TRUTH, JUSTICE AND THE AMERICAN JURY
Talk Given to Philosophical Club of Cleveland
December 13 2010 by Spencer Neth

Blackstone, THE 18TH Century jurist, the greatest legal authority of the Common Law of his time, called the jury "the glory of the English law." A more modern Federal Judge has said "the jury system is one of the really great achievements of English and American jurisprudence." It is common to read that the jury is the "palladium of our liberties." And one can find similar thoughts expressed by lawyers, judges and scholars in any age, including the present time.

The Supreme Court has said that "trial by jury in criminal cases is fundamental to the American scheme of justice."[1]

Of course, the worship of the jury is not and never has been universal. Herbert Spencer, the very influential 19th Century English philosopher and social theorist referred to the jury as "a group of twelve people of average ignorance" and a more recent humorist Norm Crosby is reported to say: "When you go into court you are putting your fate into the hands of twelve people who weren't smart enough to get out of jury duty." The most systematic and scathing criticism of the Jury came from Jerome Frank, a prominent, mid 20th century Federal District Judge and sometime teacher at Yale Law School. Frank's books for a popular audience, such as "Courts on Trial" and "Law and the Modern Mine" had a large and influential audience at the time. In many ways his critiques, which I generally take issue with, are still timely.

I could devote my entire talk to quotations of the famous and … lauding or dismissing the American or English juries, but that would get old soon. I have been a student of the American jury for over thirty years and the language and arguments of the fowes and friends of the jury has little changed. What has changed is that in the last thirty years we have had an explosion of serious studies by lawyers, social scientists – expecially social psychologists interested in the way people behave in groups of various sizes -, and social reformers of the jury – the body of literature is far to great for me to claim I have read more than a sampling.

I might add a disclaimer here. I have never been a lawyer in a case tried before a jury, and I have never served on a petti jury, the sort of jury that decides guilt or innocence of those accused of crimes and which decides who was negligent and how much damages the battered plaintiff suffered. Both Marjorie and I have served on the County Grand Jury which only decides who to indict. I have also served as an arbitrator, a finder of both fact and law, in many commercial disputes, and the insight learned in so doing has contributed to whatever insight I have with

[1] *Duncan vs Louisiana*, 391 U.S. 145, at 149 (1968)

respect to juries. Finally, I have watched the movie "Twelve Angry Men" at least 20 times. I always showed it to my Dispute Resolution classes.

Around 1975 I was asked to create a new course at the Case Western Reserve Law School to be called Conflict Resolution, and in a later incarnation called Dispute Resolution. At that time the course that was at the time unique and unprecedented. I should add the course was not my idea, but was proposed to the Faculty by a colleague of mine, Ron Coffey, who came up with the notion that law schools were too focused on the courts as institutions for resolving disputes. In fact, most disputes in American are resolved by non-courts, such as administrative agencies such as the Social Security Administration and the Securities and Exchange Commission, arbitration, mediation, trade organizations and so on. He proposed and the Case faculty approved the creation of a new course to be called Conflict Resolution. For some reason never explained to me, I was asked to teach this course. Although unique at the time, most American law schools now teach one or more courses in what is called Alternative Dispute Resolution or ADR. Being unique meant that there were no books or teaching materials, so with the help of one other colleague given to teach the course, I made it up. I borrowed parts of some mimeographed materials used at Harvard, some materials I had created for use when I was a teaching fellow at Harvard, and some stuff I put together just for the new course. Over the years I taught the course I continually revised and added new material especially in the areas that is of most relevance to this talk, that of finding facts.

