THE DIGNITY OF THE CIVIL JURY

Harry Kalven, Jr.*

Having taken one of the longest and most deliberate looks at the jury in the history of that institution—as director of the University of Chicago Jury Project—Professor Kalven concludes first that contemporary criticism centers too largely on somewhat extraneous considerations and too little on the central issue—the quality of jury-made as opposed to judge-made decisions. After pointing out that the extraneous issues—particularly the delay allegedly involved—are less critical than is widely supposed, he draws on the jury study data to show that juries are not baffled by the intricate case and do not have the simple biases with which they are credited or discredited. Rather, they differ with judges just enough to “make it interesting” and to suggest that there is a special brand of “jury equity” which the author does not here expound in any detail but which he admires.

A FEW years ago I had occasion to write a paragraph about the jury which seems so apt for the purpose of introducing the present discussion that, rather than attempt a paraphrase, I risk the gracelessness of opening with a direct quotation from myself.

The judge and jury are two remarkably different institutions for reaching the same objective—fair, impersonal adjudication of controversies. The judge represents tradition, discipline, professional competence and repeated experience with the matter. This is undoubtedly a good formula. But the endless fascination of the jury is to see whether something quite different—the layman amateur drawn from a wide public, disciplined only by the trial process, and by an obligation to reach a group verdict—can somehow work as well or perhaps better.1

The passage suggests what I hope is the proper stance for discussing the merits of the jury system. The jury is almost by definition an exciting and gallant experiment in the conduct of serious human affairs; it is not surprising that virtually since its inception it has been embroiled

*Professor of Law, University of Chicago Law School. A.B. 1935, J.D., 1938, University of Chicago.

in controversy, attracting at once the most extravagant praise and the harshest criticism. Nor is it surprising that the issue cannot be narrowly focussed or definitively put to rest.

For the past several years at the University of Chicago Law School we have been engaged in a major empirical research project dedicated to discovering facts about contemporary jury behavior. The materials are rich and complex and furnish ammunition for both sides of the argument; and ideally we should let the systematic reporting of the research speak for itself in appropriate and balanced detail. Unfortunately, as seems to be the case with most large-scale research projects, it is taking longer than anticipated to put the results into publishable book form, and the data most relevant to the civil jury have not as yet been reported.

I shall therefore attempt no more in the present essay than to offer certain reflections of my own on the jury and the debate which surrounds it, documented by a selective sampling of the project materials.


Another distinguished New York jurist, Judge Hart, has recently joined the debate on the side of the jury. See HART, LONG LIVE THE AMERICAN JURY (1964).


4. The project has been an interdisciplinary collaborative effort, and the research to which I shall be making reference is largely that of my colleagues, in particular Hans ZEISEL, Fred STRODTBECK, and Dale BROEDER. Although I am much indebted to them and to others on the project for the stimulus of innumerable discussions, the views on the jury herein expressed are my own.
Classic debate over the jury went properly to the quality of its performance, to its competence for its task. More recently, however, the debate has tended to go off on other issues. First, there has been the concern with court congestion and the civil jury's contribution to it. Second, there has been the resurgence of interest in auto compensation plans which would effect a major reform of substantive law and, as an incidental by-product, abandon the jury, thus reducing enormously the civil jury's domain.

These are both arresting and complex topics, but I submit that they are largely irrelevant, and should like at the outset to clear them from the path of discussion of the basic issue: the value of the jury as an institution for adjudication.5

The point is perhaps clearest with respect to the compensation plan.6 When one speaks in this context of the merits of the jury trial in personal injury cases, the objection is usually not to the jury trial as a distinctive mode of trial but to the common-law systems of negligence and damages. The reform is aimed not at the jury, but at the substantive criteria for determining what compensation, if any, accident victims are to receive. The serious arguments for substantive change would remain the same had the jury never been involved in these cases. The target of reform is the uneven incidence of common-law compensation. Further, the hope of such proposals is not simply to do away with jury trials but to make any trial unnecessary. In varying ways all plans envisage a relatively automatic paying of insurance claims, and so simplify the criteria for recovery as greatly to reduce the likelihood of contested cases. Basically, therefore, such proposals are no more relevant to debate over the merits of the jury system than would be a scheme for reducing or eliminating auto accidents themselves.

There is, however, one noteworthy detail here. Despite the fact that one could have a plan which retained jury trial for whatever few controversies were not disposed of by negotiation, all plans appear to transfer such residual controversy into administrative channels. Although the point receives notably little discussion in the various pro-

5. I shall also skip another familiar topic in the modern jury debate—the painless disappearance of the civil jury in England. While this may be high evidence that a civilized people can give up the civil jury and remain civilized, this surrender of the jury is not a strong precedent for the debate because of differences between the English and American jury trial situations.

posals, there are perhaps several reasons for this. But, in any event, if respect for administrative expertise is a reason for thus disposing of residual cases it is worth noting that the case for establishing an administrative agency seems upside down here. Both the liability issue and the damages issue would, under a plan, be substantially simpler than those which are now, at common law, left to the jury. The plans thus appear to be following the curious sequence of first simplifying the issues and then shifting them to an allegedly more expert tribunal. It is possible, however, to take an exactly opposite view of the matter; namely, that the jury with its common sense and feel of the community is the "expert" tribunal for the two great distinctive issues posed by the common law: drawing the profile of negligence and handling the individual pricing of damages. Perhaps the reason compensation plans have so readily surrendered the jury is that the distinctive strengths of the jury are no longer required.

