1979

Jury Size and the Peremptory Challenge: Testimony on Jury Reform

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Publication Information & Recommended Citation


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In the essay that follows, Professor Lempert pursues the "lay versus professional" issue, once again in the jury context. He begins by setting forth a general theory of the likely contribution of each. He then applies his posited theory to two issues of current interest to the bar: jury size and the peremptory challenge. The essay originated as testimony (prepared jointly with Dr. Jay Schulman) before a Senate subcommittee considering a bill (S. 2074, 95th Congress, 1st Session) to reduce the number of peremptory challenges in civil cases from three to two and also to require all federal district courts to switch from twelve-member to six-member juries. (Now most district courts use six-member juries under local rule with the blessing of the Supreme Court.) The bill was rejected by the subcommittee, yet the issues and larger concerns persist.

Richard O. Lempert, Jury Size and the Peremptory Challenge*

The ideal jury (a) is representative of the people living within the jurisdiction of the court, (b) is unbiased, (c) decides a case on the basis of the evidence presented, (d) evaluates the evidence in the light of the judge's instructions on the law, and (e) in appropriate cases mitigates the rigidity of

the law by reflecting in its verdict fundamental principles of justice and morality.

Representatives drawn randomly from a community share the biases and prejudices that characterize members of that community. The prejudices may be irrelevant to the matter being litigated, they may be benign, or they may run counter to values that are deeply engrained in our legal system. Common prejudices include the belief that a police officer's word is better than the average citizen's as well as the belief that no police officer can be trusted. They range from the feeling that no tort judgment is excessive because . . . insurance companies exist to pay claims to the feeling that only a chiseler would seek to collect for pain and suffering. Prejudices color the way in which jurors evaluate evidence, yet often even unprejudiced jurors are likely to be incapable of appreciating the true value of evidence presented. Finally, it is clear that jurors sometimes have difficulty in understanding judicial instructions and applying them to the facts of a case.

Others have noted the tension between the demand that juries be competent, unbiased factfinders and the requirement that juries be representative of the larger community. This observation is typically the empirical linchpin in arguments made by those who, at least in civil cases, would abolish the jury and transfer its factfinding functions to the judge. But those who argue this way make a fundamental mistake. They attribute the jury's deficiencies to the fact that individuals chosen arbitrarily from the community are sometimes uneducated, sometimes uncaring, and typically legally naive. In fact, most of the drawbacks attributed to the democratic nature of the jury have little to do with the representativeness requirement. Instead they are attributable to a simpler, inescapable source: the human condition. People collect biases as they go through life. While they may differ in their ability to disregard them, there is probably no one whose observations will not at some time be affected by his biases. Even if such an individual existed, his evaluation of evidence would still be far from perfect. A substantial body of research now exists demonstrating ways in which people consistently misestimate the implications of information given them.

Judges, alas, are also human. They can no more escape the dangers of biased perception and fallible information processing than the jurors over whom they preside. If judges have an advantage over jurors in their presumed understanding of the law, they are disadvantaged in that their public position subjects them to pressures that may systematically reinforce or create biases. Indeed, judges are at times elected or appointed in part because of the appeal of biases that are ideally irrelevant in the factfinding process. Furthermore, judges typically play an administrative as well as a judicial role. As administrators they are necessarily concerned with the efficient functioning of a judicial bureaucracy. Too often behavior which promotes bureaucratic efficiency is antithetical to our system's ideal of individualized justice. In such matters as criminal sentencing, judicial behavior may be influenced by the legally irrelevant consideration of whether the court's time has been "wasted" by a jury trial. In civil trials some judges reportedly engage in considerable "arm twisting" to promote out-of-court settlements. We note these factors not to condemn judges; they would not be human if they were
not at some times influenced by the bureaucratic and other pressures brought to bear on them. But these pressures do mean that there is inherent value in an institution, such as jury trial, that guarantees the insertion of a non-bureaucratic element at a key point in the trial process.

What then is the attitude that the Congress should take toward jury reform? It is not a romantic idealization of the jury; there is no reason to think that the jury today is a perfect factfinder or that it ever will be. But by the same token the jury should not be regarded as an imperfect substitute for a judge, an institution that will necessarily improve as it comes more closely to resemble or be influenced by one exalted individual learned in the law.

The continued vitality of the Sixth and Seventh Amendments should be accepted as a starting point. This means that jury trial will necessarily be with us in the foreseeable future. The issue is how may the institution be made more effective in promoting the valued goal of fair and accurate factfinding. The starting point for inquiry is with the apparent weaknesses of factfinding by average individuals.

