JURIES AND JURY DECISION MAKING

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# Juries and Jury Decision Making

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JURIES AND JURY DECISION MAKING

I. JURIES - GENERAL INFORMATION


The closing argument to the jury must marshal any support for the position of the defense into a cohesive argument either destroying the case of the prosecutor or presenting an affirmative defense for his client. The intent of the article is to help the criminal defense lawyer organize and deliver a persuasive closing argument, based on an understanding of how to most effectively influence the members of the jury toward his client.


It has been acknowledged that adverse publicity may affect the outcome of a jury's verdict. A remedy for this situation has been to sequester the jury; however this solution may in itself adversely affect juror deliberations by shifting the responsibility of guilt from the press to the jury. The source or the problem is the source of the adverse publicity - the prosecutors, police, and attorneys.


The article is a discussion of some of the findings of Kalven and Zeisel in their study, The American Jury. Among the issues discussed are jury sentiments about the defendant and the law, English reform proposals, and the place of corruption in jury decision-making. Kalven and Zeisel's data on hung juries points out that instances of corruption are rare, and that a massive minority (four to five jurors) is necessary before a jury will hung.

4. "Trial by Jury" by Dorothy Brant Tarnick. THE AMERICAN LEGION. May, 1968; p.6-10 & 53-54.

The American jury system permits the individual to participate in his government, while acting as a safeguard against government encroachment on personal rights. The American jury is essentially a cornerstone of democracy, and despite its shortcomings, should be retained.


In Kellar v. United States and United States v. Driscoll, the courts held that unsupervised questioning of jurors after
the verdict would inhibit jurors in the discharge of their office. It is suggested that courts advise jurors they are not compelled to answer questions put to them by counsel following the verdict, and that counsel refrain from such questioning except upon prior notice to the court and to opposing counsel.


In cases where the jury is instructed to disregard a confession, there is evidence that such limiting instructions may actually produce the opposite result from that intended. If instructions to the jury are not sufficient there are two alternative methods of trying two co-defendants: by separate trials or through a joint trial properly conducted so as not to prejudice the chances of the defendant who had not confessed to the crime.


The purpose of the jury has been defined in two models: first as a guarantor of accuracy in fact-finding; and second as a political institution providing individual protection from the state. The article examines four court cases dealing with jury trial rights: Duncan v. Louisiana (the jury as a political institution); Witherspoon v. Illinois (capital punishment and the jury); Bruton v. United States (nullification of a constitutional privilege); and United States v. Jackson (right to trial by jury). The article concludes that the jury will be perceived as a humanitarian institution, one that is in part for the protection of the guilty.


The two major themes of empirical research on juries are concerned with jury competence and jury representation. Studies and findings for the past four and one half decades are reviewed and suggestions for future research are offered.


Jury misconduct is difficult to determine since jury deliberations are off-limits to inquiry. Only overt conduct, as opposed to "mental processes" should be taken into consideration in the motion for a new trial on grounds of jury misconduct. Jurors should be required to testify of submit an affidavit in alleged misconduct situations.

Problems in the jury system in this country are causing many critics to call for decreased use or abolition of juries. The jurors' lack of legal knowledge,, membership in the courts, and the inconvenience to the juror are only a few of the criticisms levied at the jury system. Reform, presently being experimented with involves the use of audio-visual equipment for certain procedures and testimonies, patterned instructions, six-member juries, and nonunanimous verdicts.


The article is a special feature examining the present status of our jury system today. It incorporates the Constitutional and common law bases of the jury, federal rules of procedure, a listing of states using less than 12-person juries, recent action by Congress and the Courts, and the pros and cons of curtailing the size and use of juries.


By tracing a famous English robbery trial, the author discusses the pros and cons of the modern jury. In the face of clearly contradictory evidence, the jurors, with the controlling influence of the judge, determined the facts of the case. It is argued that what is needed for a good decision is a knowledge of the ways of the world and a desire to come to a good conclusion. Thus, the prime need may well be for people from everyday-life to serve as jurors.


Until recently, the right to trial by jury had undergone little change since the American Revolution. The Supreme Court decisions in Duncan, Williams, Johnson, and Apodaca however, are causing jury trials to be seen from a new angle. The major holdings in Duncan and Williams are discussed, along with an analysis of the jury system and recommendations for its improvement.


The English jury has been characterized as "male, middle-aged, middle-minded, and class". The history of jury trial is traced from the time when jurors were as much witnesses as judges of fact, through the modern techniques of rules of evidence, to the present jury inequities requiring property ownership. The jury in England is presently an institution with somewhat controversial selection procedures.


The military had traditionally been governed by its own system of courts-martial. Congress, in what is believed to be
an historical accident, did not exempt the military from the sixth amendment's right to trial by jury. Although there is no constitutional provision for jury trial in the military, it is questionable whether trial by jury would enhance the effectiveness of the military in the present day.

Major reforms of the jury system may be necessary to preserve the jury as a cornerstone of due process. The Federal Jury Selection and Service and Service Act of 1968, and the eligibility of women and 18 to 31 year olds have improved the representational quality of jury venires. The trend toward smaller juries and nonunanimous verdicts promise greater efficiency but must be carefully monitored to insure an impartial trial.

Data on jurors from 1962 was analyzed as to the direct and indirect costs of jury duty. The cost to society is higher than is apparent due to the fact that jurors are taken from the "supply side" of the economy; and excessively large pools of jurors are necessary to allow for excuses, exceptions and deferments. The author believes that a volunteer jury would save societal costs in general.

The primary function of the jury is that of a fact-finding body of lay citizens. Jury trials today however, require jurors to interpret and apply complex legal principles. The author argues for retaining the jury as fact-finders, allowing the judge to apply the rules of law.

The article deals with attempts to restrict and deme the right to jury trial in England. Some of these recent restrictions include: depriving a defendant of his right to receive a list of occupations of potential jurors; limiting jury trials to the more serious cases; refusing legal aid for jury trial; and heavy penalties for not-guilty pleas.

A proposal pending before Congress would make jury eavesdropping by a "recognized scholar" working on a "legal or social science study" not a crime. This article takes the position that such a proposal is too vague in its terminology; that eavesdropping would impair the functioning of the jury; and that it would conflict with the fourth amendment right to privacy.

The article examines some of the current pressures on the jury system. Many Americans avoid jury duty - through exemptions, lies, or not registering to vote. Jurors sit idle in waiting rooms because of poor management. Changes are underway in the jury system however, from six-member juries to more efficient juror utilization to the use of computers.


In Newspaper Guild, the Courts ruled that the aggregation of indirect contempts did not require jury trial. It is argued that the seriousness of the punishment should be the basis for deciding whether a jury trial is warranted in contempt cases.


The article advocates abolishing jury trial and replacing it with trials by a judge and two assessors.


The article examines the American studies done by Kalven and Zeisel (The American Jury) and Rita James Simon's The Defense of Insanity, along with recent research in England. Re-inspecting some of the findings concerning types of jurors, jury size, legal instructions, and defendants' attributes, the article points out new areas for research into the institution of the jury.


In State v. Kilberr, a black male who had confessed to killing a white teenage girl, moved for a waiver of jury trial, or as an alternative, change of venue. Both motions were denied. The article suggests that where there is "reason to believe" pretrial publicity or the character of the community might prejudice potential jury members, the waiver of a jury trial would insure the defendant's right to an impartial hearing.


The process of resolving disputes has historically and constitutionally been the function of the fact-finding jury.
The extra time and money involved are worth the purpose served by the jury: as a device insulating the citizenry from government overreach, and as a means of citizen participation in the government of their society. The jury system acts as a safeguard against the danger of allowing government processes to be conducted beyond the comprehension of the citizen.


The Supreme Court expanded the right to jury trial in direct contempt cases (in which contemptuous acts take place in the courtroom). But there is also a limitation of this right which permits the trial judge to summarily punish contempt during rather than after the trial. The result is that substantial consecutive sentences may be imposed without a jury trial, and the trial judge, in order to maximize his contempt power, punishes contempt while the personal insults are still fresh in his mind instead of rationally deliberating on the events after the trial.


The rules determining whether a case is to be tried to a magistrate or to a jury is a result of a series of historical accidents. Some cases are tried by indictment (jury), others summarily, and the rest fall into categories which each have different procedures for determining the mode of trial. Various solutions — weighing the consequences of conviction for the defendant, and subdividing offenses into categories from gravest to most trivial — are suggested and discussed.

II. JURY NULLIFICATION


The article traces the evolution of the jury, from the early days when jurors were controlled by means of attainder to the present, where jurors are not held accountable for their verdict. The duty of the jury now is to find the facts according to the judge's instructions, but at times the jury's common sense, considerations of fairness to the defendant, or appraisal of the law justify departure from the judge's rules. According to the theory of legitimated opposition, some rules permit departure from the very rules binding them.


