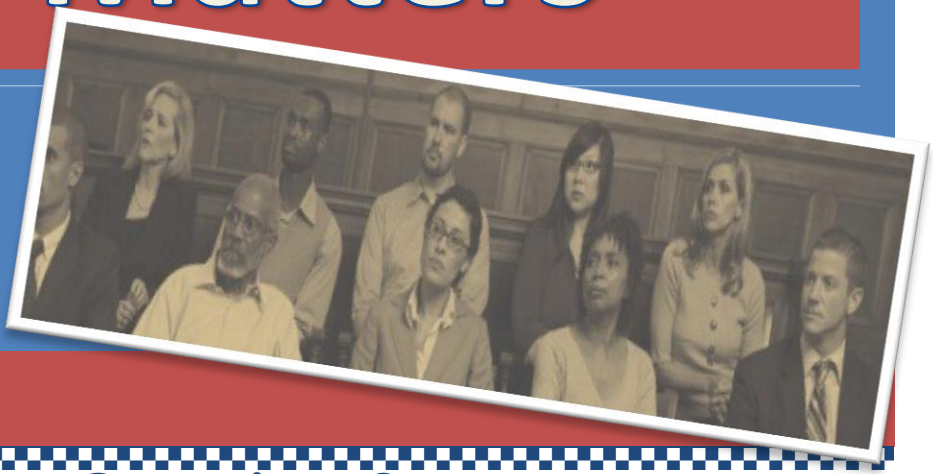
Jury Matters

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



Feb. '18, Vol. 3, Issue 2

Upcoming Events

3.8 Jury Improvement Lunch; San Francisco, CA

5.1 Jury Improvement Lunch; Dallas, TX

Opening Statement

Dear Readers,

Welcome to another edition of the Civil Jury Project's monthly newsletter. This year is already getting into full swing and we could not be more excited for continuing our work as the nation's only academic institution dedicated solely to studying the decline and betterment of civil juries.

One of the ways that we accomplish this goal is by sponsoring and participating in events and conferences around the country. Our most common event—we have held over a dozen—is what we call Jury Improvement Lunches. We invite local federal and state judges, practitioners, and jurors to discuss the troubling decline in jury trials and ways that the institution can be improved. But we have other events, too. For instance, we have delivered presentations on a number of trial innovations—which judges can easily implement—that can make trial by jury quicker, cheaper and more accurate. Likewise, last year we held a debate at the American Constitution Society annual conference on whether juries should remain an important part of our system of public dispute resolution. Both of these can be easily replicated around the country. If you are aware of any upcoming conference or meetings at which the Civil Jury Project could participate or be of assistance, please contact Kaitlin Villanueva.

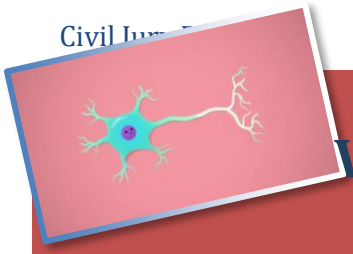
Thank you for your continued interest and support of the Civil Jury Project. As always, you can find a full and updated outline of our status of projects on our website. In addition, you can submit op-ed proposals or full drafts for inclusion in upcoming newsletters and on our website here.

Sincerely,
Stephen D. Susman

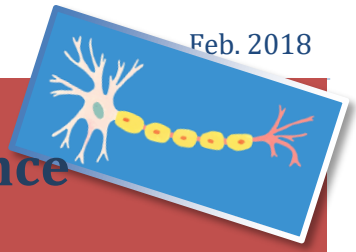
The Benefits of Trial Time Limits

Setting trial time limits is one of the easiest and most effective ways for Courts to manage their dockets, ensure that jurors' time is not disrespected, and provoke better presentations from attorneys. We review a recent order out of Massachusetts from Judge Richard G. Stearns making these points.

Find out more on pg. 5



To Tell the Truth: Voir Dire in the Age of Neuroscience



by Jill P. Holmquist

To tell the truth, the goal of voir dire examinations in jury selection has remained unchanged for centuries. Voir dire, meaning "to speak the truth," is an ancient practice for assessing jurors' potential partiality. In the 1760s, William Blackstone discussed voir dire in his Commentaries and described the right to challenge jurors "*propter affectum*, for suspicion of bias or partiality". He lauded the practice as part of the greatness of English law. It is equally important in United States law.

While the ultimate goal of voir dire is the same as it was 250 years ago, it is important to employ modern voir dire strategies in this day and age. Because neuroscience confirms that jurors' preexisting attitudes and preferences influence their decision-making and we recognize implicit bias exists, it is crucial to employ the best techniques that enable judges and attorneys to identify jurors' biases.

