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HOW JUDGES VIEW CIVIL JURIES

*Paula L. Hannaford, B. Michael Dann, & G. Thomas Munsterman**

The adage “where you stand depends on where you sit” is never truer than in opinions about civil juries. The public and most trial participants form their opinions based on the ultimate outcome of the trial—the jury’s verdict. Certainly this is true of the litigants who tend to view the civil jury in the starkly black-and-white terms of win or lose, liability or no liability. Lawyers sometimes have a more objective view of the jury based on their greater knowledge of trial procedures and greater familiarity with the vagaries of civil trials generally. Nevertheless, few lawyers will proceed to trial without at least an outside chance of persuading the jury of the rightness of their position. It is understandable, therefore, that many attorneys view favorable verdicts as proof of the strength of their evidence and presentation skills, while they view unfavorable verdicts as proof of the irrationality of juries.¹

The trial judge would appear to be the person most capable of forming an informed and objective opinion about the value of civil juries. In addition to extensive knowledge of trial procedures generally, his or her involvement in pretrial conferences and evidentiary hearings increases the likelihood that the trial judge is familiar with the specifics of the case and the idiosyncrasies of the lawyers and their clients. Through their experience on the bench and prior legal experi-

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1. Compare, for example, editorials in legal periodicals about the verdict in McDonald’s spilled coffee case, in which the jury awarded the plaintiff \$2.9 million in compensatory and punitive damages (later reduced to \$480,000). See, e.g., William A. Allison, *Cold Facts About Case of Spilled Coffee*, CHI. DAILY L. BULL., Sept. 27, 1994, at 6 (“If you and I know all the facts, there are very few jury verdicts in this country that we wouldn’t agree with.”); Michael S. Froman, *Spilled and Burned: Not Open and Shut*, CHI. DAILY L. BULL., Oct. 13, 1994, at 6 (“It is really just another example of how a jury trial can shift, bend and take unexpected turns.”).

Empirical research also demonstrates that lawyers’ assessments of jury comprehension and performance are strongly related to whether or not the verdict was favorable. Paula L. Hannaford et al., *Permitting Jury Discussions During Trial: Impact of the Arizona Reform 32 (1998)* (unpublished manuscript, on file with the National Center for State Courts).

ence, judges often develop keen insights about how juries are likely to perceive trial evidence and witness testimony. Finally, the trial judge is less likely to become caught up in the partisan concerns of the litigants and their respective attorneys and consequently is in the best position to determine whether the jury's verdict is correct based on the evidence and applicable law.

Nevertheless, it is a mistake to confuse the judge's impartiality between the parties with objectivity toward the jury. Judges necessarily must view the jury in relation to themselves and their own role in the process of litigation. This is not simply a matter of whether the judge agrees or disagrees with the jury's verdict, but also how the judge perceives the jury's decision making process. How seriously do jurors undertake their duties? Are they able to set aside their preconceived ideas and biases? Do they understand the evidence and applicable law? The judge evaluates all of these factors against the backdrop of his or her own involvement in the management of the case (e.g., pre-trial conferences, evidentiary hearings, discovery disputes, settlement negotiations) and the case's relative significance among the hundreds of other cases that make up the judge's caseload.

In any given case, therefore, the judge's view of the jury may manifest itself as a complex and subtle mixture of respect, gratitude, concern, pride, impatience, and even frustration. But more revealing than what judges *say* about juries is what judges *do* to prepare jurors for their roles in civil cases. This paper explores the various indicators of judges' views of the civil jury, including the social and institutional factors and contemporary jury reform efforts that affect judges' views about the civil jury.

I. WHAT JUDGES SAY ABOUT CIVIL JURIES— DIRECT DETERMINANTS

As a preliminary matter, judges do not generally share the reservations so often expressed by attorneys, litigants, and the public about the general competence of the civil jury. In a 1987 survey of state and federal judges, over three-quarters of the respondents indicated that the right to trial by jury in routine civil cases is an essential safeguard which must be retained.² Survey respondents demonstrated less confidence in civil juries in complex cases, but the majority nevertheless rejected a suggestion to limit the use of juries for cases involving

2. LOUIS HARRIS & ASSOCS., JUDGES' OPINIONS ON PROCEDURAL ISSUES: A SURVEY OF STATE AND FEDERAL TRIAL JUDGES WHO SPEND AT LEAST HALF THEIR TIME ON GENERAL CIVIL CASES 79-80 (1987).

highly technical and scientific issues and complicated business cases.³ As a practical matter, such cases are the exception, not the rule, of civil trial dockets.⁴

Much of this confidence stems, no doubt, from the traditionally high level of judge-jury agreement on verdicts. In their classic study of the American jury, Harry Kalven and Hans Zeisel reported that 78% of judges in civil cases would have decided the case the same as the jury.⁵ More recent studies confirm that the incidence of judge-jury agreement remains high.⁶ In a 1991 survey of Georgia judges, 87% of the respondents indicated that their experience in civil negligence cases was substantially the same as the Kalven and Zeisel respondents while another 10% reported even higher levels of judge-jury agreement.⁷ A 1998 evaluation of jury reform initiatives in Arizona revealed an 84% judge-jury agreement among judges indicating their preferences in civil verdicts.⁸

Of course, agreement on the verdict is only one of the many factors that can affect a judge's confidence in the ability of a civil jury to arrive at a correct verdict. Based on questions submitted during the trial and deliberations and post-verdict interviews with jurors, judges have a unique opportunity to assess the jury's performance. Most judges give their civil juries high marks for their process of decision making as well as the verdicts. In the Arizona study, the judges' average rating for the reasonableness of juror questions was 5.8 on a scale of 1 (very unreasonable) to 7 (very reasonable).⁹ The Harris study reported that over 98% of state and federal judges believe that jurors usually make a serious effort to apply the law as they are instructed.¹⁰ Eighty percent of the federal respondents and 69% of the state respondents disagreed with the statement that jurors' feelings about the

3. *Id.* at 83-84.

