

**Citizen Involvement in Public
Dispute Resolution: The Jury**

by

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I. Introduction

I'm going to talk a little about the jury system this morning. Juries have gotten a bad rap in recent years, and we all know why. We've seen some pretty strange results from juries in super high-profile cases: Rodney King, The Menendez Brothers, OJ Simpson. And people who are called for jury service often wonder who the real criminals are: The accused or the jury. Jury service is not seen as an important civic obligation. And some authors are now calling for the outright abolition of the jury system.

I'm not one of those authors. The jury system still has a central role to play in society, just as it has for thousands of years.

II. Juries Throughout History

Let me give you a little history.

Juries have been around in one form or another for at least 4,000 years. Historians have identified the earliest known examples in Egypt, where a jury of eight men (four from each side of the Nile) tried minor cases involving workmen in the necropolises.

The first Western jury system is usually placed in classical Athens, and the jury even played a significant role in Greek drama. The trilogy *Agamemnon* by Aeschylus involved a number of infidelities and murders. Orestes killed his mother, Clytemnestra, because of her betrayal of his father, Agamemnon. Orestes ultimately pleaded guilty to the crime and was brought before the goddess Athena. In the third play of the trilogy, *The Eumenides*, Athena decided not to judge Orestes but instead to elect "judges of manslaughter" who would do the job for her. She returned with, interestingly enough, twelve men, whom she instructed to hear the testimony and render a decision by majority vote. In part, Athena wanted someone else to be responsible for the final

decision, but the jury frustrated her wishes by splitting 6-6, which forced her to cast the deciding vote.

I'm sure some of you are wondering whether our continuing use of twelve-person juries is directly traceable to the decision by the goddess Athena. Historians can't really tell us. The historical antecedents of modern jury practice become shrouded in mystery during the Dark Ages.

What we do know is that the number twelve generally had significance throughout history: The first Roman law was the twelve tables, the Twelve Tribes of Israel, the 12 patriarchs and the 12 officers of Solomon, the 12 apostles. And although the lunar calendar is actually 13 months, 13 was a bad number, so we compressed the calendar into twelve months. Twelve remains even today a special number. How else can you explain that we purchase eggs or doughnuts by the dozen or that a foot is twelve inches or that there are twelve hours in a day (the military notwithstanding) or that there were twelve tv stations on VHF frequencies (2 through 13 before cable).

For whatever reason, juries in English and U.S. history have usually been composed of twelve persons, but it is clear that other numbers, both larger and smaller, have been used. In Greece, the jury in civil cases often consisted of 201 persons, while in criminal cases (such as the jury that convicted Socrates), the jury had 501 persons. But juries could be much larger, with some reports of thousands of persons on a single case. Majority vote was the rule, and they made sure they had an odd number of jurors. So the number 12 is not a necessary feature of the jury from a comparative perspective (a conclusion with which the U.S. Supreme Court agreed in upholding the constitutionality of six-person juries).

Jurors in Greece had to be over thirty, free and full citizens, and free of debt. Jurors were paid a small fee, according to one scholar, about ten cents a day. During periods of increasing litigation, it became difficult to secure enough jurors, and the small amount of the fees made jury service attractive primarily to the very poor and the elderly, a problem with which we are familiar.

Juries in modified form were ultimately picked up by the Romans. Juries were composed usually of members of the Senatorial class and were used in criminal trials.

I want to fast forward a bit to around 780 A.D. when Charlemagne instituted the "inquisition" as a form of fact-finding and justice. The jury for inquisition trials was chosen from free men who had knowledge of the dispute, and jury size could reach as large as two hundred. The jurors were both witnesses as well as fact-finders. In Ninth Century England, King Alfred established tithings--groups of about ten neighboring households--which were responsible for settling disputes within the neighborhood. Another popular method of dispute resolution was compurgation, in which the defendant had to swear his innocence and produce eleven other persons of repute who would similarly swear to his innocence. William the Conqueror used juries to perform certain administrative functions as part of his effort to consolidate his power. For example, he used small groups of citizens to provide information about local property arrangements, customs, and taxable resources.

The modern use of juries as decision-makers in trials can be traced to the reign of Henry II (1154-1189). He created, among other things, the Grand Assize, a court of four knights and twelve neighbors, who decided disputes about ownership of land. The twelve citizens were expected to know something about the dispute or, if they didn't know prior to the trial, were expected to find out by independent investigation. It thus appears that jurors were again both witnesses and fact-finders. The principle of being judged by one's peers was included in the Magna Carta (1215).

Over the course of the next hundred years, this practice gradually shifted so that the jurors could not also be witnesses and jurors were to decide the case on the basis of in-court testimony. This separation was complete by at least the 1600's.