From my four years as a practicing lawyer, and my extensive reading - for my own curiosity and in preparation for a career as a teacher of law, I knew that most disputes were more about facts – who did what to whom – than about the law or principles of right and wrong. At least this is true of America where for the most part we do not fight about basic principles, or maybe we have the political arena for these disputes. There are some pretty bitter battles about abortion and even immigration and such but we do not see much of the sort of Sunni killing Shias that we saw last week in Afghanistan.[2]

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[2] Perhaps the most influential, or at least viament lawyer-jurist expressing the notion that determining what happened, i.e. finding of facts, are more often more important than any disagreements about principles of right and wrong, was Jerome Frank. Frank repeated this theme many times. *See*, *e.g.*, *What Courts Do In Fact*, 26 Ill. L. Rev. 645 & 761 (1932). Jerome Frank held a number of important government positions, and was for a long time a Federal District Court Judge. He was a colorful and popular writer, whose books such as *The Law and the Modern Mind* and *Courts on Trial* were strong attacks on what he considered the mythology of our legal system. Frank's belief in the central importance of facts in legal disputes, and his deep skepticism concerning our capacity to make reliable factual determinations was the basis for much of his iconoclasm. For a time he taught a seminar at the Yale Law School which he called Facts. Frank's books remain relevant and powerful, although to my mind considerably overstated. In preparation for my new course, I read Frank's typewritten

As I began to create the course I thought about what was it that was distinctive about resolving disputes in an American court, what made litigation in courts different from litigation in other settings or different from resolving disputes without litigation. It soon seemed clear to me that there were two features of the American system of litigation in courts that made it different from litigation in other countries: namely, the adversary system and the jury. In an adversary system, the decision maker, be it the judge, jury, arbitrators, bureaucrat or administrative agency or whatever, is neutral and merely responsive to whatever arguments or evidence the parties present to it. In an adversary system the parties do the investigation of the facts and evidence, do the research and come up with the arguments. In an adversary system, the decision maker may run any hearing and may make or administer rules of procedure or evidence, but the decision maker takes what is presented to it and does not do original research of facts or evidence, and to some extent does not do original research of the law. Now, I should mention that the American legal system is not a pure adversary system as described here. Judges, or their clerks, often do not fully rely on the parties written briefs or oral arguments and they do sometimes do original research of the law. They do sometimes ask questions of witnesses at the hearings, but they do not investigate and they do not gather evidence and if they interject themselves too much into any trial they will be admonished by their superiors and they will be overruled. The adversary system is a fascinating subject that I hope to make subject of another talk before this Club.

My topic tonight is the American jury and its relation to truth and justice, one of the two peculiar features of the American justice system, and is the one feature that distinguishes litigation in American courts from litigation in other institutions of dispute resolution. There are no juries in arbitration or in a hearing before an Administrative law judge or a bureaucrat.

So what is a jury and what are they supposed to do? And why do we have them at all? No other country has them for ordinary civil cases and only England and its former colonies use them as we do for virtually all serious criminal cases.[3]

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materials for his course which Yale Law School Library kindly loaned after some urging on my part and that of the Case Law School Library staff.

[3] Well we do see some form of juries in other countries. There is a form of mixed jury, consisting of lay people, i.e. non lawyers, sitting with judges, used in criminal cases – but not civil cases - in the Scandinavian countries and in Germany. England, from which we derive our traditions, and Ireland, and Wales, and the Commonwealth countries have juries in Criminal cases, and England has civil juries, but only for cases of libel and slander. A recent book has a useful survey. *World Jury Systems,* Neil Vidmar ed. 2000.l

I won't dwell on the history, except to say that we have adopted juries and incorporated them into our Federal and State Constitutions for, at least in my opinion for the very simple reason that we as a people have always distrusted government. At least by the 17th century in England juries were seen as a check on the English royal judges. In America the juries were seen as a check on the judges appointed by the crazy King George III. For many, that remains a good reason for having juries, at least in criminal cases. For others, the only justification for retaining juries is tradition, but there are other good reasons for having juries, reasons that will come up as we go.

I would like to start as I used to start this section of my course and ask the question: What is the proper size of a jury?

Is it 12? If it is or isn't 12, why?
Is it 212? If it is or isn't 212, why or why not?
Is it 2? If it is or isn't 2, why or why not?

