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FOREWORD

EMPIRICAL RESEARCH AND THE ISSUE OF JURY COMPETENCE

NEIL J. VIDMAR*

This issue of *Law and Contemporary Problems* focuses on the question of jury competence. Some of the articles are concerned with civil juries and some with criminal juries. All are based upon empirical research.

The jury system is, and always has been, a controversial institution.¹ Many contemporary critics would endorse Judge Jerome Frank's assertion that the jury applies law it doesn't understand to facts it can't get straight.² The civil jury has received the most criticism. A leader of the attack during the 1970's and 1980's was former Chief Justice Warren Burger, who complained that jurors are not competent to deal with the complex disputes that come to trial in the federal courts.³ A series of cases have raised the question of whether

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* Professor of Social Science and Law, Duke University School of Law.

I want to dedicate my efforts on this issue of *Law and Contemporary Problems* to the memory of Milton Rokeach, Professor of Psychology (1918-1988). Milt was a dear friend and colleague and a companion in my first adventure with juries: Rokeach & Vidmar, *Testimony Concerning Possible Jury Bias in a Black Panther Murder Trial*, 3 J. APPLIED PSYCHOLOGY 19 (1973). He encouraged my interest in discovering how I might apply the theory and methodology of my native discipline, social psychology, to the field of law and to other issues involving justice in human affairs. Milt had a great professional and personal interest in justice and made lasting scholarly contributions to the understanding of our social and psychological world. See Christie, *Milton Rokeach (1918-1988)*, 45 AM. PSYCHOLOGIST 547 (1990).

1. See generally V. HANS & N. VIDMAR, *JUDGING THE JURY* (1986); H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966); L. MOORE, *THE JURY, TOOL OF KINGS, PALLADIUM OF LIBERTY* (1973); Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939).

2. J. FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1945). A more detailed critique can be found in Judge Frank's opinion in *Skidmore v. Baltimore & Ohio Railroad*, 167 F.2d 54 (2d Cir. 1948).

3. Burger, *The State of the Federal Judiciary*, 57 A.B.A. J. 855 (1971); Burger, *Is Our Jury System Working?*, 118 READERS DIGEST 126 (1981). Chief Justice Burger was also concerned about the administrative and financial burdens that the civil jury system imposed on the courts. For discussion

there should be a complexity exception to the seventh amendment right to a jury trial in civil matters.⁴ Academic writings also pillory the civil jury. In a *Harvard Law Review* article addressing the perceived ills besetting the courts, Albert Alschuler placed considerable blame for these problems on "the lawlessness of our jury system."⁵ In the mass media and in trade publications the civil jury is adjudged to be capricious, biased, and unintelligent.⁶

The criminal jury is not so roundly and consistently attacked as the civil jury, but questions are raised about whether it can properly evaluate complex evidentiary questions, such as those presented in insanity defense or sexual assault cases.⁷ Additional, more limited, criticisms involve matters such as the jury's ability to deal appropriately with the defendant's prior criminal record,⁸ joinder,⁹ and scientific evidence.¹⁰

These various assertions are statements about what juries actually *do* and are, therefore, open to empirical examination. In the light of actual data they may or may not prove to be valid. It is clear, however, that many of the assertions have been made without the benefit of any empirical data; in other instances empirical findings have been misconstrued or the limitations of the particular data sets have been ignored.¹¹ This is not to suggest that the task of empirical assessment is easy or without the possibility of controversy. Multiple issues are involved in assessing jury competence and multiple standards can be applied when studying these issues. For example, does the question of competence involve the jury's ability to assess causality, negligence, damages, or scientific evidence? Is the standard against which performance is to be assessed an absolute standard, the relative performance of a judge, some other tribunal, or a blue ribbon jury?¹² An additional

related to Burger's concerns, see Vidmar, *Assessing the Impact of Statistical Evidence, A Social Science Perspective*, in *THE EVOLVING ROLE OF STATISTICAL ASSESSMENTS AS EVIDENCE IN THE COURTS* 294 (S. Fienberg ed. 1989).

