

# Jury Matters

The Official News-  
letter for the Civil  
Jury Project at NYU  
School of Law



May '17, Vol. 2, Issue 5

## Upcoming Events

- May 3 Jury Improvement Lunch;  
Houston, Texas
- May 4 Jury Improvement Lunch;  
Dallas, Texas
- June 9 American Constitution  
Society Annual Confer-  
ence; Washington D.C.  
*Resolved: The Diminishing  
Role of the Civil Jury Nega-  
tively Affects the Fair Reso-  
lution of Trial.*

## Opening Statement

Dear Readers,

Welcome to another edition of the Civil Jury Project's monthly news-  
letter. Each month we aim to alert you to our ongoing efforts to study  
and better the civil jury, as well as offer you the insight of one of our  
nearly two hundred judicial, academic, and trial consultant advisors.

Since our last letter, we have enjoyed a flurry of activity. We met with  
state judges in Baltimore and Kansas, and learned about their experi-  
ences and approaches to presiding over civil jury trials. Next, we held  
our first event concerning CBS's television show "Bull." As mentioned in  
the past, this show follows the career of a jury consultant and deals co-  
gently with issues related to the jury and the administration of justice.  
Finally, we sponsored our first Jury Improvement Lunch in Corpus  
Christi, Texas. While we have held lunches like this before, this was our  
first in that city. It was a success, with over one hundred in attendance.

This month we also have an op-ed from Traci Feller, John Gastil, and  
Valerie P. Hans discussing the democratic virtues of civil jury service.  
Their research shows that the civil jury is a key component of our de-  
mocracy and spurs civic engagement by those who serve. In addition, we  
are sharing an email we received from Judge Mark Bennett reviewing his  
experience with a number of jury trial innovations.

Finally, an updated version of our status of projects is available [here](#).  
Thank you again for your continued support of the Civil Jury Project.

Sincerely,  
Stephen D. Susman

## *The Civil Jury and Citizen Engagement*

It is widely known that serving on a criminal jury increases citizens' rates of civic en-  
gagement. What is less known, however, is that serving on a civil jury can also spark a  
civil awakening for jurors, though it depends on the context of the case.

Find out more on pg. 3





## Dr. Bull and the Jury's Role

The Civil Jury Project recently sponsored a panel discussion exploring what CBS's new procedural drama "Bull" can teach us about juries, lawyers, and the administration of justice.

"Bull" follows the antics of an intrepid jury consultant named Dr. Bull and his team, including an in-house lawyer, a computer hacker, a former police officer, and a stylist. While critics have been harsh, the show has been incredibly popular, quickly becoming CBS's number one watched new show.

The show is inspired by the experiences of famed television personality Dr. Phil McGraw. Dr. Phil had a previous career as a successful trial consultant, founding one of the nation's first consulting groups Courtroom Sciences, Inc. in 1990. In fact, Dr. Phil serves as one of the show's executive producers.

Perhaps because of Dr. Phil's hand, the show deals intelligently with many and diverse issues facing America's jury system. Episodes have dealt with implicit juror bias, the importance of con-

structing a cohesive trial narrative, the strategic use of peremptory challenges, and more. True, the show often goes off rails, with the titular character regularly engaging in unlawful jury tampering. Nevertheless, no recent show has dealt so cogently with the jury as a significant judicial institutional.

The Civil Jury Project recognized the opportunity such a popular show presented. As such, we have been reviewing each episode as it airs, using the text as a launching post to explore in depth issues raised by the show. You can find our episode-by-episode write-ups on Texas Lawyer.

We received such positive feedback on these reviews that we decided to host an event at NYU exploring the show's themes. We organized a panel made up of a legal practitioner, Steve Susman; a trial

consultant, Roy Futterman; and an academic, Prof. Christopher Robertson. We then presented video clips dealing with issues related to the jury as an impermanent democratic body of laypeople and how they make decisions.