4. In a 1992 study of civil cases in 75 state courts, automobile and premises liability cases—which typically involve relatively uncomplicated factual and legal issues—accounted for nearly half of all jury trials. Carol J. DeFrances et al., *Civil Jury Cases and Verdicts in Large Counties*, BUREAU OF JUST. STAT. SPECIAL REP. (U.S. Dept. of Just., Washington, D.C.), July 1995, at 1, 1. Medical malpractice, products liability and toxic substance tort, and business contract disputes accounted for approximately 20% of all jury trials. *Id.* at 2.

5. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 63-64 (1966).

6. See R. Perry Sentell, Jr., *The Georgia Jury and Negligence: The View from the Bench*, 26 GA. L. REV. 85, 98-99 (1991).

7. *Id.*

8. Based on preliminary data collected in connection with a National Center for State Courts project entitled *Should Jurors Be Permitted to Discuss the Evidence Prior to Deliberation?*, funded by the State Justice Institute No. SJI-96-12A-B-181 [hereinafter *Juror Discussions Project*].

9. *Id.*

10. LOUIS HARRIS & ASSOCS., *supra* note 2, at 79-80.

parties often cause them to make inappropriate decisions.¹¹ Over two-thirds of the respondents disagreed that jurors too often fail to apply the law because of comprehension problems.¹² The Georgia study echoed these findings.¹³ Seventy-nine percent of the survey respondents rejected the suggestion that bias in favor of a party was the reason for judge-jury disagreement and 92% rejected jury miscomprehension as the reason for the disagreement.¹⁴

Judges' confidence in the judgment of civil juries can only be assessed relative to their confidence in other methods of arriving at the same outcome—generally either by settlement among the parties themselves or through a bench trial. Since the first of these alternatives precludes the need for a trial altogether, this option shall be disregarded for the time being. When asked about the relative difficulty of bench and jury trials, many judges report that bench trials require far more concentration and effort on the part of the trial judge.¹⁵ Indeed, it is through experience with bench trials that many judges first come to appreciate the value of the civil jury.

For trial judges, the difficulty associated with bench trials, and the relative benefit of jury trials, is both quantitative and qualitative. First is the purely cumulative burden of juggling the many aspects of the trial. In addition to procedural and evidentiary matters, the judge is typically responsible for routine administrative matters including managing court staff assigned to the trial (e.g., clerk, reporter, bailiff) and, all too frequently, managing the interpersonal conflicts of the trial attorneys and their clients. Responsibility for other cases on the judge's docket supplements concerns about the immediate trial. During trial recesses, for example, the judge may be hearing motions in other cases, writing decisions for cases previously adjudicated, hearing emergency petitions on other matters, scheduling new cases, holding pretrial conferences for upcoming trials, accepting settlements, and attending to post-verdict administrative matters.¹⁶ Delegating the "fact-

11. *Id.*

12. *Id.*

13. Sentell, *supra* note 6, at 117.

14. *Id.*

15. Based on anecdotal reports from trial judges during the authors' collective 50+ years working with and in courts.

16. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE (1972); NATIONAL CONFERENCE OF STATE TRIAL JUDGES, THE JUDGE'S BOOK (1989).

finding” task to the jury relieves the judge of a substantial amount of work.¹⁷

These responsibilities are separate from the qualitative tasks of understanding and evaluating the evidence and testimony and rendering a substantive decision in the case. The fact-finder’s undivided attention is needed not only for adequately understanding the evidence presented at trial, but also for making the very difficult decisions about the parties’ competing claims. The evaluation of witness credibility, for example, is wholly within the province of the fact-finder—as most jury instructions make explicitly clear.¹⁸ Even more difficult are highly subjective decisions, particularly those involving damage awards, for which judges have no special claim of authority or expertise.¹⁹ Assigning a monetary value on pain and suffering, or the worth of a life in a wrongful death case, are precisely the decisions that many judges believe are best made by the collective judgement of a jury.²⁰

Judges who have struggled with these types of decisions in bench trials develop tremendous respect for the civil jury and rarely take its role for granted.²¹ The personal benefits to the judge of the jury’s participation are, in fact, the flip side of the coin of the political and institutional benefits that make up the traditional justifications for the civil jury. The allocation of decision making between the judge and jury injects “community values” into the judicial process while shielding the judge from criticism for unpopular decisions and insulating the whole justice system from allegations of elitism, judicial bias, and political influence.