Traditionally the American jury, and the English jury, had twelve members. To the best of my knowledge, no one has been able to find out why it is twelve – the simplest answer is "tradition". In my Dispute Resolution course I had the students read the US Supreme Court case of *Ballew vs. Georgia.*[4] Ballew, the manager of the Paris Adult Theatre in Atlanta, Georgia, was charged with and convicted of knowingly distributing obscene materials in violation of a Georgia statute.[5] When we return to discussing the *Ballew* case, keep in mind the nature of the crime of which he was convicted. While none of the Supreme Court opinions in that case make anything of the crime, in my opinion it is extremely relevant. The principle issue before the US Supreme Court was that the so-called jury that convicted him had only 5 members on it. The Sixth Amendment of the US Constitution reads:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, [which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.]"

While the Sixth Amendment on its face appears to apply only to cases in Federal Courts, but by the time of Ballew it had long been applied to proceedings in

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[4] 435 U.S. 223 (1978)

[5] Georgia Code Ann. Sec. 26-2101 which outlaws among other things the exhibition of obscene material…"knowing the obscene nature thereof." Knowledge is defined in the statute as including "constructive knowledge" and constructive knowledge exists if the accuse "has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material."

state courts.[6] Furthermore, in *Williams vs Florida*, 399 U.S. 78 (1970), the Supreme Court held that the right to a jury did not mean the right to the traditional jury of 12 – that is to say, what is a "jury" was to be judged not on the basis of history[7] or tradition, but rather on the basis of the function which the jury is to perform. Williams had been found guilty by a jury of six, which the Supreme Court held was a constitutional jury. Ballew was found guilty by a jury of five.[8] Do you think that Ballew should win his argument that five is not enough to convict him?

In civil cases the right to trial by jury is founded on the Seventh Amendment, which applies only to suits in Federal Courts. Most states have State Constitutional provisions providing for jury trials in both criminal and civil matters, and these provisions are sometimes worded and interpreted significantly different than that of the US Constitution which I am discussing here. Civil cases here mean the ordinary suits between individuals or companies for breaches of contract, and tort cases such as medical malpractice or automobile accident cases. In *Colgrove vs Battin*, following the Williams case, the Supreme Court ok'd civil trials in Federal Courts by juries of less than 12. If there is time, I would like us to discuss how the function of the jury in civil trials is different from the function of the jury in criminal trials, and whether that should make any different in what should be the acceptable minimum number for jury to perform its function.

Thus far we have seen that juries in both criminal and civil cases need not have the traditional 12 to be considered a Constitutional "Jury". I will leave for later the question of whether a jury verdict needs to be unanimous to be valid. The US Supreme Court has held that juries need not be unanimous, even though traditionally verdicts and judgments had to be unanimous.[9] I should add that this does not mean that a jury can convict by a simple majority, and before I finish I

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[6] Duncan vs Louisiana, 391 U.S. 145 (1968)

[7] As I will discuss if there is time, the Constitutional provision for jury trials in civil cases is not the Sixth Amendment, but rather the Seventh Amendment, which reads "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

[8] The applicable Georgia rules concerning jury trials at the time stated: "The proceedings [in the Criminal Court of Atlanta] after information or accusation, shall conform to the rules governing like proceedings in the Superior Courts, except that the jury in said court, shall consist of five, to be stricken alternately by the defendant and State from a panel of twelve. The defendant shall be entitled to four (4) strikes and the State three (3) and the five remaining jurors shall compose the jury."

Irrespective of its size, the Georgia jury in a criminal trial, in order to convict, must do so by unanimous vote. *Ball v. State*, 9 Ga. App. 162, 70 S.E. 888 (1911).

[9] *Johnson v. Louisiana*, 406 US 356 (1972)

would like to discuss the interplay between the relaxation of the two traditional requirements of unanimity and the size of twelve. [10]

~~This reminds me of a comment by a speaker I heard recently at Chautauqua – it is now my job to speak to you about my chosen topic and it is your job to listen. Let's hope I finish my job before you finish yours.~~

So at this point I want to briefly describe the events that occur in a typical jury trial, commenting here and there about some features I find curious.

