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Recommended Citation

Richard Lempert, *Why Do Juries Get a Bum Rap? Reflections on the Work of Valerie Hans*, 48 DePaul L. Rev. 453 (1998)
Available at: <https://via.library.depaul.edu/law-review/vol48/iss2/15>

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WHY DO JURIES GET A BUM RAP? REFLECTIONS ON THE WORK OF VALERIE HANS

*Richard Lempert**

The paper by Professor Valerie Hans that I have been asked to comment on examines the widespread expectation that jurors are prepared to hold businesses responsible in tort actions when they would not hold individual actors similarly responsible.¹ Two reasons are commonly offered for this expectation. The first is that jurors naturally sympathize with individuals (like themselves) when people sue businesses, either because they identify with the plaintiffs as individuals or because they hold antibusiness attitudes. The second is that because businesses are often wealthy, a “deep pockets” effect exists such that jurors in negligence cases will find for undeserving plaintiffs or will give plaintiffs who should prevail more money than they deserve because the defendant is a large business and “can afford it.” Professor Hans’ research, and work by others that she reviews calls these assumptions into question.

Professor Hans reports results from several strands of her research that allow her to bring to bear diverse data on the problem she addresses. In addition to her work, which uses experimental methods, interviews with real jurors following actual trials, and judicial assessments of jury verdicts, Professor Hans cites public opinion poll data and archival research by others on jury verdicts. This wide-ranging research converges on three findings. First, there is no evidence that Americans generally hold heated anti-business attitudes;² second, the evidence for a defendant’s wealth effect is weak and anecdotal;³ pure wealth effects are not found;⁴ and third, large corporations probably lose some negligence cases that individual defendants would win, but this is because corporations are seen as having a capacity and hence a

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1. Valerie P. Hans, *The Illusions and Realities of Jurors’ Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327 (1999).

2. *Id.* at 331-33.

3. *Id.* at 346.

4. *Id.*

responsibility to foresee and avoid harms that individuals lack.⁵ Thus, any apparent biases against businesses in jury verdict studies are likely to reflect not counternormative biases and wealth effects but rather normatively defensible judgements about the different capacities of businesses and individuals to foresee and avoid harm. Hence, the business disadvantage in litigation seems attributable neither to negative attitudes toward businesses nor to an inappropriate identification with parties who are individuals, but rather to attitudes that reflect a special faith in the capacity of businesses to avoid harm. It seems, ironically, that a rather favorable view of business rather than an unfavorable one is at the root of any disadvantages businesses suffer in disputes with individual tort litigants. It has been said that one of the problems in punishing business crime is that businesses have no soul to damn. This may be true, but businesses also have no face to hate.⁶

I have no criticisms of Professor Hans' symposium article, nor do I dispute her conclusions. Her study is well done, and she fairly interprets her data. The picture her research paints is similar to what other leading students of the jury report. Generally speaking, the jury performs its task well, particularly the task of fairly finding facts. Bias does not seem to be a great problem in jury verdicts. Professors Harry Kalven and Hans Zeisel, in their seminal study, found that judges agreed with juror verdicts in more than three-quarters of the cases they heard,⁷ and where they disagreed, the cases were ordinarily close on the facts.⁸ In only a few cases did judges feel that juror attitudes were strongly determinative of their verdicts.⁹ Recent surveys convey a similar picture. In a poll carried out by Louis Harris and Associates, 99% of federal judges and 98% of state judges believed that jurors made a serious effort to apply the law and 80% of federal judges and 69% of state judges rejected the idea that "the feelings of the jurors about the parties often cause them to make inappropriate decisions."¹⁰ A survey of Georgia state judges reports that 87% of the time judges agreed with civil juries verdicts in negligence cases, and

5. *Id.* at 335-36.

6. Significantly, the major expressions of anti-jury bias that Professor Hans describes in the forthcoming book from which the paper here is drawn involve small businesses that were personified by those who owned them. Valerie Hans, *Business on Trial: The Civil Jury and Corporate Responsibility* (unpublished manuscript, on file with Valerie P. Hans).

7. HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* 56-57 (1966).

8. *Id.* at 104-17.

9. *Id.* at 428-33.