The event was incredibly successful. Each panelist offered their unique perspective informed by their professional experiences. Steve Susman and Roy Futterman were confident that jury consultants can help select jurors and construct winning narratives. Prof. Christopher Robertson pushed back, arguing that the data suggests demographic factors do not accurately translate into predictable outcomes. They all agreed, however, on the important role juries serve as fact finders.

You can find a recording of the discussion [here](#).

## Judge Bennett Experiments with Jury Trial Innovations

The CJP encourages judges and practitioners to experiment with trial innovations and report on their experiences. Here is an email we received from Judge Mark Bennett of the N. District of Iowa, which he allowed us to share:

*I wanted to report back on my use of . . . complete opening statements before jury selection. I used it last Monday when I started a two week civil jury trial about 19 million dollars of pepperoni. It was amazing. We discovered several issues*

*with some jurors (who were excused for cause) that never would have come out if I had just read my typical one page summary of the case. This is a highly technical case with six experts, some meat science experts, some dry formula mixing experts, some chemical engineers. We are heavily into chemistry and the jurors have asked over 50 questions so far - not one of which has been objected to. The Chicago lawyers on both sides are super impressed with the quality of questions as are the witnesses. The jurors would be fast*

*asleep but for their amazing engagement with their ability to ask questions. Sure, at this rate the juror questions will add several hours to the length of the trial but the trade off in the jurors paying close attention and fleshing out important facts is priceless.*

A full list of suggested innovations is available [here](#). Please [email](#) us any of your thoughts on these or others that you may have tried.



# The Democratic Virtue of Civil Jury Service

By Traci Feller, John Gastil, & Valerie P. Hans

The decline of the civil jury system has sparked a debate on its role in American democracy. Some opponents of the civil jury argue that jury trials have become overly long and expensive and their outcomes are unpredictable. Observing the burden that service places on civil jurors, these critics call for replacing civil jury trials with cheaper and more efficient alternatives, such as judicial panels.

Based on our research, we beg to differ. Our statistical study of civil juries in the United States suggests that this institution is a key component of our democracy and spurs civic engagement by those who serve as jurors. Civic engagement effects depend on features of the civil jury experience, including the nature of the decision rule, the jury's size, the identity of the defendant, and the type of case.

## Jury Service and Civic Engagement

In 1835, French political theorist Alexis de Tocqueville defended jury service as a particularly potent form of deliberative democracy, because it engages citizens in deliberation with one another to resolve important social and political disputes. He asserted that jury service enhanced jurors' qualities as citizens, making them better informed about the law, and more connected to the state. More than a century later, Justice Anthony Kennedy wrote, in the U.S. Supreme Court decision *Powers v. Ohio* (1991), that "for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."

To test such optimism about the jury's civic importance, John Gastil and his collaborators undertook a large-scale, multi-state study examining both civil and criminal jury service and voting rates, which they summarized in *The*

*Jury and Democracy*.<sup>2</sup> They used pre- and post-jury service voting records of thousands of empaneled jurors and found that those who deliberated on criminal juries voted more frequently in elections after their service, compared to those empaneled jurors who were tagged as alternates or whose trials were dismissed. An overall increase in voting rates, however, was not found for jurors deliberating on civil trials. Thus, we returned to those data to see if a more fine-grained analysis could reveal the civil jury's more nuanced civic impact.

## Re-Investigating the Data

We begin by reflecting on the reasons criminal and civil jury service might produce different civic activity such as voting. Beyond the fact that civil trials may seem less significant than criminal trials to jurors because of the criminal trial's salience, accessibility, and intrinsically interesting subject matter, we hypothesized that the structure, process, and nature of each deliberative task may account for the greatest difference between criminal and civil juries.

Whereas the prototypical criminal jury is made up of twelve jurors, and requires a unanimous decision, the civil jury may be smaller in size, and may not need a unanimous decision; thus raising questions about whether they function similarly as a decision-making body. Some also dispute the importance of the civil jury's consequence: only money is at stake, and not life or liberty, so the nature of the case (e.g. automotive tort versus breach of contract) and the parties involved (e.g. individuals versus corporations) may have an impact.

