

Advance Sheet

IN (MODEST) PRAISE OF JURIES

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A litigator was telling a corporate colleague about an employment case the litigator was going to try in Washington, D.C. As the litigator described the matter, the client was a company dominated by white males, and, just for good measure, the critical employment decision was made by a Southern “good ol’ boy” who was charged with having improperly forced the resignation of a female employee. The plaintiff was African American. So was her lawyer. The case was to be decided in a federal jury trial.

“You can’t do that,” the corporate colleague protested. As both lawyers well understood, what she meant was that a jury in Washington would be composed primarily, or even exclusively, of African Americans, bound to find for the plaintiff.

“The hell I can’t,” said the litigator. “The case is complete BS. And no jury anywhere or of any sort is going to believe what this fired ex-employee has to say.”

After an obvious eye roll, the corporate colleague walked off, shaking her head, sure that the litigator had addled brains

and the case was headed for disaster. It wasn’t. The outcome proved favorable for the company, notwithstanding its somewhat bumptious white executive. A jury of 11 Black women and one white male found the plaintiff’s tale unbelievable.

Biased Juries

Was this so surprising? Certainly, like the corporate lawyer in the story, we’ve grown accustomed to believing it is, glibly assuming that jurors of one race will always be well-disposed to those of their own race and unable to do justice to those of another. And not without reason. One need only look back at how white juries in the South treated Black Americans and remind oneself of the kinds of miscarriages of justice, to put it mildly, that ensued. Not least because there were few Black jurors permitted, if any at all, and there were no predominantly Black juries, there is little evidence the other way. But the outrages committed by white juries in both convicting Blacks and acquitting whites, too

numerous to catalogue, serve as powerful proof of the effects of racial bias among jurors and juries as a whole, at least where racial issues are implicated.

Indeed, sometimes the racial prejudice of juries was acknowledged without excuse or pretense. One of the very first attempts by Congress to protect Black civil rights, the Civil Rights Act of 1957, was much delayed and eventually neutered by Southern senators who insisted that contempt proceedings against local officials who were unwilling to enforce the act be subject to jury trials. The reason was that under the very local practices targeted by the act, those juries were sure to be all white and would be loath to find guilty white Southern officials who were refusing to implement the civil rights reforms Congress decreed.

Our scandalous history of race relations, as it relates to jury trials in particular, has given juries generally a bad name. We’ve come not to trust them at all where race or national origin is involved. Nor are racial problems our only worries about juries. Complex fact patterns seem more than they can handle. With the increasing importance of technology in everyday life, juries are thought unable to understand the issues they are required to resolve. And then there’s the sympathy factor. Whether because of racial bias or concern for the little guy or animus toward large corporations or other prejudices, we worry that juries will decide with their hearts, rather than their heads, sometimes awarding massive damages where perhaps much less or even nothing might be justified.

Such concerns, legitimate or not, have caused corporations in particular to try to avoid jury trials at all costs. In business transactions, to the extent possible, arbitration is now regarded as a far superior form of decision-making. So too in employment disputes. Reflexively, politicians have acted to prohibit arbitration where individual employees are concerned. The stated premise is a need to litigate “in the sunshine,” as if arbitration were some Star

Chamber proceeding in which fairness cannot be obtained. Closer to the truth is a preference for subjecting corporations to the uncertainties and larger verdicts offered by juries, which are thought to tilt the scales toward the employee.

Not surprisingly, the view abroad is that American jury trials are a disaster waiting to happen. Many in other countries look on in utter disbelief at the well-publicized cases of misunderstanding or runaway juries and seek advice how to avoid them. Compounding the problem, the ranks of American litigators who advise foreign companies increasingly find themselves poorly trained to handle a jury trial and inclined to warn that a jury trial presents unusual risks, even when it doesn't.