The jury's role can best be described as a conflicting one: the jury is required to conform to the instructions of the court, but is extended the privilege of returning a verdict of acquittal contrary to the evidence and judicial
instructions. While the jury is instructed to return a verdict according to the law, there is historical precedent for jury nullification when there is "damn good reason" to depart from the instructions.


The jury exists not only as a fact-finding institution, but as a buffer between the criminal law and common sense of the community. Jury nullification is the concept of the right of the jury to refuse to apply the law if they believe the defendant should be acquitted. Criteria for disregarding the evidence and the judge's instructions should be formulated for the benefit of the jury.


The article examines the defense of necessity where breaking the law is justified to preserve a higher principle. Two alternatives to the necessity defense are explored: jury nullification and prosecutorial discretion. Under jury nullification, jurors have the right to acquit a defendant if their conscience so dictate. The necessity instruction is much more narrow - it is limited to cases where a question of competing values is recognized. The author argues that the defense of necessity should be included in the Proposed New Federal Criminal Code to prevent the abuse of justice by law.


Numerous legal scholars have praised the function of the jury that accords with notions of justice and fairness prevailing in the community. Strict application of the law is often not in compliance with an idea of fairness and jurors are useful in representing the values of the community by tempering the law in certain situations.


Jury nullification is argued to be neither historically, functionally, or constitutionally the right of the criminal jury. There is a distinction between the right of a jury to decide the meaning of a law and the right to nullify one. Acceptance of jury nullification would create a parochial system of law-making and undermine the power of legislated statutes.
III. JURY DUTY

   The experiences of an English juror on a two-week spell of jury service are recounted here. The author's impressions of the judge, fellow-jurors, and decision-making processes are discussed.

   The author served as a petit juror in Circuit Court of Cook County for ten days in May of 1970. The article reports his feelings and observations concerning jury trial, and the author's experiences as a juror.

   The article examines some of the current pressures on the jury system. Many Americans avoid jury duty - through exemptions, lies, or not registering to vote. Jurors sit idle in waiting rooms because of poor management. Changes are under way in the jury system, however, from six-member juries to more efficient juror utilization to the use of computers.

   The attitudes of jurors to their time spent in jury duty was assessed by survey on questions ranging from physical comfort of the facilities to compensation for jury duty. The results are presented, and supplemented by recommendations from the subcommittee conducting the study.

   The economic hardship of jury duty can be seen as composed of three factors: frequent repetition of service, low jury fees, and long terms of service. Increasing jury fees is not likely to be implemented soon because of strict budgets, but length and repetition of service can be reduced through better selection practices and larger numbers of potential jurors.

   Taking part in jury duty can be an inconvenient and apathetic process. The article recalls the experiences of a Manhattan man called for two weeks' jury duty.
IV. HISTORY OF JURY TRIAL


The American jury system was largely adopted from the English system of jury trial. The article traces the development of the jury in England, and in the early history of the United States. Now the unanimous verdict and twelve-member jury are aspects of the jury system which are being watered-down, and it remains to be seen if the purpose of the jury can remain intact in the face of these changes.

42. "The Greeks Had a Jury For It" by Marvin J. Bertoch. AMERICAN BAR ASSOCIATION JOURNAL. October 1971; 57:1012-1014.

About 590 B.C. Athens first used trial courts composed of jurors drawn from every segment of society. Jury panels were composed of from 500-1500 members; both criminal and civil cases were argued. Some of the more famous trials recorded were Aeschylus' trilogy, The Oresteia, and the Trial of Socrates.

43. "Demythologizing the Historic Role of the Grand Jury" by Helene E. Schwartz. AMERICAN CRIMINAL LAW REVIEW. Summer 1972; 10(4);701-770.

The idealized view of the grand jury as that institution which protects the citizen against government oppression is challenged here. Tracing the evolution of the grand jury from the time of Henry II, the article documents the cases in which the grand jury served as a vehicle of government suppression of political dissidents. What is needed now, instead of abolition of the grand jury, is a reinforcement of its traditional function as the primary barrier between the accused and the accuser.


The article attempts to elucidate the intent of the seventh amendment as it was written into the Bill of Rights. Interpretation of the seventh amendment has been based on the historical test, i.e., in determining whether a jury was required by the seventh amendment had to be based on the practice of English Courts at the time the Bill of Rights became effective in 1971.

After an extensive review of the origin of the seventh amendment, the author suggests a new interpretation of the seventh amendment: instead of an historical interpretation, a "dynamic" reading of the seventh amendment would be more fitting, recognizing it as flexible and changing.

45. "Chancery Procedure and the Seventh Amendment: Jury Trial of Issues in Equity Cases Before 1791" by Harold Chesnin and Geoffrey C. Hazard, Jr. YALE LAW JOURNAL. April 1974; 83(5); 999-1021.

There is evidence to suggest that courts of equity in the eighteenth century and before, relied on jury trial procedures
to determine questions of fact. At the time of the adoption of the seventh amendment in 1791, the English Court of Chancery was in transition from a rule that disputed fact issues were generally submitted to juries to one that made such submissions discretionary.


Social attitudes toward homicide and strict laws on homicide in pre-Tudor England were in conflict. The trial jury, which, until the late Middle Ages controlled the flow of evidence in a trial, acted as a mediator between social views and the law. Thus, in only a small percentage of homicide cases was a verdict of guilty returned. In the sixteenth century, the jury ceased to be self-informing, relying on the prosecutor to produce evidence, and consequently control of legal proceedings passed from the jury to the bench. The legal process became subject more to the rule of law and thus a homicide verdict became less subject to lenient verdict by individual jurors.

V. JUVENILE JURY TRIALS


The article takes issue with the Supreme Court's decision denying jury trial to juveniles. The doctrine of parens patriae, is not consistent with the reality of the juvenile justice system. The essentially criminal nature of this system would apparently require the application of due process safeguards to criminal proceedings. The McKeiver decision reverses the trend set by Kent, Gault and Winship, by halting the extension of due process safeguards to juveniles.


In McKeiver v. Pennsylvania the Court ruled that trial by jury is not constitutionally required for juvenile adjudication proceedings. The article is a review of the leading opinions of the concurring and dissenting justices, and discusses the significance of Gault, Winship, and Duncan v. Louisiana to the decision in McKeiver.


McKeiver v. Pennsylvania marks a reversal in the trend of extending constitutional guaranties to juveniles. The cases related to procedural safeguards for juveniles - Kent, Gault,
Winship - were reviewed, along with two cases relevant to jury trial - Duncan v. Louisiana and Bloom v. Illinois. In McKeever, the Court ruled that the jury trial was not an essential element of the fundamental fairness test, and consequently is not constitutionally mandated for juveniles. The major considerations of the Court in reaching this decision are elaborated upon.


The ruling in McKeever v. Pennsylvania which does not permit a jury for juvenile proceedings is based on the concept of parens patriae. This rationale is criticized however in five main arguments: (1) a lack of formality increases the arbitrary power of the judge; (2) courts lack the facilities and personnel to adequately perform their role of parens patriae; (3) confidentiality may still be preserved with a jury trial; (4) the stigma of delinquency is comparable to the stigma of criminality; (5) juries strengthen the courts' fact-finding function.


In McKeever, the Court ruled that the special diagnostic and rehabilitative status of the juvenile court makes the jury trial an unnecessary element of due process. Yet, the theory and purpose behind the juvenile court has not been realized within the past few decades, and the author believes the Supreme Court will not be a likely source of reform for juvenile procedures in the near future.


Excluding young adults from jury duty constitutes a threat to the sixth amendment guarantee of jury impartiality. An amendment to the Federal Jury Service and Selection Act provided for inclusion of eighteen to twenty-one year olds in jury pools, yet eleven states at the time this article was written excluded eighteen year olds from jury service. Discrimination against young adults results not only from statutory exclusions but from the selection process itself; panels from which juries are drawn have not been updated and consequently do not include 18 to 21 year olds. The author maintains that young adults do constitute a cognizable group in American society, and as such should be included in jury selection and service.
VI. DEATH-QUALIFIED JURIES


Witherspoon held that persons having reservations about the death penalty are qualified to serve as jurors in capital cases. Death-qualified jurors may be prone to decide for the prosecution; if so, the article contends the death sentence would be invalid because the effect would be to deprive the defendant of an impartial jury. Decisions related to Witherspoon have prohibited the exclusion of potential jurors on the basis of race, national origin, religious belief, and economic class.


Juries properly selected to determine guilt in capital cases may be unrepresentative in the determination of punishment because of conscientious scruples against capital punishment. In Witherspoon v. Illinois, the Court set standards for selecting a jury to determine punishment. Witherspoon, however, is viewed only as the initial case in the application of constitutional safeguards to the determination of punishment; future rulings may challenge the assessment of the death penalty when no substantive punishment selection standards are prescribed.