THE TYPICAL TRIAL:

How is a case presented to a jury and how do they go about deciding on a verdict? In a civil case, the typical trial will begin by the plaintiff making an opening statement outlining what he intends to prove. The defendant may then make his opening statement or, in some jurisdictions, the defendant may postpone his opening statement until after the plaintiff has completed introducing all of his evidence. After the defendant has introduced all of his evidence, the plaintiff will usually have the opportunity to introduce further evidence, although usually the plaintiff is limited in rebuttal to evidence that rebuts the defendant's evidence as opposed to evidence raising new points or evidence in further support of his original case.

The order of events in a criminal case is essentially the same.

Nearly every trial has more than one factual issue in dispute. The procedure described here, with the defendant not putting in any evidence until after the plaintiff is finished, means that the jury will hear plaintiff's evidence on Issue #1, but will not hear defendant's evidence on Issue #1, until after the plaintiff has introduced all of his evidence on Issue #2 and Issue #3 etc. Furthermore, the first witness to testify for the plaintiff might also be asked questions and give testimony on Issue #3 or #4. And the second witness may give testimony about Issue #2 and #3 but not about Issue #1. The point is that the order of the plaintiff's evidence, no matter how skilled the plaintiff's attorney, may well be confusing. And when it comes time for the defendant to introduce his evidence, there could be a long delay, in a complex case days or even weeks could separate the plaintiff and defendant's evidence on the same issue. Of course, the defendant will have some chance to immediately rebut the plaintiff's evidence by means of cross

[10] See *Burch v. Louisiana*, 441 U.S. 130 (1979), where the Supreme Court in a relatively brief opinion by Justice Rehnquist stated that "much the same reasons that led us in *Ballew* to decide that use of a five-member jury threatened the fairness of the proceeding and the proper role of the jury, lead us to conclude now that conviction for a non-petty offense by only five members of a six-person jury presents a similar threat to the preservation of the substance of the jury trial guarantee and justifies our requiring verdicts rendered by six-person juries to be unanimous."

examination of the plaintiff's witnesses, but he will not have any chance for immediate rebuttal by means of introducing his own witnesses.

Note that during this whole process examining of the witness and the introduction into evidence of documents and exhibits, the jury is totally passive, inactive, observing but not participating. They don't ask questions and they can say nothing. In some court rooms in some states in just the last ten years or so, juries have been permitted to submit questions to the judge who will then ask the question of the witness which the judge things are legally appropriate. The jury is not permitted to take notes in most court room, although in recent years some judges in some states do permit the jurors to take notes.

After both sides have completed introducing their evidence, the attorneys for the two parties will make their closing arguments. Typically these closing arguments will consist of a summary of the relevant - and sometimes irrelevant - facts that they believe they have proven; an argument why the jury should believe their evidence and why that evidence does indeed establish their case; an attack on the evidence introduced by the other side in a attempt to show why the other side's evidence is weak, not credible, irrelevant, etc. These closing arguments often are the lawyers best opportunity to utilize their persuasive powers, and they are frequently full of passion and hyperbole.

Finally it is time for the Judge to give the jury instructions, or in a criminal case the charge. It is only at this point that the jury is told precisely what they are supposed to do, what they are suppose to decide. So they have heard the evidence only vaguely knowing
why they are hearing it and without the ability to know what is and what is not important. until the trial is concluded, the jurors during the trial possess no means of knowing which aspects of the testimony they should particularly concern themselves with. Instead of remembering the details of that which finally proves to be crucial, the many jurors may instead recall emotional and dramatic incidents which are legally insignificant.

Now it is true that the opening statements give them a pretty good idea of the law they are to apply, at least in a simple case, but precision in the applicable law is critical.

Unfortunately, the need for the judge to state the law with precision – if the instructions are the least bit inaccurate, that can result in an appeal and a nullification of any verdict or decision, which means a new trial with a new jury – conflicts with the need to make the instructions understandable. To state the law precisely and accurately in a manner that the jury can understand it difficult if not impossible. The language of the law is often unfamiliar and sometimes obscure to anyone not unschooled in the law.