4. An excellent review of these cases and the issues that they involve is contained in Sperlich, *The Case for Preserving Trial by Jury in Complex Civil Litigation*, 65 *JUDICATURE* 394 (1982).

5. Alschuler, *The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 *HARV. L. REV.* 1808 (1986).

6. Discussion of these matters is contained in Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building*, *LAW & CONTEMP. PROBS.*, Autumn 1989, at 269. See also Galanter, *Jury Shadows: Reflections on the Civil Jury and the "Litigation Explosion"*, in *FINAL REPORT OF THE 1986 CHIEF JUSTICE EARL WARREN CONFERENCE, THE AMERICAN CIVIL JURY*, ROSCOE POUND FOUNDATION (1988); Drazan, *The Case for Special Juries in Toxic Tort Litigation*, 72 *JUDICATURE* 292 (1989).

7. See Hans & Vidmar, *supra* note 1, at chs. 12, 13, 14.

8. See Note, *Social Science Findings and the Jury's Ability to Disregard Under the Federal Rules of Evidence*, *LAW & CONTEMP. PROBS.*, Autumn 1989, at 341.

9. Note, *Rethinking Criminal Joinder: An Analysis of the Empirical Research and Its Implications for Justice*, *LAW & CONTEMP. PROBS.*, Autumn 1989, at 325.

10. See Imwinkelried, *Judge Versus Jury: Who Should Decide Questions of Preliminary Facts Conditioning the Admissibility of Scientific Evidence?*, 25 *WM. & MARY L. REV.* 577 (1984); Imwinkelried, *The Standard for Admitting Scientific Evidence: A Critique from the Perspective of Juror Psychology*, 100 *MIL. L. REV.* 99 (1983); Thompson, *Are Juries Competent to Evaluate Statistical Evidence?*, *LAW & CONTEMP. PROBS.*, Autumn 1989, at 9.

11. See Daniels, *supra* note 6.

12. The idea of civil juries composed of persons with special education or skills bearing on complex cases has been occasionally discussed as a remedy for the perceived incompetence of juries

question involves a value judgment: How much variation from the standard, whatever it is, are we going to allow before concluding that the jury is not competent? The point, of course, is that empirical data can inform debate but cannot independently resolve it. A final issue flows from any conclusion that jury performance does not comport with the standard that is chosen. What action is to be taken? Is the performance so bad that we should consider alternatives to the jury? Is it possible to modify current procedures to improve jury performance? Should the poor performance simply be tolerated as the price paid for the other functions that the jury serves? All of these questions are addressed to varying degrees in the articles that follow, but the reader is urged to keep them in mind when contemplating the results of the various studies.

EMPIRICAL WORK DURING THE PAST QUARTER CENTURY

Although there were a few studies of jury behavior as far back as the 1930's, the systematic empirical study of the jury is usually dated from the University of Chicago Jury Project, which began in the 1950's.¹³ The project gained widespread public recognition with the publication of Kalven and Zeisel's landmark book, *The American Jury*,¹⁴ in 1966 and Simon's *The Jury and the Defense of Insanity* in 1967.¹⁵

The research reported in *The American Jury* was based on a comparison of the verdicts that juries rendered in over 3000 criminal trials around the United States with the verdict that the trial judge would have rendered if the case had been heard without a jury. In the cases studied, judge and jury agreed 78 percent of the time. In the cases where there was disagreement the jury was about six times as likely to favor the defendant as the prosecution. By comparing other data, such as the judge's estimate of the difficulty of the case, Kalven and Zeisel drew the conclusion that judge-jury disagreement was seldom due to a failure of the jury to understand the evidence. Instead, it was because the jury applied a different set of values in deciding the case.