Penalty decisions in 238 cases between 1958 and 1966 were analyzed according to 178 items of information about each case. The main findings of this study are: most of the life-death decisions made by California juries were made on a rational basis, following a system of standards; no significant racial bias was evident although strong economic bias was found; and certain aspects of conduct of the trials had an undesirable impact on the jury's punishment decisions. In light of the fact that economic status is such an important determinant in jury decision-making, the article proposes that juries should be allowed to set penalties in first-degree murder cases only when standards are set up.


The study used 100 white and 100 black college students to determine the effect of beliefs about capital punishment on the determination of guilt or innocence. Beliefs about capital punishment showed no significant effect on the outcome of the verdict; however many of the subjects who stated they held scruples against the death penalty "contradicted" their answers by imposing the death sentence.

The decision in Witherspoon was made retroactive. However, lower courts have failed to implement the standards set in Witherspoon and have been reluctant to reverse death sentences according to the mandate of this decision. The evidence that jurors not opposing the death penalty are more prone to convict is inconclusive and it seems unlikely that the Supreme Court will require reversal of guilt.


A study using 211 employees of the Sperry Rand Corporation assessed the fairness of jury selection procedures. The findings provided support for the Court's decision in Witherspoon: those in favor of capital punishment were conviction-prone; those opposed were acquittal-prone. Those jurors neither absolutely favoring or opposing capital punishment were most flexible in their verdicts.


Several post-Witherspoon studies indicate that death-qualified jurors are likely to be prosecution-prone because of a significant correlation between approving the death penalty and finding the defendant guilty. Excluding veniremen from the jury because they aren't in favor of capital punishment systematically excludes a high proportion of the population holding certain common attitudes, and also certain demographic groups, particularly blacks and women. The result is a constitutionally unrepresentative jury. The court must determine now how to retroactively apply the ruling in Witherspoon to invalidate prior convictions by conviction-prone jurors.


Questionnaires concerning attitudes toward capital punishment, liberalism-conservatism, and the assignment of penalties in thirteen capital cases were administered to 190 college students. The findings supported the decisions in the Witherspoon case: subjects who were opposed to capital punishment were inclined to be more lenient in assigning a penalty; while those who favored capital punishment were more punitive than the moderate group.
VII. VOIR DIRE


Supreme Court decisions in Duncan, Blum, and Witherspoon have changed the balance between state and federal power over the jury trial. Voir dire, in measuring up to the federal standards, should serve its purpose of eliminating bias, without obtaining a jury "more fair to one side than the other". Instructions to the jury should be co-ordinated with the voir dire, and the scope of the voir dire should be limited to determining prejudice in potential jurors.


Voir dire is not only the objective examination of potential jurors but the facilitation of communication and understanding between jury and counsel. Counsel should be allowed to examine jurors, exercise peremptory challenge, explain legal rules and procedures to the jury during the voir dire, and respect a juror's fifth amendment right to silence on the nature of certain activities.


The author discusses the process of voir dire and argues for its retention as a necessary assurance for an impartial jury. The judge has the responsibility for impressing the jury with the gravity of their task and conducting the qualifying examination. Proper handling of voir dire should produce a competent, qualified jury.

64. "Voir Dire by Two Lawyers: An Essential Safeguard" by Alice M. Padawer-Singer, Andrew Singer and Rickie Singer. JUDICATURE. April 1974; 57(9):386-391.

In a study of the effectiveness of voir dire, the authors found in mock trials that voir dire juries who had been exposed to prejudicial information were less influenced by this information in their verdict than those juries randomly selected without voir dire examinations. The authors attributed this difference to the belief that voir dire reduces the effects of prejudicial information - by sensitizing jurors to the importance of the law and examination of the evidence, and also to the fact that the voir dire proceedings were carried out by two lawyers, the prosecutor and the defense. An added advantage of this method of selection is that the two lawyers sensitize jurors to various aspects of the case.

The voir dire is a necessary constitutional element in insuring a jury impartiality. Limitations are being placed on voir dire by those who question its value and those who complain of insufficiency or delay in the courts. Voir dire has been limited by limiting the questions to be asked, addressing the entire jury panel rather than individual members, and allowing the judge instead of counsel to conduct the examination. Voir dire procedures should be standardized to insure uniform justice.


The exercise of voir dire is necessary for jury impartiality. Not only blatant areas of prejudice should be challenged (cause), but more subtle influences such as group bias and extrajudicial publicity should be challenged peremptorily. The article outlines standards for the exercise of peremptory challenges, and urges appellate courts to accept the peremptory without proof of actual prejudice.

VIII. NONUNANIMOUS VERDICTS

67. "Less Than Unanimous Verdicts in Criminal Trials" by 
John V. Ryan. JOURNAL OF CRIMINAL LAW, CRIMINOLOGY, & POLICE 

Because of the high number of acquittals in England of defendants known to be guilty, the Home Secretary, Roy Jenkins, proposed that less than unanimous jury verdicts be allowed. Eliminating the unanimous jury verdict requirement in the United States raises three main questions: first, is the unanimous verdict required by the Constitution for criminal trials? second, does a majority verdict rule allow the prosecution to obtain a conviction without proving guilt beyond a reasonable doubt?; and, third, does due process require a unanimous verdict in criminal trials? The author concludes that such a rule would not be an infringement on the rights of the defendant and that the unanimous verdict is an unwieldy and unnecessary requirement.

68. "Jury Trial". HARVARD LAW REVIEW. November 1972; 86(1); 
148-156.

Court decisions in Johnson and Apodaca held that the sixth amendment does not require unanimous verdicts in criminal trials. It is argued that majority verdicts will encourage cursory examination of the issues, and does not require the prosecutor to prove his case beyond a reasonable doubt.

The Johnson and Apodaca decisions held that unanimous verdicts were not necessary either as proof of guilt beyond a reasonable doubt or under the Sixth Amendment right to jury trial. The majority opinion stated that unanimous verdicts, like the twelve-member jury (as decided in Williams v. Florida) were an historical accident; and that the reasonable doubt standard developed at a different time than the jury system, and thus did not apply to the Sixth Amendment right to jury trial. Johnson and Apodaca left open two major questions: if unanimous verdicts are unnecessary in state trials, will they be required in the future for federal criminal trials?; and how small a majority is required for a nonunanimous verdict?


Recent Supreme Court decisions permitting juries of less than twelve members is inconsistent in criminal cases where the degree of certainty requires proof beyond a reasonable doubt. By permitting majority verdicts, the Court undercuts the protection accorded minority defendants. If the function of the jury is to interpose the community between the accused and the state, the majority verdict diminishes the vitality of the institution of the jury.


The author stands in opposition to recent Supreme Court rulings providing for six-member juries and nonunanimous verdicts. Bossard's Law of Family Interaction is cited in support of the author's contention that a twelve person jury offers greater representative capacity.


Juries of six or twelve persons listened to a simulated trial of a rape case, deliberated, and returned verdicts either in an unanimous or nonunanimous decision condition. The two variables - unanimity and jury size - had no significant effect on the verdict. However the six-person juries averaged a significantly lower amount of deliberation time. The findings also showed that individual jurors often agreed with the majority, when when they privately dissented. The primary finding was that a two-thirds majority condition best predicted overall verdict distributions.
IX. SIX-MEMBER JURIES


The major issue in the Williams case was the conviction of a defendant to life imprisonment by a six-member jury. The Court found that trial by a six-member jury constitutional on the grounds of judicial efficiency and economic expediency, and attributed the twelve-person jury to an "historical accident" in the evolution of the jury trial. The case is presented as an example of a conflict of interest between the rights of the individual and the state's administration of efficient and expedient justice.


Smaller juries, in conjunction with other court decisions and proposals to limit the function of the jury, appears to be a reduction of the jury system in general. Differences in jury size do make a difference in adjudication, as shown by statistical analysis. The article also considered other possible modifications of jury size, and the question of the majority verdict.

75. "Six-Member Civil Juries Gain Backing" by Edward J. Devitt. AMERICAN BAR ASSOCIATION JOURNAL. November 1971; 57:1111-1112.

Williams v. Florida was a criminal case involving the sixth amendment a Florida statute providing for six-member juries. The Court ruled that the twelve-member jury was an "historical accident" and not a "necessary ingredient" of trial by jury. The seventh amendment right to jury trial in civil cases has been interpreted as falling under this ruling, and the increasing use of six-member juries is resulting in savings of both time and money for the courts.


