

JURY TRIALS AREN'T WHAT THEY USED TO BE

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The American jury has been the subject of both great praise and great disdain. Two of the most recognizable and important commentators on American society offered competing assessments. Alexis de Tocqueville created a substantial list of the benefits juries provide to American society concluding with his belief that “the jury, which is the most energetic form of popular rule, is also the most effective means of teaching the people how to rule.”¹ On the other hand, Mark Twain once wrote, “[t]he jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and perjury.”²

I leave it to the reader to make up his or her own mind about the current quality of the jury. My own view is that modern jury system, although successful in reaching the right result, is structured in ways that sometimes make that goal difficult to reach.³ I want to describe here how ongoing reforms in Indiana are improving the system and reshaping it to better reflect de Tocqueville’s idealized vision.

Beginning with the adoption of new Indiana Jury Rules in 2001, the supreme court has attempted to introduce reforms that we believe will improve the public’s respect for the jury and increase its effectiveness as a tool of justice. Jury reform is an ongoing process in this state, and just this year we adopted a substantial amendment permitting juror discussions prior to deliberations. While this article affords an opportunity to introduce the newest amendments to the jury rules, I also wish to describe some of those improvements we have made over the last several years, and some of the reforms we hope to introduce in the future.

I. JURIES THEN AND NOW

One can best understand the reforms we have put in place by reference to the context in which the reforms occurred. This necessitates saying a little bit about the historic role of the jury, its importance to democracy in America, and its tragic fall from grace in the eyes of the public.

The American jury’s place on any short list of the most ancient among our bequest from older western societies is beyond peradventure. Scholars and jurists have frequently extended its roots as far back as ancient Greece. During the height of Athenian power, for example, the members of the city-state not only created what were essentially jury pools, but employed large panels of citizens as judges of law and fact during trials.⁴

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1. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 318 (Arthur Goldhammer, trans., Library 2004) (1835).

2. MARK TWAIN, *ROUGHING IT* (1872), *reprinted in* THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 222 (Fred R. Shapiro ed., 1993).

3. *See* STEPHEN BATES, *THE AMERICAN JURY SYSTEM*, CANTIGNY CONFERENCE SERIES SPECIAL REPORT 9 (2000).

4. 1 FRANCIS X. BUSCH, *LAW AND TACTICS IN JURY TRIALS* § 2 n.3 (1959).

While the roots of the jury do indeed grow deep, an Indiana jury trial would hardly be complete without someone telling the venireman that it was the legal tradition developed in England following the Norman Conquest in 1066, from which the American jury system most directly draws its heritage. Emerging from earlier Frankish legal traditions, juries and jury trials, although fairly unrecognizable to modern eyes, had become common in England by the end of the twelfth century.⁵ Only about 300 year later, in the middle of the fifteenth century, the English jury trial had come to possess a basic form that we would recognize today.⁶

That basic form, and the further refinements made over the course of the intervening years, accompanied the early English colonists to the North American continent and integrated into the colonial governments.⁷ Despite wide variations in its application, by the start of the Revolutionary War, jury trials in both civil and criminal cases had become an important right to citizens throughout the colonies.⁸ Indeed, among the numerous and weighty grievances against King George III listed in the Declaration of Independence was the complaint that he “deprive[ed] us, in many cases, of the Benefits of Trial by Jury.”⁹

Having won the war for independence, the Founders sought to protect the fruits of their labor, among other things, the right to a jury trial. To that end, they enshrined the right to jury trial in the Constitution, affirming the right in both the Sixth and Seventh Amendments.¹⁰ Indiana, like the national government and each of the other forty-nine states, similarly preserved and protected the right to trial by jury in its state constitution. In fact, Indiana’s 1851 Constitution is nearly unique among state constitutions in that it goes beyond preserving the right to jury in civil and criminal cases, by declaring that the jurors shall be the judges of both law and fact.¹¹

Today, the jury continues to exist and serve the interests of justice. The percentage of all cases being resolved by reference to juries has been in a state

5. *Id.* § 10. See also sections 3 to 15 for a brief history of the development of the jury trial.

6. *Id.* § 12.

7. *Id.* § 16.