The concern over court congestion is not quite so easily dismissed. It is fashionable today to complain that the time costs of the jury trial have made it a luxury that hard-pressed urban court systems can no longer afford. Here, fortunately, our researches have advanced to the stage of publication, and in our volume, Delay in the Court,\(^7\) Hans Zeisel, Bernard Buchholz, and I made a careful analysis of the jury's role in causing delay. Our study was confined to a single court system, the Supreme Court of New York County (Manhattan), but the analysis was broad enough to make it relevant to the problem of court delay generally. Several points, more fully developed in the book, may be usefully recapitulated here.

Jury trials can contribute to delay only if it takes longer to try a case to a jury than to try the same case to a judge alone.\(^8\) The point, therefore, must be: If all cases now tried to juries were tried to judges, there would be a sufficient saving of trial time to make a significant contribution to the reduction of backlog and the elimination of delay. Thus, jury trial can be said to "cause" delay only in the special sense that the failure to use a remedy can be said to cause the continuation of a disease. Use of the jury is a cause of delay only in the sense that use of the combined trial of liability and damage issues or the exclusive

\(^7\) Zeisel, Kalven & Buchholz, Delay in the Court (1959) [hereinafter cited as Delay in the Court].

\(^8\) See id. at 71; Zeisel, The Jury and the Court Delay, Annals, March 1960, p. 46.
reliance on adversary medical experts—rather than split trials or impartial medical experts—is a cause of delay.⁹

Confusion about the role of the jury and its effect on delay was deepened in the New York court by the fact that four separate trial calendars were employed:¹⁰ general bench trials, general jury trials, personal injury bench trials, and personal injury jury trials. Further, the New York practice was to grant a wholesale preference to cases on the first three calendars. The result, of course, was that only the personal injury jury calendar was delayed; and this was often taken as evidence that the personal injury jury trial was the cause of the delay. The thirty-nine-month delay figure credited to the personal injury jury trial at the time of our study was simply a consequence of the calendar arrangement; if cases with blond and brunette plaintiffs had been given automatic preferences in the same way, it would have appeared by the same logic that red-headed plaintiffs were the cause of the delay. Indeed, we estimated that had New York given up its preference scheme the average delay would have dropped to ten months.

We return then, to the central point: How much longer is a jury trial than a bench trial? Estimates by experienced judges and lawyers have varied widely; and it is surprisingly difficult to arrive at a satisfactory answer since we cannot try the same case by each method with a stopwatch in hand. Further, since there is good reason to believe that cases tried to a jury are in many respects different and more complex than cases in which a jury is waived, we cannot arrive at an answer simply by comparing a sample of jury trials and a sample of bench trials. We were fairly successful in extricating ourselves from this methodological impasse. By using a series of estimates,¹¹ we reached the conclusion that on the average a bench trial would be 40 per cent less time consuming than a jury trial of the same case. As far as I know, this 40 per cent figure remains the best estimate of the time savings.¹²


¹⁰. DELAY IN THE COURT 7, 29, 200, 271.

¹¹. In brief, we controlled the number of witnesses and used, in addition to statistical comparison, estimates derived from two surveys—one of trial judges and one of trial lawyers. See DELAY IN THE COURT 75-78.

¹². Judge David Peck in a widely publicized estimate has said that a jury trial takes 2½ times as long as a bench trial. In fairness, however, this is not as different from our 40% estimate as it may seem at first since the base is not the same. In our estimate the length of the jury trial is used as the base and in Judge Peck's estimate the length
The 40 per cent time cost is, to be sure, not trivial, and it will be weighed differently depending on one's view of the jury otherwise. However, this estimate, standing alone, does little to advance the discussion, regardless of its accuracy. A chief point of our study was to relate the impact on delay of abolishing the jury to the impact on delay of other remedies that were not being urged and thus to attempt to obtain a "price tag" for the civil jury system.

There are four alternative "remedies" to be compared with abolition of the jury:

(1) The New York court at the time of our survey had a total of twenty-six judges, nineteen of whom were sitting in the law division. It was our estimate that abolition of the jury in personal injury cases would have the same impact on court congestion as the appointment of 1.6 judges.\textsuperscript{13} The New York court is not in all respects typical, and the savings would be somewhat larger in many other courts. We would suggest, however, that before the jury is sacrificed on behalf of court congestion, a serious estimate be made of how many additional judges would be required to have the same impact on that delay.

