

Should we rush to reform the criminal jury?

Consider conviction rate data.

Dissatisfaction with criminal juries is due, in part, to public perception that jury acquittal rates are high. The data, however, do not support that perception.

by Neil Vidmar, Sara Sun Beale, Mary Rose, and Laura F. Donnelly

An editorial in the September-October 1995 issue of *Judicature* correctly called attention to the remarkable fact that the acquittal of O.J. Simpson seems to have almost single-handedly spurred nationwide calls for reform of the criminal jury system. It correctly admonished that

It is difficult to ascertain the precise roots of contemporary dissatisfaction with criminal juries and their performance, but public perception of high jury acquittal rates is surely a factor.¹ Many white Americans viewed the Simpson acquittal as a symbol of the ills of the jury system. Moreover, the Simpson case followed on the heels of a series of acquittals in highly publicized cases stretching back for more than a decade. These include the murder trials of the Menendez brothers, the domestic assault trials of John and Lorena Bobbitt, the attempted murder trial of Damian Williams in the beating of a white motorist during the Los Angeles riots, and the trial of Laurance Powell and three other police officers who were videotaped beating motorist Rodney King. They also include the Florida rape trial of William Kennedy Smith, the drug trial of Washington D. C. Mayor Marion Barry, the insanity acquittal of John

Hinkley, who shot President Ronald Reagan, the drug trial of automaker John DeLorean, and the 1979 acquittal of four Miami police officers in the beating death of an African American insurance executive, which set off race riots in Miami. These cases and others occurred against a backdrop of high public concern with crime rates and exploitation of that concern by politicians on both sides of the political spectrum. Jury critics argue that the cases demonstrate the incompetence and permissiveness of juries (a charge that dovetails nicely with the political debate about incompetent and irresponsible

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...a particularly useful thing to keep in mind about the Simpson trial is its singularity. Calls for extensive reform of the justice system based on events in one Los Angeles courtroom should be viewed with utmost skepticism.

This article was written while the first author held a Eugene T. Bost Research Professorship of The Charles A. Cannon Charitable Trust No. 3. The authors' conclusions do not necessarily represent the position of the trust.

1. See Reske, *Critics Claiming Race Affects Verdicts*, 82 A.B.A.J. 26 (1996); Holden, Cohen & deLisser, *Color Blinded? Race Seems to Play an Increasing Role in Many Jury Verdicts*, Wall St. J., Oct. 4, 1995, at A1; Jost, *The Jury System: Are Major Changes Needed?*, 5 CQ RESEARCHER 993 (1995) (whole issue No. 42).

civil juries²).

Commentators have simply assumed that juries are now more likely to acquit criminal defendants, and devoted their attention to seeking explanations for this supposed phenomenon. Theories abound. Various authors have blamed the use of the "abuse" excuse, which appeals to the natural sympathies and gullibility of jurors,³ the ability of jury consultants to stack juries with persons who are defense-prone,⁴ and the greater representativeness of juries, which has resulted in jury panels with less educated and less intelligent members who can be more easily swayed by defense lawyers.⁵ Others have ascribed the problem to racial politics, which leads minority jurors to acquit even in the face of overwhelming evidence of guilt.⁶

In his highly publicized 1996 book, *Guilty: The Collapse of Criminal Justice*, Judge Harold J. Rothwax, relating personal anecdotes from his experience as a trial judge in New York, appears to conclude that all of these developments have contributed to a situation in which large numbers of guilty persons go free on a daily basis. Even though the debate about jury reform is founded on the assumption that criminal juries have become increasingly acquittal-prone, none of the proponents of reform have supported their claims with systematic data about jury conviction rates. Scholars, journal-

ists, and others arguing for major reforms have relied almost exclusively on anecdotes or cases selected for their unusual public interest, instead of on systematic information about the vast number of ordinary trials that occur every day in American courtrooms.