In some types of cases or with respect to some types of evidence there are boiler-plate instructions about the reliability of the evidence. For example, the instructions will almost certainly explain the burden of proof on the various issues, although many doubt whether a typical juror is able to understand the distinctions between the various levels of burden of proof. The Ohio State Bar Association and some court systems or Bar associations publish model jury instructions for commonly occurring types of cases, this can help the judge and can make it easier to have the instructions in a written form that can be shared with the jury.

In some states, some judges give the jury the instructions in writing to take into the jury room while they deliberate. This is one of the important details of a jury trial where in most states are no rules – whether the jury gets to see as well as hear the instructions depends on the judge and maybe the case. Before the advent of widely available word processing technology, it was practically difficult to prepare a written version of the instructions – instructions which generally are not written out until after the trial is over. But the tradition developed out of practical necessity continues in many courts.

The instructions concerning the substantive law are often quite complicated, even in fairly simple cases. One reason for this is that the law is often complicated even if the facts are fairly straightforward. Another reason for the complexity of the instructions is that they must provide for all possible combinations of facts which the jury might find. Thus the instructions may take the form of "If you find A, then you must consider whether B is true, and if you find both A and B to be true then you must consider whether C is true. However, if you find that A is not true you must consider whether X is true, and if you find X to be true, you....." Although most people have great difficulty keeping instructions of that sort straight in their head, and although instructions of that sort seem to require the jury to weigh the evidence on each issue separately, there is considerable evidence that this is not what juries in fact do. Rather they "resolve complex factual disputes...not so much as a minute weighing of individual testimony as by an over-all impression garnered from viewing the evidence as a whole. In recent years there have a lot of efforts made to make the instructions more understandable, using non-legal language where possible, but given the nature of the law to be applied this is only of limited use. But if the jury in fact behaves in the holistic manner as many believe, perhaps the instructions and all the efforts to make them understandable and accurate are more or less a waste.

In Federal Courts, and a few state courts, the judge may make comments about the evidence when giving her instructions on the law. Again there are no rules, and some judges ask questions of the witnesses and make comments to the jury about the evidence. My impression is that 100 years ago the judges, or at least some of them felt free to “help” the jury reach what he thought was the correct

result. However, in today's world, the judge must be cautious that she does not go too far and prejudice the jury by indicating her own views of the merits of the case, for if she oversteps the bounds she may create reversible error. Note I use the word SHE in speaking about today and HE when speaking about 100 years ago.

While all this is going on what is the Jury doing? Who knows? No one is allowed to ask them. The judge will have instructed them to not talk about the case until the trial is over and they are sent to the jury room to deliberate. Most of us doubt if they are able to actually not talk about that which has consumed all of their time, and hopefully all of their attention while in the courtroom. They are told to suspend judgment until they have heard all of the evidence, but few believe that this is humanly possible.

They cannot ask questions but they must wonder why the lawyer or lawyers never asked the question or called the witness which seemed obviously critical – but until they have seen the instructions they cannot really know what is critical. And there may be innocent reasons why the question was never asked. In most trials there will be at least some evidence that is excluded based on some obscure – at least obscure to the jury – rule of evidence. Can the jury speculate about what the question not asked would reveal or what the evidence that was excluded might have been. How can they humanly not?

Remember, they are going to be hearing the testimony and seeing – but not really examining – the documents in the odd order – hearing plaintiff (or prosecution) testimony on issue X and some time passes before they hear the other side's evidence on issue X. And at the time they hear the testimony they will not have been given the instructions, or in criminal cases we call the charge. They will have the benefit of the opening remarks before they hear the evidence, but the opening remarks will not tell them much about the law they are to apply to the evidence. Nevertheless, in the typical case where there is little or no dispute about the applicable law, the opening statements of the parties, if done with skill, can go a long way to inform the jury of what the parties intend to prove, and therefore what evidence is likely to be legally relevant.

Having heard the testimony, seen the documents and exhibits entered into evidence, and listened to the instructions, the jury adjourns to the jury room and deliberates. One of the standard instructions they will have been given is to base their verdict strictly on the evidence presented at the trial and that they are to talk to no one outside about the case and they are not to do any research on their own. In the world of cell phones and Google and Facebook, this has created a significant challenge to the judicial system, a problem that has to date not be satisfactorily solved.

