WHAT IS WRONG WITH AMERICAN JURIES AND HOW TO FIX IT

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I. INTRODUCTION

Our jury system does not function very well. In civil cases, we increasingly see the phenomenon of the Robin Hood jury awarding runaway damages based upon emotion and a misguided understanding of the law. In criminal cases, juries have a disturbing tendency to accept preposterous theories advanced by defense counsel and sometimes by overzealous prosecutors. The problem is that juries no longer represent a true cross-section of the community.

Exclusion of certain groups from jury duty has been and continues to be problematic. At one time in the not-too-distant past, racial minorities and women were excluded from juries systematically. The Supreme Court's decision in *Batson*[1] to fix that problem was certainly correct. Today, however, we have a different problem. People who are well-educated, well-informed, and independent-minded are increasingly excluded from juries either because they refuse to serve or because they are not allowed to serve.

Recent studies show that fewer than half of Americans who are sent jury summonses actually show up at the courthouse.[2] In addition, many people are excused during voir dire or turn out not to be needed.[3] Consequently, eighty-five to ninety percent of the people who are summoned for jury service do not serve.[4] These people who do not serve often are at least as qualified as

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1. Batson v. Kentucky, 476 U.S. 79 (1986) (holding that peremptory challenges cannot be exercised on the basis of race or gender). Whether such efforts toward exclusion based on race and gender continue, despite *Batson*, is debatable.

2. *See* STEPHEN J. ADLER, THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM 243 (1994) (data extrapolated from 1989 statistics).

3. *See id.* at 251.

4. *See id.* at 220, 243 (stating that nationally, about 55% of all prospective jurors fail to appear at the courthouse; and of those who do appear, two-thirds do not serve).

or better qualified than those who do serve, because many of the reasons they do not serve are related to backgrounds and interests that would allow them to bring some independent thinking to their jury duty.[5]

Juries often reach common-sense and desirable results, but in many cases they do not. Stephen Adler's recent book, *The Jury: Trial and Error in the American Courtroom*,[6] documents a number of jury trials and exposes the misunderstandings of the juries and the poorly-informed decisionmaking processes they employ. Based upon his experience in these cases, Adler concludes:

> [S]ome jurors succumb all too easily to emotional appeals. Some are stymied by the least bit of complexity. Many filter facts through such a thick mesh of prejudice that the facts become unrecognizable. Common sense mutates into mutual delusion. And the unfortunate reality is that this isn't always an accident.[7]

Through the deceptive, frequently cynical process of jury selection, lawyers can and often do steer some of the least capable and least fair-minded people onto the most important juries. For example, questionnaires of the O.J. Simpson jury showed that of the people who served on the jury, one hundred percent did not regularly read a newspaper.[8] Seventy-five percent believed that Simpson was unlikely to have committed the crimes because he excelled at football.[9] Forty-two percent responded that they or their family members had negative law-enforcement experiences, and this same number thought it was acceptable to use physical force on a family member.[10] This jury clearly had prejudices based upon life experiences that likely affected the decisionmaking process and the verdict.

II. OVERVIEW OF THE PROCESS

Two interrelated phenomena explain the failings of our jury system: (1) people who should be serving on juries often try to avoid jury service; and (2) people who are willing and capable of

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5. *See infra* text accompanying notes 11-15 (discussing reasons why citizens do not serve as jurors).

6. *See* ADLER, *supra* note 2.

7. *Id.* at 50.

8. *See* Marc Davis & Kevin Davis, *Star Rising for Simpson Jury Consultant*, ABA JOURNAL, Dec. 1995, at 14.

9. *See id.*

10. *See id.*

serving often are prevented from doing so.

