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## THE AMERICAN JURY. By Harry Kalven, Jr., and Hans Zeisel. – WHEN AMERICANS COMPLAIN: GOVERNMENTAL GRIEVANCE PROCEDURES. By Walter Gellhorn.

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## Book Reviews

THE AMERICAN JURY. By Harry Kalven, Jr., and Hans Zeisel. Boston: Little Brown Co., 1966. Pp. 559. \$15.00.

THIS MAY BE THE MOST irritating law book ever written. It irritates more than it informs because the authors have laid hands on a goldmine of empirical data and wasted most of it. In their preface they describe their analysis of this data as "rich in unexpected impasses," presumably referring to their surprise at the abortive results of bugging a jury's deliberations. Their study is even richer in unexpected non-conclusions.

Anyone who wants to find out quickly what to expect from the 559 pages should read chapter 38 first. This is called "Methodology: Have We Studied the Wrong Thing?" The answer is yes or no depending on what the authors mean by "thing." It isn't easy to find out.

If they mean the 3576 actual jury cases that they analyzed, the answer is no, you did not study the wrong thing; but if it means the hypothetical decisions of judges who heard these cases, the answer is indeed you did. The glaring defect in their method is its meaningless assumption that in the one third of these cases where the trial judge told them that if he had decided the case he would have decided it differently, the difference would be due to some identifiable "disturbing factor" which is a "stimulus" to disagreement. It has apparently never occurred to the authors that an important function of the jury system is to protect litigants from a decision by a judge whose reaction to stimuli of a certain kind is too predictable. Anyone in contact with the practice of law in courts knows that these stimuli to predictable reactions vary greatly from judge to judge for they, like jurors, are human beings. The jury system provides protection against eccentric human behavior in the form of a judicial decision by melding diverse human prejudices into a single judgment. As the authors note, with a flash of insight that ought to have struck them at the beginning of their ten year study, "The compromise verdict must often be the practical alternative to a hung jury." (p. 477). It is also an alternative that the jury system provides to a decision by a hanging judge.

The authors' view that where there is disagreement between jury and judge, the jury's verdict is aberrant, regardless of who the judge may be, is beautifully illustrated by their Table 135, called "The Over-all Role of Defense Counsel and Prosecutor." (p. 479). The table shows that when, in the opinion of the trial judge, the

defense counsel was superior, the jury acquitted more often than the judges say they would have and that when they thought the prosecutor was superior the jury convicted more often than the judges say they would have. Ergo, say the authors, an imbalance of talent between defense counsel and the prosecutor is a "disturbing factor" that produces disagreement between judges and juries. All the table really shows is that where a judge disagrees with a jury's verdict he may be inclined to say that a superior presentation of one side of the case produced the verdict. He likes to talk as if he were immune to such a factor, but is he?

Kalven and Zeisel made no study of their judges' performance beyond reading their responses to questionnaires. We don't know how many times and in what kinds of cases appellate courts disagreed with these trial judges. If the disagreeing appellate judges were asked their opinion as to relative merits of the legal representation in the trial court, might they also explain the trial court's error as a response to superior counsel? If only juries are responsive to superior argument and preparation of a case our best trial and appellate lawyers are outrageously overpaid when they appear before judges.

I do not suggest that the authors were under any obligation to study judges if they had been content to leave judges out of their conclusions about juries. A study of jury verdicts could easily be separated from a study of judges' decisions if the students were willing to come to grips with all of the facts in the trial records. These could be analyzed and with a large sample some valid conclusions could be drawn as to what factors seem to produce abnormal jury verdicts, judged by objective legal standards. The authors of this study, however, tell us little about the facts in the trial records, as compared with the way in which the facts were presented. It was plainly more convenient to ask trial judges questions and tabulate their responses in the pseudo-scientific manner described in Chapter 28.

The true authors of what is most useful in this study are the 555 judges who generously responded to questionnaires about their jury cases. We are told that special credit is due to less than a hundred of these judges who supplied the data analyzed with respect to more than half of the total cases studied. Although these judges, at least, deserved special study themselves, since their impressions were to form the main basis for the authors' conclusions, they apparently received none.

