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Convergence and Complementarity between Professional Judges and Lay Adjudicators

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The American jury is both a popular cultural icon and a favorite scapegoat. Calls for reform are rampant (e.g., Adler, 1994; Wilkinson, Zielinski, & Curtis, 1988). Some proposed reforms are friendly and constructive, such as those advocating that jurors should be permitted to take notes and to submit questions for witnesses during the trial (e.g., Dann, 1993; McLaughlin, 1983). These changes in the jury trial do not assume that juries are failing to perform adequately, but rather are designed to assist them in reaching well-considered judgments, to improve the comfort of the conscripted citizens who serve as jurors, and generally to optimize jury performance and juror satisfaction. Other proposed reforms, however, are aggressively hostile, such as calls for a complexity exception to the right to jury trial in civil cases (Devitt, 1974; Flehner, 1979) and for legislative caps that place a ceiling on jury awards (e.g., *Crookston v. Fire Ins. Exch.*, 1991). Some of the proposed changes in the jury system have been stimulated by particular high profile trials (e.g., the acquittal of white police officers on trial for the beating of African-American Rodney King, St. George, 1993), such as calls for racial quotas to ensure minority representation on the jury (Alschuler, 1995; King & Munsterman, 1996) or the elimination of peremptory challenges (Amar, 1995; Diamond, Ellis, & Schmidt, 1997; Montoya,

1996) which can permit criteria such as race and gender to creep into jury selection.

Discourse on the performance of the jury frequently ignores a basic reality of legal systems: in evaluating the jury, the relevant comparison is not with some hypothetical ideal decision maker, whatever qualities such a model decision maker would have. Rather, the appropriate comparison is with the human alternative or set of alternatives that might be used in the jury's stead (Lempert, 1981). Thus, against the background of calls for jury reform in the United States and in light of the expanding interest in lay participation in adjudication internationally (Thaman, 1999), it is worth considering the lay adjudicator in relation to its chief alternative, the professional judge.¹

I begin with a look at the jury through the eyes of the judge, that daily observer of laypersons in the jury trial. The available evidence indicates that the judicial perspective on the jury is remarkably positive. One potential explanation for this enthusiasm is that judges generally agree with jury verdicts. Next, I compare the verdict preferences of professional judges and lay decision makers, revealing both substantial agreement and some systematic differences. Then, I consider additional ways that judges and legal adjudication benefit from the participation of laypersons in the criminal trial process. I conclude with an assessment of the implications of convergence and complementarity between professional judges and lay adjudicators and its implication for jury reform.

THROUGH THE EYES OF THE JUDGE

Trial court judges who preside over jury trials have a unique opportunity to watch what juries do. Although judges do not sit in the deliberation room and watch the jury deliberate, they have a ringside view of the jury during the trial and are in a position to evaluate the jury's behavior and verdict in light of their own impressions of the same evidence that the jurors have seen and heard. In addition, judges may be asked to answer questions from the jury in the course of the trial and deliberations, they receive the jury's verdict and must deal with post-trial motions in the

¹Some of the benefits of the jury arise from its ability to pool the resources of its various members, raising the question of whether a panel of judges, such as the three-judge panel used in the Netherlands, would offer the same benefits that a 6- or 12-person jury supplies. Although there is no direct empirical evidence on this question, two attributes of the jury would remain: (1) a larger panel of judgments to combine and (2) a more heterogeneous group of perspectives to pool.

wake of that verdict, and they may speak with the jurors before dismissing them at the end of the trial. It is significant, therefore, that judges are among the most enthusiastic supporters of the jury.

The voices of trial court judges are seldom heard when the jury is criticized.² In 1987, the National Law Journal surveyed 348 state and federal judges (*The View from the Bench*, 1987). Asked what they thought was the most frustrating aspect of being a judge, judicial complaints centered on heavy workloads and administrative problems (30%), unprepared and/or unqualified attorneys (16%), and a variety of other non-jury issues (e.g., maintaining neutrality, delays, inadequate pay). Notably absent from the list was frustration with juries. When asked to evaluate jury performance in criminal trials, most of the judges said that they agreed with the jury in the majority of cases. Only 12% of the judges said that juries acquitted when they believed the jury should have convicted more than 10% of the time. In civil cases, 18% of the judges said they disagreed with the jury's verdict more than 10% of the time. Although such aggregate self-reports may be only crude estimates of actual agreement levels, they suggest that judges do not perceive juries as frequently reaching decisions that the judges find unwarranted.

