

BOOK REVIEW

AMERICAN JURIES: THE VERDICT

Neil Vidmar & Valerie P. Hans

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*Reviewed by David F. Eisenberg**

“Over the past several decades, American criminal and civil juries have been criticized for incompetence and irresponsibility.”¹ This public outcry has been a direct result of highly-publicized cases such as O.J. Simpson’s murder acquittal, three million dollars being awarded to a woman who spilled McDonald’s coffee on herself, and convicted defendants subsequently exonerated by DNA evidence.² In response to these “failed” cases and increased distrust with the American jury system, Neil Vidmar and Valerie P. Hans re-evaluate the American jury’s role and dispel myths on the jury’s “poor performance” by examining new research and case studies conducted since the authors’ initial analysis into this forum in *Judging the Jury*.³

To accomplish this, Vidmar and Hans systematically explore every facet of the American jury and its central role in the justice system. The authors begin this process with a brief his-

* David F. Eisenberg is a Pace University School of Law, J.D. candidate (2010), a junior associate on the PACE INTERNATIONAL LAW REVIEW, and the senior student editor on the JOURNAL OF COURT INNOVATION.

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1. NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 15 (2007).
 2. *See id.*
 3. VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY (2001).

torical timeline describing the evolution of the jury system from its primitive roots to the highly-structured system that sits at the backbone of the American democracy.⁴ The authors introduce this modern American system by exploring the jury's function, the selection process, the broad spectrum of judicial controversies, and the jury's performance in considering these controversies. Then, after all the evidence is analyzed and all the facts are considered, the authors are very persuasive in silencing the critics and convincing the reader that they too should be "strongly in favor of the American jury."⁵

To reach this conclusion the authors begin by describing the jury's functions. According to Vidmar and Hans, juries are more than mere fact-finders; they serve additional critical functions such as representing "the various views of the community, serving as a political body, and, through rendering fair and just verdicts, providing legitimacy for the legal system."⁶ In order for these functions to most effectively be carried out, a "representative jury" is necessary.⁷ The authors describe this representative jury as a group of "people with a wide range of backgrounds, life experiences, and world knowledge," suggesting that such a group will promote accurate fact-finding.⁸ This argument is premised on the belief that the more diverse the group, the more likely the group will have varying perspectives on the evidence, which in turn encourages more thorough debate and consideration of the facts.⁹ The authors reveal, however, that although there has been considerable progress over the past half century, consistently recreating truly representative juries is a difficult task.¹⁰

Vidmar and Hans point to three specific reasons why representative juries are difficult to recreate. The first reason proposed by the authors is that most potential jurors are selected from voting source lists, and these lists tend to under-represent racial minorities and the indigent as a result of lower voter re-

4. See VIDMAR & HANS, *supra* note 1, at 21-41.

5. *Id.* at 346.

6. *Id.* at 66.

7. *Id.*

8. *Id.* at 74.

9. See *id.*

10. See *id.* at 76.

gistration rates within these groups.¹¹ The second reason proposed by the authors is the large non-response rate to juror summonses, with some studies estimating that in large urban areas less than 20 percent of the citizens summoned ever serve on juries.¹² Lastly, the authors identify disqualifications, exemptions, and excuses as dismissing a large and important portion of the community.¹³ For example, “[o]ne estimate is that about 30 percent of African-American men are permanently barred from serving as jurors because they have felony convictions.”¹⁴ To counter these obstacles, the authors suggest that jurisdictions create broader source lists and reduce the number of exemptions and excused absences currently being permitted in many jurisdictions.¹⁵

Following this initial assessment of the jury’s functions, the authors briefly explore the jury selection process and its customarily accepted inadequacies. Jury selection, the process of questioning prospective witnesses through *voir dire*, is conducted to weed out and dispose of those jurors whose biases could taint their ability to impartially consider the facts.¹⁶ According to Vidmar and Hans, this process “is not so much about jury selection as it is about juror de-selection,”¹⁷ and this necessary de-selection process is consistently undermined by two primary factors: time and money.¹⁸ In a perfect judicial system, each juror would be individually and privately questioned to ascertain whether any personal biases existed.¹⁹ Unfortunately, the justice system is burdened by both time constraints and financial resources, and simply cannot conduct this level of questioning. Although the authors realistically recognize these seemingly insurmountable obstacles, they pose two practical techniques for improvement: (1) have the lawyers, not the judge, ask more questions; research shows that “jurors may be more willing to self-disclose personal information to lawyers

11. *See id.*

12. *See id.* at 77-79.