The Chicago Jury Project also studied more than 6000 civil jury verdicts.¹⁶ The findings indicated that judge-jury agreement was 78 percent, the same as in criminal juries, and in the cases of disagreement the jury favored the defendant about as often as the plaintiff. On the issue of damages, jury awards averaged about 20 percent higher than what the judge would have awarded.

in complex cases. Drazan, *supra* note 6; Nordenberg & Lundburg, *Decision Making in Complex Federal Civil Cases: Two Alternatives to the Traditional Jury*, 65 JUDICATURE 430 (1982); Note, *The Case for Special Juries in Complex Litigation*, 89 YALE L.J. 1155 (1980).

13. A description of the project and its scope is contained in Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744 (1959).

14. H. KALVEN & H. ZEISEL, *supra* note 1.

15. R. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* (1967).

16. Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055 (1964).

Simons' study of the insanity defense was based upon realistic simulations of criminal trials using over 1000 jurors drawn from actual jury pools.¹⁷ The findings showed juries responding sensitively to both the law and the evidence.

The Chicago Jury Project findings suggested that on the whole the jury was a competent arbiter of the matters that were brought before it. Because of the size of the data sets and the thoroughness and insightfulness of the analyses, the Chicago Jury Project is considered, to this day, to be our best evidence on the issue of jury competence. Yet, the age of the Chicago findings may limit their applicability to controversies about the contemporary jury. The intervening decades have produced substantial changes that could, and probably do, have a bearing on the ability of juries to carry out the tasks assigned to them. Consider a partial listing of these changes.

In some jurisdictions the size of the jury has been reduced from twelve to six members. In addition, many jurisdictions no longer require that juries reach their decisions by a unanimous verdict. Jury panels are now more representative of the population than in the 1950's and 1960's. Changes have occurred in the nature of cases that are tried to juries, their complexity, and their length. Substantive laws have been altered, such as shifts from contributory to comparative negligence and the institution of the verdict of guilty but mentally ill. There have been changes in procedural laws, such as rape shield statutes. The kinds of evidence that juries hear have also evolved: Advances in technologies have increased the use of scientific evidence; lawyers have become increasingly sophisticated in developing multiple theories of causality and negligence; and social science testimony is almost routinely admitted into evidence. In short, the makeup of the jury, the evidence, and the context in which it operates today is very different from when the Chicago Jury Project data were collected. An attempt to replicate the Chicago study is overdue.

Although the University of Chicago studies still strongly influence our thinking about jury competence, there has been no recent dearth of research on various aspects of jury behavior. During the last decade alone hundreds of articles¹⁸ and a number of books¹⁹ on the subject have been published. New theoretical developments in the social sciences, particularly social psychology,

17. R. SIMON, *supra* note 15.

18. The Social Sciences Citation Index subject index lists 242 references under "juror" and 612 references under "jury" in the years 1981 to 1985. Recognizing that articles frequently receive multiple listings, depending upon the topics contained in their titles, we can arbitrarily divide these numbers by three (three listings per article) and arrive at a figure of 284 articles dealing with jurors or juries. Using the same logic the estimate for 1988 is 45 articles. In 1989 Psychological Abstracts alone listed thirty-two articles dealing with juries. The first twelve volumes of *Law and Human Behavior* (1977-1988), consisting of four issues per year, averages slightly more than one article per issue with "jury" or "juror" in the title.

19. J. BALDWIN & M. McCONVILLE, *JURY TRIALS* (1979); J. GUINTEH, *THE JURY IN AMERICA* (1988); M. SAKS, *JURY VERDICTS* (1977); V. HANS & N. VIDMAR, *supra* note 1; R. HASTIE, S. PENROD & N. PENNINGTON, *INSIDE THE JURY* (1983); S. KASSIN & L. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* (1988).

have provided insights about jury decisionmaking processes. Additionally, judges and practicing lawyers have shown increased interest in what empirical research might discover. For this reason, they have aided researchers and, in some instances, have helped to generate innovative experiments. Some of this research literature appears to corroborate the conclusions of *The American Jury* but some of it raises questions about how well juries perform their task.

This symposium is intended to further our knowledge about jury competence. The articles review research and theory bearing on a number of the issues raised in legal debates about the jury.

