, http://www.newspapers.com/image/118991130.
\item \textsuperscript{130} \textit{Id.}
From the very beginning, the case brought the community to its feet. The media also seemed to side with Franklin. Aside from the quotient verdict (which occurred during one of several retrials), a witness named Kanipe was charged with perjury during the investigation. Over the course of the next year, the case was tried at least three times, with the papers noting the difficulty at each turn.

As the third trial came to a close in September of 1885, the *Daily American* perturbedly noted:

> The public awaits the verdict with anxiety, as an index to a change since the late mob . . . . Owing to the prejudice aroused at this time, the Judge and whole Court felt different degrees of restraint. The sense of the community is that mobs are not needed to rebuke our courts."  

The *Daily American*’s polemic against the crowds (and its earlier coverage in 1884 that the crowd was largely African American) suggests that there were explicit racial overtones to the series of trials. The newspaper defended the local justice system’s handling of the troubled case, while groups continued to appear to watch the proceedings. At the end of the third trial, the jury finally reached a verdict and found Perkey guilty of man-

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131. *On Trial for Murder*, *Daily Am.* (Nashville, Tenn.), July 2, 1884, at 1, http://www.newspapers.com/image/118991700 (noting that bail was denied and that the courthouse was crowded with African American spectators who followed the prisoners to jail, “but no violence was attempted.”).

132. *See Over the State*, *Plateau Gazette and East Tenn. News* (Rugby, Tenn.), July 3, 1884, at 1, http://www.newspapers.com/image/174657998 (“Lewis Perkey, the keeper of a low saloon in Knoxville, a few days ago stabbed to death, in a fit of passion, an inoffensive negro named Sam Franklin.”).

133. *Held for Trial on a Charge of Perjury*, *Daily Am.* (Nashville, Tenn.), July 5, 1884, at 1, http://www.newspapers.com/image/118992126 (“A case against Wm. Knipe [sic], who is charged with perjury in testifying crookedly in the Perkey murder investigation, has been concluded after two days delay in examining witnesses. He was committed in default of bond.”). The minutes of the Criminal Court are difficult to read, but it seems that Kanipe’s perjury concerned the allegation that Perkey’s co-defendant, Cowan, grabbed Franklin during the fight and brought him back over to Perkey, who then continued assaulting Franklin. Transcript of Record at 18–19, State v. Kanipe (Sept. 19, 1884), microfilmed on Volume 14 (Knox Cty. Archives).

134. *Argument Concluded in the Perkey Murder Trial*, *Daily Am.* (Nashville, Tenn.), Sept. 13, 1885, at 1, http://www.newspapers.com/image/119193350 (“This is the third trial of the prisoner, and instead of the mob, and the resulting excitement having a salutary influence on the court, quite the reverse has been the result.”) (emphasis added).

135. *See Perkey Jury Disagree*, *Daily Am.* (Nashville, Tenn.), May 26, 1885, at 1, http://www.newspapers.com/image/119184643 (noting that the jury had been discharged after deadlock-10-2 in favor of acquittal); see also *No Jury Yet in the Perkey Case*, *Comet* (Johnson City, Tennessee), Sept. 10, 1885, at 2, http://www.newspapers.com/image/174066195 (“Another day has passed in the criminal court without a jury being completed in the case of L.A.M. Perkey, charged with the murder of Sam Franklin.”).

slaughter. An appeal was taken, and the case was sent to the Tennessee Supreme Court.

The record sent to the supreme court contains a detailed accounting of what transpired at trial. Ben Franklin, Sam’s father, testified that Sam had been working as a musician performing in a string band at Perkey’s bar. Ben Franklin also testified that after the fight, he stayed with his son as he lay dying in the street outside the bar. A policeman who witnessed portions of the fight testified that Perkey said to Franklin, “No darn black son of a bitch should call [Perkey] a son of a bitch.” The record also contained the affidavits of several jurors, who testified that they used a quotient method to assess the length of imprisonment and agreed to abide by that result.

In November 1885, the Comet reported that the Tennessee Supreme Court had remanded the case. A few months later, Perkey was found not guilty during the fourth retrial of the case. Quoting another newspaper, the Herald and Tribune reported that the defense presented new evidence “going to prove threats and preparations on the part of Franklin towards Perkey’s life.”

While the surviving evidence does not clearly prove that the defense manufactured this evidence demonstrating some form of culpability or evil

137. From Knoxville, Comet (Johnson City, Tenn.), Sept. 17, 1885, at 2, https://chroniclingamerica.loc.gov/lccn/sn89058128/1885-09-17/ed-1/seq-2 (“The jury in the Perkey trial to-day [sic] found a verdict of voluntary manslaughter, with a sentence of five years in the penitentiary. A motion for new trial was entered.”).
138. The Tennessee Supreme Court holds records relating to the appeal. See Tennessee Supreme Court Cases, Tenn. Sec’y of State, https://supreme-court-cases.tennsos.org (search “perkey” in search bar; click on 1885 case).
139. Case file of State v. L.A.M. Perkey & James Cowan 46–47 (testimony of Ben Franklin) (maintained by Tennessee State Library & Archives, Box ET 1908); see also id. at 58 (testimony of Dan Listen, policeman).
140. Id. at 48 (testimony of Ben Franklin).
141. Id. at 55 (testimony of Dan Listen).
142. Id. at 153 (affidavit of A.J. Hood, juror).
143. General News, Comet (Johnson City, Tenn.), Nov. 12, 1885, at 3, https://chroniclingamerica.loc.gov/lccn/sn89058128/1885-11-12/ed-1/seq-3/ (“The Supreme Court at Knoxville, last Saturday, reversed the decision of the criminal court in the case of L.A.M. Perkey, sentenced to the penitentiary five years for murder, and remanded the case for trial.”). The Herald and Tribune reported that “[a]n appeal to the Supreme Court was taken on the grounds of a ‘gambling verdict,’ and the case was remanded to the lower court for another trial.” Four Reversals by the Supreme Court, Herald & Trib. (Jonesborough, Tenn.), Nov. 12, 1885, at 2, https://www.newspapers.com/image/171510651/?terms=%22sam+franklin%22. The Supreme Court’s record says much the same. See Minute Books of the Eastern Division of the Tennessee Supreme Court (1884–88) 506–07 (maintained by Tennessee State Library and Archives).
144. Pencillings, Maryville Times (Maryville, Tenn.), Jan. 20, 1886, at 1, https://chroniclingamerica.loc.gov/lccn/sn89058370/1886-01-20/ed-1/seq-1 (“L.A.M. Perkey was acquitted of murder by a Jury, at Knoxville last Monday.”).
145. General News, Herald & Trib. (Jonesboro, Tenn.), Jan. 21, 1886, at 3, https://www.newspapers.com/image/171497860/?terms=%22sam+franklin%22. The newspaper coyly added, “[t]his does not help Perkey out of his trouble yet, however. He has a workhouse judgment hanging over him for costs, to the amount of about $100, for retailing liquor without a bond.” Id.
intent on Franklin’s part, four facts suggest this conclusion. The first clue is that the African American community gathered at the proceedings of trial, suggesting that they at least attached to Franklin’s case some measure of import. Second, an unbiased jury was difficult to come by, suggesting that the case carried perverse resonance for a racially divided community. Third, the testimony of Officer Listen suggests that Franklin may have simply insulted Perkey by calling him a “son of a bitch.” Fourth, if evidence existed showing that Franklin threatened Perkey, why did the defense wait until the fourth trial to present it?

The quotient verdict fits the schema in a number of different ways. First, there does not seem to be any doubt as to the fact that Perkey murdered Franklin. Second, the jury could manage to agree on guilt but seemingly could not muster the will to compromise on an actual quantification of that guilt for sentencing. In other words, the jury resorted to a chance method because the case was so charged for certain jurors—or made them so stubborn—that the quotient method was the only way to make everyone feel heard and allow the jurors to leave. Third, the media storm omitted the fact that the case was a quotient verdict rather than a chance verdict, simply noting cursorily that a “gambling verdict” had been overturned.

The Perkey case is significant because it shows that the history of chance verdicts tracks the history of community unrest in America relating to race. The Dickson case was a species of early tort liability as Americans came to terms with the new machines barreling around their streets, and Perkey was a case in which white attorneys used the stigma attaching to chance verdicts to exonerate a clearly guilty white defendant accused of murdering a black musician in his bar. It shows that the history of racial injustice walked hand in hand with the history of chance verdicts. It also demonstrates that the third Perkey jury did what it did because the case was high profile. The fourth Perkey jury came to the same conclusion as the second Tharp jury: it didn’t matter that Perkey and Tharp were guilty of the crimes. The community did not want to punish them. In this sense, it might be said that these juries performed a sort of graceless attempt at nullification in using chance methods to convince all the jurors that the sentence was fair, or at least that every juror had been heard.

146. Argument Concluded in the Perkey Murder Trial, supra note 134 ("In the first place, it was almost impossible to secure a jury at all. The counsel took advantage of the excitement to make an unusual number of challenges resulting in a jury of very questionable character.") (emphasis added) (discussing third trial).
E. “The Liberty of a Citizen Has Been Gambled Away in a Jury-Room”: The Mob at Work

One of the earliest reports of a chance verdict in the Ohio Reports is *Goins v. State*, although the Ohio Supreme Court had generally considered juror misconduct before. The case arose out of the aftermath of an extremely bloody election night riot in Lima, Ohio, in 1888. During the night after a particularly contested election, an African American man named William Goins and an Irish man named Tim Casey, came to blows at a restaurant. After the fight, Goins and some compatriots went looking for Casey. Casey’s compatriots did the same, and a riot ensued in which several men were grievously injured by razors and knives. Goins was arrested during the fight, and later that evening, was rushed away by his jailors to a different prison so that the mob could not locate him.

Over the next few months, other defendants were tried for the murders; one received a twenty-year sentence. Because Goins’ trial as an accessory was secondary to the preceding trials, the case received less public attention. There was still a great deal of difficulty in securing a jury and lining up approximately sixty-one witnesses to testify. At the end of the trial, Goins was convicted of second degree murder, despite the fact that it was clear that Goins had only used his fists in the otherwise deadly, weapon-ridden bout.

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147. *Goins v. State*, 21 N.E. 476 (Ohio 1889). *Goins* is a hybrid full chance verdict case because the jury flipped a coin to decide whether to convict for manslaughter or murder in the second degree, rather than to assess guilt or innocence. See id. at 482.

148. See *Hayward v. Calhoun*, 2 Ohio St. 164, 165 (1853) (If “it appears that any fraud or imposition has been practiced, by which a fair trial has been prevented by an impartial jury . . . and which could not have been prevented by proper vigilance on his part, the court, on application, should set aside the verdict, and grant a new trial.”).


150. Id.


153. Id. at 3.

154. Id. (“By the time Goins went on trial in December 1888, much of the passion surrounding the case had died down.”).


In mid-December 1888, it became clear that the verdict was the result of chance. The jurors had been evenly split between a verdict for manslaughter and second degree murder, and so twelve slips of paper (twelve reading “manslaughter” and the other twelve reading “murder”) were put into a hat. Amusingly, the first drawing resulted in a tie—six-to-six again. The second “drawing” out of the hat produced eight “ballots” for murder, and four for manslaughter; so the jury reported a verdict for murder. In other words, the method the jury used was a full chance verdict but was an agreement to use chance as between two different sentences known to the jury.

As befits the pattern of chance verdicts, the newspapers went wild. The Detroit Free Press noted that the verdict made no sense in light of the fact that the more complicit perpetrators received lighter sentences, while the Perrysburg Journal called the verdict “outrageous.” Unlike other chance verdicts, the media’s outrage was not unanimous. One newspaper simply reported a month later that Goins had been convicted. The Daily Demo-
cratic Times took a different tack, issuing an editorial objecting to the admission of juror affidavits; a chance verdict was never mentioned.\textsuperscript{164}

True to their word, Goins’ attorneys appealed the decision to the Ohio Supreme Court,\textsuperscript{165} and again the newspapers howled with rage at the chance aspect of the verdict as they reported on the appeal.\textsuperscript{166} In a lengthy treatment of the case, the Supreme Court of Ohio reversed and remanded.\textsuperscript{167} The court recited the facts of the verdict, and expressed its discontent at the posture of the submission of juror affidavits:

The almost unbroken current of authority supports this holding [excluding the affidavits], . . . and thus it may appear to all the world, by the subsequent statements of jurors, that the liberty of a citizen has been gambled away in a jury-room, yet the court is powerless to interfere, because the policy of the law is – \textit{First}, to

\textsuperscript{164} Not Satisfied, \textit{Daily Democratic Times} (Lima, Ohio), Dec. 31, 1888, at 4, https://www.newspapers.com/image/45962347/?terms=%22Mr.+Halfhill+cited%22. The Times quoted a rival paper, \textit{The Gazette}, which had printed the arguments, and retorted:

The above is but a specimen of their former ravings regarding the result of the William Goins murder trial and shows very clearly their opinion of justice, when they virtually \textit{ask a Judge to set aside all regard for law} for the sole purpose of aiding a man tried for murder to get a lighter sentence.