The exclusion of certain groups begins when the jury pool is first compiled. Because the jury rolls in many jurisdictions are not frequently updated,[11] it is difficult for college students, graduate students, or anyone who frequently changes jobs, to be summoned in the first place.[12]

Occupational exemptions are another limiting force. In a number of States, people in certain professions are excluded automatically from serving on juries. Until recently in New York, for example, some of the occupations that were excluded automatically from jury duty included "lawyers, physicians, clergy, dentists, pharmacists, optometrists, psychologists, podiatrists, registered and practical nurses, Christian Science practitioners and nurses, embalmers, police officers, correctional officers, fire fighters, sole business proprietors, prosthetists, orthodontists, and licensed physical therapists."[13] While the trend in many States is to eliminate these automatic occupational exemptions, where they still exist they often exclude people who ought to be serving on juries.

Once the jurors arrive at the courthouse, they often must wait for days, maybe weeks, in uncomfortable rooms, until they are summoned for jury consideration. Once summoned, in many States the prospective jurors must go through a demeaning process of voir dire in which the lawyers ask highly personal questions. Lawyers can, and do, ask jurors what books they read, what television shows they watch, what religion they practice, how much money they make, and other kinds of intrusive inquiries that will allow the lawyers to decide which prospective jurors may be biased in one way or another.[14]

One purpose of the voir dire is to provide information on which to base peremptory challenges or challenges for cause. In

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11. *See, e.g.*, Doris Sue Wong, *AG Says Boston Reneged on Compiling Voter List, Brings Suit*, BOST. GLOBE, Aug. 10, 1993, at 68 (reporting that Boston faced a lawsuit because it used outdated and inaccurate lists in making prospective juror selections); Rebecca L. Martin, *Trial by Jury Takes Planning*, TULSA TRIBUNE, Sept. 7, 1989, at 1B (reporting that Oklahoma voter records were too outdated to be used as a source of jury lists).

12. *See* ADLER, *supra* note 2, at 219 (reporting that voter registration records are the most common source of jury lists, and that "in an increasingly mobile society even many registered voters slip through the cracks"); *see also* Ed Housewright, *Selecting Jurors from License Rolls Faulted, Endorsed*, DALLAS MORNING NEWS, Sept. 22, 1996, at 37A (reporting that driver's license lists are updated even less often than voter registration lists).

13. ADLER, *supra* note 2, at 219.

14. *See id.* at 56-57.

California, each side can have ten to twenty peremptory challenges. In many States, the defense gets more peremptory challenges than the prosecution. All too often, the defense uses these to strike well-educated and well-informed potential jurors.[15]

Batson challenges further mar the selection process.[16] Challenges are not supposed to be exercised on the basis of race or gender; consequently, collateral disputes often arise concerning how the strikes are being exercised. Each side can also challenge for cause. Professor Gerald Uelman has pointed out that sometimes challenges for cause that should be granted are rejected.[17] Too often, however, judges err on the other side, accepting challenges in order to avoid creating reversible error.

An unfortunate type of challenge is targeted at citizens who are well informed—those who read newspapers, watch television, and have familiarity with cases reported in the media. Once these knowledgeable people are excluded, the remainder of the group consists of people who have never heard of Oliver North. The exclusion of the well-informed thus raises questions about what kind of jury will be impaneled.

Finally, once the jury is selected, alternates are often added. Alternates may have to sit through the whole trial, and then be excused—so that the alternates' service is all for nothing.

The trial itself often takes more time than would seem necessary. Judges rarely set time limits for trials, and they often are interrupted by objections and side-bar conferences. Motions are argued while the jurors wait in the jury room, which is not a very pleasant place to stay.

Jurors are paid between four and fifty dollars per day of jury service, depending on the State.[18] Some employers may pay employees who are on jury duty for a couple of weeks; unfortunately, many employers do not. Jurors who are self-employed or who work for commissions or tips suffer a serious

15. *See id.* at 53, 221.

16. *See id.* at 222.

17. *See* Gerald F. Uelman, *Jury-Bashing and the O.J. Simpson Verdict*, 20 HARV. J.L. & PUB. POL'Y 475, 480-81 (1997).

18. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1995, at 80 tbl.1.79 (Kathleen Maguire & Ann L. Pastore eds., 1995) (listing jury fees by jurisdiction). Illinois's rate is lowest, at $4.00 per day; the federal rate is the highest, reaching $50.00 per day, in the discretion of the judge, if the trial is more than 30 days long. *See id.*

financial loss as a result of serving on a jury. People with childcare responsibilities are likely to ask to be excused for the simple reason that the cost of hiring someone else to perform childcare may be prohibitive in comparison with the juror compensation rate. Most judges therefore excuse people who will suffer financial hardship or who have family responsibilities at home.[19]

The jury's central role is to make a decision. Yet as preparation for this decision, instructions are given primarily in legal boilerplate, and usually not until the end of the trial. Often, the jury is not allowed to take notes or ask questions, either during the trial itself or during the instruction-giving. During the deliberative process, jurors may decide to invoke jury nullification. As Adler documents, jurors often disregard legal instructions from judges and make decisions contrary to what the law requires.[20] Finally, hung juries sometimes occur, in which case the whole case must be retried.

III. PROPOSALS FOR REFORM

Most of my proposals for reform are suggested by my criticisms of the system. Briefly, my proposals include the following: (1) eliminating occupational exemptions and maintaining updated jury rolls; (2) employing a one-day, one-trial system where jurors report for one day, and are excused if they are not selected for a jury; (3) outlawing lawyer-conducted voir dire and limiting intrusive and demeaning questioning of potential jurors; (4) abolishing peremptory challenges, or restricting them to perhaps two or three per side; (5) prohibiting disqualification of jurors simply because they read newspapers or are reasonably well-informed; (6) eliminating the distinction between jurors and alternates, so that everyone who remains part of a jury at the end of a case can deliberate and vote; and (7) limiting sequestration, authorizing anonymous juries, and strengthening the laws against jury tampering and surveillance.

In addition, we should shorten trials and reduce the burden

19. *See* ADLER, *supra* note 2, at 51 (reporting that "[s]queezing into the friendly 'hardship' category is an art form practiced by many busy, well-educated people who otherwise would make excellent jurors").

20. *See* ADLER, *supra* note 2, at 34.

of jury service by requiring judges to set a time limit at the beginning of each case and to allocate the time to each side fairly. The time limit would not extend beyond two weeks unless the judge found that a longer period was constitutionally required to give the parties a fair trial. We should require reasonably anticipated legal objections to be raised in advance and disposed of by the judge before the jury is impaneled. To the extent that rulings are necessary during a trial, they should be made outside the presence of the jury, either before or after the jury sits for the day. Further, we should authorize additional pay to jurors who forfeit income as a result of jury service, and we should consider mandating that large employers pay employees for jury duty, at least up to a couple of weeks.

We should empower juries to function more effectively in a trial by requiring that preliminary instructions written in plain English be given to each juror in advance of the trial and be supplemented as necessary. Jurors should be allowed to take notes and to submit questions to the judge, who can screen out improper questions, and ask witnesses the remaining ones.

We should empower judges to deal more effectively with juror misconduct and jury nullification by instructing jurors that if they observe jury nullification proposed during deliberations they are to report it to the judge. The judge should then have a hearing and excuse any juror who has been advocating disregard of the legal instructions as a basis for the jury's deliberations. Judges have the power to do this now, but they rarely use it.

Finally, we should abolish the unanimous jury requirement; a super-majority vote of approximately eighty percent should be sufficient. This allowance dovetails with my proposal to abolish peremptory challenges. Eliminating peremptory challenges creates a risk that one or two jurors may harbor improper prejudices or motives. An effective way to deal with this is to require only a super-majority jury decision. This change will obviate the need to screen every last juror for possible bias or improper attitude, which cannot realistically be done with even the most intrusive voir dire.

If changes such as those offered above are implemented, the jury system can work much more effectively, and we can restore to the jury system the public confidence that it ought to have.