Jury Matters

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

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Upcoming Events

June 9	American Constitution Society Annual Conference; Washington D.C. *Resolved: The Diminishing Role of the Civil Jury Negatively Affects the Fair Resolution of Trial.*
July 13	Jury Improvement Lunch; San Francisco, CA
Sept. 14	Jury Improvement Lunch; Cleveland, OH

Opening Statement

Dear Readers,

Even as summer hits full swing here in New York, we remain hard at work in our effort to study, improve, and raise awareness of America's declining civil jury trials. In this month's newsletter, we are excited to update you on some of our many endeavors, as well as offer insights from our distinguished advisors.

We are doubling our efforts to promote and drive traffic to our public-facing website www.WethePeopleWetheJury.com. For the past few months, we have been primarily using social media to bring jurors to the site. Now, we are calling upon our judicial advisors and asking them to distribute calling cards directly to jurors after dismissal. These cards thank the jurors for their service and invite them to discuss their experience online. In addition, we are continuing our empirical research with law faculty and the American Society of Trial Consultants. This includes finalizing our study on material contracts filed with the Securities Exchange Commission, as well as a public survey of mock jurors. Of course, we will provide you with the results of these studies once completed.

Thank you for your continued interest and support of the Civil Jury Project. As always, you can find a full and updated outline of our status of projects on our website. In addition, you can submit op-ed proposals or full drafts for inclusion in upcoming newsletters and on our website here.

Sincerely,
Stephen D. Susman

An Alternative to MedMal Damage Caps?

Rather than capping runaway awards ex post, some states have tried to prevent them in the first place by manipulating what a jury hears in closing arguments. Professor Christopher Robertston and his colleagues have reviewed these laws and reached a number of interesting conclusions.

Find out more on pg. 4

Another Word on Jury Improvement Lunches

The Civil Jury Project has to date held six jury improvement lunches, with each of these events providing new insights into how jury trials can be improved.

The Civil Jury Project is the nation's only non-profit academic institution dedicated to studying and bettering civil jury trial in the United States. In pursuit of this endeavor, we have sponsored numerous empirical academic projects with sister institutions, as well as held conferences and public events aimed at practitioners and judges across the country.

Jury Improvement Lunches merge these two usually separate activities: a public event seeking to learn how we can better jury trials directly from those who have most recently served. To do so, we call upon our extensive network of trial judges to invite their recently dismissed jurors to attend a catered lunch. Local law firms and trial consulting groups sponsor the lunch, and attending attorneys earn one hour of continuing learning education credit.

We organize a panel of preselected jurors and invite them onstage to discuss their recent jury service experience. A moderator leads the discussion touching on each step of the jury process—from summoning, to selection, trial, and deliberation, culminating with dismissal and reflections. The jurors share their insights as to which aspects they enjoyed and which could use improving. Additionally, jurors complete questionnaires consisting of multiple choice and open answer questions.

Periodically we invite judges onstage alongside jurors, as we have found that the resulting discussion is more fruitful. Indeed, instead of raising complaints like expensive parking or weak coffee, the panel's diversity helps elucidate opportunities for real innovation. For instance, modified scheduling (trial held for fewer hours each day but lasting more days, or vice versa) is something for which many panelists voice strong support. Likewise, most everyone wants strict trial time limits up front.

Since their inception, we have held six Jury Improvement Lunches in Houston, Dallas, and Corpus Christi, Texas. Each of these events had around a dozen jurors and over one hundred judges, attorneys, and trial consultants in attendance. The most recent lunches were held on May 3 and May 4 as part of Texas' larger Jury Appreciation Week, which honors those who give their time to participate in our judicial system. Videos from those and all our lunches are available here.

Feedback continues to be overwhelmingly positive. Judges and practitioners have told us that these events have helped them learn new ideas and that they are anxious to experiment with trial strategies. We will be holding lunches in Cleveland and San Francisco, this summer, and have been in contact with associates in Seattle and Miami who are interested in hosting their own. Instructions for hosting your own Jury Improvement Lunch are available here.

"I felt like my service was valued, and that my time was respected."

Restoring the Civil Jury in a World Without Trials

Prof. Dmitry Bam of the U. of Maine S. of Law recently published an article in the Nebraska Law Review addressing how the power to decide dispositive motions allows biased judges to bypass the civil jury as a check on their authority and shape law and outcomes almost entirely unhindered.

