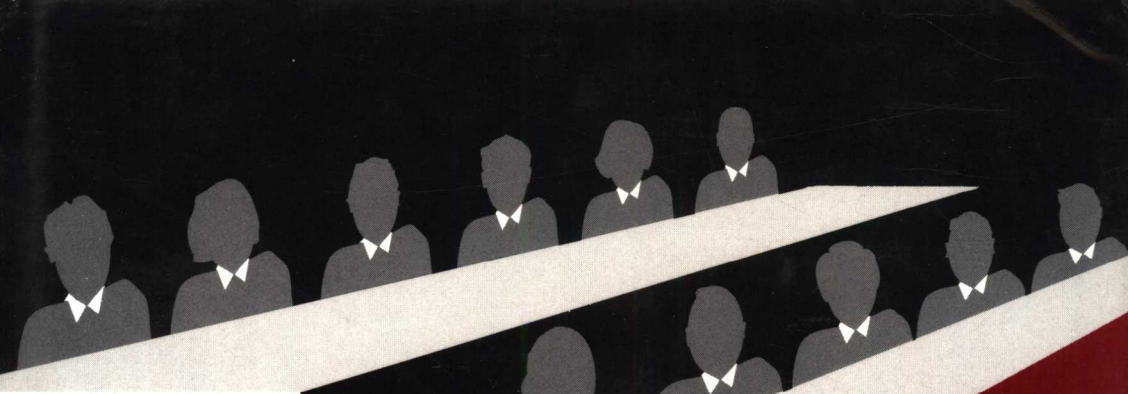

Verdict

Assessing the Civil Jury System

Robert E. Litan, Editor

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Foreword

THE RIGHT to a jury trial in civil cases is enshrined in the Seventh Amendment to the Constitution and has long been a feature of the American system of civil justice. In recent years, however, the workings of the jury system—in both civil and criminal cases—have become the subject of public discussion, if not controversy.

In this volume, edited by Brookings senior fellow Robert E. Litan, a group of prominent legal scholars, practitioners, and judges report their findings about how the civil jury system is working and what, if any, changes might improve it. The chapters in this volume were originally prepared for a joint project and symposium that Brookings conducted with the American Bar Association's Litigation Section in June 1992. A summary of that symposium was presented in *Charting a Future for the Civil Jury System*, published by Brookings in December 1992.

In contrast to the earlier report, which reflected the consensus views of the more than one hundred participants at the symposium, this volume presents the findings and views of the individual authors. As a result, the disagreements are sharper and some of the recommendations are more far-reaching. Nevertheless, there is strong agreement among the authors in this volume that resolving disputes through jury trial remains an important and valuable mechanism that should be preserved and strengthened.

Emily Chalmers, James Schneider, Deborah Styles, and Theresa Walker edited the manuscript. David Bearce, Laura Kelly, and Alison Rimsky verified its content; Susan Woollen prepared it for typesetting; and Julia Petrakis constructed the index. Anita Whitlock provided administrative assistance.

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BRUCE K. MACLAURY
President

Washington, D.C.
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CHAPTER ONE

Introduction

Robert E. Litan

THE AMERICAN SYSTEM of civil justice, much admired around the world, in recent years has become the subject of great controversy at home. Indeed, the workings of the civil justice system even became an issue in the 1992 presidential campaign.

Complaints focus on both substance and procedure. The nation's tort laws that provide compensation to injured parties, for example, have come under attack for discouraging socially worthwhile innovation. Defenders of the tort system assert that liability rules must be stringent to deter firms and individuals from selling risky products or otherwise behaving in an unsafe manner. Many states have so far sided with the critics, at least to some degree, by modifying their liability laws in some fashion in recent years. At the federal level, however, Congress has so far rejected various proposals for tort reform.

On procedural issues, the situation has been somewhat different. Perhaps surprisingly, the antagonists in the tort reform debate—the plaintiffs' and defendants' bar, the insurance industry, the manufacturing sector, and the public interest community—generally have agreed that the civil justice system is too expensive and too slow. In 1990 Congress, in recognition of that reality, enacted legislation requiring federal district courts to develop and then implement plans to reduce delay and transactions costs for litigants. Only a relatively few states, however, seem to have taken a similarly strong interest in procedural reform.

Brookings has taken part in the debates on both the substantive and procedural aspects of the civil justice system. In 1988 and again in 1991, the institution published edited volumes about the workings and effects of the nation's liability laws.[1] And in 1990, a task force convened by Brookings published a report on the delay and transactions costs in the

federal courts whose recommendations were largely incorporated in the Civil Justice Reform Act of 1990.[2]

This book continues the work of the Brookings Institution in civil justice by focusing on an important subject that has both substantive and procedural aspects: the use of juries to resolve civil disputes. In fact, the right to a jury trial in civil actions for damages is so important that it is enshrined in the Seventh Amendment to the U.S. Constitution and in similar provisions in most state constitutions.