(2) The second alternate remedy is more dramatic. In 1956 New York had experimented with a summer session as a way of increasing judicial manpower without adding judgeships. In effect the plan required that each judge surrender just two weeks of a three-month summer vacation. This scheme was abandoned after a one-year trial, due as much, perhaps, to the irritation of the trial bar as to that of the trial bench. However, we estimated that had New York continued with the summer session plan, the impact on delay would have been the same as that of 1.5 additional judges—or the same as the savings from abolition of the personal injury jury trial.\textsuperscript{14}

(3) A few years ago the Federal District Court for the Northern District of Illinois initiated use of the split trial—that is, separate trials of the liability and the damage issues. My colleagues, Hans Zeisel and Thomas Callahan, have made a careful study of the first two years of experience under the rule and conclude that its full use would save approximately 20 per cent of current trial time—or about half the saving to be expected from abolition of the jury.\textsuperscript{15}

These three comparisons make the 40 per cent estimate more mean-

\textsuperscript{13} See \textit{Delay in the Court} 82.
\textsuperscript{14} See \textit{Id.} at 176.
\textsuperscript{15} See Zeisel & Callahan, \textit{supra} note 9.
ingful and converge on a conclusion: If the case against the jury is that its abolition is to be considered a remedy for court congestion, then the proper topic is court congestion and what else can be done about it. When the price tag for the jury system is, as in New York, the appointment of 1.6 new judges, or the curtailing of summer vacations by two weeks per judge, or vigorous use of other remedies such as split trials, it seems that the jury is being sold for too low a price. In any event, responsible discussion of the jury’s contribution to delay must confront these facts.

There is a fourth set of figures that should be considered. We were able to compare a sample of New Jersey personal injury jury trial cases with a sample of New York personal injury jury trial cases; the two samples were made roughly comparable. Analysis showed that the New Jersey cases, on the average, were being tried 40 per cent faster than the New York cases. Analysis of a sample of trial transcripts, etc., was not very successful in unlocking the secret of New Jersey’s speed, but the data strongly suggested that it is feasible to speed up the jury trial. It is arresting, indeed, that the time margin of New Jersey jury trials over New York jury trials is about equal to that of the New York bench trials over the New York jury trials, or the amount of time hoped to be saved by abolishing the jury.

The 40 per cent figure does not, to my mind, make out a persuasive case against the jury on grounds of court congestion alone. And there is a further point of some generality. It can well be argued that reduction of delay is a poor ad hoc reason for tampering with the jury system in any event. It is important that the pressures generated by the very real and stubborn problems of court congestion not be dealt with in a fashion which might permanently affect the quality of our justice. Delay is not a sufficient reason for altering the jury apart from consideration of the quality of the jury as an adjudicator. At most delay is an additional straw in the calculus of those already dissatisfied with the performance of the jury—and, as the New York study shows, the straw is not a very heavy one.

II

We are ready, then, for the proper issue about the jury: the quality of its performance.

16. See Delay in the Court 94.
17. See Zeisel, supra note 8, at 52.
As we come to the merits of the institution, it may be useful to sketch three main heads under which criticism and defense of the jury have fallen.

First, there is a series of collateral advantages and disadvantages such as the fact that the jury provides an important civic experience for the citizen; that, because of popular participation the jury makes tolerable the stringency of certain decisions; or that because of its transient personnel the jury acts as a lightning rod for animosity and suspicion which might otherwise center on the more exposed judge; or that the jury is a guarantor of integrity since it is said to be more difficult to reach twelve men than one. On the negative side it is urged that jury fees are an added expense to the administration of justice; that jury service often imposes an unfair economic and social burden on those forced to serve; and that exposure to jury service disenchants the citizen and leads him to lose confidence in the administration of justice.

Although many of these considerations loom large in the tradition of jury debate, they are unamenable to research and will not concern us here. We have, however, collected considerable data bearing on the reaction of jurors to service. It will suffice for present purposes simply to state that there is much evidence that most people, once actually serving in a trial, become highly serious and responsible toward their task and toward the joint effort to deliberate through to a verdict. Whether they are good at the job may be open to question, but that they are serious about it and give it a real try is abundantly documentable. Anecdotes about jury frivolity and irresponsibility are almost always false. Further, we can document that jury service does not disenchant, but actually increases the public's preference for trial by jury. A distinction must be made between the attitude of those who have never served and seek to avoid service and the response of the juror once he has been "drafted," so to speak. Finally, the things jurors do not like about the system are quite extrinsic housekeeping defects which can and should be corrected, such as the waiting, the loss of income due to serving, and the often miserable quarters in which they are kept. The heart of the matter, the trial itself and the deliberation, is very often a major and moving experience in the life of the citizen-juror.

The second cluster of issues goes to the competence of the jury. Can it follow and remember the presentation of the facts and weigh the conflicting evidence? Can it follow and remember the law? Can it deliberate effectively?

The third cluster of issues goes to the adherence of the jury to the
law, to what its admirers call its sense of equity and what its detractors view as its taste for anarchy.

The latter two issues go to the heart of the debate and have long been the occasion for a heated exchange of proverbs. Further, they may seem so heavily enmeshed in difficult value judgments as to make further discussion unpromising. Yet it is precisely here that our empirical studies can offer some insight, although they too cannot dispose fully of the issues.

