Book Review [The Jury: Trial and Error in the American Courtroom]

Santa Clara Law Review

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.scu.edu/lawreview/vol36/iss2/18

This Book Review is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.
BOOK REVIEW

THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM.

Reviewed by Rogelio A. Lasso

I. INTRODUCTION

The current debate about the role of the jury in the American judicial process would benefit from a balanced examination of the jury system. As lawmakers throughout the country use anecdotes and exaggerations to implement laws that diminish the role of the jury in criminal, tort, and securities cases, a careful analysis of the jury process is critical. A methodical study of issues like the exclusion of educated citizens from jury duty, jury nullification, peremptory challenges, and the ability of jurors to manage complex cases is particularly important. Steven Adler, a Harvard-trained lawyer and legal editor of The Wall Street Journal, apparently seeks to accomplish this examination in The Jury: Trial and Error in the American Courtroom [hereinafter The Jury]. This book, however, adds little more than “pulp nonfiction” to the current polemic.

From his study of six trials, the author of The Jury concludes that juries decide most cases incorrectly. Adler laments that he “repeatedly encountered scenes that bore next to no resemblance to the high-minded debates of 12 Angry Men” (the 1957 movie classic about a jury’s deliberation process directed by Sidney Lumet and starring Henry Fonda).1 Adler’s book questions the value of a jury system that fre-

---

quently results in "shoddy — and sometimes patently stupid — verdicts."2

The Jury provides interesting reading on a timely and controversial topic. Adler is a skilled journalist and an engaging writer. Ultimately, however, the book's weaknesses diminish its contribution to the current debate on the jury system. The main weakness is that Adler's anecdotal examination of only six trials cannot support his broad assessments about the jury system. Additionally, his opinion that juries perform badly whenever he disagrees with the result is arrogant and offensive. Finally, Adler's unrelenting attack on juries belies his latter platitudes in favor of the jury system. Although not all juries make the best decisions all the time, the system works remarkably well most of the time. Moreover, the jury trial is too valuable to warrant Adler's attack.

II. HISTORICAL ROOTS OF THE MODERN JURY

A brief historical perspective on our jury system is helpful to better appreciate its value. Although the origins of the jury trial is the subject of debate,3 there is agreement that our modern jury system can be traced to twelfth century England.4 Prior to that time, Norman kings, like William the Conqueror, utilized the jury not to safeguard justice but to enforce sovereign power.5 During the twelfth century, King Henry II (and later Henry III) transformed the jury from a

2. Id. at xv.
3. Some scholars believe the jury trial was conceived by the ancient Greeks and brought to England by the Romans. See, e.g., MAXIMUS A. LESSER, THE HISTORICAL DEVELOPMENT OF THE JURY SYSTEM 171 (1894); PATRICK DEVLIN, TRIAL BY JURY: THE HAMLYN LECTURES 5-6 (1956). Others claim juries were used by the Saxons long before the Norman Conquest. E.g., MATHEW HALE, THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 264 (1897).
4. See, e.g., DEVLIN, supra note 3, at 6-7; JAMES THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 47, 54-67 (1898). Although in a different form and for a different purpose than today's system, the device of the jury was brought to England by the Normans in the eleventh century. Id.
5. Thayer, supra note 4, at 54-67. Under the Norman kings, a juror was a citizen compelled by the King to take a juramentum (an oath). DEVLIN, supra note 3, at 5. The Latin term juramentum reflects Norman law's roots in Roman law. The word "jury" derives from this Norman law procedure.

The juramentum was so strong a guarantor of truth that the King's officers would convene, by compulsion, a jury to establish the facts in administrative inquests. Id. at 6. William the Conqueror, for example, used a jury to compile information for the Domesday Book, a survey of the value and ownership of English lands. Id.
tool of sovereign power to an instrument of justice. For instance, if two of King Henry's subjects were involved in a land dispute, the Crown's officers would choose jurors from the disputants' neighborhood. The party able to convince twelve jurors to swear that he was entitled to the land received title to the disputed real estate. This was the origin of the trial by twelve jurors. Because the typical juror lived in the village where the trial was held, he usually knew the facts of the dispute. Under Henry II, the jury replaced the more primitive methods of dispute resolution such as trial by battle and trial by ordeal. Under Henry II, the right to a jury trial was codified as a constitutional right in the Magna Carta.

Between the twelfth and the seventeenth centuries, the right to jury trial was expanded to all criminal and most civil cases. The right to a jury trial traveled the Atlantic with the English colonization of North America where it was ratified by each of the colonies' charters. In 1774, the first Continental Congress reasserted that the colonists had the right to be "tried by their peers." On July 4, 1776, the Declaration of Independence proclaimed that all American citizens had the right to a jury trial. In 1791, the states ratified the Bill of Rights guaranteeing, through the Sixth and Seventh Amendments, the right to a jury trial in criminal and civil cases.