The early juries, and juries in colonial America, generally decided both questions of fact and law. A judge would tell the jury what the law was, but the jury retained the ultimate power to render the verdict, and there are famous examples of juries refusing to follow the law, the most famous of which involved the trial of William Penn. Penn was arrested for seditious libel, but the jury refused to find him guilty even though the judge kept them locked up for two days without food, drink or chamberpot. The judge then imposed a fine upon the jury. One of the jurors, Edward Bushell, filed a writ of habeas corpus, and the court ordered the jury released. This is credited with establishing the modern independence of the jury from the court. The jury's power to decide the law persisted in the United States until the early 1800's.

Although juries in Greece decided by majority vote, the requirement of unanimity appeared early in the English system and was embodied in a statute in 1367. In part unanimity was seen as a logical requirement because there was only one possible truth and since each juror had sworn to give the truth, all jurors necessarily had to agree. In practice, the unanimity requirement meant that jurors--who as witnesses may have had quite different information about a case--had to reconcile their differences.

As it developed in England and the United States, the jury was seen as a critical component of citizen *participation in* government and citizen *protection against* government. The Sixth Amendment to the Constitution, which applies to the states, requires "in all criminal prosecutions . . . a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed."

Although the Sixth Amendment says "all criminal prosecutions," the Supreme Court has interpreted that to mean all criminal prosecutions in which the possible sentence was six or more months in jail. Five months does not trigger a constitutional right to jury trial under the Sixth Amendment. The Court has also held that 12 is not a constitutionally required size, and that criminal juries can be as small as six. So the numbers 5 and 6 seem to have special significance for the court, even if 12 is no longer magic.

The Seventh Amendment provides for right to jury trial "in suits at common law, where the value in controversy shall exceed twenty dollars," but the Court has held that this provision is *not* binding on the states.

But that doesn't matter, because trial by jury is in virtually all states required by the *state* constitution. In California, Section 16 of Article I provides that "trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict."

From this historical discussion, two characteristics of juries seem to stand out. First, juries have typically consisted of ordinary people. Juries are not made up of government employees or persons whose sole job is to be a juror. Indeed, since the modern English and American jury is supposed to be a bulwark against government, it would be incompatible with that goal to have jurors accountable to and controlled by the government.

Second, juries have had a variety of dispute-resolution functions; they have been used flexibly throughout history. For much of its history, juries had

both fact-finding and law-deciding functions. It is only comparatively recently in the history of jury use that the function of deciding what the law is was reserved to the judges, and even today, there is a question about whether juries should have the ultimate power to ignore a judge's instructions.

III. Juries in Other Countries

Now I said at the beginning of my presentation that if you define juries narrowly, you would find that the United States is one of the very few countries which continues to use juries. My historical review suggests a broader perspective, one that focuses upon the fact of citizen participation in the resolution of individual disputes.

Using this broader definition, we see that juries continue to be used widely around the world. Let's consider France, for example. As you all know, France is a civil law--not a common law--country. And most of us probably have believed (certainly I did until I researched the issue) that juries simply are not used in France.

But that's not quite right. It is true that in many major civil cases, the court--the Tribunal de Grande Instance--consists of three trained judges. But in cases involving commerce which fall within the jurisdiction of the Tribunal de Commerce, the judges are lay persons with no training in law who are elected for a two-year term by their peers entered in the local register of commerce. These judges sit in panels of three. Similarly, labor disputes are resolved by a panel of three judges who are elected for a six-year term by employers and employees of a particular trade or profession. This is somewhat analogous to an "expert" panel of judges--expert not in the law, but in the subject matter before them.

For criminal cases, the similarly to our version of juries is much closer. Misdemeanors and minor crimes are handled by judges. But felonies are tried by the court d'assises, which has a mixed composition of 3 professional judges and 9 lay people (the jury) selected by lot from a list established for the department. The lay persons are equally responsible with the professional judges for resolving legal and factual disputes.

The same is true in Germany. In criminal proceedings, depending upon severity of offense, the court consists of one judge and two lay persons whose

role is, in all important respects, the same as the judge. In homicide or serious assault cases, there are three judges and six laymen.

Similar lay person involvement can be found in many countries, including Austria, Denmark, Greece, Italy, Norway, Portugal, Sweden, and in many countries throughout Africa.

Even in the USSR, lay persons were involved in resolving individual disputes. Courts operated with one law judge, and two lay assessors. The judge was elected for a five-year term; and the assessors were elected for a two and one-half year term, but were not required to serve for more than two weeks per year. The USSR had a large number of persons who ran for the position of assessor.

