

Chapter Thirteen: Justice and the jury.

Question: What persuaded the jurors at your trial? As an advocate, do you think you put anything over on them?

Question: What persuaded you when you were a juror? Did anyone try to put anything over on you? Did it work?

Question: When you were a juror, did you use anything like the "sponsorship principles"? Did you tend to discount what the advocates said *for* their case, but believe what they said that went *against* their case?

Question: What made the difference in who won their trials? What seems to have persuaded the jurors?

Question: Interview someone who has been on a jury. Did they take their task seriously, or was it just an annoyance? What do they say persuaded them?

Question: Are the ordinary citizens on a jury capable of finding the truth and achieving justice? The first article here from the *New York Times* reports on some factors contributing to a decline in the jury system. Is this a disturbing trend, or a good direction? Should judges--or other professionals--be making the decisions? The second Op Ed, from the *Daily*, also argues for major reforms in the jury system. Is the author right?

Juries' Role Erodes in the Nation's Courtrooms

***New York Times*, March 2, 2001**

By WILLIAM GLABERSON

The role of the American jury, the central vehicle for citizen participation in the legal system, is being sharply limited by new laws, court rulings and a legal culture that is moving away from trials as a method of resolving disputes.

At the heart of the trend, some experts say, are fundamental questions about whether jurors who return huge awards and sometimes clear people who seem to be guilty are up to the task that has been assigned to them for centuries.

"We as a society have to decide: Do we want to have our justice system essentially run by experts -- lawyers and judges -- or do we want to retain a role for the jury?" said Valerie P. Hans, an expert on juries who is a professor at the University of Delaware.

Increased plea bargaining, tort-reform laws limiting jury awards, and Supreme Court rulings giving judges new power to screen the evidence presented to jurors are among many forces marginalizing the role of the jury, some lawyers and judges argue.

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Court statistics show, for example, that jury trials are a rapidly shrinking part of federal court caseloads, with only 4.3 percent of federal criminal charges now ending in jury verdicts, down from 10.4 percent in 1988. The number of federal civil cases resolved by juries has also dropped, to 1.5 percent from 5.4 percent in 1962.

And those awards that civil juries do make are being overturned with greater frequency. Federal appeals courts are reversing certain types of civil jury awards twice as often as they did a few years ago.

Meanwhile, the explosive growth of private arbitration as an alternative to the courts for consumer, workplace and business disputes is channeling tens of thousands of cases away from jury trials annually.

This trend is likely to continue. Because George W. Bush made what proponents call "reform" of the civil justice system a priority when he was governor of Texas, some legal experts predict that his new administration will accelerate efforts to limit jury power.

Although jury trials in modern times have long accounted for a small part of the legal caseload, judges and other experts on the courts say the diminishing role of the jury in state and federal courts reflects rapidly changing attitudes about how much power jurors ought to have. The judicial system's commitment to the jury as an institution, they argue, is being tested as never before.

"Why have a jury at all?" one former juror, Michael McCarthy asked bitterly in an interview.

Mr. McCarthy said he and his fellow jurors were outraged in December when a Houston judge told them that Texas' tort-reform law would require a reduction of more than \$100 million in an award they had given the family of a pipefitter killed in an industrial accident at a Phillips Petroleum plastics plant in 1999.

The worker, Juan Martinez Jr., died when highly volatile chemicals exploded in a 500-degree fireball. The jury concluded that the accident had resulted from lax safety measures at the complex, which had experienced three explosions over 12 years, including one that killed 23 workers and injured 132 others in 1989.

Not everyone is critical of the trend limiting the role of juries. Some legal scholars, judges and business lawyers say that reining in juries is a necessity in an overloaded legal system. Others argue that juries must be controlled to limit excesses, and curb prejudices like hostility to big corporations.

"Not every legal rule that constrains a jury's discretion is an attack on the jury system," said David F. Levi, a federal district judge in Sacramento. "It may be a limit on raw power, but that may be what we need to have a fair system."

Among appeals judges, the growing skepticism of juries is reflected by their increasing willingness to overturn verdicts. In an analysis prepared for this article, Kevin M. Clermont and Theodore Eisenberg, law professors at Cornell University,

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found that federal appeals courts reversed civil jury awards in injury and contract cases less than 20 percent of the time in 1987. Over the next decade, reversals rose to nearly 40 percent.

For those jurors who do decide cases, the experience can be mystifying. It can also be embittering.

Last spring, Tyrone N. Neal, a retired government printing worker, served on a case in which a young man had lost a leg because, he claimed, of improper care in a Maryland hospital. The jury Mr. Neal was on awarded the man \$5.4 million.

When he learned during an interview that a judge had reduced the award to \$515,000, Mr. Neal was disturbed.

"It's like a slap in the face," he said. "We get your opinion and then we just go decide it our way.' "

Mr. McCarthy, the Houston juror, said his panel had concluded that only a big verdict would protect workers by showing the managers at Phillips Petroleum that there was a large cost associated with the repeated worker deaths. The award was \$117 million, including \$110 million in punitive damages, which Phillips' lawyers argued was excessive. They also said the complex was making strenuous efforts to improve safety for its workers.

