Some Proposals for Reform of the Criminal Jury Trial

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Abstract

"[Jurors], with us are often times ignorant persons, at least seldom or never are they so judicious as to understand such intricate matters as [lawyers] represent to them." (Sir George Mackenzie, 1678).

"I can't believe OJ got away with it. He was clearly guilty and they let him off the hook. But what do you expect from 12 people too stupid to get off a year's worth of jury duty?" (Joan Rivers, 1995).

Introduction

There is a perception or belief in this country that the jury system is hopelessly inadequate to achieve consistent, fair results in criminal trials. While this was a longstanding belief long before the OJ Simpson trial, the Simpson trial did bring some of the problems inherent in the jury system to the attention of greater numbers of people. Some observers respond to the criticism by saying that the problem, if it exists, is greatly exaggerated. They point to the lack of any study which shows that a large or significant number of jury verdicts are demonstrably wrong. In fact, given that quantifiable data are impossible to gather in this context, the proposition will likely have to rest on anecdotal evidence. Whatever the actual figure is for objectively "wrong" results reached by jurors, as long as the perception of juror incompetence exists, there will be a lack of confidence in the jury by the participants in the criminal justice system as well as the public at large. If we assume or accept the proposition that jurors often come back with the wrong results, then we have to ask why. Is it because jurors are incompetent, or is it that the system that has been set up is flawed, or is it perhaps a combination of both? And, second, should the criminal jury system be abolished or reformed, and, if reformed, what are some viable proposals?

Fortunately, much of the criticism of the system carries within it a clue as to how it can be reformed rather than abolished.

Methods

Because of the nature of the question, this research is based on literature review. As was said earlier, quantifiable data about "wrong" results reached by jurors in criminal trials is impossible to collect, as results will always be subjective. Some aspects of specific questions considered in this paper are subject to quantifiable analysis, but because of limited time and resources available those methods are best left to a future paper. Where quantifiable data exists in the literature, however, an attempt has been made to incorporate that into this paper.

A Historical Perspective of Abolition of Trial by Jury in Criminal Cases.

Criticism of the jury system, and more particularly, of the jurors who comprise them is nothing new. Almost a century ago, an English observer had this to say about jurors:

> It is popularly presumed that they select the right verdict in each case; but wherever the balance is delicate, wherever the evidence requires a nicety

> of discrimination, a jury's verdict is worth little more than the spin of a penny. . .The ordinary juryman is not sufficiently intelligent. He is quite untrained in the decision of a complicated problem. Often he conceals his incapacity in silence. The verdict is settled in the secrecy of the jury room; but sometimes mental confusion reveals itself to a startling extent. . . A juryman is frequently inattentive, sometimes half asleep. If he listens, he listens mechanically. If his brain is working, as likely as not, it is only to wonder vaguely what his assistant is doing in the shop. If he takes no notes, he does well. Probably they would be incorrect and worse than useless. (Murdoch, 1908, p. 276)

While the outright abolition of criminal jury trials may seem to be extreme, we might remember that in England, the country where our notion of jury trials began, jury trials in civil cases have been abolished. At last report, the judicial system there seemed to be operating just fine without any obvious ill effects, at least with respect to civil trials.

Much of the criticism of jurors comes from a time when criminal trials were much simpler, more basic affairs. Trials lasting a year or even a month were unheard of. In the 1880's jury trials in Alameda County, California lasted an average of 1½ days (Friedman, 1993). Turn of the century circuit courts in Leon County, Florida could handle up to six cases per day all heard by the same jury (Shrallow, 1991). If those juries were considered then to be ill-equipped to handle relatively brief, simple trials, what can be said about today's juries' abilities to handle the complex, long-term trials of the modern era?

There is some support in the case law for those who claim that abolishing jury trials would not be unconstitutional, at least in some circumstances. The court in *In Re* Japanese Electrical Products Antitrust Litigation, 631 F.2d 1069, held that the Seventh Amendment right to jury trial is not guaranteed when a particular lawsuit, because of its complexity, renders a jury unable to decide in a proper manner. Furthermore, the Supreme Court in Ross v. Bernhard, 396 US 531 (1970), stated that "The legal nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedies sought; and, third, the practical abilities and limitations of juries [emphasis added]" (p. 538). The Supreme Court thus indicated that whether an issue is jury triable depends upon practical, as well as historical and constitutional, considerations (Friedland, 1990). Shrallow (1991) also relies on the case of Bernhard for the proposition that the courts can consider juror abilities in making the decision whether or not to take issues, and, by implication, entire cases, from the jury. The underlying rationale for these decisions is that when the Due Process Clause of the Constitution is in conflict with the Seventh Amendment right to a jury trial, due process wins out.