7. Id. at 6-7. Trial by battle was a means of settling disputes by having the litigants (or their hired fighters) engage in physical combat until one or the other surrendered or was defeated. Stephan Landsman, The History of the Adversary System, in The Adversary System: A Description and Defense 7-8 (1984). In some types of criminal cases, trial by battle continued to the death. Id. Trial by ordeal required the litigants to submit to what can only be described as a very strict test, like being burned at the stake or submerged in cold or hot water. If the litigant survived, he "won" the case. Id.
9. Id. at 16-28; see also Paula DiPerna, Juries on Trial 28 (1984).
10. In 1606, for example, the First Charter of Virginia guaranteed to the residents of that colony the protections codified in the Magna Carta, including the right to trial by jury. Few, supra note 8, at 28-29. In 1632, the Charter of Massachusetts Bay did the same for the inhabitants of that colony. Id.
11. Id. at 33; DiPerna, supra note 9, at 28.
12. DiPerna, supra note 9, at 28.
13. Few, supra note 8, at 34.
III. THE ROLE OF THE JURY IN AMERICAN DEMOCRACY

A. The Value of the Jury

I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.14

The jury trial is essential to the full democratic aspiration of government by the people.15 As Aristotle observed more than 2000 years ago, "If liberty and equality . . . are chiefly to be found in democracy, they will be best attained when all persons alike share in the government to the utmost."16 Jury duty provides one of the few avenues available for all citizens to participate directly in the affairs of government. That the United States Constitution and the constitutions of every state guarantee the right to a jury trial underscores its importance as an American democratic institution.17

Throughout history, our Anglo-Saxon ancestors have used juries to protect citizens against unfettered governmental power.18 Today, juries safeguard common citizens against


15. FEW, supra note 8, at 265 ("One principal function of government is the administration of justice and trial by jury is justice 'by the people' in its truest sense."); see also DiPERNA, supra note 9, at 1 ("The concept of the jury system is as close as any society has ever come to true democracy.").


17. Article III and the Sixth Amendment of the United States Constitution guarantee the right to a jury in criminal cases. The Seventh Amendment preserves the right to a jury trial in civil cases brought in federal courts. Almost every state provides for jury trials in both criminal and civil cases. See, e.g., CAL. CONST. art. I, § 16; ILL. CONST. art. I, § 13; KAN. CONST. BILL OF RIGHTS, § 5.

18. Until the early eighteenth century, jurors could openly disagree with the law and decide the case based on what they thought should be the right outcome. DiPERNA, supra note 9, at 28-29. This power to disagree with the law was known as jury nullification. Id. One of the most celebrated examples of American jury nullification was the 1735 trial of John Peter Zenger. Zenger, the publisher of the New York Weekly Journal, was charged with libeling the governor of New York. Although the article for which Zenger was prosecuted was clearly unlawful under the existing law, the jury acquitted Zenger. The Pennsylvania Gazette praised the verdict by declaring that "if it is not law it is
arbitrary and overreaching government actions, and consumers from unsafe products and hidden dangers.

B. Attacks on the Jury System Are Not New

The right to trial by jury has consistently been attacked by those who wished to exert unchallenged power. In France, the Nazis abolished the right to a jury trial at the beginning of World War II and it has never been restored. In Germany, the right to a jury trial survived for only fifty years. Introduced by Napoleon to the conquered provinces of the Confederation of the Rhine, it was adopted by a unified Germany in 1870 but eliminated by the Weimar Republic in 1924. In other European nations, the decline of the right to a jury trial followed closely the weakening of their democracies. In England, despite the Magna Carta's guarantee of trial by jury and its adoption in the new world, Parliament all but eliminated the right to a jury trial during the last half of the nineteenth century.

C. The Current Attacks on the Jury

Today, the anti-democratic forces that eroded the jury system in England are seeking to accomplish the same in the United States. During the past two decades, America's privileged class has sought to diminish the participation of juries in civil and criminal trials. Like its English predecessor,
the American economic aristocracy understands that juries provide one of the last domains where ordinary citizens can hold the overclass accountable. It is no surprise, then, that this oligarchy has endeavored to accomplish in the United States what the English aristocracy has already achieved: all but the complete elimination of the jury trial in civil and criminal cases.\textsuperscript{26} Using its unique access to the media, America's privileged class is seeking to convince us that the jury system is to blame for a multitude of evils. Juries are accused of increasing the cost of medical care and weakening America's edge in global market competition.\textsuperscript{27} Juries are also blamed for inciting the Los Angeles riots in the aftermath of the first Rodney King beating trial,\textsuperscript{28} and for perverting justice and racially dividing the nation by improperly acquitting O.J. Simpson.\textsuperscript{29}