The Williams decision which permitted a six-member jury in the trial of a major felony, is eroding the significance of the American jury. Twelve-member juries allow greater chance for minority representation in the jury, and contain twice as many opinions upon which to evaluate the evidence as six-member juries. The effects of the six-member jury combined with nonunanimous verdicts result in more convictions, and fewer hung juries. These changes in the jury system are a serious attack upon the institution designed by the Constitution as a guardian of civil liberties.

The seventh amendment provides for jury trial in civil cases according to the "rules of the common law"; the common-law jury is defined as twelve jurors. Therefore, the Williams v. Florida case which permitted six-member juries in major criminal trials is not applicable to civil cases, since the seventh amendment specifies the common law (twelve-member) jury. Moreover, individual district courts do not have the power or the right to make local alterations in the size of the jury.


A study of juror utilization in the District Court for the District of Columbia shows no difference in your hire time and trial time between six and twelve person juries, and relatively little difference in jury panel size. The inference drawn from this study is that panel sizes must be reduced proportionately with jury size to avoid even more waiting time for jurors serving on six-member juries.


The author stands in opposition to recent Supreme Court rulings providing for six-member juries and non-unanimous verdicts. Hare's Law of Family Interaction is cited in support of the author's contention that a twelve-member jury offers greater representative capacity.


In light of the fact that many Americans dodge jury duty, inefficiency consumes court and taxpayers' time and money, and jury trials contribute to court backlogs and delays, a revamping of the institution of the jury is needed. The six-member jury saves time, money, promotes a better courtroom atmosphere, and insures more efficient juror utilization.


The "convincing empirical evidence" cited by the Court in its Williams decision provides misleading support for the belief that there is "no discernable difference" between results reached by two different-sized juries. The article examines four studies used to support the correctness of the Williams decision, and analyses the methodological shortcomings of each study. The flaws in these studies preclude their validity, and question the holdings of the Supreme Court on six-member juries.

The article debates the Supreme Court's holding in Williams v. Florida that there is "no discernable difference" between six-member and twelve-member jury verdicts. Quoting from other jury studies and using probability theory, the author showed that reduction in jury size does affect jury verdicts. Analysis showed that twelve-member juries are more likely than six-member groups to be represented by minority-group members, are more likely to be consistent across similar cases, and are more representative of the community from which they're drawn. The article also draws on small-group research to support the contention that twelve-member juries are qualitatively better than six-member juries.


A comparison of six-member and twelve-member juries in the Federal District Courts found major differences in verdicts and amounts awarded. Cases heard by six-member juries resolved more often in favor of the defendant than by twelve-member juries; awards granted by six-member juries were substantially smaller than those granted by twelve-member juries. The study found only a modest savings in time with the six-member jury.


Juries of six or twelve persons listened to a simulated trial of a rape case, deliberated, and returned verdicts either in a unanimous or nonunanimous decision condition. The two variables - unanimity and jury size - had no significant effect on the verdict. However the six-person juries averaged a significantly lower amount of deliberation time. The findings also showed that individual jurors often agreed with the majority, even when they privately dissented. The primary finding was that a two-thirds majority condition best predicted overall verdict distributions.


The Williams v. Florida decision permitting six-member juries raised a number of questions as to the effects jury size has on verdicts. According to this study, jury size had no
effect on the verdict when apparent guilt was low, but when apparent guilt was high, six-member juries were more likely than twelve-member juries to convict. Twelve-member juries were found to be more advantageous to the defendant; the absolute size of a minority in the larger jury was more likely to cause a hung jury (rather than a guilty verdict).


Using high school seniors as simulated jurors, this study assigned 177 students to five juries consisting of: six members, twelve members, five members plus a confederate, or eleven members plus a confederate. The results indicated that the juries prompted by confederates who argued assertively for the guilt of the defendant yielded in the direction of the assertive confederate. This finding was more pronounced in the five-member plus confederate juries. The controls (six- and twelve-member juries) did not differ in the proportion of guilty verdicts assigned. The results suggest that the twelve-member jury may still be the most reliable screen for detecting "reasonable doubt" in protecting the rights of the accused.

X. GRAND JURY


In the case of Youngblood, the defendant was held not to have shown a "particularized need" for the secret testimony of a witness in grand jury proceedings. The Court, however, promulgated a new rule for the Second Circuit: a defendant need not show particularized need for relevant testimony. The grand jury's characteristic of secrecy is most significant in cases of political corruption; in most other cases it is unnecessary and exaggerated.


Traditionally, a criminal defendant has not been given access to his own grand jury testimony previous to trial. Although it is a dying rule, many states, and even federal grand juries, preserve it in some form. A problem arises, however, with the testimony of the corporate defendant. The article suggests that a corporate defendant should not be denied access to testimony of any member or former member of the corporation, when the testimony concerns alleged criminal conduct of the defendant.

This article examines several modern expansions of the traditional grand jury procedure, particularly the use of special grand juries and special counsel. These relatively little-used innovations provide means for bypassing the local prosecutor, which may be necessary for effective investigation of government corruption. The author concludes his survey of increased grand jury flexibility with the observation that grand jury efficiency may be generally increased through use of special grand juries and special counsel, with the understanding that the grand jury can only supplement policing institutions not replace them.


The article examines the grand jury's unrestricted investigatory power, the FBI's use of grand jury resources, and the policy of grand jury secrecy. The function of the grand jury has shifted in the past 200 years from a protector against oppression to an investigatory instrument of government. In effect, the prosecutor has been given the power of ordinary law enforcement officers, but absent the constitutional restrictions placed on the police.


The grand jury's function of protection from state oppression may be converted into a rubber stamp for prosecutorial oppression. Judges and prosecutors who do not conform to standards of procedural fairness may prevent grand juries from making independent determinations on the triable merits of cases.


Recent grand jury investigations of dissident groups and activities have necessitated setting up a balance between legitimate government functions and the continued vitality of first amendment rights to freedoms of speech and association. In order to avoid the "chilling effect" which compulsory processes have on these rights, the state must be able to show a subordinating interest which is compelling, a reasonable nexus or relationship between this interest and the subject under investigation, and a reasonable means for pursuing the objective.

The idealized view of the grand jury as that institution which protects the citizen against government oppression is challenged here. Tracing the evolution of the grand jury from the time of Henry II, the article documents the cases in which the grand jury served as a vehicle of government suppression of political dissidents. What is needed now, instead of abolition of the grand jury, is a reinforcement of its traditional function as the primary barrier between the accused and the accuser.


The reasoning employed in Coleman v. Alabama (permitting participation of accused and counsel in a preliminary hearing to establish probable cause) is that this is a critical stage in the prosecution. This reasoning can and should be extended to grand jury indictment procedures. Permitting the assistance of counsel in the grand jury room would reduce the prosecutor's dominance over the grand jury.


Compelling a witness to testify before a grand jury, even though his testimony may be self-incriminating, is an abridgment of the fifth amendment right against self-incrimination. The 1970 compulsory testimony statute fails to provide for transactional immunity while permitting use immunity. It is argued that use immunity does not fully protect a witness from further prosecution, and the standard of transactional immunity must be adhered to.


In the cases of United States v. Egan and Gelbard v. United States, the Supreme Court decided that grand jury witnesses had the privilege of refusing to testify in situations where fourth amendment rights were violated. In these cases, witnesses refused to testify because of information obtained through an illegal federal wiretap. Furthermore, compelling the witness to testify in this situation under threat of contempt proceedings, is an invasion of the fifth amendment privilege against self-incrimination.


The issue in Bursey concerns the balance between the first amendment rights of a witness in a grand jury proceeding and the scope of questioning permitted a grand jury investigation. In such a situation, the Government must show (1) an interest in the subject matter of the subject under investigation that is "immediate, substantial, and subordinating"; (2) a "substantial connection" between the information sought and the governmental interest; and (3) that the information sought cannot be obtained through means less destructive of first amendment liberties.


The Bursey Court ruled on the conflicting values between the Government's interest in obtaining information and the citizen's right under the fifth amendment to remain silent and under the first amendment right to freedom of association and of the press. The decision in this case reflects the change in nature of the grand jury - from that of an independent, investigatory body to one dominated by the prosecution. The Bursey decision is seen as another step toward limiting the unrestricted investigational power of the grand jury.


A balance test, between society's need for effective grand juries, and the infringement of witnesses' first amendment rights was formulated in Bursey. It is argued that a
witness should have a copy of his grand jury testimony - as a protection against repetitious questioning, to correct errors in transcription, and as an aid for preparing a possible future defense. The first amendment's guarantee of the rights of association and the press were protected by the Court's ruling that grand jury investigations must be limited to the subject matter of the investigation, rather than broad inquiries into the workings of a newspaper.


The article surveys the development of the grand jury and its rule of secrecy. A proposal is made to provide a transcript of testimony to witnesses to protect the witnesses and prevent them from making misleading public statements.


