

## How to respond to the "problems" of the civil jury

*Although some critics urge major reforms, less radical changes would make civil jury decisions more predictable and the jury system more effective and efficient.*

by Peter H. Schuck

The civil jury has changed in many ways throughout the years. Remarkably, however, these changes have seldom been structural. Instead, the social functions of the jury and the context in which it operates have changed. Functionally, the jury has moved from fact reporting to fact finding, from deciding both the law and the facts to deciding only the facts, and from being utterly controlled by judges to being relatively independent. Contextually, it now operates in a milieu of eroding institutional authority, sharpened social divisions, and more complex factual and normative disputes.

The contemporary debate over the jury is one in which the ultimate prize is public opinion ("the 13th juror," as some have put it). Law's growing prominence, complexity, and penetration into daily life have galvanized public attention. Articles about the "litigation explosion," bizarre claims, soaring insurance rates, declining availability of insurance, overwhelming judicial caseloads, high legal costs, complex litigation, and interminable trials are common. Some of this commentary is accurate; much of it is false or at least misleading. At the center of the contending arguments is the question of the jury's contribution to these conditions.

Calls to reform the jury persist. Proposals range from limiting or abolishing the jury to enhancing its authority, independence, and influence. Because advocates on both sides often argue from quite different factual and normative premises and do not always articulate or understand these premises and their implications, the issue

of reform has seldom been squarely joined in a way that crystallizes the right questions. At a minimum, a coherent debate over jury reform requires agreement on a precise definition of the problem so that relevant evidence can be examined.

### Defining the "problem"

Objections to the use of juries fall into four major categories. One is based on the claim that the jury tends to make irrational decisions. For one reason or another, this argument goes, the jury tends to reach conclusions that are simply erroneous.

Another major category of objections centers on the ways the jury is thought to affect the behavior of six groups of participants in the legal process: insurers, the media, primary actors (that is, people or organizations in general), trial lawyers (of whom insurance lawyers are an important subset), judges, and other policy makers. These objections do not claim that juries are biased or prone to error, but rather that jury decisions by their very nature emit liability signals that are confusing, inconsistent, and arbitrary. In this view, the jury's signals convey little useful information about actual legal norms. Coupled with the largely unregulated, generous system of damage awards, jury decisions generate widespread uncertainty, anxiety, and risk avoidance.

The third major category of objections concerns the administrative costs imposed by the jury system. These include the costs to litigants of waiting for jury trial; the costs associated with the longer duration of jury trials; and the costs of recruiting, screening,

selecting, and paying jurors, including opportunity costs to the jurors themselves.

A fourth way to define the "problem" posed by the civil jury constitutes what may be the most fundamental criticism of all. In this view, the jury's most far-reaching consequence relates to its implications for the deeper structure of litigation, particularly the structure of the trial and hence of the pretrial activities of lawyers and adjudicators. Comparative law scholar Arthur von Mehren has argued convincingly that "the presence of a jury makes a discontinuous trial impractical." But as von Mehren also points out, a concentrated trial in turn entails a number of other procedural elements: extensive pretrial proceedings to minimize the problem of surprise, a high degree of lawyer control over the evidentiary and case-shaping processes, a related emphasis on party presentation and party prosecution, and a problem of delay at the pretrial rather than at the trial stage.

The four types of objections to the civil jury are obviously quite different. Although some appear to be more persuasive than others, none seems clearly sustainable on the basis of the current data. Here, as elsewhere, conclusions about the need for reform may well depend on who one thinks should bear the burden of proof.

Whatever the resolution of this question, these very different critiques call for a wide variety of reme-

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dial responses. This article distinguishes four discrete strategies. Moving from the most incremental to the most radical, they are to reduce administrative costs, restructure the jury, constrain jury discretion, and divert disputes to non-jury forums. (A fifth, improving juror comprehension, is not discussed here.) A number of specific jury reforms to implement each of these strategies is discussed. Some, of course, are consistent with more than one strategy.

### Reduce administrative costs

Strategies aimed at reducing administrative costs would retain the jury's current functions and structure. One option—directed not so much at reducing the magnitude of these costs as toward changing their distribution—is to raise the fees for parties who demand a jury. As Judge Richard Posner has noted, existing fees for the use of the courts are trivial, far below the level necessary to cover the full social costs and private benefits of even a bench trial, much less a jury trial. If fees were raised, the demand for both jury and bench trials would decline and settlements correspondingly would become more attractive. However, special provision should be made to ensure that low-income disputants enjoy continued access to the courts.