In spite of the tremendous impact of the American jury system, the view of jury service as “citizenship at its best” is generally not taught beyond the secondary school level—and often not taught well, even

17. To be sure, judges in bench trials must ensure that the parties have satisfied their burden of proof with respect to sufficiency of the evidence. This, however, is far easier than deciding the relative weight of the evidence or credibility of witnesses.

18. See, e.g., CALIFORNIA JURY INSTRUCTIONS, Civil 2.20 (Paul G. Breckenridge, Jr. ed., 8th ed. 1994) (“You are the sole and exclusive judges of the believability of the witnesses and the weight to be given the testimony of each witness.”).

19. *Id.* 14.13.

No definite standard is prescribed by law by which to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for pain and suffering you shall exercise your . . . judgment and the damages you fix shall be just and reasonable in the light of the evidence.

Id.

20. See generally *Developments in the Law: The Civil Jury*, 110 HARV. L. REV. 1408, 1432-41 (1997) (advocating the usefulness of the civil jury as a decision making body in a democracy).

21. Based on authors’ collective experience.

then.²² The most eloquent commentary on the institution of trial by jury is generally found only in the dicta of appellate court opinions,²³ and consequently is not widely read by the American public. Indeed, even those individuals who are reasonably well informed about the American justice system often overlook this aspect of jury service, mainly because their involvement as attorneys or litigants is generally characterized by partisan bias.

Recognition of the inherent limitations of the judicial role may be part of the maturation process for judges—something that cannot be acquired through legal education or practice, but only develops through long experience on the bench. This experience is not entirely unique to judges, however. In some sense, serving is believing. Individual jurors typically emerge from their jury experience with new regard and appreciation for the justice system and their own role in it.²⁴ But their involvement in the judicial process is generally too fleeting, and their numbers too few, to translate this view into widespread public support for civil juries.²⁵

22. Although schools and formal education were listed as the principal sources of information about state and local courts by 24% of respondents to a national survey of public perceptions about the courts, YANKELOVICH, SKELLY & WHITE, INC., *THE PUBLIC IMAGE OF COURTS: HIGHLIGHTS OF A NATIONAL SURVEY OF THE GENERAL PUBLIC, JUDGES, LAWYERS AND COMMUNITY LEADERS* 12 tbl.1.13 (1978), respondents' actual knowledge of courts was very low. *Id.* at 1-2; see Michael J. Saks, *Public Opinion About the Civil Jury: Can Reality Be Found in the Illusions?*, 48 DEPAUL L. REV. 221, 231-34 (1999) (describing literature on public misinformation about the civil justice system).

23. See, e.g., *Powers v. Ohio*, 499 U.S. 400, 407 (1991).

[Jury service] "affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law." Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.

Id. (quoting *Duncan v. Louisiana*, 391 U.S. 145, 187 (1968) (Harlan, J., dissenting)).

24. For an overview of studies on juror reactions to jury service, see Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve As Jurors*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 282 (Robert E. Litan ed., 1993). Anecdotally, judges and lawyers who have served as jurors generally emerge with a new appreciation for the institution of trial by jury and often with a commitment making jury service a more "juror friendly" experience. See *infra* notes 76-89 and accompanying text.

25. The National Center for State Courts estimates that 10% of the adult American population is summoned for jury service each year. The estimate is based on the following: Approximately 150,000 jury trials take place in the U.S. each year, for which approximately 1.5 million persons are needed to serve (based on average 10 persons per jury). The current estimated U.S. population is 270 million, of which approximately 180 million (2/3) are age 18 or older. Percent of population serving = 1.5 million / 180 million = 0.8%. The preferred size of the pool of prospective jurors is three times the number of jurors needed; 3 x 1.5 million = 4.5 million. To summon 4.5 million jurors, courts issue approximately 18 million summonses with the expectation that approximately 1/4 of the persons summoned will be qualified and available to serve (avg. juror yield). Percent of population issued summonses = 18 million / 180 million = 10%.

II. WHAT JUDGES THINK ABOUT CIVIL JURIES— INDIRECT DETERMINANTS

The process and outcome of a civil jury trial is not the only—or even necessarily the most critical—determinant of how judges view the civil jury. Their views of the whole civil justice system and their own roles within that system are equally as important. Judges are, after all, involved to one degree or another in the whole process of civil litigation from the filing of the initial pleading to the final disposition of the case. The actual jury trial itself represents only a small portion of the total amount of time, effort, and expense involved in resolving the case.²⁶ Less than 6% of all civil cases filed are resolved by trial, and less than one-third of those are tried to a jury.²⁷ Although many judges claim that civil jury trials are “the best of a bad job,”²⁸ it should not be surprising that concerns about other aspects of the civil justice system such as public criticism can overshadow judicial enthusiasm for civil juries.

Judges have not been unaware or unconcerned about public dissatisfaction with various aspects of civil litigation. The most frequent complaints focus primarily on two problems. First, high levels of procedural complexity create expense and delay for litigants.²⁹ Second, the gamesmanship associated with the adversary system obstructs the fact-finding process and hinders dispute resolution.³⁰ To address these concerns, courts began implementing administrative and procedural reforms designed to streamline case processing and facilitate settlements.³¹

The types of reforms were many and varied, but a common thread in most of them was greater involvement and control by the trial judge in every phase of civil litigation. For example, the unified court move-

After jury qualification and jury selection for specific trials, however, less than 1% of the adult American population actually serve.

