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## **JURORS ON TRIAL**

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*Introduction*—In 1937 Osborn, a keen observer of many jury trials, commented: "Someone has said that the invention of the jury system is one of the 'splendid achievements of civilization,' but its splendor is now and then somewhat dimmed when some juror frankly tells just what occurred in some jury-room. If for a term of court or two a complete transcript of all the comments, criticisms, and reasons of jurors in juryrooms could be made and furnished to the newspapers it would no doubt furnish some suggestions looking toward improvement. If this exposure did not bring about the total abolition of the jury system, it would perhaps tend to bring about improvement in some of the methods of selecting jurors, or perhaps a selection of the kind of cases to be submitted to juries."

Elsewhere the jury's general verdict has been called the "great procedural opiate." It successfully conceals the truth when jurors discard the legal rules and the evidence to bring in a verdict out of their own heads or hearts, and when they mean to apply the legal rules as per the judge's instructions but fail to do so because they don't understand them properly. More than anything else in the judicial system, the jury, I think, blocks the road to bettering the ways of finding the facts and applying to those facts the correct legal rules. This charge, however, is hard to prove. For close-up study of juries is not easy. In 1947, two of my students tried to make a survey, by interviews and questionnaires, of jurors' responses to particular trials in which they had served. The students asked the help of numerous judges. All these judges refused. The project was labeled "improper." Strange, isn't it, that the actual performance of one of our most highly praised institutions should be thus insulated from scrutiny.

Hoffman and Brodley were luckier. Perhaps they picked more pro-

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gressive judges; perhaps in 1952 judges are a bit more suspicious of the folk-tales about the jury than they were in 1947. Anyway these men have made a dent in the jury's traditional inaccessibility, have contrived a peep-hole which later may be turned into a window. They have shown something can and should be done to find out if the jury is doing its job as advertised. Here is a province of lawyerdom badly in need of more research, reason, and responsibility. Maybe the experiences and headaches of these men in setting up machinery for their survey will help others in more ambitious studies of jury operations.—Jerome Frank.\*\*

Few fields of law have been more profusely, or more vehemently written on than the jury.<sup>1</sup> The subject is one on which emotions often form the basis of argument. And yet there are few fields about which there is as little reliable knowledge. The workings of the jury are as a matter of course shrouded in mystery. Legal devices to mitigate this (for example, the special verdict) have proved ineffective.<sup>2</sup> The theory of our law is that the jury will do its job best in an atmosphere of secrecy and confidence. However correct this assumption may be, it has made intelligent evaluation of the work of the jury most difficult.

Following suggestions made by Judge Jerome Frank<sup>3</sup> we set about

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1. In criticism of the jury, see FRANK, *LAW AND THE MODERN MIND* 181 (1930); Duane, *Civil Jury Should be Abolished*, 12 J. AM. JUD. SOC'Y 137 (1930); Clark and Shulman, *Jury Trial in Civil Cases—A Study in Judicial Administration*, 43 YALE L. J. 867 (1934).

In defense of the jury, see Hartshorn, *Jury Verdicts: A Study of Their Characteristics and Trends*, 35 A.B.A.J. 113 (1949); Goodman, *In Defense of our Jury System* (reply to Jerome Frank), 177 COLLIER'S 24 (April 21, 1951); Wigmore, *A Program For The Trial of Jury Trial*, 12 J. AM. JUD. SOC'Y 166 (1930).

For general discussion see Parker, *Improvement of Jury System in Federal Courts*, 35 GEO. L. J. 500 (1947).

2. The special verdict though offering arguable advantages is surrounded with encumbering technicalities. Like the special interrogatory and the "simplified special verdict" (simplified interrogatories on main issues of a case), the special verdict has not been used widely, and the jury can circumvent its entire purpose by filling in answers so as to give the desired result. See James, *Functions of Judge and Jury in Negligence Cases*, 58 YALE L. J. 667, 683, 684 (1949). For support of the special verdict see Sunderland, *Verdicts, General and Special*, 29 YALE L. J. 253 (1920).

3. Judge Frank has written widely and critically on the jury system. See, *LAW AND THE MODERN MIND* (1930); *COURTS ON TRIAL* (1949); "Short of Sickness and Death": *A Study of Moral Responsibility in Legal Criticism*. 26 N.Y.U. L. REV. 545 (1951); *Something's Wrong With Our Jury System*, 126 COLLIER'S 28 (Dec. 9, 1950).

probing into this much written about but nevertheless obscure subject, with a new approach: we sought to make an empirical study—as opposed to almost all other studies of the jury, which are theoretical.