> If judicial decisions are not based on factual determinations bearing some reliable degree of accuracy, legal remedies will not be applied consistently with the purposes of the laws. There is a danger that jury verdicts will be erratic and completely unpredictable, which would be inconsistent with evenhanded justice. Finally, unless the jury can understand the evidence and the legal rules sufficiently to rest its decision on them, the objective of most rules of evidence and procedure in promoting a fair trial will be lost entirely. *In Re* Japanese (1980, p. 1084).

Friedland (1990) claims that the system attempts to hide defects like these by cloaking all aspects of jury deliberations in secrecy. In fact our judicial system is adamant about protecting the secrecy of jury deliberations, and imposes strict procedures before allowing jurors to be questioned concerning their verdicts or deliberations. Fitzgibbons and Munch (1990) found that in all jurisdictions, ethical and legal principles generally disfavor contacts with the jury by a lawyer at the conclusion of litigation. The stated premise is that disallowing inquiry into jury verdicts is essential to encouraging the finality of jury verdicts, promoting the freedom of deliberation and protecting jurors.

In McDonald v. Pless, 238 US 264 (1915), the Supreme Court said that if not for these principles:

> . . .all verdicts could be and many would be followed by an inquiry in the hope of discovering something which might invalidate the finding. The jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation to constant subject of public investigation - to the destruction of all frankness and freedom of discussion in confidence. (p. 267-268)

While these cases set out persuasive policy considerations for jury secrecy, as Murdoch (1908) said, "Anyone unconvinced of the incompetence of juries, should question a juror after his decision" (p. 69). He opines that the result will be more comic than intelligible. He cited the example of a manslaughter trial following the death of a man injured in a fight at a horse fair. The defense rested on a "thin skull" defense. The jury acquitted, noting in its verdict form that a man with a skull like deceased's had no right to attend a horse fair! As Friedland (1990) noted, jury secrecy helps to hide these "comic" results from the general public.

Given the vehemence of such criticism and its long history, it is surprising that we have kept alive such a system for the last few hundred years. However, there are several factors that help to explain the criminal jury's continuing survival.

Obstacles to Abolishing Trial by Jury

Americans' loyalty to the jury system predates the revolutionary war. Probably the single most important factor that led to our constitutional protection of a jury trial was the case of John Peter Zenger, an American colonist who was tried for seditious libel by the then governing British authorities in 1735. Three separate grand juries failed to indict him, forcing the New York Attorney General to file an Information against him. Despite the overwhelming evidence presented by the prosecutor, the petit jury acquitted him. Since then, various bouts of jury nullification have reinforced our devotion to the system. From colonialists' rejection of sedition and tax prosecutions to abolitionists' rejection of runaway slave statutes, Americans have embraced the jury system as a way to thwart the power of government. In the 50's and 60's, many southern juries nullified prosecutions targeting racial violence. Today, in the 90's some commentators perceive a similar wave of nullification by African-Americans in urban areas. (Holden, Cohen, & deLisser, 1995).

There is also some scholarly support of jury nullification. Wigmore maintained that the power of a jury to nullify the law was essential to assure justice because law

and justice will, on occasion, be in conflict (Hans & Vidmar, 1986). While juries do not have the legal right to nullify the law, Sparf and Hansen v. U.S., 156 US 51 (1896), some Supreme Court decisions, Duncan v. Louisiana, 391 US 145 (1968) and Taylor v. Louisiana, 419 US 522 (1975) imply that juries have the inherent power to do so. One court of appeals has been more direct. In U.S. v. Dougherty, 472 F.2d 1113 (D.C. Cir 1972), the court acknowledged that historically the jury has had the power to nullify the law and will do so when the circumstances warrant it.