13. *See id.* at 79.

14. *Id.* at 80.

15. *See id.* at 81.

16. *See id.* at 87.

17. *Id.*

18. *See id.* at 93.

19. *See id.* at 92.

than judges,”²⁰ and (2) provide jurors with written questionnaires prior to *voir dire*; questionnaires require a greater level of concentration and self-disclosure than orally answered questions in a courtroom.²¹

With this foundation in place, Vidmar and Hans successfully undertake the daunting task of establishing how juries evaluate trial evidence and expert witness testimony, and then the jury’s overall performance in these tasks.

The American jury system is a unique organism in which a diverse group of strangers are assembled to consider evidence and testimony presented on an enormous array of potential subject matters. To help explain how such a diverse group constructs their opinions and analyzes the evidence, Vidmar and Hans look to social psychologists Nancy Pennington and Reid Hastie’s series of simulated juror studies. According to these studies, “jurors listen to the evidence at trial, and use their knowledge about analogous information and events, as well as generic expectations about what makes a complete story to construct plausible, more or less coherent narratives explaining what occurred.”²² In addition, the study determined that when facts seemed to be missing from the story, “jurors filled in the gaps by surmising the facts necessary to develop a complete narrative.”²³

Although these studies illustrate that jurors are capable of drawing upon their own knowledge to analyze evidence being presented by the average witness, there is continuous debate on the juries’ overall ability to understand expert testimony.²⁴ This issue is especially important given the frequency with which experts testify. One study has estimated that experts testify in over half of criminal trials,²⁵ with several other studies estimating that “the average number of experts in civil cases ranged between 3.7 and 4.1 experts per trial.”²⁶ These witnesses are typically comprised of experts in the fields of medicine, mental

20. *Id.*

21. *See id.* at 93.

22. *Id.* at 134.

23. *Id.*

24. *See id.* at 169.

25. *See id.* at 173.

26. *Id.* at 174.

health, business, engineering, and safety matters.²⁷ However, in spite of the technical nature of expert witness testimony, Vidmar and Hans, referring to the research of Anthony Chapagne and Daniel Shuman, show that there is no “white coat syndrome”²⁸—the automatic acceptance of testimony as being accurate. Instead, it was discovered that jurors are diligent and skeptical in evaluating expert testimony, making conclusions based on a rational set of considerations.²⁹ There is little doubt though that cases involving complex statistical or medical evidence pose difficulties for the average juror but also for the average judge, who, like the jury, does not have specialized training in these areas.³⁰ To combat these complexities, Vidmar and Hans suggest that jurors be allowed to take notes during expert testimony, ask the experts questions, and be supervised by more alert trial judges who can assist the jury in grasping complicated concepts.³¹

So far Vidmar and Hans have portrayed the American jury as being competent and capable of analyzing even complex expert testimony. However, the crucial consideration in evaluating the jury’s competence is in examining their performance. To accomplish this, the authors first consider the research of Harry Kalven and Hans Zeisel. Kalven and Zeisel, professors at the University of Chicago Law School, conducted a study which asked trial judges “how they would have decided each case that they and the jury just heard.”³² The judges participating in this study were asked to fill out questionnaires while the jury was deliberating, indicating their “hypothetical” verdict.³³ This allowed the researchers to compare the judge’s “hypothetical verdict with the jury’s verdict,” yielding results that were uninfluenced by the judge’s knowledge of the outcome of the case.³⁴

For this study, Kalven and Zeisel recruited over 500 judges from around the country, generating questionnaires on 3,576

27. *See id.*

28. *Id.* at 178.

29. *See id.* at 179.

30. *See id.* at 188.

31. *See id.* at 189.

32. *Id.* at 148.

33. *Id.*

34. *Id.*

criminal trials and roughly 4,000 civil trials.³⁵ Based on the results from these criminal trials it was discovered that the judge and the jury agreed that the defendant was guilty 64 percent of the time and should be acquitted 14 percent of the time; rendering an overall agreement rate of 78 percent.³⁶ This study then revealed that within the remaining 22 percent of cases in which the judge and jury disagreed, in 19 percent of those cases the jury acquitted the defendant when the judge would have convicted, leaving only 3 percent of cases in which the jury convicted when the judge would have acquitted.³⁷ Therefore, in roughly four out of five criminal cases the judge agreed with the jury's verdict, and in cases in which they did not agree, the judge was six times more likely than the jury to convict the defendant.³⁸