Such an approach, moreover, appears to be the only practical approach for anyone who sincerely wishes a change in the existing system. The idea of the “twelve good men and true” has become a metaphysical concept; the workings of the jury have been surrounded not only with mystery, but with an aura of mystical respect and admiration. Mere analysis, however penetrating, appears unlikely to work a change; but in our scientifically oriented society a quantitative demonstration of the jury’s ineffectiveness might provide the necessary impetus for reform.

#### EARLY ATTEMPTS AT AN EMPIRICAL STUDY

In 1935 two Ohio State University law professors made the first empirical attempt to probe into one of the darkest corners of the law—the law in the jury room.<sup>4</sup> They made no attempt to work out a systematic test of any sort, but questioned jurors in their homes on sundry points which the professors thought significant or interesting when they heard the actual trial. For example, in one case involving a suit by the holder of a promissory note against the maker, the judge had instructed the jury that if the holder was a holder in due course without notice of the original transaction (which was not supported by consideration), the maker could not raise the defense of lack of consideration. The professors wished to see whether the jury had applied this rule correctly. They found that the jury had not applied it at all.<sup>5</sup>

The professors made no attempt in their article to compile the results of their interviews (which extended over three months) but simply cited three or four more examples similar to the one above, and then drew conclusions. Their main point was that the jury does not understand the legal rules involved in many cases and does not apply them.

In 1947 Federal District Court Judges Hervey and Murrah made a more systematic attempt to examine the workings of the jury system.<sup>6</sup> They sent out questionnaires to 375 federal and state jurors who had sat in the Federal and state courts of Oklahoma, Kansas and Colorado. 202 satisfac-

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4. Hunter, *Law in the Jury Room*, 2 OHIO ST. L. J. 1 (1935).

5. *Id.* at 14.

6. Hervey, *The Jurors Look at Our Judges*, 19 OKLA. B. A. J. 1508 (1947).

tory replies came back. The questionnaire consisted of 15 short answer questions and one discussion question. The short answer questions were all what one might term "general evaluation" questions. For example: "Did you understand clearly the instructions of the judge to the jury?"<sup>7</sup> "Did you personally consider the verdict rendered by the jury on which you sat, to be fair?"<sup>8</sup> "Do you believe that false testimony (perjury) was used in the case?"<sup>9</sup> Finally, the questionnaire asked, "What suggestion, if any, would you offer to improve the administration of justice?"

The most significant results of the study were these—that of the 185 jurors who answered the question, 73 said they did not clearly understand the judge's instructions;<sup>10</sup> only 12 out of the 117 answering the question "Would you have been willing to have a case in which you were involved tried in this court?", replied in the negative.<sup>11</sup> Among some of the suggestions made by jurors to improve trials: schools for jurors, shorter recesses, shorter closing speeches by lawyers, longer instructions by the judge with less use of legal phrases, opportunity to question the witnesses themselves.<sup>12</sup>

Though a worthy study, the work of Judges Hervey and Murrah falls short of truly empirical analysis of the jury system. They asked nothing but attitude questions and even these were too general to be of any specific help. There was no attempt to test the effectiveness with which the jury performed its functions. To rely entirely on how well they *thought* they carried out their duties is unrealistic and psychologically unsound.<sup>13</sup>

Although both of these studies tend to show that at times the jury system works badly, they omit what for many is the crucial question: How often and to what extent does the jury misperform? Legal writers who discuss the pros and cons of the jury necessarily base their analysis on some sort of an estimate of the frequency with which the jury acts poorly.<sup>14</sup> Such estimates vary as widely as the differences in views of the value of the jury.

7. *Id.* at 1511.

8. *Ibid.*

9. *Id.* at 1512.

10. *Id.* at 1511.

11. *Id.* at 1512.

12. *Id.* at 1512-13. A similar study with similar defects is reported by Moffat, *As Jurors See a Lawsuit*, 24 ORE. L. REV. 199 (1945).

13. For an example of how opposite belief and fact can sometimes be, see Marston, *Is the Jury Ever Right*, 9 FLA. L. J. 554 (1935).

14. See *e.g.* Goodman, *op. cit. supra* note 1; Hartshorn, *op. cit. supra* note 1.

## THE NATURE OF OUR STUDY

With the aid of Judge Jerome Frank we conceived the idea of running tests on individual juries immediately after they had rendered their verdict. We wanted to allow as little time as possible to elapse between the actual deliberation in the jury room and our test.

