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Hans Zeisel

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# A Jury Hoax: The Superpower of the Opening Statement

by Hans Zeisel

Some years ago, a distinguished federal judge buttonholed me and said, "I understand you and your friend Kalven found out that 80 percent of all jury trials are decided right after the opening statements. It is then that these juries make up their mind, and never change afterwards." With some embarrassment I answered that this sounded both interesting and important, but that we certainly had made no such discovery. Similar conversations with other judges and lawyers followed.

I remained baffled until one day the general counsel of a major corporation handed me a letter, remarking: "He cites your and Harry Kalven's work in *The American Jury*. . . ." And there, in this round-robin letter to prestigious general counsels of the land, I at last found the attribution, accompanied by the assurance that his law firm devoted particular attention to its opening statements. I asked the letter writer where he had learned of the discovery; he named three lawyers. My inquiry with these three lawyers was not successful. Each, in effect, answered: "Sorry, I never made such a statement."

I lost interest in the affair until my good friend Thomas Sullivan told me that at the recent conference of the American Trial Lawyers Association, the "discovery" was presented as one of the few dogmas of good trial tactic. Around that time I also received an inquiry from a lawyer who was writing a text on trial strategy, asking me for the proper citation for our discovery.

My friend suggested that through an appropriate statement I should put an end to the hoax. This, then, is the statement.

First, we never made such a discovery; we never even asked the question. Nowhere in *The American Jury's* 438 pages can one even find the words "opening statement."

The most puzzling aspect of the discovery is why it acquired such powerful currency, when a moment's reflection should have raised all kinds of questions. Even if there had been data to back the discovery, one should have wondered about its meaning. Since there were not and are not any data,

the reaction is even more puzzling. What exactly is the meaning of the claim?

If it emphasizes the importance of a good opening statement, it adds nothing to what every good trial lawyer knows. But, if it seriously suggests that a good opening statement relieves the lawyer or the client of caring about the evidence and its proper presentation, about the credibility of the witnesses, about the lawyer's own performance, and about the judge's instructions, because the case has, in fact, been decided—only a feeble-minded lawyer would assent.

Since the so-called discovery was never made, one must ask: Why do distinguished lawyers and judges continue to talk about it as if it were one of the few anchor points in trial strategy?

As a continuing provider of empirical insights into the legal process, I know that the law world does not exactly rush to embrace new statistical evidence. What does it mean that this law world embraced with alacrity a discovery that was never made and makes little sense? Perhaps it is the pleasure of having such an anchor point at all. It certainly allows the burgeoning class of jury consultants to claim access to the formula for guaranteed victory. Here, for instance, is an excerpt from a recently issued outline composed by a leading company in the field:

Research indicates lawyers win or lose a case with the opening statement. . . .

•••

Many jurors come to a decision during or immediately after the opening statement.

Lawyers or judges may be forgiven for misquoting research. A research company cannot aspire to such forgiveness.

In case somebody is tempted to do the research that was never done, the researcher should consider how difficult it would be to design research to test the issue. No doubt, if the researcher could poll juries right after they have heard the opening statements and compare their tentative verdict with the one they would ultimately render, the researcher would obtain considerable correlation.

The crucial question, though, would be whether the jury's

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Mr. Zeisel is professor of law and sociology emeritus at the University of Chicago. Along with Harry Kalven, Jr., Mr. Zeisel is the author of *The American Jury*, published by Little Brown & Co., Boston, in 1966 (first edition), and by the University of Chicago Press in 1986 (second edition).

tentative verdict wasn't based on the promise of superior evidence, a promise then kept in the subsequent trial. To credit victory in these cases to the opening statement makes no sense because, more likely than not, it was the weight of the evidence, properly foreshadowed in the opening statement, that deserved the credit and not the forensic merits of the statement. To design research that would separate the effect of the "foreshadowing" from the effect of the oratory would be almost impossible. And, if such research could be designed and executed, its yield would be small.

One of the undesirable by-products of the discovery is the implied diminution of the jury's intelligence and decency, a by-product that obviously fuels partisans' efforts to abolish the jury in civil cases. Although there may be arguments for abolition, jurors' lack of decency and intelligence should not be among them, because the average jury has both.