This study yielded similar results in civil jury trials. According to the study, "in 47% of the cases, judge and jury both found in favor of the plaintiff, and in 31% they both found for the defendant."³⁹ The 22 percent disagreement rate in civil trials was, however, more balanced than in criminal trials.⁴⁰ In these cases, the judge favored the plaintiff 10 percent of the time when the jury found for the defendant, and the jury favored the plaintiff 12 percent of the time when the judge found for the defendant.⁴¹

Drawing on these studies, Vidmar and Hans strongly support the jury's overall performance. The authors support their conclusion by citing the largely consistent agreement rates between the jury's verdicts and the judge's "hypothetical" verdicts.⁴² Furthermore, even when the judge's decision would have been inconsistent with the jury's, at least in criminal trials, juries were much more likely than judges to acquit the defendant.⁴³ Therefore, based on these findings and its far-reaching implications, it becomes evident why many consider Kalven

35. *See id.*

36. *See id.*

37. *See id.*

38. *See id.*

39. *Id.* at 149.

40. *See id.*

41. *See id.*

42. *Id.* at 148-49.

43. *See id.*

and Zeisel's research to be "the most famous and most important single study of juries" ever conducted.⁴⁴

Following this study, Vidmar and Hans continue to analyze the jury's performance by taking a closer look at civil liability, specifically the amount of damages awarded to plaintiffs. Opponents of modern civil juries have been relentlessly critical, accusing juries of making uneducated calculations about damages as well as being consistently pro-plaintiff, often being referred to as a contemporary Robin Hood.⁴⁵ Furthermore, the American Tort Reform Association has identified what it calls "judicial hellholes," jurisdictions believed to award unwarranted damages to plaintiffs.⁴⁶ Similar to these "hellholes" are what some studies refer to as the "Bronx effect," the assertion that some counties are more prone than others to hand out larger damage awards.⁴⁷ The authors, however, counter these speculations by considering several studies which have explored compensatory and punitive damages awarded by juries.

When computing compensatory damages, "some lawyers and academics have speculated that jurors do not concern themselves with the details of the damages but instead search for a single amount that seems right."⁴⁸ However, there is solid evidence that juries do not merely estimate damages, but rather take their task "very seriously, often to the extent of calculating and arguing down to the last dollar."⁴⁹ Although there is no precise way to measure a jury's performance in calculating compensatory damages, one California study determined that "the magnitudes of the awards were positively related to the size" of the plaintiff's losses.⁵⁰ In addition, several subsequent studies revealed that "the more serious the injury the larger the award."⁵¹ These studies therefore illustrate a direct correlation between the size and seriousness of a plaintiff's injury and the amount of compensatory damages the plaintiff is awarded.

44. *Id.* at 148.

45. *See id.* at 270.

46. *See id.* at 267.

47. *Id.* at 286.

48. *Id.* at 294.

49. *Id.* at 299.

50. *Id.*

51. *Id.*

In addition to compensatory damages, juries are also asked to ascertain whether punitive damages are appropriate and, if so, how much should be awarded. George Priest, a professor at Yale Law School, openly contends that “juries are capricious and unreliable when rendering punitive awards.”⁵² As a result of such contentions and highly publicized cases in which juries have awarded substantial punitive damages, civil juries have been widely criticized.⁵³ However, according to the Bureau of Justice Statistics and the National Center for State Courts, punitive damages are rarely ever given, being awarded in less than one percent of all civil cases in state courts.⁵⁴ In addition to the relative infrequency with which punitive damages are awarded, judges maintain the power to, and frequently do, reduce awards that appear to be founded on “passion or prejudice” or that “shock the conscience.”⁵⁵ As a result of the rarity of punitive damages and the ability of judges to decrease the amounts awarded by the jury, the authors seemingly contend that the criticism towards juries is unjustified and alleged without any substantive basis.

Following an examination of these studies, Vidmar and Hans conclude their foray into the American jury by recounting the strengths and signs of vulnerability of the jury system. Overall, however, the authors express a profound confidence in the American jury as decision-makers in both the criminal and civil contexts. This confidence is further demonstrated when the authors reveal that “over fifty countries around the world have jury systems modeled in varying degrees after the English common law jury.”⁵⁶ Vidmar and Hans convey that the American jury system works and should continue to be a cornerstone of democracy in this country and the world in the future.

52. *Id.* at 304.

53. *See id.*

54. *Id.* at 308 (citing Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. EMPIRICAL LEGAL STUD. 263 (2006)).

55. VIDMAR & HANS, *supra* note 1, at 314.

56. *Id.* at 345.