Juries play a dual role as fact finders and arbiters of community standards. With the rise of technology for resolving disputes over facts, the jury’s focus should be transformed from fact finding toward adapting justice to community standards, including the desired level of proactive law enforcement and the severity of sanctions.

What comes to mind when one thinks of the word *court*? Is it not the image of the trial, more particularly the criminal trial? Lawrence M. Friedman (2004) provides a sharper mental image:

“It is not the image of the trial, more particularly the criminal trial? Lawrence M. Friedman (2004) provides a sharper mental image:

> The jury sits in its box, the judge sits on his or her high bench in a robe with an American flag in the background, the witnesses raise their right hands and swear; the lawyers and the defendant sit at tables facing the judge. . . . The trial itself is long, tense, and full of excitement. . . . Then the judge instructs the jury, the jury retires to a locked room, and a spine-tingling period of waiting begins. Finally, the door opens, a hush comes over the crowd in the courtroom, and the jury comes in and announces its verdict.

Ordinary citizens, as jurors, play a key decision-making role in trials. Abramson noted: “Perhaps no other institution of government rivals the jury in placing power so directly in the hands of citizens” (1994: 1). Jury trials are not only an essential component of court decision making but also one of the key sources of public trust and confidence in the American justice system, especially among minorities (Lindsay, 1999; Roberts and Hough, 2009).

The very legitimacy of courts rests partially on the participation of the public, and the jury is a very valuable point of contact between the public and the courts. Several empirical studies...
have shown that participation in jury trials is one of the most important sources of the legitimacy of courts themselves.

Transparency is the foundation for government and essential to its administration. With its use of citizens as decision makers in public proceedings, jury trials are one of the highest forms of transparency within the justice system.

Jury Trials Are “Vanishing”

A “State-of-the-States” survey published in 2007 estimated that 148,558 jury trials are conducted annually in the United States, but there has been such a “precipitous decline” in the number of trials over the past several decades that Marc Galanter’s (2004) term “vanishing trials” has entered the popular lexicon. This decline includes jury trials. Most jury trials are criminal trials (47 percent felony and 19 percent misdemeanor), 31 percent are civil trials, and the remaining 4 percent are family, juvenile, traffic, and other. Between 1976 and 2009, criminal jury trials cases dropped from 3.1 percent of dispositions to 1.1 percent, and civil jury trials fell from 3.5 percent of dispositions to 0.5 percent (see Flango and Clarke, 2015, for statistics).

In England, juries are seldom used in civil or even criminal cases, except for major crimes, and are being used less frequently for those (Frank, 1963). In the United States, many larger civil cases have left the court system entirely or have migrated to special “business courts.” Many consumer and commercial transactions, including health-care and insurance contracts, employment contracts, and financial services agreements, now specify that disputes must be resolved by mediation or binding arbitration (Stipanowich, 2004). Literally millions of consumer disputes formerly resolved by courts are now handled by online dispute resolution services (Tyler, 2004). This leaves state courts with lower-value contract and small-claims cases, rather than higher-value commercial and tort cases, and most of these were disposed through an administrative process (Hannaford, Graves, and Spacek-Miller, 2015: 35). Jury trials that do occur in civil cases are primarily tort disputes (65 percent).

One recent survey of the future of courts asked if the civil jury trial was an anachronism (Knox and Keifer, 2015). Although the respondents said it is “unlikely” that the civil jury trial would be so rare as to be virtually nonexistent within the next ten years, the observed decline in civil jury trials means that fewer cases have “the benefit of citizen input, fewer case precedents, fewer jurors who understand the system, and fewer judges and lawyers who can try jury cases” (Institute for the Advancement of the American Legal System, American Board of Trial Advocates, and National Center for State Courts, 2012).
In contrast, the rate of criminal trials has declined drastically, but most of those that remain require juries. William J. Stuntz (2011: 302) argues that the lack of transparency in guilty pleas, especially those that occur early in the process, is a problem that would be mitigated if a larger proportion of criminal cases were resolved by trial. An increase in the number of criminal jury trials would involve more members of the public in their resolution. If the number of criminal trials increased, the public could see how cases are resolved; public visibility would improve decision making and, thus, increase public trust and confidence in the court system.

