THE JURY SYSTEM: IMPERFECT, BUT IT WORKS

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No Records

Despite "scientific proof" that it cannot fly, the bumblebee does. So, too, the jury system: by logic, it should not deliver justice, but it characteristically and usually does. "Why should anyone think," asks former United States Solicitor General Erwin Griswold, "that twelve persons brought in from the street, selected, in various ways, for their lack of general ability, should have any special capacity to decide controversies between persons?"

Yet mush more often than not, most observers agree, when jurors are left to apply their experiences and common sense to the evidence presented them, they render as impartial a brand of justice as is humanly possible. Numerous studies have heen made by scholars throughout the inception of the jury system. One of the most notable jury studies was that entitled The American Jury, published in 1966 by Kalven and Zeisel. Foremost in the authors findings was thatjurors were genuinely interested in arriving at a logical and fair verdict. The jurors were remarkably consistent in their reactions, making generalizations of findings and characteristics possible for the authors possible.

Trial by jury is guaranteed by the Sixth and Seventh Amendments to the Constitution. But the system is not frozen in an eighteenth century mold. A growing reform movement is easing many strains, helping to bring "twelve men and true" into the modern era.

Jury service can be an ordeal. Jurors must endure a tedious and intrusive selection process, sit bemused by lawyers' legerdemain and then, somehow, sift the facts and return what may well be an unpopular verdict. More than three million citizens a year are summoned for jury service. Some are on duty for several months, but the trend is toward the so-called one day, one trial system: Jorors who are not selected go home after one day; those who are chosen serve for just one trial. The old key-man system of calling only community leaders has been abandoned in favor of random lists compiled from voter and tax rolls. While many potential jury lists are now computerized, there are still some counties that still draw numbers out of a barrel.

The number twelve is no longer sacrosanct in civil or criminal cases. Many states, including Indiana, utilize as few as six jurors in civil and some criminal cases. The citizens summoned are, in a sense, on trial, not for any crime but for their attitudes and prejudices. In what is known as voir dire---old French for "to say the truth"---jurors not accepted by the prosecution or the defense are excused either for cause, or without explanation, up to a limit.

In these choices, lawyers have long relied on ethnic stereotypes and seat-of-the-pants hunches to a degree. Today, however, the emphasis is on more sophisticated selection techniques. Firms that specialize in jury research for lawyers use such tools as "micromomentaries," fleeting changes of expression that indicate whether a potential juror is telling the truth or hedging; "alpha factors," which indicate juror assertiveness, and trick questions to spot hidden biases. Elaborate shadow juries, chosen for their similarity to the real jury, observe the trial and each night feed back their impressions to the lawyers trying the case. Lawyer Robert F. Hanley, a past president of the American Association of Trial Lawyers, says simulated opening arguments before surrogate jurors helped win a 1.8 billion dollar anti-trust judgment in 1980 for his client, MCI Communications Corporation, against AT & T. The award was the largest anti-trust jury verdict in United States history. Hanley and his associates honed their case by watching the practice jury deliberate behind a see-through mirror. While many attorneys see jury research as just another aid to winning cases, critics say all the psychological poking into jurors' backgrounds invades privacy, smacks of unconstitutional manipulation of the justice system and, because of the costliness of such a process, tends to favor the richer side in a dispute.

Furthermore, jury selection can take almost as long as the

trial itself. In one California murder trial of three defendants, it took five months to question more than two hundred fifty prospective jurors in a screening that filled more than eighteen thousand pages of transcript. The trial took seven months.

Jurors' ability in complicated cases to understand and comprehend the issues and render intelligent and impartial verdicts is increasingly being called into question. In England, the birthplace of the jury in the Middle Ages, and in many otyer countries juries have been abolished in most civil cases for this reason. The United States Supreme Court so far has refused to deicde whether some cases are too complex to be decided by a jury. But Chief Justice Warren Burger has commented that "it borders on cruelty to draft people to sit for long periods trying to cope with issues largely beyond their grasp." Other experts are not so sure. "We currently know little about the capacity of juries to evaluate rationally the evidence in complex cases or about the capacity of judges to do the same," says Richard Lempert, a professor at the University of Michigan Law School.