\begin{itemize}
\item ANN. § 60-3402 (limiting recovery and heightening the burden of proof for punitive damages); KAN. STAT. ANN. § 60-258a (eliminating joint and several liability); see also FLA. STAT. ANN. § 768.73 (West 1992) (limiting punitive damages in most tort cases); N.H. REV. STAT. ANN. § 508:4-d (1994) (limiting damages in personal injury cases); UTAH CODE ANN. § 78-14-7.1 (1992) (limiting damages in malpractice cases).
\item "Tort Reform" is a cornerstone of the Republican "Contract with America." See H.R. 10, 104th Cong., 1st Sess. (1995). Euphemistically called the "Common Sense Legal Reforms Act of 1995," H.R. 10 proposes, among other changes, tougher standards of proof and mandatory caps for punitive damages as well as tougher standards for compensatory damages in product liability and medical malpractice cases. \textit{Id.}
\item Since 1883, the British Parliament has slowly eliminated the right to a jury trial in all but a few civil actions. Buckley, \textit{Civil Trial by Jury, in Current Legal Problems} 63 (1966). Currently, jury trials in England are limited to actions for slander, libel, false imprisonment, seduction, breach of promise of marriage, and malicious prosecution. \textit{Id.} In addition, many criminal offenses previously triable to a jury are now summarily tried to a magistrate. James Driscoll, \textit{The Decline of the English Jury, 17 Am. Bus. Law J.} 99, 104 (1979).
\item In \textit{The Jury}, Adler suggests that the post-trial disturbances in south-central Los Angeles were the result of the jury's decision in the first trial of the officers who beat Rodney King. \textit{Adler, supra} note 1, at 240.
\item In the aftermath of the acquittal of O.J. Simpson, some commentators have suggested that the verdict was due not to reasonable doubt, but rather to the refusal of black jurors to convict an obviously guilty black defendant. \textit{See, \textit{e.g.}}, Kingsley Guy, \textit{Trial Demonstrated Perversion of Long-Revered System, Ft.}
BOOK REVIEW

D. The Need to Improve the Jury System

As the gap between rich and poor rapidly widens, input into the justice system from all citizens is critical to the survival of our democracy. By providing individuals an avenue to affect a collective result, jury duty provides one of the few means by which a small group of citizens can directly participate in the affairs of government. The jury system, however, is not without its flaws. A book that explores ways to improve the jury system would be a welcome endeavor. Unfortunately, Adler's The Jury, is not such a book.

IV. Analysis of Adler's The Jury

As Adler sees it, our jury system is not only flawed, it is a contradiction. "We celebrate the jurors' democratic power but no longer trust the decisions they reach," he tells us in his introduction to The Jury. To explain this contradiction, Adler reenacts six jury trials. Adler reconstructs these trials by post-trial interviews with jurors, judges and lawyers involved in each case. These trials demonstrate, in Adler's view, that

LAUDERDALE SUN-SENTINEL, Oct. 5, 1995, at A26 (verdict was a "travesty of justice"); John Kolbe, O.J. Verdict Says Race Drives Logic, PHOENIX GAZETTE, Oct. 4, 1995, at B7 (the jury's verdict was a result of "a blatant appeal to prejudice"). Several pundits warn us that this "jury nullification" verdict will lead to a white backlash. Kenneth B. Noble, In the City of the Beautiful People, Trial Hinged on Uglier Issues, N.Y. TIMES, Oct. 4, 1995, at A13 (quoting law professor Susan Estrich as stating that the verdict will cause a white backlash); Frank Rich, Los Angeles: The Big Nowhere, KAN. CITY STAR, Oct. 9, 1995, at B5 ("When O.J. gets off, the whites will... punish blacks by closing their day-care programs and cutting off their Medicaid.").

30. The United States has the highest level of concentration of wealth in the industrialized world. The richest 1% of the population owns almost 40% of the nation's wealth, compared to 18% for the wealthiest Britons. See, e.g., Keith Bradsher, Gap in Wealth in U.S. Called Widest in West, N.Y. TIMES, Apr. 17, 1995, at A1; Michael Lind, To Have and Have Not: Notes on the Progress of the American Class War, HARPER'S, June 1995, at 35.

31. The importance of the jury trial has led to extensive scrutiny of the jury. Legal scholars, social scientists, psychologists, and journalists have long studied, critiqued and sought to explain and improve the jury deliberation process. See, e.g., PATRICK DEVLIN, TRIAL BY JURY: THE HAMLYN LECTURES (1956) (the author was a British jurist when he gave these lectures); HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966) (the authors are legal and sociological scholars); REID HASTIE ET AL., INSIDE THE JURY (1983) (the authors are social scientists); PAULA DiPERNA, JURIES ON TRIAL: FACES OF AMERICAN JUSTICE (1984) (Ms. DiPerna is a journalist); SAUL M. KASSIN & LAWRENCE S. WRIGHTS- MAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES (1988) (the editors of this collection are psychologists, the authors include social scientists, lawyers and legal scholars).
the jury system is badly malfunctioning, primarily due to the stupidity of jurors. He concludes, nevertheless, that the jury system can survive if we follow his prescription for reforms.

The book is divided into three major sections: "The Vision," "The Disappointment," and "The Hope." In "The Vision," Adler describes the idealized American vision of the jury as a group of "little guys" who, "told what the written law is, can nonetheless disregard it when circumstances require." 32

In the first chapter, Adler examines a death penalty case which he believes is typical and embodies everything that is good about the jury. A case where the killer confesses to the crime, mounts no defense, and the jury convicts him after deliberating for only a few hours is hardly a typical death penalty case. 33 The only reason Adler finds this case acceptable is because he agrees with the verdict.