\textit{Id.} (emphasis added). This counter-narrative shows that the politics of the case were so charged that the editors felt it necessary (or, felt that it was good business) to wade deep into the weeds of legal argument to show the result of the Goins trial was fair. Less than a month earlier, interspersed with inline advertisements, the paper’s editors had asked, “

\textit{Will the jury in the Goins case be more consistent in the rendering of a verdict in this case than the jury in the Sam Thomas case? Will they render a verdict according to the evidence, or will their judgment be warped by their political beliefs?” \textit{General News, Daily Democratic Times} (Lima, Ohio), Dec. 7, 1888, at 7, https://www.newspapers.com/image/45959307/?terms=goins. In other words, the newspaper took the side it thought (or knew) its readers would.

\textsuperscript{165} Goins was represented by a prominent Republican lawyer in Lima named James W. Halfhill, whose biography in later life mentioned the Goins case. \textit{See George Irving Reed, James W. Halfhill, in Bench and Bar of Ohio} 357, 357 (1897) (“It is the case in which the verdict was determined by a method as reprehensible as that adopted by the Louisiana Lottery Company, and which caused the Supreme Court of the State to grant a new trial, resulting in the acquittal of the prisoner.”); \textit{see also id. at 371} (biography of the prosecutor, Isaac Motter). Goins’ other attorney in the case was James Price, who later became a local judge. \textit{See George Irving Reed, James L. Price in Bench and Bar of Ohio} 324–25 (1897). Price’s biography contains a more detailed account of the case. \textit{Id.} Reed’s account of the brawl differs from the newspapers, which reported that Goins and his friends played a part in starting the trouble. Reed’s portrayal of the attorneys as the heroic white saviors of the poor, black man served to bolster Price’s image in the book.

\textsuperscript{166} \textit{The Cincinnati Enquirer} wrote:

The prisoner, his attorneys and friends claim to have information to the effect that the verdict of the jury was arrived at by \textit{flipping coppers} [sic][f]or a decision. . . . Unfortunately for Goins, “tails” turned up, and, according to report, Goins was sentenced to imprisonment for life as a result of a game of chance.

\textit{Flipping Coppers On the Fate of a Prisoner, The Cincinnati Enquirer}, Mar. 11, 1889, at 4, https://www.newspapers.com/image/31312696 (emphasis added). \textit{The Akron Times} was similarly galled, \textit{Akron City Times}, Mar. 20, 1889, at 2, http://www.newspapers.com/image/228085021 (“After this case is settled the court ought to turn its attention from the prisoner to the jurors who convicted him. If gambling in grain is a penitentiary offense juggling with a human life ought to be so.”) (emphasis added).

\textsuperscript{167} Goins v. State, 21 N.E. 476 (Ohio 1889).
seclude the jury; and second, not to allow their evidence to impeach their verdict . . . . But a case like this at bar strains the principle to its utmost tension, and suggests a doubt whether there may not be found a carefully guarded exception to the rule, the universal application of which may present a spectacle so discreditable to our jury system.168

The court ended its analysis by noting that the chance verdict issue did not decide the case, but the proceeding clearly troubled the court and likely informed its decision-making on the other dispositive issues in the appeal.

The court’s analysis is also important because it recognizes a crucial reality: jurors talk. The outcome—and more importantly, the outcome’s narrative in the public sphere—goes beyond the confines of a courtroom where the evidence cannot be received. The method used by the jury made a mockery of the proceedings, and the trial court’s refusal to admit the juror affidavits “left the allegation of misconduct without proof.”169 But the allegation—and the fact that it stood unchallenged by counteraffidavits—nevertheless tainted the proceeding. The newspapers were certainly unconcerned with the court’s resolution of the other issues in the appeal.170

William Goins, who had been in jail during the pendency of his appeal,171 was eventually acquitted on Christmas Eve of 1889.172 In its Christmas issue, the Daily Ohio State Journal reported a “complete overthrow of the copper-flipping verdict” and ended its writeup by stating that “[t]he verdict gives general satisfaction.”173 Goins died three years later of tuberculosis.174

F. Conclusion

What does all of this history mean when considered as a whole? Chance verdicts occur along the fault lines of society and law: racial tensions, moral tensions, and the tearing of communities are all common fea-

168. Id. at 482.
169. Id.
170. See Jury Gambling: Verdict Found by Flipping Coppers, Cincinnati Enquirer, May 8, 1889, at 1, https://www.newspapers.com/image/32049237/ (mentioning no ground other than the chance verdict as the reason for the Supreme Court’s reversal); see also Head or Tail?, Buffalo Com. Advertiser, Mar. 20, 1889, at 1, http://www.newspapers.com/image/269308634 (“The supreme court today granted William Goins of Allen county a new trial on a charge of murder in the second degree on the ground of the jury’s misconduct. They . . . agreed to arrive at a verdict by flipping a coin.”).
171. Admitted to Bail, Meadville Saturday Night (Meadville, Pennsylvania), May 21, 1889, at 2, http://www.newspapers.com/image/295509696 (“Goins has been in jail nearly a year.”).
tures of cases where chance verdicts can be observed. For legal scholars, chance verdicts challenge the wisdom and fairness of a jury trial. Are jury rooms sacrosanct or worthy of scrutiny? The answer is that when community tensions overwhelm a jury’s ability to review the evidence before them (producing a chance verdict), then that jury’s verdict is rarely the last word on the case.

Chance verdicts also cut to the heart of the jury system. They lay bare the potential for corrupting the core promise of being judged by one’s peers. The forceful reactions of the jurists involved in these cases show that the same strands of argument and debate run through the decades. While the conclusions of judges as to the merit of those arguments may shift back and forth over time, the lines remain clearly drawn. Understanding these shifts in legal culture is paramount at arriving at just outcomes in future cases. Perspectives may go in and out of fashion, but when those currents are poorly assessed, the benefit of centuries of thought on these questions is wasted.

The conditions under which these verdicts were rendered will recur. The only question is when and how. Indeed, in California in the early 2000s, a partial chance verdict occurred. The next section will examine California as a case study and trace the history of chance verdicts in that state, and show how, when misunderstood or glossed over, history was misapplied.

III. THE CALIFORNIA FORMULATION: FROM 1855 TO 2005

The strange and tortured narrative of chance verdicts in California strikes at the heart of what makes these verdicts so contentious. Chance verdicts are so interesting precisely because they raise deep and difficult questions about how a community should judge its defendants and how deeply that community should examine its decision-makers’ reasoning after the fact. Does a defendant have a right to a jury that fairly considers his case? More pointedly, if such a right exists, how far will a court go to uncover misconduct abridging that right? In the case of quotient verdicts, is the influence of a rogue juror corruptingly penetrative or superfluous? California is one of the few states with a rich record of both legislative and judicial assessments of chance verdicts. The give and take of different judges and the legislature zigzags between privileging different conceptions of the no-impeachment rules. Lawyers exploited the gray areas between these perspectives. Assessing these trends as a whole demonstrates the value of these debates to arriving at fair outcomes; in a recent case, the California courts underexplored this history and allowed a partial chance verdict to slip through the cracks.

175. A chart synthesizing the cases discussed is appended at Appendix B.
To begin, it is important to remember that California is one state where chance verdicts remain enshrined by statute as grounds for a new trial to this day. On the civil side, chance verdicts have been statutorily codified since 1862.176

The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial.

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors . . . .177

First, notice the breadth of this statute. Juror misconduct is an independent ground for granting a new trial (denoted by a semicolon following “misconduct of the jury.”). Secondly, the statute empowers “any one” juror to prove the misconduct by affidavit. In other words, theoretically one credible juror could undo an entire verdict. The statute also seems to implicate partial chance verdicts in addition to full chance verdicts. Finally, “resort to the determination of chance” is undefined, and the confusion arising from this vague language has produced a troubled line of case law that extends from 1862 to the present day.

On the criminal side, the statute is composed differently, but its codification nonetheless demonstrates that legislators felt chance verdicts worthy of specific mention:

When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only: . . .

4. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors . . . .178

Importantly, the statute does not contemplate a new trial when a chance verdict comes out in favor of the defense, even though the same issues are at play. Secondly, the statute nests an expansive definition (“any means

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176. See Act of March 5, 1862, ch. 48, 1862 Cal. Stat. 38–39 (showing the relevant language in almost the exact same formulation) (emphasis added).
other than . . . .”) within a narrow class of cases (“in the following cases only.”).

Opening the door to the jury room is an incredibly intensive exercise of a trial court’s powers. In reality, courts are reluctant to wield the tools provided by these statutes. Because granting a new trial is a defendant’s or disappointed litigant’s ultimate remedy, a judge is unlikely to throw an entire case out on the basis of a single juror’s affidavit, although the statute allows that outcome. Tracing the evolution of this rule demonstrates the contention that chance verdicts generate in the legal sphere, and understanding that evolution is crucial to applying its lessons correctly.

Prior to 1862, California followed the common law rule that jurors could present testimony “substantiating” their verdict but could not “impeach” it.179 The 1855 Wilson decision provides a clear window into the rule courts used before the intervention of the California legislature in 1862. In Wilson, a full quotient verdict case,180 both a juror and the sheriff submitted affidavits alleging the misconduct.181 According to the syllabus preceding Chief Justice Murray’s opinion, the sheriff was in fact present with the jury during deliberations.182 The court recognized that the sheriff’s affidavit was admissible,183 while the juror’s testimony was not.184 Importantly, the court illustrated with clarity that a “full quotient verdict” and a “full chance verdict” were effectively the same: “Such verdicts are regarded in the same light by the courts as gambling verdicts, and will invariably be set aside, just as if the jury had thrown dice, or resorted to any species of gaming, to determine the amount.”185 In other words, if a quotient was used as a platform upon which further discussion proceeded, then the offensive nature of the quotient receded. The Wilson case is important because it illustrates the common law rule briefly and clearly. The bottom line is that attacking a verdict was very difficult without the testimony of someone

179. Wilson v. Berryman, 5 Cal. 44, 46 (1855) (“Although jurors will not be allowed to impeach their own verdict, still they will be permitted to substantiate it, and this will always be found a sufficient check against collusion or corruption on the part of the officer having them in charge.”).

180. Id. at 45 (“In this case, the jury, for the purpose of arriving at a verdict, agreed that each member should set down a sum according to his own judgment; that the aggregate should be divided by twelve, and that the quotient should be returned as the verdict; which was done.”).

181. Id. at 46.

182. Id. at 45.

183. Id. at 46 (“In most of the cases, however, in which this question has occurred, the verdict has been set aside upon the testimony of Sheriffs, and no objection seems to have been taken to the competency of such evidence.”).

184. Id. (“Although jurors will not be allowed to impeach their own verdict, still they will be permitted to substantiate it, and this will always be found a sufficient check against collusion or corruption on the part of the officer having them in charge.”) (emphasis added). The court’s optimism, as we will see, was misplaced.

185. Wilson, 5 Cal. at 46.
other than a juror. There is no mention in Wilson of the defendant’s rights; the court speaks only of preserving the order of the jury room.\footnote{186}

\section{That the Secrets of the Jury Room Should Not Be Revealed: Wilson, Donner, and The Connections of Mr. Shafter}

Assessing state legislative history is notoriously imprecise. But in the case of California in 1862, thanks to the coverage of newspapers like the \textit{Sacramento Daily Union}, we may piece together a rough picture of what happened. And what happened is nothing short of extraordinary. In the main, the legislature changed the statute to allow jurors to submit affidavits to overturn chance verdicts. If the newspapers are to be believed, one legislator drove this change because he stood to benefit financially from a different outcome in a chance verdict that recently had been handed down. The legislative intent was quite simply to target this particular case.

