

Jury Matters

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



July '17, Vol. 2, Issue 7

Upcoming Events

Sept. 14 Jury Improvement
Lunch; Cleveland, OH

Opening Statement

Dear Readers,

The Civil Jury Project continues its efforts to study and better civil jury trials, as well as raise awareness of their historic decline. In addition to the following content, we have much news to report in this month's letter.

First, in conjunction with the American Society of Trial Consultants, we have recently completed administering a survey of mock jurors. This survey aims to assess whether everyday people are aware of the decline in civil jury trials, and what they think of it. We are now in the process of analyzing the results and should have a report by the end of summer. In addition, we are continuing our social outreach efforts, creating video and interactive content for our website www.WethePeopleWetheJury.com. Most recently, we created a video with one of our academic advisors, Suja Thomas, exploring the history and importance of the civil juries in an easy to follow manner. The video will be posted in the coming week. Finally, we are saddened to report that Catherine Sharkey will be taking leave as an academic director of the Project due to her going on sabbatical.

As always, thank you for your continued support of the Civil Jury Project. You can find a full and updated outline of our status of projects on our [website](#). In addition, you can still submit op-ed proposals or full drafts for inclusion in upcoming newsletters and on our website either by email or [here](#).

Sincerely,
Stephen D. Susman



Can we make jury duty . . . enjoyable?

Judge Mike Engelhart and his summer clerks argue that jurors who have good experiences serving become ambassadors to the jury system. But how can we improve citizens' experiences so that they'll spread the word?

Find out more on pg. 4



The Debate over Civil Jury Trials

Steve Susman and Renee Lerner engaged in a vigorous and informative debate at this year's American Constitution Society Annual Conference.

Not everyone agrees that the historic decline and current dearth of civil jury trials poses a problem. Professor Renée Lettow Lerner of George Washington Law School, for instance, has written extensively on the subject and argued that in most instances the civil jury is an anachronistic and inefficient dispute resolution tool. Stressing that nearly every other country—including England, the birthplace of the institution—have abandoned juries, she does not hesitate to recommend the United States adopt a similar path.

But in making this argument, Prof. Lerner overlooks the fact that but for the Seventh Amendment, we would likely not have a national constitution at all. Indeed, one of the great oppositions to the Constitution was the initial lack of protection for trial by jury in civil cases. Many states made ratification conditional on enactment of an amendment protecting the right. And today, 226 years later, the constitutions, statutes, or procedural rules of all 50 states similarly guarantee jury trials to civil litigants.

The right to civil jury trial was preserved not because it is efficient, or always right or fair, but because it is generally better than the only via-

ble alternative: trial by a single judge. Prof. Lerner would point out that other countries have adopted panels of judges, and that patent review occurs in the United States with such panels. This alternative, however, fails to consider the democratic importance of jury duty. In this country, perhaps more than any other, citizens value their freedom and have always been suspicious of authority. There is strong political will not to entrust everything to the government.

Furthermore, countries like England select judges in a manner that makes them more akin to bureaucrats, compared to the United States where they are essentially politicians. In our country today, 90% of all trial judges are state judges who are beholden to the electorate for getting or retaining their jobs. And at the federal level, the hyper-political appointment process means that judges are subjected to a litmus test to assure that they will be biased.

It is not just the political implications that motivate the preservation of civil jury trials. In many instances, civil juries are faster than bench trials or arbitration. Judges, out of deference to jurors, typically try a jury case without interruption, while they

often take breaks in a bench trial to attend to other matters. And arbitrators, who are paid by the hour, rarely are in any hurry. Likewise, jury trials are not more expensive than bench trials, as the bulk cost of discovery and motions practice is similar between the two. Finally, jury trials need not be less predictable than bench trials. Litigants have many procedural protections to ensure that the jury reaches a just outcome.

Today, trial by jury is one of the few remaining institutions of our democracy that is truly “of the people, by the people, and for the people,” and that also has bipartisan support among the people. With money in politics and the requirement of unanimity in most jury rooms, your vote as a juror counts more than your vote as an elector. It provides citizens an alternative channel to provide democratic input and shape the law. That is why we must ensure that the promise of the Seventh Amendment persists.

A full video recording of the ACS conference debate between Steve Susman and Prof. Lerner is available [here](#).



The Decline of Trials in a Legalizing Society

Prof. Mark Galanter of the University of Wisconsin-Madison recently published a fantastic piece as part of a series of lectures hosted by Valparaiso University School of Law.

In it, Prof. Galanter juxtaposes the decline of trials as the defining characteristic of what courts do, with the

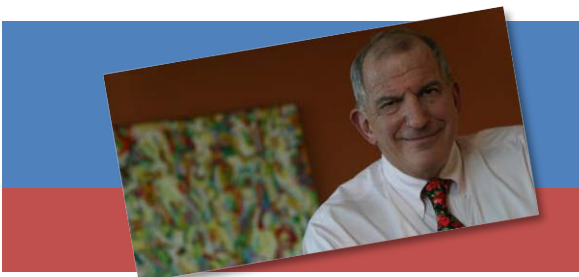
changes in the role and shape of law in American society. He argues that there has been a dramatic legalization of society in the past half-century, such that while trials and courts have declined, society and its economy, the legal profession, and all things legal continue to grow. He

goes on to address how this shift affects courts' mode of operation, relegating trials to administrative and private forums.