**Jury Size**

We specified three possible deficiencies in lay factfinding: the biases may influence perceptions, the probative weight of evidence may be distorted, and instructions on the law may be misunderstood. These are all problems that are ameliorated by group decision making. In groups, expressions of bias may be inhibited or properly dismissed as individuals with conflicting points of view call each other to account. Totally apart from bias, group factual judgments tend to be more accurate than those made by individuals. An individual is at all times left to his own devices while a group may receive contributions from many individuals. Where, for example, memory is important as in recalling the testimony of various witnesses, one individual may recall certain facts while another recalls others. Where a problem is inescapably ambiguous, error variance is reduced when individual judgments are averaged together. Where understanding is difficult, as with a judge’s instructions, a lone decision maker is lost if he does not understand. A person in a group may benefit from the understanding of others. Groups, in short, are in many ways as strong as their strongest link.

These advantages of group decision making are more pronounced as group size increases, until the point where the contributions of new members are offset by increasing problems of coordination and morale. However, even before the point of negative returns each additional new member is likely to add somewhat less to the quality of group decision making than the person before him. The question is whether differences in the quality of decisions rendered by six and twelve member groups are likely to be so great that the quality of jury justice will be decreased by mandating the smaller number. Our feeling is that this is the case. In clear cases, six and twelve member juries should decide similarly, although the occasional decision against the weight of the evidence will be more common with the smaller group. In close cases, decisions of larger juries should, on the average, be better with respect to such core legal values as unbiased factfinding, thorough consideration of the evidence, and consistency across similar cases.
It can be shown statistically that minority viewpoints are substantially more likely to be represented in (more or less) randomly chosen groups of twelve than in similarly chosen groups of six. The greater heterogeneity of the larger group makes it a setting in which individual prejudices are more likely to cancel out and in which individuals with valuable specialized knowledge or particularly astute insights are more likely to be available. A further advantage enjoyed by larger juries is that they are more likely to render similar decisions in similar cases. Where individual judgments are averaged, as is often the case in civil litigation despite the official disrepute of quotient verdicts, averages taken across twelve individuals are likely to diverge less than averages taken across six. Even where judgments are not averaged, groups of twelve are more likely to resemble each other than groups of six, in that larger groups more accurately reflect the population from which they are drawn.

In short, both statistical modeling and the existing research on small groups make it clear that proponents of six member juries cannot substantiate the claim that such juries are likely to be better decision makers than juries of twelve. Indeed, even the weaker burden of showing that the switch to smaller juries will not positively harm the quality of jury justice cannot be met. While proponents of larger juries cannot specify precisely the degree to which the decisions of twelve are likely to be better than those of six, a fair reading of the evidence indicates that the advantage generally lies with twelve, perhaps by a considerable margin.

Peremptory Challenges

A second proposed “reform” is reducing the number of allowed peremptory challenges in civil and criminal cases. Some who argue for fewer peremptory challenges view them as a device by which adroit attorneys can pack juries with those biased in their favor, while others believe that peremptory challenges distort juries by making them less representative of the population from which their members are drawn. While we recognize that attorneys do on occasion eliminate people because of their leadership potential or education rather than because of perceived bias, we nonetheless believe that the first view is largely mistaken. Given the limited number of peremptory challenges, their availability to both sides, and the fact that challenged jurors are replaced at random, the most an attorney can usually do is eliminate those jurors likely to be prejudiced against his or her client. Only in special circumstances, where community views disproportionately favor one party or a case appears hopeless to begin with, can an attorney afford the luxury of eliminating the unbiased.

There is more substance to the claim that the use of peremptory challenges lead to a less representative jury, but this by no means makes the case for reducing the number of peremptory challenges. Although maximizing the degree to which the jury represents the community may have value in itself, few would think this value more important than maximizing the likelihood of fair factfinding. Some viewpoints found in the community should not be represented on juries. An obvious case is the viewpoint of one so closely related to a party that his decision is likely to be colored by that re-
The right to challenge jurors is essential because where values clash it is more important to have jurors who can be fair in their judgments than it is to have a jury that mimics the demographic or attitudinal composition of the community. Challenges are devices for eliminating from juries individuals whose prejudices are likely to interfere with their ability to be impartial triers of fact. The group of jurors who survive the challenge process may be less representative of the community from which they are drawn than the original group of unchallenged jurors, but they are more likely to render a judgment fairly responsive to the evidence in the case. The trade-off between representativeness and fairness strengthens rather than weakens the quality of jury justice.