Statutes barring chance verdicts had been on the books in California for some time, but in a lesser form.\footnote{187} On February 10, 1862, state senator Van Dyke introduced the modification to the statute that contemplated juror testimony in civil cases when verdicts were made “by resort to the determination of chance.”\footnote{188} On March 1, 1862, Senator O’Brien was quoted by the \textit{Daily Evening Bulletin} discussing a bill relating to wills and trusts and endorsing the chance verdict bill’s retroactivity.\footnote{189} Once passed,\footnote{190} the bill

\begin{itemize}
\item \footnote{186. Indeed, the court’s language suggests it considered the jury room sacrosanct: “It has been suggested that every verdict may be set aside upon the affidavit of a corrupt officer, and that public policy imperatively demands, \textit{that the secrets of the jury room should not be revealed.}” \textit{Id.} (emphasis added).}
\item \footnote{187. In a statutory compilation from 1850, “verdict by lot” was listed as a ground for a new trial in a criminal case. Law of April 20, 1850, ch. 11, § 472(4), 1850 Cal. Stat. 310 (“When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors.”); \textit{see also id.} § 681(4) (same language). Note that the statute lists “verdict by lot” in the same breath as other, vaguer means of deciding a verdict that depart from the “ideal juror standard,” where juries fairly contemplate guilt based only on the facts before them. The modern analog is \textit{Cal. Penal Code} § 1181 (West 2018).}
\item \footnote{188. \textit{More Bills, Daily Alta Cal.}, Feb. 11, 1862, at 1, https://cdnc.ucr.edu/?a=d&id=DAC18620211&c=----en--20--1--txt-txIN------1. The bill in the same form may also have been introduced on March 8 by Senator Rhodes during the later attempts to roll the bill back, although the legislative write-up is unclear. \textit{See California Legislature Thirteenth Session, Daily Alta Cal.}, Mar. 8, 1862, at 1, https://cdnc.ucr.edu/?a=d&id=DAC18620308&c=----en--20--1--txt-txIN------1 (referencing repeal of the amendment, but then offering the same language). The modern analogy is \textit{Cal. Civ. Proc. Code} § 657 (West 2018).}
\item \footnote{189. Senator O’Brien was quoted by a local paper:

\begin{quote}
Why, we passed the other day a law declaring that jury verdicts obtained by chance, null and void, and that Law will affect causes now pending – Donner vs. Palmer, and some others. I don’t profess to know much about law, but it seems to me that if this bill becomes a law, it will be one of the best enacted this session. I hope it will pass.
\end{quote}

\begin{quote}
\end{quote}

\item \footnote{190. \textit{See Laws of California, Passed at the Thirteenth Session of the Legislature–1862, Sacramento Daily Union}, Mar. 24, 1862, at 6, https://cdnc.ucr.edu/?a=d&id=SDU18620324&c=-----en--20--1--txt-txIN------1.}}
caused a stir when the newspapers learned that its retroactivity was intended to influence a specific case, Donner v. Palmer. The case was tried in February of 1862, and several jurors flipped a coin to determine their votes (a "partial chance verdict.").

The Donner case was the subject of enormous media attention in part because of its subject. The plaintiff, Donner, was in fact the child of one of the infamous Donner party, who was rescued from the mountains. When the child arrived in San Francisco, the citizens of the city arranged for a transfer of land to the boy. The grant, however, was tampered with, and thus when the young Donner came of age, he filed an ejectment action to settle title to the property. A more sympathetic plaintiff would have been hard to come by, and this case illustrates the trend that chance verdicts occur more frequently when cases are highly charged.

Once the amendment passed allowing for jurors to testify as to chance verdicts, the legislature debated several attempts to roll the amendment back. In the April 21, 1862 issue, the Daily Evening Bulletin could hardly contain its disgust:

Senate bill to repeal the Act amendatory of the Practiced Act, passed at this session, and which excited so much harsh comment

191. The Daily Evening Bulletin was particularly harsh in its critique:

In the Assembly, it was stated that the bill was designed to meet one particular case, viz:

The Donner suit lately finally decided in this city, and was rushed through the Assembly by title only. It was characterized as an unwarrantable and dangerous species of special legislation, which would not receive the sanction of the Legislature when its purport and object were exposed. Nevertheless, the resolution was voted down. The only way now remaining to check what is believed to be a trick, if not a gross fraud, will be for the Senate, where the matter seems to be understood, to adopt a resolution asking the Governor to veto the Act.

192. The Donner Case again–A Romance of the Mountains, Daily Evening Bull. (San Francisco, Cal.), Mar. 25, 1864, at 5, http://tinyurl.galegroup.com/tinyurl/6DPFW5 (referencing as grounds for a new trial that "one of the jurors confessed to having raffled for a verdict") (emphasis added). The paper framed the issue as one of criminal liability—the juror confessed to gambling in lieu of performing his civic duty.

193. See generally id.

194. Id.

as having been muggled through\textsuperscript{196} for the purpose of re-opening the celebrated case of Donner vs. Palmer came up at a late hour and excited a lengthy discussion. It will be remembered that the obnoxious Act was construed to authorize the verdict of a jury to be set aside on the affidavit of a single juryman, that he had gambled with himself in a corner, as to his verdict. Not only would this open up a temptation to the grossest frauds, but it is generally believed that the sole object of the Act was to re-open [sic] the Donner case, which had otherwise been finally settled.\textsuperscript{197}

The newspaper’s impression that opening up the jury room amounted to opening a Pandora’s Box would be echoed by later generations of judges. But importantly, the newspaper was in the corner of the sympathetic party. Its legal stance was the “popular” one. This is another observable trend in the history of chance verdicts, and the legislative interference made the story all the more outrageous.

Several days later, the \textit{Sacramento Daily Union} printed some of the legislative debate conducted over a repeal bill. Although the Senators disclaimed any intention of trying to directly impact the \textit{Donner} case, the debate is revealing for its discussion of how society should deal with chance verdicts:

\textbf{Misconduct of Jurors . . .}

Mr. \textsc{Shafter} took occasion to reply to certain charges made by the papers of San Francisco against him, for endeavoring to smuggle through a bill of the same character in the early part of the session, with a view to settling a case in which his client was deeply interested in his favor. He had nothing to do with it whatever, and did not vote for it . . . .

Mr. \textsc{Rhodes} said he had no idea that the Senator from San Francisco was guilty of trying to smuggle through any bill, and testified that that was not his way of doing things. The evil of gambling openly in juries was not half so bad as destroying the effect of a verdict by the pretension of some packed juryman to have been gambling secretly. Honest jurymen gambled openly in the jury room, while all villains would pretend to have gambled secretly. . . .

Mr. \textsc{Oulton} said it seemed to be agreed that a verdict obtained by chance was one that ought not to stand. He could see no injustice, hardship or danger in going upon the affidavit of a man who stated that he himself was the party whose verdict was decided by a game of chance. It simply opened

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\textsuperscript{196} The paper may have intended to use the word “smuggle” rather than “muggle.” The “smuggle” language appears in a different article several days later, \textit{See Senate: Misconduct of Jurors, SACRAMENTO DAILY UNION}, Apr. 23, 1862, at 4, https://cdnc.ucr.edu/?a=d&d=SDU18620423&e=-------en--20--1--txt-txIN-------1.

\textsuperscript{197} \textit{Legislative Doings, DAILY EVENING BULL.} (San Francisco, Cal.), Apr. 21, 1864, at 1, http://tinyurl.galegroup.com/tinyurl/6DP5V9.
up the case for a new trial. That was not going to a dangerous extent.

Mr. Van Dyke argued that they were going too far by taking the affidavit of one as proof. He could see no harm in one person gambling in a jury room where no other person knew of it. Jurymen were often worn out and driven to such means of deciding . . . .

Mr. Parks expressed himself opposed to this bill, and hoped it would be killed on engrossment. If he was found guilty of any crime by chance, he would feel entitled to a new trial.

Mr. Rhodes said he wished himself that no chance verdict should stand, but it would open a door to a greater fraud. It would be impossible in many cases to get the witnesses all together again in his life.

Mr. Parks said if such a man was on a jury in the first place, it was enough that he should have a new trial before an honest jury . . . .

This debate captures perfectly the competing arguments and incentives around admitting evidence to prove a chance verdict occurred. On the one hand, any defendant found guilty by chance would rightly demand a new trial where the evidence was considered. On the other hand, if a motion for new trial based on a chance verdict could be used as a weapon by a clever defense attorney (based on the testimony of one juror gambling privately), that might undo the jury system. Whether prompted by sheer corruption on the part of Senator Shafter or concern for the integrity of the jury system, the statute promotes an ideal: jurors who deliberate fairly and sensibly. The “resort” language—and the legislative debate—imply that chance verdicts were seen as a form of surrender to temptation. The tenor of the senators’ comments also suggests that the legislators feared the public hearing too much about what happened in the jury room.

The next day, April 23, 1862, the Daily Evening Bulletin printed an editor bulletin signed “One Who Knows,” slamming Senator Shafter for his ties to the firm representing the defendants in Donner v. Palmer.199 The editorial is remarkable because it illustrates that newspapers at the time considered a chance verdict as the highest of drama. The legislative wrangling made the issue even riper fodder for print sales. But the author’s position was, in a sense, non-populist; that is, it argued for preserving the outcome of a chance verdict. Later newspapers would argue just as vehemently on behalf of defendants convicted by different forms of chance verdict, but

198. Senate: Misconduct of Jurors, supra note 196. This is the most extensive legislative history on a chance verdict. Van Dyke’s arguments in particular show that a partial chance verdict was meant to be included in the statute.

Their modus operandi was the same: assuming whatever legal argument better served the more sympathetic party.

The controversy was not limited to the machinations of the California Legislature. One of the jurors from the February 1862 trial, J.M. Good, was so offended by the public discourse surrounding the verdict that he penned a letter to the Daily Evening Bulletin disclaiming any part in the chance verdict:

In your issue of yesterday a correspondent states that Mr. [Senator] Shafter is reputed to have said, in the Senate, that in the case of Donner vs. Palmer et al. a verdict ‘had absolutely been decided by the tossing of a copper.’ From this I am constrained to infer that Mr. Shafter had not only charged the jury with gambling, but given the public the opinion that the jury empaneled to try the case were no better than a set of blacklegs, and had no regard for the oaths under which they were acting.

As a juryman in that case I must plead ‘not guilty’ to the charge, or implied charge, of Mr. Shafter, and not only call upon, but demand that he shall place the jury in a proper light to the public. If any unlawful act has been done by the jury or any members of it, let Mr. Shafter mention the names of the parties, and not let an insinuation go to the world, that all members composing that jury are gamblers. As a juryman in that case I ask for justice at the hands of Mr. Shafter.

J.M. Good200

His missive is significant because it shows that Good did not want to be tarred with the same stigma that he felt the offending jurors deserved. For Good, “giving in to chance” was a stain on a man’s reputation. His letter speaks in several different modes: (a) a vice component, referencing gambling as an undesirable activity; (b) a civic component, in terms of assuring the public that he had not abdicated his duties as a civil servant; and (c) a community component, where Good connotes his fellow jurors’ conduct as a failure to afford a fellow citizen a fair hearing.

The stigma of a chance verdict may also explain the newspapers’ (perhaps feigned) fury that the legislature had rushed through a bill on such a significant topic. Of course, the sheer spectacle of the event could be behind the emotional character of the coverage. The copy writes itself: “A boy, victim of the tragedy of a murderous migration, is welcomed to his new metropolis by generous citizens. He lays claim to the land set aside for his benefit, and the trial is corrupted by yet more barbarism as the jurors ‘raf-

200. J.M. Good, Editor Bulletin, A Juror in the Donner Case Upon the Late Verdict, DAILY EVENING BULL. (San Francisco, Cal.), Apr. 24, 1864, at 2, http://tinyurl.galegroup.com/tinyurl/6DP6WX (emphasis in original). “Blackleg” is defined as “one who cheats at cards, especially a professional gambler; cardsharp.” Blackleg, AM. HERITAGE DICTIONARY (1981). The language is significant because it not only connotes someone as a gambler, but a cheating gambler at that. This “double-vice” terminology showcases the contempt people felt for chance verdicts.
fle" off his rights. Then the Legislature, motivated by one senator’s greed, monkeys with the statute to undo the verdict.” Chance verdicts are sensational because they shock the conscience; they invite us to question the very integrity of the jury system generally. Why should we trust juries with our fates when they cannot be trusted to even give defendants a fair hearing? Of course, the newspapers in 1862 adopted the perspective that the exact outrage that its readers should be concerned with was in fact the reversal of a chance verdict; in other words, the newspapers’ sympathies lay with the plaintiff, Donner. As this paper seeks to show through this history, chance verdicts are certainly a rarity, but they are a recurring rarity.

By the time Donner vs. Palmer reached the California Supreme Court in the July term of 1863, the parties had had months to brief their positions on the new statute. The California Supreme Court, speaking through Justice Crocker, held that the statute applied to motions for new trial submitted after the statute’s passage and that, thus, the defendant was entitled to a new trial. The court’s opinion also included the sordid details of what transpired in the jury room at trial. Ironically, one of the offending jurors was named Fortune. The two flipped a coin to decide which group they would join.