However, the questionnaires were a first class effort to find out how trial judges think juries perform. If Kalven and Zeisel had simply published summaries of the answers they got, their study would have been a great contribution to our knowledge of the judge-jury relationship. Unfortunately, instead of summarizing these explanations of differences, they tabulated them in a weird set of statistical classifications. For this purpose they used all of the cliches that describe supposed differences between the way juries and judges behave. This resulted in tabulating those differences under such spectacularly vague headings as "Jury Sentiment About the Individual Defendant." (Chapter 15).

These tabulated differences, no matter how classified, are not based on actual decisions by anybody but the juries. The tabulated informal explanations of the judges as to why they differed with their juries are even less subject to informative statistical analysis than formal judicial opinions. Those opinions are at least rationalizations of what a judge has actually done—not explanations of what he says he would have

done. Yet the glimpses Kalven and Zeisel give us of what these judges actually said about their hypothetical disagreements with their juries are far more illuminating than all of their tables that tell us only how often they disagreed and which "disturbing factors" were present when they did so.

The most liberal use of what the responding judges actually said appears in Chapter 9, headed "Facts That Only the Judge Knew." Here we have concrete information that reveals much more about the trial judges than about juries. It may be ungrateful to carp about the author's refusal to analyze this data in terms of judicial reactions; since, after all, they were studying juries, rather than judges. Yet their failure to understand fully what this data told them about judges is simply a reflection of their failure to understand that tabulating judge-jury differences would tell very little about the value of juries.

If the judges' responses quoted in Chapter 9 are analyzed critically they show that judicial training and experience provide no guarantee that judges will be any less influenced by their personal prejudices than jurors. However, the authors misread this material as confirming that "exclusionary rules of evidence" may not achieve "the ideal" of "a trial record which contains all of the relevant information about the case." (p. 121). They evidently regard legal rules which exclude prejudicial evidence from a jury trial as interfering with an "ideal" record, if the prejudicial evidence would have moved the trial judge to decide the case differently.

They were merely analyzing the judge's knowledge of matters the jury did not know as a "disturbing factor" tending to produce disagreement between judge and jury, if we accept their own description of their method. It obviously was such a factor and no scientific talk or tables are necessary to demonstrate this fact. The truly significant and disturbing fact about the responses quoted in this chapter is that neither the responding judges nor the authors of the study seemed to recognize that these judges' personal prejudices were disqualifying. For example, a number of judges explained their differences with juries as due to personal knowledge of a defendant's prior conduct that the jury lacked and could not lawfully possess. These judges would have been disqualified to sit as jurors because of such knowledge but they apparently did not regard such knowledge as disqualifying them as judges.

The only point at which the authors seem to be disturbed over this kind of non-judicial behavior is when the judges drew a negative inference from a "previous arrest," rather than a prior conviction. Here a great white light shines through the "scientific" rhetoric; the judge is exposed to prejudicial information which the law, in its regard for the right of the defendant, aims to screen out of the evaluation of his guilt or innocence. (p. 127). But this aim of the jury system is immediately denigrated as "a libertarian luxury." (p. 127).

The authors' final conclusion about a difference resulting from prejudicial information known only to the judge is that "it reveals nothing distinctive about the jury's view of things, for if the jury knew fully what the judge knew, it would have agreed with him." (p. 133). Whether the authors are right or wrong about this sweeping and patently unscientific conclusion is beside the point. What this data should have warned them against was the smug assumption that the quality of a jury's performance may be statistically measured by tabulating disagreements between them and their trial judges. Even "when judge and jury are deciding the same

case" (p. 133) it should have been apparent to the authors that these differences are frequently accounted for by a judge's prejudices that his jury did not share. If they had understood this basic fact they would certainly have given us some data from which a meaningful comparison of judge and jury responses to given factual stimuli in the same case, could have been made. However, this kind of analysis would have forced them to talk like lawyers instead of social scientists and they were evidently determined to play the latter role, even if the facts were too cumbersome to handle in a scientific manner.