"The Disappointment" begins with Adler's largely unsupported assessment that the jury system is in major disrepair. 34 Adler relies on the $10.5 billion jury verdict in the

32. ADLER, supra note 1, at 3. Adler seems to say that Americans value jury nullification. He apparently did not anticipate the fury that white Americans expressed when they believed that the O.J. Simpson verdict was the result of "little guys" who "disregarded" the written law because the "circumstances [i.e. Mark Fuhrman] require[d]" it. Id.

33. There is very little that is typical about this death penalty case. The defendant is a white man accused of the unemotional killing of two other whites, apparently to rob them. First, studies show that black defendant/white victim cases most likely result in a death penalty conviction. See, e.g., DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 42-46, 140-97 (1990); William Bowers & Glen L. Pierce, Arbitrariness and Discrimination Under Post-Fuhrman Capital Statutes, 26 CRIME & DELINQ. 563, 578 (1980). Second, the rate of murder is much greater among nonwhites than among whites. For example, the homicide rate for white males is 8.2 per 100,000 while the rate for black males is 61.1 per 100,000. BALDUS ET AL., supra, at 42-46, 140-97. A more typical death penalty case would have involved a black defendant and a white victim.

34. Adler maintains that "academic studies, lawyers' and judges' anecdotes, and court records of damage awards reduced on appeal as a result of jurors' errors" support his conclusion that juries generally perform poorly. ADLER, supra note 1, at xvi. To sustain his argument, however, Adler asserts only that jury awards are altered by judges in about 20% of civil cases, and that his educated guess is that "punitive damages may be reduced or eliminated on appeal more often than not." Id. For further support, Adler recommends we read Robert MacCoun, Inside the Black Box: What Empirical Research Tells Us About Decisionmaking by Civil Juries, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 137 (Robert E. Litan ed., 1993). Actually, MacCoun's article demonstrates the risk in using a few jury verdicts "to infer general principles of jury performance." Id. at 139. See also infra notes 62-63 and accompanying text.
Pennzoil-Texaco case and the verdict in the Rodney King trial to argue that juries regularly blunder. To bolster his conclusion, Adler analyzes five cases in which he believes juries reached erroneous verdicts.

A. The Flawed Jury Selection Process

Adler first presents the criminal trial of Imelda Marcos to prove that the American jury system is not working. The case does reveal a jury selection process that permits capable citizens to easily avoid jury duty. It further demonstrates the effect incompetent lawyering may have on a verdict. The Marcos case may even demonstrate the effect of jury nullification in action as Adler's account insinuates that some jurors decided to acquit Mrs. Marcos because they believed that the case should have been prosecuted by the Philippine Government in the Philippines and not by the U.S. Government here. Adler's amusing behind-the-scenes reenactment of the jury's deliberations in the Marcos case manages only to illustrate the effect factors outside the jury room can have on a verdict. In doing so, Adler fails to persuade the reader that jury ineptitude or stupidity led to Mrs. Marcos' acquittal. Adler offers no evidence that another jury hearing the same case would have reached a different verdict. Simply believing in Mrs. Marcos' guilt, as Adler emphatically does, in no way means that the jury reached an incorrect verdict. As with all the cases he analyzes in the book, Adler's evaluation of the jury's competence seems based entirely on whether the jury reaches a verdict with which he agrees.

35. In 1985, after a four month trial, a Houston jury held that Texaco had to pay $10.53 billion in damages to Pennzoil. The jury found that Texaco interfered with Pennzoil's bid to acquire Getty Oil in a 1984 hostile takeover. Steven Greenhouse, Business and the Law; Pennzoil's Huge Award, N.Y. TIMES, Nov. 26, 1985, at D2. In 1987, the Texas Court of Appeals upheld the verdict. Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768 (Tex. Ct. App. 1987).

36. ADLER, supra note 1, at 53-63.

37. Adler's reconstruction of the Marcos' trial reveals how the prosecutors presented the complex financial transactions that benefited Mrs. Marcos in a manner that jurors found incomprehensible. See, e.g., ADLER, supra note 1, at 69-70. By contrast, Adler's account demonstrates how Mrs. Marcos' lawyer, Gerry Spence, was able to present his client as a "decent, generous, and persecuted woman," who the jury liked. Id. at 70-71.

38. ABRAMSOM, supra note 18, at 79. Jury nullification is the term given to a verdict decided in violation of the law. Id. at 61; see also supra note 18 and accompanying text.
B. The Jury Riggers

Adler next tackles the controversial issue of jury consultants. Adler believes that jury consultants can "rig" a jury to reach an incorrect result. Adler analyzes a case in which a child severely injured by a drunk driver sues the corporate owner of the restaurant that served the driver alcohol immediately preceding the accident. As part of their litigation strategy, the plaintiff’s lawyers arranged to present an abridged trial before a group of mock "jurors" hired by the jury consultants. Although the plaintiff’s lawyers hired the jury consultants, the mock jury did not know which party had hired them. Although the driver had told the police at the scene that she had been drinking for several hours at the restaurant, the mock jury believed she may have been having an affair after she left the restaurant. The mock verdict was that the driver and the plaintiff shared fault for the accident. The mock jury exonerated the restaurant partly because they considered the driver's story less than credible.