8. *Id.*

9. THE DECLARATION OF INDEPENDENCE para. 16 (U.S. 1776).

10. The importance the Founders placed on preserving the jury trial as a constitutional right was perhaps best explained by Justice Sandra Day O’Connor who once pointed out that “the federalists and anti-federalists, who could agree on little, agreed on the importance of preserving trial by jury.” Sandra Day O’Connor, *Juries: They May Be Broken, But We Can Fix Them*, FED. LAW., June 1997, at 20, 22.

11. IND. CONST. art. I, § 19 (1851). Indiana is one of only three states that makes the jury the judge of law and facts in criminal trials. 2 CITIZENS COMM’N FOR THE FUTURE OF IND. COURTS & THE JUDICIAL ADMIN. COMM. OF THE IND. JUDICIAL CONFERENCE, JURIES FOR THE 21ST CENTURY 3 (2000). My colleague Justice Rucker has provided a splendid examination of the heritage and meaning of this provision. Robert D. Rucker, *The Right to Ignore the Law: Constitutional Entitlement Versus Judicial Interpretation*, 33 VAL. U. L. REV. 449 (1999).

of long-term decline, raising important questions about the nature of the rule of law in our country. Still, last year over 2000 jury trials were conducted in Indiana, and thousands of Hoosiers fulfilled their civic duty by serving on panels.¹²

Despite the long and distinguished pedigree of the jury, and its continued importance to the justice system, the jury trial has fallen on hard times both in Indiana and across the country. Research suggests that there are many problems with the present system. Jurors frequently complain of poor treatment at the hands of court officials, the inconvenience of jury service, fear over their role as jurors, and anxiety because they are uncertain about the trial process.¹³ Moreover, many in the public tend to view the jury as archaic, emotional, irrational, and unintelligent.¹⁴ Indeed, the jury system has long been a fertile source of material for comedians and satirists.¹⁵

Despite the ongoing flow of slams against the jury, the system is hardly doomed. Although there are many complaints about the mechanics of the jury process, one of the most promising signs of the health of the system is that there remains a broad conviction that the jury system is a positive and necessary force in the quest for justice.¹⁶ There is thus every reason to believe that by reforming

12. The supreme court's Division of State Court Administration has not yet released statistics for 2004, but they estimate that about 2176 occurred. The statistics for 2003 show that 2022 jury trials were conducted. DIV. OF STATE COURT ADMIN., SUPREME COURT OF INDIANA, VOL. I, 2003 INDIANA JUDICIAL REPORT 81 (2003).

13. BATES, *supra* note 3, at 13-14. Representative comments regarding juror's experiences with jury duty can be found in Bethany K. Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 TENN. L. REV. 701, 706-07 (2000).

14. 2 CITIZENS COMM'N, *supra* note 11, at 6-7.

15. Mark Twain's biting sarcasm is only the tip of the iceberg when it comes to popular entertainers poking fun at the ineffectiveness and lack of intelligence of the jury. Popular comedian Norm Crosby once quipped that "when you go into court you are putting your fate into the hands of twelve people who weren't smart enough to get out of jury duty."

Even the modern popular television show *The Simpsons* has taken its jabs at America's attitude towards juries and jury duty. The lovable buffoon Homer has been seen on a jury, confirming for us the public perception that juries are made up of those too stupid to avoid service. *The Simpsons: The Boy Who Knew Too Much* (Fox television broadcast, May 5, 1995). In another episode the show writers acknowledged America's antipathy towards jury service, when the city of Springfield issued new, more enticing summons informing the recipient that they "[h]ave been chosen to join the Justice Squadron, 8 A.M. Monday at the Municipal Fortress of Vengeance." *The Simpsons: They Saved Lisa's Brain* (Fox television broadcast, May 9, 1999).

It would be a great deal easier to bring about jury reform if the problems facing real juries were so easy to correct. Alas, television is not real life, and we must, unfortunately, take more meaningful and less humorous steps to confront the negative public perception of jury service if we are to preserve that important institution. The humor, however, helps make the bitter pill less difficult to swallow.

16. Susan Carol Losh et al., "Reluctant Jurors" *What Summons Responses Reveal About Jury Duty Attitudes*, 83 JUDICATURE 304, 306 (2000).

and improving the mechanics of the jury trial, the system can flourish in the twenty-first century.

