

THE VERDICT ON JURIES

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COMSTOCK IMAGES

In reviewing debates and research evidence about jury trials for our

book, *American Juries: The Verdict* (Prometheus Books, 2007), we have had the chance to reflect on the status of the jury system in the United States. High profile jury trials put the spotlight on the American practice of using its citizens as decision makers. When jury verdicts are at odds with public opinion, criticisms of the institution are common. The civil jury has been a lightning rod for those who want tort reform. This article draws together some of our reflections about the health of the jury system and our predictions for its future.

The American jury remains basically sound, the verdict is clearly in its favor.

Signs of strength

As we evaluated the case for the jury in the course of our research, we observed many signs that the American jury is a sound decision maker in the vast majority of both civil and criminal trials. Very significant to us were the findings from empirical studies that show that the strength of the evidence presented at the trial is the major determinant of jury verdicts. Similarly, civil jury damage awards are strongly correlated with the degree of injury in a case. These reasonable patterns in jury decisions go a long way toward reassuring us that juries, by and large, listen to the judge and decide cases on the

merits of the evidence rather than on biases and prejudice.

Furthermore, in systematic studies spanning five decades, we find that judges agree with jury verdicts in most cases. Many readers will know of the basic finding from the pioneering jury research done at the University of Chicago Law School during the 1950s. That early research showed that judges agreed with jury verdicts in 78 percent of criminal and civil trials. But what may not be as well known are the multiple replications of that basic discovery of substantial judge-jury agreement. What is more, the recent research substantiates early ideas about why juries decide cases distinctively.

But first, it's worth noting what does *not* explain judge-jury differences. In both civil and criminal trials, the disagreement is unrelated to the complexity of the trial evidence, as would be expected if juries misunderstood law and evidence that legal experts correctly comprehended. Nor is it associated with whether a business or a corporation is the defendant in the case, as would be presumed if juries were more biased against corporate actors than judges. Most judges say that jurors make a serious attempt to apply the law, and they do not see jurors relying on their feelings rather than the law in deciding on a verdict.

Instead, the jury's distinctive approach of common sense justice, and judges' greater willingness to convict based on the same evidence, best explain why juries and judges sometimes reach different conclusions. These juror values affect the verdicts primarily in trials in which the evidence is relatively evenly bal-

anced and a verdict for either side could be justified. Other studies, which show that the judgments of medical experts and arbitrators converge with jury decisions, reinforce this basic conclusion.

Many mock jury studies that allow a fine-grained examination of the decision process also put the jury in a generally good light. Jurors' individual and collective recall and comprehension of evidence are substantial. Jurors critically evaluate the content and consistency of testimony provided by both lay and expert witnesses, and do not appear to rubber stamp expert conclusions. The unique Arizona Jury Project, which allowed taping of the actual discussions and deliberations of 50 civil juries (with permission of the jurors and under strict confidentiality conditions), backs up the mock jury studies.¹

A key element contributing to jury competence is the deliberation process. A representative, diverse jury promotes vigorous debate. One of the most dramatic and important changes over the last half century is the increasing diversity of the American jury. Heterogeneous juries have an edge in fact finding, especially when the matters at issue incorporate social norms and judgments, as jury trials often do. Deliberation improves comprehension. Jurors with expertise on a topic often take a lead role when the jury discusses that topic, and factual errors made by one juror are frequently corrected by another juror. Deliberations encourage the sharing of knowledge and also the testing of narrative accounts. The representative jury and its verdicts are also seen as more legitimate by the public, an important strength of the jury as an institution.

We have explored the claims of doctors and business and corporate executives about unfair treatment by juries, but the empirical evidence does not back them up. The notion of the pro-plaintiff jury is contradicted by many studies that show both actual and mock jurors subject plaintiffs' evidence to strict scrutiny. Most members of the public adhere

to an ethic of individual responsibility, and many wonder about the validity of civil lawsuits. A skeptical approach is reflected in civil jurors' initial stances as they evaluate the testimony and form narrative accounts from the conflicting adversary presentation of evidence.

Although the research finds that juries treat corporate actors differently, the differential treatment appears to be linked primarily to jurors setting higher standards for corporate and professional behavior, rather than to anti-business sentiments or a "deep pockets" effect. Members of the public, and juries in turn, believe that it is appropriate to hold corporations to higher standards, because of their greater knowledge, resources, and potential for impact. The distinctive treatment that businesses receive at the hands of juries is a reflection of the jury's translation of community values about the role of business in society.

