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Judging the Jury

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JUDGING THE JURY. By *Valerie P. Hans* and *Neil Vidmar.* New York: Plenum Press. 1986. Pp. 285. $17.95.

> *Our final judgment on the jury system is a positive one. Despite some flaws, it serves the cause of justice very well. For over 700 years it has weathered criticism and attack, always to survive and to be cherished by the peoples who own it. Adaptability has been the key to survival. It should remain open to experimentation and modification, but those who would wish to curtail its powers or abolish it should bear the burden of proof. Defenders of the jury have the weight of the evidence on their side.* [p. 251]

The constitutional right to a trial by jury is an almost sacred privilege in the American legal system. In recent years the competence of juries has been attacked by judges, attorneys, and laymen who claim that juries fail to base their decisions upon legal precedent. These critics contend: (1) that juries base their decisions upon emotion; (2) that they are unable to understand complex evidence or legal theories; and (3) that they are willing to ignore the law in reaching what they consider to be an equitable verdict (p. 20). Legal reformers claim that eliminating juries can improve the quality of trial verdicts and decrease both the cost and time involved with litigation.

As a result of these criticisms, several major changes have occurred in the American jury system in the past decade. These changes include the reduction in the size of juries and the discarding of the unanimity rule in many jurisdictions. Furthermore, some critics of the jury system, including former Chief Justice Warren Burger, have suggested that there be an "exception rule" to the seventh amendment right to a jury trial in complex civil litigation.[1]

In *Judging the Jury,* Valerie Hans and Neil Vidmar[2] combine the research of sociologists and legal scholars in an attempt to prove that

1. *See* Burger, *Thinking the Unthinkable: First Robert A. Ainsworth, Jr. Memorial Lecture,* 31 LOY. L. REV. 205 (1985).

2. Valerie P. Hans is an Associate Professor in the Division of Criminal Justice and Department of Psychology at the University of Delaware, where she specializes in psychology and law.

juries arrive at their verdicts through valid legal analysis, not incompetence or emotionalism. The authors support their conclusions by examining the selection, trial process, and deliberation of juries in several actual trials.[3] *Judging the Jury* addresses the critical issues surrounding the American and Canadian jury systems and uses sociological research to rebut the major criticisms of the jury process.

After describing the historical development of the jury system in the United States, the authors examine the jury selection process. Hans and Vidmar stress that a jury must represent all segments of the community in order to be a fair decisionmaking body. The authors argue that to reach this goal of unbiased, equal representation, an extensive voir dire process in which opposing attorneys are allowed to question potential jurors at length is necessary. The authors contend that attorneys will become more effective in the voir dire process by using "scientific jury selection" techniques.[4] Hans and Vidmar then suggest that through the adversarial process, a balanced jury will be chosen as each attorney weeds out jurors biased against his or her client. Yet, the authors realize that there are two major problems with this conclusion.

First, the effectiveness of "scientific jury selection" techniques is questionable. It is doubtful whether these methods of jury selection can actually deliver the results their designers claim to achieve.[5] The authors point out that the success of parties who use these techniques may be due either to the diligence of counsel or to a weak opposing case rather than to the ability to select a favorable jury. A second and more important problem is the unequal availability of these techniques for wealthy and indigent parties. Only those litigants with substantial resources can obtain the benefit of "scientific jury selection" techniques. Thus, the availability of these techniques may create an unfair advantage for wealthy parties, rather than the selection of unbiased, representative juries.

The authors mention the problems with these techniques, but they

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3. The cases the authors use to examine jury behavior include: the John DeLorean drug case, p. 13; the William Penn contempt of the king and his law case, p. 21; the John Peter Zenger seditious libel case, p. 32; the Dr. Spock conspiracy to counsel draft evasion case, p. 41; the Jack Ruby murder case, p. 47; the Joan Little murder case, p. 58; the Angela Davis conspiracy case, p. 69; the Huey Newton murder trial, p. 70; the AT&T antitrust case, p. 79; the Scarsdale Doctor murder case, p. 97; the Norman Perl mail fraud and conspiracy case, p. 113; the John Hinckley case, p. 179; and the Big Dan's Bar rape case, p. 199.

4. The scientific jury selection techniques the authors analyze consist primarily of demographic research procedures. These procedures include phone surveys of potential jurors, public opinion surveys, investigation of jury panel members, psychiatric sketches of potential jurors, mock trials, and shadow juries. *See* pp. 79-89.