26. In a study of civil jury trials in the country's 75 largest county courts, the median number of days from the beginning of trial to the verdict averaged four days while the total time to disposition (filing to verdict) was 751 days. John A. Goerdts et al., *Civil Jury Trials and Awards*, 19 ST. CT. J. 23, 35 (1995).

27. DeFrances et al., *supra* note 4, at 2.

28. Private communication from a civil trial judge attending the National Judicial College, Reno, Nevada, to G. Thomas Munsterman.

29. See generally ABA ACTION COMM'N TO REDUCE COURT COSTS & DELAY, ATTACKING LITIGATION COSTS AND DELAY (1984) (describing caseload and management studies and recommendations to improve case processing).

30. See generally Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85, 90-92 (1994) (discussing a lack of professionalism, procedural exaggerations, and other “Rambo Tactics” that are bringing increased disrepute and dissatisfaction to lawyers and the legal field).

31. See *infra* notes 32-37 and accompanying text.

ment had as an objective the dissolution of limited jurisdiction courts and the creation of a single level of general jurisdiction trial courts.³² From a case processing perspective, this arrangement granted judges the authority to decide any and all legal issues that were presented at trial. The elimination of multiple case transfers and appeals *de novo* to higher level trial courts saved time and expense for litigants.

Similarly, the rise of judicial administration and court management as specialized professions within the judicial arena legitimized caseload management techniques.³³ For the first time, courts could evaluate their trial dockets and assign cases with an eye for improving disposition and clearance rates and using judicial resources as efficiently and effectively as possible.³⁴ More importantly, this careful evaluation of caseloads revealed for the first time the extent of non-trial resolution of civil cases. Paradoxically, the civil justice system was devised to plan for, manage, and carry out an event—a civil trial—that very rarely occurred. As much as 95% of all civil cases were settled, dismissed, or decided by default or summary judgment.³⁵

As courts became aware that non-trial resolutions to civil cases tended to decrease the “filing to disposition” time and increase docket clearance rates, judges were encouraged to become more proactive in their approach to caseload management. The establishment of firm trial dates, greater involvement in pretrial conferences, settlement negotiations, and alternative dispute resolution programs became increasingly popular techniques.³⁶ This was a sea change in the expected role of the civil trial judge that could not help but affect how judges viewed civil jury trials.³⁷

32. See generally LARRY BERKSON & SUSAN CARBON, COURT UNIFICATION: HISTORY, POLITICS AND IMPLEMENTATION (1978) (evaluating the strengths and weaknesses of court unification in light of the experience of 11 states).

33. ROBERT W. TOBIN, AN OVERVIEW OF COURT ADMINISTRATION IN THE UNITED STATES 15-24 (1997).

34. *Id.*

35. DeFrances et al., *supra* note 4, at 2.

36. See, e.g., HERBERT M. KRITZER, THE JUDGE'S ROLE IN PRETRIAL CASE PROCESSING (Disputes Processing Research Program Working Paper No. 1981-2, 1981); E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 322-26 (1986); Ernest C. Friesen, *The Trial Management Conference*, JUDGES' J., Fall 1990, at 4, 4-7, 42-44; Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257, 261-62 (1986); Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 254 (1985); Jaime Pieras, Jr., *Judicial Economy and Efficiency Through the Initial Scheduling Conference: The Method*, 35 CATH. U. L. REV. 943, 943-44 (1986); Hubert L. Will et al., *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203, 203 (1976).

37. The use of these techniques was not uniformly accepted by civil trial court judges, and much less so by the legal community generally. For critical commentary, see Daisy Hurst Floyd,

Consider, for a moment, some of the implications of these fundamental changes in the judge's role in civil litigation. Judges, particularly those using an individual calendaring system, became much more familiar with the details of the civil cases on their dockets than previously.³⁸ Factual and legal issues likely to arise at trial now are typically raised on numerous occasions during discovery,³⁹ and most certainly during pretrial conferences.⁴⁰ After two or more years of case management—a normal time frame for civil litigation⁴¹—the judge may be just plain tired of the case, particularly if rancor between the parties has required substantial judicial intervention during discovery.⁴² Moreover, if the judge has taken an active part in decisions on discovery motions concerning, for example, the relevance or admissibility of witness testimony, he or she may have already formed a fairly well informed opinion on the merits of the parties' competing arguments.

Juries, of course, do not have the advantage of months or years to become familiar with the various factual issues implicated in the case.⁴³ The combined task of maneuvering through an unfamiliar judicial system, absorbing new information (often consisting of complex scientific, technical, or financial evidence and testimony), and applying legal standards (many of them counter-intuitive) to the facts is understandably difficult for many jurors. This difficulty, however, may be met with little sympathy and indeed some level of impatience

Can the Judge Do That?—The Need for a Clearer Judicial Role in Settlement, 26 ARIZ. ST. L.J. 45 (1994) and Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

38. See, e.g., PAUL S. LYNES, MOVING FROM THE MASTER CALENDAR SYSTEM TO THE INDIVIDUAL ASSESSMENT SYSTEM IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK: A COMPARATIVE REPORT 29-32 (1997).