A second survey of 800 state and 200 federal judges who spent at least half their time on civil cases was carried out by Louis Harris and Associates (Harris, 1989). An overwhelming majority of both federal and state judges (99% and 98%) said that jurors usually make a serious effort to apply the law as they are instructed. More than three-quarters of both the federal and state judges viewed the right to trial by jury as an essential safeguard which must be retained in routine civil cases. The judges varied in their interest in considering potential alternatives to the jury in some complex civil cases, but a majority rejected the idea of a limitation on the use of juries for complex civil cases involving highly technical and scientific issues, or for very complicated business cases. Although 66% of federal and 62% of state judges thought juries need more guidance than they usually get, most did not believe that "the feelings of jurors about the parties often cause them to make inappropriate decisions" (80% for federal judges and 69% for state judges).

²One notable exception to this pattern can be found in the writings of the prominent legal realist, Jerome Frank. Although Frank was critical of judges, he reserved his most aggressive criticism for the jury (see, e.g., Frank, 1950, Chapter VII on juries). Frank was appointed to the Second Circuit from his position as a law professor. He never served as a trial court judge and thus not only lacked the firsthand exposure to trials and juries that trial court judges accumulate, but also saw only the selective sample of jury cases that are appealed.

Similar results were obtained in a 1991 survey of state judges in Georgia (Sentell, 1991).³ A substantial majority of judges (87%) reported that they agreed with the jury's verdict in negligence cases about 80% of the time. Moreover, they generally did not attribute disagreements to incompetence or bias. Ninety-two percent of the judges rejected the idea that jury miscomprehension was the reason for the disagreement and 79% rejected the notion that bias in favor of a particular party was the explanation for the difference in verdict.

Judges have also expressed their reactions to juries outside of the survey context. One particularly interesting set of judicial reactions to the jury appears in a series of firsthand reports about juries from judges who have served as members of a jury. Although judges were traditionally excluded from jury service in the United States, in recent years most occupational exclusions have been eliminated (see Sarokin & Munsterman, 1993) and judges as well as other attorneys are eligible for jury service. The expectation, however, is that a judge or other attorney is likely to be excused by one side or the other out of concern that the judge or attorney will exert an undue amount of influence on fellow jurors. Nonetheless, judges have served as jurors and a number of them have written about their experiences (see examples collected in Hinchcliff, 1986). It is easy to discount these reports: they may not be representative of the experiences of all juries or even of all judges who have served on juries—these are the judges who have chosen to write publicly about their jury service. Nonetheless, I could find no instance of a judge who expressed disappointment with the jury after serving as a juror. Instead, the common theme in the reports of these professionals was an increased appreciation for the conscientiousness and good sense of their fellow jurors.

The reports from judicial jurors are surprisingly consistent. Judge James Duke Cameron's report is typical, albeit more poetic than most: "One swallow does not a summer make, but I came away with a renewed faith in our jury system Many attorneys and judges have become cynical about the jury system. After one chance to participate as a juror, I no longer share any of that cynicism" (Cameron, 1981). Even Justice Shirley Abrahamson, who served as a juror in a trial that ended in a hung jury, reported "The system works. I've seen it" (see also Abrahamson, 1986a, 1986b). The judges were not, however, uncritical of their jury experience and several expressed some frustration, but their frustration was not with their fellow jurors. For example, Judge David Hittner observed: "Many trial judges permit a relatively wide area to be discussed in the redirect examination, resulting in a total rehashing of the witness' direct

³Sentell (1992) found a similar reaction from federal judges.

testimony. I believe this is a mistake by both a judge and a questioning attorney. I was amazed how attentive the jury was to the evidence. They do not have to hear a witness say the same thing twice" (Hittner, 1984).

Both the judicial surveys and judicial testimonials paint a picture that is inconsistent with the complaints voiced by critics of the jury. A simple explanation for the difference is that the judges are better informed and more objective than are other jury observers, and as a result are better able to appreciate the lay jury. Thus, although the judge may not always agree with the jury's verdict, the process that produces the verdict impresses the judicial observer. Nonetheless, it would be surprising if judges were enthusiastic supporters of the jury merely because they see jurors as conscientious and hard-working decision makers. That is, if juries regularly reached verdicts that judges found unacceptable, we would expect judges to find the jury an unacceptable alternative to the bench trial. A series of studies comparing professional and lay verdict preferences allows us to estimate the frequency of disagreement between judges and juries.