5. "Litigation Sciences advertises in its promotional brochure: 'To date, where our advice and recommendations have been employed, our clients have achieved successful results in over 95 percent of the cases in which we have been involved.' " P. 90.

fail to offer any solutions. The authors suggest that either (1) without the use of these jury selection methods, lawyers will be unable effectively to pick out prejudicial jurors; or (2) that the use of these techniques will create a disparate effect between poor and rich litigants. Hans and Vidmar recognize that the dilemma stems from the inherent inequities in the adversarial system, but they do not offer any suggestions to alleviate those inequities. The authors' assumption that juries consist of a representative and unbiased sample of a community is crucial to their defense of the jury system. However, such untainted juries will be difficult to assemble unless a method is developed to increase the ability of the voir dire process to screen out biased jurors without creating this disparate effect between wealthy and poor litigants.

In the most innovative section of the book, Hans and Vidmar respond to other significant criticisms of the jury system. The primary criticisms addressed are: (1) the jury's inability to decipher complex evidence; (2) the jury's inability to understand the law; (3) the jury's emotional decisionmaking; and (4) jury nullification. Relying on three major sociological studies[6] of the jury system as well as research they conducted themselves, the authors provide convincing evidence to refute these criticisms. The primary alternative to the current jury system is to allow judges to decide the outcome of all litigation. Thus, to examine the validity of these criticisms, the authors use studies that compare jury decisions to the decisions that judges acting alone would have arrived at in the same cases.

The studies cited suggest that the number of cases that judges would decide differently than juries is far fewer than critics of the system contend. Also, the reasons for differences in opinion between judges and juries are different than jury critics believe them to be. Hans and Vidmar argue that any failure of the jury to understand the law is due not to jury incompetence, but to poor jury instructions and other procedural defects.[7] In some cases, the authors believe that juries are better suited to understanding evidence than judges because they are more likely to understand the testimony of their peers.[8] The

6. *See* J. BALDWIN & M. MCCONVILLE, JURY TRIALS (1979); H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966); Meyers, *Rule Departures and Making Law: Juries and their Verdicts*, 13 LAW & SOCY. REV. 781 (1979).

7. Pp. 120-27. *See also* H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966).

8. Hans and Vidmar emphasize this idea by pointing out the miscommunication that occurs between cultural lines. In a trial in which the judge and jury were white and the defendant and all the witnesses were black, the defendant pleaded that the victim had put him "in the dozens." P. 138 (an extreme form of verbal aggression in the black ghetto). The jury did not understand this expression and convicted the defendant of second degree murder.

The authors contend that "[t]he overwhelming majority of judges, as many studies have documented, are white, male, middle class, and conservative in outlook and in their life experiences. Their legal training prepares them for the language and culture of the white middle class." P. 141. Hans and Vidmar argue that if the jury in this trial "had contained a few members from the

authors contend that rarely is the difference in opinion between judges and juries due to the jury's inability to understand evidence or law.[9]

The criticisms of the jury system next addressed by Hans and Vidmar are jury nullification and emotional decisionmaking.[10] The studies cited by the authors show that jury nullification of the law and jury decisions based on emotion are not as common as critics contend — the "battle with the law" is a modest one. Further, Hans and Vidmar argue that because juries reflect community standards of justice, jury nullification will, in some cases, provide a more just decision than a judge's ruling. The cited studies suggest that in the majority of cases juries base their decisions on evidence and not emotion. Even when emotion does influence a jury's decision, the authors contend that this may be a positive influence. Like jury nullification, an emotional jury decision will many times produce a just verdict by reflecting community standards and mores. Although Hans and Vidmar argue that emotion is a minor and sometimes positive influence on jury decisions, there are special cases in which jury emotion and nullification of the law can lead to bad decisions.

The three kinds of cases that most often present problems for the jury system are rape, capital punishment, and the insanity defense. The final section of *Judging the Jury* asks how the jury system handles these cases. Hans and Vidmar contend that the insanity defense creates the least difficulty of these three for juries. Critics contend that juries do not understand insanity pleas and that they tend to place too much importance on psychiatric testimony. In response, the authors present limited studies[11] to demonstrate that juries are not rubber stamps for psychiatric testimony and that the specific wording of jury instructions for the insanity defense does not have an overwhelming effect upon jury verdicts. The studies cited suggest that juries rely predominantly on the evidence concerning the circumstances of the

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black community, the verdict might have been different. In the jury room those jurors might have been able to explain to the others the implications of being put 'in the dozens.' " P. 142.

9. Hans and Vidmar concede that juries usually fail correctly to follow the prohibition against allowing a defendant's past criminal record or the knowledge that the defendant is a "deep pocket" from influencing their decisions. Yet, the authors contend that if juries were given jury instructions before and after trials, were allowed to take notes, and were allowed to ask questions during testimony, their ability to remember and understand law and evidence would be greatly enhanced. *See* pp. 122-23.