39. *Id.*

40. Rule 16 of the Federal Rules of Civil Procedure and corresponding state civil procedure rules encourage judges to become involved in pretrial case management. FED. R. CIV. P. 16 advisory committee's notes.

[Rule 16] has been extensively rewritten and expanded to meet the challenges of modern litigation. Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices.

Id. Many state and local civil procedure rules echo these sentiments. See, e.g., ARIZ. R. CIV. P. 16; DEL. SUPER. CT. CIV. R. 16; IOWA R. CIV. P. 136; MD. R. CIV. P. (CIR. CT.) 2-504.2; TENN. R. CIV. P. 16.03; WIS. STAT. § 802.10 (1994).

41. DeFrances et al., *supra* note 4, at 10.

42. Cases that ultimately go to trial typically involve the most difficult legal and factual issues, the least skilled lawyers, and the most recalcitrant parties.

43. Indeed, prospective jurors are struck from the jury panel during voir dire if they indicate any personal knowledge about the case or the parties. NATIONAL CONFERENCE OF STATE TRIAL JUDGES, *supra* note 16, at 127-28.

and frustration from judges who have dealt with the case and the parties over a substantial period of time.

There is yet another implication to having judges more actively involved in pretrial efforts to settle civil cases—judges' reaction to the need for a jury trial given their efforts to help settle the case. Increasingly, judicial productivity is measured by the total number of cases resolved, as compared to the total number of trials presided over.⁴⁴ The incentive, therefore, is to get cases resolved as expeditiously as possible. Viewed in this light, a jury trial is the least desirable outcome and a poor reflection on the judge as "case manager" or "dispute resolver."

III. WHAT JUDGES DO ABOUT CIVIL JURIES

Judicial views of the civil jury—both positive and negative—ultimately have little effect on the continuation of jury trials as a method of dispute resolution in civil litigation. As vehemently as some judges defend the civil jury system, there is no denying that it is a human—and thus imperfect—system. Some juries fail to understand the import of evidence and testimony presented at trial, particularly in complex cases.⁴⁵ Juries routinely struggle with jury instructions on the applicable law, often misunderstanding legal concepts that are critical to the correct application of the governing law to the facts.⁴⁶ On extremely rare occasions, some juries even engage in misconduct, such as consulting external sources to arrive at their verdicts or basing their decision on bias toward or against a party in deliberate disregard for the facts and the law.⁴⁷ At some point in every civil jury trial, the trial judge must make a transition from thinking about the jury as an abstract ideal to thinking about the jury as a specific collection of lay persons who have little or no accurate knowledge of the American justice system and who are fully capable of fallibility in this specific case.

44. See TRIAL COURT PERFORMANCE STANDARDS WITH COMMENTARY §§ 2.1-2.3 (Bureau of Justice Assistance 1997).

45. See generally VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 113-29 (1986) (noting that problems of juror competence may impede jurors from following instructions and correctly applying the law as intended).

46. Numerous studies document the difficulty jurors face in comprehending jury instructions. See, e.g., Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or In Light of It?*, 1 LAW & HUM. BEHAV. 163 (1977); Michael J. Saks, *Judicial Nullification*, 68 IND. L.J. 1281 (1993); Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77 (1988).

47. Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796-1996*, 94 MICH. L. REV. 2673, 2730-39 (1996).

By the same token, as much as some judges distrust the jury's ability to render fair and just verdicts, some cases just resist resolution by any other means. The facts are sufficiently disputed to survive a motion for summary judgment, the weight of the evidence is so close that capitulation on the merits by either party is unlikely, or the stakes of winning or losing are too great for the parties to settle. In some cases, sheer human stubbornness on the part of the parties and lawyers may make them unreasonable and incapable of settling their differences. Unless the parties and lawyers opt for a bench trial—permitting the judge to decide the case formally during trial rather than assist the parties informally during pretrial—the civil jury will become a reality in due time, regardless of the judge's views about its efficacy.

In response to many of the conflicting views of the civil jury, various civil jury reforms have been promoted across the country.⁴⁸ The specific problems that these reforms purport to address, however, reflect the idiosyncratic views of their respective supporters.⁴⁹ For judges who distrust civil juries, appropriate reforms are designed to place restrictions on jury decision making discretion—or at least to minimize the potential damage caused by “erroneous” jury verdicts.⁵⁰ In contrast, those judges who generally approve of the civil jury tend to support reforms aimed at improving the jury's comprehension and competence as decision makers, thus decreasing the need to overturn the jury's verdict or adjust the jury's award.⁵¹ But there are subtle differences even among the latter type of reforms. Some reforms, for example, are designed to help jurors reach their verdicts through a decision making process that resembles that used by judges.⁵² Others attempt to structure the trial process in a “jury friendly” manner that permits jurors to utilize their natural learning and decision making skills to arrive at an appropriate verdict.⁵³ As discussed below, the reform initiatives that ultimately dominate the jury reform agenda in any given jurisdiction will reflect judges' views of the civil jury.⁵⁴ Moreover, all of the approaches raise questions about the judge-jury

48. See generally NATIONAL CTR. FOR STATE COURTS, JURY TRIAL INNOVATIONS (G. Thomas Munsterman et al. eds., 1997) (describing contemporary jury reform techniques).