Several practices assist in making voir dire successful, from the use of supplemental juror questionnaires to not rehabilitating obviously biased jurors.

Supplemental Questionnaires

Although technically not part of voir dire, supplemental juror questionnaires ("SJQs") that supplement (or replace) the standard court form provide great assistance in identifying jurors who may be partial and unfair to a litigant. They are used in State and Federal courts across the country in all types of cases, from intellectual property matters to personal injury suits. Jurors tend to tell the truth more in SJQs than in open court in front of a judge.

Typically, SJQs ask for some background information, such as education and occupation of the juror and partner, and sometimes strange but potentially revealing questions (e.g., what bumper stickers are on your vehicle). More importantly, though, they focus on questions that are specifically correlated to unfavorable attitudes for each litigant.

Attitudes are greater predictors of verdicts than are demographic information. For instance, a civil defendant has reason to be concerned about a juror who harbors the belief that if a case makes it to court the defendant must have acted wrongfully. Such a question on an SJQ would be beneficial to that defendant. A personal injury plaintiff might ask about a belief in caps or limits on damages. A party challenging a patent might ask about a belief that the Patent and Trademark Office's determinations are complete proof of validity.

Some questions might be open-ended, while others might be phrased in agree/disagree statements. Questions might also require an answer on a scale, as in strongly agree to strongly disagree. Others might offer a choice between two to four alternative opinions.

SJQs are particularly helpful when a litigant is a minority or the case or the parties relate to a sensitive subject about which some people may have strong views. In a case involving a minority member, one question might be about negative experiences with people of that group. In a case involving child sexual abuse, it is important to ask whether the juror or someone close has been the victim of sexual abuse. In these cases, it is important to permit jurors to mark questions as private and afford them an opportunity to explain outside the hearing of other jurors.

SJQs can range from one page to several and have varied formats, from tables to columns to standard line-by-line questions. Although they can help streamline the process, follow up voir dire is essential in order to determine whether jurors' beliefs are so strong that they warrant excusal for cause.

Attorney-Conducted Voir Dire

While SJQs can be of great assistance, attorney-conducted voir dire is critical. The formality of the courtroom and the respect afforded the judge make it difficult for people to respond honestly to a judge's questions. They tend to tell the judge what they believe the judge wants to hear. As a result, knowing they are supposed to be impartial, it is very difficult for jurors to tell the judge they cannot be fair and impartial.

Although jurors are more forthcoming with attorneys, just the mere presence of the judge causes jurors to shift their answers to more conservative positions. Women may be more prone to shifting their responses than are men. In addition, judges may use language in a way that suggests the correct answers to their questions,

Continued on next page...

which enhances the tendency for jurors to conform their answers to the judge's preference.

Given the difficulties imposed by judge-conducted voir dire, it is far more preferable for attorneys to conduct voir dire.

Challenge-Focused Voir Dire

One of the reasons, besides time savings, judges are sometimes reluctant to permit lengthy attorney voir dire is the perception that attorneys just want to use voir dire to indoctrinate jurors. While attorneys may want to educate jurors about the law or case facts, the primary goal of most attorneys today is "getting the bad jurors sent home" as trial lawyers Lisa Blue (also a psychologist) and Robert Hirschhorn plainly put it.

Rather than argue their case, savvy attorneys try to identify biased jurors and help them admit that they are biased. Because it is difficult for jurors to admit their bias, attorneys often have to let jurors know being honest is only just. This is completely appropriate, given the law's guarantee of an impartial jury and the role of voir dire in effecting that.

The next most important goal of voir dire is to elicit sufficient information to exercise peremptory challenges intelligently. Again, this has nothing to do with indoctrinating jurors. The focus is on jurors who may have a hidden or implicit bias that they fail to (or cannot) disclose.

Challenge-focused questioning is evident when attorneys ask for disclosure of views unfavorable to their own clients.

Adequate Time

If attorneys are to conduct voir dire in a way that yields information useful both for cause and peremptory challenges as is the parties' right, it is vital that they be given sufficient time for voir dire. Ten minutes is far too little and even a limitation of a few hours can serve as an artificial restriction that prevents full inquiry.

Appellate courts frequently reject appellate arguments based on retention of biased jurors because counsel failed to ask the right question that would elicit an admission of bias. Therefore, trial judges should keep in mind that liberal voir dire enables counsel to ask enough questions to detect bias in jurors and to make a sufficient appellate record.

Jurors do not suddenly become impartial just by saying that they can be.

Judges are understandably concerned with efficiency, but justice should trump efficiency. As Blackstone wrote, "[L]et it be . . . remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters."