Several important points in the above rendition merit discussion. First, there was pressure on the jury generally to act in favor of a plaintiff that was likely generally well known to the public. Second, there was pressure on these two men as the sole dissenters in the case. Third, the California Supreme Court recited these facts without commentary. Absent is the language of contempt and scorn that most courts adopt when dealing with these verdicts. The court delivered its judgment soberly and procedurally. For Fortune and Heller, resorting to a statistical method was enough in the heat of the moment to relinquish their views. Upon being approached after

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201. The “raffle” language is the Daily Evening Bulletin’s, but the rest is my own. See The “Donner Case” again—A Romance of the Mountains, supra note 192 (referencing as grounds for a new trial that “one of the jurors confessed to having raffled for a verdict”).


203. The court’s procedural wrangling is important because it demonstrates the granular level of detail that the court felt was necessary in arriving at an unpopular outcome:

The statute related merely to the remedy, declaring the rule of evidence to govern the Courts in hearing and determining motions for new trials, founded upon alleged misconduct of the jury, and it clearly applies to all motions for new trials heard after it took effect. . . . If that judgment was entered upon a verdict rendered under circumstances showing misconduct on the part of the jury, the law in existence at the time of the trial, verdict, and judgment, gave the defendants a right to have the judgment vacated and a new trial granted . . . .

Id. at 47 (emphasis added).

204. Id. at 48 (“That the conduct of these jurors was such as to vitiate the verdict there can be no doubt. The rule of law upon this subject is well settled. . . . The judgment is reversed and a new trial ordered as to the defendants and the intervenor.”).

205. Id. at 47.
the fact, the two men refused to testify as to their conduct.\footnote{206} The dispute over the land itself would not end until 1870.\footnote{207}

B. “The Most Accurate of the Sciences”: Changing Perspectives in the Turner Case

The Donner case was just the beginning of the California judiciary’s attempts to apply the new statute to different forms of chance verdict. Two cases, both decided a year after Donner in the July term of 1864, demonstrate the ensuing confusion surrounding chance and quotient verdicts. Ironically, the judge who wrote the opinion for both cases, Chief Judge Sanderson, was chosen as chief judge by the drawing of lots,\footnote{208} and in fact served on the court with a brother of the Senator Shafter who shepherded the statute through the legislature.\footnote{209} The key question was whether quotient verdicts should rank as offensive with full and partial chance verdicts. This distinction is crucial because, on the one hand, a quotient verdict jury departs from the realm of reasoned, collaborative decision-making, but on the other hand, quotients seem less offensive than full chance verdicts.

The first case, Turner, concerned excess flow from a ditch.\footnote{210} Justice Sanderson assumed for the purposes of the decision that the case had been rendered as a full quotient verdict (the more specious kind) rather than a working quotient verdict.\footnote{211} The crux of the problem with a quotient verdict was the agreement in advance to be bound; a “working quotient verdict,” conversely, was allowable.\footnote{212} A quotient verdict driven by an agreement to be bound in advance (without further tinkering with the resulting quotient) was “vicious and irregular.”\footnote{213} The remainder of the opinion is remarkable for the criticisms it heaps on the legislature and for the outcome of the case. Discussing the statute of 1862, Justice Sanderson did not hold back as he criticized the statute.\footnote{214} In other words, Sanderson questioned why the legislature had elevated some forms of misconduct while choosing not to speak on others; it is difficult to assess whether he was taking a veiled shot at

\footnotesize{206. Apparently, the defendants approached the two to no avail. \textit{Id.} at 48.}
\footnotesize{207. Donner v. Palmer, No. 751, 1870 WL 582 (Cal. July 29, 1870), later codified as Donner v. Palmer, 51 Cal. 629 (1877). The Reporter’s Note at the end of the 1877 opinion indicates that the case was chosen in 1877 for inclusion in the California Reports series.}
\footnotesize{210. \textit{Turner v. Tuolumne Cty. Water Co.}, 25 Cal. 397 (1864).}
\footnotesize{211. \textit{Id.} at 399.}
\footnotesize{212. \textit{Id.} at 399–400.}
\footnotesize{213. \textit{Id.}}
\footnotesize{214. \textit{Id.} at 400–01.}
Senator Shafter’s statute for being “selective” in order to achieve profitability for its author. Though the assumed full quotient verdict was “undoubtedly vicious, and ought to be set aside,”\footnote{Id. at 400.} the only question for the court was whether juror affidavits could be admitted to prove the misconduct. After reviewing several key precedential cases,\footnote{Importantly, the court quoted Wilson’s language noting that a quotient verdict shared the same evils as a full chance verdict. \textit{Turner}, 25 Cal. at 402 (quoting \textit{Wilson v. Berryman}, 5 Cal. 44, 45–46 (1855)).} the court took an extraordinary turn away from the logic of the precedent it cited and held that full quotient verdicts did not employ chance:

Neither is the aggregate of these sums, nor the quotient resulting from a division of the aggregate by twelve, the result of chance, but, on the contrary, the result of the most accurate of the sciences. Thus from the commencement to the end of the process no quantity which enters into the final result is determined by a resort to chance.\footnote{\textit{Turner}, 25 Cal. at 402–03 (deciding not to admit the affidavits).}

In other words, the Sanderson court rejected not only the applicability of the statute to the instant case but additionally the applicability of a case, \textit{Wilson v. Berryman}, decided by the same court not even ten years prior.\footnote{5 Cal. 44 (1855).} Indeed, the court’s discussion of mathematics as self-evidently ensuring fairness brings to mind the statistical fairness of a coin flip itself. This dispute—whether quotient verdicts share the problems of chance verdicts—is the bedrock of what makes chance verdicts so contentious.

The second case, \textit{Boyce}, a horrific stagecoach liability suit involving a quotient verdict, should be understood as the logical outgrowth of the knot that the court tied for itself in \textit{Turner}.\footnote{\textit{Boyce v. California Stage Co.}, 25 Cal. 460 (1864).} The question similarly was whether quotient verdicts shared the offensive characteristics of chance verdicts. The litigators were well aware of the passion churned up by chance verdicts and sought to prove that quotient verdicts were just as bad as chance verdicts in their arguments.\footnote{See id. at 464–65 (counsellor Filkins’s argument on the petition for rehearing). Filkins argued that the verdict was “vicious and void,” and his argument painted chance verdicts and quotient verdicts as peas in a pod. \textit{Id}. Filkins used the language of sin and public order in his argument. He even cited \textit{Donna v. Palmer} in his earlier papers. \textit{See id.} at 461 (argument before petition for rehearing).} The first time the case was heard, Chief Justice Sanderson devoted a paragraph to the chance verdict issue.\footnote{Id. at 473.} He noted that each juror had marked down his preferred damages figure on a slip of paper, added them together, and divided by twelve to arrive at a figure that the jury had previously agreed to adopt. Calling the method “vicious,” he went on to state that because there was no evidence of the computation aside from evidence submitted by the jury, it was as though the
verdict was completely intact.\textsuperscript{222} Citing \textit{Turner}, he again held that quotient verdicts did not fit within the meaning of the new chance verdict statute.

On rehearing (codified within the same reported opinion), Justice Sanderson spilled a great deal of ink addressing the chance verdict issue. The “better rule,” he said, was that affidavits of jurors could not be received to impeach a verdict.\textsuperscript{223} Noting that the 1862 statute had “superseded” the common law by creating exceptions to it, he then took the case out of the statute’s bailiwick.\textsuperscript{224} His opinion demonstrates that judges were afraid of construing the chance verdict statute too broadly.\textsuperscript{225} Sanderson then recited the history of the statute,\textsuperscript{226} noting that it had been prompted by \textit{Donner v. Palmer}. Calling \textit{Donner} “a clear case of chance,” he noted that the Legislature had “legitimate[ly] reference[d]” the case in passing the statute.\textsuperscript{227} The injustice of that case was so grave, in other words, that the legislature’s intervention was rightful. There was no mention of the act’s troubled history, or that Sanderson was serving with a family member of a man who was allegedly instrumental in the act’s passage. This tug of war over whether quotient verdicts were on the “bad side” of the jury misconduct line would rage for decades, and it adds a legal dimension to the human interest stories explored earlier.

\textit{Boyce} illustrates that, for Justice Sanderson, the public shame from a full chance verdict was so great that the law had to yield; the court in \textit{Boyce} viewed the change in the law as rightful, even though it refused to apply the change to a quotient verdict. The opinion also shows that the judicial reaction to the act was one of fear. Holding the common law rule as cardinal, the court in \textit{Boyce} and \textit{Turner} narrowly construed the inquiry, even as they criticized quotient verdicts as “vicious” and noted that they shared some of the same problems as “clear” chance verdicts. Taken together, \textit{Boyce} and \textit{Turner} signaled that: (1) lawyers in the community had gotten the message that the statute could be used offensively even when a quotient verdict, rather than a chance verdict, had transpired; (2) judges were fearful that the legislature’s meddling had created an opening in the common law rule of no impeachment; and (3) those judges were willing to jump over (even after citing) precedent like \textit{Wilson v. Berryman} in rushing to protect the common law rule. The distinction between chance verdicts and quotient verdicts was most disputed when the judges felt the common law rule was under threat. To save the common law, courts began to disregard components of it that did not suit their purposes. Justice Sanderson may also have been trying to

\textsuperscript{222} \textit{Id.}
\textsuperscript{223} \textit{Boyce}, 25 Cal. at 474.
\textsuperscript{224} \textit{Id.} at 475.
\textsuperscript{225} \textit{See id.} at 476.
\textsuperscript{226} Again, using moralistic language, Justice Sanderson notes that he was reviewing the legislative history to “ascertain” the precise “evil” that the Legislature had “in view, and for which they sought to provide a remedy.” \textit{Id.}
\textsuperscript{227} \textit{Id.} at 477.
send a message to the legislature that if they wished to override a common law rule, they had to do so with sweeping clarity.

Over the next decades, the California courts continued to zigzag between holding that quotient verdicts fell under the umbrella of chance verdicts and, conversely, that they did not. Lawyers clearly continued to attempt to use the statute offensively when verdicts were rendered in the other side’s favor. In at least one case, the lawyers succeeded. In Levy v. Brannan, a partial quotient verdict case, the reporter reprinted the respondent’s brief, which argued that because the entire jury had not used a quotient method, the verdict was valid. In a one paragraph order, the court ordered a new trial with no mention of Boyce and Turner. Perhaps the court felt that this case came closer to a partial chance verdict than a partial quotient verdict, but the opinion makes no mention of the distinction. In any case, the lack of distinction likely incentivized attorneys to continue including chance verdict allegations in their motions for new trial. By 1888, the California Supreme Court was back onto the Turner and Boyce line of case law construing quotient verdicts in all their forms as outside the statute.

The confusion reached a head when the court decided Marriner v. Dennison. This case, perhaps more than the others in the period between 1864 and 1893, demonstrates why quotient verdicts share the problematic features of chance verdicts, even if the court did not always perceive it this way. Evidently, the jury voted to see where they “stood”; eight voted for the plaintiff and four for the defendant. One juror suggested a quotient method be used, and a majority of the jury voted to approve that “motion.” In this case, one juror threw the average off by inserting a very

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228. Perhaps this offensive use of the statute substantiates Justice Sanderson’s probable fear that the statute would be misused if it were construed too broadly. See Hoare v. Hindley, 49 Cal. 274 (1874). In Hoare, a full quotient verdict case, the reported opinion relates the language used in the affidavit testifying to the misconduct. Id. at 275–76. The affidavit was the defendant’s, and it used the precise word in the statute: “resorted.” Id. at 276. This implies that the defendant’s attorney, searching for ways to overturn a verdict unfavorable to his client, lifted the statute’s language and put it in his client’s affidavit. The California Supreme Court was not impressed, and simply deferred to the trial court’s resolution of the conflicting evidence. Id. at 277 (“We do not feel authorized to set it aside.”).


230. Id. at 489 (setting aside the verdict for the “misconduct” of “drawing lots”).

231. This is demonstrated by Hunt v. Elliott, 20 P. 132, 133 (Cal. 1888), a working quotient verdict case where the court cited Turner and Hoare.

232. 27 P. 927 (Cal. 1891), modified on reh’g, 27 P. 1091 (Cal. 1891).

233. Id. at 559.

234. The court described the process:

Some voted for the defendant, one voted $1, others, various amounts, and one voted $10,000. The amounts voted were all added together, and divided by twelve, which made $2,600. One member of the jury then moved that $100 be knocked off, making the amount $2,500, which was carried by a majority of the jury, and they then returned that amount to the court as their verdict.

