
Introduction: The American Civil Jury: Illusion and Reality - Fourth Annual Clifford Symposium on Tort Law and Social Policy

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INTRODUCTION

*Stephan Landsman**

Hardly a day passes without some reference to the doings of a civil jury. Whether the news involves a huge damage award or a shocking testimonial revelation, jury trials and their results regularly take center stage. This should come as no surprise since both federal and state constitutions charge juries of ordinary citizens with the task of resolving society's most intractable disputes.

The American jury is a remarkable institution, operating at the sensitive interface between law, local community, and larger society. No other entity is called upon to do what it does—harmonize the views of a diverse group of citizens to make some of society's most important decisions. No other nation in the world entrusts its lay citizens with such authority or responsibility.

Despite its critical position the civil jury is one of the most reviled and misunderstood of American institutions. Its competence, intelligence, and integrity are regularly questioned by some of the most powerful members of our society including corporate leaders, legislators, and executive branch officials. Recently, critics have engaged in a range of law-making efforts to curtail the power of the civil jury.

What has been in strikingly short supply in the public debate is a well-informed understanding of what the American civil jury really does and how jurors really think. The Fourth Annual Robert A. Clifford Symposium examines both illusions and realities regarding the American jury. It begins with an examination of some of the civil jury's past history by Lawrence Friedman. Professor Friedman finds that disputes about the jury; its makeup, its procedure, its reliability, and its guidance, have been with us for a long time. He finds in the nineteenth century record evidence of an oscillation between judge and jury power but, as significantly, a diminution of the authority of *both* in a number of situations. He notes that the civil jury has lent our law flexibility and representativeness but unpredictability as well.

The Symposium moves from the past to the present with Michael Saks's article, *Public Opinion about the Civil Jury: Can Reality Be*

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Found in Illusions? Professor Saks who, along with other contributors including Neil Vidmar, Shari Diamond, Valerie Hans, Joseph Sanders, and Richard Lempert, is a leading social scientist commentator on the American legal scene, seeks to provide a new perspective on public opinion survey data that suggest widespread dissatisfaction with the civil jury. Saks contends that polls showing popular concern about juries are deeply flawed and tell us more about the sad state of opinion surveying than about how juries are performing.

Paula Hannaford and C. Thomas Munsterman of the National Center for State Courts, along with Judge Michael Dann of the Arizona Superior Court, provide the Symposium with some judicial opinions about the jury in their article, *How Judges View Civil Juries*. They suggest that judges generally do not share public skepticism about the jury. They go on, however, to point out that judges are far from monolithic on the topic, holding a range of different views especially as expressed in their courtroom conduct and efforts at procedural reform.

Professor Neil Vidmar and his colleagues then provide a closer look at one particularly contentious area of civil litigation, in an article entitled, *Jury Awards for Medical Malpractice and Post-Verdict Adjustments of Those Awards*. Vidmar and his collaborators find that the widespread fixation on and concern about very large jury awards yields a seriously misleading picture of the nuanced system of checks and balances that eventuates in the payment of compensatory damages. Vidmar concludes by noting the general reliability of the tort sub-system he has examined.

Professor Shari Diamond and her co-authors explore a series of provocative questions concerning the variability of juror judgments, most particularly with respect to the amount of damages awarded in an article entitled, *Juror Judgments about Liability and Damages: Sources of Variability and Ways to Increase Consistency*. In this piece Professor Diamond scrutinizes varying juror reactions to a single mock case patterned on an asbestos trial and attempts to uncover the reasons for juror damages-setting variability. She finds in her mock case that juror background characteristics and specified social attitudes have little to do with variations in damage awards. In light of these findings and a number of other social science insights, Professor Diamond explores the possibility of increasing award consistency by providing jurors, in one form or another, greater guidance through the use of awards in comparable cases.