Another factor weighing against abolishing juries in criminal trials is the alternative, which is usually a bench trial where the judge sits as the trier of fact. Taking the decision from incompetent jurors is no solution if the case is thrown in the lap of an incompetent judge. Many attorneys, and litigants, would surely agree with the statement that, "Apart from the occasional situation in which a judge possesses unique training however, the assumption that a jury collectively has less ability to comprehend complex material than does a single judge is an unjustified conclusion" (Higginbotham, 1977, p. 53). Higginbotham believes that a group working together is better equipped than a single judge to process large amounts of complex and technical information. He also believes that the presence of a jury forces lawyers to work harder to make facts and legal issues more understandable.

Furthermore, the jury system is more than a mere decision-making body. It serves a legitimizing function in a democratic society. The consequences of being found guilty in the criminal justice system can be exceedingly harsh, but it is easier for society to accept these consequences when they are directly participating in the process. de Tocqueville (1945) considered the jury to be "a political institution. . .one form of the sovereignty of the people. . ." (pg. 283). Abolishing criminal juries may increase accuracy in decision-making, but at the same time may decrease confidence in the legitimacy of the judicial system.

Reform of the Criminal Jury

There appears to be broad-based support among legal scholars and the populace for reform of the jury system. Sperlich (1982), for instance, argues that it would be more effective to seek changes in the jury rather than to restrict or abolish jury trial. There are myriad issues to be addressed, but this paper will focus on straightforward recommendations for changing how a jury receives its information, rather than any radical recommendations regarding the makeup of the jury itself. These recommendations will concern: 1) jury instructions; 2) the interaction between witnesses and jurors; and 3) expert testimony.

Helping Jurors Understand Jury Instructions

Friedland (1990) notes several studies which have suggested that jurors do not understand either the specific words used in the instructions, or the overall meaning of the instructions, thus disabling them from adequately applying those instructions to the evidence in the case. Alschuler and Deiss (1994) also claim that numerous studies demonstrate that jurors do not understand jury instructions.

In the prosecution of automaker John Delorean, for example, it was alleged that jurors misunderstood a crucial instruction requiring that their verdict be unanimous. They returned a verdict of acquittal even though the vote was only nine to three for acquittal (Friedland, 1990).

Jury instructions have come a long way since the 19th century. What started out

as colorful, frank and actually helpful, has become strained, legalistic and sometimes impenetrably abstruse. As jury instructions were originally the handiwork of the individual judge hearing the case, their quality varied widely and unfortunately gave undue discretion to the court to comment on the evidence. Perhaps in response to these abuses, states started to require instructions in writing. Any oral changes from those instructions could prompt reversal (Friedman, 1993). Some examples of instructions following this change in the law hardly showed how there had been an improvement. In a case cited by Friedman (1993) a jury in a manslaughter case in 1895 California was instructed that manslaughter was:

> ...the unlawful killing of a human being without malice. It is of two kinds: voluntary, upon a sudden quarrel or heat of passion; involuntary in the commission of an unlawful act which might produce death in an unlawful manner, or without due caution or circumspection. It must be an imperious necessity, or such an apparent necessity as would impress a reasonably prudent man that it existed. (p. 246-247)

While this is hardly an egregious example, it is hard to see how the jury benefited from such a speech. A request by the jury, after having deliberated a few hours, for further instructions brought a mere re-reading of the same legalese. It can hardly be presumed that they wanted to hear the judge drone on again through the same jabberwocky. What they wanted, and what juries want today, is for the judge to explain in plain English what those instructions meant. Unfortunately, that is precisely what the court cannot do, because of the rigid procedural rules mandated by the higher courts. In Florida, the Standard Jury Instructions first adopted in 1970 are mandatory. In fact, two Broward Circuit Court judges have been repeatedly reversed this past year for attempting to explain to jurors what is arguably the most important, and most difficult to understand, legal instruction of all, the reasonable doubt standard (Lowell, 1995). The relevant portion of the standard jury instruction reads that if "there is not an abiding conviction of guilt, or, if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable." (Florida Standard Jury Instructions, 1994, p. 1090). One trial judge was quoted as instructing the jury:

> But even though it's a very heavy burden, the State does not, and I repeat, stress, emphasize, the State does not have to convince a jury to an absolute certainty of the defendant's guilt. In other words you don't have to be one hundred percent certain that the defendant is guilty in order to find him guilty and that's because nothing is certain in life other than death and taxes. (Lowell, 1995, p. A11)

Apparently, the appellate court felt that any instruction with the words abiding and vacillating was too clear for jurors to have misunderstood or to need help in deciphering (Wilson v. State, 21 FLW D37). Coincidentally, while these cases were being decided in the lower courts, the Florida Supreme Court asked its Criminal Rules Committee to study possible changes in that very same instruction.