10. 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* 76, 79-80 (1987); see John Setear, *Comments on Judges' Opinions on Procedural Issues*, 69 B.U. L. REV. 765, 775 (1989) (discussing the poll results further).

when there was disagreement, only 19% of judges indicated that it was their belief that the jury was pro-plaintiff.¹¹ Consistent with Professor Hans' findings, various studies find little or no support for the view that juries are hostile to corporations, doctors, or other defendants with deep pockets.¹² Indeed, a number of studies report that jurors and jury eligible citizens believe plaintiffs bring frivolous law suits or have other attitudes that should favor defense rather than plaintiff verdicts.¹³

Overall the social science evidence does not mean we should discard the notion that general jury attitudes—like attitudes toward big business or sympathy for “little guys”—influence jury verdicts, but if attitudes like these bear on verdicts, their bearing is ordinarily small and may be proxying for mind sets that affect how evidence is perceived and not other kinds of bias. Thus, the interesting question may not be, do juror attitudes bear on verdicts, but rather why—contrary to most social science evidence—do people, including lawyers and the press, persist in believing that juror attitudes toward institutions like businesses have a strong effect on jury decisions. Let me suggest some possible reasons.

First, there is what has been called, the fundamental attribution error:¹⁴ In explaining the actions of another, particularly untoward actions, we attribute more responsibility to the person's characteristics and less to the person's circumstances than we should. If the attribution error applies when we look at jury verdicts, and there is no reason why it should not, there will be a natural tendency to attribute verdicts more to the supposed dispositions and attitudes of jurors than to their circumstances, which are being in court, hearing a particular case and being instructed on legal rules. This tendency is, no doubt, fostered by cases in which the public gets only part of the story. If the media present a story which suggests just one verdict makes sense and the jury reaches a different verdict, it is hard to attribute the verdict to

11. Perry R. Sentell, Jr., *The Georgia Jury and Negligence: The View from the Bench*, 26 GA. L. REV. 85, 116 tbl.1 (1991). In a later study, Sentell found that federal judges had similar views. Perry R. Sentell, Jr., *The Georgia Jury and Negligence: The View from the (Federal) Bench*, 27 GA. L. REV. 59 (1992).

12. NEIL VIDMAR, *MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS* 191-220 (1995); Robert MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the “Deep Pockets” Hypothesis*, 30 L. & SOC'Y REV. 121, 125-43 (1996).

13. VIDMAR, *supra* note 12, at 169-71; Valerie P. Hans & William S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 L. & SOC'Y REV. 85, 93-107 (1992).

14. RICHARD NISBET & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS IN SOCIAL JUDGEMENT* (1980).

anything other than juror shortcomings, like an inability to comprehend the evidence or bias. This is especially likely if the media foregrounds possible sources of jury bias. For example, if people were polled on their knowledge of the two O.J. Simpson trials, it would not be surprising if more people remembered that the jury in the criminal case, which found Simpson not guilty, was largely black while the jury in the civil trial, which found Simpson liable in a wrongful death action, was largely white, than remembered the evidentiary differences in the two cases or the fact that the cases were decided under different burdens of proof.

The tendency to make attributions of this sort is, of course, not limited to juries. About the time I delivered the remarks on which this paper is based, some then good news for President Clinton provided a nice example. Judge Wright threw out the civil suit brought against him by Paula Jones.¹⁵ People were puzzled because she was a Bush appointee, but news reports, trying to make sense of the decision, pointed out that she had been in a class on the Law of the Sea that President Clinton taught during his brief stint as a law professor.¹⁶ What received less prominent attention, at least initially in the reports I read and heard, was the law the judge was applying. Even lawyers professed astonishment at what Judge Wright had done, but they seemed to be astonished not so much because they felt her decision was inconsistent with law and precedent, but rather because they had doubted that a judge would take the responsibility of throwing out such a high profile case.¹⁷ Later some commentators noted that Judge Wright had originally decided that the President should not be tried while in office.¹⁸ The implication of this observation was that a consistent pro-Clinton bias motivated her decisions. Lost in the press accounts was the possibility that good faith and independent readings of the law informed these different decisions. I am not arguing that the attribution of bias to Judge Wright was wrong. I do not know. Rather I am saying that the attribution is a natural one for any person who disagrees with a legal decision, whether by judge or jury, to make.