Nevertheless, the jury system too has attracted criticism. Some of those worried about the excesses of the tort system, for example, have argued that juries are incapable of understanding complex issues and are often biased against such deep pocket defendants as insurance companies, large companies, or physicians. Others have expressed concern that the rules of civil procedure are too stilted and impede jurors' understanding of issues. Still others are troubled about the rules governing the selection of juries. Perhaps the most damning public criticisms of the jury system—in a criminal trial, to be sure, but one with much broader implications—followed the verdict in the first Rodney King police brutality case in Los Angeles in 1992, where because of the widely shown videotape of the critical events at issue in the trial, millions of Americans found themselves unable to understand the jury's acquittal.

In short, given the apparent misgivings about aspects of the civil jury system, the time is ripe for a scholarly reexamination of the civil jury. In this book a distinguished group of academic scholars and judges do that by assessing various aspects of the civil jury system.

Chapter 2 begins by describing the history of the jury as a decisionmaker in both civil and criminal matters. Chapters 3 and 4 present competing views of the objectives of the jury system and whether, and to what extent, actual practice meets those objectives. Chapters 5 through 8 describe what is known about how juries work and what attitudes lawyers, judges, litigants, former jurors, and the public at large hold about the system. Chapters 9 through 14 present a wide range of recommendations for improving the jury system or changing it in a way that, in the opinion of some authors, would further the broader objectives of the justice system. Chapter 15 closes by placing the discussion of the jury in a broader context of how society resolves or manages civil disputes.

The idea for this project originated in discussions among this author, Brookings senior staff member Warren Cikins, and two recent chairmen of the American Bar Association's Section on Litigation, Ted Tetzlaff and

G. Marc Whitehead, who reported the section's interest in cosponsoring a symposium on the subject. An advisory group of approximately thirty distinguished legal practitioners helped select the authors of the chapters that follow. It was agreed that the authors of these chapters would present drafts to the symposium, which was held in June 1992 and attended by more than one hundred attorneys, judges, academic scholars, and representatives of users of the judicial system, including businesses, insurance companies, and public interest organizations. The product of that symposium was a report published by Brookings in December 1992, *Charting a Future for the Civil Jury System.*

Readers of that report will detect a number of differences from the views presented here. Broadly speaking, many of the authors in this volume seem more willing to entertain fundamental changes to the jury system than the participants in the symposium, who strongly defended the jury as an institution but who also agreed that jury trials and selection procedures could be improved to some degree.

More than twenty-five years ago, Harry Kalven and Hans Zeisel of the University of Chicago published what continues to stand as the preeminent study of the jury system.[3] This book does not pretend to update or augment that effort. However, all of the authors in the following chapters approached the subject matter of the civil jury in a similar spirit, with an open mind as to how the jury functions and whether certain features of the civil jury system should be modified or reformed.

The History of the Civil Jury

The American jury system, like that of the common law more generally, has its roots in England. In its original form, juries were used by the Crown to gather information for prosecuting alleged criminals. Later, juries evolved as decisionmakers in both criminal and civil contexts. In the process, juries moved from being handmaidens of royal authority to bulwarks of liberty, acting as a means for ordinary citizens to resist excessive demands by government. In their capacity as jurors, ordinary citizens essentially could make legal doctrine. In principle, of course, jurors made law only for the cases before them. But in the process of reaching their verdicts—deciding, for example, what is or is not reasonable conduct—juries could and did make precedent-setting decisions that affected private behavior throughout society.

In chapter 2 Stephan Landsman explains how the jury system in the United States has evolved. As in England, the views of the American system have also undergone change.

In colonial times, jury service was common for community residents and viewed as an essential instrument of governance and a strongly unifying experience for those who served. That view was a key reason why the right to a jury trial was included in the Constitution. After the revolution, however, the view of the jury gradually changed: juries were no longer seen as a means of governing, but instead as essential bodies for counterbalancing the growing power of judges and the fear that that power could be abused. Indeed, as the country matured during the nineteenth century, power shifted away from juries to judges, who increasingly controlled the procedures and outcomes of disputes and criminal trials. Nonetheless, the jury still continued to be an important force in shaping common law, especially for tort actions, or when individuals sought compensation for the injuries they alleged were caused by other individuals or corporations.