None of the judges' questionnaire responses even purports to give a full summary of all of the evidence these juries had before them because Kalven and Zeisel did not ask for it. It would therefore have been useful if the authors had taken a look themselves at at least one trial record and compared all of the facts in the record that might have moved the jury to decide the case as it did with the facts selected by the judge to explain his differing hypothetical verdict. This kind of analysis would have been a contribution that cries out to be made and these authors had a unique opportunity to make it. Instead they merely devised questionnaires, let the judges do the work and then added endless scientific looking compilations of non-compilable subject matter, all accompanied by scientific sounding explanations of what they did.

Oddly enough, the authors evidently thought they were analyzing what Herman Oliphant called the "non-verbal" aspects of the legal process. They recognized that neither a record of juror deliberations nor even the most careful interviewing of jurors would necessarily explain their votes. However, their tables ignore the obvious fact that judges are also human beings and even more reluctant than jurors to rationalize what they do, in a manner inconsistent with strict legal requirements. Perhaps the most ironic aspect of this monumental study is the authors' apparent awareness that even in their official opinions judges do not necessarily disclose the true grounds of their decisions. They quote what Oliphant said forty years ago and it bears repeating here.

"There is a constant factor in the cases which is susceptible of sound and satisfying study. The predictable element in it all is what the courts have done in response to stimuli of the facts of the concrete cases before them. Note *not the judge's opinions*, but which way they decide cases, will be the dominant subject-matter of any truly scientific study of law." (p. 490). (Emphasis added).

Presumably Kalven and Zeisel addressed themselves to the truly scientific task of finding out how juries, rather than judges, respond to the facts of the concrete cases before them. Yet they seem to suffer from some psychological block which inhibited them from finding out. I quote their concluding words of Chapter 28 in full because they illustrate a caution that, while undeniably scholarly, prevented the bold analysis their magnificent material deserved. I have taken the liberty of expressing my own disappointment by an italicized translation of what they seem to me to be saying.

"Our study of the jury, to adopt Oliphant's phrase, emphasizes the non-vocal behavior of juries." *We are aware that juries do not rationalize their criminal verdicts with any instructive vocal behavior beyond saying "guilty" or "not guilty."* "At least with respect to the decisions of juries, we are inclined to think that this early view is correct." *We think Oliphant was right in telling us to look at the facts in concrete cases to find out why jurors decide them as they do.* "We are less certain that the point

is totally well taken with respect to the judicial process." *We aren't sure of the relationship between the way judges and juries view the same facts because we haven't looked hard enough at the facts, the judges or the juries.*

"In any event, the tracing of connections between this study of jury behavior and various theories of judicial behavior, however tempting, will have to wait another day." *If you want to find out from us how jury behavior affects the judicial process you are going to have to wait a long time.*

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WHEN AMERICANS COMPLAIN: GOVERNMENTAL GRIEVANCE PROCEDURES. By Walter Gellhorn. Cambridge: Harvard University Press, 1966. Pp. 287. Cloth: \$3.95. OMBUDSMEN AND OTHERS: CITIZENS PROTECTORS IN NINE COUNTRIES. By Walter Gellhorn. Cambridge: Harvard University Press, 1966. Pp. xvi, 448. Cloth: \$6.95.

1966 WAS THE YEAR when the term "ombudsman" broke out of the jargon of politico-legal technicians and into the popular vocabulary. For this breakthrough, three practicing scholars—Professors Kenneth Davis, Donald Rowatt and the author of these two books—and one practicing politician—Representative Henry Reuss of Wisconsin deserve chief credit. For Professor Walter Gellhorn, we may say on the evidence of these admirable volumes, that 1966 was a very good year.