Enhancing or channeling the normal tendency to make the fundamental attribution error when explaining jury verdicts are popular

15. See, e.g., Peter Barker, *Judge Finds 'No Genuine Issues for Trial,'* WASH. POST, Apr. 2, 1998, at A1.

16. See, e.g., Nancy Gibbs, *Day of Deliverance,* TIME, Apr. 13, 1998, at 44, 46.

17. See, e.g., Harvey Berkman, *Student of Prof. Clinton Will Judge His Lawsuit,* NAT'L L.J., June 6, 1994, at A12; Robert J. Caldwell, *Clinton's Victory: A Big Win, but Still Far From Exoneration,* SAN DIEGO UNION-TRIB., Apr. 5, 1998, at G1.

18. See, e.g., Bill Sammon, *Decision Ensures Trial Won't Occur During Presidency,* WASH. TIMES, Apr. 2, 1998, at A1.

narratives that make bias a particularly plausible explanation for particular jury decisions and for jury decisions in general. Two kinds of narratives may play a role. One is a *bias story*: people tend to stick up for those who are like them with respect to race, gender, or other relevant characteristics. Therefore, if a black inner city jury acquits a black youth charged with distributing drugs, a ready explanation is that this is most likely due to a sense of racial solidarity rather than to the jury's reasonably concluding, after hearing all the evidence, that the arresting officer may have planted drugs on the defendant to help explain the brutality of an arrest. A similar view that likeness has created bias is available to explain any verdict for an individual suing a business. The jurors are, after all, the plaintiff's peers.

More interesting, however, is the recognition of the power of narrative. People recognize that there are stories out there about such things as the badness of big business or the violence proneness of blacks and Hispanics as well as the widely diffused Robin Hood story, which makes it noble to take from the rich and give to the poor, and they tell plausible stories about how these stories are likely to affect jury verdicts. Thus, the losing lawyer might explain a particularly large verdict against a business client with the remark, "The jury was playing Robin Hood."

Yet some of those narratives, like the "big business is bad" narrative may not be as widespread or generalized across businesses as people might think. As with the "Robin Hood" story in an age of "welfare reform" that threatens to cut subsistence payments to the poor and promises tax cuts for the rich, the "big business is bad" story is perhaps dated. Although it may have been a powerful popular motif in the Grange and trustbusting days of the late nineteenth and early twentieth centuries, or in the union organizing days of the 1930s, after a major war in which our industrial might saved the world from Nazism and a cold war in which capitalism triumphed over communism, the "big business is bad" narrative may have far shallower cultural roots than it once did. Certainly Professor Hans' data suggests its roots are shallow, even though they say nothing about whether they were ever deep. Moreover, Professor Hans finds that powerful competing narratives, like the "greedy plaintiff" story, exist. If stories like this have any effect, they should bias juries in favor of business defendants. But even if the "big business is bad" narrative does not resonate with most people (of the kind who sit on juries), the rhetoric of consumer activists like Ralph Nader, of certain environmental groups and of some labor and other leaders makes the "big business is bad" story an *available* one that is easy to draw on as an explanation for

high punitive damage awards or other seemingly anti-business verdicts.

Interacting with these two psychological reasons that may explain our proneness to attribute unpopular verdicts to the biases or irrationality of juries is a material reason. Both individuals and organizations have strong incentives to blame jury verdicts they do not like on juror failings rather than on the facts and law of the cases juries hear. Losing lawyers have an obvious incentive to do this, for if juror attitudes or jury incompetence do not explain a jury's verdict, other obvious explanations are that the lawyer did a poor job with a winning case or the lawyer had a losing case, which also means the lawyer did a poor job because lawyers with losing cases should advise clients to settle. Moreover, defense lawyers have a greater incentive than plaintiff's lawyers to blame defeats on the jury. Defense attorneys represent repeat players, like manufacturers and insurance companies. If their clients are dissatisfied by a string of losses, defense attorneys may be replaced as business counsel. Plaintiff's lawyers are more likely to represent one-time litigants. They have less need to justify their losses to clients since they do not depend on their clients' repeat business.

In addition to the desire to justify defeats, plaintiff's and defense lawyers both have other reasons to attribute jury verdicts to the attitudes or irrationality of juries. Lawyers, in selling themselves to clients may, for example, claim they can pick juries with favorable biases, and lawyers can point to the possibility of jury irrationality in attempting to persuade clients who feel justice is on their side to settle on terms the lawyers want to achieve.