The Dual Role of Juries

This essay argues that juries have two separate and distinct roles to play: one as fact finder and one as arbiter of community standards. I further argue that the fact-finding role is diminishing, which is one reason for the decline in jury usage. The use of juries as arbiters of community standards, however, could be increased, with salutary effects on public trust and confidence in the judicial system. Let us discuss these roles briefly.

Juries as Fact Finders

One role of the jury is to determine what the facts are so that the law can be applied. Robert Tobin (1999) put it this way: “No area of court operation is more integral to the American legal system than the use of juries to decide facts and, in a few states, even to decide the sentence.”

...the observed decline in civil jury trials means that fewer cases have “the benefit of citizen input, fewer case precedents, fewer jurors who understand the system, and fewer judges and lawyers who can try jury cases”...

This conception of the jury is derived from the time of mechanical jurisprudence, when it was thought that the role of courts was to apply legal rules to carefully ascertain facts to reach a decision. The jury determines the facts. The judge decides what law applies to a particular set of facts, makes legal rulings as to evidence to be heard by the jury, and interprets the law governing the case. Jurors are instructed to follow the law as given by the judge. In the overwhelming number of cases, the jury determines the truth of factual allegations, but renders a “general verdict,” which just announces the result without explanation—whether a criminal defendant is guilty or a civil defendant is liable. Consequently, there is no way of knowing the reasons behind the decision.

Sunderland (1919) said:

Whether the jurors deliberately threw the law into the discard, and rendered a verdict out of their own heads, or whether they applied the law correctly as instructed by the court, or whether they tried to apply it properly but failed for lack of understanding—these are questions respecting which the verdict discloses nothing.

Before DNA and other technological innovations, juries evaluated the credibility of witnesses and defendants, whom they might actually know either personally or by reputation. The facts they had to decide were essentially “did the accused do it” and “did he intend to do it,” which involves judgment in reading people.

...
The role of the jury as fact finder needs to be de-emphasized because today’s more complex cases require expertise to understand facts, let alone apply them in complex criminal and civil cases. The widely reported fraud trial against three former executives of one of New York’s most prestigious law firms, in which the jury was “hopelessly deadlocked” after 22 days of deliberation, again raises the question of whether juries are best equipped to hear complex cases. Posttrial interviews with the Dewey & LeBoeuf jurors made it clear that they were confused not only with technical terms such as accounting adjustments, but also with basic terms such as “burden of proof” and what it means to deliberate (Stewart, 2015).

Are juries capable of making decisions in complex cases with volumes of information and difficult subject matter? The extreme example is the record-breaking trial in Kenner vs. Monsanto, a train derailment with Dioxin case in Bellville, Illinois, which involved 65 residents of Sturgeon, Missouri, 182 witnesses, 6,000 exhibits, and three and a half years of testimony (Tackett, 1987). The equivalent criminal case was the Pizza Connection trial, where 21 of 22 defendants were convicted of heroin distribution from pizza shops, which ran from September 30, 1985 to March 2, 1987.

Given the complexity of the modern world and the degrees of specialization, some argue that fact finding is a role better played by a panel of experts than lay people. For example, in a dispute over whether certain medical procedures constitute malpractice, a small panel of medical experts would be superior to a jury of lay people. The same is true for cases involving the potential risks of fracking, product liability, corporate mergers, and anti-trust cases.

Indeed, at one time in England, when a case related to a particular trade, it was not unusual to have a jury of men engaged in that trade (Beuscher, 1941). That practice has been discontinued in England and was never adopted in the United States. A recent survey noted that it was improbable that specialized jurors experienced in a specific subject area would occur within the next ten years (Knox and Kiefer, 2015).

Even with respect to criminal cases, concepts such as “reasonable doubt” and “circumstantial evidence” may require more formal education than a few minutes of jury instructions can provide.

Juries as a Gauge of Community Standards

What the jury is uniquely qualified to do is establish community standards and norms of behavior. Because juries represent the public, they are more likely to decide in accordance with generally accepted values of their communities. They leaven the law with community standards, which should add flexibility to the rigidity of laws and the straitjacket of sentencing guidelines. Juries, in effect, used the “medical model” of treating the individual offender rather than the “legal model” of treating similar offenses with the

Back in 1945, noted historian Carl Becker said:

Trial by jury, as a method of determining facts, is antiquated...and inherently absurd—so much so that no lawyer, judge, scholar, prescription-clerk, cook, or mechanic in a garage would ever think for a moment of employing that method for determining facts in any situation that concerned him (quoted in Frank, 1963: 100).
same punishment, regardless of aggravated or mitigating circumstances (Flango and Clarke, 2015). Juries were a primary way to individualize justice before the creation of problem-solving courts.