Campbell argues for abolishing the grand jury and using in its stead an information filed by the prosecutor and reviewed in a probable cause hearing by a magistrate. After reviewing the evolution of the grand jury, Campbell argues that such an institution is no longer viable in a pluralistic urban society. The unskilled and untrained members of the grand jury have become the stamp of approval upon the efforts of the prosecuting authority, minimizing the prosecutor from responsibility for his conduct. An information filed by the prosecutor would place responsibility where it belongs, and the probable cause hearing would serve the purpose of the grand jury in deterring it there is sufficient evidence to proceed with prosecution.


In United States v. Calandra, the Court ruled that extending the exclusionary rule to grand jury proceedings would substantially impede the role of the grand jury; while providing only a minimal deterrent to police misconduct. Thus a witness before a grand jury may not refuse to answer questions which are based on illegally seized evidence. The function of the exclusionary rule has been interpreted in two ways: as a deterrent to law enforcement officers from engaging in illegal behavior; and in the judicial integrity doctrine which views the exclusionary rule as a remedy designed to safeguard fourth amendment rights. The deterrence theory is a questionable rationale for this vital constitutional doctrine, for the entire exclusionary rule may be brought down if and when it is proven that deterrence is not a significant effect of the exclusionary rule.
The article examines the Court's ruling in Calandra, concerning the exclusionary rule. The traditional interpretation of the Fourth amendment is merged with a balancing analysis to give the exclusionary rule its greatest deterrent effect. The article suggests strategies for limiting Calandra.

The author counters the argument that the grand jury is a "rubber stamp" of the prosecutor. Stating that the police present only those cases where there is substantial evidence of a crime, the high rate of indictments returned are evidence that the prosecutor is doing a good job, and not necessarily, as has been interpreted, that the grand jury reflects the will of the prosecutor. In cases of prosecutorial misconduct, where the prosecutor has prejudiced or manipulated the grand jury, the courts have dismissed the resulting indictments. The author advocates granting the defendant more leeway in establishing prosecutorial misconduct, and prompting the courts to be more active in the indictment process to assure proper functioning of the grand jury.

A concern for defendants has led to a softening of the barrier of secrecy surrounding grand jury testimony. State and federal agencies are drawing upon the grand jury disclosures in investigations of civil proceedings. As such, the grand jury is being diverted from its historic role as a safeguard of liberty to a new role as an inquisitorial tool of the executive branch.

Grand jury behavior is characterized by a rapid processing of cases with little deliberation, by low internal conflict in reaching decisions, and by overwhelming approval of the district attorney's recommendations. Some factors explaining these behavior patterns are: the kind of people who become grand jurors, the inadequacy of the grand jury preparation process, a heavy caseload demanding speedy processing of cases, and the manipulative nature of the district attorney's office. More research is needed on grand jurors, their selection, and decision-making processes.
XI. CHALLENGING JURY DISCRIMINATION


The Jury Discrimination Act (S. 1319), still in committee, would saddle state or local officials with the burden of proof when a defendant charges discrimination in the make-up of the jury panel. If this law were passed, defendants would be able to take their chances with a trial, and if they lost, to then challenge the jury on the basis of unequal representation.


In the trial of Dr. Benjamin Spock, there were only nine women out of a venire of one hundred. Statistical analysis showed that past venires had all systematically excluded female jurors. Public law 90-274 has set federal guidelines for juror selection and expanded jury service to the total eligible population.


This article traces the historical background of the juror selection cases, summarizes the present state of the law, and discusses the standing of a grand jury witness to raise the issue of unconstitutional representation. The mathematics of juror selection are considered, and using Philadelphia as an example, the methodology and results of applying a mathematical analysis is done on that city's juror selection system.


The article discussed the appropriateness of whether civil petitioners should be allowed to challenge grand jury selections as criminal defendants seeking reversal of a verdict. A sample of 209 grand jurors in Alameda County was analyzed and found gross underrepresentation among certain segments of the population of the county. This was attributed to the unchecked discretion of the judges who selected potential grand jurors. The article suggested that basic socio-economic classifications be delineated with standards set to insure adequate representations of these groups; that sources for juror selection lists be expanded to provide a broader base than is currently possible using voter registration lists; and that financial security be insured for lower-income people serving as grand jurors.


To prove jury discrimination, a petitioner must show that his jury was not drawn from a representative cross-section of the community and that the opportunity for discrimination was present. The role of the statistician is to assist in showing that the class or race of the petitioner was not represented in the group from which the jury was chosen. The article demonstrates how to make a prima facie case, using statistical arguments, that the venire from which the jury is chosen is nonrepresentative of the petitioner's class. The author concludes that discrimination will become less blatant as statistical arguments become accepted by the courts.


Through statistical analysis, a challenge to the jury selection process in the Attica case was mounted. Discrimination was alleged with respect to race, sex, and age, and some 116,000 jurors were subsequently excluded. Permanent jury pools are set up so as to discriminate against young people and ethnic groups; and women and ethnic groups are systematically underrepresented.

XII. CIVIL JURY TRIALS


Deficiencies in the civil jury system are partially responsible for backlogs in the courts. New methods of nonjury settlements are being tried, but what is really needed is a
change in the constitution to permit civil cases to be tried to a magistrate.


The Beacon decision broadens the right to jury trial in civil cases. New procedural devices have enlarged the scope of the seventh amendment right to jury trial - the question of jurisdiction has moved toward use of a legal remedy, and away from equity or admiralty jurisdiction. The article examines the practices of merger, interpleader, the declaratory judgment, and the shareholder's derivative suit in light of Beacon's enlargement of the jurisdiction of law.


Legislative intent in creating Title VII cannot be interpreted to mean that civil suits under this statute have the right to jury trial. However, when monetary damages for discriminatory employment practice are sought, there is a question as to the right of jury trial. Case law in the area of civil actions is confusing when it comes to jury trials, although similar past trials indicate that jury trial under Title VII is inconsistent with the purpose of the act.


The jury in civil cases is not an essential element of justice, and in the interest of expediency and economy, an amendment to the Constitution abolishing civil jury trials should be carried through. The United Kingdom has already abolished civil jury trials in most cases, and the finding of truth could be just as fairly (and more economically carried out) with a competent judge presiding over an adversary system of litigation.


This article is a reprint of one written for the October, 1925 issue of Judicature. Recognizing three distinct classes of jury trials - criminal trials, trials in tort actions, and trials in contract actions - the author states that jury trials in the case of contract actions are an unnecessary hindrance to adjudication of business disputes.


In Ross v. Bernhard, a stockholder derivative suit which
would normally have come under equity jurisdiction, was ruled to come under legal jurisdiction with the concomitant right to jury trial. But the expansion of jury trial as ruled in Ross brings with it a significant delay in the administration of justice, which may in effect be a denial of justice in itself. The tripartite test formulated in Ross to determine the "legal" nature of an issue can be interpreted to serve as a limit on the expansion of civil jury trials.


An examination of previous related cases and the development of civil jury trial in regards to Rachal lead the authors to believe that the jury trial was not a constitutional right in this case. It is questionable whether civil jury trial is so often necessary and indeed mandated by common law as lately interpreted by the Supreme Court.


The submission of the controlling issues in negligence cases has given the jury no adequate basis on which to come to a decision. As a consequence, jury verdicts are likely to be overturned by appellate courts. The instructions given to the jury do not include the possible effects of their verdict, i.e., what penalty will be assessed upon their decision, and thus juries are forced to find facts in a vacuum - an unrealistic situation in which consequences are not taken into account.


Certain basic issues and special issues in negligence cases can be manipulated so as to invalidate a jury's verdict. In effect, the special issue practice has been used to nullify the function of the jury.


The article attempts to elucidate the intent of the seventh amendment as it was written into the Bill of Rights. Interpretation of the seventh amendment has been based on the historical test, i.e., in determining whether a jury was required by the seventh amendment had to be based on the practice of English courts at the time the Bill of Rights became effective in 1791. After an extensive review of the origin of the seventh amendment, the author suggests a new interpretation of the seventh amendment; instead of an historical interpretation, a dynamic reading of the seventh would be more fitting, recognizing it as flexible and changing.

The seventh amendment preserves the right of jury trial in civil cases. The text constructed in Ross v. Bernhard indicates that any action for monetary relief presents legal issues triable by jury. Fears about jury bias in the vindication of unpopular rights are exaggerated: the voir dire acts to insure an unprejudiced jury.


Jury trial as a means of adjudicating negligence cases should be preserved. Determination of fault of a defendant, resolution of disputes regarding the items of injury, and determination of comparative fault can be best performed by a jury. The function of assessing damages should be left to judges who are qualified to do so. In this way, jury trial can be preserved in negligence cases.