"Rehabilitation" of Partial Jurors

Neuroscience leads to another issue we should reconsider in the interests of justice: juror rehabilitation. When jurors indicate they have a leaning toward one party, the judge typically asks if the jurors can be fair, or whether they can set the opinion aside and decide the case on the law and the evidence. Commonly, jurors agree because they know the "right" answer, often to the detriment of one of the parties. Therefore, judges should be careful in the way they phrase rehabilitation questions to avoid communicating their preferred response.

In addition, judges need to be aware that jurors do not suddenly become impartial just by saying they can be. Biased people unconsciously interpret information in a biased fashion, even when given information that contradicts their biases. Chief Justice Marshall recognized this truth in 1807. Regarding a juror who has a strong opinion, he wrote, "Such a person may believe that he will be regulated by testimony, but the law suspects him, and certainly not without reason. He will listen with more favor to that testimony which confirms, than to that which would change his opinion."

Such people should be excused for cause. As Chief Justice Marshall wrote, "The great value of the trial by jury certainly consists in its fairness and impartiality. Those who most prize the institution, prize it because it furnishes a tribunal which may be expected to be uninfluenced by an undue bias of the mind."

Conclusion

The purpose of voir dire has always been identifying biased jurors. And the Constitution requires impartial juries. Voir dire is the last opportunity for ensuring that right. When jurors tell the truth about their attitudes and beliefs, attorneys can assess their fitness for a particular case and, when appropriate, challenge them for cause. When judges acknowledge jurors' partiality and grant challenges for cause, the right to an impartial jury is effectuated and justice is served.

Jill P. Holmquist is a trial consultant and an advisor to the Civil Jury Project . A full version of this essay, with references, is available on the CJP website, here.

The Long Shadow of the Civil Jury Trial by Anna Offit

Anna Offit is a research fellow at the CJP. She has a PhD in Anthropology from Princeton University and JD from the Georgetown University Law Center. Her email is aco269@nyu.edu.

In 2017, 0.65 percent of federal civil cases were tried before juries— down fifteen percent from the year before. In light of this fact, and the downward trend it perpetuates, one might expect jurors to play a diminished role in lawyers' everyday work. Empirical research in a U.S. Attorney's Office in the Northeast, however, suggests otherwise. After interviewing 133 Assistant U.S. Attorneys between 2013 and 2017, I discovered that even Civil Division lawyers with limited trial experience prepare cases with jurors in mind. This is a counterintuitive finding at a time when some argue that jurors have a limited role in the legal system today.

How might one account for jurors' salience in prosecutors' work? My research offers several explanations and argues that consideration of hypothetical jurors informs decisions at every stage of case preparation. First, and most obviously, attorneys have an instrumental interest in anticipating how jurors will respond to evidence and witnesses if there is any chance a case will proceed to trial. If an employment discrimination (Title VII) suit or Federal Tort Claims Act case with nongovernment defendants may find its way in front of jurors, it would— after all— be irresponsible *not* to consider them. By one lawyer's account, assessing the "jury impact" of a case was a logical extension of this uncertainty. A colleague likened his consideration of jurors to "planning for an emergency"— recognizing that even summary judgment is an exercise in imagining what a fictive reasonable juror might think.

Beyond the instrumentalities of trial strategy, however, prosecutors invoked jurors as an ethical resource. Throughout their preparation, for example, prosecutors grounded opinions about the fairness of their cases in future jurors' hypothetical views. One supervisor distinguished this analytic move from discussions about the sufficiency of evidence in a case. He explained that AUSAs exercised discretion to determine whether filing a complaint (or prosecuting a criminal case) "was in the interest of justice." Proofs might be viewed as a "close call," he reflected, "if a juror is going to think who really cares that A lied to B if B did not suffer harm.'"

Others more explicitly ascribed justice considerations to hypothetical lay decision-makers through references to the "jury appeal" of their cases. In some prosecutors' formulations, jury appeal assessments were likened to asking, "If I were a juror, what would I think?"— or weighing whether a "hypothetical juror would feel the case should not be prosecuted even if it legally could be." To this end, talk of jury appeal allowed sources of concern to be discussed from a position of detachment. In some instances jury appeal was cited in decisions to modify investigations or decline cases altogether.