This article reports changes in conviction/acquittal rates over time in the federal courts and in the state courts of North Carolina, Florida, California, New York and Texas. If present concerns about juror leniency and racially-based nullification of laws are well founded, we would expect a downward trend in conviction rates. The data, however, cast grave doubt on the assumption that juries are becoming more acquittal prone. To the contrary, the jury con-

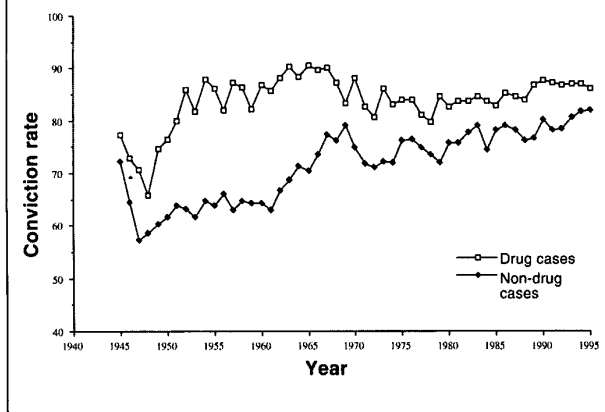
the five state judicial systems have remained stable or increased. These findings place the burden of proving the existence of a problem on those who are calling for reforms.

Federal conviction rates

Federal court statistics since 1945 report jury conviction rates for all offenses and disaggregated rates for drug offenses.⁷ Contrary to the assumption of jury critics, the data show that the conviction rates in federal jury trials have increased, both across the board and in drug cases.

From 1945 to 1960 the conviction rates for non-drug offenses averaged at 63 percent. (See Figure 1.) Thereafter, conviction rates climbed more or less steadily, so that in 1995 juries found 82 percent of defendants guilty. Conviction rates for drug offenses have tended to be higher than for non-drug offenses, with the highest rates occurring in the 1960-70 decade and in the half decade of the 1990s. For the past six years approximately 87 percent of defendants tried before juries for drug offenses were convicted. Since the enactment of jury reform legislation in 1968, federal juries have become more representative of the population and include more members of ethnic and racial minorities.⁸ Contrary to the hypothesis

Figure 1 Jury conviction rates in federal courts drug and non-drug cases, 1945-1995



viction rates in federal courts have increased, and jury conviction rates in

that increased jury representativeness would lead to a decline in conviction rates, the rates have remained steadily high or increased slightly.

State conviction rates

Federal criminal trials constitute only a small percentage of criminal trials nationwide, and, moreover, in some respects federal cases are atypical. Federal prosecutors tend to have much more discretion than state prosecutors in deciding which cases to prosecute, and they can often

2. See, e.g. Daniels & Martin, *Civil Juries and the Politics of Reform* (1995); Vidmar, *MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS* (1995).

3. Dershowitz, *THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB-STORIES, AND EVASIONS OF RESPONSIBILITY* (1994); Berns, *Getting Away With Murder*, COMMENTARY, April 1994, at 25.

4. E.g., Adler, *THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM* (1994); Boyarsley, *The Misuse of Jury Consultants*, L.A. TIMES, Nov. 8, 1994, at A25; Bradley, *Juries and Justice: Is the System Obsolete?*, Vol. 11 #16 INSIGHT ON THE NEWS, April 24, 1995, at 6.

5. E.g., Lind, *Jury Dismissed*, NEW REPUBLIC, Oct. 23, 1995 at 10.

6. E.g., Holden, et al., *supra* n. 1; Reske, *supra* n. 1; Sleeper, *The Simpsons*, 213 THE NEW REPUBLIC, Oct. 23, 1995, at 17; Nethaway, *Have We All Become Victims Now? To Work, America's Jury System Requires Sense of Duty and Community Responsibility*, ATLANTA JOURNAL AND CONSTITUTION, Jan. 30, 1995 at A11. For a reasoned discussion of the issues of racial politics as they pertain to the jury see Abramson, *WE THE JURY* (1994).

7. BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1995 (Maguire & Pastore, eds.) Tables 5.27 & 5.38.

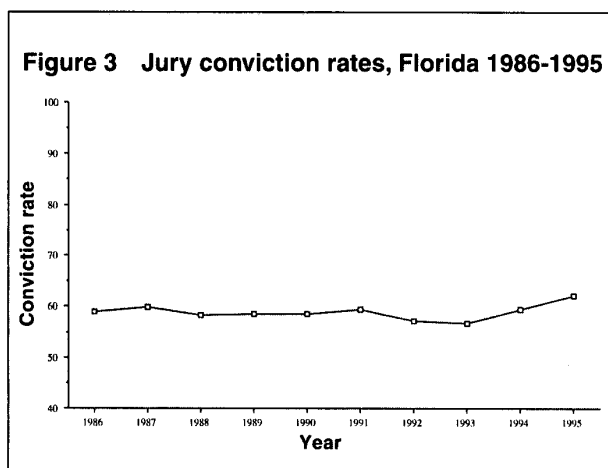
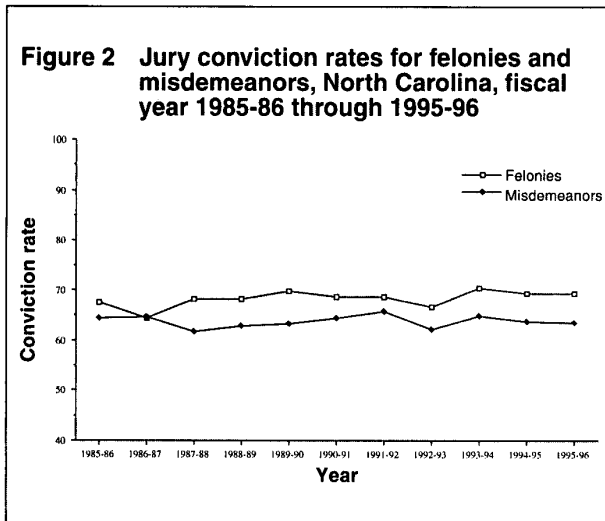
8. The Jury Selection and Service Act of 1968, 28 U.S.C. §§1861-1871, requires federal juries to be drawn from a fair cross section of the community, and mandates random selection from voting rolls or other representative source lists.

bring greater resources to bear than their state counterparts. Accordingly, to determine whether the trends observed in the federal data are consistent with the experience in the state courts, statistics from five state courts were examined. The data are from the general jurisdiction trial courts in each state. All of these courts try felonies, and some have limited misdemeanor jurisdiction as well.

The time span and specificity of detail provided varied from state to state. For example, only for North Carolina was it possible to consider misdemeanor trials as well as felonies and also disaggregate felonies by type of charge. The states have different substantive criminal laws and prosecutorial practices and also differ in the way that statistics are tabulated. Therefore, it is inappropriate to make facile comparisons between state and federal courts or among state courts. However, while taking cognizance of caveats regarding the effects of possible changes in case mixes over time,⁹ it is still important to ask whether conviction rates have dropped in each of the states.

North Carolina, Florida, California, New York, and Texas were chosen because they keep systematic statistics that were readily available.¹⁰ While they do not constitute a random sample, as a group they are geographically, demographically, and culturally diverse, with different laws and legal cultures. Each of the state data sets can thus be viewed as separate studies attempting to determine if the trends observed in the federal data on jury verdicts are replicated in a sample of state courts.

North Carolina conviction rates. The North Carolina Administrative Office of the Courts has statistics on



statewide jury conviction rates in its superior courts from fiscal years 1985-86 through 1995-96. The data are available separately for felony and misdemeanor trials and by categories of crime. On average over this 11-year period there were 1,918 felony trials in which juries reached a verdict, representing 2.9 percent of all felony dispositions. There were also, on average, 948 misdemeanor trials representing 2.6 percent of all misdemeanor dispositions.