Prof. Bam argues that this is particularly problematic with elected judges, who decide the majority of civil cases. Empirical research overwhelming shows that elected judges are biased in favor of those interests that helped the judge get elected and can help the judge be reelected (e.g., donors, contributors, in-state litigants), and against the interests that have not and cannot (e.g., out-of-state litigants, unpopular litigants). These effects are especially acute when specific parties appear before a judge and around election time. And the public is seemingly aware of this, with 80% believing that judges' decisions are partially influenced by campaign contributions.

To check these biases, Prof. Bam recommends repurposing the civil jury. He notes that the Founders did not rely on recusal rules alone, but installed the jury as a check directly within the judiciary. He proposes doing the same with dispositive motions, creating what he calls "Hybrid Judicial Panels" that would see a judge and a few jurors decide dispositive motions collaboratively. It is an interesting proposal that draws upon the inherent strengths of lay participation and empowers civil juries to serve once again as a check on the government.

Whose Jury is it Anyways?: The Return of Attorney-Conducted Voir Dire

By Steve Susman, Richard Jolly, and Roy Futterman

Voir Dire has been the main method for selecting jurors in this country since the founding. Lawyers historically handled this process, but over the last few decades federal judges have taken near complete control over jury selection. This is a problem. The Civil Jury Project at New York University School of Law has been monitoring this issue as part of its overall mission to support and re-invigorate the power of juries in our legal system.

It is important to remember that lawyer-conducted voir dire is central to constructing a jury of one's peers. One reason juries even exist is because back in the day the King of England could not afford judges, so he forced people from the community to work for free. Luckily, these people probably also knew a little bit about property rights, criminal activity, who was sleeping with whose spouse, et cetera. This made the trial move at a quick and dirty pace, but also motivated lawyers to carefully select who they would let decide their client's fate.

As lawyers are prone to do, they realized that voir dire could be used as a sword rather than just a shield. By the twentieth century, voir dire became the time that lawyers argued their case, trying to get the jury on their side right out of the gate. And it was common knowledge that you win or lose your case during voir dire. Around the 1980s, however, federal judges—imbued with a newfound fixation on efficiency—came to see this as a problem. Judges took away lawyers' rights to ask almost any questions, seeing it as a waste of time and an invasion of jurors' privacy. They thought lawyers were abusing the system and decided that they would handle jury selection themselves instead.

This shift has carried serious consequences. Judges have tended to conduct voir dire in a perfunctory way, often rapidly selecting jurors in just a couple of hours. They accomplish this by basing most of the voir dire on limited demographic questions. This results in a jury selection process in which attorneys are forced to make arbitrary decisions, and invites discrimination. When lawyers have only demographic information to work with, they are left with relying on racial and social stereotypes. Furthermore, because the lawyers are not conducting questioning, it can be difficult if needed to prove discrimination. The Supreme Court has noted that discriminatory intent is often "best evidence[d] . . . by the demeanor of the attorney who exercised the challenge." When judges conduct voir dire, however, the evidentiary record with which an appellate court can determine if there has been a *Batson* violation is unhelpfully limited.

In addition, judge-conducted voir dire often results in a less impartial jury by misusing the judge's role as authority figure. The courtroom remains one of the last American institutions in which an authority figure enjoys near royal treatment—having people rise upon entry, for instance. Voir dire questioning by this authority figure encourages potential jurors to meekly answer questions in a way that they believe the judge wants to hear. The practice encourages jurors to give the desirable response that, "Yes, I can be fair and impartial, your Honor." To be sure, a famous empirical study by jury expert Dr. Susan E. Jones showed that jurors are less prone toward self-disclosure when judges rather than lawyers handle voir dire. In that study, jurors questioned by judges changed their answers in conformance with their understanding of what a judge expected almost twice as much as when interviewed by a lawyer. Lawyers, because of their comparatively non-privileged positions, are better at eliciting biases than are judges.