Jerome Frank (1930) also was a critic of jury instructions. Earlier this century he wrote:

> Time and money and lives are consumed in debating the precise words

> which the judge may address to the jury, although everyone who stops to see and think knows that those words might as well be spoken in a foreign language - that, indeed, for all the jury's understanding of them, they are spoken in a foreign language. Yet, everyday cases which have taken weeks to try are reversed by upper courts because a phrase or sentence, meaningless to the jury, has been included in, or omitted from the judge's charge. (p. 181)

Even the simple expedient of consulting a dictionary is denied the jurors. The first thing any person does when needing assistance while writing a simple letter or doing a crossword puzzle is forbidden to jurors contemplating a defendant's fate. Almost 40 years ago the Florida Supreme Court in Smith v. State, 95 So.2d 525 ruled that "under our Florida Statutes a dictionary is not one of those things permitted to be taken into the juryroom; and we therefore hold that it was error to permit the jury to have the use of a dictionary while deliberating its verdict" (p. 527). Later in Grissinger v. Griffin, 186 So.2d 58 (4DCA 1966) the 4th DCA held that:

> The trial court is the only source which the jurors may properly obtain the law or definition of legal terms...If members of the jury are permitted access to and use of an unabridged dictionary...they may proceed to torture the words in the court's charge from their true meaning. (p. 59)

This of course implies that jurors know the true meaning of the words used by the courts to begin with. This assumption flies in the face of virtually all research done on jury instructions. (Elwork, Alfini and Sales, 1982). The concerns addressed by these opinions, however, seem to skirt the issue. The courts appear to be concerned that the jurors would rely on dictionary definitions of legal terms; however, it is not the legal terms that give jurors problems. Those terms are defined by the Court. The jurors' problems ensue from the words used by the courts to define the legal terms. Therefore, if a judge continues to use terms such as abiding, vacillating, imperious, circumspection, predisposition, subterfuge, preponderance, and even speculate, merits and rebuttal, it is then incumbent upon that judge to offer some sort of definition for these words. This can be done by either providing the jurors with a standard dictionary; a more limited dictionary of words used in the standard jury instructions; or at the very least an instruction to jurors that if there is any word that they do not understand, the court will, upon request, provide them with the dictionary definition in open court. Failing that, the courts need to reconsider jury instructions with an eye toward rewriting them, using the common and plain words readily understood by the average person.

The widespread adoption of pattern or uniform instructions in the 60's and 70's was in response to the criticism of the quality of jury instructions earlier this century. These pattern instructions were usually drafted by committees made up of judges and lawyers, and were ostensibly designed to cut down on reversals caused by giving erroneous instructions, and to increase juror comprehension of the applicable law. Nieland (1979), however, noting that these drafting committees were universally composed of lawyers said "while these individuals communicate very well with each other in the special language of the law, few are well enough versed in semantics to communicate legal concepts to jurors... The primary objective of most drafting committees is likely to be in the area with which they are most familiar - the technical accuracy of instructions." (p. 23.) In fact, Elwork, Alfini and Sales (1982) found that studies had shown that juror comprehension had not increased as a result of the

adoption of pattern instructions, that pattern instructions still resulted in confused jurors. Their own study compared juror comprehension of non-standard instructions from a Nevada murder case and standard instructions from a Florida burglary case. Three hundred and fourteen mock jurors took part in the study. While the Florida pattern instructions were simpler and easier to understand than the Nevada instructions, they found that rewriting the jury instructions with the goal of using more understandable language led to statistically significant increases in juror comprehension in both cases.