There are also powerful interests that have—or think they have because they buy into biased jury stories—incentives to attack the jury system and jurors as biased or irrational. Many organizations that are repeat players in the litigation process seem to believe either that juries are out to get them because of what they are or that juries favor the “little guys.” They have reason to promote stories of jury bias or incompetence as part of a long term campaign to limit the power of juries and a shorter run effort to influence the votes of citizens who might serve on juries. The same is true of organizations that may feel they might bring political pressure to bear on the selection of judges—including substantial contributions in states where judges are elected—that they cannot bring to bear on juries. Thus, the Exxon Corporation, following the \$5 billion punitive damage verdict against it in the Exxon Valdez oil spill case invested substantial sums in a series of studies designed to show that juries cannot competently and

fairly set punitive damages.¹⁹ One would not expect them to be less shy about investing in judicial elections if the demise of the jury system meant more was at stake.

Insurance companies have taken out ads designed to spread so-called juror horror stories. Those who have pursued the underlying stories have shown that when the case facts are appreciated the element of horror—which is to say the suggestion of jury bias and irrationality—is generally diminished substantially or disappears.²⁰

Tort defense organizations also promote such stories, and the media seem to delight in spreading them. The most recent celebrated example of what is wrong with the jury system is the so-called McDonald's coffee incident in which a jury gave a \$2.7 million punitive damage award to a seventy-nine-year-old woman, Stella Liebeck, who was burned when she spilled a hot cup of McDonald's coffee on herself.²¹ The story, as originally portrayed in press accounts and on the evening news, symbolized plaintiff greed and seemed like strong evidence of a jury system run amok. Only after the initial story had cemented these images in people's minds was it reported, with much less publicity, that McDonald's kept its coffee about twenty degrees hotter than other fast food restaurants,²² that it had had over 700 coffee burn complaints during the previous year but had not ordered its franchisees to turn down the heat on their coffee,²³ that the car Ms. Liebeck was in was parked when she spilled the coffee, that Ms. Liebeck's burns were serious enough to require hospitalization and for her daughter, a nurse, to take a week off from work to care for her,²⁴ and that McDonald's had refused Ms. Liebeck's original offer to settle for her hospital and medical expenses of \$8,000 (McDonald's offered \$800) as well as later opportunities to settle, or to accept an arbitrator's award, for sums far less than the eventual verdict.²⁵ Much of this

19. See, e.g., Reid Hastie & W. Kip Viscusi, *What Juries Can't Do Well: The Jury's Performance As a Risk Manager*, 40 ARIZ. L. REV. 901 (1998); Daniel Kahneman et al., *Shared Outrage and Erratic Awards: The Psychology of Punitive Damages*, 16 J. RISK & UNCERTAINTY 49 (1998); Cass R. Sunstein et al., *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071 (1998).

20. Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 77 (1993); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1109-12 (1996); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147, 1253 (1992).

21. Andrea Gerlin, *A Matter of Degree: How a Jury Decided That a Coffee Spill is Worth \$2.9 Million*, WALL ST. J., Sept. 1, 1994, at A1.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

information was in a press release Ms. Liebeck's attorney made available after the verdict, but it was not picked up when the case was first reported and might not be known today if an enterprising *Wall Street Journal* reporter had not decided to find out how a jury could render what appeared to be so outrageous a verdict.

Stories like the original McDonald's story shape elite as well as popular images of how juries perform and what motivates jury verdicts. This is because they both reflect and reinforce extant narratives, like the "big business is bad" or "Robin Hood" narratives. These stories can be seen as explanations for what juries do even when they have nothing to do with the jury's final decision. In the McDonald's case, to return to the example, several jurors later said that when they heard the bare facts of the case on voir dire, they wanted to be on the jury so that they could make a strong statement about greed and responsibility by *denying recovery*.

In short, popular views of the degree to which juries are motivated by biases or fail to understand evidence clash dramatically with what social science research on juries reveals, and the cases cited anecdotally to support these views often stand for very different propositions than that which they appear to establish. Juries are more or less random samples of ordinary people. Usually there is little reason to think that the ordinary people who learn of what appears to be an outrageous jury verdict would have decided differently had they been the jurors in the case, and, conversely, the jurors who heard the case probably would have regarded their verdict as a sign of a jury system run amuck had they been exposed to news stories about the case rather than to the case itself.