When one asserts that jury adjudication is of low quality, he must be asserting that jury decisions vary in some significant degree from those a judge would have made in the same cases. If he denies this and wishes to include the judge, he has lost any baseline, and with it any force, for his criticism. While it is possible to say that even those juries whose decision patterns coincide with those of judges are nevertheless given to caprice, lack of understanding, and sheer anarchic disobedience to law, it is not likely that the critic means to go this far. If he does, he may have an interesting point to make about the legal order as a whole, but he has lost any distinctive point about the jury as a mode of trial. Further, trial by judge is the relevant and obvious alternative to trial by jury. To argue against jury trial is, therefore, to argue for bench trial.

Can one say anything, then, about how often judge and jury decisions agree and how often they differ? We can. One of our major research ventures has been a massive survey of trial judges on a nationwide basis. With their cooperation we were able to obtain reports on actual cases tried to a jury before them, to get the jury’s verdict in each case, and to get from the judge a statement of how he would have decided the case had it been tried to him alone. Finally, the trial judge gave us his explanation of any instance of disagreement. We have, in this fashion, collected from some 600 judges, reports on some 8,000 jury trials throughout the United States for each of which we have an actual jury verdict and a hypothetical verdict from the bench. We are just completing a full, book-length, analysis of the picture thus obtained for criminal cases and plan in the ensuing year to complete the companion book reporting on the civil cases. 18 The methodological details about the sample, about the reality and accuracy of the judges’ responses, and about the logic by which we infer explanations for the disagreements must be left to the book presentation. 19 We are satisfied that

18. See note 3 supra.
19. Some preliminary remarks about the methodological problems involved are found
the methods were sound and that we have developed an effective tool for studying the nature of the jury’s performance.

While there are rich nuances in the patterns of jury disagreement that cannot be detailed here, we can report the main findings and place the jury system against the baseline of the bench trial system, thus giving an empirical measure of the quality of the jury performance. We shall do so first for criminal cases and then for civil cases; the contrast may help to put the performance of the civil jury in perspective.

It is evident that the matching of verdicts in criminal cases yields four possible combinations: cases where judge and jury agree to convict, where they agree to acquit, where the judge would acquit and the jury convict, and where the jury would acquit and the judge convict. Hence, the quantitative results can be readily summarized in a fourfold table. Table 1 gives the data on the criminal cases.

Table 1

Judge and Jury Agreement and Disagreement on Guilt in Criminal Cases

<table>
<thead>
<tr>
<th>Jury Found:</th>
<th>For Defendant</th>
<th>Against Defendant</th>
<th>Total Judge</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judge Would Have Found:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>For Defendant</td>
<td>13</td>
<td>2</td>
<td>15</td>
</tr>
<tr>
<td>Against Defendant</td>
<td>18</td>
<td>67</td>
<td>85</td>
</tr>
<tr>
<td>Total Jury</td>
<td>31</td>
<td>69</td>
<td>100</td>
</tr>
</tbody>
</table>

The table contains two main conclusions. First, the jury and judge agree in the large majority of cases; to be exact in 13 per cent plus 67 per cent or 80 per cent in all. Second, in the remaining 20 per cent of the cases, in which they disagree, the disagreement is generally due to the jury’s being more lenient toward the criminal defendant. In summary, the overall performance of the jury is such as to produce a high degree of conformity to that of the judge, but with elbow room left for the jury to perform a distinctive function. Or, as we have put it on other occasions, the jury agrees with the judge often enough to be reassuring, yet disagrees often enough to keep it interesting.


20. Tables 1 and 2 have been simplified by the omission of hung juries.
The Dignity of the Civil Jury

Table 2 gives the companion figures for personal injury cases.

Table 2

Judge and Jury Agreement on Liability in Personal Injury Cases

<table>
<thead>
<tr>
<th>Jury Found:</th>
<th>For Plaintiff</th>
<th>For Defendant</th>
<th>Total Judge</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judge Would Have Found:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>For Plaintiff</td>
<td>44</td>
<td>10</td>
<td>54</td>
</tr>
<tr>
<td>For Defendant</td>
<td>11</td>
<td>35</td>
<td>46</td>
</tr>
<tr>
<td>Total Jury</td>
<td>55</td>
<td>45</td>
<td>100</td>
</tr>
</tbody>
</table>

Again we see that there is massive agreement; in the personal injury cases it runs 44 per cent plus 35 per cent or 79 per cent, almost exactly the same as for the criminal cases. Here, however, the pattern of disagreement is much more evenly balanced. The judge disagrees with the jury because he is more pro-plaintiff about as often as the jury disagrees with him because it is more pro-plaintiff. Whereas the greater leniency of the jury toward the criminal defendant is congruent with popular expectations, the equality of pro-plaintiff response between judge and jury in civil cases is in sharp contrast to popular expectations.

It must be added that Table 2 does not present quite the whole picture. If we look for the moment simply at the 44 per cent of the cases where both decide for the plaintiff, we find considerable disagreement on the level of damages. In roughly 23 per cent the jury gives the higher award, in 17 per cent the judge gives the higher award and in the remaining 4 per cent they are in approximate agreement. More important, however, is the fact that the jury awards average 20 per cent higher than those of the judge.