They usually start by choosing a foreperson, and probably take an initial straw poll to see if they all agree or not. Assuming that they don't all agree they

begin to deliberate, taking additional votes as it seems wise until they come up with a verdict or a decision on liability. In a civil case where the plaintiff wins something, they then usually have to determine the amount of damages to award. What they actually do in the jury room is a secret. However, there are maybe a dozen cases where the jury's deliberation has been videotaped with the approval of the judge, the jury, and all parties. There is an especially interesting one of a murder trial in Cleveland that I usually showed my Dispute Resolution classes. There are also accounts by former members of juries, including some lawyers and judges who in recent years have been included on the jury rolls. And then there is *Twelve Angry Men*, written by Reginald Rose shortly after he served on a jury. In the 1950's there was large Ford Foundation funded study of the jury headquartered at the University of Chicago. Only one book and about a half dozen articles came out of that study which was terminated when the study attempted to invade the privacy of the jury deliberation room.

Many of the features I have described here of the American jury trial is a matter of tradition. A remarkably large part of the details, like jurors asking questions and taking notes, are not written down in any code and vary from jurisdiction to jurisdiction, and indeed from judge to judge. Although they come from tradition, one would hope that the traditions reflect wisdom. And wisdom must be judged in terms of the function, in terms of what the jury trial is supposed to do. Is it to find the truth? If that were the only or even principle function then surely we do not have an ideal design – tradition to that extent does not reflect wisdom. Is it to produce justice? Then one has to ask, what is justice – can justice be other than the accurate application of the law, assuming the law is just, to the true facts?

There is little reason to think that tradition always mirrors wisdom. Especially when our traditions vary from that of Western Europe, where the goals of civil and criminal trials are not likely much different and where the people are pretty civilized.

The verdict is typically one or two words without explanation, e.g. "guilty", "not guilty", "liable for $30,000", "not liable", unless a party or both parties has requested a special verdict or a general verdict with interrogatories.

Note that while the jury in a civil case normally is required to declare the amount of damages, in criminal cases the jury has nothing to say about the sentence to be imposed on someone found guilty.[11] Indeed, usually we don't permit the jury to know what the penalties are until after the verdict. In civil cases it is generally believed that damages are determined largely as a result of negotiation and compromise among the various jurors. Quotient verdicts, e.g. where the jury adds all of the opinions of the various jurors as to damages

[11] Capital punishment is an important exception to this statement.

and takes the average, are technically improper, but are believed to be quite common.[12] Criminal cases frequently involve multiple counts, either involving separate crimes or involving "lesser included offenses". In such cases, the jury can produce a similar compromise verdict by finding the defendant guilty of less than all of the counts or guilty of a lesser included offense.

After the jury has rendered its verdict it is usually dismissed,[13] although the individual jurors may be subsequently chosen for the panel on another case. However, there is rarely any chance for anyone to find out if the jury in fact followed the judge's instructions, ignored irrelevant evidence and decided the case only on the evidence presented at the trial. The opportunity to interview the jurors is in most states very limited, and there are many rules that are willfully designed to prevent discovery of possible jury misconduct.[14] In essence, if the judge has done his or her job properly, we don't want to know why or how the jury did what it did.

The Supreme Court in *Williams* held that a jury of 6 was ok – it was still big enough to fulfill the function of the jury and could properly be called a "Jury". The Supreme Court in *Ballew* held that a jury of 5 is not enough to fulfill that the functions and thus be deemed a proper jury. In a later case the Court held that a jury of 6 was not a constitutional jury unless it the verdict was unanimous, although a jury of 12 need not be unanimous.

So, what is the function of the jury and why do we use them, and what is the proper size of a jury?

In *Williams* the court said it was "the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt of innocence."[15]

And from *Ballew*, quoting from prior cases: "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the

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[12] Annotation: Comment Note - Quotient Verdicts , 8 A.L.R. 3d 335.