Many individuals accept the above argument in the case of the challenge for cause, but do not believe it applies to the peremptory challenge. Those who make this distinction do not realize how the system of challenging for cause is often administered. While there are circumstances, such as a close family relationship to one of the parties, where a challenge for cause must be allowed, the system is generally one of great judicial discretion. Many judges are reluctant to exclude jurors for cause despite an obvious source of bias if the juror states that his decision will be unaffected by the apparent cause for concern. Appellate courts typically support such lower court decisions. For example, plaintiff's attorney in a suit brought against an insurance company might wish to challenge for cause a juror whose parents were agents for some other insurance company. If the juror states that these family ties will not influence his decision, a challenge for cause will be unavailable in many courts. The decision not to exclude for cause in these circumstances may be justifiable, but it is not justifiable on the ground that the juror can be trusted to disregard the obvious source of bias. A promise to put aside one's biases is inherently suspect because people are often unaware of how their biases affect their judgments. The promise is even more suspect when it is made in a setting where one might be embarrassed to admit that he could not be fair. If the promise is suspect, the quality of jury justice is likely to be enhanced by disregarding disclaimers of prejudice where any likely source of bias is revealed on voir dire.

This alternative, however, has its disquieting aspects. People rarely ask to serve on juries and they surely do not ask to be publicly questioned in ways that cast doubt on their integrity. To dismiss for cause a juror who has asserted his capacity for separating judgment from prejudices may be perceived by the one dismissed and by others as degrading or insulting. We should be reluctant to add this kind of burden to the other burdens of jury service. Furthermore, the likelihood that a person will be influenced by apparent sources of prejudice will not always be as clear as in the example of the preceding paragraph. Judicial intuitions about when an asserted capacity for unbiased judgment should override suspicions of bias almost surely will vary from judge to judge and individual judges might well be inconsistent over time. One situation poses almost insoluble difficulties for a system.
which relies on the challenge for cause to eliminate individuals whose prejudices would interfere with fair jury factfinding. This is where a suspicion of bias is engendered not by some particular feature of the juror’s biography or by some specific prejudice, but rather by a set of diffuse attitudes that characterize the juror’s outlook on life. An individual low in tolerance of ambiguity and high in deference toward authority might be likely to approach a criminal defendant with a presumption of guilt rather than innocence. Yet we can hardly expect a judge to attend to all the character traits that might predict to biased judgments. We have even less reason to expect an appellate court to declare that they do predict as a matter of law.

If we relied on judges to exclude for cause all individuals likely to be incapable of fair judgment and if current practice is a guide, the error of failing to strike biased jurors would be more common than the error of striking the unbiased, but both should occur. The latter error should never be grounds for appeal since the struck juror would, in theory, be replaced by one equally unbiased. The former error, being defined by psychological rather than legal theory, would be very difficult for appellate courts to handle. Hence, trial judges would be likely to be given considerable discretion which, in practice, would be largely unreviewable. Thus, attempts to eliminate juror bias by an expanded conception of what constitutes grounds for challenge might lead to a system which was in practice only slightly more effective than the current one.

The availability of peremptory challenges minimizes tensions inherent in our system of challenges for cause. The primary virtue of the peremptory challenge is as a device for eliminating from the jury individuals whose capacity for impartial judgment is suspect, but not so much so as to require their exclusion as a matter of law. The peremptory challenge has the further virtue of saving face for jurors who have asserted a doubtful capacity to decide in an unbiased fashion since these assertions are never rejected by the court in the way that they would be if a challenge for cause was sustained. Mistakes, no doubt, continue to be made, but they are the mistakes of the parties who suffer from them and not the mistakes of the court. Finally, the availability of peremptory challenges allow the courts to take what is, psychologically speaking, an unduly restrictive view of when potential jurors are likely to be impermissibly biased without endangering the quality of jury justice as substantially as [it] would be if prejudiced jurors not challengeable for cause could not be removed peremptorily. By limiting the situations in which challenges for cause must be granted, appellate courts minimize the chance of reversible error during the jury selection process.

There is no ideal number of peremptory challenges. Their availability would vary with incidence of potentially biasing attitudes in the jury population. Generally speaking, people’s biases are more likely to be activated in criminal than in civil matters and these biases are more likely to favor the prosecution than the defense. This justifies the decision to grant more peremptory challenges in criminal cases than in civil actions and it would also justify a decision to grant criminal defendants more peremptory challenges than prosecutors. While the number of available peremptory challenges may be made to turn on whether an action is criminal or civil, it is impossible
to specify in advance appropriate numbers of peremptory challenges for different types of civil litigation.