AGREEMENT AND DISAGREEMENT BETWEEN LAYPERSONS AND PROFESSIONAL JUDGES

Studies of judge-jury agreement in both criminal and civil trials reveal substantial, but not uniform agreement levels. In Kalven and Zeisel's classic study of the American jury (Kalven & Zeisel, 1966), judges filled out questionnaires in over 3500 criminal jury trials, indicating how the jury decided the case and how they would have decided it if it had been a bench trial. In 78% of the cases the judge and jury agreed on the verdict. In disagreement cases, the judge would have convicted when the jury acquitted in 19% of the cases and the jury convicted when the judge would have acquitted in 3% of the cases, a net leniency of 16%. These data were collected in the late 1950s, but despite many changes in the make-up of the jury pool and the bench, a very similar pattern was found more recently by Heuer and Penrod (1994). In a sample of 77 criminal trials, they obtained a rate of 74% agreement, with the judge convicting when the jury would have acquitted in 23% of the cases and the jury convicting when the judge would have acquitted in 3%, a net leniency of 20%.

The United States is not alone in this general pattern. Baldwin and McConville (1979) studied reactions to jury verdicts in Birmingham, England and measured the frequency of doubt about the jury's verdict by at least two professionals (judges, attorneys, or police officers). Treating cases in which two professionals had doubts about the verdict as cases of disagreement, the agreement cases constituted 82% of the jury cases, with

12% yielding doubts about an acquittal and 6% yielding doubts about a conviction, producing a net leniency of 6%.

Finally, a study of German lay and professional judges by Casper and Zeisel (1972) produced an initial agreement rate of 90% on the issue of guilt in cases in which there had not been a confession, with professionals favoring conviction and the lay judges favoring acquittal in 7% of the cases and lay judges favoring conviction and the professional acquittal in 3% of the cases, a net leniency of 4%.

What does this pattern indicate? First, it is worth noting that the studies were conducted in very different legal settings. Thus, the highest rate of agreement occurred on the mixed tribunals of Germany where one of the professional judges generally receives the dossier on the case before the trial begins, putting that judge at a distinct advantage in familiarity with the facts and potentially as a source of influence on the other decision makers in the trial. In England, where the agreement rate dropped to 82%, the professional judge has the opportunity to sum up and comment on the evidence, providing clear signals about the judge's impressions of the case to the lay jury. The lowest rate of agreement comes from the studies in the United States, where judges typically do not comment on the evidence and there is significantly less opportunity for the judge to influence the jury's decision, but even here there was agreement in over three-quarters of the cases.

Whether the 74–90% agreement is too high or too low is a judgment call (is the glass half full or half empty?), but two additional pieces of information are relevant. First, Kalven and Zeisel (1966) found that disagreement rates were no higher when the judge characterized the evidence as difficult than when it was characterized as easy, suggesting that the disagreements were not produced by the jury's inability to understand the evidence. Second, they *did* find that disagreement rates rose when the judge characterized the evidence as close rather than clear—suggesting that disagreement cases were, at least in the judge's view, more likely to be those cases that were susceptible to more than one defensible verdict. Finally, the majority of disagreements were characterized by the judge either as one a judge also might come to or as tenable for a jury, though not for a judge. Here again, the evidence suggests that disagreements between the judge and jury do not signal a fundamentally different view—but rather a modest different of opinion that affects a minority of cases.

In all of these studies, we have no measure of the extent to which the independent judgments of multiple professional judges would disagree. We do have evidence from other research that human decision makers, even those drawn from the same population (all judges or all physicians),

often differ from one another when they independently make judgments on the same case, whether in judging grant proposals, diagnosing patients, or evaluating job applicants (Diamond, 1983). Some research on the sentencing judgments by federal judges in Chicago and New York reveals an agreement rate of approximately 80% between two judges making independent decisions on whether or not to sentence the defendant to custody (Diamond & Zeisel, 1975). Moreover, the three-judge federal appellate court panels in the United States produce non-unanimous decisions despite the opportunity for the judges to confer and resolve disagreements before the final court decision is issued (George, 1999). Although appealed cases are likely to be more closely contested than the average case decided at trial, and the judges as a result may be less likely to resolve their initial disagreements than they would be in the average case, these non-unanimous verdicts provide additional evidence that judges too show evidence of some inter-judge disparity in their judgments.