[13] Following the verdict, which might be read by the judge or the jury foreperson, in criminal cases the parties may request that the jury be polled, the process by which the judge asks each juror individually if the verdict reflects his or her vote.

[14] Here too there are variations from state to state and from judge to judge. It is clear that no juror can ever be required to answer to anyone about deliberations or the result.

[15] *Williams vs US*, 399 U.S. 78, 100

corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.' This purpose is attained by the participation of the community in determinations of guilt and by the application of the common sense of laymen who, as jurors, consider the case. *Williams v. Florida*, 399 U.S., at 100.

These functions of the jury are obviously mostly relevant in criminal cases. However, the need to have judgment by a group of laypeople is also important in many types of civil cases. For instance, what about a suit by an individual injured by a defectively manufactured machine? One might think that judges, coming mostly from the upper middle class educated elite social group, might identify more with the corporation than the individual. This was probably more true, say 50 years ago, when judges were all white male drawn mostly from those classes which could afford the 7 years of education required to be a lawyer, but the perception if not the reality will remain in many of those less fortunate folk.

The most extreme example of the jury interjecting its common sense notion of justice would be cases of jury nullification. Those are cases where the jurors have understood or have at least attempted to understand the law but come down to a decision that ignores the law. The heroic example of the jury in Colonial New York where a jury acquitted the obviously guilty John Peter Zenger of seditious libel. There were a number of known cases of Northern juries refusing to find guilty those accused of violating the Fugitive Slave Act. During Prohibition many juries refused to find guilty those obviously guilty of violating the anti-liquor laws. Less appealing are the cases in the 20th century American South where those guilty of racial murders were let off by bigoted and unrepresentative juries. The Henry Morgentaler case in Canada is perhaps a more troubling example. There, Morgentaler the abortionist was acquitted by a jury, and found guilty on appeal. The Canadian appellate courts denied the jury of the power to nullify the law, something that I believe could not happen in the United States, where we often say the jury has the power but not the right to ignore their instructions. The power of the Canadian appellate courts to overrule a jury was eliminated shortly after the Morgentaler case, and the case was clearly influential in changing the Canadian law of abortion.

Jury nullification also happens in civil cases. The clearest examples are the cases involving contributory negligence. Until about mid-20th century most common law state followed the doctrine of contributory negligence. According to this doctrine, if you were injured by someone else's negligence – say that you were hit by someone coming through a red light drunk – you could not recover from them if you were also even the slightest bit negligent – say you were going 5 miles an hour over the speed limit. Many juries, perhaps most juries, were believed to find the more negligent party liable but for a lesser amount. Ultimately, in most American states the doctrine of contributory negligence was abolished, confirming the justice of those juries who ignored their instructions.

Jury nullification, however, is a bit off the focus of my talk. It is a controversial and interesting topic of it own and would be a good topic for another paper on another day.

In the *Ballew* case the majority reviewed a lot of the empirical studies of the effect of size on the function of juries, some of those functions studied were as follows:

1. How does size change the group's ability to have effective group deliberation.

The easy cases are the "jury' of one or a "jury" of 1,000. But is there a difference between 5 and 6?

2. I have alluded to the problem of the jury understanding and remembering the testimony when the evidence of the plaintiff and defendant on each factual issue can be separated by days or weeks. One virtue of the jury is that while none of the jurors can remember everything that happened in the trial, collectively they might. Surely size does matter here, but in that respect is not 12 likely to be a good deal better than 6?

3. Protection from a less than perfect judge is certainly important in both civil and criminal cases – although probably more important in criminal cases where the judge decides the penalty after a verdict of guilt. Does the size of the jury impact this function? Surely, it would be more difficult for a small jury, say 3 or 4, to resist pressure from a judge than it would for a jury of 12 acting unanimously.

4. We speak of a "jury of one's peers". But in fact we draw the juries from a random selection of the adult public, and the jury is supposed to represent the general public. Given the heterogeneous nature of our society we are not likely to get a good cross section of society if there are only 3, or 4, or 5… or 6? Once we depart from the traditional 12, it is hard to say what is the right number if there is a right number. Of course, allowing each party to peremptorily dismiss a number of potential jurors likely reduces the representativeness of the jury, but we keep this feature, for better or for worse, for other reasons. I have not talked about the jury selection process up to now, but only for reason of time as it is important and relevant.