Adler suggests that at this point the plaintiff’s lawyers should have dismissed the suit or accept a modest settlement. Instead, the plaintiff’s lawyers decided their focus should be more clearly on the huge restaurant chain’s negligent training of its staff members in detecting drunk patrons. The lawyers used the consultant to help them select jurors whose characteristics and attitudes would supposedly make them sympathetic to the plaintiff’s case. Adler does not tell us whether the restaurant chain’s lawyer used jury consultants to select pro-defense jurors. The parties’ lawyers selected a jury that was far from what the plaintiff’s lawyers had sought. This jury, however, never heard the case because the judge declared a mistrial as a result of improper conduct on the part of plaintiff’s lawyers. Before the next jury heard the case, the parties settled the case for a relatively modest sum in light of the plaintiff’s severe and irreversible brain injury.

Adler’s use of this case is less than compelling because we never find out whether jury consultants “rigged” the jury so that the “undeserving child” recovered damages. The settlement indicates that despite the “rigged” jury, both parties were uncertain as to the eventual verdict. This weakens Adler’s suggestion that jury consultants unfairly advantage a party by facilitating the selection of jurors with the “right” attitudes and characteristics.
Adler concludes that "objectively" the child did not deserve to win. As with the previous case, Adler's "objective" conclusion is based on little more than his subjective belief that the plaintiff "didn't deserve to win damages from [the restaurant]." Adler derides the plaintiff's lawyers' single-minded determination to achieve the best results for their client. Adler would have advised his client to drop the suit or accept a nuisance settlement. Adler also urges that a jury of individuals "selected for their likely partisanship" lacks the "moral authority" to decide cases fairly.\textsuperscript{39}

Adler's conclusions that a lawyer should view the case "objectively" and that jury consultants produce a jury system unworthy of our faith demonstrates his simplistic view of our adversary system. The adversary system is the primary model of dispute resolution in the Anglo-American legal system.\textsuperscript{40} The adversary system compels clearly different roles from the lawyers and the decision-maker. The adversary model requires that opposing lawyers zealously advocate the interests of disputing parties while the jury (or judge) act as the neutral arbitrator.\textsuperscript{41} The adversary system mandates that lawyers refrain from pursuing frivolous claims. That does not imply, however, that a lawyer drop a lawsuit at the first sign of a weakness in their case. As advocates, the role of opposing attorneys is to employ their innate talents and acquired lawyering skills in a two-step process. In the first step, each advocate defines the issues of a dispute and seeks legal and factual support for the client's position. In this step, the adversary process demands that lawyers promote their clients' position by advancing evidence favorable to their clients and refuting unfavorable evidence.

In the case Adler examines, the plaintiff's lawyers did just that. By focusing on the strengths of the case and seeking to diminish the weaknesses, the lawyers for the plaintiff

\textsuperscript{39} Adler, \textit{supra} note 1, at 113.

\textsuperscript{40} The adversary model of the Anglo-American judicial system contrasts with what is commonly called the inquisitorial or interrogative model used in civil law countries. See, e.g., Geoffrey C. Hazard, Jr., \textit{The Adversary System}, in \textit{Ethics in the Practice of Law} 120, 120-35 (1978).

\textsuperscript{41} See, e.g., Hazard, \textit{supra} note 40, at 120; see also Lon Fuller, \textit{The Adversary System}, in \textit{Talks on American Law} 30, 30-32 (1961). This contrasts with the inquisitorial model where it is the judge who is called upon to both make a decision as well as protect the interests of opposing parties. \textit{Id}.

\textsuperscript{42} Hazard, \textit{supra} note 40, at 121.
pursued their proper roles within the adversary system. Anything less would have betrayed their duty as advocates.

Once all relevant information is made available to the decision-maker, the second step of the adversary process proceeds with the advocates making competitive presentations to the decision-maker. In this step, the advocates use the facts and law to present the claims in the light most favorable to their respective clients.  

Even if consultants could affect jury selection, both parties (theoretically) have access to them. Any perceived advantage a plaintiff may secure by selecting a pro-plaintiff juror will likely be offset by a juror chosen by the defense. This is indeed the essence of the adversary system.

Adler's conclusions about jury consultants are based more on common mythology than on empirical research. Adler compares jury consultants to mercenaries who can pick a jury whose decision will not be based on the merits of a case. This fiction may have created a cottage industry of jury consultants but has been debunked by empirical research. Studies show that jury decisions in most cases are driven more by the evidence than by the individual characteristics and attitudes of the jurors.

