
The Civic Impact of Civil Jury Service

By Traci Feller, John Gastil and Valerie P. Hans

Editor's Note:

The following article is adapted from Valerie P. Hans, John Gastil & Traci Feller, Deliberative Democracy and the American Civil Jury, 11 J. EMPIRICAL LEGAL STUD. 697 (2014).

Renewed public debate on civil juries has been spurred by a series of guest posts at the *Washington Post* by George Washington University law professor Renee Lettow Lerner. She argues that the civil jury system has become lengthy, expensive, unpredictable, and burdensome on jurors and such trials should be abolished and replaced with alternatives, such as judicial panels.

She defends criminal trials, and their importance to our judicial system, providing protection against the corruption of government, but says specifically that regarding liberty, citizen participation, and education in government “the civil jury today is no help.”¹

Based on research findings from a study of American civil juries, we beg to differ. Our data suggest that the civil jury is a key component of our participatory democracy and does lead to greater civic engagement, though the nature of those effects is complex. To uncover the civil jury’s power, we reexamined a dataset that had shown how criminal jury service encouraged future electoral participation, with no comparable impact from civil trials.²

Our new analysis discovered that the value of civil jury service had been obscured. Civic engagement effects of civil jury service appear to depend on the nature of the decision rule, the jury’s size, the identity of the defendant, and the type of case.

Jury Service and Civic Engagement

As long ago as 1835, the French political theorist Alexis de Tocqueville defended jury service as a particularly potent form of deliberative democracy, because it engages citizens in deliberation with one another to resolve important social and political

disputes.³ He asserted that jury service enhanced jurors’ qualities as citizens. They were better informed about the rule of law, and they were more closely connected to the state.

In the U.S. Supreme Court decision *Powers v. Ohio* (1991), the Justices drew on Tocqueville to emphasize the political significance of jury service. “With the exception of voting,” Justice Kennedy wrote, “for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.”⁴

To test such optimism about the jury’s civic import, John Gastil and his collaborators undertook a large-scale, multi-state study examining jury service and voting rates, which they summarized in *The Jury and Democracy*.⁵ They used pre- and post-jury service voting records of thousands of impaneled jurors and found that those who deliberated voted more frequently in elections after their service, compared to those impaneled jurors who were tagged as alternates or whose trials were dismissed for reasons such as mistrials or mid-trial guilty pleas. Though the voting rate boost was found only for those jurors who had voted infrequently in the past, the 4 to 7% increase in voting rates was comparable to the impact of a year in student government or enrollment in a civics class.

That same result was not present in the data for civil trials. There is some irony here, since Tocqueville singled out the civil jury for its deliberative potential. Moreover, civil juries often have the opportunity to make crucial judgments that are political in nature, such as deciding whether a corporation has behaved negligently or determining damages in discrimination cases. Thus, we returned to those data to see if a more fine-grained analysis could reveal the civil jury’s more nuanced civic impact.

Differences Between Criminal and Civil Juries

Our inquiry begins by reflecting on the reasons why criminal and civil jury service might produce different civic outcomes. Civil trials may seem less significant than criminal trials to jurors because of the criminal trial's salience, accessibility, and intrinsically interesting subject matter.

When people think about juries, they tend to recall the criminal jury, because it is an important symbol of democracy and because criminal trials are far more common than civil trials. When citizens receive a jury summons, they likely expect to decide a criminal case in a group of twelve people who must decide unanimously.

For such jurors, a civil trial would be a violation of their assumptions, might seem less significant, and thus could be somewhat of a disappointment, resulting in a dampened civic impact.

The jury's political role as the judge of government action may be more striking for a criminal jury than for a civil jury. For example, the U.S. Supreme Court found in *Duncan v. Louisiana* (1968) that the right to a jury trial in state criminal cases was fundamental to the American system of justice, protecting individuals against arbitrary state power. In contrast, the right to a civil jury has not been held to be such a fundamental right. The U.S. Supreme Court has never held that the right to a civil jury trial (guaranteed by the Seventh Amendment) is binding on the states.

The process and nature of the civil jury's deliberative task may account for the greatest difference between criminal and civil juries. Whereas the prototypical criminal jury has a binary decision that requires a judgment about guilt "beyond a reasonable doubt" on one or more charges, the civil jury must simply consider the "preponderance of evidence" and seek a sufficiently large majority to render a decision.

The almost continuous scale of possible judgments and the fact that civil jury verdicts in many jurisdictions require only a majority means that some jurors end up as dissenters, who we might expect to draw less civic inspiration from their experience.