49. See *infra* notes 57-85 and accompanying text.

50. G. Thomas Munsterman & Paula L. Hannaford, *Reshaping the Bedrock of Democracy: American Jury Reform During the Last 30 Years*, JUDGES' J., Fall 1997, at 5, 8-9.

51. See *infra* Part III.A.

52. See *infra* Part III.B.

53. See *infra* Part III.C.

54. See *infra* Parts III.A to III.C.

relationship and the role of the jury in the American civil justice system.⁵⁵

A. Constraints on the Civil Jury

Rhetoric favoring wholesale abandonment of the civil jury is popular with some commentators, but the odds that such a drastic measure would ever be implemented are slim to none—almost certainly none in those jurisdictions that elect their trial court judges.⁵⁶ The more common approach has been to place constraints on the power of the civil jury, ostensibly to limit the potential damage from erroneous verdicts or excessive damages.⁵⁷ Most of these constraints are legislative creations enacted under the general rubric of tort reform.⁵⁸ For example, proposals for statutory caps on damage awards and restrictions on the availability of punitive damages have been enacted in several jurisdictions.⁵⁹ Such measures are in addition to traditional judicial remedies of *remittitur* and *additur* to adjust jury awards that are excessive or inadequate as a matter of law.⁶⁰ Some attorneys have also developed the practice of “high-low agreements” in which the parties (with or without the knowledge or consent of the trial judge) agree that a reasonable damage award would fall within a specified dollar range.⁶¹ If the jury’s award falls within the range, the parties accept it as given.⁶² If the jury’s award falls above or below that range, however, the parties agree to the highest or lowest amount on the range, respectively.⁶³ Such agreements reduce the perceived level of uncertainty associated with jury trials.

55. See *infra* Parts III.A. to III.C.

56. *In re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069 (3d Cir. 1980), was the closest that courts have come to abolishing the civil jury on their own initiative. In that case, the Third Circuit Court of Appeals concluded that due process precludes the Seventh Amendment right to a jury when the factual and legal issues to be decided would exceed the jury’s ability to decide a case with a reasonable understanding of the evidence and law. *Id.* at 1084-86. *But see In re United States Fin. Sec. Litig.*, 609 F.2d 411, 431-32 (9th Cir. 1979) (holding that there is no “complexity” exception to the Seventh Amendment right to a jury trial).

57. *Munsterman & Hannaford*, *supra* note 50, at 8-9.

58. *Id.*

59. See, e.g., KAN. STAT. ANN. § 60-19a01 (1997) (limiting compensatory damages for pain and suffering to a maximum of \$250,000); VA. CODE ANN. § 8.01-38.1 (Michie 1997) (limiting punitive damages to a maximum of \$350,000); *Id.* § 8.01-581.15 (limiting compensatory damages in medical malpractice cases to \$1 million).

60. See, e.g., VA. CODE ANN. § 8.01-38.1.

61. For descriptions of this technique, see Kevin G. Faley & Andrea M. Alonso, *High-Low Agreements: Misunderstood Litigation Technique*, 219 N.Y. L.J. 1 (1998), available in LEXIS, Legnew Library, NYLAWJ File.

62. *Id.*

63. *Id.*

Whether implemented as a legislative, judicial, or contractual arrangement, the sentiment underlying these approaches is the same: civil juries are untrustworthy and their power to decide liability and impose damage awards on litigants should be sharply curtailed. The ultimate effect of these approaches is to transform the civil jury into an advisory body whose judgments may be accepted if they are deemed "reasonable" by some external standard, but otherwise can be disregarded in favor of a more palatable result.

B. *Helping Juries Think Like Judges*

In contrast to reform initiatives that place constraints on the jury's verdict, some initiatives attempt to guide the jury's decision making process so that it resembles that of a well-trained trial judge. The presumption is that a jury that uses a legal analysis framework during its deliberations will invariably arrive at a judicially acceptable verdict. The hallmark of legal analysis, after all, is the prioritization of legal issues within independent and dependent categories.⁶⁴ The resolution of these claims depends on the application of neutral rules specific to the legal issues according to their respective priority.⁶⁵

Two reform innovations that employ this strategy are the use of bifurcated trials and special verdicts.⁶⁶ Both techniques parse the factual and legal issues from a single cause of action into logical segments (e.g., liability, compensatory damages, punitive damages).⁶⁷ In bifurcated trials, only the evidence and testimony relevant to each segment is presented to the jury for its decision before moving forward to the next segment, if necessary.⁶⁸ Special verdicts, in contrast, do not affect the evidentiary presentation at trial, but instead require jurors to articulate answers to specific questions concerning disputed facts in the case and the jury's application of law to those facts.⁶⁹ The use of these techniques raises a number of concerns about their impact on the jury and on jury verdicts. The two most prevalent concerns are whether bifurcation and special verdicts actually improve the quality of jury decision making⁷⁰ (as evidenced by the verdict) and whether

64. See generally KENNETH J. VANDELDE, THINKING LIKE A LAWYER: AN INTRODUCTION TO LEGAL REASONING 39-55 (1996) (describing the process of synthesizing law).

65. *Id.* at 65-106 (describing the process of applying law to facts).