Many statutes contain ambiguous language and can be interpreted as either "legal" or "equitable" claims for relief. An historical interpretation of the seventh amendment would require jury trials for legal matters; jury trials are unnecessary in equity cases. The article traces the development of Court cases related to the civil jury trial issue, and discusses the determining factors in legal or equity cases.


The article reviews the law versus equity dimensions of civil trials, and the tripartite test formulated in Ross v. Bernhard. When applied to Sections VII and VIII of the Civil Rights Acts (1964 and 1968 respectively) it is concluded that Congress did not intend to provide for jury trials in suits brought under these provisions.

129. "Federal Civil Jury Trials Should be Abolished" by Edward J. Devitt. AMERICAN BAR ASSOCIATION JOURNAL. May 1974; 60; 570-574.

Civil jury trials are an unnecessary strain on the administration of justice in the courts. Short of a constitutional amendment modifying the seventh amendment right of civil jury trial, the article suggests three alternatives to improve efficiency in civil cases: (1) encourage litigants and counsel to waive jury trial; (2) charge fees to the party demanding the
jury trial, to defray juror costs; and (3) increase arbitration and mediation as methods of settling disputes.


There is evidence to suggest that courts of equity in the eighteenth century and before, relied on jury trial procedures to determine questions of fact. At the time of the adoption of the seventh amendment in 1791, the English Court of Chancery was in transition from a rule that disputed fact issues were generally submitted to juries to one that made such submissions discretionary.


The jury in the civil trial is the only safeguard against an arbitrary judge. The dispensation of justice is the important value in a trial court; the civil juror is the best guarantor of justice. Costs and delays in the jury system are minimal, and are the price paid for quality justice.


In the interests of efficiency and expediency, Constitutional rights to trial by jury are being ignored in the potentially criminal penalties imposed by administrative agencies. Administrative procedures are considered civil in nature, and the sixth amendment guarantee to jury trial is thus not applicable. But the author argues that increasingly severe monetary fines are beginning to resemble criminal sanctions rather than compensatory civil fines. A more broad interpretation of the sixth amendment right to trial by jury has been given to contempt and denaturalization proceedings; the author believes this broadened interpretation should be extended to allow a jury trial in certain administrative proceedings. A "primary nature" test would be used to determine if the sanction is primarily civil or criminal; if criminal, a jury trial would be constitutionally required to determine guilt or innocence.


A variety of tactics have been used to limit the freedom of the jury in Texas: the special issue system, directing of verdicts, and pyramiding of inferences. A related tool of jury control is the presumption - an area of judicial encroachment on the jury's province. Presumption, however, can be used as
a rational tool for jury control without the side effects of incomprehensible instructions and undue judicial meddling.


The Congress, in Title VII, did not provide for jury trials in civil suits for racially discriminatory employment practices. However, Congress permitted the individual bringing the civil action the legal right to recover his lost wages in the period he remained unemployed. In so doing, the seventh amendment's guarantee to trial by jury comes into play.


In interpreting a constitutional amendment, the Court must consider the effects their decision will have on the day-to-day workings of the courts. A "rational" interpretation of the seventh amendment would take into account changing conditions and provide a more flexible basis upon which to decide if a jury trial is necessary in civil cases. This rational approach has the effect of widening the scope of cases triable by jury - which is challenged as an inefficient and incompetent method of determining a case. The article advocates a strictly historical interpretation of the seventh amendment, which is constitutionally acceptable and would limit the use of the jury trial in civil cases.

XIII. JURY INSTRUCTIONS


The article suggested jury instructions that might be given in cases of aiding and abetting. Among the guidelines suggested are: knowledge of the result, the importance of the aid, the time and place the aid is given, and the defendant's stake in the crime. The author suggests that a solution to the problem rests in modifying the rule that the aider and abettor of a crime is guilty as a principal.


The author presents a rationale for the use of pattern instructions to the jury, arguing that a copy of those instructions be given the jury in their deliberations. The author also advocates that juries be given basic instructions before they hear testimony, to further efficient use of the jury.

Supplementary instructions, such as the Allen charge, are becoming negatively viewed due to the fact that they are believed too "coercive": the judge is pressuring jurors in the minority to agree with the majority to prevent a hung jury. Two persuasion mechanisms in jury deliberations are coalition pressure and verbal pressure. When these two mechanisms are operating efficiently and jury members still cannot reach an agreement, the jury may be defined as "properly" hung. When these two mechanisms are not functioning adequately, it is the responsibility of the judge to make them function as they should through supplemental instructions.


Pattern jury instructions, also known as uniform or standardized instructions are guidelines used by judges in preparing jury instructions. They have the advantages of savings in trial preparation time, greater accuracy, impartiality, uniformity and conciseness, along with increased intelligibility. The article discusses relevant questions concerning various aspects of pattern jury instructions.


The article examines an inoffensive method of monitoring the deliberative processes of the jury by analyzing the questions judges are asked by jurors. A questionnaire was sent to judges and clerks of courts holding jury trials, and the return questionnaires analyzed. The jurors' questions were categorized as: (1) forgotten or not clearly understood instructions; (2) instructions omitted by the judge; and (3) instructions which the jury have trouble accepting as the law. Analyzing the concerns of the jury in this manner would be an acceptable method for improving the judge's instructions to the jury.


The Allen charge has been used since 1896 to bring deadlocked juries to a verdict and avoid mistrials. However, the charge is viewed as coercive, and compromising a defendant's right to an impartial jury and a verdict based on proof of guilt beyond a reasonable doubt. The American Bar Association formulated a supplemental charge which avoids the coercive elements of the Allen charge but urges reevaluation of opinions held by all members of the jury.

When a deadlock in jury deliberations appears evident, the judge has the power to issue supplemental instructions, urging the jury to come to an agreement. The two most frequently used charges are the Allen charge (the traditional federal charge), and the American Bar Association charge. The article compares the two charges with regard to five factors: coerciveness of wording, vulnerability to additions and deletions, timing of issuance, constitutionality, and reviewability. Upon analysis, both charges could be considered inherently coercive, although the Allen charge involves a substantial risk of coercing the minority in a jury deadlock.


In special verdicts, the jury is given to decide questions of fact, leaving the judge to apply the law to the facts. The question addressed in this article is whether or not the jury should be informed of the effect of a special verdict, thus possibly influencing the verdict. The amendment of the Minnesota Rules of Civil Procedure allowing instruction and argument to the jury in special verdict cases has been ambiguously interpreted, and a discussion of procedural reform in this area is included.


In cases where the jury is instructed to disregard a confession, there is evidence that such limiting instructions may actually produce the opposite result from that intended. If instructions to the jury are not sufficient there are two alternative methods of trying two co-defendants - by separate trials or through a joint trial properly conducted so as not to prejudice the chances of the defendant who has not confessed to the crime.


A group of Florida veniremen were used as research subjects for mock juries. Participants were divided into two groups: a control group receiving no instructions and an experimen tal group receiving pattern instructions. Predictably, the experimental group scored much higher than the control group on a measure of comprehension. However comprehension
even in the experimental group only reached 70% of the material, and the article argues that instructions to juries should be couched in more familiar, everyday language to enhance juror understanding.

XIV: JUROR SELECTION AND MANAGEMENT


The article discusses two major shortcomings of our present jury system: the procedure for preparation of jury lists, and the large number of exemptions from jury service. Suggestions for efficient and fair jury selection, for excusing prospective jurors from jury service, and for drawing grand jurors are discussed.


The article presents two senators' differing views on Title I of the Civil Rights Bill of 1966, dealing with the selection of juries. Senator Hart of Michigan argues that uniform standards set forth in this bill be accepted, to insure that a representative cross-section of the population is indeed chosen for jury duty. Senator Ervin of North Carolina argues that the proposals are awkward and unworkable; and that it is impossible to achieve a jury representing a cross-section of the community.


The author opens by stating the reasons for retaining trial by jury in the face of pressure to abolish this right. Effective jury management can become a strong argument for retention of jury trial. The author believes a greater list of jurors, shorter length of juror impanelment, juror characteristics matching characteristics from the population, and rotation of jury panels prevents professionalism. The author advocates use of computers, an effective personal interview, and consolidation of all jurors for courts of record into a common pool.


In this article, Kaufman argues for legislation pending in Congress which would improve the method of jury selection. The "key man" system, challenged in Smith v. Texas, and the blue ribbon jury are cited as contrasts to the proposed system of random selection of jurors. Jury service must not be denied to anyone qualified, argues Kaufman, to preserve the impartiality of the jury.

The use of data processing has been demonstrated to cut down on the length of time required to select jurors in Union County, New Jersey. The article describes the new computerized process for selecting juries and printing subpoenas and juror forms.


A jury assembly room system has been successfully used by the Superior Court in Santa Clara County, California, for the past five years. It has proved to be an effective method for summoning multiple-panel juries, has proved economically efficient by saving thousands of dollars in court operation, and acts as a public relations procedure by minimizing confusion and discomfort among jurors.