Recent Juries Doing Well

Have you noticed, however, how well juries have been doing lately? In the last couple of years at least, juries in high-profile cases have often seemed to find their way to the right results. These have not generally been in the business or commercial areas, where the tactics that corporate defendants have employed to get out of jury trials still hold sway. Instead, it is in the criminal cases, even where hypercharged racial issues are present and juries have not had the kind of diversity that would give us comfort, where the jury trial is at least improved.

The George Floyd trial was the first of these. There, a mostly white jury convicted not just a white defendant, but a policeman, of having murdered a defenseless Black man during the course of an arrest. Surprising, surely. Even more tellingly, in the Ahmaud Arbery trial, an almost all-white Southern jury found three white men guilty of killing a Black jogger whom they said they had suspicions might be burglarizing homes. In a second trial, a more racially diverse jury convicted the three killers of hate crimes. Unheard of. Back in Minnesota, another white cop,

this time a woman, was found guilty by a mostly white jury of manslaughter for shooting a Black man whom she claimed to be trying to tase. Stunning.

Perhaps the case of Jussie Smollett, a TV personality said to have staged his own hate crime incident, was proof that the system will still victimize Blacks. But the jury was racially diverse, and few who listened to the testimony in that case found the jury's guilty verdict to be beyond the bounds of the evidence. Add in, outside the racial realm, the trials of Ghislaine Maxwell and Elizabeth Holmes, and juries have seemed to do quite well recently.

While the process isn't always pretty, the results can still be pretty good.

What about Kyle Rittenhouse, you may ask? Is it really to the contrary? Even many of those disappointed by the jury's decision that Rittenhouse would go free had to admit that the evidence could have raised a reasonable doubt whether Rittenhouse had acted in self-defense, however guilty he was of being someplace he had no business being. The latter was itself no crime, even if it bore on what was charged. In the end, Rittenhouse seemed to go free less for any waywardness by the jury than as a result of our high standard of proof, one most people endorse as serving other purposes thought just indeed.

Juries Reflect Society

What might one conclude from all these events? We may worry how well juries will understand, but in these cases, it seems they mostly did, overcoming the dangers of racial bias in the process. Still, it is

easy to overstate the trend in two opposing respects. To some extent, good jury decision-making is hardly such a new phenomenon. Juries, after all, deliver sound verdicts every day in hundreds of courtrooms across the country, and, as a result of decades of improvements, are now usually racially diverse too.

But let's not get too comfortable. One swallow, or even a few, do not a summer make. Note there was no case in which a Black defendant was charged with a crime in a predominantly white community roiled by the kind of salacious rumors and overcharged emotions that so easily and frequently infected proceedings in an earlier day. It is too early, if the day will ever come, that a Black defendant can be confident of a fair trial in such a setting and others as well. As was once said, God's mistake was to give humans limited rationality but unlimited foolishness, and sometimes racial malice.

But it's hard to deny that as the country has moved toward a greater awareness of and concern about the character and sources of racial bias, progress is being made. Nor should that be surprising either. Juries reflect our society. Indeed, engaging the voices of ordinary community members is part of a jury's whole purpose. It stands to reason that how well or poorly they do will reflect how well or poorly our society is doing as a whole to root out prejudice and prevent miscarriages of justice on racial grounds or any other. It is not quite right to say that juries generally do as well as society does, but clearly juries themselves are not the whole or even the heart of the underlying problem.

Juries trade on common sense and a need for consensus. The former is particularly valuable in the decisions jurors routinely make. Who was responsible for an accident, who negligent, and who the victim? Was a contract breached? Who between the parties is the believable one? Most jury trial lawyers will acknowledge that it is sometimes astonishing how well and carefully juries have used everyday

thinking to figure out not only who is the good guy and who the bad guy but also how to reward the former proportionally and punish the latter fairly.

Part of the reason has to do with how seriously jurors take their job. They understand that someone's life or wealth lies in the balance. They try to do the right thing. Of course, there are exceptions. There are jurors who fall asleep or doze or pay little attention to the proceedings or only to the clothing worn by the lawyers or the looks of the witnesses. But as a general matter, jurors seem to care about doing their job well. And, while the process isn't always pretty, the results can still be pretty good.