The two tables considered together imply that the jury's disagreement with the judge is not a random matter; they indicate something more interesting about the nature both of judge and jury as decision makers. The precise quality of that something cannot be properly sketched here. We have had considerable success in finding explanations for the instances of disagreement and thus in reconstructing a full and rounded rationale. Our thesis is that it is the jury's sense of equity, and not its relative competence, that is producing most of the
disagreement. Thus, debate over the merits of the jury system is in the end debate over the jury as a means of introducing flexibility and equity into the legal process.

There are, however, some further observations about the issue of jury competence. We have been told often enough that the jury trial is a process whereby twelve inexperienced laymen, who are probably strangers to each other, are invited to apply law which they will not understand to facts which they will not get straight and by secret deliberation arrive at a group decision. We are told also that heroic feats of learning law, remembering facts, and running an orderly discussion as a group are called for in every jury trial. In the forum of armchair speculation, a forum which on this topic has enrolled some of the most able and distinguished names in law, the jury often loses the day.

The two basic tables giving the architectural statistics of the jury's performance vis-à-vis the judge's performance have already indicated that the armchair indictment of the jury must go awry somewhere. We can, however, in a variety of ways document more securely our assertion that intellectual incompetence or sheer misunderstanding of the case is not a problem with the jury.

In the judge-jury survey the trial judge, among other things, classified each case as to whether it was "difficult to understand" or "easy." We can therefore spell out the following hypothesis to test against the judge-jury data. If the jury has a propensity not to understand, that propensity should be more evident in the cases rated by the judges as difficult than in those rated as easy. Further, disagreement should be higher in cases which the jury does not understand than in cases which they do understand since, where the jury misunderstands the case, it must be deciding on a different basis than the judge. We reach, then, the decisive hypothesis to test, namely, that the jury should disagree more often with the judge in difficult cases than in easy ones. However, when we compare the decision patterns in easy cases with those in difficult cases we find that the level of disagreement remains the same.

This rather intricate proof is corroborated by the fact that although

21. For varying expressions of this view see Frank, Courts on Trial (1949); Green, Juries and Justice—The Jury's Role in Personal Injury Cases, 1962 U. ILL. L.F. 152; Sunderland, Verdicts, General and Special, 29 YALE L.J. 253 (1920).

22. It might be noted that some 85% of the cases were rated by the judges as falling in the "easy" category.

23. The data here discussed come from the study of criminal cases; there is no reason to believe the point will not hold for civil trials as well.
the trial judges polled gave a wide variety of explanations for the cases in which there was disagreement, they virtually never offered the jury’s inability to understand the case as a reason.

Any mystery as to why the plausible a priori surmises of jury incompetence should prove so wrong is considerably reduced when we take a closer look at the dynamics of the jury process, a look we have been able to take as a result of intensive and extensive post-trial juror interviews in actual cases and as a result of complete observation of jury deliberations in mock experimental cases, a technique used widely in the project.24 We observed that the trial had structured the communication to the jury far more than the usual comment recognizes and had made certain points quite salient. A more important point is that the jury can operate by collective recall. Different jurors remember, and make available to all, different items of the trial so that the jury as a group remembers far more than most of its members could as individuals. It tends, in this connection, to be as strong as its strongest link. The conclusion, therefore, is that the jury understands well enough for its purposes and that its intellectual incompetence has been vastly exaggerated.

Often in the debate over the jury the capacity of one layman is compared to the capacity of one judge, as though this were the issue. The distinctive strength and safeguard of the jury system is that the jury operates as a group. Whether twelve lay heads are better than one judicial head is still open to argument, but it should be recognized that twelve lay heads are very probably better than one.

It has been a major characteristic of debate over the jury that its critics are quick to announce at the outset that they are talking only of civil juries—their argument is not meant to impeach juries in criminal cases. The view I have been developing in this paper sees the jury as an adjudicating institution with certain basic characteristics and qualities which would be relatively constant as its business moves from civil to criminal cases. The question I wish to explore for a moment is the logic by which one would abolish the civil jury and cherish the criminal jury.25 I recognize, of course, that as a practical matter there are great

24. The experimental jury technique was developed for the project by Fred L. Strodtbeck and some aspects of the method are discussed in Strodtbeck, Social Process, the Law and Jury Functioning, in LAW AND SOCIOLOGY 144 (Evan ed. 1962). The forthcoming volume, SIMON, THE JURY AND THE DEFENSE OF INSANITY (see note 3 supra) will be the first full length publication of the results of a jury experimental sequence.

25. Consider, for example, the conclusion of the careful essay on the civil jury by Milton Green:

(T)he defects appear to be nonremediable. To be a jury, within constitutional
differences here in terms of both constitutional requirements and popular reaction. I wish, however, to look theoretically at this matter. If the jury operates in a civil case as its critics say, can one justify retaining such an archaic and incompetent institution in criminal cases?

Dean Griswold, for example, has recently observed:

But 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?  