As seen in Figure 2, neither the felony nor the misdemeanor conviction rate shows a downward trend. However, as expected, conviction rates were lower than in federal courts. On average the conviction rate for felony cases was 68.3 percent and for misdemeanor cases 63.7 percent.

Disaggregating the data for felony trials by categories of crime indicates, probably to the surprise of no one, that average annual conviction rates did vary by type of crime: murder=80.7 percent convictions; rape and first degree sex offenses=56.0 percent; other sex offenses=55.3 percent; robbery=71.9 percent; assault=64.6 percent; and controlled substances=75.0 percent. Conviction rates remained, on average, stable across the time period with the possible exception of murder trials. During the three-year period from 1985-86 through 1987-88 the average conviction rate in murder trials was 77.3 percent, and during the three-year period of 1993-94 through 1995-96 the average conviction rate was 86.1 percent. Thus, compared to the average conviction rate of 80.7 percent for the 11-year period, the conviction rate for murder has risen. Clearly, the conviction rate data for North Carolina lend no support for the hypothesis that juries are becoming acquittal prone.

Florida conviction rates. Verdict statistics were available for Florida for calendar years 1986 through 1995. The data base involved jury verdicts in the circuit criminal courts. In Florida, juries are composed of six

9. It is important to report that over the past decade four of the five states show a substantial increase in the total number of cases disposed without trial, while the number of jury trials remained relatively stable. In other words, jury trials now represent a smaller percentage of these courts' dispositions. For example, in North Carolina jury trials represented 3.5 percent of all felony dispositions from 1985-86 to 1989-90, whereas from 1991-92 through 1995-96 they represented 2.4 percent of all felony dispositions.

10. The data were obtained from the following sources: North Carolina Administrative Office of the Courts; the Florida State Court System; the Judicial Council of California, Administrative Office of the Courts, Office of Court Technology and Information; the New York Office of Court Administration; and the Texas Office of Court Administration, Jury and Data Services.

Figure 4 Jury conviction rates, California 1981-1995

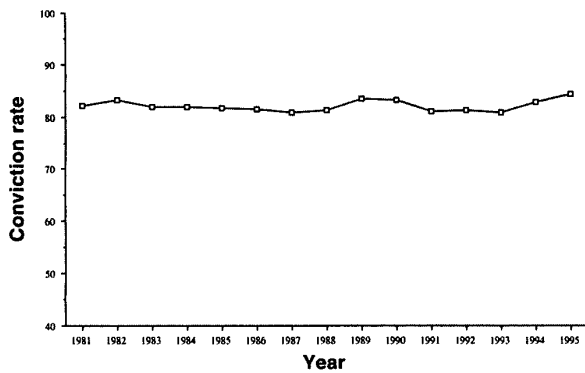
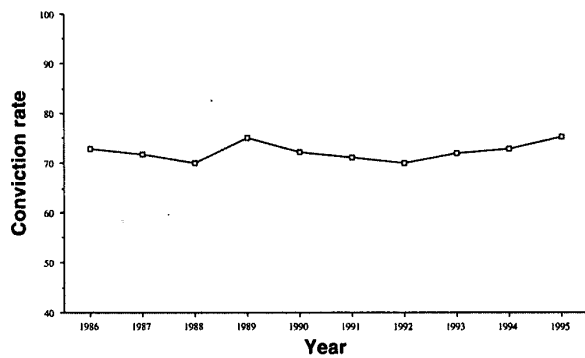


Figure 5 Jury conviction rates, New York 1986-1995



members except for capital murder trials, which require 12 members. The data set did not allow disaggregation for the type of crime. Over the 10-year period there were, on average, 4,524 jury trials and these remained a fairly constant percentage of dispositions, on average 2.9 percent. The average annual conviction rate was 58.9 percent, with no downward trend in rates over time. (See Figure 3.)