We tried to devise a test which would to as large a degree as possible give us information on specific ways and instances in which the jury did, or did not, carry out its functions. We gave them a true and false examination on the facts of the case. When we asked for their attitudes we were very specific. Rather than ask them if they *thought* the jury should have more time to consider its verdict, we asked, "Answer yes or no: The pressure to arrive at a quick decision prevented me from having sufficient time to consider the problem in this case as thoroughly as I would have liked to."

Moreover, we tried to fill in for any oversights in our questionnaire by asking a number of general questions in which we allowed the jurors to "write freely whatever comes to your mind." Many of the answers to these questions were, as would be expected, too general to be helpful, but others were quite useful.

Our questionnaire contained the following types of questions:

1. *General, free association type questions:* e.g. "Would you like to be a juror again? Why?" and "What did you like least about the trial?"
2. *Specific responses to this trial:* e.g. "If I needed an attorney, and had to choose between the two attorneys in this trial, I would hire: P's attorney; D's attorney; Could not decide because both were equally good or bad," or "Because of the harshness of the rules of law applicable here, we did not follow the rules exactly. Answer yes or no."
3. *Specific attitudes to court room situations which might or might not have arisen in this trial:* e.g. "If the law as given to you by the Judge in his charge is unfair, it is your duty as a juror to alter the law in this particular case so as to give a fair result. Answer yes or no."
4. *Factual questions on specific points in the case decided:* e.g. "Answer true or false: Defendant motioned with his hand before the accident and then moved back about 100 feet."

We asked for a small amount of biographic information: Occupation, sex, age, previous jury experience, education, marital status. We prefaced the questionnaire with the following: "This is part of a study of court room

procedures. Do *NOT* write your name on any of the following pages. We do not wish to know who fills out a particular questionnaire. Please answer frankly and to the best of your knowledge. This survey will be worthless unless you do. We appreciate your help in this project."

We gave the test to a jury sitting in a mock trial at the Yale Law School. The jury was *not* composed of law students, however, but of working people from New Haven.<sup>15</sup> Then we ran the test on three juries sitting in the Municipal Court of one of our largest cities. We generally found the jurors cooperative; it took them from 15 to 30 minutes to fill out our questionnaire.

As we ran our test on only four trials, on a total of 28 jurors in all,<sup>16</sup> we do not claim that we have established any general propositions about the value, or lack of it, of the jury. This is not the attitude with which we publish our study. We rather wish to demonstrate a method by which it is possible to get epirical evidence on the functioning of the jury system, and the kind of results which such a method gave us. We hope that this article will encourage others with greater resources, both of time and money, to undertake a more exhaustive study.

We do claim that our study offers *some* evidence, tentative though it may be, on the capability of the jury. We have organized the results of our efforts along nine key questions which critics have asked about the jury. They are as follows:

1. Does the jury try the lawyers?
2. Does the jury ignore instructions by the judge to disregard a statement previously made?
3. Does the jury tend to presume guilt merely because the defendant has been indicted?
4. Does the jury's preconceived prejudices and beliefs interfere with its fact-finding process?
5. Does the jury's presence encourage a fight atmosphere in the courtroom?
6. Does the jury tend to disregard the rules of law presented in the judge's charge?
7. Do the legal technicalities of a trial confuse and annoy the jury?

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15. The presiding judge was Stephen S. Chandler, Jr., United States District Court Judge, Western District of Oklahoma.

16. This consisted of eighteen jurors from the three Municipal Court trials and ten jurors from the Yale Law School trial. The Municipal Court limits its jurors to six persons. A minimum of five jurors must concur in order to reach a verdict.

8. Does the jury recollect the facts accurately?
9. Does the jury provide adequate cures for legislative ills?

#### THE CASES WHICH FORMED THE SUBJECT MATTER OF OUR STUDY

We ran our test on three municipal court cases which we shall, for convenience, label Trials A, B, and C. Trial A was a tort case arising as the result of personal injuries sustained in an automobile accident.<sup>17</sup> Trial B was a contracts case centering around the alleged breach of a contract to join a health club and pay dues.<sup>18</sup> Trial C was a rather complicated sales case in which a corporation was suing one of its officers for money due on an engineering design the company had sold to the officer and which he was refusing to pay because of an alleged defect, and in addition counterclaiming for damages.<sup>19</sup>

The Yale Law School Barrister's Union case which we used as a trial

17. Plaintiff was parked at a drive-in diner. He was eating hamburgers in the car with his family. Suddenly, the defendant backed his car into the rear of plaintiff's car. The plaintiff claimed \$100 property damage to his car and \$1000 for personal injuries. A doctor testified that plaintiff had lost time from his job as a result of the accident, and that plaintiff had payed a bill to him for \$40.