Some reform proposals would also reduce the cost of jury trials by expediting them. These include techniques to streamline voir dire, to present deposition evidence more efficiently, to impose time limits on lawyers, and to narrow the issues before trial. Many of these proposals would expedite trials by improving jury comprehension as well.

The critical question in evaluating reforms aimed at reducing administrative costs is the extent to which they can be instituted without also changing case outcomes. At the margin, of course, every cost change will affect the propensity to litigate (indeed, cheaper jury trials will encourage parties to demand more of them) and is likely to affect the parties differently. The fact that a reform might alter the balance of advantage need not be a decisive objection. But such reforms should be justified in those terms, and

not on the supposedly neutral ground of cost reduction.

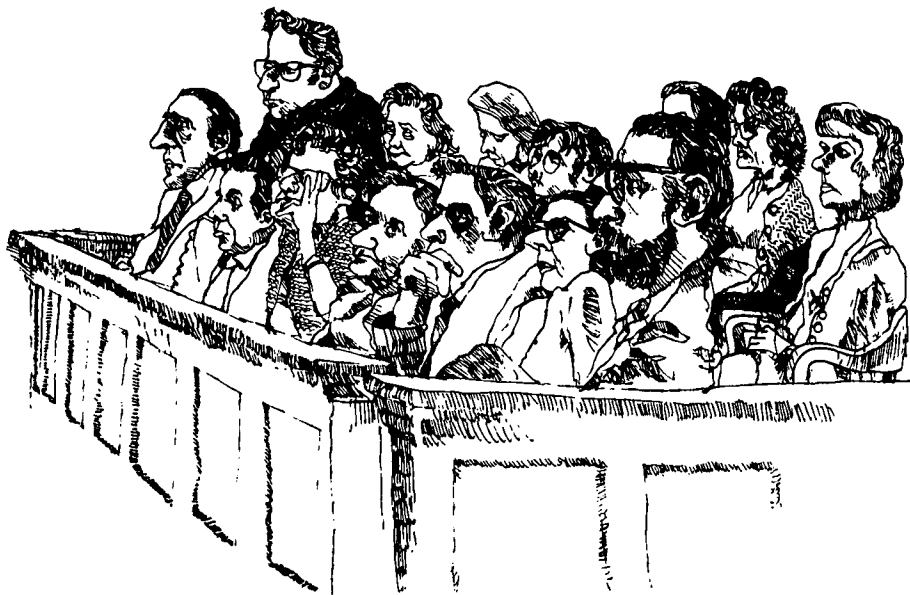
### Restructure the jury

Two features of the jury's current structure—size and composition—appear to impair jury rationality, to contribute to undesirable behavior by other participants in the legal process, and to affect administrative cost. A restructuring strategy seeks to improve the jury's performance by altering its size, its composition, or both, without necessarily changing the questions that are put to it or the ways it operates.

Commentators have pointed out that the move to smaller civil juries has reduced their representativeness while increasing the likelihood of bias and other sources of irrational behavior. Smaller juries are widely thought to produce somewhat greater variability and thus unpredictability in their verdicts. Some evidence shows that re-

offs of jury panels of different sizes.

The jury's composition also affects the rationality of its decisions and the behavior of actors. In addition to the likelihood that greater diversity among jurors increases the variability of decision outcomes, there is the irony noted by Paul Carrington: Recent developments promoting greater diversity and representativeness, including statutory requirements for more broadly based jury venires and growing judicial control of the voir dire, have occurred at precisely the time that other developments—the reduction in jury size, longer trials, new forms of evidence, and more complex litigation—have rendered representativeness both harder to achieve and more of a barrier to juries capable of rational decisions in certain kinds of cases. This latter concern has led to controversial proposals to select juries in complex disputes from among individuals possessing special expertise



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duced size impairs juries' collective memory. These effects of size may impede the settlement process, which has probably increased the number of trials and led to greater resort to remittitur and other techniques for controlling and modifying outlier jury verdicts, perhaps dissipating any administrative savings. An obvious response to these changes would be to increase the jury's size, but this should only result from a process of experimentation that better informs us about the relevant effects and trade-

in the relevant subject, and for judges to screen scientific testimony more rigorously before it goes to a jury.

### Constrain jury discretion

The next, more radical strategy moves beyond procedural tinkering and structural changes. It seeks instead (or in addition) to impose significant limitations on jury discretion in the hope of improving rationality, providing clearer liability signals, and reducing administrative costs. These limitations may take at least four different forms.