C. Simple Jurors Can't Handle Complex Cases

In chapter four, Adler seeks to prove that common folks are too dense to decide complex cases. His vehicle is an an-
titrust case between two tobacco companies involving predatory pricing in violation of the Robinson-Patman Act.\textsuperscript{47} The trial lasted seven months, the longest in North Carolina history. The lawyers were convinced they were communicating with the jury but in reality the jurors found the technical and legal jargon incomprehensible. The judge contributed to the confusion by reading eighty-one pages of impenetrable instructions. Adler portrays a jury that remained baffled throughout the trial by the hyper-technical evidence presented by both sides. Unable to comprehend fully the issues presented, but determined to fulfill their sworn duty, jurors alternated between anger and despair. After deliberating for eleven days, the jury held in favor of the plaintiff and the defendant appealed. The United States Supreme Court reversed, concluding that the jury's verdict was unreasonable.

If the jury's verdict was incorrect, was it due to the jurors' failure to grasp the complexities of antitrust law or to something more fundamental? A failure to communicate perhaps? Adler suggests the uneducated and simple jurors were too dense to understand complex issues. Underlying Adler's suggestion, however, there is a more plausible explanation for the jury's decision. The jury's inability to comprehend this complex case was more likely due to the incompetence of the lawyers and the incomprehensibility of the judge's instructions. It was incumbent upon the high-paid lawyers to communicate their theories to the lay jurors without losing them in a fog of legal patois. The jurors should not be blamed for the lawyers' and the judge's failure to communicate. Even Adler admits that the lawyers' presentation in this case was so inept that "[a] jury didn't have to be uneducated or ill informed to get lost in [the lawyer's explanation of the applicable law]." Adler also chides the judge, who could have made the case more understandable to the jury had he managed it more intelligently. Adler's rendering of this antitrust case demonstrates only that there are incompetent lawyers and judges and that some courtroom practices are counterproductive. His conclusion that lay jurors are too stupid to handle

---

that their Ivy League education helped mold an elitist attitude toward ordinary citizens and a conviction that anyone whose views differ from theirs is simply wrong.

complex cases is not only elitist; it is not supported by this case.

D. The Average Citizen Versus Corporate America

In chapter five, Adler evaluates a product liability suit brought by a fifty-five-year-old mother of four infected with the AIDS virus during a transfusion in 1983. The defendant, a for-profit blood bank, supplied the blood at a time prior to widespread monitoring for AIDS. The plaintiff’s witnesses included physicians from the Centers for Disease Control (CDC). The CDC scientists testified that in 1983 blood bank officials had refused to follow the CDC’s recommendations that the blood supply be more aggressively protected from the emerging threat of AIDS. The defendant’s executives and other blood bank industry officials testified that in 1983 defendant had complied with most of the available industry safety standards. One of the defendant’s high-ranking officials testified that, like the rest of the blood bank industry, the defendant’s policies had been designed to “encourage applicants to exclude themselves if they fit into any of the high risk categories while not offending, embarrassing, or excluding anyone who might be a healthy and valuable donor.”

The jury had no trouble finding liability in light of the blood banking industry’s indifferent policies despite the deadly consequences of AIDS. Calculating the damages, however, stumped the jury. In the absence of guidance from the lawyers and the judge, the jury awarded the dying woman and her husband a total of $8.15 million in damages. Adler flunks the jury for finding liability, for awarding “exorbitant” damages, and for having an anti-corporate bias.

This case belies these conclusions. First, Adler’s conclusion that the jury should not have found the blood bank liable is based only on his disagreement with the result. While he concedes that the blood bank’s negligence was a close call, Adler baldly asserts that the jury’s ruling was “clearly” wrong because it found that the “common practice” of the defendant’s industry was unreasonable. Adler’s arrogance is off base again. The jury heard the best arguments from both

48. ADLER, supra note 1, at 155. The defendant, like all for-profit blood banks, made its money by buying blood directly from individual donors and selling it to hospitals. Turning donors away was not an encouraged practice.

49. ADLER, supra note 1, at 155.
sides and decided that the defendant acted unreasonably even if it merely followed common industry practice. As members of the community affected by the defendant's practices, the jury performs a valuable task when it sometimes delivers a message that what is commonly done is not necessarily what ought to be done.\textsuperscript{50} This is particularly true in the area of products liability where economic theory and empirical studies demonstrate that accountability through litigation increases product safety.\textsuperscript{51}

Second, even if, as Adler claims, the damage award was excessive, it was less due to the jury's shortcomings and more to the lawyers and judge who failed to provide guidance for the jury regarding the proper calculation of damages. Besides, I wonder if Adler would be willing to be infected with the AIDS virus in exchange for $8 million. Finally, there is nothing in this case that supports Adler's belief that average Americans are prejudiced against large corporations.\textsuperscript{52}

This is another atypical case. Many persons injured by defective products never file a lawsuit and plaintiffs win only half of the very few cases that make it to trial.\textsuperscript{53} What this case does illustrate is the value of the civil jury trial. Adler describes a thoughtful group of individuals who, despite formidable obstacles, took their duties very seriously. As is usually the case, these jurors reached what they collectively thought was the correct verdict. Their mistake, of course, was that Adler would have ruled otherwise. After all, what

\textsuperscript{50} In determining whether a defendant's conduct is unreasonable under the circumstances, the jury is not required to accept a defendant's conduct as reasonable simply because it did what most members of the defendant's industry do. But, again, let's remember that jurors rule in favor of corporate defendants in at least half the products liability cases.