This is not to say that legalese has no place in the law:

> Legalese has the compactness of a mathematical formula. Legalese cannot be judged by literary standards. In it everything must be subordinated to one paramount purpose: that is insuring that if words have to be interpreted by a court, they will be given the meaning the draftsman intended. Elegance cannot be expected from anyone so circumscribed. Indeed that it is hardly an exaggeration to say that the more readily a legal document appears to yield its meaning, the less likely it is to prove unambiguous. (Fowler, 1965, p. 411-412)

While legalese may be of inestimable value to lawyers and judges well versed in its usage, it is of doubtful value to lay people sitting on a jury. One only has to look at the practice of lawyers addressing the jury in either opening or closing arguments. The most successful experienced attorneys find a way to communicate to the jury in plain, straightforward English, neither talking over them nor talking down to them. There is no reason for the judge, when he or she in turn addresses the jury, to speak any differently.

Helping Jurors Understand the Testimony

Jurors often have as much trouble understanding the testimony as they do the jury instructions. One of the main impediments to jurors' comprehension of testimony is the one-way communication between witnesses and jurors (Shrallow, 1991). Jurors must sit passively, sometimes for days or weeks, listening to one witness after another. This method of communication, completely different from how people communicate in their day to day lives, can easily lead to boredom and frustration. Allowing juror notes and questions, however, can greatly enhance juror comprehension and decision making.

Juror Note Taking

One aforementioned way to increase juror competence is to allow jurors to take notes during testimony. Many commentators, including trial judges, have argued for its widespread adoption. It has been tried in the federal courts, as well as various state courts (Valen, 1993). Here in Florida, several judges in Palm Beach County have adopted the practice for some years (Silverman and Colby, 1991).

Despite the many positive experiences and numerous studies demonstrating the efficacy of such tools, it has not been adopted as standard practice as most judges apparently are reluctant to part with tradition. Indeed, some are even under the mistaken impression that it is not allowed. Heuer and Penrod (1990) surveyed 553 trial judges from around the United States. They found that 37 percent of the judges never allowed note taking during their trials and 77 percent reported never allowing juror questions during trial. The judges who allowed either procedure reported that note taking was only used in 33 percent of their trials and juror questioning was only used in

1 percent of their trials. Many judges are also surprised to learn that ABA guidelines encourage the use of questions and note taking.

Silverman and Colby (1991) found that most judges and lawyers were unaware that it is well settled law in Florida that allowing juror note taking is discretionary with the trial judge. The Florida Supreme Court specifically addressed the issue in Kelly v. State, 486 So.2d 578 (Fla. 1986) and concluded that trial judges have the discretion to allow note-taking by jurors and to allow the jurors to use those notes in their deliberations.

Those in favor of juror note taking claim that it increases juror recall and lessens confusion. This would seem to be a logical conclusion. College students take notes in classes. Lawyers take notes when opposing counsel is examining a witness, and the judge himself takes copious notes throughout the proceeding. During a bench trial, judges are apt to take even more notes when they're sitting as a finder of fact. Common sense alone supports the notion that if all these people benefit from note taking, it only stands to reason that jurors would also.

One objection to allowing juror note taking is the fear that jurors would miss crucial testimony while writing down notes. But this is possible even when there is no note taking allowed. That is why jurors are admonished to rely on their collective memory. Whatever the danger is of missing testimony, it would seem to be outweighed by the danger of forgetting testimony, especially in some of the longer trials. The court in U.S. v. Bassler, 651 F.2d 600 (8 ClR. 1981) opined that note taking may seek to focus the jurors' attention in the trial and keep their minds from wandering. It also saw a benefit in being able to write down calculations, money figures, and experimental results that may be difficult to remember later.

Another objection to juror note taking is that jurors who take notes would have undue influence over jurors who didn't because the former would have proof of what was said right there in black and white. While this is possible, this argument is of doubtful validity. Some jurors can always unduly influence others depending on their personality, character, and strength of their arguments. All these concerns, however, can be lessened or dissipated by appropriate instructions. The following proposed instruction taken from Silverman and Colby (1991) would seem to address all the concerns:

> You have probably noticed that note pads and pencils are provided to you so that you may take notes during the trial if you desire to do so. The taking of notes by jurors is discretionary with the trial judge. I am going to exercise that discretion by allowing you to take notes during the trial and to carry those notes with you to the jury room during your deliberations.
> However, there are some dangers associated with note-taking by jurors about which I will caution you. First, there is the possibility that a juror may become so engrossed in taking notes that the juror may fail to see or hear other evidence, or he or she may fail to appreciate the demeanor of a witness. Also, when a juror uses the notes during the jury's deliberations, there may be a tendency for other jurors to rely on those notes and to abandon their recollection of the evidence. If your recollection of the evidence differs from the notes taken, you should not abandon that recollection merely because of what is contained in the written notes. You should, therefore, not allow the opinion or position of a juror who is relying on written notes to be given greater weight solely because that juror took

> notes. After you have completed your deliberations, your notes will be placed into an envelope that will be provided to you when you retire to consider your verdict. The notes will be delivered to me after the trial and I will personally destroy them - unread. You are instructed that although note pads are furnished, you are not required to take notes. (p. 34)

The bottom line is, of course, that note taking is always optional for the jurors, not mandatory.

Juror Questioning

Another closely related tool for jurors, and one usually seen in the literature in conjunction with note taking is juror questioning. Juror questioning of witnesses has also been tried in numerous places at numerous times. The argument for juror questioning is even stronger, albeit, the concerns are likewise greater. Juror questioning of witnesses dates back at least to the nineteenth century (Valen, 1993).

Any courtroom observer will notice that many players in the courtroom scene ask questions. Lawyers ask the witnesses to repeat or clarify answers, the judge asks the attorneys to repeat or clarify questions, opposing counsel chime in when they feel they've missed something, even the court reporter will pipe up if she doesn't understand something just said. In fact, everybody in the courtroom can ask questions except for the very people deciding the case.

Shrallow (1991) found that the vast majority of judges do not allow juror notes and questions despite its advantages and opined that the reason was primarily fear of reversal and following long-standing legal tradition. Of course, this tradition began at a time when trials were much, much shorter as she and Friedman (1993) found.

Some of the reluctance to allow juror questions may stem from the belief that it is unnecessary since each side is represented by a competent attorney who is paid to bring out all the necessary information for the benefit of the jury. Advocates are often so steeped in the facts of the case, however, that they sometimes assume some things are more obvious than they really are, to the detriment of the juror and their client. Valen (1993) reports an example during an arson trial when the time the fire was reported became a critical issue. Neither side had brought the information out and it was left to the jury to ask the question, a question so obvious that counsel for both sides forgot to ask it.

College professors are also trained professionals paid to communicate a certain subject matter to an educated audience. Typically, students find the need to ask at least some questions in order to clarify the material. What then of a lay jury with no particular educational prerequisites in an unfamiliar setting forced to listen to the slow, awkward, stilted procedure called direct examination? Throw into the scenario a nervous witness, an inartful questioner, an obstreperous opposing counsel, and perhaps bad acoustics, and it's a wonder the jury can get anything from the process.

Some lawyers also fear losing control of the case or of allowing passive, neutral juries to become too much of an advocate as they get caught up in their questioning. There is also concern that jurors would ask objectionable questions and that objecting attorneys would lose credibility with the jury. While these are valid concerns, they really relate more to how the questioning is done rather than if it is done. Most of these concerns relate to the practice of allowing uncensored oral questions from the jury, a procedure nearly universally condemned. Generally, the procedure is to allow the jurors to submit written questions to the judge for his consideration. Under this practice, the

concerns expressed have yet to materialize, at least in the experience of the various judges who have written on the subject.

Valen (1993) suggests that jurors be required to wait until the attorneys are finished with their questioning and then submit written questions to the judge who will review them with the attorneys, make whatever changes are necessary and then read it to the witness if not objected to. Objections would be done at sidebar while reviewing the questions with the judge. Judge Valen also instructs his juries not to consider themselves as advocates that it is primarily the lawyers' responsibility to present the case and evidence, but if they have a question they feel is necessary to have answered, they are permitted to ask it.

J. Frankel, a circuit judge in Dane County, Wisconsin, allows each lawyer an opportunity to ask follow-up questions if a juror question is put to the witness. His experience is that most frequently, jurors ask rather straightforward, non-argumentative questions. Jury questions tend to focus on matters of time, place, distance, and relationships between witnesses. Based on conversations with jurors after trial, Frankel believes that the overwhelming majority of jurors are decidedly enthusiastic about the opportunity to ask questions. He also believes that the opportunity to ask questions reduces requests to re-read testimony and shortens deliberations which would seem to more than offset the time spent in allowing the questions to be asked (Frankel, 1990).