Professor Valerie Hans takes us from jury award size to juror treatment of corporations in her article, *The Illusions and Realities of Ju-*

rors' *Treatment of Corporate Defendants*. Although business leaders have repeatedly stressed their concerns about juror hostility, a careful examination of juror attitudes suggests a far different picture—one in which jurors are generally sympathetic to business but will hold large organizations to a higher standard of care when their resources and expertise seem to warrant such a step. This balanced picture suggests jurors are thoughtful assessors of social and economic realities who are not out to empty deep pockets but to promote what they perceive as just results.

Next, Professor Joseph Sanders focuses our attention on quite a different juror problem in his article, *Scientifically Complex Cases, Trial By Jury, and the Erosion of Adversarial Processes*. His piece is designed to take a careful look at the impact of increasing complexity and reliance on expert testimony in jury trials. He finds that the impact of complexity and expertise has not, as once anticipated, resulted in the curtailment of jury trials but rather the profound alteration of our evidence rules (in cases like *Daubert v. Merrill Dow Pharmaceuticals, Inc.*¹) and adversarial methodology. We appear to have decided to promote judicial activism to keep jury trials on track. These observations provide a provocative insight about the potential competition between our allegiance to the jury trial and the adversarial method of adjudication—two processes traditionally depicted as interdependent and reinforcing.

Carol Clover, who is Class of 1936 Professor of Humanities at the University of California, Berkeley offers us a delightfully novel perspective on the jury—one arising from American cinema. Professor Clover notes that in our motion pictures the jury is seldom depicted in any detail or for any length of time. The implication is not that juries do not count but that we of the audience are the jury. Out of this insight arise a number of provocative ideas including the possibility that real-world jurors are acculturated (for better or worse) to jury duty through their years of “service” as mock jurors watching television shows and movies about the law.

The foregoing set of articles is followed by a rich variety of somewhat shorter commentary pieces. Professor Albert Alschuler begins the commentary section with a response to Michael Saks's assessment of the value of public opinion poll results about the jury. Alschuler suggests that Saks's argument contains a fundamental paradox—that the same population providing a range of dubious opinions in polls is going to be drawn upon to form the juries that will decide important

1. 509 U.S. 579 (1993).

cases. On a more fundamental level Professor Alschuler calls into question juror competence in a variety of situations. Professor Nancy King then provides a brief response to the Hannaford article suggesting why and how judicial attitudes toward jurors may profoundly color the jury trials judges supervise. Professor Nancy Marder in her comment responds to material in both the Vidmar and Diamond articles. She provides a series of valuable caveats and follow up questions to each of these two empirical studies, emphasizing their linked concern with damage awards. Professor Richard Lempert next considers Valerie Hans's piece and asks a fascinating question about it—why do so many Americans, especially in the business community, cling to the myth of juror anti-business bias? Professor Lempert suggests attributional error (the human inclination to attribute more responsibility to inherent characteristics than circumstances or evidence) and the continuing power of certain ubiquitous American narratives (the-jury-as-Robin-Hood story and the-plaintiff-as-grasping-and-greedy-litigant story for example) as among the reasons we continue to criticize the jury in a range of contexts. Professor Peter Schuck follows with an exploration of what appears to be another curious anomaly on the jury scene, the seeming desire of almost all major players in mass tort cases (including plaintiffs' lawyers, defense counsel, and judges) to *avoid* jury trials. Professor Schuck's assessment of the institutional forces at work leads him to conclude that we have a substantial number of questions to answer before we can decide how we ought to respond to this pattern of avoidance. The participants' behavior does, however, lead Professor Schuck to question the value of juries in mass tort cases, at least as presently constituted. Finally, DePaul Professor Mark Weber highlights the advantages of consolidating certain massive cases into a single jury trial in state court proceedings that can effectively deal with particular problems of efficiency, consistency, and settlement pressure.

All those who have worked with this Symposium hope that their efforts will help to dispel some of the illusions that have grown up regarding the American civil jury.