The defendant, represented by a lawyer from his insurance company, admitted that he had been drinking beer a few hours before and was negligent in hitting the plaintiff's car; but he claimed the damages were negligible, that he had only barely touched the plaintiff's car.

After deliberating an hour, the jury by a unanimous vote found for the plaintiff, but only awarded \$25 as damages.

18. The plaintiff, a men's health club, sued the defendants on promissory notes they had signed. The defendants signed these notes in order to pay their dues under a contract for one year's membership in the club. They signed after making one free visit to the club and trying out its facilities. The defendants testified that a salesman for the club, who was present at the time they signed the notes and membership contract, told them that they would not be bound to pay if they did not wish to stay in the club. The salesman and the club manager, who was also present, denied that any such thing was said.

The jury after deliberating an hour and ten minutes reached a 5-1 verdict for the defendants.

19. This presented by far the most complicated factual situation of the three cases. It was a suit by a closely held corporation against a debtor with a counterclaim for damages by the debtor. The corporation was formed by the defendant and a few others to capitalize on a new idea one of the organizers had for the control of sound. The debtor, defendant in this case and an officer of the corporation, bought on credit from the corporation one of the engineering designs for sound control. The debtor then contracted with a firm of engineers to build a sound control unit, but it did not work. The engineering company refused to give the debtor his money back because, they said, the plans were defective. Debtor then sued the engineering company to get his money back but lost.

Meanwhile, the debtor, because of internal dissension, left his post with the corporation. He gave it notes for \$750 to cover his indebtedness to it. Upon losing his action against the engineering firm, the debtor-defendant who had already paid \$175, refused to pay the balance due, claiming the corporation owed him \$2,400 in damages which he had sustained because of the defective plans. Thereupon the

run for our study was a rape case in which the defendant contended that the complaining witness, a nineteen year old nurse, had consented to intercourse after considerable drinking.<sup>20</sup>

Specific reference to the backgrounds of the jurors will be made as we discuss our study, but it is worthy of mention at the outset that of the eighteen who sat on the three municipal cases, 50% had either attended or graduated from college, and of these, two had even done graduate work. It is unlikely that many juries possess such a well educated group within their numbers.<sup>21</sup>

Trials A and B were short, less than a day, and the jurors were very cooperative in filling out our questionnaire. Trial C lasted over two days, was marked by antagonism and lack of courtesy between the parties and their attorneys, and resulted in the jurors being quite uncooperative about answering our questions. Only two of the six completed the form.

#### THE RESULTS OF OUR STUDY

We shall now proceed through each of the nine questions and marshal all the significant evidence we have gathered on each point.

##### 1. *Does the jury try the lawyers?*<sup>22</sup>

We thought one of the best ways to test this proposition would be to ask the jurors which of the two attorneys they would hire if they were on trial, and then correlate the results with the side they voted for. Our question read:

"If I needed an attorney and had to choose between the attorneys in this case, I would hire:

- (a) Plaintiff's attorney.
- (b) Defendant's attorney.

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corporation brought suit for the balance due on the notes, \$575, and the defendant counterclaimed for the difference between \$2,400 and \$575, \$1,825.

After being out for only one half hour, the jury came to the unanimous verdict that the defendant was liable for the balance due and that his counterclaim was without merit.

20. The defendant, married and the father of three children, was charged with the rape of the complaining witness. The complainant was nineteen at the time of the alleged crime and in training as a nurse in a local hospital. She claimed that the defendant tricked her into going out with him for the evening and without provocation forcibly ravished her.

The defendant denied tricking the complainant into going out with him, and contended that after considerable drinking, she consented to intercourse.

21. See generally Schlinger, *Improving the Juror*, 1 TEXAS LAW AND LEGIS. 55 (1947).

22. This has been asserted by various legal writers. See e.g. GOLDSTEIN, TRIAL TECHNIQUES 152 (1943); FRANK, COURTS ON TRIAL 121-2 (1949).

(c) Could not decide because both were equally good, or bad."