10. Jury nullification and emotional decisionmaking are separate yet closely related criticisms of the jury system. Jury nullification occurs when the jury believes that a defendant is guilty under the given law, but refuses to convict because of the particular facts of the case. P. 149. The classic example of jury nullification is when a jury refuses to convict in euthanasia cases. Emotional decisionmaking occurs when jurors' emotions taint their perceptions of the evidence so that they do not believe the defendant is guilty under the law. This often occurs in rape cases when jurors allow the past sexual experiences of the victim to influence their view of the crime. *See* p. 131.

11. R. SIMON, THE JURY AND THE DEFENSE OF INSANITY (1967). Simon's study was part of the Chicago jury project, but it only consisted of two simulated jury trials.

crime and are not overly influenced by legal complexities or psychiatric testimony. The authors conclude that juries are actually better than judges at determining the validity of a defendant's insanity defense because juries are representative of community standards. Thus juries, unlike judges, will evaluate a defendant's mental state using the standards of acceptable behavior that are prevalent in the community.

Evidence suggests that cases involving rape present more of a problem for juries because of society's attitudes toward rape.[12] Since the jury will generally reflect social biases, juries in rape cases will "represent the anger, ambivalence, and myths that characterize public views of rape" (p. 204). Hans and Vidmar explain that because rape cases often pit the word of the victim against the word of the defendant, jurors base their decisions on their emotional impressions of the defendant and of the victim, rather than on the evidence presented (pp. 204-05). The authors concede that rape cases present a dilemma for the jury system. Often, verdicts will turn upon the past sexual activities of the victim or the moral character of the defendant. To avoid this problem, the authors advocate the use of rape shield laws to limit cross-examination of rape victims, and more specific jury instructions to decrease the influence of emotions on jurors' decisions. With these modifications, Hans and Vidmar argue that emotionally tainted decision making in rape cases can be decreased.

Capital punishment cases present a unique problem for the jury system because of the arbitrariness of its application and the requirement in many jurisdictions that jurors be "death qualified."[13] The authors present evidence to demonstrate that jurors who are "death qualified" are usually biased towards the prosecution, thus defeating the basic assumption that juries are unbiased and representative of the community. To improve the jury system's ability to decide capital punishment cases, Hans and Vidmar advocate the use of a bifurcated jury system,[14] more specific jury instructions, and the abolishment of "death qualified" juries. But even with these improvements, Hans and Vidmar argue that the application of the death sentence is an arbitrary process tainted by racial prejudice. Thus, neither judges nor juries can

12. While regarding rape with horror and the rapist as "contemptible," the public often holds the victim "responsible for her own victimization." P. 204. *See* Blumstein & Cohen, *Sentencing of Convicted Offenders: An Analysis of the Public's View*, 14 LAW & SOCY. REV. 223 (1980) (surveying public sentiment on sentencing for a variety of offenses, including rape); Burt, *Cultural Myths and Support for Rape*, 48 J. PERSONALITY & SOC. PSYCHOLOGY 217 (1985).

13. The "death qualified" statutes that exist in many jurisdictions do not allow jurors to sit on death penalty cases if they would never consider voting for a death sentence or they would vote not guilty to eliminate the possibility that the defendant would be sentenced to death. *See* Witherspoon v. Illinois, 391 U.S. 510 (1968).

14. The Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), which struck down several states' capital punishment laws because of due process flaws, caused the majority of states who had capital punishment statutes to adopt bifurcated trial systems. In these dual systems, separate juries are selected to decide the verdict and sentence in each capital punishment case.

sentence defendants to death in a just manner. The authors conclude that at present there are no improvements that can be made in the jury system to remove the basic unfairness of capital punishment verdicts. Hans and Vidmar state that the use of capital punishment is a moral issue that can only be dealt with by the Supreme Court and the American public.

Judging the Jury provides a good starting point for the examination of the debate over the competence of the American and Canadian jury systems. Hans and Vidmar's book is a useful resource for both the advocate who wishes to refute the claims of jury critics and the layman who seeks to develop an understanding of the issues involved in the jury debate. Although the authors present a strong argument in favor of the jury, *Judging the Jury* does not provide a conclusive answer to the jury debate. Issues such as excessive jury verdicts, the expense of funding the jury system, the inefficiency of jury pool selection, and jury compensation are either not adequately discussed or not addressed at all in *Judging the Jury.* Nevertheless, Hans and Vidmar have succeeded in using the existing research and sociological data to present an intriguing defense of the jury system.

— *Eric M. Acker*