To those who study juries most closely, Professor Hans' findings will not be at all surprising, for jury researchers generally find that juries perform most tasks entrusted to them well.²⁶ Indeed, most people who study the jury closely end up as strong supporters of the institution. This, of course raises another possible explanation for the disjunction between what jury research tells us and popular views of the jury. Maybe the jury is studied largely by its fans, whose respect for the jury colors what they find. There may be something to this, for a commitment to the value of the jury as a democratic institution can

26. The major weakness revealed by empirical work on the jury is difficulty in understanding and following instructions. These difficulties seem attributable more to the way jury instructions are written and to practices regarding jury instructions than to intentional noncompliance or the intellectual deficiencies of juries. Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable, A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1309 (1979).

affect how a researcher writes an article.²⁷ But this does not explain Professor Hans' data. The methods she uses are well-suited to the problem she is studying, and several different approaches, as well as research by others, converge on essentially the same picture. Nor do I think that jury researchers' values explain the generally favorable picture that most empirical investigations of the jury reveals. The jury researchers I know are, first, committed social scientists. Many are excellent methodologists, and when juries fall down in various respects, these data are reported.

Overall, I think the disjunction between popular images of juries as biased and/or incompetent and what the social science evidence tells us reflects the kinds of psychological processes and media manipulation I discuss. But the reader should realize that my discussion is speculative. While the reasons I have identified for the disjunction between social science and popular images of the jury are plausible, I cannot claim to have proven what is going on. Indeed, I do not even claim that what I call the popular image of the jury is the dominant image among the population. All I claim is that it is one that has considerable currency and figures heavily in legal and political debates. Nor do I claim that anti-business biases or cavalier attitudes toward imposing costs on those with deep pockets do not determine some jury verdicts. Certainly jury attitudes, including general attitudes like hostility towards big business, can influence the votes of jurors just as their idiosyncratic experiences can influence their votes, and in individual cases anything can happen.

We should, however, recognize that judges or other alternative triers of fact also have attitudes that can affect their judgements, because this is part of what it is to be human. Given the ubiquity of potentially case-relevant attitudes, there are substantial reasons to prefer the influence of juror attitudes on verdicts to that of judicial ones. First, juries decide as a group. Juror attitudes differ and can cancel each other out. Trial judges hear only one voice, their own. Second, jurors

27. If I can use myself as an example, my article, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, concludes that despite the difficulties juries have handling complex cases there seems to be no fundamental problem with entrusting the jury with such cases that could not be ameliorated by handling such cases differently or that could be cured by giving such cases to trial judges. Richard O. Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 181, 247 (Robert E. Litan ed., 1993). A researcher less committed than I to the jury system and the democratic values it enshrines might have drawn a different picture from the empirical evidence I had available, which showed juries often performing well but in some cases making serious mistakes. A different person might perhaps have not called attention to the need always to compare juries with judges or might not have emphasized the possibility that changes in how we treat juries in complex cases could increase the jury's ability to understand the case.

hear one case and then disperse. Judges, in the absence of juries, would hear case after case. If jurors in a case share an attitude so strong that it biases their decision, it is only one case which is affected. If a judge has an attitude so strong it biases her decisions, that attitude can improperly affect a string of cases. Finally, and most importantly, jurors seldom get where they are because of their attitudes. Although lawyers strive to get juries favorably disposed to them, it is hard to accurately discern case-relevant juror attitudes, and no juror can be retained because of a favorable attitude. A juror can only, within the limits of the available peremptory challenges, be rejected because of seemingly unfavorable views. Judges, by contrast, are chosen through a political process in which their attitude may figure prominently. Without the jury, judicial attitudes would be yet more important to decisions in cases, and wealthy repeat player litigants would have reason to spend lavishly to influence the selection of even low level trial judges.

Let me close with what is perhaps the best news about juries, news consistent with what Professor Hans' work tells us. If there is any single finding that stands out in the thirty-two years of modern social science research on juries, beginning with *The American Jury*,²⁸ it is that case facts are the most important determinant of jury verdicts. Ordinarily their influence dwarfs everything else. This is exactly as it should be.

28. KALVEN & ZEISEL, *supra* note 7.