Jury Matters

The Official Newsletter for the Civil Jury Project at NYU School of Law

April '17, Vol. 2, Issue 4

Upcoming Events

April 4	Civil Trial Innovations Conference; Kansas City, Missouri *Susman on the Preservation of Trials and Trial Judges*
April 7	Jury Improvement Lunch; Corpus Christi, Texas
April 17	Dr. Bull and the Jury's Role; New York, NY; *What does CBS' New Show Teach Us?*
May 3	Jury Improvement Lunch; Houston, Texas
May 4	Jury Improvement Lunch; Dallas, Texas
June 9	American Constitution Society Annual Conference; Washington D.C.

Opening Statement

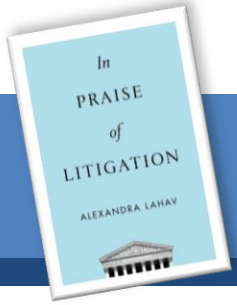
Dear Readers,

Welcome to the Civil Jury Project's monthly newsletter. We remain the nation's only nonprofit academic institution dedicated to the civil jury. This month, however, the biggest news came out of the Supreme Court.

In early March, the Court decided *Pena-Rodriguez v. Colorado*. It concluded that the Constitution requires an exception to the anti-impeachment rule when a juror presents compelling evidence that another juror made statements indicating that racial animus was a significant motivating factor in his decision. While currently this rule only applies in criminal cases, it is a watershed in the law of juries. First, Justice Kennedy wrote this ringing endorsement of jury trials: "The jury is a central foundation of our justice system and our democracy. Whatever its imperfections in a particular case, the jury is a necessary check on government power." Second, if the Court's holding is extended to civil cases, it could well have a chilling effect on the ability to conduct empirical research by interviewing jurors who have returned a verdict. Finally, this decision comes while the Senate is considering the Supreme Court nomination of Judge Gorsuch, himself a strong supporter of juries. Judge Gorsuch, a former Justice Kennedy clerk, recently lamented that while "we used to have trials without discovery[:] Now we have discovery without trials." He noted that this has led to "reduced involvement of citizens in the justice system and . . . a lack of transparency." To be sure, it has been sometime since judges and the Court have expressed such strong interest in the jury.

This month we are lucky to have op-eds from both Prof. Jeffrey Abramson and Pierre Deess discussing *Pena-Rodriguez* and its likely effects. We also have a piece from Prof. Alexandra Lahav discussing the role of the jury in securing judicial legitimacy. Of course, we also continue to host events and produce empirical research. You can find an updated version of our status of projects here.

Sincerely,
Stephen D. Susman



What is the function of a jury?

Professor Alexandra Lahav recently authored a new book titled In Praise of Litigation in which she argues that litigation plays a central role in a well-functioning democracy. But what role does the jury play in ensuring that litigation can fulfill that role? She answers.

Find out more on pg. 4

Did the Supreme Court Open a Pandora's Box on Jury Discrimination? By Jeffrey Abramson

What happens if, after a jury convicts a defendant, one or more of the jurors alert the judge or lawyers that serious misconduct occurred in the jury room? The answer, in a major Supreme Court decision this month, is that it depends on what the wrongdoing was.

In 1987, jurors complained that several of their fellow panelists were using drugs and alcohol and often asleep during the trial. Nonetheless, the Supreme Court upheld the defendant's conviction, citing centuries-old principles that prevent courts from invading the confidentiality of privacy jury deliberations. We want jurors to have the independence it takes to converse freely. That independence is lost if jurors know that judges can investigate their behavior. While it is bothersome to find that jurors were high on drugs, the court concluded there was no evidence that such wrongdoing was common enough to chance the traditional prohibition from reviewing what went on in the jury room.

This prohibition dates back to the greatest jury trial of all: the acquittal in 1630 of William Penn on charges meant to suppress the Quaker religion. When the trial court punished the jurors for perjury, the highest Court in England rules that no court can ever second-guess a final jury verdict of acquittal, since it is impossible to stand in the jurors' shoes or see the evidence with their eyes.

In a major decision this month, the Supreme Court reacted differently, and correctly, when the misconduct involved racial or ethnic prejudice. In 2010, a Colorado jury convicted Miguel Angel Pena-Rodriguez of sexual assault. Following conviction, two jurors submitted an affidavit reporting that a fellow juror blatantly argued "the defendant was guilty because Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." Following the Supreme Court precedent set in the 1987 drug case, the Colorado Supreme Court upheld Pena-Rodriquez's conviction.