Of the fourteen jurors answering the question<sup>23</sup> only two would have hired the attorney of the side they voted against, while six would have hired the lawyer of the side for which they voted and six had no preference. Thus 75% of those who thought there was any difference in the ability of counsel voted for the side represented by the attorneys they would hire.

Furthermore, in answer to the question: "What was your opinion and reaction to the various attorneys?", seven jurors on thirteen occasions gave favorable descriptions of counsel of the side they voted for, while at the same time giving less favorable statements about counsel of the side they voted against. Only one juror expressed remarks against the side he voted for and in favor of the side he voted against, and he did this only once. For example, one juror voting for the defendant called defendant's counsel a "very bright attorney," but termed plaintiff's attorney "fair," another voting for defendant called the latter's counsel "good," and opposing counsel "O.K." Still another labelled counsel of the side he voted for as a "sharp good man," and the losing attorney as demonstrating "lack of eloquence," (and this lack was what this juror, a college graduate, listed as "liking least about the trial.")<sup>24</sup>

We used two other questions to discover the juror's reaction to the attorneys. As to both plaintiff's and defendant's attorney we asked that the jury check any of the following characteristics which would apply: "In-sincere, dishonest, too well dressed, boring, cruel and harsh, very convincing, a good actor, a person who aroused sympathy for his side," or add any other descriptions which they thought applicable.

In answers to this question we observed the same trend. Those voting for a particular side found that side's attorney "very convincing," and, perhaps curiously, "a good actor." The attorney of the side they voted against was, in the words of one juror, "boring," and in the words of another, "convincing, but not enough."

2. *Does the jury ignore instructions by the judge to disregard a statement previously made?*

It is frequently argued by critics of the jury that directions by a judge

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23. Four jurors in trial C refused to answer the question.

24. He said, in addition, that plaintiff's attorney was "boring," and that defendant's attorney (the side he voted for) was "efficient, convincing."

to disregard certain statements are totally ignored by the jury.<sup>25</sup> Our survey gave color to this charge. In trial A the following testimony of the plaintiff was ordered stricken by the judge: "Defendant asked me to 'take a walk' with him, having the intention of fighting with me. There was alcohol on defendant's breath." To test the effectiveness of the judge's order, we asked the jury if they should consider this testimony, and to explain their answer. Some thought the evidence was of probative value, while some did not, but of the six, only one (who had served as a juror 20 times before) remembered that the jury was supposed to disregard it entirely.

We asked a similar question in trial C,<sup>26</sup> and in the Yale Barrister's Union trial. In the latter trial (a rape case) the attorney for the defendant in his cross examination of the complainant asked if she had informed the defendant that she was a virgin. Her response was that she had not. Counsel then remarked sarcastically that it was indeed unfortunate that she had neglected to use the most effective weapon at her disposal to halt the defendant. Opposing counsel objected to this comment by the defense attorney. The court ordered it stricken from the record and informed the jury that they were "of course" not to consider it.

To test the effectiveness of this instruction by the judge we asked the jurors in our questionnaire if they should give consideration in their determinations to the fact that ". . . counsel for defendant, in his cross examination of Beatrice (the complainant) stated that the most effective thing she could have done to stop the defendant's attack was to tell him she was a virgin." All of the seven jurors who answered the question<sup>27</sup> wholly ignored the instruction of the judge that "of course" they should not consider counsel's improper remark.

All of them attacked the substantive value of the remark. For example, one juror (the youngest) stated that the jury should not consider this statement because "a man intent on rape hardly would stop because the girl told him she was a virgin. In fact, it would probably heighten his de-

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25. See MOORE, TREATISE ON FACTS 36 (1908) for a discussion of cases reversed on the ground that "illegal evidence was heard by the jury and gained such lodgement in their minds that no instruction by the trial judge to disregard it could possibly be faithfully executed by conscientious jurymen."

26. Of the two jurors answering, both would have given the excluded statement substantive weight.

27. Three jurors failed to answer the question.

sire." Another believed the jury should consider it, for "she should have explained to him that she was a virgin and that she wanted to keep her womanhood." Another stated, "I don't think that under the circumstances he would have listened." Still another, "No, because if she was objecting, she wouldn't have had much time to think of anything. I know, for myself, if I were ever in her position, I'd fight."

