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The Debate over the Civil Jury in Historical Perspective

Hans Zeisel†

Friends of the Law School, I am pleased to introduce this Symposium on the Civil Jury, and thought I would do it best by sketching out the historical context in which this unending debate about the merits or demerits of the civil jury has taken place. The debate began early. In 1788, Thomas Jefferson wrote to a friend: “[I]t astonishes me to find . . . that [our countrymen] should be contented to live under a system which leaves to their governors the power of taking from them the trial by jury in civil cases [and] freedom of religion”¹ The civil jury, it seems, was as important to Jefferson as the freedom of religion.

I will now make a big jump in time, and turn somewhat immodestly to the year 1952, when this law school began the first systematic study of the jury system. Two volumes came from that effort: one on the civil jury, called *Delay in the Court*;² the other on the criminal jury, which we called *The American Jury*.³

Delay in the Court received its impetus, as did so many things that have happened in this law school, from Edward Levi, then its dean. One day he approached us who were working on the jury project and said: “Everybody is now talking about the jury, primarily as a cause of delay in the civil courts. Why don’t you first study that problem?”

So we did. What we found astounded us. First, we discovered that an arbitrary choice of procedure, not the jury, accounted for much of the delay in the Manhattan civil court we studied. The court had established a special calendar for personal injury jury

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¹ Letter from Jefferson to Colonel William Stephen Smith, dated Paris, February 2, 1788, reprinted in Julian P. Boyd, ed, 12 *The Papers of Thomas Jefferson: 7 August 1787 to 31 March 1788* 557, 558 (Princeton University Press, 1955).

² Hans Zeisel, Harry Kalven, Jr., and Bernard Buchholz, *Delay in the Court* (Little, Brown & Co., 1959). Second edition published in 1979 by Greenwood Press, Inc.

³ Harry Kalven, Jr., and Hans Zeisel, *The American Jury* (Little, Brown & Co., 1966). Second edition published in 1971 by the University of Chicago Press.

trials and gave all other cases trial precedence.⁴ No wonder, then, that personal injury jury trials encountered delay. Secondly, we concluded that any extra time demanded by a jury trial did not justify its abolition. Our study found that a jury trial required only about two-thirds more time than a bench trial of the same case.⁵ If that extra time requirement for the court for a whole year were added together, it would require the full-time attention of only one and a half additional judges.⁶ In a court having more than a dozen judges, it did not seem that this difference was big enough to serve as serious argument against the civil jury.

In spite of such findings, distinguished legal scholars continued to criticize the civil jury, foremost among them Edwin Griswold, the former dean of the Harvard Law School. This was his view:

The jury trial, at best, is the apotheosis of the amateur. Why should anyone think that twelve persons brought in from the street, selected in various ways, for their lack of general ability, should have any special capacity for deciding controversies between persons?⁷

Efforts to do away with or diminish the civil jury went beyond theorizing. I recall that in the 1950s, a distinguished New York state court judge tried to persuade litigants to waive jury trial by stipulation. He offered them a bench trial before one of a group of distinguished trial judges specially selected for the purpose; the promised reward was an immediate trial at a time when the jury calendar was five years in arrears. The effort failed, because neither the move to a bench trial, nor the removal of the delay, proved to be in the interest of both plaintiffs and defendants, a necessary precondition for such a stipulation.

With respect to defense lawyers, our study produced some surprising results. Our findings showed that, on average, plaintiffs obtain roughly 20 percent more money from juries than they would have obtained in bench trials of the same cases.⁸ One would have expected defense lawyers to waive the jury trial with some regularity—but they rarely do. Rather, we found that, generally, defense lawyers often trust a jury more than they trust a judge.

⁴ Zeisel, Kalven & Buchholz, *Delay in the Court* at 29.

⁵ *Id.* at 78.

⁶ *Id.* at 84.

⁷ 1962-63 *Harvard Law School Dean's Rep* 5-6.

⁸ From an as yet unpublished manuscript.

The defense bar has, nevertheless, shown a preference for Alternative Dispute Resolution (“ADR”) which aims to remove cases from the judicial system altogether—away from both jurors and judges. In spite of persistent efforts to increase the scope of ADR, it seems that it is not widely practiced unless the procedure is obligatory. In any event, it is not clear that such arbitration provides adequate justice, nor that it actually saves resources.⁹

Interestingly, the most massive attack on the civil jury was launched by neither defense nor plaintiffs’ lawyers, but by the federal court system itself, which ostensibly directed its efforts against the alleged oversize of the 12 member jury as it stood at common law. If my memory serves me correctly, the attack gained strength in the late 1960s, when the American Bar Association held its annual meeting in London, and some of its members noted with approval that the English civil jury had been practically eliminated; only libel and other personal torts were still tried to juries.¹⁰ This observation started what one might call the second reception of the English common law.