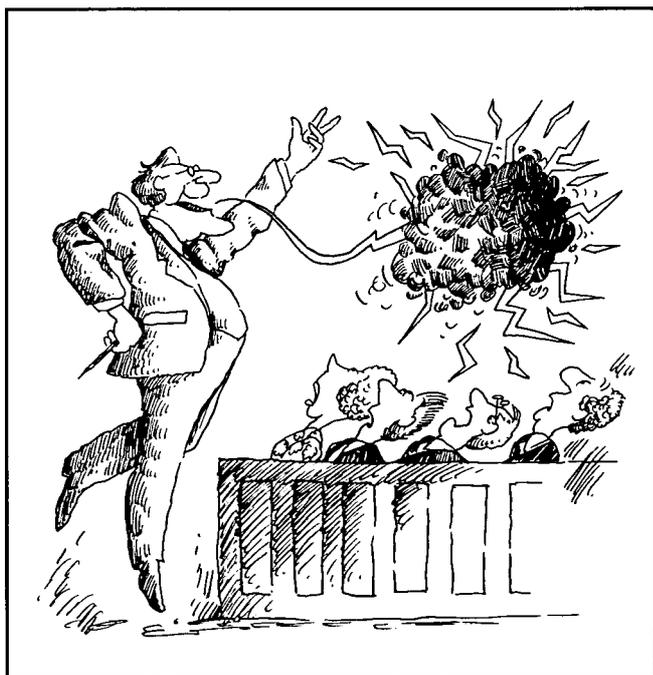
Thus, since the discovery was never made and the issue cannot be tested, and since continuing the claim serves only to degrade the jury, why not stop peddling the nonsense?

There remains another puzzle: What in *The American Jury* misled the original attributor of the hoax into believing we had dealt with the opening statement?

I had to comb the pages for data that even remotely could be mistaken for such a commentary on the opening statement. I am reasonably certain that one of our real discoveries, abetted by sloppy reading and sloppy hearsay, was the source of the misattribution.

Our real discovery, since confirmed by other researchers, was this: We found that in the great majority of cases, the jury's decision is, indeed, made long before the final phase of the decision process. Decision time comes not at the end of the deliberation process, but at its beginning.

In Chapter 38 we discuss data on the relationship between the first ballot a jury normally takes shortly after the start of the deliberation ("to see where we stand") and the jury's final verdict. Since these data led to a rather important insight into jury behavior, I present them here, together with the comment that accompanied them in *The American Jury*:



## FIRST BALLOT AND FINAL VERDICT

% of Concurrence with Final Verdict	Number of Guilty Votes on First Ballot				
	0	1-5	6	7-11	12
Not Guilty	100	91	50	5	—
Hung	—	7	—	9	—
Guilty	—	2	50	86	100
Total	100%	100%	100%	100%	100%
# of cases	(26)	(41)	(10)	(105)	(43)

If we look first at the third column, we see that where the jury is split 6-6, the final verdict falls half the time in one direction and half in the other. Where there is an initial majority either for conviction or for acquittal, however, the jury in roughly nine out of 10 cases decides in the direction of the initial majority. Only with extreme infrequency does the minority succeed in persuading the majority to change its mind during the deliberation. But, this is only to say that with very few exceptions, the first ballot indicates the outcome of the verdict. And if this is true, then the real decision often is made before deliberation begins.

The upshot is a radical hunch about the function of the deliberation process. Perhaps it does not so much decide the case as bring about the consensus, the outcome of which has been made highly likely by the distribution of first-ballot votes. The deliberation process might well be likened to what the developer does for an exposed film: It brings out the picture, but the outcome is predetermined.

On this view, the deliberation process offers fascinating data on human behavior and should reward systematic study. The topic, however, is not so much how juries decide cases but how small groups produce consensus. From what we have been able to perceive thus far, the process is an interesting combination of rational persuasion, sheer social pressure, and the psychological mechanism by which individual perceptions undergo change when exposed to group discussion.

Our statistics further suggest that reversal of a first ballot majority will become possible only if the margin of that majority was small. We, therefore, relegated Henry Fonda's accomplishment in *The Twelve Angry Men* to the movie world. We later found, however, one real case in which such an improbable reversal took place—when Nixon's cabinet members John Mitchell and Maurice Stans were tried in 1974 in New York City on a conspiracy charge. Their jury at one time stood 8 to 4 for conviction, but ultimately acquitted the defendants. The odds that such a jury would acquit are around one in 20. That acquittal, too, was the work of one of the jurors, and the intriguing circumstances that led to it merely confirm the soundness of the general rule.

The pivotal juror, by such tactics as arranging for the sequestered jury to use baseball equipment and to see movies at his bank's headquarters and by inviting his fellow jurors to see the St. Patrick's Day Parade from one of the bank's branches, established himself as social director of the jury. When the critical time came, he, the bank director among a jury that had no other college-educated members, "explained" to them the true situation. See Zeisel and Diamond, "The Jury Selection in the Mitchell-Stans Trial," 1 *American Bar Foundation Res. J.*, 151+ (1976). □