Assuming some number is fixed for civil litigation, flexibility may be achieved by judicial administration of the challenge for cause or by judicial discretion to increase the number of peremptory challenges available to one or both parties. Where an action is likely to evoke popular prejudices, the judge should be more willing to allow challenges for cause despite disclaimers of bias than when an action appears less emotionally charged. If popular prejudice is directed largely against one side, that side should have the easier time in excluding jurors for cause or should be allowed extra peremptory challenges. If one party is to be awarded extra peremptory challenges, that party should bear a substantial burden of showing that prejudicial public opinion is widespread and deeply held. Whatever the judge's discretion with respect to challenges, the number of peremptory challenges should be sufficient to allow for the judge who is unduly rigid in his attitude toward for-cause challenges. It should allow room to challenge individuals whose attitudes suggest bias even though their biographies or acknowledged prejudices do not, and it should take into account the fact that individuals often have general biases regarding the kinds of people and organizations who are parties to typical civil actions. At the same time, it should not be so large as to allow an attorney too many opportunities to eliminate those who are likely to be unfavorable by reason of their abilities to rationally evaluate evidence rather than because of bias.


2. In pointing to the deficiencies of judges, Lempert says that "judges are at times elected or appointed in part because of the appeal of biases that are ideally irrelevant in the factfinding process." What are those biases? Lempert also suggests that judges are especially sensitive to considerations of "bureaucratic efficiency" and that such considerations are antithetical to our ideal of "individualized justice." What kinds of considerations regarding "bureaucratic efficiency" is a judge likely to introduce into the adjudicatory process? Are such considerations, in fact, antithetical to our conception of justice?

3. Against Professor Lempert's claim that "group factual judgments tend to be more accurate than those made by individuals," consider I. Janis, Victims of Groupthink (1972). Professor Janis examines foreign policy decisions, and writes: "The more amiability and esprit de corps among the members of an in-group of policy-makers, the greater is the danger that independent critical thinking will be replaced by groupthink, which is likely to result in irrational and dehumanizing actions directed at outgroups." At 198. Professor Lempert made his claim in the context of objecting to re-
ductions in size. A reduction in size might increase the likelihood of "amiable-
ity" and "esprit de corps," and thus Janis' analysis might be understood as
supporting Lempert's position (though it is hard to believe that the change,
say, from twelve jurors to six, will have much impact on that). On the
other hand, Janis throws into question Lempert's major premise, assuming,
as we do, that parallels can be found between the jury and the foreign policy
decisionmaking group. Thus Janis' study, if it is correct, might influence
the agenda of more ambitious reformers. The views of Professor Lempert
on the value of groupness have recently been embraced by the Supreme
Court. See Ballew v. Georgia, 435 U.S. 223, 233 (1978) (Blackmun, J.)
(holding the line at six—a five-person jury for a state criminal trial is un-
constitutional). For a recent attempt to model the deliberative process of
the jury and to critically examine the majority-persuasion hypothesis of Kal-
vem and Zeisel, see Klevorick and Rothschild, A Model of the Jury Decision

4. The ideal of jury representativeness is ambiguous. It could either
mean that no cognizable social group is systematically and arbitrarily excluded
from the jury, or, alternatively, that the jury (or, more plausibly, the group
or pool from which it is chosen) represents a true cross section of the com-
community. Taken in the cross-sectional sense, the representativeness ideal may
well conflict with another ideal of the jury, that of its impartiality. Pro-
fessor Lempert acknowledges this conflict or tension. He then, however,
presents the case for peremptory challenges by assigning a priority to the
impartiality ideal. What are the assumptions behind such a preference or
priority? See Spears, Voir Dire: Establishing Minimum Standards to Fac-
cilitate the Exercise of Peremptory Challenges, 27 Stan.L.Rev. 1493 (1975);
Phillips, Limiting the Peremptory Challenge: Representation of Groups on
Petit Juries, 86 Yale L.J. 1715 (1977); Zeisel and Diamond, The Jury Se-
lection in the Mitchell-Stans Conspiracy Trial, 1976 A.B.F.Res.J. 151 (1976);
Zeisel and Diamond, The Effect of Peremptory Challenges on Jury and
Verdict: An Experiment in a Federal District Court, 30 Stan.L.Rev. 491
(1978).

5. The jury is a distinctively Anglo-American procedural institution.
Thus it is natural that most of the scholarship on lay participation in the
adjudicatory process has focused on the jury. But the basic issue transcends
the jury itself, and scholars have more recently turned to the examination of
the participation of lay personnel within the continental adjudicatory sys-
tems. See Casper and Zeisel, Lay Judges in the German Criminal Courts,
1 J.Legal Stud. 135 (1972); G. Casper and H. Zeisel, The Lay Judge in
the Criminal Trial (1979) (written in German). See also J. Berman, The