The judge told the jurors it would almost certainly be cut to \$11 million under Texas laws that sharply limit punitive damages

"I felt betrayed," Mr. McCarthy said. "You think you've done a good service to the community and then you find out all your work has come to nothing."

Because the jury occupies a near mythical spot as the centerpiece of the justice system, its denigration has been discouraged by lawyers and judges in the past. Americans imported the vehicle from English common law, and it has long allowed for the expression of community values in the legal system.

But in recent year, events like the the jury acquittal of O. J. Simpson on murder charges in 1995 have helped broaden the debate over the proper role of the jury.

In many states, advocates of tort reform have turned their cause into a populist political rallying cry, with billboards and radio advertising attacking "runaway juries." Some judges have spoken publicly about their skepticism of the jury system.

Last spring, John E. Babiarz Jr., a Superior Court judge in Delaware who headed a state jury study, made a speech proposing that the use of civil juries be sharply curtailed.

"It is simply impossible," Judge Babiarz said, "to achieve fairness when each case is decided by a different group of 12 people who are called to serve on a civil jury perhaps only once in their lives."

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In a new survey of 594 federal trial judges nationally, 27.4 percent said juries should decide fewer types of cases. The survey, conducted by The Dallas Morning News and the Southern Methodist University School of Law, is to be published this spring in the school's law review. . . .

ASMUSSEN: The all-volunteer jury

Professional juries, like a professional military, could lead to better results (Iowa State Daily) (4.18.06)

Maybe this has happened to you before. You open your mailbox, sift through the credit card applications and find a jury summons for the Story County District Court. You shake your fist, ruing the day those trucker hat-wearing, clipboard-carrying New Voters Project volunteers harangued you into registering to vote here.

Immediately, you go complain to your friends and ask their advice on how to get out of it.

That's a problem with jury duty - no one is ever particularly fond of doing it. It comes upon you unpredictably, like a cold, and it can last for as little as a day or for weeks or months. It doesn't care if you have a previous engagement or if you have a better use of your time than to get paid \$10 a day to sit in a box with 11 of your fellow citizens.

It's easy for those who have never been the unlucky winner of the jury lottery to chide you for your plans to pretend to have a nervous twitch and mutter "guilty, guilty" under your breath during the jury selection process. "It's your civic duty," they say. Why is it that the word "duty" always follows unpleasant things such as "garbage" or "clean-up," never "ice cream" or "nap"?

I suppose there is something wonderfully patriotic about serving on a jury with your fellow community members, whether rich or poor, male or female, blue-collar or professional. Well, that would be patriotic if it ever happened that way. In practice, the jury makeup may be closer to Homer Simpson's description of "12 people too stupid to get out of jury duty."

There's a certain truth to that. For long trials, business owners and professionals can usually be released from duty by claiming financial hardship. During the selection process, lawyers for either side can exclude potential jurors whom they believe will be indisposed to side with their client or to be easily swayed. Jurors with authoritative knowledge - such as those with legal, medical or psychological training - may also be excluded or prevented from sharing this knowledge with their fellow jurors.

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Even if juries were perfect cross-sections of the community, to say that it's one's civic duty to serve on a jury misses the point. Juries don't exist so that those serving on them can feel patriotic. The purpose of a jury is to make decisions of innocence and guilt, and if there is some different way to compose juries that better serves that purpose, we ought to consider it.

Why not create a pool of professional jurors? These individuals could receive basic training in legal procedures and serve as jurors on a regular basis, eliminating the need for random jury summons and drawn-out jury selection questioning. Instead of using the judicial insights they picked up from watching episodes of "Law and Order," professional jurors could use actual courtroom experience to guide their decisions. This would also add consistency and predictability to trial outcomes, making them less like lotteries.

Professional juries are not without their problems. One potential difficulty is that jurors could become too predictable. What happens if an entrepreneurial statistician decides to publish *Juror Weekly* with up-to-date statistics on individual jurors' CBIs (convictions batted in) and ARAs (appealed ruling average)?

One opponent of professional juries also fears that if jurors sat through multiple trials, they would come to despise lawyers. Considering lawyers are nearly uniformly despised by people who rarely serve on juries, and that even so, both sides are represented by lawyers, this criticism does not carry much weight.

Unfortunately, the question of cost is usually the weightiest. Professional jurors would certainly demand more than \$10 a day for wages, but citizen jurors don't come cheap, either. They impose hidden costs: the loss of productivity when the juror misses work, the burden of maintaining potential juror lists and mailing summons, the time wasted in questioning potential jurors and the errors of justice made by inexperienced jurors.

Americans once had, and some still have, romantic notions of a drafted military where men from every background served side-by-side. But exemptions for the privileged poisoned the appeal, and an all-volunteer army proved to be more disciplined and effective.

If we want to improve the jury system - and ensure that no one's summer plans will be spoiled by an unexpected jury summons - we need to stop thinking about the jury system through the romantic lens of "civic duty" and see it how it really is: a less-than-representative group of 12 reluctant citizens who may not be the best ones to get the job done.

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