II. THE ISSUANCE OF JURY RULES IN 2001 PROVIDED A HOST OF CHANGES

The reforms instituted in Indiana's jury system are the product of the long and careful investigation by numerous individuals and organizations dedicated to ensuring the success of the Hoosier jury. Chief among these reformers were the late Sara B. Davies of Evansville, Chair of Citizens Commission for the Future of Indiana Courts, and former judge Ernest B. Yelton, chair of the Judicial Administration Committee for the Judicial Conference of Indiana. Indiana's reforms cannot, however, be viewed in a vacuum. The impetus for the recent round of jury reforms began not here in Indiana, but in Arizona in 1993 when the Arizona Supreme Court appointed a committee to review the entire jury system and develop responses to the perceived inadequacy of the existing arrangements.¹⁷ The trend that began in Arizona spread to New York, California, and Colorado, all of which assembled committees to examine those states' jury systems as well.¹⁸

In 1997, following the groundbreaking work in those states but still entering unfamiliar waters, the members of our Judicial Administration Committee began working on ways to reform the Hoosier jury.¹⁹ That effort ran along a parallel project by the freestanding Citizens Commission. In 2000 those two organizations recommended a variety of reform measures to juries in Indiana as part of their combined report "Juries for the 21st Century."²⁰ In 2001, the Supreme Court adopted for the first time a set of statewide jury rules, which incorporated most of the recommendations contained in the report.²¹

Before separate jury rules existed, the Indiana Rules of Trial Procedure provided such guidance as there was relating to juries, largely limited to matters of the right to trial by jury, the number of jurors, peremptory challenges, and instructions.²² Creating a separate section of jury rules to the Indiana Rules of Court reflected the supreme court's conclusion that reforming jury practices by using case law would be very laborious. A separate set of new rules also facilitated making multiple changes at one time in a coordinated way.

A leading objective of the whole endeavor has been to ensure a more representative cross-section of the public in each jury trial. For example Jury Rule 6 provides for narrow construction of statutory exemptions to jury service.

17. B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 280-81 (1996).

18. 2 CITIZENS COMM'N, *supra* note 11, at ii-iii.

19. 1 CITIZENS COMM'N FOR THE FUTURE OF IND. COURTS & THE JUDICIAL ADMIN. COMM. OF THE IND. JUDICIAL CONFERENCE, JURIES FOR THE 21ST CENTURY 58-59 (2000).

20. *Id.*

21. Adopted late in 2001, the rules became effective at the beginning of 2003. See IND. JURY RULES (2005).

22. See IND. TRIAL R. 38, 39, 47, 51 (2000).

Legislative efforts both last year and this have sought to decrease the number of exemptions available.²³ In addition, Jury Rule 2 requires that the local jury administrator supplement the voter registration lists used to compile the jury pool by using at least one additional source of names—such as a list of utility customers, property taxpayers, telephone directories, etc. As with the elimination of exemptions, legislators interested in jury reform are working to authorize jury administrators to use whatever mix of lists that will produce the widest participation.²⁴

But once we have a representative list of potential jurors, how do we ensure that prospective jurors actually show up? On the premise that at least some citizens do not appear for duty when summoned because they lack information, the Citizens Commission recommended that jury notices be accompanied by useful information about reporting for jury duty.²⁵ Indiana Jury Rule 4 addresses the notification process by providing a timeline for sending out notices and summons and by requiring that the summons contain “directions to the court, parking, public transportation, compensation, attire, meals, and how to obtain auxiliary aids and services.”²⁶ Once the summoned jurors report for duty, they receive jury orientation in the form of a video that helps prospective jurors understand their role in the legal system, a new requirement contained in Jury Rule 11.²⁷

Jurors who eventually serve on cases have long needed better tools for their job. This is why the 2003 jury rules sanctioned juror note-taking and questioning of witnesses.²⁸ Despite criticisms that juror note-taking can distract jurors, the general public (and specifically former jurors) believe note-taking is a useful tool to assist them through a learning process.²⁹ Indiana decisional law had long held that jurors could take notes, but judges usually did not inform juries of the opportunity to take notes or provide writing material.³⁰ This is why the jury rules require a judge to provide paper for the jury and inform them that they may take notes.