California conviction rates. Next, consider data on jury conviction rates in California's Superior Criminal Courts. The time period for California extends from fiscal year 1980-81 through fiscal year 1994-95. The number of jury trials in these courts has increased steadily over the 15-

Jury reforms should not be based on false pictures of reality.

year period, rising from 4,544 jury trials in 1980-81 to 6,175 trials in 1994-95. As shown in Figure 4, the conviction rate has remained steady despite the growth in the number of trials. Over the 15 year period the average conviction rate was 82.1 percent. Indeed, the conviction rate for 1994 and 1995 was up slightly, rather than down.

New York conviction rates. Data for felony cases in New York's supreme and county courts—the venues for Judge Rothwax's conclusions about the collapse of criminal justice—extend from calendar year 1986 through 1995. The annual number of jury trials remained steady over the period, averaging 3,716 per year. As shown in Figure 5, the conviction rate also remained steady, averaging 72.3 percent. New York shows no downward slide in jury conviction rates. Indeed, there has been a slight upturn in the conviction rate since 1992.

Texas conviction rates. Verdict statistics were available for the criminal

cases tried by juries in Texas district courts from fiscal years 1985-86 through 1994-95. These data must be interpreted with the caveat that they include guilty pleas entered during jury trials, which are recorded as jury convictions. The number of jury trials remained steady, averaging 4,099

per year. Those 4,099 trials represent an annual average of 2.3 percent of all criminal dispositions in these courts. Figure 6 shows that in Texas, as in the other states, conviction rates held steady. The annual Texas jury conviction rate has averaged 84.0 percent over the last 10 years.

Caveats

To avoid any misunderstanding, significant limitations of the findings must be acknowledged. Verdict statistics can be affected by changes in the numbers and types of cases being selected for trials and how the cases are litigated. For example, the federal data cover approximately 50 years during which numerous changes in procedural and substantive law were adopted that might affect the selection of cases, the way cases are tried, and the resulting conviction rates. Prosecutorial policies also change over time. The data do not permit identification of the effects of such changes.¹¹ The data can also be affected by changes in how the statistics

11. Comparisons of jury conviction rates between the federal courts and state courts or between different state courts point out these dangers. For example, North Carolina's average felony conviction rate of 68.3 percent and Florida's average rate of 58.9 percent, compared to California's rate of 82.1 percent, undoubtedly reflect to some degree differences in laws, crime rates, charging practices, plea bargaining practices and a host of other variables. Cf. LaFave & Israel, *Criminal Procedure* 1.4 at 21-25 (2d ed. 1992) (the rigor of police and prosecutorial screening varies from jurisdiction to jurisdiction and affects the percentage of cases dismissed at later stages in the criminal justice process). For detailed expositions of the methodological problems of such statistical analyses see Vidmar, *Making Inferences About Jury Behavior From Jury Verdict Statistics: Cautions About the Lorelei's Lied*, 18 *LAW & HUM. BEHAV.* 599 (1994); Vidmar, *Pap and Circumstance: What Jury Verdict Statistics Can Tell Us About Jury Behavior and the Tort System*, 28 *SUFFOLK U.L. REV.* 1205 (1994).

were calculated over the time periods; however, these changes are unlikely to have had any significant impact on the present findings.

Consider another qualification. The conviction rates reported in the federal statistical compilations are based upon the most serious charge found by a jury. Many prosecutions involve either multiple offenses or charges for an offense that is deemed to include a lesser offense. The data do not indicate the rate of conviction—or any change in the rate over time—for all charges in a multiple count indictment, or for the most serious charge as opposed to a lesser included offense. Thus, the federal data do not permit a determination whether juries have become either more or less willing to convict for the most serious offense charged or for multiple charges. The same basic reasoning applies to the state court statistics.

In short, these data sets do not allow a scientifically unqualified conclusion that criminal jury behavior has or has not changed over time. Nevertheless, the important point is that the findings yield *no* support for the claims about increased jury acquittal rates. The statistics also show that on the whole, conviction rates are quite high, especially for serious crimes.