Dean Griswold was arguing for the abolition of the jury in civil cases. Is there not an obligation to try this biting premise on the criminal jury as well? For these grave and important controversies the jury should not be any abler; it must still be "the apotheosis of the amateur" and the twelve men must still be "selected in various ways for their lack of general ability."

The answer to all this, of course, is likely to be that we favor the jury in criminal cases as a safeguard for the accused, and that we need no corresponding safeguard in the civil case. There are two things to note about this line of reasoning, however. First, it would seem to be waiving any objections about the jury's incompetence and resting the case on the jury's sense of equity. Second, since it recognizes that introducing equity into the legal scheme is a characteristic of the jury, is there sufficient basis for applauding the jury's brand of equity in criminal cases while being critical of it in civil cases?

III

The discussion thus far has been regrettabley general and colorless and removed from the particular issue or the particular case. I should like

---

definitions, it must be a fair cross-section of the community. As such it will never be a competent fact-finder, and it will never be able to make an intelligent application of the law to the facts. The inescapable conclusion is that, in the interest of dispatch and justice, the jury should be abolished.

It may be argued that this is all very well in theory, but the public will never stand for it. It would take a constitutional amendment to eliminate the jury and the people will not give it up. I would readily agree if we were talking about eliminating the jury in criminal cases, and the people would be right. It is quite another matter to ask the public to give up the jury in civil cases, to ask people to give up an irksome chore which they frequently seek to avoid. . . . Average citizens may be inept as fact-finders and law-appliers, but they generally have good common sense and are able to recognize an important public need created by the changing pace of our time.

Green, supra note 21, at 166-67.

to try to compensate a bit for this abstractness by pausing to explore one pocket of “jury law” as an example of the human flavor of the jury process and of the ambivalence of the legal system toward the jury’s precise function. The topic is the jury’s handling of counsel fees in the personal injury case.27

I begin with an anecdote that comes, not from our study, but from a bar meeting I attended a few years ago. It seems a lawyer chanced to overhear a jury deliberating in a personal injury case. They had agreed on liability and were moving to the issue of damages. Their first step was to agree on a fee for the plaintiff’s lawyer. They then proceeded to multiply it by three to get the damages!

What do the materials from our study do to the picture of the jury suggested by this story? To begin with we might note some points about the law within this area. Under American law counsel fees are not to be awarded as part of the plaintiff’s damages. This rule, although clear, embodies a controversial policy which is not uniformly followed in other legal systems.28 Second, the jury normally is not instructed about fees; that is, they are not told they are not to award them. The theory is that it is enough to explain the heads under which damages are to be awarded and that it would be dangerous to mention the fee problem for fear that the negative instruction might boomerang. Fees along with taxes and interest are therefore instances of what may be called “silent” instructions.29

What then does the jury do about fees? It is curiously difficult to come to a firm conclusion, but the data run about as follows. The jurors often discuss fees in the course of deliberations and see no impropriety in so doing. They are frequently but not invariably well informed about the one-third contingent fee contract. Do they then add the fee? We are inclined to conclude not. It is more that fees provide a useful talking point in the deliberations over damages, functioning as a device in argument to facilitate agreement. And the salience of fees in the discussion appears to vary inversely with the clarity of the damage measurement. Thus, in a series of property damage cases where the damages had objective referents, the jury did not discuss fees. Furthermore, we never found a jury determining the damage total and then as a group deciding on the fee and adding it.

27. See generally Kalven, The Jury, the Law, and the Personal Injury Damage Award, 19 Ohio St. L.J. 158, 163, 176 (1958).
28. See McCormick, Damages § 71 (1935); Delay in the Court 290.
I shall conclude this brief sketch with an anecdote that does come from our own files. In one of the experimental jury deliberations there was a sharp split in the jury over the damages. The majority faction favored 35,000 dollars and the minority 25,000 dollars and after considerable discussion the impasse seemed firm. Finally, one of the majority raised the fee issue for the first time and reminded the holdouts that the plaintiff would have to pay his lawyer. The holdouts agreed that this was a point they had not previously considered and yielded rather rapidly. An overly logical member of the majority then raised the point that in reaching their figure of 35,000 dollars they had not considered fees either. He was summarily silenced by the other majority jurors, and a verdict of 35,000 dollars was unanimously agreed upon!

The anecdote has echoes at the appellate court level. In *Renuart Lumber Yards, Inc. v. Levine,* a relatively recent Florida case, the court found an award of 75,000 dollars excessive, estimated that some 30,000 dollars must have been for pain and suffering, and ordered a remittitur. Judge Hobson in dissent argued that for this purpose the court should consider the facts of life as to fees. He said:

Moreover, although there is no legal basis for the inclusion of an attorney's fee in the judgment it is a matter of common knowledge that in personal injury actions lawyers do not customarily perform services for the plaintiff gratuitously. As a practical proposition it is indeed probable that after paying for the services of his attorney appellee would have little, if any, of the $30,000 left. . . . Such circumstance cannot be ignored by the writer in performing his part of this Appellate Court's duty to determine whether the judgment is so grossly excessive as to shock the judicial conscience.  