The attack on the twelve-member jury in the federal system was mounted cautiously. At first, some judges were encouraged to try cases before six-member juries by stipulation of the parties. Then, in March of 1971, the Judicial Conference of the United States adopted a resolution approving “in principle” a reduction in the size of the civil jury.¹¹ The resolution gave the movement toward six-member juries a large boost. At the time of the resolution, only “five or six districts” provided for a reduced-size jury by local rule.¹² However, in the first nine months of 1971, 29 districts

⁹ Forty years ago, we evaluated the beginning of this development in Pennsylvania and Massachusetts as follows: “[T]his becomes indeed an effective remedy for delay. . . . And yet one is hesitant to recommend the solution. First, because it runs the risk of being the first step in a progressive abdication by the courts. . . . Second, any such system necessarily conveys an aura of, and will indeed often be, second-class justice. Third, the acceptance of these systems is enforced by rules which fit ill into our judicial tradition of keeping the litigants’ access to the courts free. And fourth, at a time when a major concern . . . is to upgrade the status and stature and independence of the judiciary, the utilization of substitute judges seems to be a step in the wrong direction.” See Zeisel, Kalven & Buchholz, *Delay in the Court* at 219-20 (cited in note 2).

¹⁰ See Benjamin Landis, *Jury Trials and the Delay of Justice*, 56 ABA J 950, 951-52 (1970); Anthony T. Augelli, *Six-Member Juries in Civil Actions in the Federal Judicial System*, 3 Seton Hall L Rev 281, 290 (1972).

¹¹ *Report of the Proceedings of the Judicial Conference of the United States* 5 (Mar 1971).

¹² *Id.*

adopted the six-member jury.¹³ When judges in these districts duly, but superficially, reported that the six-member jury did its job as well as the twelve-member jury, the Judicial Conference of the United States passed a resolution recommending that the size of the federal civil jury be reduced from 12 to six through congressional legislation or by a ruling of the Judicial Conference. In spite of continuing prodding, Congress did not oblige. Finally, in 1978, the Judicial Conference took notice of the fact that 78 of the then 85 circuits had reduced their juries by rule of court, adopted a rule that enabled any federal court to make the reduction, and left it at that.¹⁴

Reactions to these developments were diverse and interesting. There were, of course, jury "abolitionists" who welcomed the reduction of the size of the jury as a first step towards its extinction. I consider these abolitionists to be much like the magazine editor who, when he received a certain manuscript, told the author that it was much too long and had to be cut. After much cutting, the author returned. The editor, still dissatisfied, asked for more cuts, and so it went two or three times until there were just two pages of the manuscript left. After some hesitation, the editor said: "It isn't as good as if you had written nothing, but I will take it." In short, the abolitionists would only truly be satisfied by a law that would eliminate civil juries entirely.

Other judges accepted the trend toward reducing the size of the jury with equanimity because of its potential for saving time and money. Many judges, however, felt that it was improper, especially in cases with high stakes, to cut the common law jury in half. These judges tried and still try to circumvent local rules by encouraging the parties to stipulate to a twelve-member jury, sometimes even ordering one, or at least allowing alternate jurors to function as ordinary jurors at the end of the trial.

The most interesting reaction came from the districts that cover the state of Utah. They simply refused to reduce the size of their juries. I believe I understand why. As one judge explained it, they wanted to be sure to have at least one non-Mormon on their juries.

¹³ *Annual Report of the Director of the Administrative Office of the United States Courts* 198 (1971).

¹⁴ See Edward J. Devitt, *The Six Man Jury in the Federal Court*, 53 FRD 273 (1972) (reprint of address by Judge Devitt, Chief Judge, District of Minnesota, at the Eighth Circuit Judicial Conference at Lutsen, Minnesota, June 30, 1971).

The Utah judge's response points to what is probably the greatest defect of the smaller jury, namely the greatly reduced likelihood that minorities will be properly represented.¹⁵ My concern here lies not only with the viewpoints held by demographic minorities, but more importantly with the under-representation of minority views on any issue, such as the death penalty or abortion. The problem is aggravated by the relative ease with which jurors with minority views can be removed through peremptory challenges by the other side. In short, the smaller jury is a poorer representation of the community from which it is drawn.

Lack of community representation is a serious defect because, as we found in our studies, the primary contribution of the jury is to inject into the decision process the community's sense of justice. We found that in some 20 percent of civil jury trials, judge and jury come to a different decision on liability;¹⁶ in the majority of these cases, the jury reached a different decision precisely because its own "sense of justice" differed from that of the judge.¹⁷ All of this evidence points to the most important argument against the six-member jury: it is a poorer sample of the community and hence a poorer representation of the community's sense of justice. Admittedly, 12 members do not supply a large sample either, but a sample of six is worse.

Another undesirable consequence of size reduction is the increase in the number of extravagantly high jury awards. On the whole, jury awards are the result of some averaging of individual ideas of what should be the right award. Although the law frowns upon such averaging, it remains a fact of jury life. And smaller juries show larger variations of their average awards.¹⁸

I am pleased to report to you that now, in response to these defects, a committee of the American Bar Association, composed of distinguished judges, defense lawyers and plaintiffs' lawyers have proposed to restore the twelve-member civil jury to the federal court, albeit with the proviso that ten of the 12 jurors may find a verdict.