66. See NATIONAL CTR. FOR STATE COURTS, *supra* note 48, at 112-16, 187-90. Typically, both techniques are reserved for cases involving complex evidentiary issues or applicable law. *Id.*

67. *Id.* at 112, 187.

68. FED. R. CIV. P. 42(b).

69. FED. R. CIV. P. 49.

70. See *infra* notes 72-73 and accompanying text.

they prevent the jury from bringing community values into their deliberations or reflecting such values in their verdicts.⁷¹

The first concern is entirely pragmatic: Is it feasible to structure the trial or deliberative process in such a way that jury comprehension of factual and legal issues will be equivalent to that of judges?⁷² Will the use of such techniques make jury verdicts as predictable or as reliable as judges' verdicts? Empirical studies suggest that the use of bifurcated trials and special verdicts can improve overall juror comprehension or provide a practical roadmap for jurors during their deliberations, respectively.⁷³

There is no question, however, that these techniques artificially constrain juror decision making either by withholding selected portions of evidence until the jury returns its verdict on a specific element of the claim or by forcing the jury's deliberations to conform to the format articulated in the special verdict questions. These constraints are precisely what raise the second concern—that they remove the ability of juries to inject community values into their deliberations, thus undermining one of the traditional justifications for civil jury trials.⁷⁴ A better alternative, claim opponents of such reforms, is to modify trial procedures in such a way that jurors use their natural learning and decision making abilities to comprehend the evidence and apply the law more effectively.⁷⁵

71. See *infra* notes 74-75 and accompanying text.

72. See Stephan Landsman et al., *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 WIS. L. REV. 297; David A. Lombardero, *Do Special Verdicts Improve the Structure of Jury Decision-Making?*, 36 JURIMETRICS 275 (1996).

73. See, e.g., Elizabeth C. Wiggins & Steven J. Breckler, *Special Verdicts as Guides to Jury Decision Making*, 14 LAW & PSYCHOL. REV. 1 (1990) (discussing the relative advantages and disadvantages of special verdicts in light of a study of their impact on juror decision making).

74. See Jennifer M. Granholm & William J. Richards, *Bifurcated Justice: How Trial-Splitting Devices Defeat the Jury's Role*, 26 U. TOL. L. REV. 505 (1995); Jack B. Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power*, 14 VAND. L. REV. 831, 832-35 (1961); see also *supra* notes 17-19 and accompanying text (discussing some traditional justifications for civil jury trials). Of course, some critics of the civil jury argue that "community values" already play too great a part in jury deliberations—leading to unwarranted plaintiff verdicts and excessive damages on "deep pocket" defendants. For a summary of the critics' arguments, see NEIL VIDMAR, *MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS* (1995); Valerie P. Hans, *The Contested Role of the Civil Jury in Business Litigation*, 79 JUDICATURE 242 (1996); Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327, 328-30 (1999); Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the "Deep Pockets" Hypothesis*, 30 L. & SOC'Y REV. 121 (1996). Recent research on bifurcation, however, reveals that the effects of this technique may be more complex than previously realized. See Landsman et al., *supra* note 72, at 316-33.

75. See, e.g., B. Michael Dann, "Learning Lessons" and "Speaking Rights:" *Creating Educated and Democratic Juries*, 68 IND. L.J. 1229 (1993).

C. Making Trials Juror-Friendly

A host of jury trial innovations are consistent with the "educational model" of jury reform. They include such reforms as preinstructing the jury about the applicable law,⁷⁶ and permitting jurors to take notes⁷⁷ and to submit questions through the trial judge to witnesses.⁷⁸ These techniques, now a routine practice in many courts, are based on the premise that providing jurors with a conceptual framework in which to evaluate the evidence and permitting them to use the tools that they would normally employ in a new learning situation increase juror comprehension, recall, and satisfaction.⁷⁹

Other reforms are less widely employed, but nevertheless are gaining favorable attention in many jurisdictions. For example, permitting civil jurors to discuss the evidence before final deliberations purportedly allows jurors an opportunity to clarify ambiguous evidence or testimony while it is still fresh in their minds.⁸⁰ In cases where the jury deadlocks over an evidentiary issue, reopening the case for additional argument or evidence is thought to be less potentially coercive than the standard *Allen* charge⁸¹ and a reasonable alternative to declaring a mistrial.⁸² Written copies of well-organized, "plain English" jury instructions are also a popular component of contemporary jury reform, because poorly drafted jury instructions are known to be one of the greatest impediments to juror comprehension.⁸³

76. Vicki L. Smith, *The Feasibility and Utility of Pretrial Instruction in the Substantive Law*, 14 *LAW & HUM. BEHAV.* 235, 236 (1990).

77. AMERICAN JUDICATURE SOC'Y, *TOWARD MORE ACTIVE JURIES: TAKING NOTES AND ASKING QUESTIONS* 8-10, 13-14, 16-17 (1991); David L. Rosenhan et al., *Notetaking Can Aid Juror Recall*, 18 *LAW & HUM. BEHAV.* 53 (1994).

78. AMERICAN JUDICATURE SOC'Y, *supra* note 77, at 7, 11-13, 15-16.

79. See Vicki L. Smith, *How Jurors Make Decisions: The Value of Trial Innovations*, in NATIONAL CTR. FOR STATE COURTS, *supra* note 48, at 5-21.