Presumably Judge Hobson would have held it error for the jury to be instructed to consider fees. Yet he feels it appropriate to consider them himself for the special purpose of resolving the issue before him. We are tempted to say that the jury, insofar as we can tell, treats fees much the same as the judge did—not as simply additive but as an acceptable reason for not rejecting a given award as excessive. 

Finally, I suspect the law likes the fee rule the way it is. The fee question as an explicit issue of policy is difficult to resolve. Since we cannot decide what we want to do about fees as damages, we are happy to let the whole troublesome issue go to the jury. The jury's performance with respect to counsel fees can be read as furnishing both

30. 49 So. 2d 97 (Fla. 1950).
31. Id. at 102.
an argument for the civil jury and an argument against it. My immediate point in reviewing it was not so much to sharpen the debate as to give some indication of how complex jury decision-making behavior is.\textsuperscript{32}

It has been a traditional point of argument against the jury that it ameliorated the harsh rules of law just enough to dampen any enthusiasm or momentum toward proper reform. And the fee example may support this. It is easy to say that a rule of law is either sound or unsound. If it is sound it should be enforced as written; if it is unsound it should be changed by proper process. This logical scheme, however, seems to me too rigid. Reform of private law is notoriously hard to effectuate, and in the long interim there is room for the jury’s touch. Further, there is not inconsiderable evidence that jury resistance to a rule is often a catalyst of change.\textsuperscript{33} Finally, and perhaps most important, we have a sense that many of the jury’s most interesting deviations would be exceedingly hard to codify and incorporate by rule.

The content of jury equity in civil cases is obviously a topic of high interest, and we have not yet documented it fully in our studies. There are, however, three or four major points to be at least noted here. First, as has been long recognized,\textsuperscript{34} in certain areas of law jury equity is fully legitimated by the system. Here, it is not what we suspect the jury may do in bending the law; it is what the jury is instructed to do according to the official view. For example, in defamation it is the jury’s official task to define the content of the defamatory standard, and in negligence cases its task is to define negligence for the particular conduct involved.\textsuperscript{35} Although I realize that history and comparative

\begin{itemize}
\item \textsuperscript{32} The difference between the two anecdotes about fees can be taken as the difference between the lore of the bench and bar and the systematic empirical study of the behavior. In a sense the systematic study of the jury simply rediscovers truths that the bar has long known; but I would hasten to add that when so rediscovered the bar’s “truths” appear to be half-truths.
\item \textsuperscript{33} See, e.g., Vascoe v. Ford, 212 Miss. 370, 54 So. 2d 541 (1951), where the court, in explicitly changing its rule as to the allowance of damages for humiliation from scars, recognized the jury’s refusal to follow the old rule.
\item \textsuperscript{34} See Holmes, The Common Law 98-103 (Howe ed. 1963).
\item \textsuperscript{35} This familiar point as to negligence is made fully explicit in the new standard jury instructions made mandatory in Illinois by ILL. SUP. CR. R. 25-1:
\begin{quote}
When I use the word negligence in these instructions, I mean the failure to do something which a reasonably careful person would do or the doing of something which a reasonably careful person would not do under the circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under these circumstances; that is for you to decide.
\end{quote}
\end{itemize}
law are against the notion, I cannot but wonder whether a negligence criterion would have developed without the jury—and whether it can make any real sense without a jury.

Second, there are three big points of jury equity on which our research may alter the popular view. The jury does not simply ignore the contributory negligence rule and apply a comparative negligence formula of its own; this view, popular among torts professors, is at most a half-truth, and the less interesting half at that.

Again, it is perhaps evident from Table 2 that the jury has not, in keeping with the mood of the day, silently revolutionized the basis of liability so that today we have in effect a strict liability system.36

Finally, the jury in personal injury cases has perhaps radically altered the official doctrine on computing damages; it tends to price the injury as a whole in a fashion analogous to the use of general damages in defamation.37

And as a final teaser it should be recalled that the jury, as Table 2 warns, is not monolithically pro-plaintiff in personal injury cases. The thesis here is complex and centers on the distribution of the equities vis-à-vis the existing legal rules. The jury tends to follow the equities, in a very loose and rough sense, and the law has not uniformly deprived the plaintiff of them. The jury's response to collateral benefits, to imputed negligence, and, on occasion, to the use of criminal statutes to establish negligence may be quickly cited as instances of what we have in mind here.

In the end, then, debate about the merits of the jury system should center far more on the value and propriety of the jury's sense of equity, of its modest war with the law, than on its sheer competence. Criticism of the jury raises a deep, durable, and perplexing jurisprudential issue, and not a simple one of the professional engineer versus the amateur.

IV

On most issues of policy one may question the relevance of an opinion poll as an aid to forming his own opinion. In the case of the jury, however, an opinion poll may have extra force. In any event, the final item of data I wish to report is a survey we conducted among a national sample of trial judges as to their opinions of, and attitudes toward, the

37. See Kalven, supra note 27.
jury system. The trial judge's views as to the value of the jury are especially entitled to respectful hearing: he is the daily observer of the jury system in action, its daily partner in the administration of justice, and the one who would be most affected if the civil jury were abolished.