The jury as an institution came under strong attack in the early years of the twentieth century, with opponents challenging its composition, procedures, and even its right to exist. These criticisms stimulated a series of empirical studies of the ways juries worked, which ultimately only enhanced the jury's reputation.

In short, Landsman explains, the jury of today has a mixed heritage. On the one hand, juries have been assigned a wide range of tasks, including the assessment of business morality, protection of the consuming public, the definition of key Constitutional rights, and the determination of questions of life and death in criminal cases. On the other hand, the jury system continues to be the target of reform proposals. Some of these have already been adopted: in many jurisdictions, juries can be fewer than twelve persons in size, unanimous verdicts are not required, questioning of jurors (during voir dire) has been limited, and the right of the parties to make peremptory challenges (where no reason need be given) has been restricted.

Landsman concludes his historical overview with a warning. The civil jury as an institution is not invincible, as demonstrated by the fact that it disappeared in England (where it was born) in the years between the First World War and the depression. If the jury in the United States is not to suffer the same fate, Landsman argues, its importance to democratic values must be appreciated and significantly broader reform efforts resisted.

As we shall soon see, this view is not shared by all of the authors in this project. Some believe that fundamental reforms are desirable, if not essential. But there is broad agreement among all of the authors that the jury still has and will continue to have an important role to play in the American system of civil justice.

Competing Views of the Civil Jury

It is often said that where one sits determines where one stands. By the same token, one's views about the efficacy or desirability of the jury system depend significantly on the purposes one believes the jury is supposed to fulfill. In this spirit, chapters 3 and 4 present very different perspectives on the objectives and achievements of the civil jury as an institution. Subsequent chapters contain more detailed discussions of the empirical evidence relating to many of the claims advanced in chapter 3 by Marc Galanter and chapter 4 by George Priest.

To set the stage, it is useful to describe the essential features of the civil jury. Typically, it consists of twelve persons (but in many jurisdictions, juries as small in size as six are permitted), all ordinary citizens and generally not legal professionals (although most jurisdictions allow attorneys to serve), chosen randomly; sitting discontinuously (that is, dispersing after the case is over), and, in the words of George Priest, "aresponsible" in the sense that juries decide cases without having to give reasons, while their verdicts are largely invulnerable to review. The critical question to which both Galanter and Priest address themselves is how such a system of decisionmaking can be justified.

Marc Galanter takes up the defense by making the distinction already made between two functions of the jury system: to decide specific cases, and to collectively generate a body of legal knowledge and doctrine that underpins the American system of "litigotiation." Galanter uses the latter term because relatively few of the cases filed actually are decided by juries but instead are settled by negotiation between the parties.

Galanter's reading of the substantial accumulated body of jury research is that juries have been found to do a good job of deciding cases. Jurors are as conscientious and able to recall evidence as judges. Jurors and judges also agree about as often as one could reasonably expect given the often complex matters juries are asked to resolve. Although some evidence shows that jury outcomes are affected by the identities of the litigants, Galanter finds little support for the notion that juries are biased

against deep pocket defendants. On the whole, Galanter finds the evidence supporting juries as decisionmakers somewhat remarkable, given that the cases that make it to trial are those in which the facts and the law are most strongly in dispute.

At the same time, however, the fact that the fraction of cases decided by juries has fallen in recent years—from about 5 percent of federal cases in 1961 to just 2 percent in 1991—is the reason why Galanter concentrates on the norm-setting or signaling function that juries collectively perform. He observes that jury decisions affect private behavior through many channels: through the judicial apparatus and related reporting services, attorneys, word-of-mouth discussions by jurors of their experiences, academic publications, and perhaps most importantly through reporting by the mass media. As the share of cases decided by juries falls—and even more importantly, as the number of jury verdicts declines relative to the population as a whole—jury outcomes increasingly are transmitted to the public not through jurors but through the other channels.

Galanter suggests that little is known about how individuals form beliefs about the jury system or its outcomes, let alone how these factors affect the litigotiation process. He points to evidence that lawyers display persistent and sizable variability and error in their readings of the potential outcomes of jurors' decisionmaking. Among other things, Galanter believes this is because of a media bias that overstates the number and size of jury verdicts: only large verdicts tend to be newsworthy, thus distorting perceptions by lawyers and the public of likely outcomes.