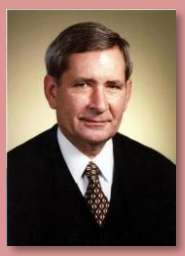
Consideration of jurors' perspectives also influenced the way prosecutors talked about their cases— including the language they used to characterize evidence and witnesses. In the process of defending the U.S. in a civil suit involving a plane crash, for example, a prosecutor felt strongly that a record of radio communications between an air traffic controller and pilot should be referred to as a "partial transcript." If the case went to trial, he reasoned, this distinction would emphasize the incompleteness of the interactions that jurors would learn about. The plaintiff, in contrast, referred to the transcript as though the airplane at issue was the sole focus of the air traffic controller's attention rather than one of eight planes. This attorney emphasized the importance of fashioning phrases and case themes from the imagined perspective of future lay decision-makers.

References to jurors also facilitated more democratic decision-making among prosecutors. Despite working in a hierarchically organized office, AUSAs often grounded the contrary opinions they shared with supervisors and peers in the imagined perspectives of lay onlookers. This approach allowed conflicting views to be presented in impersonal terms and kept lay intuitions about justice at the center of their discussions. The diversely constituted and unpredictable interpretations of future jurors raised the stakes of disregarding colleagues' divergent views. A finding that emerges from this research is that the declining number of trials has not robbed juries of their ideational effects on government lawyers' work. Collectively, these insights make a strong case for the continued relevance of the jury despite the rarity of trials.

Top 6 Reasons to Report for Jury Duty

Last month, Steve Susman sat down with Judge Mark W. Bennett of the Northern District of Iowa to discuss the importance of jury service. A six-part video series documenting their discussion is now available on our website, here.

New Advisors Spotlight



Hon. Richard G. Stearns
U.S. District Court for the District of Massachusetts

The Benefits of Setting Trial Time Limits

By Richard Jolly

Of the many trial innovations the Civil Jury Project recommends for making jury trials faster, cheaper, and more accurate, the easiest and most obvious is setting and keeping trial time limits. Adding this simple constraint to proceedings saves courts resources, ensures jurors' time is not wasted, and can in fact benefit attorneys by forcing them to think carefully about their trial presentations. Thus, to the extent justice allows, trial time limits should be implemented.

Recently, Judge Richard G. Stearns of the United States District Court for the District of Massachusetts issued an order aiming to set such time limits and recognizing a number of important points. First, he correctly noted that trial courts can sua sponte set time limits as part of their power to manage dockets. This inherent power is bolstered, Judge Stearns noted, by the Federal Rules of Evidence, which are to "be construed so as to . . . eliminate unjustifiable expense and delay." Fed. R. Evid. 102. Indeed, "it has never been supposed that a party has an absolute right to force upon an unwilling tribunal an unending and superfluous mass of testimony limited only by his own judgment and whim." 6 Wigmore, Evidence § 1907 (1976).

Judge Stearns continued to note how non-time limited trials can drain courts of their limited resources. He derided the rise in "megatrials," which he noted are often "measured in months rather than weeks." Such trials, he warned, "consume an inordinate amount of the court's time and focus, inevitably have an impact on the rights of other litigants who have equally pressing matters that do not get the attention they deserve as a result."

Furthermore, Judge Stearns added, lengthy trials place a heavy burden on jurors. They "effectively eliminate from the available venire those jurors who cannot afford to take extended absences from their jobs, or who cannot afford the extra costs of child or parental care that months of service may entail, leaving largely jurors who are either retired or who, in a few fortunate instances, have employers willing to fund unlimited jury service." Eliminating these citizens, he noticed, undermines "the representativeness of the jury eventually selected to serve."

Finally, Judge Stearns argued that trial limits enhance the attorneys' trial presentations. Time limits "promote[] a more efficient presentation of the case, which not only improves the quality of jury comprehension, . . . but also eliminates numerous objections or sua sponte interruptions by the court to debate what evidence is repetitious or cumulative." He added that from his present and past experience, "time limits focus the presentations of the attorneys to the benefit of the jurors, the court, and ultimately the lawyers themselves."

Judge Stearns is not alone in recognizing these benefits. In fact, for similar reasons, the American Bar Association's American Jury Project Principles and Standards has long recommended that courts "limit the length of jury trials insofar as justice allows," and that "jurors should be fully informed of the trial schedule established." Nevertheless, it is refreshing to see a jurist explain these rationales as cogently as he does. A full copy of his order is available here.

Status of Project: Winter 2018

The Civil Jury Project looks forward to continuing its efforts throughout 2018 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. 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

Stephen Susman
Executive Director

Samuel Issacharoff
Faculty Director

Anna Offit
Research Fellow

Richard Jolly
Research Fellow

Kaitlin Villanueva
Admin. Assistant

A Preview of Next Month . . .

Richard Jolly will offer a concise history of jury trial innovations, outlining their development in academic circles during the 1970s.

Anna Offit will review the importance of access to public dispute resolution in rectifying largely hidden harms.