Adherence to constitutional provisions for the selection of jurors do not minimize the opportunity for discrimination and prejudice in the selection of jurors. The Federal Jury Selection and Service Act of 1968 draws guidelines for federal courts in selecting a representative cross-section of jurors from the community. Statutory provisions in Minnesota concerning juror selection should be patterned after the Jury Selection and Service Act, to eliminate the inadequacies of the present selection system.


The traditional jury has been middle-class and all-white. In its exclusion of blacks, juries are neither legitimate nor qualified in their fact-finding function. Court decisions in Swain v. Alabama and Fay v. New York have tended to perpetuate the systematic exclusion of blacks from juries. The problem of drawing an adequate and representative sample of blacks for jury duty could be solved by redrawing jury districts to insure a proportionate representation of blacks from each vicinity.


New methods of selecting prospective jurors will be initiated in the new decade due to Supreme Court decisions, the increased demand for jurors, court reorganization, and the emergence of modern data processing techniques. The article outlines the process of jury selection, discussing constitutional standards, determining the source of prospective jurors, screening and summoning prospective jurors, and providing incentives for jury service.

The District Courts of Wichita, Kansas, have eliminated much of the delays and waiting time for jurors by doing away with jury pools. Instead, jurors are called to try only one case. The new procedure has reversed the community's formerly unfavorable attitude toward jury duty, spread the burden of jury service among a larger number of people, and has disposed of more jury cases than the former method of jury pools.


The English jury has been characterized as "male, middle-aged, middle-minded, and middle-class". The history of jury trial is traced: from the time when jurors were as much witnesses as judges of fact, through the modern techniques of rules of evidence, to the present jury inequities requiring property ownership. The jury in England is presently an institution with somewhat controversial selection procedures.


Lack of good management in jury selection has resulted in an oversupply of jurors (with a concomitant over-expenditure of public funds), and has hampered jury efficiency and public willingness to serve. Analysis of data from the District Court in the District of Columbia showed the efficiency of juror use to be about 50%. If daily demands for jurors could be more closely adjusted to the juror supply, and the demand for jurors more controlled, the size of jury panels could be cut and thus more efficiently used. Using this approach, the author estimated a 50% savings, or a possible total savings of $100 million in juror costs per year.


This article traces the historical background of the juror selection cases, summarizes the present state of the law, and discusses the standing of a grand jury witness to raise the issue of unconstitutional representation the mathematics of juror selection are considered, and using Philadelphia as an example, the methodology and results of applying a mathematical analysis is done on that city's juror selection system.


The problem of overcalling jurors is reviewed in this article. The waste of money and human resources calls for speedy corrective actions. Some suggested solutions to the problem are reducing the daily call-in and panel size of jurors, instituting six-member juries in civil cases, and staggering scheduled trial times.

The article documents the difference between characteristics of the general population and those of persons on voter registration lists. Data gathered in the jurisdiction of the Rhode Island District Court demonstrate the differences between characteristics of the venires and of the population: venires are disproportionately male, middle-aged, educated, and employed. Implied in these findings is the belief that venire lists, from which venires are often drawn, do not provide a representative cross-section of the population.

161. "Juror Management in a Metropolitan Trial Court" by Leon S. Lasdon, Allan D. Warren, Steven J. Madson. JUDICATURE. April 1974; 57(9):402-409.

Efficient management of jurors can best be achieved by constant monitoring of daily juror utilization. The article describes the management program used by the Cuyahoga County courts in Ohio. By comparing daily juror pool size with peak use of jurors, and observing fluctuations in juror use on various days of the week, the authors were able to make recommendations for more efficient use of jurors, resulting in an estimated savings of 28% of the previous year's juror costs.


The article discusses the denial of equal protection to women litigants by the exclusion of women as jurors. Four modes of analysis are examined: the systematic exclusion theory, rational basis analysis, suspect classification scrutiny, and fundamental interest scrutiny. Sexual stereotypes which type women as incapable of jury duty will apparently no longer be given legal recognition.


English and American jury selection is similar up to the point where juror's names are randomly drawn. From here, the American system proceeds to the voir dire, while English law is based on the principle of impersonal advocacy - lawyers are not allowed to speak with jurors. A study of 50 Canadian lawyers explored the effects of sex, age, socio-economic status and appearance on the lawyers' selection of jurors for four different trials: rape, murder, fraud, and issuing a false prospectus. The findings indicated that men were preferred over women (except in the murder case); age was a significant factor only in the rape case with the preferred age bracket listed as 20-30; and prospective jurors in the case of issuing a false prospectus were rejected on the basis of rebellious dress.

A recent furor over government conspiracy cases has accused social scientist of stacking the jury. However, it is countered by Zeisel, Schulman, and others studying jury selection processes that the government had little to stand on in the conspiracy cases, and the majority of cases are won on the evidence rather than on who was on the jury. Use of scientific jury selection methods would be more equitable in jurisdictions where juries are not representative of a cross-section of the population.


Through statistical analysis, a challenge to the jury selection process in the Attica Case was mounted. Discrimination was alleged with regards to race, sex, and age, and some 110,000 jurors were subsequently excluded. Permanent jury pools are set up so as to discriminate against young people and ethnic groups; and women and ethnic groups are systematically underrepresented.


June L. Rapp is a psychologist who was employed by the defense to pick a jury for the Wounded Knee trial. In this interview, she explains how she used her knowledge of behavioral science to select an impartial jury for the case. Psychological research into authoritarianism, Machiavellianism, legal socialization, and the totalitarian liberal were utilized in analyzing the responses of jurors questioned in the voir dire.


Scientific jury selection can take into account attitudes and personality characteristics, but all these factors are based on probabilities and do not by themselves predict the outcome of jury deliberations. The intent to impanel an impartial jury rests on the belief that jury members can deliberate on the evidence, i.e., not on personal biases. The goal of social science jury selection is to enable counsel for both sides to exclude biased jurors until the final panel consists of neutral jurors — those most competent to reach an impartial verdict.

XV. JURY DECISIONMAKING

The article provides a comparison and contrast between psychology and law. Psychological variables in the selection and behavior of jurors are discussed, such as the prestige or appearance of witnesses, emotions, and social perceptions of the jurors.


In two separate experiments, the authors manipulated the attractiveness of the defendant and the attractiveness of a victim in a negligent automobile homicide. The circumstances of the crime were identical in all conditions, and subjects were requested to sentence the defendant. In both experiments, subjects sentenced the defendant to a longer term of imprisonment in the attractive victim condition; in the second experiment, the defendant was more severely sentenced in the unattractive defendant condition.


In studying the process of persuasion, eighteen pairs of subjects were matched on the basis of age, height, weight, and birth order, and given a summary of a dispute between a plaintiff and defendant to read. Each pair also received different legal analyses of the case, so that the two subjects' task was to reconcile the opposing viewpoints. The results suggest that expressed confidence leads to persuasion.


Under Texas law, the court may not inform the jury of the possible outcome of its verdict—probation, parole, or executive clemency. Jury deliberation shrouded in such ignorance of the possible outcome of a verdict precludes a fair and informed sentence. Procedural reform should be implemented, allowing information concerning the sentence to be given to the jury.


A comparison of decisions reached by all-male and mixed (male-female) juries found that juries containing women were more likely than an all-male jury to decide for a litigant of superior status. Male-female juries however awarded proportionately less money than did all-male juries. Women's behavior on juries has important implications for a society in which women are playing a more significant role.

Simulated jurors read a description of an attempted robbery and subsequent murder and were asked to return a verdict. Eight conditions—two control and seven which varied the number and severity of alternatives—were set up. Subjects choosing between a severe penalty (first-degree murder) and not guilty returned not guilty verdicts more often than subjects with a greater number of alternatives or alternatives providing less severe penalties. Subjects rationalized their decisions in accordance with dissonance theory; those returning a guilty verdict reported the defendant to be more guilty and more deserving of harsh punishment.


Using 104 students as simulated jurors, the experiment studied the effects of defendant attractiveness and suffering on verdict outcome. The attractive defendant was given, on the average, a significantly lighter sentence than his unattractive counterpart. The effect of sympathy aroused by the defendant's suffering appeared unimportant in the punishment assigned.


The article examines some of the hypotheses and studies done concerning how the sex of the juror affects the verdict. The studies cited support the equality hypothesis which says men favor neither sex and women favor neither sex. Differences between men and women in the amount of damages awarded appear to be related to the sex of the jurors, and prompts a call for more equal representation of males and females as jurors to assure more equal treatment of male and female defendants and and personal injury plaintiffs.