OVERVIEW OF THE ARTICLES

The first four articles in the issue address the problem of how juries respond to scientific evidence. Over the past fifteen years there has been a dramatic increase in both the types and amount of scientific evidence introduced at trial.²⁰ The evaluation of scientific evidence requires a different form of analysis and decisionmaking than that required with other forms of evidence. The central questions raised by these developments are whether the jury can be aided by the evidence, whether it is capable of understanding the evidence, and whether it is capable of using it in a legally proper way.

William Thompson addresses the issue of statistical evidence. Most forensic science evidence is probabilistic in nature. He argues that this fact raises several concerns about the ability of juries to deal with statistical evidence: They may overestimate or underestimate its value as evidence; they may be insensitive to important statistical variations that affect the strength of the evidence; and they may be insensitive to partial redundancies between statistical and nonstatistical evidence. He delineates the basic concepts associated with these questions and then describes a series of studies that shed light on how juries respond to statistical information.

In the next article, Steven Penrod and Brian Cutler deal with the impact of expert testimony about eyewitness reliability. Experimental psychologists have studied in detail many of the factors that may affect the reliability of eyewitness identifications. As this body of knowledge has developed, courts have increasingly shown a willingness to accept expert testimony on the subject. Such testimony has raised controversy not only among judges and legal critics, but also within the community of psychologists. Questions have arisen about whether the body of knowledge on eyewitness reliability is sufficiently developed to be applied in legal settings; whether the knowledge, in any event, is beyond the ken of the jurors; and whether the impact on the jury is likely to be more prejudicial than probative. Penrod and Cutler

20. THE EVOLVING ROLE OF STATISTICAL ASSESSMENTS AS EVIDENCE IN THE COURTS (S. Fienberg ed. 1989); P. GIANELLI & E. IMWINKELRIED, *SCIENTIFIC EVIDENCE* (1986); M. SAKS & R. VAN DUIZEND, *THE USE OF SCIENTIFIC EVIDENCE IN LITIGATION* (1983); Decker, *Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents*, 51 U. CIN. L. REV. 574 (1982); Gianelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, A Half Century Later*, 80 COLUM. L. REV. 1197 (1980).

describe their own research and the research of others on each of these questions.

The evidence about eyewitness reliability discussed by Penrod and Cutler is one instance of a generic category of social science evidence that Walker and Monahan have recently labeled “social framework” evidence.²¹ Social framework evidence is offered to provide the jury with information about the social and psychological context in which contested adjudicative facts occurred. Other examples of social framework evidence include testimony about the characteristics of victims of child sex abuse, rape, and spousal abuse.

Robert Mosteller’s contribution to this symposium concerns the legal doctrines that govern the admissibility of social framework evidence. Mosteller analyzes these doctrines and then contrasts testimony involving sexual abuse of children with that involving rape victims. He concludes by raising empirical questions about jury responses to this type of evidence.

The article by Neil Vidmar and Regina Schuller also explores social framework evidence. It reviews research literature describing jury awareness of issues involving battered women, rape victims, and eyewitness reliability, and jury behavior in response to expert testimony on these subjects. Jury reactions to other types of expert testimony are also considered. The goal of this review was to uncover any similarities in jury responses to expert evidence in different contexts.

Valerie Hans’ article shifts our attention to the issue of how juries assess corporate responsibility. It has been charged that juries are biased against corporate defendants and, alternatively, that they are too lenient in cases involving corporate wrongdoing. Hans analyzes the arguments on both sides of this controversy and discusses research findings on the subject. She concludes by setting forth a research agenda to improve our understanding of judgments about corporate responsibility.

Despite the fact that the jury is a deliberative body, surprisingly few of the many studies devoted to jury behavior have attempted to examine directly the process by which juries reach decisions. Given legal constraints, studies of the process must be accomplished through simulation experiments. Phoebe Ellsworth’s article shows that we can learn a great deal about the deliberation process through simulations. Ellsworth contrasts juries’ understanding of the evidence with their understanding of the law in regard to a murder trial.