\textsuperscript{52} If it is true, however, Adler should utilize his journalistic skills to explore why average citizens are biased against big corporations. Every week corporate America divests itself of thousands of employees as a result of "rightsizing," "outsourcing," and mergers. The workers who stay behind are stressed because they have to work harder to make up for their lost colleagues and anxious that they may be the next ones to be let go. It would be valuable to determine whether these factors affect a corporation's credibility when it argues at trial that corporate practices are guided not by economics, but by the consumers' interests.

\textsuperscript{53} Citing to various studies, Adler acknowledges that plaintiffs only win half the personal injury cases brought against corporate defendants. \textit{Adler, supra} note 1, at 147.
are twelve regular people when compared to one Harvard-educated lawyer?

E. Jurors Can't See Through Mark Fuhrman

The last "incorrectly" decided case involves a white police officer who kills a Hispanic man that the officer believes is responsible for the breakup of his marriage. The trial's outcome hinged on the credibility of the officer and his estranged wife, the only witnesses to the shooting. The shooting occurred in the home once shared by the officer and his wife. The officer claimed that the shooting was the accidental result of a struggle with the victim, who outweighed the officer by fifty pounds. The officer's wife testified that the officer had found the victim in bed, then, as the victim attempted to get dressed, used his service weapon to beat and then kill him.

Adler argues that the jury acquitted the officer because they believed his version of the events. Adler describes the officer as "clean-cut and pleasant-looking." Mark Fuhrman comes to mind. The officer was a good witness who "looked right at the jurors when he talked, as if he were speaking with them in their living rooms." By contrast, the officer's wife was a "plain dressed" and "not very good-looking" Hispanic woman whose "don't-mess-with-me" demeanor . . . suggested an unpleasant toughness." She was not a good witness, appearing unemotional, hostile, and coached.

Adler's argument that the jury found the shooting to be accidental primarily because the jurors were unable to properly judge the credibility of the witnesses is not entirely unpersuasive. Even if this is true, however, the case does not support Adler's inference that juries are incompetent.

A glance under the surface of the case reveals other factors which likely played a role in the jury's verdict. That this jury found the white officer not guilty in the killing of a non-white man is not enough to conclude that the jury's verdict was due to the jurors inability to judge credibility. I suspect that even after the Rodney King case, most juries who hear police brutality cases will continue to acquit the accused of-

54. Id. at 193.
55. Id. at 185.
56. Id. at 186.
ficers at a high rate. Maybe there is a deep-rooted belief that the police only brutalize those who deserve it. Maybe there is widespread ignorance about the prevalence of police brutality against people of color. It will be interesting to explore whether the widely publicized Mark Fuhrman tapes will affect how juries judge the credibility of police officers in future police brutality cases.

Empirical studies demonstrate that, without training, most of us are poor judges of credibility. After all, several prosecutors and a judge were unable to properly assess Mark Fuhrman's credibility. It is possible that another jury would also have acquitted the officer in Adler's case. In the last ten years, empirical research has shed much light on the process by which we judge the credibility of trial witnesses. Adler eloquently argues this recently acquired knowledge regarding credibility should be incorporated into jury instructions.

F. They Are Bad, but . . .

Although Adler spends the bulk of the book berating jury performance, the final section of the book begins with the startling exultation that the jury trial must be preserved at any cost. Adler suggests a formula for improving jury performance, including changes in jury selection and better communication between judges and jurors.

Adler contends that juries do not reflect the community because the jury selection system is in disrepair. Too little is done to enforce jury duty and too many able citizens are ex-

---

57. This opinion is based on numerous conversations with experts working in the criminal justice system.
59. Lempert, supra note 58, at 192-94.
60. ADLER, supra note 1, at 208-11. But see Steven A. Saltzburg, Improving the Quality of Jury Decisionmaking, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 341, 356-57 (Robert E. Litan ed., 1993) (arguing that jury instructions on witness credibility should be simplified to inform the jury only that they should determine who to believe, what to believe and the weight to be given to any evidence).
empted from jury duty. Adler advises that the current trend is for states to eliminate or reduce exemptions to jury duty. Although he is vague on specifics, Adler suggests that jury duty should be made obligatory and jury service less burdensome.

Adler urges that to achieve more representative juries, courts should eliminate peremptory challenges and voir dire, allowing the first randomly selected twelve persons to become the jury. This suggestion is not likely to be taken seriously. For one thing, forming a jury with the first twelve persons who show up to court would not result in a representative jury any more often than current systems of jury selection.