Id.
high number into the proceedings, but arguably the juror who wrote $1 did precisely the same thing on the low end.\textsuperscript{235} As the court noted, the plaintiff had only requested damages in the amount of $3,500.\textsuperscript{236} The court went on to declare that the verdict was “undoubtedly vicious and ought to be set aside,” but, after citing \textit{Turner} and \textit{Hunt}, stated that the affidavits could not be received to show a chance verdict.\textsuperscript{237}

The court in \textit{Marriner} granted a new trial based on the plaintiff’s failure to show by a preponderance of the evidence that he had been damaged.\textsuperscript{238} But the court’s logical progression on the quotient verdict issue is sweeping. In the same breath, the court said: (a) the verdict, more specifically the quotient verdict method, was vicious; (b) the juror affidavits testifying as to the misconduct were credible; (c) the \textit{Turner} case line prevented the affidavits from fitting under the chance verdict statute; and (d) granting a new trial on other grounds. The quotient verdict issue no doubt influenced the granting of the motion for new trial. The fact that one juror suggested knocking $100 off the verdict—and the fact that the jurors in the minority did not dispute entering a verdict for $2,500 when presumably they believed the plaintiff was not entitled to anything—displays the rough and tumble of jurors deliberating baldly. It suggests the jury cared only about the verdict “appearing” reasonable than giving the parties a fair shot. Evidently, the California Supreme Court was not pleased with this “seeing how the sausage is made” fact pattern, because a month after issuing the opinion, the court struck the chance verdict discussion from its own record.\textsuperscript{239} This action suggests that the court feared the case’s future application as precedent.

\textbf{C. “They Had as Well Determine Their Own Rights by Drawing Lots”: Dixon to Mirabito II}

In 1893, the court attempted to end the confusion, and recalibrated its posture on quotient verdicts. In \textit{Dixon v. Pluns}, the court overruled the \textit{Turner} case line, and again squarely asked whether quotient verdicts fit the meaning of chance verdicts as contemplated by the statute.\textsuperscript{240} Seizing on Justice Sanderson’s admonition in \textit{Turner} that quotient verdicts were “vicious and irregular,” the \textit{Dixon} court reasoned that “[i]f this character of verdict is vicious and irregular, it can only be vicious and irregular upon the ground that it was not the result of that calm and deliberate judgment of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{235} Id.
\item \textsuperscript{236} Id.
\item \textsuperscript{237} Id.
\item \textsuperscript{238} Marriner, 27 P. at 928.
\item \textsuperscript{239} Marriner v. Dennison, 27 P. 1091, 1091 (Cal. 1891) (“The opinion heretofore filed in the above-entitled cause is hereby modified by striking therefrom that portion which is included under the subdivisions numbered, respectively, 2 and 3.”).
\item \textsuperscript{240} 33 P. 268, 269 (Cal. 1893).
\end{itemize}
\end{footnotesize}
jurors contemplated by the law, but that it was arrived at by a resort to chance or lot.” Dixon represents the beginning of a transition, whereby the court began to discuss and elevate a new ideal of jurors as the calm arbiters of facts. Gone in the Dixon opinion is any discussion or implied fear of assertive defense attorneys seeking to undo an unfavorable verdict. Instead, the Dixon court attempted to define “chance” itself, decided that quotient verdicts were as bad as full chance verdicts, and overturned Turner and its progeny.

The distinction made by the Dixon court is subtle but profound. The court engineered an explicit decisional course correction that brings quotient verdicts under the chance verdict umbrella by spelling out precisely why a quotient verdict shares the offensive characteristics of a chance verdict. Jurors agreeing to be bound surrender their autonomy. Averaging may seem fair, but it often performs the same insidious, penetrative function as a coin. In the main, someone is inserting their prejudice (be it bias for one party via a higher damages figure, a lack of interest in their civic duty via a coin toss, or racial animus) into a figure or a decision that cannot be evaluated by other jurors. This “prejudice perspective” contrasts with the “mathe-

241. Id. at 386 (citing Turner v. Tuolumne Cty. Water Co., 25 Cal. 397 (1864)).

242. The California Supreme Court may have drawn inspiration from its sister courts in the West. Earlier in 1893, Idaho, which had adopted the chance verdict statute directly from California, considered the Turner case line and held that it was misguided. See Flood v. McClure, 32 P. 254, 255 (Idaho 1893). Considering a full quotient verdict, the Idaho Supreme Court opined:

The clear intent of the law is that the verdict shall be the result of intelligent discussion, deliberation, and conviction by and of the jury, and we think the method used comes clearly within the provision of subdivision 2, § 4439, Rev. St., and that the affidavit of a juror is competent to prove the same. If the rights of litigants are to be determined by juries by such methods, they had as well determine their own rights by drawing lots or tossing up a piece of money, and not pretend to submit their cases to juries for their careful deliberation, and for the result of their best judgment. Id. at 256 (emphasis added). The Dixon court noticed this logic and cited Flood with approval. Dixon, 33 P. at 269. Thus, it might be said that the Idaho Supreme Court began the transition to “rights-based” language, and that the California Supreme Court followed suit. See generally Watson v. Navistar Transp. Corp., 927 P.2d 656 (Idaho 1992) (showing the Idaho Supreme Court at the forefront of assessing chance verdicts even into the late twentieth century). The Flood case proved influential in its own era; later Idaho courts cited it as guiding precedent even when the facts did not perfectly match. See McDonald v. Great N. Ry. Co., 46 P. 766, 767 (Idaho 1896) (“While the facts disclosed by the record do not bring this case strictly within the letter of the decision in the case of [Flood v. McClure], we think it is clearly within the spirit of that decision.”). Flood was also cited in a Montana quotient verdict case. Gordon v. Trevathan, 34 P. 185, 187 (Mont. 1893). The Gordon court also noted that the Turner case line had endured heavy criticism in treatises and cases. Id. at 186–87.

243. The court said:

“Chance” may be defined to be hazard, risk, or the result or issue of uncertain and unknown conditions or forces, and the facts here developed bring the case clearly within such definition. . . . In the casting of a die or the tossing of a coin justice has an equal chance with injustice, but under the system here considered [quotient verdict], one unscrupulous and cunning juror always has the power to defeat justice by increasing or decreasing the amount of the verdict in proportion as he places his estimate at an unconscionably high or low figure. Dixon, 33 P. at 269 (emphasis added).
mational approach” employed by earlier California supreme courts. The zigzagging by the court during this era as to whether chance verdicts encompassed quotient verdicts suggests that it is best to be flexible when assessing a quotient verdict that shares characteristics of a chance verdict.

Even as the Dixon court tried to resolve matters, later courts returned to the same logical fault lines. In one case, the court accepted the gloss placed on the verdict by counteraffidavits to conclude that the verdict was a working quotient verdict rather than a full quotient verdict. In another case discussing outside influences on the jury, the court expressed its fears about opening and reopening jury verdicts to inquiry.

Thirty years later, a San Francisco jury invented a new method of arriving at a damages figure that would further challenge jurists. In the Mirabito case, the jurors could not agree upon a damages figure. So, they agreed to vote on two different damage figures ($5,000 and $2,000), and agreed that whichever figure received more votes would be the unanimous verdict of all jurors. The California Court of Appeals reversed, speaking in the same voice as Dixon and emphasizing that “the parties to a civil action are entitled to a verdict of nine jurors arrived at by considering the evidence and exercising their judgments.”

The problem, as discussed in Dixon, was the agreement to be bound beforehand. The court’s language completes the shift from the language of order and religiosity (the sin of gambling) in the 1850s and 1860s to a litigant-focused, rights-perspective approach begun by Dixon. But in yet another twist, the California Supreme Court took up the case and reversed the appellate court.

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244. McDonnell v. Pescadero & San Mateo Stage Co., 52 P. 725, 726 (Cal. 1898) (“The counter affidavits, however, put an entirely different phase on the matter, and show that the balloting to arrive at an average was not to control the minds of the jury nor to forestall their ultimate conclusion; it was merely a basis from which to work in their effort to reach a verdict, and the method adopted did not violate the statute.”). Counter affidavits can present a vexing problem to courts trying to assess whether a chance verdict even occurred. See, e.g., Beakley v. Optimist Printing Co., 152 P. 212, 215 (Idaho 1915) (Sullivan, J., dissenting).

245. People v. Azoff, 39 P. 59, 60 (Cal. 1895) (“Indeed, it would be difficult to place a limit to the corruption such a practice might engender.”).


247. Id.

248. Id.

249. Id. at 107–08. The Court said:

Whenever the jurors agree beforehand to abide by the unknown . . . it is likewise a resort to chance depriving the parties of a verdict which can be said to be the verdict of nine of their number arrived at by the exercise of the judgment of said jurors. In such cases the jurors wrongfully agree beforehand to forego their independent judgments and to hazard their individual verdicts upon conditions which are then unknown and uncertain.

Id. (emphasis added).

The supreme court reasoned that the verdict was inoffensive because the two damage figures were known to the jury. While the court accepted the Dixon definition of “chance,” it denied that Dixon’s logic controlled:

To our minds there was no operation of any unknown force or unexplainable cause but an exercise of the judgment of each juror. Each juror by an act of conscious volition participated in the determination of the amount of the verdict even though he may have reached his decision by other methods than by weighing the evidence and may have based his judgment upon considerations other than his own opinion of the proper amount of damages to be awarded. The agreement which appellants attempted to show was not an agreement to resort to the determination of chance.

Mirabito II, in distinguishing Dixon, created a new, inoffensive category of quotient verdict: a quotient verdict where the options are known to the voting jurors. In this sense, there is no chance of an interloping juror inserting an unreasonably high figure into the proceeding. Conversely, there is still an element of the unknown as between options A and B. The California Supreme Court seems to be suggesting that compromise as a juror is desirable, understandable, and necessary. Because there is no mysterious force at work, the concerns surrounding a chance verdict fall away. Despite the supreme court’s assurance that this jury was above board, the line here is incredibly difficult to police. The appeals court thought that there was a rights problem here, whereas the supreme court’s understanding of the role of jurors is far more transactional and negotiation-based. An ideal jury for the appeals court exercises good independent judgment, while an ideal jury for the supreme court conducts a give and take that will remain undisturbed absent some penetrative, unknown force.

In the ensuing decades, chance verdicts retreated somewhat from the pages of the California reports. In 1969, the California Supreme Court reaffirmed the rule that jurors could testify as to objective facts to uncover misconduct and cited the history of the 1862 statute as proof that the root of the rule was not solely statutory. It is important to note that simply because a gap in the case law exists as to chance verdicts, that does not mean that they have not occurred. On the contrary, the shame that attaches to a juror accused of involvement with a chance verdict diminishes the chances that they will be reported or discovered.

251. Id. at 404.
252. Id.
D. “The Right to a Verdict Based on the Evidence and Not a Coin Flip is Clearly Established in Law, Though Hardly Ever Vindicated in Practice”: The Long Journey of Mr. Reyes

The last chapter of the California story is troubling and demonstrates the need for additional clarity in the small but contentious arena of chance verdicts. For the purposes of this particular entry in the California saga, this paper will depart from the position of historical observer and adopt a position on the case law. In 1994, a man named Isidro Reyes was arrested and later convicted for possession of cocaine for sale. During the deliberations, the lone holdout on the jury flipped a coin privately and later testified to doing so. On direct appeal and on collateral review, Reyes argued that this partial chance verdict should have afforded him a new trial. He was right. Simply, four courts—the California state trial court, the California Court of Appeal, the Magistrate Judge in the Central District of California, and two justices of the Ninth Circuit—misinterpreted the case law and denied Reyes a new trial. Partial and full chance verdicts (and arguably certain quotient verdicts) undermine the rule of law, and the flip of a coin has no place in a jury room whatsoever.

The facts of the case present a classic partial chance verdict. The jury was in its final day of deliberations, and two jurors remained unconvinced of the defendant’s guilt. One of the two switched sides, and the final juror, Shakeed F., felt pressured to vote to return a guilty verdict. He suggested that the jury inform the judge that they were hung, eleven-to-one. The eleven jurors requested that Shakeed listen to their thoughts. During the lunch hour, he flipped a coin in his car as a “corporate decision” that was not “biased.” After lunch, the jury spent an hour and half in the room before declaring Reyes guilty. That hour and a half became crucial in later commentary on whether Shakeed’s coin flip was problematic. Upon being asked at a posttrial hearing what occurred during that hour and a half, Shakeed (later called Juror F, or “Mr. Fareed” in the federal decisions) testified that “[w]e were in there, but the decision was made. The decision was practically made before we even went to lunch.” The prosecution argued posttrial that this hour and a half was dispositive because it demonstrated

254. All of the facts of the Reyes case were assembled from three opinions. The first is the state court appellate decision, See The People v. Isidro Samuel Reyes, No. B106911 (Cal. Ct. App. Jan. 11, 2000) [hereinafter Reyes Appellate Decision]. The second is a Magistrate Judge’s Amended Report and Recommendation on Reyes’ habeas claim. Amended Report and Recommendation, Reyes v. Seifert, No. 2:01-cv-08666-PA-MAN (C.D. Cal. Apr. 10, 2003) (No. 16) [hereinafter Reyes Magistrate Decision]. The third is the Ninth Circuit’s decision on Reyes’ habeas claim. Reyes v. Seifert, 125 F. App’x 788 (9th Cir. 2005). Because the California Court of Appeals decision is unreported, it is appended as Appendix C.
255. Reyes Appellate Decision, supra note 254, at 3.
256. Id.
257. Id.
258. Reyes Magistrate Decision, supra note 254, at 24 n.9.
that the jury continued substantive deliberations after the coin flip, which was “a rationalization for [Mr. Shakeed’s] succumbing to the pressure.”