The questionnaire was elaborate and reflected a series of specific points about which we had become concerned during the life of the project. When reported in full, it should yield a rounded profile of contemporary judicial attitudes toward the jury and toward specific reforms that might increase its usefulness. At the moment we shall rest with reporting two basic tables. The judges were asked to choose among three positions on the jury for criminal, and then for civil trials:

(1) On balance the jury system is thoroughly satisfactory.
(2) The jury system has serious disadvantages which could be corrected and should be corrected if the system is to remain useful.
(3) The disadvantages of the jury system outweigh its advantages so much that its use should be sharply curtailed.

There were some 1,060 trial judges in the national sample. Table 3 gives the results for criminal cases and Table 4 for civil cases.

Table 3
Trial Judges' Opinions of Jury—Criminal Cases

<table>
<thead>
<tr>
<th>Number</th>
<th>Per Cent</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Thoroughly Satisfactory</td>
<td>791</td>
</tr>
<tr>
<td>(2) Satisfactory if Certain Changes</td>
<td>210</td>
</tr>
<tr>
<td>(3) Unsatisfactory</td>
<td>29</td>
</tr>
<tr>
<td>1,030</td>
<td>100</td>
</tr>
</tbody>
</table>

Table 4
Trial Judges' Opinions of Jury—Civil Cases

<table>
<thead>
<tr>
<th>Number</th>
<th>Per Cent</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Thoroughly Satisfactory</td>
<td>661</td>
</tr>
<tr>
<td>(2) Satisfactory if Certain Changes</td>
<td>280</td>
</tr>
<tr>
<td>(3) Unsatisfactory</td>
<td>97</td>
</tr>
<tr>
<td>1,038</td>
<td>100</td>
</tr>
</tbody>
</table>
The tables require little comment. It is evident that the trial judges are overwhelmingly against sharp curtailment of the jury; that a substantial majority find the jury thoroughly satisfactory; and that this support for the jury does not decline appreciably as we shift from criminal to civil cases.\textsuperscript{38}

\section*{V}

As the second alternative offered the judges in our opinion poll suggests, it has been a strong tradition in the jury debate for one group of its supporters to specify certain reforms of the jury which would then make it a satisfactory institution. I have said nothing thus far about reforms and deliberately elect not to do so. It is not that the jury system could not conceivably be improved; nor is it that all of the specific reforms suggested are unsound. It is, rather, that the debate is over the basic architecture of a jury trial system and the basic architecture of a bench trial system.\textsuperscript{39}

I am therefore not discussing such matters as: improving the administration of jury selection systems; having the judge do the \textit{voir dire} questioning; standardizing jury instructions; summation of the evidence by the judge; comment on the evidence by the judge; use of vigorous pretrial procedures to narrow issues; whether the jury is instructed before or after the closing arguments; written versus oral instructions; special verdicts; impartial medical experts; reducing the size of the jury; eliminating the unanimity requirement; or permitting the jurors to take notes. These measures have a considerable literature in their own right and appear to constitute a good part of what is currently called judicial administration.\textsuperscript{40} In varying degrees our studies have given us data and views on virtually all of these measures. Some of the measures are ill-advised, in my view, some are trivial, and some would be definite improvements. But the case for the civil jury does not, I think, stand or fall on the adoption of any one or any combination of them.

Sometimes I suspect that the jury issue will go to whichever side does not have the burden of proof. And in the forum of policy debate

\textsuperscript{38} Another poll of judges on their attitudes toward the jury system which also finds widespread support for the jury system is reported in \textit{Hart, op. cit. supra} note 2, at 4-32.

\textsuperscript{39} Milton Green would appear to agree that the issue is basic and not conditional upon specific reforms of the jury; he would therefore resolve it against the jury. See \textit{Green, supra} note 21.

\textsuperscript{40} \textit{Elliot, Improving Our Courts passim} (1959).
the assignment of the burden of proof tends to be a debater's strategy rather than an accepted convention. Does the argument stand differently if, on the one hand, the issue is put in terms of introducing the civil jury into a system that does not have it or perhaps extending it to areas where we do not have it today, such as the Federal Tort Claims Act, than it does if, on the other hand, the issue is whether we should abolish the jury in areas where we do now have it? I think it does, and I incline toward the view that old institutions should not be changed lightly.41

We lack, I feel, fresh arguments against the civil jury, apart perhaps from delay. I cannot resist observing that we need to hear a fresher point than that the civil jury consists of twelve laymen.

Inevitably, debate over an institution as complex and long standing as the jury will continue to be inviting and will continue to be inconclusive. It should be stressed that it was not the primary purpose of our project to appraise the jury, but simply to study it. In the course of the many years of that study it should be clear that I, personally, have become increasingly impressed with the humanity, strength, sanity, and responsibility of the jury. I suspect that that is not a proper argument for it, and I profoundly agree that it would be far better to have our careful studies ready to speak for themselves and give the rounded picture.