*When Americans Complain* originated in the 1966 Holmes Lectures at Harvard Law School. It is a highly nounced analysis treatment of various types of "administrative critic" existing and presently proposed in the United States. The companion volume *Ombudsmen and Others* published simultaneously, is a penetrating study in comparative public administration. In part it deals with matters previously published in law reviews; it is based in considerable degree upon 15 months of field study in the nine countries whose grievance procedures are examined (Denmark, Finland, New Zealand, Norway, Sweden, Yugoslavia, Poland, the U.S.S.R. and Japan). As Gellhorn planned the coupling, the smaller analytical volume (which should be on any small shelf in public law and administration) examines "whether citizen-official conflicts in the United States might advantageously be approached in ways observed elsewhere"; these ways are reported on in perceptive detail in the comparative study (which is somewhat less than a "must" for a modest shelf).

The two books bring into clear focus two distinct phases of the Ombudsman syndrome: (1) the need for intelligent authoritative restraints on administrative power, and (2) the need to keep an administrative organization dynamic, unclogged and capable of achieving the social goals that positive government (Kenneth Davis' tag)

has set it up to achieve. To Gellhorn the chief advantage of the ombudsman or other "administrative critic" is *not* to relieve the individual citizen whose case is investigated of the personal consequence of administrative injustice or incompetency. It is rather to learn from the administrative defects that are given surface in a particular case what adjustments in the machinery are needed to smooth the just way of the administrative process for the future.

Some participants in the recent dialog have viewed the Scandinavian-type ombudsman as the heaven-sent answer to an existing chaos and lack of due process in American public administration. Unlike these, Gellhorn considers "the general level of governmental performance . . . so high that we can now sensibly consider how to make it more consistently excellent, rather than merely tolerably good." The need for an "ombudsman type" critic must be measured in any particular governmental situation in the light of already existing restraints: judicial review, or fiscal superintendence, or political checks furnished by intervening legislators. There are areas of American life, he concedes, where all is not well and supplemental devices are needed to superintend official activity: In a perceptive treatment of welfare and police administration he points to two particularly needy areas. The need for an administrative critic is most poignant where the advocate system is weakest—in small cases and in those involving the poor.

Two mild disappointments may be mentioned without muting the note of enthusiasm sounded up to here: (1) The comparative study of ombudsmen and other administrative critics might have looked at other exemplars: the Inspector General Office in the United States Army and other military organizations, (of which Professor Donald Rowatt took account in his fine book, *The Ombudsman*, London, Allen and Unwin, 1966), or perhaps even at the system of "visitors" familiar to religious orders of the Catholic Church. In a rare historical reference (*Ombudsmen and Others*, p. 194) Gellhorn chides historians for discerning "resemblances between the ombudsman and the Roman tribune of the people, the 'censors' in seventeenth century American Colonies, or even the Control Yuan that functioned in China during the Han dynasty, 206 B.C.-A.D. 220." He is satisfied that the "nineteenth-century Swedes who created their ombudsmen were probably not antiquarians, nor have the later creators of ombudsmen looked further than Sweden for inspiration." But to an inquiry at whether the western political tradition has long recognized the need for curb on official power, it may not be irrelevant to note that the Constitutions of the Dominican Order from 1220 have provided for election of "visitors" by the central and local legislative bodies to correct its highest administrative officials. (2) Gellhorn does not, as have others, (Cf. Evan, "Due Process of Law in Military and Industrial Organizations", *Administrative Science Quart.* 7 (Sept. 1962), 187-207) approach the question whether private ombudsmen (wholly apart from civil legal pressures) would make a valuable contribution in private institutions, where fully as much as public ones (and often more) individuals may be crushed by the anonymity and arbitrariness of a faceless, occasionally ruthless administrative process. Such areas as universities, large private corporations, even church organizations and their component parts (such as religious orders) have recently come on the horizon as apt candidates for internal administrative critics, who might be given official status within the particular institutional group—to safe-

guard individuals against injustice as well as to remove the spots and wrinkles that deface the most efficient administrative structures, often just because of their very efficiency. To be fair these books do not pretend to go beyond the governmental field. Professor Gellhorn may already be at the press on this further "private" step.

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