It is a fantastic piece that we heartily recommend. A copy is available for download [here](#).

“Saving Jury Trials”

The Civil Jury Project's Executive Director, Steve Susman, delivered the following remarks at the 55th Reunion for the Yale Class of 1962. It provides an overview of the motivations for the Project and where we currently stand.



My project to save jury trials was born exactly 15 years ago, at a Saturday morning session of our 40th reunion with Prof. Akhil Amar talking about the Constitution.

Although I began my legal career clerking for Hugo Black, the Supreme Court justice most respectful of juries, and had spent the last 25 years trying business disputes in front of Texas juries, I had not thought a lot about the Constitution or the role of the jury in the founding of this country. I simply attributed the decline in jury trials to tort reform and the enormous amounts of money spent by the Business Roundtable to remove Texas from the list of judicial hellholes for corporations.

Prof. Amar changed that. Ellen and I headed for the bookstore after his talk to buy his book *America's Constitution: A Biography*, and I quickly began to understand the centrality of the right to trial by jury in our founding documents. Our founders, according to Prof. Amar, believed that juries were the ultimate protectors of all other constitutional rights. That started a close friendship with Prof. Amar and eventually led to the establishment two years ago at NYU School of Law of the Civil Jury Project, of which I am the Executive Director. It is the only academic center in the country that is devoted exclusively to asking why jury trials are disappearing, whether it matters, and if so, what can be done about it.

We currently have over 200 judicial advisors, 65 academic advisors (including Prof. Amar) and 40 jury consultant advisors. We engage in many types of empirical research, hold conferences around the country, maintain two websites, and publish a monthly newsletter entitled *JuryMatters*. I personally have crisscrossed the country hosting lunches for federal and state trial judges to find out why they are trying so few cases and to suggest how they can improve the quality of the trials they do conduct.

Here are some of our conclusions thus far: While non-trial lawyers or judges may not realize it, there is no question that almost all trials are disap-

pearing: civil jury trials, civil bench trials, and criminal jury trials. Should we care about this, or are jury trials, like powdered wigs, a relic of 18th Century England, the country that gave America's founding fathers a 700-year-old tradition of trial by jury but that abandoned them itself, in civil cases, towards the end of the 19th century?

The right to trial by jury was the only right mentioned five times in our founding documents, and of all the rights mentioned in the Declaration of Independence, the Constitution and the Bill of Rights, it was the only right guaranteed by the constitutions of every state before the federal Constitution was adopted. Because the right to trial by jury in civil cases was not contained in the Constitution, seven of the states that were needed to ratify it did so only on the condition that there would be a future amendment guaranteeing the right to jury trial in civil cases.

The civil jury was to be a check on an overreaching federal government and judges appointed by the government. Unlike judges, it would be difficult to bribe twelve jurors, unknown until the trial begins. And because jurors have nothing to lose by the verdicts they return, they are beholden to no one.

At the time of the 7th Amendment, jurors could decide the law and the facts, and our founders were well aware of the Peter Zenger trial of 1735, where a jury refused to convict a newspaper publisher for defaming the governor of New York. That result was no anomaly: During colonial times, there were hundreds of convictions for seditious libel in England but only two in the colonies where grand juries usually refused to indict and, if they did, petit juries refused to convict.

Today, we need the protection of juries just as much as our founders needed them in 1791:

1. Freedom of the press is still under attack.
2. Our central government gets more and more powerful.
3. The appointment of federal judges has become extremely partisan and

both parties try to impose litmus tests that ensure the judge will be biased.

4. Over 90% of the trial judges in this country are state judges who stand for election either to obtain or retain their seats, and all efforts to change that have failed. The empirical research is overwhelming: Elected judges are biased in favor of litigants they perceive can help them stay on the bench.
5. People who serve on juries make better citizens: Empirical research shows they are much more likely to vote and be engaged civically.
6. Finally, empirical research establishes that judges agree with jurors 75% of the time, and judges themselves agree that twelve jurors collectively are more likely than the judge, acting alone, to get it right.

Everyone has a different idea of why dispute resolution is being privatized, but the CJP is focusing on the ones that we can do something about without having to change any laws, including:

1. Alerting the public to the phenomenon of the vanishing trial;
2. Reducing the expense of getting to trial and of the trial itself;
3. Improving the quality of trials by using various innovations designed to increase jury comprehension;
4. Encouraging people to want to serve on juries, not avoid jury duty;
5. Training young lawyers to try jury cases;
6. Publicizing the disadvantages of alternative forms of private dispute resolution.

Saving jury trials is not a partisan cause. Unlike other provisions of the Constitution, there is not even a dispute about what the framers intended: The right to trial by jury of civil cases was to be preserved as it existed in 1791. No one argues that the 7th Amendment is a “living provision”—it is the essence of originalism to preserve a right Americans had at the time the nation was formed.

