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WHY SHOULD WE CARE HOW JUDGES VIEW CIVIL JURIES?

*Nancy J. King**

At a bar function earlier this year, the dinner table conversation turned to juries. One judge¹ spoke freely against allowing jurors to submit questions for witnesses to the judge during the trial. “Makes them think they are in control,” he said, “and that’s dangerous.” “What is the danger, exactly?” I could not help asking. “Gives them too much power,” he explained. “They begin to demand things: pizza, breaks, certain evidence. They could begin to think that they can apply whatever law they want in deliberations. It can interfere with the litigants’ interest in the orderly presentation of their cases. Judges run trials, not jurors.”

I wondered how another trial judge I knew would respond to that opinion. The jurist I had in mind was downright reverential about his jurors. As far as he was concerned, they were the justice system’s most honored guests, to be treated like V.I.Ps. In court he reprimanded any attorney who dared to inconvenience or show disrespect for the jurors by keeping them waiting or by failing to rise when they entered the courtroom. This judge answered jurors’ questions and bent over backwards to meet their requests, addressing jurors in tones reserved for decorated war veterans who have risked their lives for the greater good. I suspect that this judge never worried that such adulation would have a negative effect on his or the parties’ control of the litigation.

A third view of jurors was represented in yet another judge’s comments to me. He told me that jurors try hard, but just do not have the expertise or judgment needed to decide complex factual inquiries. He tries to make the questions they decide as simple and easy as possible. “So they don’t feel bad,” he explained.

Why is one judge threatened and wary of the jury, another grateful and full of admiration, and another patronizing and condescending? Paula Hannaford, Michael Dann, and Thomas Munsterman offer sev-

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1. I have chosen not to provide identifying information about my judicial sources.

eral reasons to explain these varying judicial attitudes² toward jurors in their article *How Judges View Civil Juries*.³ In my brief comments, I would like to explore a question somewhat different, although related, to the issues addressed so well by Hannaford, Dann, and Munsterman. The question in which I am interested actually precedes theirs: Why do we even care about judicial attitudes towards jurors? Put somewhat differently: How could we use this information?

Judicial attitudes toward jurors are important to understand for two reasons. First, judicial attitudes have a direct influence on jurors in the courtroom. I disagree with the authors' initial assertion that judicial views of the jury "ultimately have little effect on the actual performance of civil juries"⁴ though I have little more proof of my position than they have for theirs. But consider: What a judge expects from jurors cannot help but influence what she says and does during a trial, and this, in turn, must affect, at least to some degree, the juror's own views about his role and about his fellow jurors.⁵ For example, a judge's perception of jurors' ability to process information and assess its relevance will affect her rulings on evidence and her instructions to the jury, as well as her rulings during voir dire. A judge who distrusts jurors may second-guess jurors' answers during voir dire, exclude evidence, or give cautionary instructions and warnings during the trial. She may be quicker to find misconduct by jurors. A judge who thinks that her duty is to simplify the jurors' job into something they can handle is less likely to solicit, or even answer, questions from the jury. A judge who reveres the jury may discount signs that a jury is having real trouble understanding what is going on, unable to consider that the jury may be only a "collection of lay persons who have little or no accurate knowledge of the American justice system and who are fully capable of fallibility."⁶ In other words, had the three judges mentioned earlier sat on the same case tried to the same jury, I suspect that the jurors in the three trials would come away with different sets of information about the subject of the trial, as well as different views about their own role as jurors and the jury system as a whole.

2. The triad of attitudes illustrated here by no means exhausts the variety of judicial views toward jurors.

3. Paula L. Hannaford et al., *How Judges View Civil Juries*, 48 DEPAUL L. REV. 247 (1999).

4. Paula L. Hannaford et al., *How Judges View Civil Juries* (draft Mar. 1998, at 12) (on file with the *DePaul Law Review*).

5. Peter D. Blanck, *What Empirical Research Tells Us: Studying Judges' and Juries' Behavior*, 40 AM. U. L. REV. 775 (1991). "The courts, legal scholars, practitioners, and social scientists recognize that trial judges' verbal and nonverbal behavior may have important effects on trial processes and outcomes . . ." *Id.* at 777. Blanck's article also contains a collection of sources studying the effects of judicial behavior on trials. *Id.*

6. Hannaford et al., *supra* note 3, at 256.

Conceivably, it could be possible to identify which judicial attitudes prompt the most efficient, accurate, and satisfying decision making by jurors, or, at the least, which judicial attitudes about jurors seem to consistently correlate with certain negative aspects of the deliberative process.⁷ Thus identified, this information could become an element of judicial training and evaluation programs. Undoubtedly, some will guffaw at the prospect of changing the minds of judges about anything as fundamental as the treatment of jurors. For skeptics, there may be another use for this information that does not involve attitude adjustment. Awareness of correlations between judicial attitude and jury performance could be used to help interpret information about jury behavior in courtrooms or districts in which a certain judicial attitude is prevalent.