It seems that the pendulum may finally be swinging back, however. Some federal judges are slowly beginning to allow lawyers to participate once again in jury selection. And the Civil Jury Project is spreading the word that it is possible to realize the benefits of lawyer-conducted voir dire, while also preventing its abuse. One way to do so, for instance, is for judges to impose strict time limits on both jury selection and the trial itself. These limits force the lawyers to strategize from the outset, and not waste time chest pounding in front of the venire. Another option is for the court to administer substantive pre-voir dire questionnaires, which are specifically tailored to the case and agreed to by both parties. Alternatively, the court could provide information about the venire in advance so lawyers may perform online research. Both of these approaches allow the lawyers to more quickly dismiss jurors without wasting the court's or the venirepersons' time. Finally, the Civil Jury Project encourages judges to experiment and report on what they find to be most effective. Trial judges enjoy tremendous discretion over their courtrooms, and with boldness may identify new approaches not yet considered.

If we truly believe in providing litigants with a jury of one's peers, we must adopt strategies to ensure that parties and their representatives have a say in selecting their jury. When only judges participate, the result is a less representative and less fair cross section of the community. Yet, if judges and lawyers work together, they can secure the jury's promise of democratic participation in the administration of justice.

This piece was originally published on Law 360 and is reproduced with permission.

Steve Susman is a founder of Susman Godfrey and Executive Director the Civil Jury Project.

Richard Jolly is an attorney and research fellow for the Civil Jury Project.

Roy Futterman, Ph.D. is a trial consultant and advisor to the Civil Jury Project.

Another Way to Cut Medical Malpractice Damages?

By Christopher Robertson

To limit liability and increase predictability, scholars and policymakers have long focused on capping damages awards. In particular, they have been worried that there are many runaway jury awards for non-economic damages (i.e., pain and suffering). Because these are not based on tallies of medical bills or lost wages, these are the least predictable component of the jury's award. Still, statutory caps on damages effectively nullify the jury's determination (and the trial judge's oversight) of how much to compensate a plaintiff for pain and suffering. The laws substitute an arbitrary maximum instead (which, in many states, has not adjusted with decades of inflation).

There is now a cottage industry of scholarship that tries to understand the effects of these state caps on payouts, the supply of physicians, liability insurance, economic damages awards, and the aggregate cost of medical care (which may decrease or increase). (See a synthesis of the literature.)

In new work with John Cambpell and Bernard Chao, I study a different way to cabin jury awards for non-economic damages. Rather than capping runaway awards ex post, some states have tried to prevent them in the first place, by manipulating what a jury hears in closing arguments.

Our review of caselaw from all states and DC revealed that fifteen jurisdictions regulate the way that plaintiff attorneys can argue pain and suffering damages to the jury. Thirteen of these states prevent the attorney from quantifying the years, days, and hours of suffering, which is known as a "*per diem*" argument. Of these, four states also prohibit attorneys from asking for a specific amount of pain and suffering damages (a "lump sum"), on the fear that such a demand could create an irrationally high anchor (a phenomenon we have studied in other work). Two states allow *per diem* arguments, but prohibit lump sum requests.

> "These laws substitute an arbitrary maximum instead"

Scholars could use our coding of these states to examine whether these legal variations affect jury awards or aggregate liability at the state level. However, these states are quite different in a number of other ways, which would confound such an observational strategy, and it is difficult to tell whether the cases announcing these rules are changing or reflecting the preexisting local legal culture.

Instead, we used a randomized mock jury experiment to examine the effects of these three different regimes (alongside a fourth permissive regime, which exists in 24 states).

Long story short: regulating attorney *per diem* arguments does not substantially reduce damages awards. Or, to put our finding another way, jurors do not seem to be irrationally drawn towards *per diem* arguments, even though they can yield millions of minutes of suffering (and thus a potential anchor). Insterestingly, we did find that per diem arguments slightly improve the plaintiff's chances of winning anything at all, perhaps by helping the jury understand the reality of plaintiff's injury.

Check out the paper.

This piece was originally published in the Harvard Law Bill of Health. It is reproduced with permission.

Christopher Robertson is a professor at the James E. Rogers College of Law, University of Arizona, and affiliated faculty with the Petrie Flom Center for Heath Care Policy, Bioethics and Biotechnology at Harvard.

Status of Project: Summer 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.

Contact Information

Civil Jury Project
NYU School of Law
Vanderbilt Hall
40 Washington Square
New York, NY 10012
Civiljuryproject@law.nyu.edu

Steve Susman
Executive Director

Samuel Issacharoff
Faculty Director

Catherine Sharkey
Faculty Director

Richard Jolly
Research Fellow

Kaitlin Villanueva
Admin. Assistant