Both judges and laypersons are sometimes called upon to make sentencing decisions in criminal cases. The Casper and Zeisel (1972) study of mixed tribunals in Germany reveals a somewhat lower rate of agreement for sentencing than for guilt—80% rather than 90%, preserving a small leniency effect of 3%. Three other sentencing studies used a simulation approach, asking laypersons and criminal court judges to sentence the same defendants. Diamond and Stalans (1989) presented a series of cases that ranged from a drug sale to a burglary to Illinois state court judges and jurors. In each case, the jurors were less likely to favor a prison sentence than were the professional judges. A similar pattern emerged in a study comparing the sentencing preferences of professional and lay magistrates in Great Britain (Diamond, 1990). The average sentence given by the laypersons was consistently lower than that given by the professionals. Moreover, the difference was not attributable to a naive expectation on the part of the laypersons that the offender was unlikely to offend again. Both the lay and the professional magistrates varied their predictions of future offending with the nature of the offense and offender—and the two types of magistrates were nearly identical in their pattern. Finally, Mussweiler and Englich (in press) found that experienced German judges responding to a case of sexual assault gave more severe sentences than did law students presented with the same case.

The pattern across all of these studies is strikingly consistent. In a substantial majority of cases, laypersons and professionals agree in the outcomes they prefer. Where disagreement arises, it generally takes the form of greater leniency on the part of the lay decision makers. When compared to their professional counterparts, laypersons are somewhat

more likely both to acquit and to prefer less severe sentences. In retrospect, the high rate of agreement is perhaps not so surprising if we view juries and judges as competent, if imperfect, decision makers. After all, both the judge and the jury or lay tribunal are responding to the same evidence and the same legal structure. Moreover, as human decision makers, both are subject to many of the same weaknesses. The few studies that have examined the impact of extra-legal factors such as inadmissible evidence (Landsman & Rakos, 1994), an irrelevant anchor (Guthrie, Rachlinski, & Wistrich, 2001; Mussweiler & Englich, in press), or the hindsight bias (Anderson, Lowe, & Reckers, 1993; Guthrie, Rachlinski, & Wistrich, 2001) on judges have demonstrated that judges as well as laypersons are influenced by these cognitive biases. Thus, shared reactions to both legal and extra-legal factors may explain high levels of judge-lay agreement. High agreement in turn encourages widespread judicial support, but it is not the only explanation for judicial approval of lay adjudicators. As is suggested below, lay adjudicators provide more than merely an alternative means for resolving disputes.

BEYOND AGREEMENT: OTHER JURY ATTRIBUTES

The jury offers the judge and the legal system a number of potential benefits beyond a high rate of agreement with the judge on the appropriate outcome of the case. The legitimacy of the jury's verdict and its ability to reflect community standards, including its occasional actions as a safety valve that softens the edges of an inflexible legal standard, are attributes that judges may recognize and appreciate. There is, in addition, another value in the jury trial that judges are less likely to recognize. The pretrial activities and rulings that precede a bench trial expose the judge to a range of potentially biasing and legally irrelevant information. Only in a jury trial is the adjudicator protected from exposure to that potentially biasing information.

THE JURY AS A SOURCE OF LEGITIMACY

The jury's role as a safeguard against the tyranny of abusive government and the arbitrary exercise of power is commonly cited as its chief virtue: the jury in a criminal trial can protect the defendant from a corrupt or biased judge or from an overzealous prosecutor. In addition to occupying this role as the "safeguard of liberty" (Hamilton, 1961, p. 499) the jury plays another protective role as well. The jury acts as a lightning rod shielding the judge from responsibility and potential blame.

A lightning rod protects the house that stands beside it by attracting lightning. The jury offers the same support for the judge, absorbing the criticism and the second-guessing that may follow an unpopular verdict. Even or perhaps especially when the judge and jury would agree, the verdict of the jury can carry a legitimacy that the decision of the judge, as an employee of the state may lack. If the jury is viewed as an impartial decision maker representing a fair cross-section of the community, its verdict is likely to be seen as the product of fair consideration. The convictions of popular public officials after a trial by jury have been widely accepted as legitimate and even uncontroversial. Even when the jury is not perceived as a fair cross-section of the community or as an impartial decision maker, it is the jury that will receive the blame for an unpopular verdict rather than the judge. Thus, even if preferences of the judge and jury were identical in all cases; a legal system employing a lay jury of decision makers drawn from the community would offer the benefit of insulating the judge and the state legal system from charges that it unfairly convicted a popular defendant or unfairly acquitted an unpopular defendant charged with a brutal crime. Judges do not write about the jury's ability to protect the judge from scrutiny and potential criticism, but they sometimes express their appreciation for this distinctive role of the jury privately.