There are of course many countries in which lay persons are not involved in judicial dispute resolution. For example, many countries in the Pacific Rim rely entirely upon government-appointed, professional judges (e.g., South Korea, Taiwan, Samoa). In these countries, it is common to see one judge courts for minor disputes but three judge courts for major civil cases and felonies.

IV. Why Do We Have Juries?

Looking back at history and around the world today, we can see a significant commitment to lay person involvement in the resolution of individual disputes. How can we explain and understand the widespread reliance upon ordinary citizens to resolve legal disputes? I want to close by offering a few answers to that question.

First, it is clear that some countries permit citizen involvement as a deliberate buffer between government and the people.

Second, it seems apparent from the literature that there is a healthy distrust of experts--including lawyers and judges--and permitting citizen involvement is one way of insuring an element of common sense and practicality in decision-making.

Third, there seems to be a preference for group decision-making over single-person decision-making particularly in important cases. Financially, it is much less expensive to rely upon citizen involvement than it is to pay for three

or more judges to sit on every felony. You get the benefits of group decision-making without all the expense of experts.

Fourth, and perhaps most importantly in my view, citizen involvement creates a sense of legitimacy in decision-making and dispute-resolution. It is easier to trust a system that permits outsiders to have such a significant role in how the system performs. It is clear historically, that juries were used by the Kings of England to give legitimacy to certain decisions that otherwise would have been politically problematic (such as who owns what land, and how many assets someone has for tax purposes).

V. Jury Reform in California

The jury system in California is on the brink of collapse. To some, this statement may seem hyperbolic. But to jury commissioners, judges and attorneys who work with juries on a daily basis, collapse seems to be just around the corner.

The crisis manifests itself in public dissatisfaction with the jury system as it currently is structured and managed. The public is rendering its own judgment by refusing to show up for jury duty when called. There is no single cause for the dissatisfaction. However, the results of the dissatisfaction are clear. Felony trials in several counties with large populations are now occasionally delayed because of an inability to provide sufficient jurors for the courtroom when needed.

Although Los Angeles has been one of the hardest hit jurisdictions and has been one of the first to respond comprehensively to juror issues, it is clear that the challenges facing our jury system go far beyond Los Angeles County. Other counties have witnessed declines in juror yields, and virtually all counties are seeing increasing demands for jury trials, particularly in criminal cases. *See, e.g., Jurors' Verdict: Make Reforms*, Sacramento Bee, A1 (Jan. 29, 1996) ("In Sacramento, where the number of criminal trials has doubled in the last three years, the number of potential jurors not responding to eligibility questionnaires has tripled."). In addition, exit interviews with jurors and public reaction as reflected in news media accounts reflect increasing public intolerance for a jury system that many perceive as out of control, unnecessary, costly, burdensome, and, in some cases, an obstacle to achieving justice.

Court and community leaders around the State have been actively responding to the challenge. In November of 1994, the Superior Court of Los Angeles issued a comprehensive report with recommendations to improve the jury system. *The Jury Report--A Blueprint for Change in the Los Angeles County Jury System*. The Citizens Economy and Efficiency Commission of Los Angeles County issued its own report in December of 1994. *The Management of Juries Within Los Angeles County*. Many of the recommendations found in those reports have already been implemented in Los Angeles County and are adopted in substantial form by this Commission. Finally, the California Judicial Counsel last year convened a Blue Ribbon Commission on Jury System Improvement which made almost 60 recommendations for change. I was the principal author of the Commission's final report, and I want to describe just briefly a few of what I think are the most important recommendations.

The first set of changes are intended to encourage more people to show up at the courthouse when they receive a juror summons. In many counties, significant numbers of persons simply fail to appear. The Commission's recommendations on this issue are of the carrot and stick variety. The carrots include the following.

(1) Jury commissioners and judges should actively promote the importance of the jury system and the duty to serve through all available channels of communication. I'm not a judge, but that's what I'm doing this morning.

(2) The Legislature should enact a child-care program for those jurors who must make special child-care arrangements as a result of jury service.

(3) The Judicial Council should adopt a Rule of Court providing for mandatory judicial, court administrator, and jury staff team-training on juror treatment.

(4) Each court should create a mechanism for responding to juror complaints.

(5) The Legislature should consider whether we can require mass transit providers to offer free public transportation to and from courthouses for jurors.

(6) Courts should reimburse jurors for all reasonable transportation and parking expenses.

(7) Courts should review juror facilities, from the parking lots, to the hallways, to the jury assembly rooms, for both safety, security and comfort.

(8) The Legislature should alter juror fees so that each juror, after the first day, receives \$40 per day (instead of the paltry \$5 per day that exists today).

(9) Businesses should be required to continue paying usual compensation and benefits to employees for the first three days of jury service, and businesses should receive a tax credit for continuing to pay usual compensation and benefits after the first three days.