The Supreme Court Reversed. Event centuries-old jury traditions have to give way to the paramount importance of rooting out racial prejudice from the criminal justice system. As opposed to the occasional misconduct of rogue jurors using drugs during a trial, anyone familiar with the history of the America jury know that racial bias is a familiar and recurring evil. Any rule or tradition that keep courts from protecting jury trials from racial prejudice would make a mockery of the Constitution's guarantee of trial before an impartial jury.

In this political climate, the court's call to recommit the nation to eliminate racial prejudice is welcome. But will it make a difference? The court limited its decision to cases of overt or explicit bias of the sort Pena-Rodriguez faced. The justices suggested more tolerance for "off-hand" stereotypical remarks, without providing guidance as to when stereotypes morph into prejudice. Clearly, the court is worried about chilling the rough and tumble exchanges we might want among jurors.

The Supreme Court also limited its decision to instances of "racial o ethnic" prejudice. But what about remarks expressing religious bias, or prejudice against gays or lesbians? The court cited historical reasons for singling out race as a special case. But in today's world, who can say a jury exposed to these other forms of prejudice is impartial? The court did not wish to open Pandora's Box and start routinely investigating jury deliberations. It wants both to preserve our general faith in the jury system while dealing with the particularly egregious effects of race on the administration of justice.

This may be a hard combination to pull off. When I go to class this week to teach my jury seminar to law students, I will pepper them with hypothetical. What if white jurors report that an African-American juror was prejudiced against police witnesses? Is anti-police bias code for anti-white bias? What if a juror makes explicit comments about laziness of welfare moms; is that a dog whistle to racial stereotype?

We should not seek to make jurors into more perfect human beings that we are. But we can insist, as the court did that the it would be unconscionable as well as unconstitutional to let a jury conviction stand in the face of evidence of juror racial bias. Whatever else the court decision accomplishes, it serves as a necessary corrective to the accommodation with prejudicial rhetoric on the rise elsewhere in our politics.

This piece was originally published in the Dallas News and is reproduced with permission.

Jeffrey Abramson is a professor of law and government at the University of Texas at Austin.

E. Pierre Deess is the Director of Institutional Research and Planning at the New Jersey Institute of Technology.

Democracy, Citizenship, and the *Pena-Rodriguez* Case

by E. Pierre Deess

The [Pena-Rodriguez case] concerns... the age-old rule against attempting to overturn or "impeach" a jury's verdict by offering statements made by jurors during the course of deliberations. For centuries, it has been the judgment...that allowing jurors to testify after a trial about what took place in the jury room would undermine the system of trial by jury that is integral to our legal system.

Juries occupy a unique place in our justice system...When jurors retire to deliberate…they enter a space that is not regulated in the same way. Jurors are ordinary people. They are expected to speak, debate, argue, and make decisions the way ordinary people do in their daily lives... To protect that right, the door to the jury room has been locked, and the confidentiality of jury deliberations has been closely guarded.

Today... the Court not only pries open the door; it rules that respecting the privacy of the jury room, as our legal system has done for centuries, violates the Constitution… it is doubtful that there are principled grounds for preventing the expansion of today's holding.

--Justice Alito, Dissenting Opinion

Democracy depends on citizens or, more precisely, the free and fair decisions of citizens. As the Jury and Democracy (Oxford 2010) shows, voting and juries are two pillars of our system inextricably linked by the faith they put in decisions of citizens. We educate and inform people because we ultimately abide by their decisions.

Entrusting power to citizens comes at a cost. People hold varied opinions and draw conclusions in a myriad of ways, some we will not agree with. As Justice Marshall observed in the Aaron Burr treason trial, the question is not whether people have an opinion, all people have opinions, but whether that opinion is impervious to evidence. In this case, the court holds that racial bias is an opinion with a unique basis for invalidating a decision. The Supreme Court's majority opinion states that the judgment ought not be expanded to bias based on gender or creed, but the argument for this rests on air. At its core, the *Pena-Rodriguez* decision holds that expressions of 'bias' in the jury room can provide grounds to overturn a jury verdict. It does not offer strong principles limiting the decision to racial bias. For example, a juror stating a strong prejudicial bias against Islam in the jury room would meet the same tests.

Let the attorneys debate the Constitution, here let us consider the impact on the jury. Sacrosanct deliberation provides ordinary people an opportunity to converse and argue freely. Historically, they have not minded words or policed opinions to assure the verdict stands. No longer. With this decision, jurors—ordinary people—must police their words even in the heat of argument or the decision of the jury can be overturned. One may expect future instructions to the jury will suggest they 'mind their Ps and Qs' lest that give a reason to overturn their decision. How will this impede deliberation? The Supreme Court expects jurors to consider their arguments not only for how they will persuade other jurors, but for how they will stand up before an appellate court. For many jurors, this injunction will preclude free speech. If, like me, you often let your mouth get the better of you in debate then you had best remain silent.