The practice of jurors questioning witnesses was commonplace in Great Britain until the seventeenth century.³¹ A current movement to revive this

23. See *infra* note 45 and accompanying text.

24. See *infra* note 42 and accompanying text; Chief Justice Randall T. Shepard, State of the Judiciary Address (Jan. 19, 2005).

25. 1 CITIZENS COMM’N, *supra* note 19, at 31-34.

26. IND. JURY R. 4.

27. See Jury Orientation Video: “Indiana Jury Service: Duty, Privilege, Honor,” at <http://www.in.gov/judiciary/webcast/info.html>.

28. IND. JURY R. 20(a)(4), (7). These practices were already permissible in trial courts. IND. EVID. R. 614(d); 1 CITIZENS COMM’N, *supra* note 19, at 52-53. The jury rules sanctioned them by requiring judges to read preliminary instructions explaining these rights to jurors largely to remedy inconsistent practices among trial courts. *Id.* at 52.

29. 1 CITIZENS COMM’N, *supra* note 19, at 52.

30. Terry Carter, *The Verdict on Juries*, A.B.A. J., Apr. 2005, at 44.

31. BATES, *supra* note 3, at 28.

practice has provoked opposition, such that some consider this practice the most controversial amongst recent reforms.³² But respectable research validates its benefits,³³ and we believe the advantages outweigh any disadvantages.

The desired goal of the jury system, a verdict, can sometimes be elusive. An explanation of what a deadlock is to a jury at an impasse oftentimes leads to exactly that—a deadlock.³⁴ Indiana Jury Rule 28 permits a judge to ask the jurors how they might be assisted, and if necessary, direct further proceedings. Judges have most often responded to these moments by giving counsel time to speak to the jury on the topic they describe as important to the impasse. More assistance in reaching a verdict also comes from juror trial books of instructions, exhibits, and witnesses, and from written final instructions.³⁵

III. THE MOST RECENT REFORM

Even after these groundbreaking changes, reform efforts are still underway. One of the most innovative recommendations in the “Jurors for the 21st Century” report, that jurors be allowed to discuss the case prior to deliberations, met strong resistance and was not initially adopted. For instance, the adoption of a “discussion rule” met with great skepticism from members of the supreme court’s rules committee.³⁶ The arguments made against adopting this recommendation were based on the belief that jurors would be unable to remain open minded to new evidence presented over the course of the trial, that the jurors would filter new evidence through their pre-formed conclusions, and that some jurors might be intimidated into adopting a position they did not agree with.³⁷

On concerns such as these, as on some other matters of jury reform, there has been no little contrast between what we say *to jurors* about the magic of their common sense and understanding gained from everyday life and what we lawyers say *to each other* about whether jurors can be “trusted” to comprehend what we say and show in a trial. Concerns about changing the rule against jury discussions had nevertheless been advanced by serious-minded people, and in a legal system that depends upon the impartiality and unassailability of jurors to ensure that the interests of justice are served, those fears needed to be addressed.

Once again, pioneering work examining those concerns emerged from Arizona, where the state had been allowing jurors to discuss evidence in civil trials since 1995 under Arizona Rule of Civil Procedure 39(f). At the request of

32. Carter, *supra* note 30, at 43.

33. BATES, *supra* note 3, at 28; Larry Heuer & Steven Penrod, *Increasing Juror Participation in Trials Through Note Taking and Question Asking*, 79 JUDICATURE 256, 256-62 (1996).

34. Dann & Logan, *supra* note 17, at 283.

35. IND. JURY R. 23, 26.

36. Letter from Supreme Court Committee on Rules of Practice and Procedure to Indiana Supreme Court 5 (June 2, 2004) (on file with author).

37. *Id.* Similar fears were also expressed regarding the implementation of such a rule in Arizona. See SHARI SEIDMAN DIAMOND & NEIL VIDMAR, *JUROR DISCUSSIONS DURING CIVIL TRIALS: A STUDY OF ARIZONA’S RULE 39(F) INNOVATION*, 12-16 (2002).

the Arizona Superior Court in Pima County, the Supreme Court of Arizona, and the State Justice Institute, an investigatory team from Northwestern University Law School, Duke Law School, and the American Bar Foundation conducted an extended study on the effect of Rule 39(f) by monitoring the process of jury discussions. Their report, issued in 2002, ultimately concluded that allowing jurors to discuss evidence before deliberation had no substantial negative impact on the jury's ability to remain impartial and open-minded.³⁸