In their classis study, The American Jury, (supra), Harry Kalven, Jr. and Hans Zeisel of the University of Chicago found that in about eighty percent of the criminal and civil cases examined, judges agreed with jury verdicts. In civil cases, juries were only slightly more generous with damage

awards than judges, All jurors related that they had not reached a conclusion until after the closing arguments were given. Contrary to conventional wisdom, closing arguments were frequently considered too brief and lacking of sufficient detail. Many jurors remarked that they forgot evidence and relied upon the lawyers to remind them. Illustratively, in an eminent domain case jurors knowledgeable in business matters criticized counsel for not reviewing the prices in several offers made to buy the property.

In their study, Kalven and Zeisel found that the lawyer whose closing statements were repetitive or irrelevant came under criticism. Jurors disparaged as a waste of their time closing arguments that contained a string of platitudes. Remarks requesting jorors to "give close attention" to the argument were considered demeaning. Lawyers who thanked juries for their service to the community or for their attentiveness were considered patronizing. And, those lawyers were in danger of being criticized either for not observing that certain jurors were in fact not giving full attention, or for insincerity in overlooking that fact.

Attorneys who admonish jurors about their responsibilities like, "This is hte most important decision you will ever make," were in danger of being regarded as presumptuous. Obviously, certain comments about the jurors' functions or the approach they should take were well-received when made by the Court, but were

considered unseemly when given by counsel. Disparagement of opposing counsel invariably proved to be an egregious, tactical error. Disparagement of the opponent's case, with such general comments as, "This is the weakest case I ever defended against," also produced unfavorable comments. Juror criticism was commonly given to those lawyers who "strayed from the facts of the case," or who "were unable to get right dowm to discussing the evidnece in the case."

Personal comments about incidnets in the lawyer's life, or about private philosophies, were rarely well-received and often damaging. Attempts by counsel in closing argument to explain seientific principles or other esoteric subjects without evidence from an expert witness frequesntly caused jury antagonism. For example, jurors became antagonistic when a lawyer cited and applied a reasonably sophisticated principle of science to explain the issues in the case on trial without explanation by a scientific witness. Attempts to explain strategy or tactics, like explanations of why certain persons were called to testify, or were not called, or the reasons particular questions were or were not asked, evoked the suspicion that the lawyer was simply playing a gmae. On the other hand, jurors commended reasonable explanations for not presenting corroborating evidence, a subject often contemplated by jurors.

"It should come as no surprise that jurors manifest the same degree of antipatht about lawyers as do others." Report of Hallonder, Cohen Associates to the Maryland State Bar Association; The Law

Profession as Perceived by Marylanders (1978). They often voiced a preoccupation with the disturbing prospect of the large fee, especially the contingent fee. Certain phrases seemed to raise this sensitivity. Reading the obviously inflated ad damnum clause caused jurors to focus on the fee. However, the jurors felt benefitted by arguments that sought to justify reasonable sums of money. Most jurors wanted damage amounts to be argued. But, the words, "win" and "award," suggested the lawyer's interest more than the client's, as did the phrase, "this case is worth . . . ."

Unpopular jury verdicts , such as the insanity acquittal of John Hinckley, President Reagan's assailant, fuel critical scrutiny of the system by the public and press. Nevertheless, an abiding, almost mystical faith in a jury of one's peers is deeply rooted in America. In the words of the late Judge Frank W. Wilson, of the United States District Court in Chattanooga, "For centuries now, the institution of the jury has helped assure English-speaking people all over the world that they got the kind of justice they wanted, and not just the sort of justice that the experts thought was good for them."