5. The court discussed the problem that different juries can come to a different conclusion on the same evidence, and that some studies showed that smaller juries will produce less consistent results than a large jury. Is this consistency in results something that suggests juries are not a good way to decide rights and wrongs? This brings to my mind the US Supreme Court case of *BMW vs Gore.*[16] Two doctors in Alabama each bought a new BMW. The BMWs had been repainted after their factory paint job had be damaged while parked in a lot before

[16] 517 US 559 (1995)

delivery to the dealer. Alabama had a statute which would entitle each doctor to recover $4,000 in these circumstances. The same attorneys represented both doctors and in both cases asked for the $4,000 plus punitive damages. Dr. Gore was awarded $4 million plus the $4,000.[17] The other doctor in a trial before a different jury was awarded only $4,000. And punitive damages is something that would seem especially suitable for a jury rather than a judge.

6. One of the virtues of having a jury is that the bias, prejudices, pre-dispositions and such are thought to off set one another in a jury of 12 – or apparently 6 but not of 5. In any event, in a jury of only 3 chances are they could all think Hispanics are all lazy and unreliable and this is less likely in a jury of 6 or even less likely if there are 12.

7. I have mentioned that a crucial function of the jury is to determine damage in civil cases. In breach of contract cases determination of the damages might be difficult because it often requires the jury to calculate what the plaintiff lost due to the breach. Tort cases are different. Consider a suit by a woman who is injured in an automobile accident and has to have plastic surgery to partially restore her face and who loses 6 months of earnings due while recovering from her injuries. The jury must determine what her lost earnings are – this is not much different from the breach of contract case – but also her pain and suffering and maybe her lifetime living with a scarred face. It is believed that in such cases that juries sort of average their individual judgments about the appropriate dollar amount to award. The US Supreme Court seemed to think that this was good and proper, but would it be better to average the judgments of 12 than of 5? Perhaps.

8. The Court also noted that with a smaller number there were likely be fewer hung juries – juries unable to reach a unanimous decision. That surely is statistically true, but one wonders if that is good or bad – Defendants surely would think it bad to have less chance of a hung jury but hung juries are a big waste of time and expense.

9. There are many times when the question is not what happened but how to characterize it. We might know that the defendant swung around to the right as the car in front stopped suddenly, but was that negligent and was the car in front which stopped so suddenly acting negligently? Negligence is defined in terms of what a reason person would reasonably do in that circumstance. And in *Ballew*, did the Mr. Ballew have "knowledge of facts which would put a reasonable and prudent person on notice…" What Ballew knew is a fact, but reasonable and prudent man sounds like something a jury would be more apt to be able to determine than a judge. And a decision in one case that a particular defendant was or was not negligent is only good for that case -no precedent is made by any jury verdict. Thus it seems at least some questions can best be decided by a jury.

[17] This was later reduced to $2 million by the Alabama Supreme Court.

Finally, a word about the alternatives to a American Jury. Professor John Langbein of Yale Law School - and former student of mine, I am proud to say – argues that the German mixed jury is preferable to ours. The German jury consists of judges and a select jury of accomplished citizens who serve for a term of months, not just for one case. Given our history, the real alternative is the judge. I have practiced enough law to sympathize with the many lawyers who distrust the reliability or the fairness of certain judges. And we get to choose to some extent who will serve on our juries, and we have no control over what judge we get.

There have been a number of studies comparing judges and juries. One way is to have judges keep track of how they would have voted in cases decided in fact by the jury. The studies that I have seen all show very little difference in result. When it comes to awarding damages to plaintiffs injuries in auto accidents or defective products and the like, the judges would probably give a bit more to the plaintiff than the jury, but the judges decisions are more consistent, and less apt to be extreme at either end.

My opinion after much study, and very little first had experience is that juries are a good thing and we should and I am certain we will keep them for the foreseeable future.