Two final methodological caveats need mention. The aggregated data could obscure variations in conviction rates between court locales within states or between particular types of crimes. The North Carolina data do show differences between broad categories of crimes. The last caveat, which cannot be emphasized too strongly, is that the data say nothing about the accuracy or correctness of the verdicts. Absent some other criterion to serve as a standard, the present statistics and verdict statistics collected in the future tell us nothing

about whether conviction rates are too low, too high, or about right.

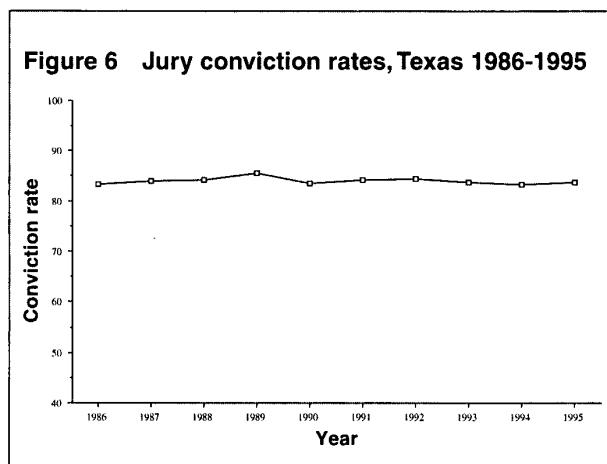
Comparisons

Keeping all of the methodological qualifications firmly in mind, it is useful to compare the North Carolina data with nationwide statistics that were collected in the mid-1950s and reported in Kalven and Zeisel's classic study, *The American Jury*. Based upon a sample of 3,576 felony and misdemeanor trials, those authors concluded that juries convicted 67 percent of the time. The North Carolina statistics allow a very rough comparison with Kalven and Zeisel since they report both felony and misdemeanor convictions. Combining the data over the decade from 1986 to 1996 the comparative conviction rate in North

Carolina was also 67 percent. There is another comparison that deserves mention. Readers familiar with Kalven and Zeisel's work will recall that those authors asked the trial judge in each case to offer an independent judgment on the verdict and then compared the judge's decision with the jury's verdict. Overall, juries were somewhat more lenient than judges but, Kalven and Zeisel concluded, this was due not to jury incompetence but rather to the jury applying a different set of values and perspectives to the evidence. Those authors observed that a charge involving drinking and driving was one type of case in which judge and jury were most likely to diverge. Recently, Bromley used Kalven and Zeisel's methodological approach to study drinking and driving cases in an urban/suburban jurisdiction in Colorado in 1993. She found that compared to 1958, judge acquittal rates had increased but jury rates were the same as 35 years earlier.¹²

Methodological qualifications and cautions about interpretation notwithstanding, the fact remains that the statistics from the federal courts and from the states of North Carolina, Florida, California, New York, and Texas show absolutely no support for critics' explicit or implicit assertions that juries are becoming too easily swayed by emotional appeals, soft hearts, or racial politics and consequently tend to acquit defendants at higher rates than in the past. If anything, the trend appears to be in the opposite direction. *Judicature's* editorial admonition was on the mark. Whatever one believes about the correctness of the "O.J." verdict, it was not typical of the overwhelming majority of criminal jury trials.

The jury has survived the centuries by adapting to changing times. Recent developments in forensic evidence, mass media coverage, and jury composition may require further adaptations. However, the jury is an important institution in American legal and political life and major reforms should not be taken lightly or be based on false pictures of reality. The present study places the burden squarely on critics of the criminal jury system to produce valid and reliable data to support their claims. Anecdotes will not do. ☞☞



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12. Bromley, *Jury Leniency in Drinking and Driving Cases: Has It Changed? 1958 versus 1993*, 20 *LAW & PSYCHOLOGY REV.* 27 (1996).

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