The policeman charged with the murder of a black man received a change of venue—to an all-white rural community—and his jury was limited in choice between verdicts of innocent or guilty of first-degree murder. Examining these two issues, this study found that race had little, if any effect, on the 307 simulated jurors. In cases where the simulated jurors were offered the two extreme options as verdicts, more innocent verdicts were returned. The authors conclude that extreme verdict choices force jurors to choose between unsatisfactory alternatives. A range of alternatives must be offered to the jury to make the verdict compatible with the crime.

In a simulated jury situation, 139 subjects who were either ranked high or low in authoritarianism returned a verdict and punishment on an accused defendant whose attitudes on five irrelevant issues were either similar or dissimilar to the jurors'. The two variables (authoritarianism and attitude similarity) together showed a significant interaction on determining guilt and severity of punishment. Those jurors ranked low in authoritarianism were more immune to locally irrelevant information than their authoritarian counterparts.


A quotient verdict is one wherein the jury, after having determined guilt, determines the sentence, fine or award by averaging the individual calculations of each juror. As such, a quotient verdict is a poor substitute for careful consideration of evidence and testimony, and more progressive jurisdictions have done away with it completely.


A study of 337 high school students tested the relationships between pre-trial publicity, attribution of guilt, sex, and IQ on simulated juror verdicts in a rape-murder case. Neither type of pre-trial publicity affected males' verdicts; however, females in the low IQ condition had more of a tendency to attribute guilt to the defendant when exposed to pre-trial publicity that dramatized the heinousness of the crime. Several explanations for the differential effect of sex on verdicts were offered.


Two samples of subjects, differing in class and political orientation, were used in a study to determine the effects of defendant attractiveness and defendant race. Defendant attractiveness was the central variable; severity of sentence was inversely related to how attractive the defendant was. Race appeared to have no significant effect on verdicts. The interactions between severity of sentence and characteristics of the juror are explored.

The article examines the question of how a jury, given conflicting evidence, determines a verdict. It is the author's contention that jurors are active agents in the construction of social reality. They base their determinations not on the issues of guilt or innocence, but on the symbolic representation of the defendant in the reality constructions of the prosecution and the defense. The defendant is "typed" as a certain kind of person. Jurors base their decisions on their everyday conceptions of these "types".


A series of four experiments used 795 subjects as simulated jurors to investigate the dependance of persuasion on cognitive factors. The number of prosecution arguments and the number of defense arguments had a positive effect on persuasion - juror judgements were directly influenced by the number of arguments for each side. The time allowed for deliberation also affected determination of guilt or innocence. An investigation of the cognitive processes by which jurors determined verdicts suggested use of an information-processing theory for further research.


Persons having served previously as jurors were used in a study of the influence of psychiatric testimony on the jurors' attitudes toward hypothetical defendants. It was found that the label of "mentally ill" had no significant effect on juror attitudes in and of itself, although this may be ascribed to the fact that labelling occurred in the context of extensive testimony. Jurors judged the defendant who committed a crime against property to be more insane and nonresponsible than the defendant who committed manslaughter.


The jury's role in modern society is viewed in two contradictory ways: in the demand for general rules of law, and for justice in each individual case. Social psychology theories of equity can partially explain principles of juror determinations and insights into the effects of jury instructions.

In special verdicts, the jury is given to decide questions of fact, leaving the judge to apply the law to the facts. The question addressed in this article is whether or not the jury should be informed of the effect of a special verdict, thus possibly influencing the verdict. The amendment of the Minnesota Rules of Civil Procedure allowing instructions and argument to the jury in special verdict cases has been ambiguously interpreted, and a discussion of procedural reform in this area is included.


The study utilized 100 matched cases (50 guilty, 50 not-guilty) in assessing the importance of socioeconomic level on jury decision-making. It was found that juries finding defendants guilty were rated significantly higher on a prestige test; that socioeconomic discrepancy between jury and defendant was more pronounced in cases where the defendant was found guilty; and that occupational status discrepancy between defendant and jury was greater among those convicted.


The researchers hypothesized that under conditions in which no attempt to be impartial was made, the attractive defendant would be treated more leniently; while under conditions in which the attractive defendant would be judged more harshly than the unattractive defendant. Using 102 male college students as simulated jurors, both hypotheses were confirmed. The study also found that high Authoritarians gave significantly harsher sentences than low Authoritarians, while aware of their own feelings toward the crime and the sentence.


A study of 99 college students investigated the relationship between rating of guilt, severity of punishment, and seriousness of charge. The results supported Vidmar's data indicating that the lower the charge, the greater the guilt ratings tend to be. However, previous experiments along this line have confined the severity of punishment with the seriousness of the charge. In this study, only seriousness of charge showed a significant effect on guilt ratings.


Simulated jurors gave guiltiness and punishment ratings for eight traffic felony cases that varied in level of incrimination depicted by the evidence and characteristics of the
defendant. Information integration theory explains that jurors' judgement integrates both relevant and irrelevant factors into the evaluation. Previous experimental and observational settings have confirmed the finding that a defendant's attributes affect guilt and punishment.


In a two by three design, 107 simulated jurors received either strong or weak evidence against a defendant in a murder case. Within each condition, subjects were given either additional evidence ruled admissible, additional evidence ruled inadmissible, or no additional evidence. As expected, strong evidence resulted in more guilty verdicts, and confidence in verdict was influenced by the strength of the evidence. Inadmissible evidence had more of a biasing effect on the weak-evidence condition, i.e., inadmissible evidence produced more guilty verdicts in this condition.


A simulated jury situation using 50 college students corroborated findings of other researchers indicating unattractive defendants are more harshly sentenced than attractive defendants. However, group discussion appeared to have an effect on jurors' sentencing: there was a significant shift towards leniency in the unattractive defendant treatment, and most discussion sentences of jurors in the unattractive defendant category approached sentences by jurors in the attractive defendant treatment.


An experiment study of 195 college students (84 male, 101 female) rendered verdicts on male or female defendants in a murder trial. The findings showed a same-sex favoritism: males favored the male defendant and females favored the female defendant in both verdict and sentence.


A study of the effects on jurors of viewing a live trial as opposed to a videotaped trial showed no significant differences between the two groups. Videotape is suggested as a method of streamlining the judicial system as well as studying jury decision-making processes.

The article, through probability theory, proposes a model explaining juror decision-making under conditions with limited decision alternatives. This model holds that the large number of not guilty verdicts in a restricted-alternative situation is a function of the number of responses available and not to any psychological processes of the juror.


A study of forty simulated jurors examined the effects of jury deliberation, affective arousal, and levels of moral judgment among the jurors. A consistent affective response was found generally among all jurors; jurors became more anxious but less hostile as a result of the trial. However, severity of verdict appears related to affective arousal, for subjects assigning the most severe penalty showed heightened feelings of anxiety, depression, and hostility. The second major finding of this study was that subjects whose verdicts were consistent throughout rated significantly higher on a measure of moral judgement.


Subjects were asked to sentence a defendant to a term of imprisonment after reading a case study. The predicted hypothesis was confirmed by the findings: when the crime was unrelated to attractiveness (burglary), attractive defendants were given more lenient sentences than unattractive defendants; when the offense was attractiveness-related (swindle), the attractive defendant was meted out harsher punishment.


In a critique of an experiment by Landy and Aronson, this study demonstrates that age and extent of injury suffered by the defendant are important variables affecting social attractiveness. Using 144 psychology students, the study suggests that simulated jurors operate within a hierarchy of cues. The most important variable (as found by Landy and Aronson) was the defendant's social attractiveness, but when this variable was ambiguous, subjects cued on the defendant's age.

In a simulated juror setting, 56 college students were used to study the effects of sympathy for the victim, especially when the defendant has taken opportunistic advantage of the victim's frailties. The results showed that, while the simulated jurors were more sympathetic toward incompetent victims who had been unfairly taken advantage of, they did not assign more severe sentences to these defendants than did those in the competent victim condition.


The Williams v. Florida case, which involving six-member juries raised a number of questions as to the effect of jury size has on verdicts. According to this study, jury size had no effect on the verdict when apparent guilt was low; but when apparent guilt was high, six-member juries were more likely than twelve-member juries to convict. Twelve-member juries were found to be more advantageous to the defendant; the absolute size of a minority in the larger jury was more likely to cause a hung jury (rather than a guilty verdict).


Using high school seniors as simulated jurors, this study assigned 177 students to five juries consisting of six members, twelve members, five members plus confederate, or eleven members plus confederate. The results indicated that the juries prompted by confederates who argued assertively for the guilt of the defendant yielded in the direction of the assertive confederate. This finding was more pronounced in the five-member plus confederate juries. The controls (six- and twelve-member juries) did not differ in the proportion of guilty verdicts assigned. The results suggest that the twelve-member jury may still be the most reliable screen for detecting "reasonable doubt" in protecting the rights of the accused.
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