Altogether in the three cases there was only one juror who remembered what the judge had told them well enough to follow his instructions and disregard. This is significant when one realizes that we tested eighteen jurors on this point.<sup>28</sup>

Our survey shows the wisdom of trial lawyers who fight hard to get a particular piece of evidence before the jury, even though they know the judge is going to strike it out. If the jury once hears it, it is as if it were written in the record with indelible ink.<sup>29</sup>

3. *Does the jury tend to presume guilt merely because the defendant has been indicted?*<sup>30</sup>

Since cases A, B and C were civil, they did not afford us an opportunity of testing this proposition. But the Barrister's Union Trial was criminal (rape case), and though we did not specifically elicit the information, we found some evidence that in the special situation of this rape case, two jurors believed that the mere fact of indictment made the defendant suspect. In answer to the question, "What factors most influenced you in arriving at your decision?", one juror answered, "If she (complainant) had consented (to the act of intercourse) she would not have dragged her name into court." Another replied in substantially the same manner. It is true that rape cases present peculiar features, but it is also true that one of the characteristics of such trials is the tendency of people who have consented to intercourse to delude themselves into thinking they have been raped in order to soothe

28. This consisted of six jurors from Trial A, two jurors from Trial C, and ten jurors from the Barrister's Union Trial.

29. See Farley, *Instructions to Juries*, 42 YALE L. J. 194, 218 (1933).

30. Robert Daru, former assistant district attorney in New York City, while heading an investigation for the New York County Criminal Courts Bar Association, stated: "Lip service alone is given to the fine American principle of the presumption of innocence in many court rooms." *New York Times*, Aug. 1, 1945, p. 19, col. 1.

A letter to the Editor of the *New York Times*, Aug. 1, 1945, p. 18, col. 6, tells of "the juror in a criminal case, who, after listening to the plea for the defendant, said to a fellow juror, "If that fellow isn't guilty, what in hell is he doing here?"

their consciences. As these jurors listed no other factor, this was the most important fact of which they were conscious, leading them to their decision.

4. *Does the jury's preconceived prejudices and beliefs interfere with its fact finding process?*<sup>31</sup>

One preconceived belief we uncovered was the idea that a jury must do almost anything to avoid having to report back to the judge that they could not reach a decision. Out of the 14 jurors who answered the question, 3 said the following statement was true: "If a case is very close and the jury finds it impossible to agree among themselves, it would be better—as a last resort—to draw lots for the verdict, than to report back to the judge that they were unable to reach a verdict."

In the Yale Barrister's Union trial we asked the question: "The main purpose of a trial is to see that a fair decision is reached. Do you think this goal was achieved in this trial? Why?" One juror who answered yes explained that the defendant "Being married with children shouldn't be dating other girls." This, of course, is not a crime, but had that juror (a woman) been sitting on a real case, defendant would have had to pay dearly for her misknowledge. Another juror replying to the question, "What did you like least about this trial?" said, "Sordid details and nasty jokes." Yet what she labeled sordid details was relevant evidence.

5. *Does the jury's presence encourage a fight atmosphere in the courtroom?*<sup>32</sup>

On several occasions in trial C we observed that the lawyers were putting on a show for the jury. An atmosphere of heated argument, confusion and histrionics prevailed between the two contending sides, as long as the jury was within the room; but as soon as the jury was dismissed for any reason, the argument would quickly be toned down, the facts clarified and the argument became intelligent off-the-record discussion between judge and counsel rather than a fight to the death.

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31. See Arpaia, *Hints to a Young Lawyer on Picking a Jury*, 6 JOHN MARSHALL L. Q. 344 (1940), for discussion of this question.

32. "... the excessive fighting spirit in trials . . . still unfortunately dominates too much of court-house government, and . . . prevents needed improvement in courtroom fact-finding. The jury helps to keep alive this fight theory." FRANK, *op.cit. supra* note 22, at 138.

6. *Does the jury tend to disregard the rules of law presented in the judge's charge?*<sup>33</sup>

We asked the question, "If the law as given to you by the judge in his charge is unfair, it is your duty as a juror to alter the law in this particular case so as to give a fair result. Answer yes or no, or leave it blank if you don't know the answer." Three out of the fourteen jurors who did this part of our questionnaire answered "yes." Four others left the answer blank, indicating they were in doubt. Only 50% answered the question according to the law books.

To the question, "Because of the harshness of the rules of law applicable here, we did not follow the rules exactly," only nine (64%) answered "no." Two said "yes." Three did not answer the question.