The jury system, of course, has its monetary and nonmonetary costs. The latter include some variance in verdicts pertaining to similar cases, which sends blurry signals to private actors. Nevertheless, in Galanter's view, the benefits of the jury system outweigh the costs. The jury promotes democratic values and helps legitimate judicial outcomes. But for Galanter a key advantage is the jury's strongly positive impact on the litigotiation system. The amateurism and transience of juries, which some find to be vices, Galanter argues are their virtues. Because juries have neither experience nor institutional responsibilities, they respond to the case at hand, free of the biases and hardened attitudes that can all too easily develop among professionals seeing similar cases day in and day out. The freshness of jury decisions helps ensure that legal norms are aligned with emerging community values and understandings.

George Priest advances a very different perspective on the civil jury system in chapter 4 by attempting to match specific types of civil cases

with the various justifications that have been advanced for having juries, rather than judges, decide these disputes. He concludes that while, in principle, many types of civil cases satisfy these criteria, in practice only a small proportion of the millions of the civil cases that are filed each year do so.

For example, Harry Kalven, one of the most prominent academic defenders of the jury system, argued that a group of representatively chosen laypersons was appropriate for deciding disputes whose resolution required the application of some "community sense of values." Cases meeting this standard include those involving claims of defamation and cases requiring complex societal value judgments, such as wrongful death actions for homemakers or children (whose activities are not measured by the market, as is the case for working men and women), or perhaps tort cases in which victims have suffered extreme pain and suffering.

Jury decisionmaking in civil cases can also be justified as a means of preserving democratic values. A similar argument justifies jury decisionmaking in criminal cases. Priest suggests that condemnation actions, or civil suits against the police or other governmental agencies, would satisfy this criterion for upholding democracy.

Harry Kalven also defended the discontinuous nature of jury service on the grounds that juries serve as a "lightning rod for animosity." Such a characteristic is helpful, he argues, in cases involving great public controversy since juries can render a decision and then their members can return to anonymity. In contrast, if permanently appointed judges were to decide these delicate questions, they might long remain an object of controversy.

Priest argues that the most difficult characteristic of the civil jury to defend is its "aresponsibility"—that is, its freedom from explaining or justifying decisions, as well as its insulation from effective review (except in cases of serious error). Nevertheless, Yale Law School Dean Guido Calabresi has defended this characteristic in cases requiring "tragic choices," such as the determination of which individual best deserves a scarce dialysis machine or resuscitator. In such instances, requiring statements of the standards by which decisions are made in individual cases (one individual is younger than another and therefore should be first in line to receive the treatment) may be destructive of larger social values (all citizens deserve equal treatment).

A final defense of jury decisionmaking as an institution is that jury service gives citizens important lessons in civic virtues and in the law itself. This feature of the jury system, which de Tocqueville championed

as "wonderfully effective in shaping a nation's judgment and increasing its natural lights," is continuously bolstered by post-trial interviews of jurors.

Priest then asks how relevant each of these various justifications is for the actual casework of the modern civil jury. He attempts to supply answers by examining empirical evidence of civil jury experience in the metropolitan Chicago civil courts over a twenty-one-year period ending in the mid-1980s. He finds that in only a few of these disputes are any of the various justifications met.

For example, less than 2 percent of the Chicago jury trials involved defamation or wrongful death of nonmarket participants, or two of the categories of cases most likely to satisfy Kalven's "community values" justification for jury decisionmaking. Expanding as widely as possible the other category of such cases, those with difficult judgments on pain and suffering, adds another 16 percent to the total. Still another 5 percent represents cases implicating governmental power. In all, the cases meeting what Priest believes are the most important types of specific matters where jury decisionmaking can be justified, constituted less than one-quarter of all the cases tried by Chicago juries during this period.

What, then, were these juries doing most of the time? In almost two-thirds of the cases, they were resolving disputes deriving from routine auto accidents causing routine injuries. Priest notes that slightly over half of the Chicago juries spent their time on cases in which the most serious claimed injury was a strain, bruise, fracture, or dislocation.

Priest also finds that the number of Chicago citizens able to learn about civic virtues was very limited. Whereas in de Tocqueville's day, the typical citizen may have served on a jury every 3 or 4 years, in Chicago during the two decades that Priest examined, a citizen faced the likelihood of jury service once every 260 years. The odds of serving on a case requiring application of community values or the exercise of governmental power were much smaller, only once over 1,252 years.[4]

In short, Priest questions whether the civil jury is appropriate for resolution of the types of disputes that currently dominate its caseload. Moreover, he wonders whether the features of the civil jury that ensure its democratic character—namely, its composition of lay persons with little experience in the law, chosen randomly—increase uncertainty about outcomes and thus impair the ability of parties in routine and nonroutine cases to settle out of court. If true, then the congestion that now prevents a large proportion of cases from ever reaching a jury is, at least in part, a product of the jury system.