Encouraged by the results of the Arizona report, we amended Indiana Jury Rule 20 to include a provision that permits jurors to discuss "the evidence among themselves . . . when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence."³⁹ Jury Rule 20(a)(8) went into effect on January 1, 2005, and we believe that it is an important step in the process of reforming this state's jury system. Besides helping jurors to clarify confusing issues of evidence when they occur, and helping jurors to follow the dynamics of trial, allowing jurors to discuss evidence during the trial treats them as they are: intelligent, responsible adults. Because so much of the public's perception of jury service is built upon anecdotal evidence related by those who have served on juries, treating jurors as capable adults is important not only for promoting a better legal result, but in helping to eliminate the public's conception of jury service as tedious, belittling, and pointless.

Allowing jurors to discuss the evidence before deliberations begin is an important step in reforming the Hoosier jury, but as I discuss below there is still work to be done.

IV. THE NEED FOR ONGOING REFORM

The current version of Indiana Jury Rule 2, as explained above, directs trial court jury administrators to compile the jury pool annually from the county voter registration lists and at least one supplemental list.⁴⁰ This system is certainly better than the traditional method of using solely registered voters lists, but it can and will be improved. I alluded to these improvements in the 2005 State of the Judiciary address, in which I said:

We hope this year to be able to provide every county with easy to use, up-to-date lists of names and addresses from sources like the Bureau of Motor Vehicles and the Department of Revenue. And there are two things the General Assembly could do to help, neither of which will cost anything: give us better access to the existing state-wide voter lists and make it clear that we can summon jurors using whatever mix of lists will produce the widest participation in jury service.⁴¹

To achieve this end, the Judicial Technology and Automation Committee

38. DIAMOND & VIDMAR, *supra* note 37, at 101-07.

39. IND. JURY R. 20(a)(8).

40. IND. JURY R. 2.

41. Chief Justice Randall T. Shepard, State of the Judiciary Address (Jan. 19, 2005).

("JTAC"), a committee of the supreme court, the Judicial Administration Committee of the Judicial Conference, and Purdue University are developing a central repository of jury pool information for all ninety-two Indiana counties.⁴² They plan to merge voter registration records with Bureau of Motor Vehicles and the Department of Revenue records to create a more accurate, centralized jury pool list.⁴³ This list will then be sent to all trial courts in Indiana to decrease the administrative burden placed on local courts by Indiana Jury Rule 2.⁴⁴

The other campaign to create a more representative jury pool is currently underway in the 2005 session of the Indiana General Assembly. Senator Beverly Gard, R.-Greenfield, has authored a bill to eliminate many statutory exemptions from jury duty.⁴⁵ Indiana Code section 33-28-4-8 in its present form automatically excuses many classes of people from jury duty if they desire to be excused, including: those at least sixty-five years old; members of the military in active service; elected or appointed officials at the federal, state, or municipal level; licensed veterinarians; Indianapolis Public School board members; licensed dentists; police officers; firemen; etc. The proposed bill would eliminate these exemptions.

Senator Gard's bill would also protect jurors from a variety of negative actions taken by employers who punish their employees for doing what the law requires by reporting for jury duty. Upon an employee's reasonable notification to their employer of a jury summons, the employee is protected from adverse employment action, which includes being forced to use annual, vacation, or sick leave for days spent at jury duty instead of work.⁴⁶

CONCLUSION

The theme of this year's State of the Judiciary speech was that in our justice system "good enough" can no longer be good enough. While our jury system is certainly "good enough," it is still a work in progress that needs reform. Over the last several years we have taken steps to make the system work in ways that are more effective and more satisfying for all involved.

Our aim now should not be merely a "better" jury system, but the best we can provide. The people of this state deserve nothing less, and we in the justice system owe to them our dedication to make good on the promises of our constitution.

42. *Federal Grant Funds Help Develop Centralized Jury Pool Repository*, INDIANA COURT TIMES, Spring/Summer 2004, at 9.

43. *Id.*

44. *Id.*

45. S.B. 0045, 114th General Assembly, 1st Reg. Sess. (Ind. 2005).

46. *Id.*