We also asked, "In this case the plaintiff had to show that defendant was guilty *beyond a reasonable doubt* in order to recover. Answer yes or no." All three cases were civil cases, and in each the judge emphasized that plaintiff need only establish his case by a preponderance of the evidence, and we underlined "beyond a reasonable doubt" to make sure that we directed the juror's attention to this part of the sentence. And still 6 answered the question incorrectly, and 3 others left it blank, while only 5 answered it correctly.

The results of the Barrister's Union trial were generally in harmony with this.<sup>34</sup>

7. *Do the legal technicalities confuse and annoy the jury?*

Trials A and B were so short that there necessarily were not very many legal technicalities; but even in this situation one of the most educated of the jurors, an accountant who had completed five years of college, thought that the jury spent most of its time just sitting around and waiting.

In trial C there were many technicalities. The jury was sent from the room twice, and the attorneys made constant objections to the introduction of evidence and testimony. So irritated were the jurors that only two of them were willing to fill out our questionnaire in anything but the most

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33. "There is . . . good reason to believe that instructions are not particularly effective in getting the jury to perform their theoretical function and in keeping within the bounds charted out for them by the rules of law." James, *op. cit. supra* note 2, at 682; see also Green, *The Negligence Issue*, 37 YALE L. J. 1029, 1043 (1928).

34. *E.g.* on the burden of proof rule, four jurors answered correctly, one answered incorrectly and five signified they did not know by leaving the question blank.

cursory manner. Two of the group answered "yes" to the question, "Did you feel that the technicalities of the trial (such as lawyers objections) made it more difficult for you to understand what was going on?" Two jurors in trial C also answered the question, "What did you like least about the trial?" by referring to the constant interruptions made by the attorneys. Five of the six jurors stated they wouldn't want to serve as jurors again.

Both the jurors in trial C who completed our questionnaire indicated their misunderstanding of why the judge had dismissed the jury from the room for brief intervals by answering "yes" to the question, "If the judge made the jury leave the courtroom for short intervals during the trial, he did this because evidence was introduced which the judge and attorneys felt was too important or complicated for the jury to hear."

Interesting results might be obtained in a future survey by giving the jurors a test on the meaning of the legal concepts used in their case, and relevant to that decision.<sup>35</sup> (Law students often flunk such tests after studying for months).

#### 8. *Does the jury recollect the facts accurately?*

We wished to test the accuracy of the juror's knowledge of the detailed facts of the case, an indispensable ingredient of "fact-finding."<sup>36</sup> How much of what has happened in a specific factual situation do the jurors absorb? How good are their powers of observation and memory? During each trial, as we listened to the testimony, we jotted down parts of the testimony. When the jury retired we selected points which, though detailed, seemed reasonably significant in the light of the issues of the case. Around these points we composed true and false questions, and then incorporated these into our questionnaire.

For example in the first trial we asked, "Plaintiff testified he did *not* blow the horn of his car before the accident. Answer true or false." (The correct answer was "false;" he testified that he had.) In trial B we asked, "The salesman's commission for getting members to join the club is 25%. True or false." (The correct answer was "false;" the commission was 20%.)

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35. "In any but the simplest cases they [instructions to jury on the law] are long and involved, phrased in terms of the nicest distinctions, capable of being understood only by lawyers. . . . No one seriously claims that they are understood by juries or that they assist a jury in reaching a verdict. For the most part they are ritual." GREEN, JUDGE AND JURY 351 (1930).

36. For discussion as to general unreliability of human observation, based on psychological tests run on students in a class room, see Marston, *op. cit. supra* note 13.

And in trial C "Some of the individuals in the corporation did not put up all the money they had promised." (The correct answer was "true.")

We found that the jury did a good, though not perfect, job of remembering facts but that their accuracy tended to drop off in a longer trial. The results we obtained can be summarized in the following table. The percentages indicate the number of correct answers:

Trial	Lowest Individual score	Highest Individual score	Average of all jurors
A	73%	91%	79%
B	82%	91%	89%
C	67%	78%	72%

As the reader will recall, trials A and B each lasted two hours or less, while trial C lasted two days. If we average the results of trial A and B, we get a combined accuracy of 84%. The significantly lower score of trial C, 72%, is just what would be expected if one follows the thesis of Hutchins and Slesinger's article on memory.<sup>37</sup>

#### 9. Does the jury provide adequate cures for legislative ills?

Some defenders of the jury system have argued that one of the noblest functions of the twelve good men and true is that they advance the progress of the law, and as a type of private legislature are the forerunner of legislative change.<sup>38</sup> An example often cited is their tendency toward imposing absolute liability on defendants in automobile accident cases.<sup>39</sup> They know the defendant is insured, so the argument goes, and they therefore in the best democratic fashion vote for the plaintiff and a sharing of the risk.