Attention to judicial attitudes about juries may have a second, more direct value to those considering jury reforms. Just as judicial views about the capabilities and shortcomings of juries control to some extent the administration of trial procedures, they also control changes in those procedures as well.⁸ Jury reform truly starts and ends with judges, as it is judges who must eventually administer any jury procedure. For good or ill, judges constitute jury reform's major constituency. Through their writings and lobbying, or simply by failing to implement changes, judges can control the jury reform agenda. If a majority of judges in a particular jurisdiction does not view a particular jury procedure or condition as a problem, those who wish to change it will have an uphill battle. This suggests that information regarding judicial attitudes about jurors may prove to be a better diagnostic tool than public opinion surveys when it comes to jury reform because information about judicial attitudes can help lawmakers and others decide when reform efforts should be directed elsewhere or postponed.⁹ For example, of the over 550 trial judges who responded to a recent survey concerning juror misconduct in cases tried over the past three years, 27% reported that not a single juror had failed to tell

7. Of course, it would be much more difficult to sort out these effects in real trials than in mock trial studies. Cf. Peter David Blanck et al., *The Measure of the Judge: An Empirically-Based Framework for Exploring Trial Judges' Behavior*, 75 IOWA L. REV. 653 (1990) (describing an empirically-based framework for exploring trial judges' behavior in actual trials and reporting the results).

8. See Hannaford et al., *supra* note 3, at 257 (mentioning that judicial views are affected by jury reform efforts). I think the link is much stronger in the other direction, a point they eventually make later in their article. *Id.* at 259-60.

9. This is not to suggest that judicial opinion will never coincide with public opinion on these matters, just that judicial opinion has greater influence.

the truth, while 2% reported that jurors were untruthful in most or even *all* trials.¹⁰

The authors' analysis of judicial attitudes toward juries is a useful tool for advocates of jury reform for another reason. Sensitivity to the features that shape judicial attitudes about jurors may facilitate more productive discussion and negotiations about various reform proposals. Often, a judge's self interest in opposing or endorsing change may very well coincide with the public's interest. For example, both may be interested in minimizing the cost of litigation. But sometimes the individual incentives of judges will depart from the preferences of the public or the legislature. Using the same reasoning that the authors employed to trace the source of judicial attitudes about juries, one can assume, for instance, that a judge's capacity to recognize a "problem" with her juries is influenced by self interest, at least subconsciously. So long as the public and others link jury behavior to judicial action (as I have above, and the public did after the trial of O.J. Simpson¹¹), trial judges will continue to be blamed for jury shortcomings. Judges may very well react to the assessment that "juries are failing," as parents react to claims that their children have gone awry—defensively. To avoid unpleasant self-doubt and guilt ("It's our fault—where did we go wrong?"), whether irrational or not, it may be easier for judges to deny that any problem exists.¹² Similarly, even judges who may agree that a particular change in jury procedure is needed may resist it for reasons that vary in their legitimacy, including laziness, reluctance to take on new responsibly, or the desire to minimize accountability. This possibility suggests that the most productive discussions about jury reform will take place when these competing incentives are recognized and addressed. By collecting and exposing these influences, the authors have opened the dialogue. In the years to come, we should remind ourselves of their insights.

10. Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796-1996*, 94 MICH. L. REV. 2673, 2737 (1996).

11. See, e.g., Murray Richtel, *The Simpson Trial: A Timid Judge and a Lawless Verdict*, 67 U. COLO. L. REV. 977 (1996).

I am loathe to criticize jury verdicts because I think that if the jury goes wrong, it is usually the judge who bears a measure of responsibility My distance from the Simpson case, however, gives me the luxury of saying that Judge Ito's handling of the case greatly contributed to a courtroom atmosphere that was not conducive to justice, and his conduct in part explains the jury verdict.

Id. at 979-80.

12. See Hannaford et al., *supra* note 3, at 256 (stating that judges may view the jury trial itself as proof of failed settlement or case management skills). The tendency for judges, like the rest of us, to cast our behavior in the best light possible may lead judges to subconsciously underreport jury misconduct or fail to recognize it, for example.