**Ask the jury different substantive questions.** One group of reforms that will constrain discretion appeals to the principle of institutional competence. These reforms emphasize that since jurors can answer some questions more readily than others, the law should only ask jurors the kinds of questions for which they possess the requisite expertise, information, and cognitive capacities. As legal disputes become more complex, the legal doctrines that frame their resolution should be altered to take account of jurors' limited competence.

The effectiveness of reforms that would alter doctrine in order to reformulate jury questions depends on how deeply the critiques of jury rationality cut. If juries are in fact as biased or prone to error as their critics assert, their answers to the new questions may not be much better than their answers to the old ones.

Many jury critics, however, would find more categorical, discretion-constraining doctrines attractive even if such doctrines had little effect on jury bias or rates of error. These critics emphasize that a doctrine's substantive content may be less important than the clarity and determinacy of its rules. This possibility is particularly great in contexts in which potential risk bearers, confronted with a bright-line rule, can reallocate risks among themselves at low cost. If people know about a rule, can predict how it will apply to their conduct, and can easily bargain about who should bear the risk under what circumstances and at what cost, they can produce a more efficient risk allocation. Juries can also apply such rules at lower cost and with greater accuracy and predictability.

**Increase deference to others' decisions.** We have seen that the jury's discretion can sometimes be constrained by formulating new doctrines that present it with more tractable, and one hopes more useful, questions. But reformers can also limit jury discretion by reinvigorating old doctrines that require the jury to defer to decisions already made by others, especially in tort law. In this category are two important sources of external norms that might be used to confine jury decisions in tort cases: contract and

regulation. Both are highly controversial when courts invoke them for this purpose.

Contemporary courts increasingly apply tort principles to transactions and relationships that are also governed—some used to be exclusively governed—by contract principles. Some examples of this extension include liability for pure economic loss, manufacturer and distributor liability to purchasers for defective products, landlord liability to tenants, wrongful discharge, insurer liability for failure to pay claims, and medical malpractice liability even in organized care settings where provider contracts are actually negotiated. Even workplace injuries in settings in which workers compensation is supposed to be the exclusive remedy against employers have increasingly become the province of tort law.

In tort disputes arising in such situations, courts could bind juries with the norms adopted in these contractual transactions and relationships. Juries cannot be so easily confined, however, in cases in which defendants cannot rely on an express contract but must instead argue that a risk allocation was implicit in the contract or that the plaintiff made a non-contractual, informed, consensual decision to accept the injury-producing risk. Such cases surely compose the vast majority of those in which the assumed-risk defense is invoked. Juries in products liability cases, for example, must often decide whether the warning accompanying a product adequately informed the user about the risk that resulted in the injury. The only feasible way to constrain jury discretion in cases of this kind is to move the dispute out of the tort system, a strategy discussed below.

The second major source of external norms to which reformers might require juries to defer is administrative regulations. The traditional legal doctrine holds that the jury is the best and ultimate judge of whether a particular course of conduct complies with the standard of reasonableness, nondefectiveness, or normative criteria to which parties in civil liability litigation are held. Even regulations directed at controlling the very same risks that are at

issue in the tort case do not bind the jury. Thus, although defendants' failure to comply with such regulations almost invariably operates to establish liability, those who comply with the regulations may also be held liable.

Commentators have sharply criticized this doctrine. They point to the importance of expert judgment on such technical issues, the advantages of regulatory analysis over ad hoc jury decisions in making the socially relevant trade-offs between risk and benefits, the confusion that tort law's rejection of regulatory standards sows in the private sector, and other problems with the traditional rule. They have called for courts to recognize a regulatory compliance defense that would prevent the jury from second-guessing the regulators and imposing liability.

**Determine damages.** Jury discretion is at its height in the determination of damages, and the resulting variability of awards in cases that in objective terms seem quite similar is large enough to be disturbing. Quite apart from its unfairness, this variability has undesirable effects on the behavioral incentives of primary actors and on settlement decisions.

A number of reformers have proposed to narrow, though not eliminate, this jury discretion by awarding damages according to established schedules. These schedules could be similar to those used in workers compensation and similar social insurance programs, but they might be made more flexible by taking into account a variety of factors relevant to measuring the plaintiff's loss. In most such schemes, the jury would make findings that would enable the court to classify the injury according to the damage schedule.