The few appellate decisions in Florida that address juror questions unequivocally state that it is within the sound discretion of the court. None of the cases however, suggest or mandate a particular procedure nor do they articulate what would be an abuse of discretion. Once again Silverman and Colby (1991) propose an instruction based on federal cases and the practice in other states that have allowed juror questioning. The instruction reads:

> If during the course of the trial you would like a particular question asked of a witness, this court has a procedure by which that can be done. After all the attorneys have completed their questioning of the witness, you should raise your hand. I will then give you sufficient time to write the question on a piece of paper, and upon its completion the bailiff will take it from you and pass it up to me. You must not discuss your question among yourselves. In other words, your question must be private. Once I have all of the questions, I will go over them with the attorneys outside of your presence. From time to time we will decide that there are certain questions that we cannot ask under the rules of law. Sometimes, I will edit the question just a little bit. In short, if the question is legally proper, I will direct it to the witness. After all of your questions are asked, the attorneys will be afforded an opportunity to present further questions to the witness on the subjects raised by your question and the answers given. The court does not want to encourage you to ask large numbers of questions, but you should not hesitate to ask a question if you feel there is something you need to know from a witness, and the lawyers or the court have not brought it out. This is a very useful procedure for you to get all of the facts that are important in this case. (p. 36)

Such an instruction again addresses most, if not all, of the concerns regarding juror questions and almost certainly will pass appellate review.

Whatever extra time is invested in allowing juror questions is more than made up

for by less time wasted in deliberation or even worse, a hung jury. Even if there is no net gain realized in time, if juror questions lead to a fairer, more accurate trial, the due process mandates its use whatever the increase in time may be.

Helping Jurors Understand Experts

Most jurisdictions including Florida allow the use of expert testimony. Under Fla.R.Crim.P. 90.702, an expert may testify as to his opinion if the court finds the testimony will aid the jury in determining factual issues or understanding the evidence. The use of expert testimony is seen as necessary to help juries understand evidence about such technical topics as fingerprints, serology, blood splatter analysis, DNA and, more frequently from the defense side, testimony regarding Battered Women's Syndrome, Post-Traumatic Stress Disorder, Organic Brain Dysfunction, Voluntary Intoxication and a host of mental disorders.

Furthermore, opinion testimony is not objectionable because it includes an ultimate issue to be decided by the jury (Fla.R.Crim.P. 90.701). Of course, jurors are free to reject the expert's testimony in whole or in part, but it is difficult to imagine a group of lay people rejecting the opinion of an expert presumably carrying impressive credentials testifying about a matter within his expertise and substituting their own judgement for his. Of course, jurors frequently do reject expert testimony, but it is debatable whether it is a result of close analysis of the expert's testimony and credentials, or merely a rejection of the science behind the opinion, in essence, a jury nullification of the defense. This is especially true in cases involving insanity defense, which is often viewed with disfavor and skepticism by juries.

Use of experts dates back centuries. In one case in 1353, surgeons were called to testify as to whether a wound amounted to mayhem and in a fifteenth century case grammarians were asked to testify about the meaning of certain Latin words (Weinstein, 1989). Originally, expert witnesses like these were considered to be assistants of the court. It was only in the seventeenth century that experts began to be considered witnesses. The eighteenth century ushered in the common law rules regarding opinion testimony.

What started out as a way to educate to jurors about a technical topic and to assist them in understanding technical evidence has been corrupted by the astounding increase in experts willing to testify for big fees. There is no issue, big or small, where one cannot find a range of opinions to pick and choose from (Elliott, 1989). Alschuler and Deiss (1994) refer to them as "saxophones" for their penchant for playing whatever tune they are asked to play. Weinstein (1989) said:

> An expert can be found to testify to the truth of almost any factual theory, no matter how frivolous, thus validating the case sufficiently to avoid summary judgment and force the matter to trial. At the trial itself an expert's testimony can be used to obfuscate what would otherwise be a simple case. The most tenuous factual bases are sufficient to produce firm opinions to a high degree of 'medical (or other expert) probability' or even of 'certainty.' Juries and judges can be, and sometimes are, misled by the expert-for-hire.