Because juries only hear one case, they approach the trial with a fresh outlook, in contrast to judges who often hear many similar cases. Juries also have more flexibility and do not have to follow the letter of the law. A jury verdict in a case is binding only in that case and is not a legally binding precedent in other cases. Consequently, given the same factual evidence, it is possible for one jury to find a particular conduct is negligent, and another jury to find that similar conduct is not negligent. Of course, no two witnesses are exactly the same, and even the same witness will not express testimony in exactly the same way twice, so this is difficult to demonstrate except with experiments using mock jurors.

When the classic study of the American Jury was done, Kalven and Zeisel (1966) identified some unpopular laws where juries would tolerate some violations because they disagreed with the laws themselves. Many of these were so-called blue laws, which attempted to regulate behavior on social or moral grounds. These laws included game laws, liquor laws, drunken driving, and gambling laws. Of course, hostility to liquor laws was greatly reduced after the repeal of Prohibition.

One illustration of how community values may provide justice in an individual case, even if they are at odds with the law, is the case of Ryan Collins, found guilty of having 19 videos and 93 images of child pornography on his computer (see Ward, 2015). Collins and other defendants downloaded the images through a peer-to-peer file-sharing program. Users often do not realize they are sharing the images because the software automatically downloads the images from other users’ hard drives.

U.S. District Judge James S. Gwin of the Northern District of Ohio polled a jury about a suitable sentence for Ryan Collins. The jury recommended on average a 14-month sentence. Gwin sentenced him to 5 years, longer than the recommendation, but significantly less than the sentencing guideline recommendation of 20 years.

This role of community conscience is especially important now in terms of communities deciding how much flexibility they would prefer in sanctioning crimes such as marijuana possession and use. Juries are ideal for those types of decisions and can guide the prosecutor in how lenient to be with plea agreements.

They [juries] can serve as a de facto citizen review board and as a safeguard against arbitrary law enforcement.
More broadly, juries can help determine the degree of law enforcement that is appropriate to their communities. They can serve as a de facto citizen review board and as a safeguard against arbitrary law enforcement.

New York has struggled with the use of “stop-and-frisk” laws. These were used as part of the “broken windows” theory of law enforcement; i.e., police stop people in high-crime areas to search for weapons and other contraband. The purpose is to remove weapons before they are used in more serious crimes, but enforcement has been linked to racial profiling, whereby minorities have been stopped much more frequently by police than others. By determining which offenses are treated relatively harshly and which are treated relatively leniently, juries can provide guidance to law enforcement. For example, does the community as represented by juries prefer more aggressive policing to rid the towns or cities of gangs and crime, or more community policing that is more flexible with minor offenses and perhaps more willing to treat offenders with warnings, peer courts, etc., and if found guilty make more use of fines, community service, and other alternatives to incarceration?

Summary

The Jefferson quote that began this article addressed the importance of the jury system. The suggestion here is that revitalizing the jury requires a realignment of the function of the jury with the appropriate structure necessary to achieve those purposes. This means triaging issues sent to a jury for resolution and using juries to resolve conflicts over values—community standards. Juries selected to be representative of the communities they serve are the appropriate decision-making body to articulate community standards, especially with respect to the amount of latitude given to law enforcement and the severity of punishment to be meted out to individual offenders. It could be argued that the nascent trend toward this use is already becoming evident in the use of juries in criminal cases. As noted above, even though criminal trials are declining, most that do remain are jury trials.

In contrast, juries selected to be representative of communities should not be expected to be the best decision-making arrangement for fact finding, especially in areas of dispute that require a high level of general knowledge and even more so in areas that require some sort of specific expertise. One could read the trends toward specialized business courts, increased use of mediation and binding arbitration, and increased use of online dispute resolution as indications that the jury’s role in fact finding is being diminished. If key issues in contention involve determining questions of fact that require technical expertise, many of those questions should be referred to expert witnesses or, better yet, a panel of experts. For those issues, jury selection procedures could focus less on being representative of the community and more on the types of expertise necessary to resolve issues of fact.
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