Signs of vulnerability

The overall picture of strength and competence is marred by some areas of particular vulnerability. The first and most important is the fact that while once the American jury decided a good proportion of all disputes, today it resolves only a fraction of them. The percentage of cases that are resolved by juries has declined substantially over the last half-century. The picture of declining jury trials is a little different in state and federal courts, recent research shows. In the state courts, where most jury trials take place, the overall number of jury trials declined from 1976 to 2002, and the fraction of court cases that were resolved by jury trials also decreased over the period. The pattern of decline was especially pronounced in serious criminal cases. But in some states there was a slight increase in the jury trial rate for civil cases.²

In the federal court system, although again there has been an overall decline in trial by jury, jury trials are not decreasing as rapidly as judge trials. Professor Marc Galanter's analysis of federal civil trials over the

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1. Shari S. Diamond, Neil Vidmar, Mary Rose, Leslie Ellis & Beth Murphy, *Inside the Jury Room: Evaluating Juror Discussions During Trial*, 87 *JUDICATURE* 54 (2003).

2. Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agor, *Examining Trial Trends in State Courts: 1976-2002*, 1 *J. EMPIRICAL LEGAL STUD.* 755 (2004).

last several decades, for example, found that in 1962, judge trials were a bit more numerous than jury trials. Civil trials climbed, and the pattern in which judge trials were more frequent than jury trials held until the early 1980s. However, starting in the 1990s, although trials in general decreased, jury trials became more common than bench trials, and that has persisted at least through the latest data from 2003.³ Nonetheless, the overall declining percentage of cases decided by juries makes one wonder whether we are witnessing a slow but steady movement toward the extinction of a meaningful right to jury trial.

Some other vulnerabilities may be added to this question about the declining use of juries. The jury system is strong to the extent that its members reflect a broad range of the community. Therefore, the low participation rates observed in some jurisdictions, and problems with seating representative juries in others, constitute a serious threat to the jury's integrity and strength as a community fact finder. So does the evidence that peremptory challenges are exercised on the basis of a prospective juror's race or gender.

Prejudice is the dark side of common sense justice. In cases with extensive pretrial publicity, jurors exposed to incriminating news stories are negatively affected in their judgments of the parties, in their estimations of the strength of the evidence, and in their deliberations. In capital trials, death-qualified juries often tilt right from the start toward the prosecution in their evidence assessments, taking a dim view of capital defendants and their lawyers. Other especially troubling cases involving mental illness and acquaintance rape engender stereotypes that may be hard to overcome. In the civil arena, plaintiffs' attorneys might reasonably argue that they face an uphill fight against juries that are predisposed against their claims. In both criminal and civil justice contexts, the community's inclinations and limitations translate into the inclinations and limitations of the jury.

Those who want better justice for



the disadvantaged can attempt it in the courtroom, where the adversarial context allows advocates to make (if not always win) an unpopular case. A more representative jury helps here, too, as biases in some segments of the community can perhaps be counteracted when different jurors bring divergent perspectives in the deliberations. However, when it comes to widely shared stereotypes that disadvantage particular litigants, the surest way to improve juries is to improve the public's understanding.

Bias in decision making has been documented in many cognitive psychology studies. Perhaps it is an inescapable part of the human condition, and we have to deal with it as best we can if we want to continue to include a human element in our judicial system. We have not found compelling evidence that overall bias is markedly worse in juries than in judges. Repeated exposure to similar cases, as judges have, might lead them to be better able to manage certain kinds of bias, but may introduce others. Regular exposure to

particular types of cases, defenses and even specific litigants may create predispositions that influence evidence evaluation. A jury gives every litigant the benefit of a fresh look.

Another factor to consider about the judge as the alternative to the jury is that although judges are markedly more diverse than 25 years ago when they were nearly all white men, the judiciary does not reflect the broad range of the community as well as juries do. But even more important, the fact that juries typically make a single decision and then disperse may disrupt to some degree the substantial advantages that repeat players have in the legal system. The potential for being beholden to special interests is greater when identifiable judges, as opposed to ad hoc juries, make the civil justice system's central decisions. Both plaintiff and defense lawyers who make up the trial bar and regular litigants are apt to lobby for the selection of congenial judges. In states where judges are elected, these groups contribute money to the judicial campaign funds of judges they believe are more likely to render favorable rulings. But even without political considerations, both elected and appointed judges who sit on the bench over many years may become jaded or predisposed toward one side or another.

A serious problem is the jury's documented difficulty in understanding legal instructions. This issue has plagued the courts since judges first took over the law-finding role from juries. In our experience, judges are often surprised to learn just how perplexed jurors can be over jury instructions. The remedy has been known for decades: Straightforward revisions to complicated legal instructions produce better understanding and better application of the law. Law professor Peter Tiersma has recently pulled all

3. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

4. Peter Tiersma, *Communication With Juries: How to Draft More Understandable Jury Instructions* (2006), available at <http://ncsconline.org/Communicating.pdf>.