(10) All counties should move towards the one-trial, one-day system. Under this system, if you don't get called for a trial on the second day of service, your service is completed.

As you can see, there are quite a few carrots. I'm only going to mention one of the sticks, but it is a pretty big one. The Legislature should pass a statute making jury service mandatory and providing that failure to appear at the courthouse will result in a hold being placed upon a juror's drivers' license renewal. Hit Californians where it really hurts; on the freeway.

Let me turn just briefly to a few of the recommendations on changing how the jury does its job once selected for a case.

Historically, juries were active participants in the fact-finding and dispute-resolution process. For example, during the reign of Henry II (1154-1189), the twelve citizens who were part of the Grand Assize, which decided disputes about ownership of land, were expected to know something about the dispute or, if they didn't know prior to the trial, were expected to find out by independent investigation. Over the course of the next several hundred years, the functions of witness and jury were separated, and juries were expected to decide the case on the basis of in-court testimony.

From the sixteenth century forward, jurors have had an increasingly passive role. Jurors were not permitted to ask questions during the trial, and rules of evidence were developed to limit the information that was received by

the jury. Instead of judging both issues of fact and law, judges began to assert for themselves the power to declare the law in the form of jury instructions which jurors were expected to follow. Ultimately, jurors were regarded as “passive fact finders.” Hon. B. Michael Dann, “*Learning Lessons*” and “*Speaking Rights:*” *Creating Educated and Democratic Juries*, 68 Ind. L.J. 1229, 1232. *See also* Steven J. Adler, *The Jury: Disorder in the Court*, pp. 235-36 (1994).

Social science research over the past thirty years raises the question of whether we have swung too far in the direction of juror passivity. This research shows that learning takes place most efficiently when the student is actively engaged and that persons handle the stress of processing new information through social discussion of that information. As applied to juries, this research suggests that we should permit jurors to be much more active. Jurors should be encouraged to take notes, ask questions, and discuss the case among themselves as the case progresses.

Jury research over the past two decades also establishes that our traditional method of instructing the jury about the law creates difficult hurdles for jurors to surmount. First, we have traditionally given instructions orally. But it now is well known that most persons retain only a fraction of what is heard (as compared with what is seen). Second, many jury instructions include technical legal jargon, and jury instructions are often syntactically complex, directly reflecting the complexity of the law. But jurors, most of whom are not educated in the law, have great difficulty understanding many of the words used and concepts expressed. *See, e.g.,* Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 74 *Judicature* 249 (1991); J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 *Neb. L. Rev.* 71 (1990). Third, in California, judges do not assist juries by explaining how the law might be applied to the facts presented in the trial. That function is performed by the advocates in closing argument. But in many cases, jurors are left with very different interpretations of the instructions from competing counsel and no practical way of resolving those conflicts.

The Commission recommends a rather significant return to a more active jury.

(1) Not only should all jurors be permitted to have notebooks and to take notes (which is pretty much standard practice now), but all jurors should also

have the right to submit to the judge written questions during the trial that would be asked to a witness before the witness is excused.

(2) There is a study going on in Arizona in civil cases where jurors are being permitted to discuss the case among themselves before deliberations begin. We should look at that study when it concludes next year.

(3) Alternative jurors should be permitted to observe, but not participate in jury deliberations.

(4) Jury instructions in California should be rewritten from start to finish to make them more understandable. Let me give you an example by reading an instruction that is given in virtually every case attempting to define “circumstantial evidence.”

“Evidence consists of testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or non-existence of a fact.

Evidence is either direct or circumstantial.

Direct evidence is evidence that directly proves a fact, without the necessity of an inference. It is evidence which by itself, if found to be true, establishes that fact.

Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn.

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct evidence and circumstantial evidence. Both direct and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.”
(CALJIC 2.00)

Did everybody get that? I’ll be distributing a test at the end of my remarks.

So what has happened with these recommendations? Quite a lot, surprisingly. Often, these types of blue ribbon reports just get put on a shelf

where they gather dust. So far, however, this one has been acted on. The Judicial Council has created a task force responsible for redrafting jury instructions. Judges are permitting jurors to ask questions during the trial. Jury commissioners are doing what they can without legislation to improve jury facilities and security, and to offer perks for jury service. And the Legislature is actively and seriously considering many of the reforms suggested by the Commission. There is a good chance that before the year is out, significant jury reform legislation will have cleared the Assembly and the Senate.

Is this going to fix all of the concerns with the jury system? Of course not. The recent serious of rather incredible verdicts from Southern California juries in high profile cases can't be controlled. But we can try to improve a system that has become unduly burdensome, somewhat antiquated, and often more a tool for manipulation by clever lawyers than an instrument of justice. And that remains the great promise of the jury in a democratic society.

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