The trial court denied Reyes’s motion for new trial and accepted that the coin flip occurred, but refused to inquire into the juror’s subjective mental processes. The California Court of Appeal conducted a statutory analysis based on Cal. Civ. Proc. Code § 657(2) and Cal. Penal Code § 1181(4). The court reviewed some of the precedent discussed above, and concluded that:

Here, appellant contends there was a chance verdict because one juror, Mr. Shakeed F., tossed a coin. By focusing on this language, however, appellant misses the mark and demonstrates a misunderstanding of the basic premise of a “chance verdict” or a “verdict by lot.” Such verdicts result from the jury’s agreement in advance to be bound by a result reached by a methodology which resorts to chance. . . . A verdict by chance or lot does not refer to the mental processes of one juror, in isolation from his or her fellow jurors. If the jury panel uses some tool, such as a coin, the roll of a dice, or a mathematical formula, to assist it in reaching a conclusion, but there was no antece-dent agreement to use that result as the verdict, there is no impropriety. If there is no antece-dent agreement, the verdict was not a “verdict by chance or lot.”

The court further noted that the jury continued to deliberate for an hour and a half after the flip.

The appellate court’s logic is flawed for several reasons. First, the premise underlying the decision—that the jury deliberated for an hour after the coin flip—is contradicted by the juror-in-question’s testimony, which stated clearly that even though the jury was in the room after lunch, the coin flip influenced the decision. His very act of coming forward indicates that the coin flip was essential to his decision and that he felt guilty about the way it happened. Second, the court cited Dixon for its definition of chance and then failed to acknowledge that Dixon itself was a partial chance verdict where at least a modicum of deliberation occurred after the alleged flip. Third, the fact that one juror resorted to a chance method has never been an obstacle to receiving evidence of a chance verdict—in fact, in the quotient verdict context, the one juror who inserts an unreasonably high or low figure into the quotient is the one corrupting the proceeding. The legislative history of the act also suggests that it was written to broadly encompass misconduct by even a single juror. The problem here is the intrusion of

259. Reyes Appellate Decision, supra note 254, at 4.
260. Id. at 5.
261. Id. at 5–7. Importantly, the court noted that there was no difference between the two statutes. Id. at 8–9.
262. Id. at 9–10 (emphasis in original).
263. Id. at 10–11.
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chance into the sanctum of the jury room. Thus, as a matter of state law, the
court erred by failing to properly appreciate the meaning of the statute as
codified in later years.

Reyes fared no better on habeas review. Although the magistrate judge
prefaced her analysis by noting that criminal defendants are entitled to im-
partial and competent jurors who base their verdict on the evidence devel-
oped at trial, she concluded that the coin toss was simply part and parcel of
the juror’s internal mental deliberations to make a decision.264 Given that
the case had assumed a collateral posture, the magistrate judge narrowed the
inquiry to assessing “solely whether the state courts’ decision that juror F.’s
actions did not violate petitioner’s constitutional rights is contrary to, or an
unreasonable application of, clearly established federal law as established
by the United States Supreme Court.”265 The court concluded that no
United States Supreme Court authority compelled the opposite result. As
this paper argues elsewhere, a chance verdict should qualify under general
principles of due process as one of the grave and extraordinary circum-
stances where the strictures of the Federal Rules of Evidence should fall
away to prevent a manifest injustice. The magistrate concluded on that sub-
ject that even if California’s chance verdict statutes created a liberty interest
under the due process clause, the state court’s conclusion that the verdict
did not fit into the statute was logical.266 “The jurors in Donner agreed to
abide by the coin toss and considered themselves bound by the agreement.
Thus, Donner does not support a conclusion that petitioner was convicted
based on a ‘chance verdict’ under California law.”267 The history of Cali-
ifornia chance verdicts decidedly shows that it is the injection of chance into
a verdict—by one juror or more—that corrupts a proceeding. While the
statute certainly condemns “full chance verdicts,” the history and the statute
can be fairly read to encompass partial chance verdicts and certain forms of
quotient verdict. By narrowly construing the history of California chance
verdicts as a mere expression of agreements to abide in advance by a

264. Reyes Magistrate Decision, supra note 254, at 14–16. It should be said at the outset that
the Magistrate Judge’s simple statement (“The Sixth Amendment guarantees criminal defendants
a verdict by impartial and competent jurors. . . . [T]he jury’s verdict must be based upon the
evidence developed at trial.” Id. at 14) should resolve the issue of a chance verdict in any form.
The Magistrate Judge also noted that a defendant is entitled to twelve impartial jurors. Id. at 15
(emphasis added). Interestingly, the District Judge hesitated in adopting the Magistrate’s opinions
on the chance verdict wholesale and certified the issue for appeal. See Reyes v. Seifert, No. CV-
01-08666-PA (MAN), 2003 WL 27382041, at *2 (C.D. Cal. Dec. 22, 2003) (“Additionally, the
Court believes that this claim raises significant issues regarding the constitutionality of a verdict
when one juror has resorted to a random means for determining guilt, and clarification of the law
on this issue may be warranted.”).


266. Id. at 20–21.

267. Id. at 21–22. As a factual matter, the Donner opinion stated: “[T]hey [the offending
jurors] announced that he had guessed right, and they thereupon agreed to a verdict for the plain-
tiff, but both said it was still contrary to their convictions.” Donner v. Palmer, 23 Cal. 40, 47
(1863). There is no indication in the opinion of how long this process actually took.
chance method—as opposed to the spirit of the statutes and the case law—the magistrate judge erred.

The case’s outcome at the federal appellate level demonstrates the contentiousness that chance verdicts still inspire. Circuit Judge Clifton and District Judge Weiner (sitting by designation) held in a brief opinion that “[n]o Supreme Court authority holds that a defendant has a constitutional right to a new trial when an individual juror bases his decision to vote guilty on an irrational method, such as a coin toss.”268 Circuit Judge Reinhardt dissented, noting that chance verdicts posed unique due process problems and opining that “[a] defendant is entitled to such relief whether a taint implicates the entire jury or whether only one juror commits the unconstitutional act.”269 Judge Reinhardt also discussed the admissibility problem and suggested that the California statute had been designed with this express issue in mind.270 The Reyes case demonstrates that although chance verdicts are rarely discovered, the questions they present retain a potent character in the minds of jurists and defense attorneys.

Throughout the history of chance verdicts in California, the courts have attempted to police the line between juror conduct that is acceptable and juror conduct that must be addressed. Prying open the door of the jury room is a titanic undertaking because misconduct is so hard to prove, and because a judge must feel that the misconduct is so outrageous that it warrants the relaxing of one of the most fundamental rules in American jurisprudence. But the California saga demonstrates that chance verdicts have a long and tortured relationship with notions of justice. In the 1850s, judges spoke in the language of order and sin. Chance verdicts were abdications of a public responsibility. The newspapers treated the Legislature’s intrusion in 1862 as a similar kind of corruption. As the nineteenth century ended, the California courts began to speak in a new kind of language concerning rights. The Reyes case continues that trend and proves that the issue is still far from dead. Chance verdicts will continue to recur, and their history

268. Reyes v. Seifert, 125 F. App’x 788, 789 (9th Cir. 2005).
269. Id. at 789 (Reinhardt, J., dissenting).
270. He wrote:

California, however, has decided to strike a different balance between jury secrecy and due process rights and allows jurors to testify about matters” within or without of the jury room, of such a character as is likely to have influenced the verdict improperly.” Cal. Evid. Code § 1150 (2004). Therefore, unlike most chance verdict cases, in this case there is admissible evidence to prove the claim. Juror F. admitted that he decided the case according to two flips of a coin and that he therefore did not decide the case solely on the evidence. Because Reyes supported his federal claim with admissible and uncontrovneted evidence, he should have received relief.

In sum, California’s rule of evidence concerning juror testimony allowed Reyes a practical means of proving his claim that a juror arrived at his guilty verdict by lot or chance. Having done so entitled him to prevail on his due process claim. The right to a verdict based on the evidence and not a coin flip is clearly established in law, though hardly ever vindicated in practice. It should have been vindicated here.

Id. at 790 (Reinhardt, J., dissenting) (emphasis added).
teaches that they present courts with some of the most complex and problematic issues for resolution. From this history, we can divine better means of dealing with quotient and chance verdicts.

IV. “IN THE GRAVEST CASES”—LINKING HISTORY TO A SPECIFIC STRATEGY FOR HANDLING CHANCE VERDICTS

Chance verdicts are not historical oddities—they are a necessary and predictable consequence of cases where pressure on the jury is great. Allegations of a chance verdict strike at the heart of the integrity of the jury system. Even the United States Supreme Court’s recent jurisprudence proves that our society is still debating the same questions about accessing juries after verdicts as were judges hundreds of years ago.271 This paper has proposed that “chance verdicts” should be further subdivided into four categories of jury misconduct. Working quotient verdicts and full quotient verdicts without an agreement to be bound in advance pose the fewest problems for jurists. This is because such verdicts are part of the give and take that society hopes jurors will conduct as a proxy for the levelheaded, common sense practicality of the community at its best. Full and partial chance verdicts, where the jury employs chance to decide a case, pose the most serious problems because the jury has not truly decided anything. This paper has also posited that the most egregious species of chance verdict: (1) tend to occur in communities experiencing upheaval; (2) arise where the facts of the case are relatively clear; and (3) often create media firestorms when news of the verdict breaks. To a trial judge considering whether to admit evidence that a chance verdict has occurred, what guidance does history provide? In short, the history of chance verdicts demonstrates that the law is denigrated when a full or partial chance verdict is exposed.

Where reliable evidence of a full or partial chance verdict is available, due process demands that the door of the jury room open. Juries exercise discretion on the public’s behalf—disputes must end, and parties must move on. Perhaps a jury’s verdict will not be perfectly fair or will ignore some class of evidence. But at some point, amidst the cross-currents of legal thinking and philosophical wrangling, decisions must be made about who wins cases and who must be separated from society. The decision to confer that discretion on ordinary people is the most powerful endorsement of democracy our society makes. We trust the jury to exercise discretion fairly because we have no other choice. But when a jury fools with chance,

271. Compare Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 871 (2017) (“The progress that has already been made underlies the Court’s insistence that blatant racial prejudice is antithetical to the functioning of the jury system and must be confronted in egregious cases like this one despite the general bar of the no-impeachment rule.”), with id. at 884 (Alito, J., dissenting) (“Today’s ruling will also prompt losing parties and their friends, supporters, and attorneys to contact and seek to question jurors, and this pestering may erode citizens’ willingness to serve on juries.”).
it fundamentally destroys the relationship between society and the jury. Even a jury that makes an unfair decision based on the evidence before it is within the scope of our bargain with the jury system. A full or partial chance verdict cannot stand because it negates the need for the legal process. It distills discretion to the meanest and cruelest force: unguided fate. It certainly violates basic notions of due process, including those held by the state as an agent of the people in court.\(^{272}\) It certainly is not the trial by jury spoken of in the Sixth Amendment.\(^{273}\) Chance is an outside force that influences the jury to abandon their duty and their oaths. To tolerate a full chance verdict in our courts is to surrender ourselves to the arbitrary rule of something fundamentally outside a system of laws aspiring to justice. As Justice Gorsuch has said, “Only a jury, acting on proof beyond a reasonable doubt, may take a person’s liberty. That promise stands as one of the Constitution’s most vital protections against arbitrary government.”\(^{274}\)

Our society’s commitment to and reliance on the jury system demands that true “full” chance verdicts and even partial chance verdicts be vacated. The history demonstrates that the exposure of chance verdicts denigrates the integrity of the jury system in the eyes of the public. A verdict tainted by chance loses legitimacy. Even in a case where the jury has resorted to chance as a form of nullification (where a jury does not wish to decide the case themselves), trial judges should begin their inquiries with an assumption that an evidentiary hearing may be necessary to ensure honest verdicts.