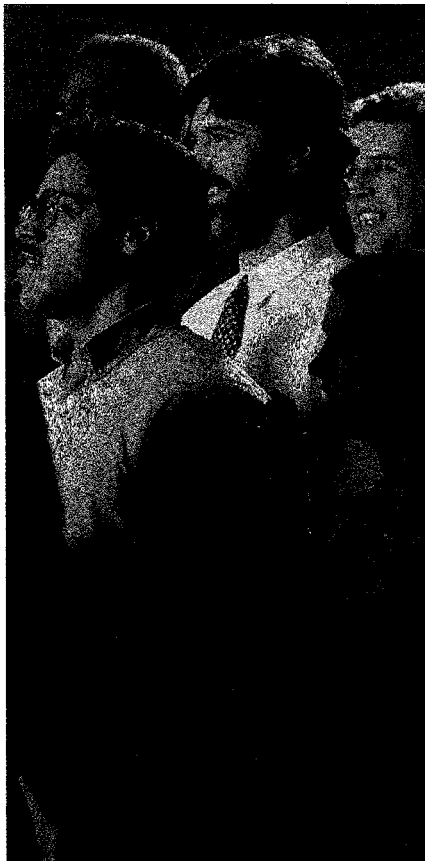
of these findings into a single source, *Communicating With Juries*.⁴

Simple testing procedures can be used to determine whether current legal instructions are clearly understood by the range of citizens who sit on juries. We strongly advise the systematic testing of proposed legal instructions. Several states have introduced plain English legal instructions, a move we applaud. Yet some judges still rely exclusively on oral instructions before sending the jury out to deliberate. Examples we provide in our book indicate that if jurors are given written instructions to take into the jury room, they give those instructions careful attention during their deliberations.

Reforms and remedies

Although the jury is always evolving, the jury system in recent decades has experienced a remarkable period of change. State jury reform commissions, policymakers, jury researchers, and innovative judges and lawyers have promoted new approaches to choosing jurors and trying cases. The jury selection process in many jurisdictions has been dramatically modified to better democratize the jury. A broader range of people are now called for jury duty. There are fewer exclusions and exemptions. Many courts have moved to a “one day - one trial” system and concomitantly have become less open to accepting excuses from people who think they are just too busy to serve on a jury. As a result, a record number of Americans have served on juries.

Another important set of reforms involves changes in trial procedures that allow jurors to take a more active role during the trial. The American



Bar Association adopted a revised set of Principles for Juries and Jury Trials (2005) that includes active jury reforms.⁵ Although many judges have not yet adopted them, active jury reforms are based on cognitive and educational research that shows the well-documented benefits of active and interactive learning. The adversary system’s emphasis on ensuring a neutral decision maker has led to a largely passive formal role for juries. Jurors absorb the evidence presented by both sides, waiting until the end of the trial to make their judgment. Yet how passive are they in practice? We know that long before they embark on their deliberations, jurors are attempting to organize the evidence into a narrative account and to test the coherence and consistency of each side’s story.

Although some of the active jury reforms, such as note taking, enjoy broad support, others are more controversial. Attorneys in particular worry about permitting jurors to ask questions of witnesses, discuss the case with one another during the trial, and

seek additional arguments and assistance from the two sides if they are stuck. Their caution is understandable. Allowing jurors to ask questions takes over a slice of the adversary attorney’s role in the trial. Discussing the evidence when only one side has had a chance to present its case raises fears of prejudgment, especially for the side that goes second. The side that has the burden of proof might be seen as getting an advantage if jurors cannot arrive at a verdict and the two sides are given additional time for arguments focused on the issues that most trouble the jury. Yet if confusion and biases develop during the process of evidence presentation, and these shape how later testimony is viewed, then timely questions or discussions with other jurors could promote better fact finding.

Both of us have been involved in experimentally testing the impact of active jury reforms, and have published our work in *Judicature* and elsewhere.⁶ On the whole, the findings of our studies and those of other researchers show that there are some benefits in particular cases; the feared harms such as prejudgment, distraction, and asymmetrical benefits do not materialize. At the same time, the most passionate advocates of jury reform may oversell the benefits. Even so, in the past, attorneys and judges could only speculate about the likely impact of specific innovations. Now, there is substantial empirical evidence about the merits of particular reforms that attorneys and judges can review to decide whether they will employ them as a general rule or in particular trials.

Signs of vitality

The promulgation of jury reform commissions in many states and the work on jury trials by organizations like the American Bar Association, the American Judicature Society, the Federal Judicial Center, and the National Center for State Courts show that a broad range of policy makers in and outside the legal system are committed to modernizing American jury systems. We see these efforts as a positive way to reconfig-

5. American Bar Association, PRINCIPLES FOR JURIES AND JURY TRIALS (2005), <http://www.abanet.org/juryprojectstandards/principles.pdf>. JURY TRIAL INNOVATIONS (G. Thomas Munsterman, Paula Hannaford-Agor & Marc Whitehead eds., 2nd ed., 2006) is a comprehensive compendium of jury reforms that lists for each reform the relevant issues, procedures, advantages, disadvantages, and representative studies.