Some also dispute the importance of the civil jury's political role, pointing to the fact that civil juries mostly resolve less-consequential disputes between individual parties. Legal scholar Jason Solomon has likewise argued that that deciding civil damages is a "poor way for members of a community to articulate their values and participate in government."⁶

Structural differences exist between civil and criminal juries. In all but a handful of states, serious criminal cases are decided by juries composed of 12 citizens who must agree unanimously in the verdict. In contrast, states vary considerably in the size and decision rule required for civil juries.⁷

For cost, efficiency, and other reasons, many states have reduced the size of civil juries and have replaced the unanimous rule with a majority decision rule. These structural differences raise questions about whether civil and criminal juries function as decision-making bodies in the same way. Research suggests that both the representativeness of the jury and the experience of the decision-making process are likely to differ as a function of size and decision rule.

The parties also differ between criminal and civil juries. In a criminal case, jurors hold the fate of an individual defendant, or at most a small number of defendants, in their hands. On the other side is the prosecution, representing the people of the state. Most civil cases involve disputes between private parties. When one of the parties is a corporation or other organization as opposed to an individual, the consequences may be less tangible. It is easier to feel empathy for individuals than for a faceless corporation, and that empathy difference could lead jurors to treat corporate defendants differently than individual defendants.⁸

Re-Investigating the Data

With these characteristics in mind, we re-examined the civil jury data.⁹ We categorized each case in terms of jury size, decision rule, whether the parties were exclusively individuals or included organizational parties such as businesses and corporations, and the case type (auto, non-auto

tort, or contract). The new analysis included 522 different civil juries and 3,378 individual jurors. This included 195 jurors from Boulder County (Colorado), 252 from Cumberland and Swain Counties (North Carolina), 834 from Douglas County (Nebraska), 428 from El Paso County (Texas), 153 from Orleans Parish (Louisiana), 781 from Summit County (Ohio), and 735 from Thurston and King counties (Washington).

We used the jury trial characteristics variables to predict changes in voting rates for individual jurors before and after their period of service. Voting rate was calculated based on all regular county-wide primaries, Presidential primaries, and general elections; the number of times voting was divided by the number of opportunities to vote (from roughly 1994-2004). For our sample, the average turnout rate before jury service was 50.1%, and post-service turnout was 56.4%.¹⁰

As *The Jury and Democracy* had shown, comparing the voting rates of civil jurors before and after their jury service showed no overall statistically significant differences. But when we took our new variables into account in the analysis, however, we discovered significant effects on voting rates for particular types of jury trial experiences.

First, the nature of the defendant mattered. When jurors served on civil cases with organizational defendants such as business corporations, their jury experience produced a more positive change in their voting rates than did those jurors whose cases featured only individual defendants. As predicted, the unanimous decision rule also tended to yield more positive change in juror voting rates. The size of the jury had no significant direct overall effect.

Whether jurors actually deliberated interacted with the jury's size and decision rule. Some civil jurors never get the opportunity to deliberate. For example, some serve as alternates; their cases settle during trial, or a mistrial is declared and the jury is sent home. Interestingly, the effect of unanimity (vs. majority rule) on voting rate change was significant for both deliberating and non-deliberating jurors. In addition, there was a net decline in voting

rate for those jurors who were assigned majority rule and who did not deliberate. In other words, jurors who were seated for a majority-rule trial and only anticipated deliberation (or began but did not complete it) experienced an average decline in their voting rates.

We found a strikingly similar pattern for jury size. As we noted above, the sample as a whole experienced an increase in post-service voter turnout of roughly 6%. However, jury size mattered for juries that did not deliberate. Service on a 12-person non-deliberating jury rose by close to 14%. In contrast, smaller juries that did not deliberate experienced an average *drop* in voting rate of 6%. Once again, it is the *non-deliberating* juries that appear to be most responsive to the structural conditions of their service.

Using automotive cases as the comparison group, our analysis also revealed two significant effects for claim type. Those who served on contract cases had an average voting rate change of roughly 6%, which was comparable to that resulting for jurors on non-automotive tort cases. Those jurors hearing automotive claims, however, had a mean change in voting rate of only 2% — a significantly lower boost.

Lessons Learned

Civil juries *can* spark a civic awakening for jurors, depending on the context of the trial. The civic effect is more visible and positive when the defendants include at least one organization, as opposed to exclusively private individuals, and the civic effect fades when the case concerns minor cases, such as automotive claims.