80. Hannaford et al., *supra* note 1; Valerie P. Hans et al., *The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges, and Jurors*, 32 *U. MICH. J.L. REFORM* (forthcoming 1999). Although several states are considering this reform, only Arizona has implemented this reform by court rule. ARIZ. R. CIV. P. 39(f). The *Juror Discussions Project*, *supra* note 8, is an independent evaluation of this reform. The results of the study will be available in late 1998.

81. The "Allen charge" or "dynamite charge" is a jury instruction often delivered to deadlocked juries. *Allen v. United States*, 164 U.S. 492 (1896). The instruction asks jurors to "listen, with a disposition to be convinced, to each other's arguments" and specifically suggests to jurors holding the minority position in deliberations to "consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself." *Id.* at 501.

82. ARIZ. R. CIV. P. 39(h); see Dann, *supra* note 75, at 1269-77.

83. Although most judges are willing to provide jurors with written instructions, few have taken substantial steps toward drafting "plain English" jury instructions, ostensibly because of

Despite considerable enthusiasm in some quarters, many of these reform techniques present difficult and troubling questions about their effectiveness and their ultimate impact on civil jury verdicts. Although many jurors are enthusiastic about the opportunity to take a more active role in the trial process, not all of them take advantage of these opportunities. For example, some jurors take only sketchy notes (if any), despite receiving permission (and even notepads and writing utensils) from the court to do so.⁸⁴ In the evaluation of Arizona Rule 39(f), permitting jurors in civil cases to discuss the evidence before final deliberations, nearly one-third of the jurors did not engage in such discussions.⁸⁵

The reality that empirical research is often inconclusive about the overall effectiveness of these types of reforms complicates the picture. A study of the effect of permitting jurors to take notes and ask questions, for example, did not prove conclusively that such techniques significantly improve juror comprehension or recall of the evidence.⁸⁶ Other studies of innovative techniques have shown contradictory, inconclusive, or only marginal results.⁸⁷ In fact, the only reform that consistently improves juror comprehension is to simplify and clarify jury instructions—a labor-intensive task that many judges are reluctant to undertake because of fear of deviating from pattern instructions that have already survived appellate scrutiny.⁸⁸

Finally, some judges (and attorneys) are suspicious that these types of jury reform techniques cross the line between an educational model of jury decision making and a “pop psychology” or mass marketing approach to trial practice.⁸⁹ Many people who hold the image of care-

the perceived risk that instructions that deviate from well-established pattern instructions will not survive appellate scrutiny. Munsterman & Hannaford, *supra* note 50, at 9.

84. Although an instruction explaining that jurors are permitted to take notes is required in Arizona, ARIZ. R. CIV. P. 39(p), an evaluation of the Arizona jury reforms found that 11% of jurors reported taking only sketchy notes and 4% did not take any notes at all. *Juror Discussions Project*, *supra* note 8.

85. In the evaluation of the Arizona civil rule that permits jurors to discuss the evidence before final deliberations, 20% expressed concern that doing so would compromise their ability to make an independent judgment about the evidence. *Juror Discussions Project*, *supra* note 8.

86. AMERICAN JUDICATURE SOC'Y, *supra* note 77, at 11. It did, however, disprove allegations that these techniques would distract jurors or otherwise jeopardize the neutral role of the jury. *Id.*

87. Compare David L. Rosenhan et al., *supra* note 77, at 59-60 (finding that those who took notes during a trial simulation showed superior recall and involvement proportionate to the quantity, accuracy, and organization of notes taken) with AMERICAN JUDICATURE SOC'Y, *supra* note 77, at 11-14 (reporting few benefits in either juror question asking or note taking).

88. Munsterman & Hannaford, *supra* note 50, at 9.

89. See, e.g., Noelle C. Nelson, *A New Generation of Jurors?*, TRIAL, July 1997, at 54 (describing techniques designed to appeal to “Generation X” jurors).

ful, thoughtful, sober jurors as the ideal find it troublesome to think that courtroom “gimmicks” (e.g., demonstrative evidence, technological presentations of evidence) can significantly affect jury decision making or influence the jury’s verdict.

CONCLUSION

As has been discussed, the factors that determine judges’ opinions about civil juries are far more complex than simply whether the judges generally agree or disagree with jury verdicts—or even approve of jurors’ approach to decision making. Some judges tend to view the civil jury as a natural partner that makes the difficult factual determinations, leaving the judge free to concentrate on the managerial and administrative aspects of the trial and other pending cases. Other judges view the civil jury in a more negative light—for example, as a comparatively less effective and efficient method of dispute resolution than a bench trial or even as a sign of the judge’s failure to resolve the case during pretrial discovery. Indeed, each judge’s views can vary from trial to trial depending on the characteristics of the trial, the efforts expended to resolve the case, and the external pressure on the judge to resolve the existing caseload. Finally, judges’ use of contemporary jury reform techniques—and in particular their choice of reforms—also reflects judges’ views of the civil jury. The fact that judges sometimes use different types of reform techniques in combinations that do not necessarily serve the same ends may reveal misunderstanding by some judges about the impact of these techniques and highlights the need for more information.