The means by which juries arrive at damage awards has also been neglected in empirical research. This neglect seems odd since damages—the bottom line in the civil jury trial—are what actually fuels much of the criticism of the jury system. Edith Greene’s article begins to fill this gap in our knowledge. She draws upon research using juror interviews and simulation studies to consider alternate models of how juries arrive at their awards.

21. Walker & Monahan, *Social Frameworks: A New Age of Social Science in Law*, 73 VA. L. REV. 559 (1987).

Shari Diamond, Jonathan Casper, and Lynne Ostergren's article looks at the legal rules intended to restrain the jury by denying the jurors access to certain kinds of evidence thought to be overly prejudicial. How effective is this "blindfolding" and does it have unintended consequences? Consistent with other research reported in this issue, the studies that Diamond, Casper, and Ostergren review show the jury as an active decisionmaker, utilizing the knowledge and assumptions of its constituents members. This fact has important consequences for attempts to construct rules intended to control how juries arrive at their verdicts.

The articles by Stephen Daniels and Judyth Pendell should be viewed as a unit. Daniels examines the contemporary charges of jury incompetence from a political perspective. He argues that powerful lobbies from the insurance industry, manufacturers, and certain professional groups, particularly doctors, have made the jury the public scapegoat for a perceived crisis in the civil justice system. He documents instances in which exaggerated stories and misinterpreted data have been presented to policymakers and the public to create, he argues, the appearance of a crisis and the need for major legal reforms. As part of the documentation for his article, he wanted to reproduce some advertisements from insurance companies.

The student editors of *Law and Contemporary Problems* contacted the companies for permission to reproduce the advertisements. The Corporate Communications division of Aetna Life and Casualty Insurance Company gave permission to reprint its advertisements only if it was allowed to write a reply to Daniels' article.²² I had several conversations with Joyce Rutledge, the General Editor of *Law and Contemporary Problems*, and with Stephen Daniels about the appropriateness of this unusual request. We decided that we would consider an article from Aetna if it met certain standards, but also that Daniels should be allowed to write a reply, and that I should relate the history of the Pendell article in this foreword.

Despite some lingering reservations,²³ I am mostly content with our course of action. Daniels was able to include the Aetna advertisements in his article. The Pendell piece calls for research on procedural reforms intended

22. The letter of permission, dated January 16, 1990, read, in part, as follows:

Permission is granted subject to the following conditions:

(1) The ads must run verbatim and without any captions or explanations. We agree it will be much more helpful to your readers to see the ads than to read descriptions, but they must speak for themselves.

(2) An appropriate footnote must be added on the pages where the ads appear, as follows: "The advertisements are reprinted with permission from Aetna Life and Casualty Company. Aetna's own views on the jury system are presented in a companion article on page —."

(3) Our article is published in the same issue We do feel . . . that the spirit and the reality of fairness will be best served if our article appears in the same issue where our ads are scrutinized—hence condition 3.

Perhaps you could ascertain the feasibility of our purchasing reprints of the two articles—or extra copies of the Journal issue if that is more cost efficient. Interested in purchasing 1500 copies.

23. The most important is whether we should have acceded to Aetna's conditions in the first place.

to enhance jury competence, a position that is consistent with the empirical focus of this symposium. I leave it to the reader to judge whether the history behind the Pendell article helps to support or refute Daniels' thesis.

Two student notes appear in the symposium. One, by James Farrin, is concerned with research on criminal joinder. The other, by Lisa Eichhorn, considers the jury's ability to follow a judge's admonition to disregard evidence.

ACKNOWLEDGEMENTS

Professor Richard Lempert of the University Michigan Law School and Judge Anthony M. Brannon of the Superior Court of North Carolina made important contributions to our discussion of issues at the symposium held at Duke Law School. Many of the articles are enriched as a result. The student editors also made very significant contributions, and I thank them on behalf of the authors.