Worse yet, imagine the horror in a jury room if, after instructions to mind what they say, someone, perhaps accidentally, blurts out a blatantly racist opinion. Suddenly, the jury's work may be in vain—and they know it. Why should they continue to deliberate seriously?

Should we overturn an otherwise legitimate election because the voters' stated racial bias produced a 'wrong' result? If we believe in democracy, we must accept the decisions of citizens on the ballot and in the jury room. People must be free to make those decisions in a sacrosanct space based on whatever opinions they hold. We cannot invoke some greater authority to set aside the decisions of an electorate or a jury because faith in the people is the final consequence of democracy.

The Expressive Function of the Jury

by Alexandra D. Lahav

In my book In Praise of Litigation, I argue that the jury right expresses a societal belief that citizens are sufficiently educated and thoughtful to decide the fate of their fellow citizens, and it relies on the precept that law can be accessible to ordinary people. The Supreme Court, quoting Alexis de Tocqueville, affirmed this idea: "[T]he institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority [and] invests the people, or that class of citizens, with the direction of society."

People often speak of jury service and voting in one breath. But in a crucial way jury service offers a more robust form of participation in self-government than voting: it requires deliberation. Unlike voters, who do not have to explain why they picked a particular candidate, jurors hear evidence and arguments from both sides and in their deliberations must consider the evidence presented in light of the applicable law and justify their conclusions to their fellow jurors. When a jury of one's fellow citizens decides important questions, they are participating in social ordering. In cases determining the limits of governmental power over people, the jury is a direct exercise in self-government by the people themselves. Serving on a jury involves serious deliberation and engagement with self-government like no other experience except, perhaps, serving in public office.

Critics of the jury system often compare juries to judges, and rightly so—judicial decision-making is the obvious alternative to jury trials. But studies show that juries and judges agree on liability most of the time, and that judges also vary on damages determinations. The judge-versus-jury debate is not only empirical—it implicates many of the touchstone issues in modern democracy, such as the wisdom of entrusting sophisticated decisions to the general population, the difficulty of reaching consensus in a pluralist society, and the legitimacy of popular sovereignty when important decisions are made by the people instead of by a small group of virtuous elites. It is precisely in encouraging deliberation, consensus and recognizing different points of view that the jury is so important to democracy. Instead of being a threat to expertise, virtuous elites, and professional homogeneity, the jury can be understood as a welcome complement. Even in technical cases, reasonable minds will differ about what happened and, importantly, about the significance of what happened—this is where the jury can be utilized to improve the quality of justice. For this reason, the imperative ought to be to improve jury decision-making rather than minimize it, and to create more opportunities for utilizing juries.

Yet, so few cases are decided by a jury that it cannot be said to be a central civic institution any more. There are two responses to this problem. The first is that the low jury trial rate is acceptable so long as the really important cases are decided by a jury, but not every case need to tried. In the civil rights arena, for example, cases involving the limits of governmental power over people, such as those involving the Fourth Amendment, should be decided by a jury. In mass torts, sample or bellwether cases can be tried to a jury and the results of those trials extrapolated to the many other cases that are brought. The second response to the problem of the very low number of jury trials is to find innovative ways to include juries in the adjudication process. For example, judges in injunctive cases could use advisory juries under Federal Rule 39 to obtain jury input into their decisions. In the stop and frisk litigation in New York City, the judge considered empaneling an advisory jury but ultimately decided not to. It would have been an exciting development if she had.

Alexandra D. Lahav is a Professor at the University of Connecticut School of Law.

Prof. Suja Thomas teamed up with TED-ED to produce an animated video on the decline of criminal, civil, and grand juries.

You can watch it here

The CJP has continued its reviews of CBS' Procedural Drama *Bull.*

We will also be sponsoring an event exploring some of the show's themes next month.

Status of Project: Spring 2017

The Civil Jury Project looks forward to continuing its efforts throughout 2017 with the following objectives:

- Continue our efforts to enlist and involve judicial, academic, and practitioner advisors around the country
- Identify and study those judges who are trying the most jury cases, endeavoring to understand their techniques
- Develop plain language pattern jury instructions
- Advance a large scale survey regarding public perceptions of public dispute resolution
- Encourage public discussion and debates about the pros and cons of public dispute resolution, particularly through the use of social and traditional media

This is but a sampling of our objectives for the coming year. A comprehensive list is available on our website, here.

Thank you for your involvement in this important project. We believe that by working together we can reach a better understanding of how America's juries work and how they can be improved.

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