Nor is the process so askew. Perhaps you don't place much stock in instructions and admonitions given by a judge. But jurors tend to. They seem to understand the basic principles that the judges try to impart, even if they don't get the fine detail. It is never surprising to hear jurors repeat in post-trial interviews some of the phrases the judge tried hard to impress upon them. Nor is this the sole support for good jury decision-making. Jurors don't just get all the evidence placed before them unsorted and untested, to do with as they please. The whole purpose of the rules of evidence is to sift out evidence that is unreliable for juries to hear. The notion of what's reliable and what's not has been worked over and vetted for hundreds of years, and not in the laboratory, as it were, but in practical circumstances.

Jurors understand implicitly what legal theorists and lawyers often fight about. One of the most interesting developments in modern trials is the appearance of the expert who testifies about how witnesses tend to misremember or make mistakes about whom they identify. Most jurors know this already. Yes, they will rely on identification by witnesses. But no, they don't take this as gospel. We all know from our own everyday experiences how memory and eyesight can fool us. No witness is really necessary to remind jurors

of this or to caution them to consider all the facts and circumstances, including what has been revealed by cross-examination. The concern that jurors will rely too heavily on eyewitness testimony is, in most cases, spurious.

Nor should we underestimate the importance of consensus. For every lackadaisical juror, there tend to be two who are not. And in criminal cases, they all must agree. Yes, some jurors can be overwhelmed by the combined opinion of their peers. But that is not always such a bad thing, particularly if the others are motivated by a more serious consideration of the facts. The need to enlist the support of others makes the jurors themselves more serious about what they are doing, as anyone who has sat with others on a jury will tell you.

Are Jury Alternatives Better?

Admittedly, none of this ensures perfect justice by juries. Far from it. They make mistakes, sometimes large ones, and they do so frequently, and not only where incompetence or prejudice, if not both, has ruled supreme. But don't make the mistake of not considering the alternative. Do other fact-finding mechanisms do any better job? Should we really have such confidence that a judge or an arbitrator or in foreign proceedings, an investigating magistrate will do better?

Judges are products of their communities, too, and have biases as well. They see all the evidence, moreover, the inadmissible along with what the rules of evidence say may be seen or heard. Might they not be improperly influenced by tainted proofs not available to juries? While we hope they have been well trained to disregard what they should, we run a greater risk of improper or tainted judgment because they make their decisions, at the trial court level at least, solo. By contrast, a jury trial requires a majority or even a full complement of other sensible people, overseen by a watchful judge, to reach its result.

The magistrate model of civil law systems is hardly more reassuring. In most instances, the proceedings lack the virtues of the adversary system, where conclusions can be tested through testimony and cross-examination. Magistrates have freer rein to investigate, but so too are freer to rely on untested or even unreliable facts, often prejudicially viewed.

Juries are not so obviously inferior to these alternatives, at least not in all cases. And then there's this: Observers from abroad cannot help but notice the unusual character of having everyday citizens participating in the legal process and making practical decisions about liability and non-liability, crime and punishment, life and death. There is a risk, surely, in having people without legal training do the fact-finding, less because they don't know the law (given that they are instructed about it) and more because of a concern about whether they will be willing to apply it. But do judges always follow the law? And apply it well, free of bias?

Think what we gain. A professor of the law, known for travels in distant lands to teach about American democracy and the American legal system, tells how he gives students an opportunity at the end of his classes to say what they regard as the best thing about the American legal process they've been learning about. Is it the rules of evidence? Or simple pleading? Or the discovery process? Cross-examination or the common law? In maybe two-thirds of the cases, the answer is the American jury system. They are amazed that American citizens are so intimately involved in doing justice. And while they sometimes don't, and there is still substantial work to be done, we should not ignore that they can be pretty darn good at it much of the time. ■