In federal court, securing a hearing to evaluate (even reliable) evidence of a chance verdict is difficult. But it can hardly be said that a full or partial chance verdict comports with the basic promises of due process. Applying the words of Justice Kennedy, these matters rise to the level of the “gravest” cases that the jury system sees.\(^{275}\) This is because, effectively, in a chance verdict scenario, social pressure has overwhelmed jurors to the point of incapacitation. The jury in Reyes ceased to be an effective organ in dispensing anything like justice because but for chance, the deadlock would have persisted. When a jury breaks down and resorts to chance, it is the duty of the reviewing jurists to ensure that such a verdict does not stand. In states where chance verdicts have been statutorily cemented as exceptions

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\(^{272}\) Cf. Beakley v. Optimist Printing Co., 152 P. 212, 214 (Idaho 1915); Crabtree v. State, 35 Tenn. 302, 303 (1855) (discussing the right of the state to a fair jury verdict).

\(^{273}\) No matter the scope of the Sixth Amendment, the founders cannot have intended it be so mean as to encompass the approval of a full chance verdict. Such a construction would render the Amendment a nullity. Trial by chance verdict, though statistically “impartial,” would render the “assistance of counsel for his defence” unnecessary. U.S. Const. amend. VI.

\(^{274}\) United States v. Haymond, 139 S. Ct. 2369, 2373 (2019) (emphasis added); Peña-Rodríguez, 137 S. Ct. at 861 (“Like all human institutions, the jury system has its flaws, yet experience shows that fair and impartial verdicts can be reached if the jury follows the court’s instructions and undertakes deliberations that are honest, candid, robust, and based on common sense.”).

\(^{275}\) Id. at 865–66.
to the no-impeachment rule, state appellate courts must look to history in assessing their options.

In states where chance verdicts have been statutorily or judicially cemented as exceptions to the no-impeachment rule, it is crucial that state appellate courts apply their laws. A breakdown in this process occurred in *Reyes* when the courts treated the incident as a curiosity rather than simply a new expression of a long-running phenomenon that courts have wrestled with for centuries.

To that end, the court that finds itself facing allegations of a chance verdict may employ the flowchart appended in Appendix A to ensure that its decision to grant or deny a post-trial motion comports with the lessons that the history teaches us: namely, that the narrative adopted by a community in response to a chance verdict often matters more than the precise legal norm violated by the jurors. Juror abdication to chance is a serious problem that often goes unnoticed—but where it can be proven, it should. These cases present grave issues of due process and evidentiary fairness, and courts risk prejudicing litigants when they do not take allegations of a chance verdict seriously. The schema in Appendix A is general—it does not necessarily account for the precise ins and outs of the rules of each state. The goal in articulating such a procedure is to place different chance methods along a continuum for courts to reference. Chance verdicts are not oddities—they are expressions of communities strained to the breaking point, and it is at these outer edges of the jury system when the no-impeachment rule should be suspect.

V. Conclusion

Chance verdicts pose unique challenges for trial judges and appellate courts. Far from being a simple anomaly occasionally reported by a treatise, chance verdicts tend to occur when specific circumstances are present. When there is pressure on jurors, either from within or without, most juries will be able to soldier through and render a decision without resorting to misconduct. But for some juries, chance methods like quotients and coin flipping seem fair in the moment. It is obviously impossible to assess how often chance verdicts occur. If the jury remains silent, their misconduct is undiscoverable. But when chance verdicts are discovered, they incite the passions of the public and of judges. The questions they raise strike at the heart of our deepest fears about the jury system.

An examination of example chance verdicts and the California progression shows that chance verdicts will likely recur simply because the conditions that prompt them will recur. The California history also demonstrates that if courts do not apply the same principles to each case, confusion will ensue to the detriment of litigants who are entitled to a new trial under the case law. Given the state of the media in the United States today,
it is not difficult to imagine a new form of hybrid chance verdict arising and being exposed to the public. The last thing the jury system needs is another case that shakes the public’s faith in the judicial system and in the community. Thus, it is imperative that courts keep this history of chance verdicts in mind when confronting the next evidentiary challenge.
APPENDIX A

Factors to Consider in Deciding Whether to Hold an Evidentiary Hearing

What kind of verdict is alleged?

Full/Partial Chance Verdict

Are there counter-affidavits?

Yes

Are they credible?

Yes

Are they relevant?

No

Do the affidavits regarding matters in controversy?

Yes

Are they likely to concern?

Full Quotient Verdict

Agreement to be bound in advance?

No

No

Likely to concern?

Working Quotient Verdict

No

No

Federal Court

What need for community participation are or would the jury?

No

State Court

Likely to concern?

A A A A

A

Is there a constitutional law issue with the case?

Yes

Is there a constitutional law issue with the case?

No

Is there a constitutional law issue with the case?

A
APPENDIX B

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<tbody>
<tr>
<td><strong>Type of Chance Verdict</strong></td>
<td>Full Quotient Verdict</td>
<td>Partial Chance Verdict</td>
<td>Full Quotient Verdict</td>
<td>Full Quotient Verdict</td>
<td>Partial Chance Verdict or Partial Quotient Verdict</td>
<td>Full Quotient Verdict</td>
<td>Working Quotient Verdict</td>
<td>Full Quotient Verdict</td>
<td>Hybrid</td>
<td>Hybrid</td>
<td>Partial Chance Verdict</td>
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<tr>
<td><strong>Type of Language</strong></td>
<td>Order; avoiding revealing jury’s secrets</td>
<td>Reserved; reciting the facts dispassionately</td>
<td>Narrowly Construing the Statute; Fear of Common Law Rule’s Collapse</td>
<td>Mathematics; Deciding that Full Quotient Verdicts Did Not Share the Offensive Characteristics of Chance Verdicts</td>
<td>Perfunctory; “Drawing Lots” Method Vitiates Verdict</td>
<td>Perfunctory; Referential to Trial Court’s Credibility Determination</td>
<td>Noting the Working Element of the Quotient Method</td>
<td>Condemning the Misconduct, but Refusing to Admit Evidence of it</td>
<td>Defining Chance; Idealistic Perspective on Juror Role in Proceedings</td>
<td>Discussing Right to Jury Considering Facts;</td>
<td>Negotiations-Based</td>
<td>Discussing Agreement to be Bound in Advance</td>
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<td>Common law</td>
<td>Statute and common law</td>
<td>Common Law</td>
<td>Mathematics</td>
<td>Statute and Case law</td>
<td>Statute and Case law</td>
<td>Case law</td>
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<td>Case law</td>
<td>Negotiation Logic</td>
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<tr>
<td><strong>Other Factors</strong></td>
<td>Sheriff Affidavit</td>
<td>Sympathetic plaintiff</td>
<td>Companion case to Turner</td>
<td>Companion case to Boyce</td>
<td>Jurors Throwing off the Average</td>
<td>Choosing Between Two Figures</td>
<td>Intervening Ninety Minutes After Coin Flip</td>
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276. It is unclear from the opinion whether the jurors flipped a coin as between $1,000 and $1,500 for damages or whether the jury used a quotient method to arrive at the damages figure.
THE COURT:* Appellant and defendant Isidro Samuel Reyes appeals from the judgment entered following a jury trial which resulted in his conviction on one count of possession of cocaine base for sale. (Health & Saf. Code, § 11351.5; Pen. Code, § 1203.073, subd. (b)(5).) Appellant was sentenced to a total prison term of seven years.

Appellant contends the trial court erred in denying his motion for a new trial based upon allegations of juror misconduct. The motion was supported by statements from one juror that, outside the presence of the other jurors, he had used a coin to assist him in deciding how to vote. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Facts.

On July 16, 1994, appellant was in the Mar Vista Housing Project in Culver City. When appellant saw a police officer approach, he threw plastic bags onto the roof of a building. The bags contained cocaine. When arrested, appellant had two $100 bills and two $20 bills.

* KLEIN, P. J. KITCHING, J. ALDRICH, J.
2. Procedure.

In a bifurcated proceeding, appellant was convicted by jury of one count of possession of cocaine base for sale (Health & Saf. Code, § 11351.5) in an excess amount, within the meaning of Penal Code section 1203.073, subdivision (b)(5). Thereafter, the trial court found it true that appellant had previously been convicted of a violation of Health and Safety Code section 11351, within the meaning of Health and Safety Code section 11370.2, subdivision (a).

Appellant was sentenced to a total prison term of seven years.

Appellant made a motion for a new trial. The motion papers included declarations from appellant’s trial counsel. These declarations were filed between November 28, 1995 and January 18, 1996. In these declarations, appellant’s trial counsel declared the following. Trial concluded on November 7, 1995. Jury deliberations lasted until 3 p.m. on November 9, 1995, at which time appellant was found guilty. After the jury was excused, trial counsel had a conversation with Mr. Juan J., one of the jurors. Another juror, Mr. Shakeed F., approached to discuss the case. During this conversation, Mr. Shakeed F. said he voted for guilt because he was pressured into doing so and because it was his last day of jury service. Mr. Shakeed F. further stated that before lunch he was the only juror who did not vote guilty. After lunch Mr. Shakeed F. voted guilty because of pressure from the other jurors. Mr. Shakeed F. still believed appellant was not guilty.

Appellant’s investigator declared Mr. Shakeed F. had also told the investigator about succumbing to pressure during deliberations.

On February 15, 1996, appellant’s counsel filed a supplemental declaration. Appellant’s counsel attested Mr. Shakeed F. had stated the following. Mr. Shakeed F.’s “vote of guilt was not based on his true belief . . . . Despite [Mr. Shakeed F.’s] adamant position that [appellant] was not guilty, he nevertheless voted with the rest of the jurors rather than run the risk of further self-deprecation.” Mr. Shakeed F. felt inferior and kept to himself. “On the last day of deliberation two jurists felt that [appellant] was not guilty. The eleventh jurist ultimately sided with the other ten jurists leaving [Mr. Shakeed F.] the lone hold-out.” “Now, being the lone voice of innocence created by the type of pressure which he could not tolerate. At the lunch break of the Friday on which the verdict was rendered [Mr. Shakeed F.] went to his car to eat alone . . . . He knew that he had to make a decision one way or the other. Yet, he still felt that [appellant] was not guilty based on the evidence presented. On the one hand he felt that he had to arrive at a decision for the benefit of the other jurists, on the other hand he did not agree with the guilty verdict. [Mr. Shakeed F.] felt that the only way out of this predicament was to flip a coin!! Depending the side on
which the coin fell determined whether he voted guilty or not guilty.”¹
(Original emphasis.)

A hearing was held on February 23, 1996. Mr. Shakeed F. was sworn and testified to the following. During the lunch break he was alone, in his car. He used the coin to assist him in a “corporate decision,” a “decision not being biased.” He decided that if the coin landed on heads, he would vote “guilty.” If the coin landed on tails, he would vote not guilty. Since the coin landed on heads, he flipped the coin again. It landed on heads again. After lunch, he rejoined the other jurors. They were waiting for his decision, as the rest of the panel “knew which direction they were going.” Earlier in the day, he had suggested the jury inform the trial court the jury was hung, 11-1. However, the other jurors requested he listen to what they had to say. After lunch, the jury was in the jury room for an hour and a half. The verdict was rendered, and the jury polled. He voted guilty because he “went along with the flow.” He talked to defense counsel after trial and subsequently to an investigator. However, he did not mention the flipping the coin until months later.

The trial court asked for supplemental briefing. In appellant’s supplemental briefs, appellant argued a chance verdict, such as flipping a coin, constituted improper conduct warranting a new trial.

The People’s supplemental brief contended appellant had not met his burden of proof. The People suggested Mr. Shakeed F.’s testimony was not credible because his statements were inconsistent, and he had not mentioned flipping the coin until months after the conviction. The People also argued that even if Mr. Shakeed F. used a coin in his thinking process, this was not the decisive fact because Mr. Shakeed F. continued to deliberate with the jurors for one and one-half hours after the coin was flipped. The People further agreed Mr. Shakeed F. simply was pressured into voting. According to the People, the flip of the coin merely provided Mr. Shakeed F. with a rationalization for succumbing to the pressure.

A declaration from juror Mr. David M. revealed the following.² After the verdict, Mr. Shakeed F. discussed the matter with appellant’s counsel. Mr. Shakeed F. was profoundly affected when he heard appellant’s counsel discuss “many points that were not brought out in the trial. . . . [Mr. Shakeed F.] seemed to be expressing doubts about his decision based on this discussion. The defense attorney’s points were interesting, provoca-

¹ Appellant’s counsel referred to Mr. Shakeed F. as “Mr. Shaheed.”
² The trial court permitted the prosecution to submit a letter which would be sent to jurors asking for facts with regard to jury deliberations. The letter said in part, “[ ] told the Court that he was the last juror to decide to vote guilty. We would like to know if [ ] returned from the lunch break on the last day of the trial prepared to vote guilty, or instead, whether he changed his position after the lunch break and following more deliberation.” The record on appeal contains information from only one juror in addition to that submitted by Mr. Shakeed F.
tive, and biased. They should have been brought up in court if true. [Mr. Shakeed F.] seemed to accept them as facts.”