Our study presents evidence counter to this argument in defense of the jury. In trial A counsel for the plaintiff asked each juror if he owned any stock in the X insurance company. This is supposed to be the customary tip-off by which the jury is given the go-ahead signal to soak the insurer.<sup>40</sup> Nevertheless, they awarded the plaintiff only nominal damages. Our study revealed that not one of the six jurors knew that the defendant was insured,

37. *Some Observations on the Law of Evidence—Memory*, 41 HARV. L. REV. 860 (1928). "If the trial has lasted for many days or weeks, the required feat of memory is prodigious." FRANK, *op. cit.*, *supra* note 22 at 119.

38. See James, *Chief Justice Malbie and the Law of Negligence*, 24 CONN. B.J. 61, 62 (1950). For discussion as to how this takes place, see James, *op. cit.* *supra* note 2.

39. See James, *op. cit.* *supra* note 2 at 687.

40. Hunter, *op. cit.* *supra* note 4 at 15.

and were amazed and shocked to find out that he was.<sup>41</sup> This was so despite the fact that four had attended college, and so would be presumed to be more intelligent and alert than the more normal, less educated jury.

#### CONCLUSION

Our study is only a beginning. The numbers involved were too small to be statistically significant. Our questions were perhaps not perfect. But inconclusive as our results are, they do indicate that there are some deficiencies in the jury system, and that the magnitude of those deficiencies is measurable. Let us hope that future investigators will continue to perform the detailed and time consuming work necessary to give dependable results.

Some conclusions are possible with the results we have obtained. The chief of these is that the jury needs more orientation. In one of the trials a juror asked a question after the judge had charged the jury, and this was held too late. This juror was not aware that he could have asked a question any time during the proceedings. Several of the jurors had a mistaken apprehension which might have colored their reaction as to what went on when the jury was required to leave the room. They seemed to believe that important information was being introduced. Furthermore, some jurors felt it was their duty to alter the rules of law given to them by the judge if they were unfair. And a few jurors thought it better to draw lots for a verdict than to report back to the judge that they were unable to reach a decision.

Four devices might be used to dispel such erroneous impressions: (1) juror handbooks of a practical nature,<sup>42</sup> (2) adult education classes,<sup>43</sup> (3) instructions to the jury by the judge before the trial begins,<sup>44</sup> and (4) juries specially qualified in the subject matter of the case.<sup>45</sup>

41. This was discovered by oral questioning after the trial. Similar results were obtained in the Ohio State study. See Hunter, *op. cit. supra* note 4 at 16.

42. Handbooks have been used by courts in California, Georgia, Florida, Kansas, Michigan, Maine, New York, Ohio, Texas and in the federal courts. For favorable comment on their use, see Richardson, *The Jury and Methods of Increasing its Efficiency*, 14 A.B.A.J. 410 (1928); Comment, *Pre-Trial Education of Jurors*, 38 J. CRIM. L. & CRIMINOLOGY 620 (1948). But one state supreme court has forbade their use. *People v. Schoos*, 78 N.E. 2d 245 (Ill. 1948).

For criticism of handbooks as ineffective, see FRANK, *op. cit. supra* note 22 at 145.

43. Such classes have been advocated by Galston, *Civil Jury Trials and Tribulations*, 29 A. B. A. J. 195 (1943); and Frank, "Short of Sickness and Death": A Study of Moral Responsibility in Legal Criticism, 26 N. Y. U. L. REV. 545, 632 (1951).

44. For argument that judge's charge should at least precede final summaries,

Some might say that since the jury system is justifiable only if it is as alert and aware of what is going on as an experienced trial judge, our study demonstrates the inadequacy of the jury. A more moderate view would be that our investigation has shown that there is at least some evidence behind the criticisms of the jury implied by our nine questions; but these results are tentative. The final evaluation of these criticisms will have to await the results of further studies.

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see Blatt, *Judge's Charge to Jury Should Precede Arguments of Counsel*, 33 J. AM. JUD. SOC'Y 56 (1949).

45. See BERLE AND DE CAMP, *INVENTIONS AND THEIR MANAGEMENT* 659 (1937) (advocates special juries in patent infringement cases). For general discussion see Beuscher, *The Use of Experts by Courts*, 54 HARV. L. REV. 1105 (1941).