IMPROVING THE JUROR'S EXPERIENCE

By:



Judge Mike Engelhart,
151st Civil District
Court, Harris County,
Texas



Elizabeth George,
2017 Summer Law
Clerk



Gavriella Roisman,
2017 Summer Law
Clerk



Catherine Tassin de
Montaigu, 2017
Summer Law Clerk

Although a critical source of our democracy, modern jury service is often perceived as a burden. Harris County (Houston) and Montgomery County, Texas have had no-show rates of 75 percent and 86 percent, respectively.¹ A juror with a positive jury duty experience becomes an ambassador for the jury system.² Therefore, any improvement on a juror's experience would have the positive effect of increasing participation among potential jurists.³

Several complaints are at the forefront of the jury experience:

- Only some salaried workers are compensated by their employers; regardless, employees still need to make up the actual work.⁴
- Jury duty is boring.⁵
- Firms sustain the burden of losing employees temporarily (negating the idea that employees are interchangeable widgets).⁶

The economic burden of jury duty is a primary concern. While it may not impact every potential juror, it is a legitimate concern especially for those jurors who are paid hourly. Current daily compensation in Texas courts ranges from \$6.00 - \$50.00. Even with maximum compensation, this is only 86% of a corresponding minimum wage compensation. Potential jurors who survive on the living wage could hardly see a financial incentive for missing work.

A possible solution is creating and enforcing increased compensation requirements on employers. Texas and Federal law hold limited requirements for employers to compensate employees serving jury duty. In effect, employees may not only lose vacation time or wages, but also suffer the real impact of having to offset work missed. By shifting part of the economic burden to employers, the state may be able to sustain the increased juror wage with the juror herself benefitting overall.

Additional economic concerns include transit and childcare. Parking and transportation downtown are both prohibitive in cost and

time. While the court offers metro passes, only a quarter of potential jurors take advantage of this service. It would behoove the courts to examine parking vouchers, which might ultimately be more convenient for the potential jurors. Similarly, many potential jurors deal with childcare issues such as transporting school age children or finding babysitters. By reviewing court hours, or investigating courthouse childcare options, the courts may improve the juror experience.

Money aside, jury service is universally inconvenient. Traveling downtown can be time consuming. There are often long periods of time spent idly waiting. Often potential jurors are dismissed without even seeing the inside of a courtroom, giving the impression that jury service is simply a waste of time.

There are various methods of mitigating the inconvenience: first, streamlining the juror selection process and increasing efficient communication with the jurors; second, instilling a sense of responsibility and pride in the jury system to overcome the tangible drawbacks. The various inconveniences (i.e. wait times, communication) continue to be addressed through technology. By utilizing any number of [juror management technologies](#), the process will become more efficient not only for the jurors but for the court. Improving the experience of court employees will have a beneficial effect on their interactions with the potential jurors, which in turn will give those potential jurors a better experience overall.

Less concrete is creating a sense of positive responsibility among the potential juror pool. Jury service is the paradigm of democracy. Actively participating in the process furthers the American value of preventing oppression and creating a government of the people and by the people. Currently, the country stands so far removed from the perceived threat of tyranny that only 30% of Millennials think that democracy it-

self is essential.⁷ The challenge is to engage a growing population in an ideology that they view as non-essential. While facially discouraging, the discussion of democracy fails to recognize an appreciation of civic engagement held by Millennials. Civic involvement has steadily increased as the Millennial generation has grown older; the national volunteer rate actually reached a five-year high in

Millennials are inspired by opportunities to take part in policy leadership.⁹ By retooling the concept of "juror" from a burden to a position of governmental change-maker, the willingness to participate will likely grow. Addressing the intrinsic motivators of identifiable generations would help target outreach to all populations.

Andrew Guthrie Ferguson, *A Juror Bill of Rights*, *The Atlantic*, (Sep. 11, 2015),

<https://www.theatlantic.com/politics/archive/2015/09/the-juror-bill-of-rights/404833/>.

² *Id.*

³ *Id.*

⁴ Josh Barron, *This is Why People Hate Jury Service*, *Forbes* (Feb. 27, 2012),

<https://www.forbes.com/sites/joshbarron/2012/02/27/this-is-why-people-hate-jury-duty/#5c6dbb1e4709>

⁵ Kevin Drum, *Why We All Hate Jury Service*, *Mother Jones* (Feb. 27, 2012), <http://www.motherjones.com/kevin-drum/2012/02/why-we-all-hate-jury-duty>

⁶ Matthew Yglesias, *Jury Duty: The Economic Catastrophe of Jury Duty*, *Slate* (Jan. 9, 2014), http://www.slate.com/blogs/moneybox/2014/01/09/jury_duty_an_economic_catastrophe.html.

⁷ Maggie Koerth-Baker, *Democracy, Meh?* (Dec. 2, 2016), <https://fivethirtyeight.com/features/democracy-meh/>.

⁸ Tom Splenger, *Civic Engagement: Why Millennials Have Outpaced Seniors*, *Huffington Post* (June 13, 2014), http://www.huffingtonpost.com/tom-splenger/civic-engagement-why-mill_b_5492478.html.

⁹ *Id.*

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
- 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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