6. Diamond et al., *supra* n. 1; Paula L. Hannaford-Agor, Valerie P. Hans & G. Thomas Munsterman, “Speaking Rights”: Evaluating juror discussions during civil trials, 85 JUDICATURE 237 (2002).

ure the jury in order to keep it relevant to contemporary society. There are also other signs of vitality.

Whether jury trials have declined or not, the judiciary and the American public continue to hold the jury in high regard, even if people disagree with particular verdicts from time to time. The jury system is strongly supported by the public. In one recent and typical poll, three-quarters of respondents say that if they were on trial, they would prefer a jury to a judge. Jury service itself educates the public about the law and the legal system and produces more positive views of the courts. What is more, jury service can increase other forms of civic participation such as voting. Research done by the Jury and Democracy Project has discovered that citizens who vote only infrequently and then deliberate with fellow citizens in criminal jury trials are subsequently more likely to vote.⁷ Thus, the experience of jury service can promote citizen actions favorable to democratic governance.

There are other signs that lay decision makers add value to a legal system. One of the purported culprits in the declining use of juries is the nearly ubiquitous jury trial opt-out provision in standard form consumer contracts. The provision mandates arbitration rather than jury trial for dispute resolution. Theodore Eisenberg and his collaborators have analyzed the content of complex business contracts to determine whether corporations employ similar opt-out provisions when they contract with their peers.⁸ The answer, in short, is no. When corporations write contracts with each other, they are apt to retain a jury trial right rather than allow an arbitrator to resolve the case. This suggests that even some of the harshest critics of the jury believe that it adds value in litigation.

Citizen participation in legal decision making is enjoying something of a worldwide renaissance. In recent years, a number of countries have introduced or reintroduced the jury or other forms of lay decision making

into their legal systems.⁹ Juries seem to constitute part of a move away from a totalitarian regime to one of greater democracy. Russia resurrected its jury system in the early 1990s as the Soviet Union collapsed. The right to jury trial is enshrined in a number of post-Soviet constitutions, including those of Armenia, Kazakhstan, Ukraine, and Azerbaijan. Similarly, as Spanish

dictator Franco's regime ended, Spain introduced trial by jury. Japan is scheduled to debut *Saiban-in Seido*, a form of mixed tribunal, beginning in 2009. Three professional judges will decide serious felony cases jointly with six lay judges chosen from the general population. In the wake of political controversy over the fairness and integrity of the legal system in Argentina, serious debates about the benefits of a jury system have been sparked in that country. South Korea has introduced an advisory jury that will decide cases along with judges in serious felony cases over the next five years.¹⁰

The juries or mixed tribunals in these countries will not, of course, necessarily be identical to the American jury. The form and procedure will develop from within these countries' different legal systems as well as their social and political worlds. However, the international interest and emergence of jury systems suggest that there are some enduring benefits to the direct involvement of citizens as legal decision makers.

On balance

In 1986, we wrote our first book together, *Judging the Jury*. The field of jury studies was at an early stage; trial consultants were just beginning to emerge as occasional players in high profile trials; and concerted attacks

on the civil jury were about to commence. Over two decades have passed. We have the benefit of many new empirical studies of the jury system, particularly of the civil jury that has undergone so much scrutiny and criticism. Thus, we know a great deal more now about how the jury functions and the values that it serves in contemporary society than we did

THE EXPERIENCE OF JURY SERVICE CAN PROMOTE CITIZEN ACTIONS FAVORABLE TO DEMOCRATIC GOVERNANCE.

then. The conclusion we reached in 1986 about the basic soundness of the American jury has been reinforced by this new scholarship. After evaluating all of the evidence, our verdict is strongly in favor of the American jury. ❧

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7. John Gastil, E. Perry Deess, Phil Weiser & J. Larner, *Jury Service and Electoral Participation: A Test of the Participation Hypothesis*, J. POL. (forthcoming).

8. Theodore Eisenberg & Geoffrey P. Miller, *Do Juries Add Value? Evidence from an Empirical Study of Jury Trial Waiver Clauses in Large Corporate Contracts*, 4 J. EMPIRICAL LEGAL STUD. 539 (2007); Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, "Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts," U. MICH. J.L. REFORM (forthcoming), available at SSRN.com.

9. See 40 CORNELL INT. L.J., Whole No. 2 (Spring 2007), entitled "The Rising Tide: Citizen Participation in Legal Decision Making: A Cross-Cultural Perspective."

10. *South Korea: First Trial by Jury*, N. Y. TIMES, Feb. 13, 2008.