¹⁵ Hans Zeisel, *The Waning of the American Jury*, 58 ABA J 367, 368 (Apr 1972).

¹⁶ Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 Va L Rev 1055, 1064 (1964).

¹⁷ In one of study, we noted that "two thirds of the [jury's] disagreements with the judge are marked by some jury response to values." Kalven and Zeisel, *The American Jury* at 495 (cited in note 3).

¹⁸ Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U Chi L Rev 710, 717-18 (1971). See also Hans Zeisel, *The Verdict of Five out of Six Civil Jurors: Constitutional Problems*, 1982 Am Bar Found Res J 141; Zeisel, 58 ABA J at 369 (cited in note 15).

These jury "restorationists" have been forced to rebut much criticism concerning the costs of a full-size jury. It turns out that the annual savings from the reduced juror fees are estimated to be between eight and ten million dollars.¹⁹ This is serious money, but it accounts for a fraction of one percent of the federal judicial budget, and for an infinitesimally small fraction of the total federal budget. Economists will say these are not all the costs—that we must include the loss to the economy because these people perform jury service instead of something more productive. Perhaps this is so. I believe, however, that jury service is not only an enjoyable experience for most jurors, but also, importantly, that jury service increases their respect for the legal system. Given our general mistrust of the law, jury service is an asset we should not dismiss lightly.

Once we realize that the civil jury is here to stay, all of our criticism should be directed towards helping the jury to do an even better job. Consider, for instance, the old-fashioned way of instructing juries on the law at the end of the trial. Today, sensibly, many judges give preliminary instructions to their juries at the outset of the trial. I would go one step further and suggest that in longer trials judges instruct the jury every morning within specified limits. For example, the judge knows which witnesses will appear that day, and he knows the crucial points on which they will provide evidence. It would not hurt if the judge shared this knowledge every morning with the jurors. The information would focus the jury's attention and perhaps increase the jury's interest and participation in what might be a tedious trial.

Still another avenue for helping the jury would be to eliminate certain "blindfolds" on the jury. For procedural reasons, we withhold from the jury information to which the judge is privy. Professor Shari Diamond of the University of Illinois, with some colleagues, is now studying the consequences of such rules to see whether the removal of these "blindfolds" would improve jury performance.²⁰

At present, the most fashionable point of attack against the civil jury is that it is unable to cope with complex trials. The problem is potentially serious, but before we jump to conclusions, we should explore more systematically the jury's performance in those

¹⁹ Letter from M.L. Ralph Mecham, Director of the Administrative Office of the United States Courts, to the author, April 5, 1988.

²⁰ See Shari Seidman Diamond, Jonathan D. Casper and Lynne Ostergren, *Blindfolding the Jury*, 52 L & Contemp Probs 247 (Autumn 1989).

complex cases. We should analyze our collective experience on how well or poorly jurors perform in such cases in order to gain a perspective on the size and the structure of the problem—if, in fact, there is one. We might include in our research, for comparison, an exploration of how well, or how poorly, judges have performed in such cases. Many a complex case has suffered from “mismanagement” when tried solely before a judge. Moreover, jury trial “monstrosities” that last one year, two years and longer should not be blamed on the jury. No trial should last that long, and an imaginative judge should find a way to reduce the length.

In recent years, a new research tool has emerged that allows us to learn how juries go about their business: the mock trial. We can use it, not as is usually done to foster settlement, but in a way that allows us to learn in detail how juries think and deliberate. In mock trials we are able to observe jury deliberations through one-way mirrors or through other appropriate monitoring. I do not mean to anticipate the findings of more systematic research, but it may suffice to report here that whenever I have seen a great trial lawyer watch, often for the first time, a jury actually deliberate, he or she is, as a rule, astounded at how intelligent the process is and at how effectively 12 jurors of varying abilities perform their difficult tasks.

I come to the end of my remarks concerning what my late friend and colleague Harry Kalven has called the “elegant experiment of the jury.” It would seem that the civil jury has passed the experimental stage. In spite of all the efforts to diminish its role or to do away with it entirely, the jury has remained a robust institution. Dean Griswold’s resentment of the juror-as-amateur in civil cases remains unconvincing. Harry Kalven wrote in response to Griswold a beautiful essay he named “The Dignity of the Civil Jury.” In it he points out that nobody ever doubted that these same amateurs are fit to make decisions over life and death in criminal cases.²¹

To be sure, very few countries have civil juries, and many countries have no juries at all. I am not here to argue that we *must* have the civil jury. But since we do have it, and since it enjoys wide and growing acceptance by the community, I think we should strive to make it even better; whatever criticism we have should be constructive.

²¹ Kalven, 50 Va L Rev at 1067-68 (cited in note 16).

There is one final thought I want to leave with you. By the vagaries of history, the civil jury has become a uniquely American institution. It has been recognized as such since Thomas Jefferson's time. Let us continue to treat the civil jury with the respect it has earned by surviving with honor two centuries of doubts and criticism.