With these characteristics in mind, we reexamined the civil jury data and compared it to jurors' voting rates before and after their period of service.<sup>3</sup>



Traci Feller is a doctoral student in the Department of Communication at the University of Washington.



John Gastil is a professor Communication Arts & Sciences and Political Science at the Pennsylvania State University



Valerie Hans is a Professor of Law at Cornell University Law School.

We categorized each case in terms of jury size, decision rule, whether the parties were exclusively individuals or included organizational parties such as businesses and corporations, and the case type (auto, non-auto tort, or contract). These new variables helped to shed light on significant civic effects for particular types of civil jury experiences.

As predicted, twelve person juries and juries with a unanimous decision rule yielded more positive change in juror voting rates. Furthermore, the nature of the defendant mattered; when jurors served on civil cases with organizational defendants such as business corporations, they experienced a more positive change in their voting rates than did those jurors whose cases featured only individual defendants. Case type also mattered; jurors hearing automotive claims had a significantly lower boost in voting rates than did jurors serving on non-automotive tort cases.

### Lessons Learned

Civil juries *can* spark a civic awakening for jurors, depending on the context of the trial. The fact that the civic effect is more visible and positive when the defendants include at least one organization, as opposed to exclusively private individuals, speaks to a common argument voiced by those advocating for abolition of the civil jury—that they are not necessary when deciding private matters, and should be reserved only for the protection of individuals from the tyranny of the state in criminal trials. In fact, civil jurors play an important role in setting community standards by deciding what type of conduct is acceptable from cornerstones in our society, be it corporations, doctors, small businesses, land owners, and the like.

Civic effects are also more pronounced for twelve person juries and those that have a unanimous decision rule. Allowing for members of a jury to

reach a binding verdict even when jurors disagree lowers the participatory effect of serving on a jury. These findings augur caution for those who would reduce the size of civil juries and lower the bar for their decisions to a form of majority rule. Low-stakes juries have been proposed as a means of revitalizing the civil jury, making them more appealing and commonplace, yet these “summary” or expedited civil juries could yield no positive civic impact.<sup>4</sup> Future research should investigate whether these summary juries can deliver the civic educational promise identified by Tocqueville.

Abolishing the civil jury altogether will eliminate one of the most intimate ways that citizens can contribute to democratic self-governance. Not only does the civil jury allow the public to make decisions affecting the community, but it positively affects the civic engagement of those involved when the procedural qualities remain more like a traditional criminal trial.

1. ALEXIS DE TOCQUEVILLE *DEMOCRACY IN AMERICA* (Schocken, 1835/1961), <http://xroads.virginia.edu/~HYPER/DETOC>.

2. JOHN GASTIL, E. PIERRE DEESS, PHIL WEISER & CINDY SIMMONS, *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* (2010).

3. The full data analysis strategy and results may be found in the original publication: Valerie P. Hans, John Gastil & Traci Feller, *Deliberative Democracy and the American Civil Jury*, 11 J. EMPIRICAL LEGAL STUD. 697 (2014).

4. INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, *A RETURN TO TRIALS: IMPLEMENTING EFFECTIVE SHORT, SUMMARY, AND EXPEDITED CIVIL ACTION PROGRAMS* (2012), [http://iaals.du.edu/sites/default/files/documents/publications/a\\_return\\_to\\_trials\\_implementing\\_effective\\_short\\_summary\\_and\\_expedited\\_civil\\_action\\_programs.pdf](http://iaals.du.edu/sites/default/files/documents/publications/a_return_to_trials_implementing_effective_short_summary_and_expedited_civil_action_programs.pdf).

**Editor’s Note:** This is a condensed version of the article that was published in the [Summer 2016 issue](#) of *Voir Dire*, a publication produced by the American Board of Trial Advocates. It is reprinted with permission.

## 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.*



## 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