Even a quite flexible system of damage schedules, however, might not gain the necessary public support. Even so, it should be possible to improve the determination of damages by measures short of scheduling. For example, the jury might be informed about a range of previous awards without being confined to that range, or it might be informed about a range but be allowed to award outside that range as long as it gives reasons for doing so. Alternatively, its discretion might be

informed by data on the distribution in past cases of the ratios of out-of-pocket losses to total damage awards or of the ratios of compensatory to punitive damages.

**Special verdicts.** Another way to control jury discretion would be to require the jury to submit verdicts in a specific form. This approach, authorized by Rule 49 of the Federal Rules of Civil Procedure, seems to have numerous advantages. It would simplify the jury's task by posing specific questions for it to answer, focus the jury's attention on the critical factual issues, obviate the need for the judge to instruct the jury on the law, highlight any inconsistent findings by the jury, and facilitate appellate review by rendering more transparent the factual premises underlying the jury's verdict and animating the judge's application of the law.

These are considerable virtues, making it even more important to know why special verdicts are not used very often. Apparently, the reasons have to do with lawyers' tactical opposition to special verdicts and with judges' fears about erring in the formulation of the questions, calling attention to jury inconsistencies, and inviting more intensive appellate review of jury verdicts.

### **Divert to non-jury forums**

Historically, the most far-reaching response to the perceived defects of the civil jury has been to divert disputes to non-jury forums. In most but not all diverted cases, the reallocated fact-finding function remains subject to at least limited judicial review.

Generally speaking, diversion may take three forms. One category consists of alternative dispute resolution techniques. ADR is the least radical of the diversion strategies because most ADR techniques are consensual. They are available to disputants who wish to use them in lieu of a jury trial, but jury trial ordinarily remains as the default option.

A second type of diversion reform—what Jeffrey O'Connell calls the "neo-no-fault" approach—involves somewhat more legal regulation of the parties' access to jury trial. O'Connell has imaginatively crafted a variety of neo-no-fault schemes, tailoring them

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to address the special characteristics of different areas of tort law and tort litigation. These versions have two pertinent features in common. First, they encourage a potential defendant to make to a potential plaintiff a pre-accident offer to defray certain categories of cost (usually out-of-pocket expenses) that the offeree may incur in return for the offeree's waiver of a tort claim. (These plans also encourage post-accident, pre-litigation offers.) Second, they provide that if such an offer is rejected, the issues that may be raised in the subsequent litigation, and the burdens of proof that will then apply, will be governed by rules that are more disadvantageous to the offeree than those that would otherwise apply.

A third reform model would partly or completely replace jury trials of particular categories of claims with bench or administrative agency trials. The workers compensation system, which usually includes exclusive remedy provisions designed to supplant all common law claims by workers against their employers, is perhaps the most important example of the administrative agency model. Environmental protection agencies have displaced some private environmental litigation that would have been tried to juries, although the environmental statutes often preserve damage remedies for

nuisance, which may be tried to juries.

Diversion reforms, whatever their merits, probably reached their high-water mark some time ago and may have already begun to retreat. The evidence from some contemporary reform debates indicates strongly that the political obstacles to adopting such reforms are simply enormous, if not insuperable.

### **Looking to the future**

If the recent past is prologue, the prospects for reform of the civil jury are not bright. The politics of jury reform are daunting. Virtually all of the important groups with stakes in the system of civil litigation favor retaining the jury. Trial lawyers' veneration of the jury is almost religious in its fervor, and their missionary zeal appears to have won many converts among the general public, which expresses great confidence in the jury. When queried about the value of the jury, judges almost invariably praise it.

Given the broad array of public and special interest support for the jury system, one would not expect politicians to show much interest in jury reform. But the political inertia in favor of the status quo can occasionally be overcome. The insurance crisis of price and availability of the mid-1980s is the most important example. In this spasm of reform activity, unusual for both its intensity and its legislative success, almost all states imposed some restrictions on jury awards—typically with respect to pain and suffering, punitive damages, joint and several liability, or the treatment of collateral sources. For all these changes, this episode in fact demonstrates the political marginality of jury reform efforts. Despite the irresistible political tide propelling tort reform in virtually every state in the 1980s, the changes to the jury that were actually adopted were decidedly incremental. They chipped away at the edges of jury discretion but neither invaded its core nor altered the jury's structure or essential functions.

Two other, more recent developments—the continuing effort to amend the Federal Employers' Liability Act of 1908 (FELA) and the extension

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