One can only imagine what jurors must think when they hear two, four, or even six experts with equally impressive credentials, testify with certainty to directly conflicting opinions on the same facts.

In the Simpson case, alluded to at the beginning of this article, the defense was able to present numerous witnesses to attack the state's DNA evidence. They generally testified that the test results were invalid because the blood was handled improperly, contaminated at the scene and at the lab, the lab itself was suspect, the test used was inappropriate, the state's experts were unqualified, and the state's math in figuring the odds was wrong. Let's imagine for a moment that the blood samples did not match Mr. Simpson, or better yet, matched some other identifiable suspect. Is there any doubt that the defense would have been able to find experts to testify to exactly the opposite testimony elicited at the Simpson trial?

Elliott (1989) claims that jurors are not only ill equipped to understand technical scientific evidence themselves, he says they cannot distinguish between charlatans and Nobel Prize winners. One alternative is to substitute one neutral expert appointed by the court to substitute for experts picked by the prosecution and defense for their bias. The concept is not new. As far back as the turn of the century, Judge Learned Hand called for the appointment of advisory panels of experts as a solution to the "battle of experts for hire".

Most judges in this country, however, appear to be reluctant to make use of court-appointed experts. Elliott (1989) claims that the reluctance of judges to appoint neutral experts has to do with skepticism that there is such a thing as a truly neutral unbiased expert on any subject. He believes, however, that if litigants can search for and select experts based on their particular biases, then the court should be able to search for and find experts based on their lack of bias. While these experts may not be perfectly neutral, he argues that they will be far more unbiased than any experts picked by the parties. These experts would act as assistants of the court rather than partisan witnesses. Their role should be to help jurors understand complex technical evidence rather than attempt to influence them in one way or the other. This procedure, if adopted, would more closely resemble what was originally intended by the rules of evidence in allowing expert testimony, and decrease juror confusion caused by the "battle of experts for hire".

There are two ways these neutral experts can be used. One is to allow only court appointed experts to testify as assistants to the court. The other is to integrate these experts into the already existing scheme, to give the jurors an alternative to picking an expert from one side or the other.

Not all the commentators are in agreement however. Jacobs (1993) states that those who claim that jurors can't distinguish the charlatan from the Nobel Prize winners (in the context of expert witnesses) fail to give enough credit to the strength and vitality of the adversarial system, and its ability to expose flaws and weaknesses in the evidence.

Others argue that the importance attached to expert testimony is exaggerated. Imwinkelried (1982), for instance, asserts that there is little or no objective support for the assertion that jurors attach too much weight to scientific evidence. Even if that were true, however, it doesn't really resolve the issue. Perhaps jurors <u>should</u> be attaching greater weight to scientific evidence. Perhaps the fact they are not is an indication they are rejecting scientific evidence altogether because of their inability to sort out the conflicting testimony, and are relying instead on whatever else has been presented as evidence. If so, we are depriving jurors of what could be extremely helpful evidence in deciding the case.

Conclusion

Despite sporadic calls for its abolition, it is unlikely that we will ever completely reject criminal jury trials in this country. Regardless of its real or perceived defects, the jury serves an important function in our society separate and apart from its fact-finding and decision-making role. It allows direct grass roots participation in one of the branches of government, its historical power of nullification is an important check on government excess, and for all its flaws, there is no alternative which has been demonstrated to be clearly superior. There is, however, support for reform. Some minor changes in the way trials are conducted can go a long way in assisting juries to better understand proceedings, and to achieve better and fairer results. One way is to help jurors understand complex jury instructions by simplifying the instructions or providing better definitions of the terms used in those instructions. Changes can also be made to help jurors better understand the evidence put before them. Allowing jurors to ask questions and take notes has been demonstrated to increase their understanding and recall of the facts. Finally, using court-appointed experts to assist and educate jurors faced with technical or complex evidence would lessen juror confusion caused by biased, partisan expert witnesses.

Much of the criticism of the proposed reforms is based on explicit or implicit assumptions about the intelligence or abilities of jurors. Such assumptions are unfair and unwarranted. Jurors are by and large imbued with common sense. It would be unnecessary and unwise to give up on such an important part of the criminal justice system without first trying to unshackle jurors from archaic practices and tradition.

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