THE JURY AS A CONDUIT FOR COMMUNITY STANDARDS

Although the American jury is charged with merely applying the law as the judge presents it to the facts as the jury determines them, the division between law and facts is not clear-cut. In evaluating a claim of self-defense, for example, the jury must determine what a reasonable person would believe. Unlike a single trial court judge, the jury can pool the experiences of a group of citizens with diverse backgrounds to arrive at its assessment of what this hypothetical reasonable person would believe under the circumstances of the case, infusing the decision making with an estimate of community standards in judging such behavior. The difference in perspective can be a source of disagreement between the judge and jury that reflects an advantage for decision making by a group of laypersons.

In some cases, the verdict that a judge feels compelled to give may not be the verdict that the judge would prefer. Thus, even when the judge would decide a case differently than a jury does, the jury's verdict may satisfy the judge. The first time offender whose trial has been "punishment enough" and the technically guilty defendant whose trial was the result of an overzealous prosecutor may get the judge's sympathy, but an acquittal is likely to result only from a jury that concludes that a

conviction is not warranted (for descriptions of some situations in which juries have that exercised their power to acquit, to the satisfaction of a trial court judge who would have convicted, see Diamond & Schklar, 1998). The potential for such jury nullification has been a symbol of the power and virtues of the jury as well as a source of jury criticism (see, e.g., Schefflin & Van Dyke, 1980). Because an acquittal by the jury in a criminal case gives the jury the last word in the United States, some judges and legal scholars have identified jury nullification with lawlessness (the seminal case setting out the opposing views in this controversy is *United States v. Dougherty*, 1972). Yet, although the legal system depends on the high level of consistency between judge and jury decision-making, it also profits from the flexibility of the jury to offer, without setting any precedent, a relief from strict application of the law in a limited number of cases. One poignant example of this behavior occurred in the filming of an actual deliberating jury in the case of *Wisconsin v. Leroy Reed* (Herzberg, 1986). The jurors acquitted the defendant on a weapons charge after a long and difficult deliberation. The jury approved of the gun law, but did not believe it was appropriate to apply the law to a mentally deficient defendant who purchased the gun so he could comply with what a magazine described as what was required for training to be a detective. The jury's ability to acquit in this case left the law intact, but prevented its application the facts of this particular case. To the extent that such a tempering of the law is desirable, the jury is in a far better position than the judge to exercise such discretionary mercy.⁴ The judge may sit at the sidelines and privately applaud the jury's actions, but in the role of decision maker would be constrained from adopting the jury's resolution (see cases discussed in Diamond & Schklar, 1998).

THE JURY AS AN INSULATED DECISION MAKER

A third attribute of the jury emphasizes the complementarity of the relationship between the jury and the judge in a jury trial. The jury trial has an important structural feature that may actually decrease the effect of extra-legal influences in the verdict. In an effort to control and channel

⁴Peter van Koppen makes the interesting point that it is possible to have a legal system in which judges can "soften the application of general legal rules in a specific case or, if necessary, ignore the rule, without setting a precedent that defeats the general nice rule." His point is more than hypothetical because he provides examples from the Dutch criminal justice system. The American judge is more constrained, however (unlike the American prosecutor or the Dutch judge). The jury provides a safety valve that has the additional virtue of reflecting community values and legitimacy in deviating from the letter of the formal law.

that professional judges in the United States generally applaud sharing their power and responsibilities with lay jurors in both criminal and civil cases. Adopting the vantage point of the judge reveals a number of explanations for this judicial enthusiasm: a high rate of agreement with jury verdicts, the role that the jury can play in legitimizing decisions and in deflecting potential criticism from the judiciary, and the jury's ability to temper the harshness of the law without introducing a change in precedent. Moreover, the structure of the jury trial introduces an additional rarely acknowledged benefit by insulating the adjudicator from exposure to potentially biasing information.

The recent resurgence of the jury and other forms of lay participation in criminal adjudication around the globe (e.g., Thaman, 1999) reflects a recognition of some of these benefits, accompanied by an appreciation of the traditional merits of the educative value of the jury (De Tocqueville, 1948, 1969) and its political role as an indicator of democratic values (*Id.* at p. 272). Amid the contemporary calls for reform of the American jury, all of these benefits and values are worth acknowledging.