This supports one of the largest arguments against the abolition of the civil jury—that they are not necessary when deciding private matters, and should be reserved only for the protection of individuals from the tyranny of the state in criminal trials. In fact, civil jurors play an important role in setting community standards by deciding what type of conduct we will accept from cornerstones in our society, be it corporations, doctors, small businesses, land owners, manufacturers, and the list goes on.

Civic effects are also more pronounced for those civil juries that have a unanimity decision rule. Allowing for members of a jury to reach a binding verdict even when jurors disagree lowers the participatory effect of serving on a jury. And finally, when the jurors are impaneled but do not get the chance to deliberate, the civic effect can become negative if the jury would have used majority rule or included fewer than twelve persons.

Abolishing the civil jury altogether will eliminate one of the most intimate ways that citizens can increase their political engagement. Not only does the civil jury have effects on how the public has a right to make decisions affecting the community, but it has effects on the civic participation of those involved with making those decisions. While some would suggest truncating or otherwise expediting the process of the civil trial, we have discovered here that the procedural qualities of a civil trial that make it more like a traditional criminal trial, such as using a unanimity rule, and a jury of twelve, are those that lead to increased civic engagement.

Furthermore, it appears that the dissatisfaction of not being able to deliberate coupled with the disenchantment of having a smaller jury group or a non-unanimous task lowers overall civic participation. Whatever the issues are with civil juries, their abolition or abbreviation (in either number of jurors or decision rule) is not the answer.

These findings augur caution for those who would reduce the size of civil juries and lower the bar for their decisions to a form of majority rule. Low-stakes juries have been proposed as a means of revitalizing the civil jury.¹¹ These “summary” or expedited civil juries could make juries more appealing and reverse the trend toward ever-fewer jury trials. But if they are not designed carefully, they could have the same features of those civil juries that yield no positive civic impact. Future research should investigate the experiences people have on these juries to better determine whether they can deliver on the civic educational promise first identified by Tocqueville. ■

¹ Renee Lettow Lerner, *The Uncivil Jury Part I: America's Misplaced Sentiment about the Civil Jury*, WASH. POST: VOLOKH CONSPIRACY (May 26, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/26/the-uncivil-jury-part-1-americans-misplaced-sentiment-about-the-civil-jury/>.

² John Gastil, E. Pierre Deess, Phil Weiser & Jordan Meade, *Jury Service and Electoral Participation: A Test of the Participation Hypothesis*, 70 J. POL. 1 (2008).

³ ALEXIS DE TOCQUEVILLE DEMOCRACY IN AMERICA (Schocken, 1835/1961), <http://xroads.virginia.edu/~HYPER/DETOC>.

⁴ *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (internal citations omitted).

⁵ JOHN GASTIL, E. PIERRE DEESS, PHIL WEISER & CINDY SIMMONS, *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* (2010).

⁶ Jason Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY LAW J. 1331, 1382 (2012). But see Valerie P. Hans, *What's it Worth? Jury Damage Awards as Community Judgments*, 55 WM. & MARY L. REV. 935, 937-41 (2014) (offering multiple ways in which the dollar amounts in jury damage awards express community values).

⁷ RON MALEGA & THOMAS H. COHEN, STATE COURT ORGANIZATION, 2011 (2013), at 10 (Table 10).

⁸ VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY (2000).

⁹ The full data analysis strategy and results may be found in the original publication: Valerie P. Hans, John Gastil & Traci Feller, *Deliberative Democracy and the American Civil Jury*, 11 J. EMPIRICAL LEGAL STUD. 697 (2014).

¹⁰ As in the earlier analyses of these data, jurors with no history of voting or a history of voting in every single election were removed because their voting rate can only move in one direction; this created a more normal distribution of both pre and post-service voting rates and reduced floor and ceiling effects. As Gastil and his colleagues had found with criminal juries (GASTIL ET AL., *supra* note 5), a significant and stable effect found through each model of our analyses was that relatively infrequent voters were more likely to experience a positive change in voting rates following civil jury service.

¹¹ INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, A RETURN TO TRIALS: IMPLEMENTING EFFECTIVE SHORT, SUMMARY, AND EXPEDITED CIVIL ACTION PROGRAMS (2012), http://iaals.du.edu/sites/default/files/documents/publications/a_return_to_trials_implementing_effective_short_summary_and_expedited_civil_action_programs.pdf.

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