Adler admits that the jury system requires more than “building a better jury” and proposes that “poor courtroom practices” also be eliminated. Adler persuasively admonishes that juries should be given instructions on the applicable laws in plain English and before evidence is introduced at trial. Adler endorses the trend to allow jurors to take notes and, with some safeguards, ask witnesses questions during the trial. He also encourages judges to take more control of their courtrooms in order to shorten trials. Adler’s section on improving the system is very short on specifics. When combined with his unrelenting attack on juries, Adler’s last-minute effort to convince the reader that he actually believes in the jury system is unpersuasive.

V. CRITIQUE OF THE BOOK

Despite its many flaws, this book has undeniable appeal. Its major strength is that Adler is a good journalist whose writing is accessible to a broad audience. His reporting is clear and concise. Adler’s journalistic instinct for sensational stories keeps The Jury’s narrative clipping along. The absence of legalese, technical jargon, and statistics makes the book appealing to a vast audience. Recent and current sensational trials are likely to keep The Jury selling crisply for many months.

61. Adler reports that across the country, 55% of persons who receive jury notices simply ignore them but suffer no consequences. Adler also describes how New York automatically exempts from jury duty many professionals, law enforcement officers, firefighters, sole business proprietors and even members of certain religious groups. ADLER, supra note 1, at 219.
The book’s main flaw emerges in the first chapter. Adler suggests that the cases he chose to examine are typical and therefore their analysis can be extrapolated to all cases. By Adler’s own account, there are approximately 150,000 jury trials a year. The six cases in this book, therefore, do not constitute a random sample of jury verdicts and, as such, cannot provide a true picture of how juries work. As Adler’s book reveals, using a few dramatic cases to make generalizations about the overall effectiveness of juries leads to biased conclusions about how to improve jury performance.

This problem is not alleviated by Adler’s “reconstruction” of the trials by interviews with the players. Because Adler was not present during the actual deliberations, there is really no way to know how juries reached their decisions. Revisionist accounts by jurors justifying their decision are not always (if ever) reliable. This diminishes the value of Adler’s generalizations based on a few interviews.

Adler’s opinion that most jurors are inept because he disagreed with their result is arrogant. It is possible for common folks to reach a correct decision even if an Ivy League-trained lawyer would decide the case differently. When coupled with his claim that most jurors he observed were uneducated simpletons, his conclusion is elitist and even more offensive.

In the current climate of political pandering, Adler’s broad assessments based on anecdotes are exactly what many politicians are using to validate legislation that will harm the nation for many years to come. This makes Adler’s bald conclusions particularly troublesome.

Finally, after spending the bulk of the book trashing juries, Adler’s late defense of the system sounds hollow and disingenuous. At the very least, it is schizophrenic. He focuses mainly on poorly performing juries yet wants us to believe he is actually defending the jury system. The first two paragraphs of the last section of the book encapsulate this
book's schizoid perspective. Adler first assails the jury system and calls for its abolition.

[N]one of the juries in the previous section of this book did much to justify our extraordinary reliance on the jury system. Instead, they reinforced our doubts about the competence, fairness, and even much-vaunted common sense of jurors. . . . Nearly every other nation has shunned the jury; with some constitutional engine work, we could too.  


64

In the next breath, however, Adler argues that our jury system is too valuable to scrap. "Even in the cases in which the juries we observed performed woefully, it seemed clear that there were powerful reasons to want a jury to make the decision." The problem, however, is that it is not at all clear that Adler's unrelenting attack is actually an argument in favor of the jury.

Adler condemns juries for what he deems to be "bad decisions" but his criticisms are usually unrelated to the jury's actual performance. Although he appears to understand that these "bad decisions" are often the result of underlying factors for which jurors cannot be held accountable, Adler glosses over the reasons these problems exist and how they can be resolved. Adler's contribution to the current debate about the jury would be more persuasive if the book included an in-depth examination of how the incompetence of judges and lawyers affects jury decision-making. Moreover, a valuable addition to the book would have been Adler's analysis of a complex trial in which the jury was instructed early, the lawyers and judge were competent and the jury reached a "correct" verdict. By demonstrating how better results are achieved when most of the systems' shortcomings are surmounted, this comparison would have provided more persuasive grounds for implementing Adler's suggested improvements.

VI. CONCLUSION

The importance of the jury to our increasingly complex society requires that we continually study and seek to improve the jury process. The widespread controversy over recent sensational trials underscores our fascination with ju-

64. Adler, supra note 1, at 215.
ries. In their aftermath, we can expect more assaults on the jury system. Unfortunately, most of the reactions will parallel Adler’s attack on juries.

Part of the problem may be that Adler’s standards for jury behavior are difficult if not impossible to meet. His ideal that “[a] justice system can’t just look marvelous in theory; it has to work day after day in case after case,” reflects an admirable but improbable aspiration. First, it is almost impossible for someone not present during deliberations to determine how the decision was reached. Second, no institution that depends on human endeavor will work as intended every time. That may make the system less than completely predictable, but it does not require its demise. Particularly when the alternatives are more offensive to the democratic ideal.