The trial court denied appellant’s motion for a new trial. For purposes of ruling on the motion, the trial court accepted the fact that Mr. Shakeed F. flipped a coin and thus the trial court did not decide the issue on credibility. The trial court concluded the situation was no different from cases in which jurors changed their minds and there was an attempt to impeach the verdict with evidence of those jurors’ subjective mental processes. The trial court ruled, “A coin toss for a single individual, which basically would indicate there was no decision-making process going on, but it is the juror’s subjective process that we are looking into in evaluating the validity of this verdict; and that is the area of inquiry which I think we are precluded in doing as a matter of law. [¶] . . . . [¶] It would be peculiar to me that, if a juror came back and said, ‘I only voted guilty because I was under pressure and I wanted to go home and it was Friday’ that that would be invalid, and we would be unable to review that verdict but, if a juror came in and said, ‘I only voted guilty because I flipped a coin,’ that that one would be automatically kicked out and the other we couldn’t even look at. [¶] It is one juror’s effort to impeach the verdict based on their own decision-making process, and that can’t be done.” “Analytically, I don’t regard that as being any different from ‘I did it because I was under pressure; I did it because I was tired; I did it because I wanted to go home. I did it for any other reason other than an analysis of the evidence.’ ”

Appellant’s motion for reconsideration was denied. He appeals from the judgment.

DISCUSSION

The only issue raised is whether the flipping of a coin by Mr. Shakeed F. constituted a chance verdict and thus the motion for a new trial should have been granted. We conclude there was no chance verdict. Thus, the trial court did not err in denying the new trial motion.

Evidence Code section 1150 states the general rule in California regarding the submission of juror affidavits to impeach a verdict. Jurors are competent to testify to objective facts occurring inside or outside the jury room. However, there can be no examination of juror’s mental processes.³ Verdicts cannot be upset by statements by individual jurors as to their motives and reasons for entering a particular vote. This rule protects the finality of verdicts and the sanctity of jury deliberations. It is summarized in In

³. Evidence Code section 1150 reads: “(a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.”
re Stankewitz (1985) 40 Cal.3d 391 at page 398: “jurors may testify to ‘overt acts’ — that is, such statements, conduct, conditions, or events as are ‘open to sight, hearing, and the other senses and thus subject to corroboration’ — but may not testify to ‘the subjective reasoning processes of the individual juror . . . .’ (People v. Hutchinson [(1969) 71 Cal.2d 342] 349-350.)”

There are limited exceptions to the general rule prohibiting inquiry into the minds of jurors. One exception is that juries are not permitted to decide a case by chance or lot. (Pen. Code, § 1181, subd. 4; Code Civ. Proc., § 657, subd. 2.) Affidavits of jurors are admissible to overturn a verdict to show a case was decided by tossing a coin, by drawing papers out of a hat, as a result of a game of chance or by casting a die. (People v. Hall (1980) 108 Cal.App.3d 373, 380; People v. Richards (1905) 1 Cal.App. 566, 570; c.f. Wright v. Abbott (Mass. 1894) 36 N.E. 62 [ballots put in a hat].)

A more sophisticated chance verdict device is the prohibited quotient verdict where jurors agree to average their views. It has been improperly used by juries in civil cases to determine the amount of damages and in criminal cases to determine the duration of a sentence or the amount of a fine.4 (C.f. Chronakis v. Windsor (1993) 14 Cal.App.4th 1058, 1064-1068 [civil case]; Williams v. State (Ark. 1899) 50 S.W. 517, questioned in Lin Manufacturing Company of Arkansas v. Courson (Ark. 1969) 436 S.W.2d 472, 474, [criminal case].) A quotient verdict is one in which the jury agrees that each individual will arrive at a verdict (e.g., a damage award), the individual decisions will be added together, and then the total will be divided by 12 to arrive at the quotient verdict. However, there is no quotient verdict if a similar procedure is followed, but there was no antecedent agreement. “[I]t is not improper for jurors to calculate an average amount as a basis for discussion if there is a later consideration of the amount and a vote upon it, even if they agree upon that amount.” (Will v. Southern Pacific Co. (1941) 18 Cal.2d 468, 478; Chronakis v. Windsor, supra, 14 Cal.App.4th at pp. 1064-1066, citing among others, Dixon v. Pluns (1893) 98 Cal. 384.)

Quotient verdicts, like other verdicts based on chance, are improper because the jury agrees to a decision which is entirely uncertain and unknown at the time the agreement is made, “as though the whole matter were decided by the casting of a die, or the tossing of a coin.” (Dixon v. Pluns, supra, 98 Cal. at p. 387.) Thus, if the mathematical computation is used merely as a working tool and each juror thereafter independently agrees to that result, there is no misconduct. (City of Pleasant Hill v. First Baptist Church (1969) 1 Cal.App.3d 384, 433-435; Balkwill v. City of Stockton

4. In California, sentences are determined by the court.
In some cases discussing verdicts by lot or chance, there is a dispute as to whether or not there was an antecedent agreement and the influence of that agreement on one or more jurors. In those cases, some jurors attest that the verdict was based upon a mathematical formula, while other jurors attest the formula was used merely as a tool to assist in the decisionmaking process. If a juror believed there was an agreement and was induced to assent to the verdict because of that belief, some courts conclude the verdict must be reversed. (E.g., Gordon v. Trevarthan (Mont. 1893) 34 P. 185 [discussing a statute virtually identical to Code of Civil Procedure section 657].) Others conclude reversal is not required. (E.g., Maryland Casualty Co. v. Gideon (Tex.Civ.App. 1948) 213 S.W.2d 848, 851 [one juror assented to verdict because he believed there was an agreement to be bound; “there was no overt act of misconduct and such testimony could merely constitute the mental process by which [one juror] arrived at the verdict and is insufficient to destroy it.”].) The only decision we have found in California which touched this point is Levy v. Brannan (1870) 39 Cal. 485. In Levy, it appears a portion of the jury agreed to fix damages by a resort to chance. The verdict was set aside because a portion of the jurors were “induced to assent to a verdict . . . by drawing lots.” (Id. at p. 489.)

Penal Code section 1181 permits the trial court in criminal cases to grant a new trial “[w]hen the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors[.]” (Pen. Code, § 1181, subd. 4.) Code of Civil Procedure section 657 also codifies California’s prohibition of chance verdicts and specifically permits the testimony of one juror to be used as evidence to prove the verdict was arrived in such a manner. Code of Civil Procedure section 657 is more detailed than its criminal counterpart and states in pertinent part: “The verdict may be vacated and . . . a new or further trial granted on all or part of the issues . . . for any of the following causes, materially affecting the substantial rights of such party:

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“2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the

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5. The focus on an individual juror arises in one other related arena. To reverse after jury misconduct has been found, prejudice must be shown. (In re Malone (1996) 12 Cal.4th 935, 963; People v. Perez (1992) 4 Cal.App.4th 893, 906.) In discussing prejudice, courts state that “[w]hen the misconduct in question supports a finding that there is a substantial likelihood that at least one juror was impossibly influenced to the [detriment of the party alleging error], we are compelled to conclude that the integrity of the trial was undermined: under such circumstances, we cannot conclude that the jury was impartial.” (People v. Marshall (1990) 50 Cal.3d 907, 951; In re Malone, supra, 12 Cal.4th at pp. 963-964.)
determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.”

There does not appear to be a difference between a “verdict . . . decided by lot” as used in Penal Code section 1181 and the “resort to the determination of chance” as specified in Code of Civil Procedure section 657. There are few criminal cases discussing the subject and these cases use the terms together, as if they were interchangeable. The criminal cases have little discussion and usually simply state verdicts by chance or lot are not permitted, or the facts presented in that case do not constitute a verdict by chance or lot. (E.g., People v. Kromphold (1916) 172 Cal. 512, 524-525; People v. Soap (1899) 127 Cal. 408, 411; People v. Azoff (1895) 105 Cal. 632, 634, distinguished in People v. Hutchinson, supra, 71 Cal.2d at pp. 347-348; People v. Richards, supra, 1 Cal.App. at p. 570.) Also, the Civil Code provision has been applied in criminal cases. (E.g., People v. Sherman (1950) 97 Cal.App.2d 245, 256; People v. Azoff, supra, 105 Cal. at p. 635.) Further, differences in the two statutes appear to be insignificant. For example, even though Penal Code section 1181 does not explicitly state juror(s) affidavits may be used to prove a decision was by chance or lot, while the civil code is explicit in this regard, other authorities makes this point in a criminal context. (Evid. Code, § 1150; People v. Hall, supra, 108 Cal.App.3d at p. 380; People v. Cook, (1955) 136 Cal.App.2d 442, 446.)

Here, appellant contends there was a chance verdict because one juror, Mr. Shakeed F., tossed a coin. Appellant focuses on the language in Civil Code section 657 which states a new trial may be granted when “one or more jurors have been induced to assent . . . by a resort to the determination of chance”. By focusing on this language, however, appellant misses the mark and demonstrates a misunderstanding of the basic premise of a “chance verdict” or a “verdict by lot.” Such verdicts result from the jury’s agreement in advance to be bound by a result reached by a methodology which resorts to chance.6 (Sunset Brick & Tile, Inc. v. Miles (Tex.Civ.App. 1968) 430 S.W.2d 388, 392.) A verdict by chance or lot does not refer to the mental processes of one juror, in isolation from his or her fellow jurors. If the jury panel uses some tool, such as a coin, the roll of a dice, or a mathematical formula, to assist it in reaching a conclusion, but there was no antecedent agreement to use that result as the verdict, there is no impropriety. If there is no antecedent agreement, the verdict was not a “verdict by chance or lot.”

Even in situations discussing the impact of one or more jurors being “induced to assent” by the chance methodology, there is no dispute that either the entire jury panel or a portion of the panel agreed to use a chance

6. “Chance” has been defined as “hazard, risk, or the result or issue of uncertain and unknown conditions or forces.” (Dixon v. Pluns, supra, 98 Cal. 384 at p. 387.)
methodology in the decisionmaking process. The only evidence before us is that one juror used a verdict to assist him in his decisionmaking process. There are no facts before us which show there was an agreement among the jurors to abide by the toss of a coin or Mr. Shakeed F. believed there was an agreement to be bound by a coin toss.7

Here, one juror used a coin toss to assist him in voting. It appears this aided his decision to give into the majority. Deciding to acquiesce to the vote of the majority does not result in a chance verdict. (Cf. People v. Sherman, supra, 97 Cal.App.2d at pp. 256-257; People v. Cook, supra, 136 Cal.App.2d at p. 446 [juror succumbing to pressures does not violate Penal Code section 1181, subd. 4].)8 Further, after flipping the coin, Mr. Shakeed F. rejoined the rest of the jury and deliberations continued for another one and one-half hours. Additional deliberations demonstrate the vote was independent of the coin toss. Thus, the information contained in the motion for new trial reveals Mr. Shakeed F.'s mental processes. The information reflects on his subjective concerns and the mental processes he used to overcome those concerns.

While the method used by Mr. Shakeed F. may be disturbing, and is indeed unorthodox, it does not constitute a chance verdict or one determined by lot. Were we to examine Mr. Shakeed's reasons for voting, we would be probing the mental processes of this one juror, something which we are prohibited from doing.

DISPOSITION

The judgment is affirmed.

7. Since the trial court did not decide the case based upon the credibility of Mr. Shakeed F., we have no reason to discuss situations in which affidavits are not believed or there are contradictory affidavits. (E.g. Bunker v. City of Glendale (1980) 111 Cal.App.3d 325, 329.)

8. We have found few cases which deal with verdicts based upon flipping of a coin. (Vaise v. Delaval (1785 K.B.) 1 T.R. 11 [99 Eng.Rep.944].) Schwindt v. Graeff (Ohio 1924) 142 N.E. 736 involved a situation in which one juror tossed a coin to assist that juror in making a decision. The Supreme Court of Ohio concluded the judgment could not be set aside because jurors’ declarations were not admissible, noted the case strained the general rule to the breaking point, and suggested the legislature could enact laws to modify or abrogate that rule. There was no statute permitting misconduct be proven by affidavit and there was no discussion as to whether the juror’s act constituted a chance verdict.

In Crawford v. Consolidated Underwriters (Tex.Civ.App. 1959) 323 S.W.2d 657, the jury was deadlocked on whether plaintiff should receive $1,250 or $1,450. To resolve the impasse, the jury “agreed to flip a coin and abide the result.” (Id. at p. 658.) Thereafter, the jury answered the issues in a manner which would entitle plaintiff to that amount. Acknowledging the agreement to abide by the toss of a coin was flagrant misconduct, the court refused to reverse the judgment on that ground because plaintiff benefited from that position. (Id. at 659.) The court held, however, it was reversible error to answer the questions in a manner consistent with that flip. (Id. at p. 659.)