

2006

Court Review: Volume 43, Issue 2 – Judges vs. Juries

Brian H. Bornstein

University of Nebraska at Lincoln, bbornstein2@unl.edu

Follow this and additional works at: <http://digitalcommons.unl.edu/ajacourtreview>



Part of the [Jurisprudence Commons](#)

Bornstein, Brian H., "Court Review: Volume 43, Issue 2 – Judges vs. Juries" (2006). *Court Review: The Journal of the American Judges Association*. 211.

<http://digitalcommons.unl.edu/ajacourtreview/211>

This Article is brought to you for free and open access by the American Judges Association at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Court Review: The Journal of the American Judges Association by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

Judges vs. Juries

Brian H. Bornstein

This article introduces a new feature for Court Review, “Social Science Research for (and in) the Courts,” the purpose of which is to summarize recent research on social science topics that judges might encounter. Social science research has a long-standing, and sometimes tense, relationship with the law.¹ Nonetheless, there are signs that the courts’ receptivity to social science research is growing. The fields of psychology and the law and economics and the law have expanded considerably in the last 20 or so years. Because judges are increasingly likely to encounter social science issues, the goal of these columns is to provide “state-of-the-art” research summaries in a non-technical manner.

In contrast to the standard scholarly publication, the columns will not be heavily footnoted, but they will list a handful of relevant sources for further reading. As Court Review is the official journal of the American Judges Association, this inaugural column focuses on an issue that arises frequently in debates about court reform and that is central to discussions of judicial performance—the nature and extent of differences in judge and jury decision making.²

JUDGES VS. JURIES

Critics of the jury often assume, explicitly or implicitly, that judges would in some sense “do better”—that is, reach verdicts that are more in line with the evidence, be less susceptible to extralegal influences, and so on.³ There have been relatively few systematic studies of judicial decision making, perhaps because of difficulties in recruiting judges as research participants and the complexity of what judges do. Nonetheless, a number of social scientists have applied fundamental decision making models to judicial reasoning, encompassing judges at both the trial and appellate levels.⁴ Whether judges’ decisions differ from juries’ decisions is, of course, an empirical question. Most attempts to answer this question fall into one of three general categories: archival studies of trial verdicts; surveys of judges’ opinions regarding jury trials over which they presided (often referred to as studies of judge-jury agreement); and experimental vignette studies in which judges serve as research participants.

ARCHIVAL STUDIES

Archival studies compile data from a large number of

decided cases to assess the relationship between trial outcome and various factors, such as characteristics of the judge or whether the decision maker was a judge or a jury. Gregory Sisk and colleagues took advantage of a fascinating opportunity to analyze decisions made by 188 judges concerning essentially the same legal question, namely, the flurry of cases that posed constitutional challenges to the Sentencing Reform Act of 1984.⁵ They found that judges’ decisions—and even more so their reasoning—varied depending on several social background variables, such as prior employment (e.g., prior experience as a criminal defense lawyer).

More germane to the question of whether judges’ decisions differ from jury verdicts, several studies have compared outcomes in jury versus bench trials. In one of the earliest, and still one of the best, exemplars of this approach, Clermont and Eisenberg analyzed a large number of state court trials. They found that plaintiffs were more likely to win, and recovered more in damages, when their cases were decided by a judge than when they were tried before a jury.⁶ This observation suggests that jurors find civil defendants more sympathetic than do judges. Such a tendency is at odds with the claims made by

Footnotes

1. See generally, JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW* (6th ed., 2005).
2. The Column Coordinator, Brian Bornstein, welcomes comments from readers and suggestions for topics to be covered in future columns. They can be directed to bbornstein2@unl.edu or via phone at (402) 472-3743.
3. See, e.g., Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1 (2004); CASS R. SUNSTEIN ET AL., *PUNITIVE DAMAGES: HOW JURIES DECIDE* (2002).
4. For overviews of this approach, see, e.g., Edith Greene & Lawrence Wrightsman, *Decision Making by Juries and Judges: International Perspectives*, in *HANDBOOK OF PSYCHOLOGY IN LEGAL CONTEXTS* (D. Carson & R. Bull eds., 2d ed., 2003) (covering both

- trial and appellate court judges); Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (trial); Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1 (1998) (appellate); Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?* 32 FLA. ST. U. L. REV. 469 (2005); LAWRENCE S. WRIGHTSMAN, *THE PSYCHOLOGY OF THE SUPREME COURT* (2006) (appellate). Specific exemplars are discussed *infra*.
5. Gregory C. Sisk, Michael Heise, & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998).
6. Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124 (1992).

many tort-reform advocates that jurors are excessively pro-plaintiff and anti-defendant.

A number of more recent studies have focused on judge versus jury behavior in awarding punitive damages. For example, Hersch and Viscusi found that juries are more likely than judges to make extremely large, “blockbuster” awards and juries’ punitive awards are less strongly related to compensatory damages.⁷ Eisenberg and colleagues, on the other hand, using similar data sets (but different statistical assumptions) found that judges and juries award punitive damages at about the same rate, and the ratio of punitive to compensatory damages is approximately the same for the two groups.⁸ Punitive damage awards by juries were, however, more variable, and the groups’ respective tendency to award punitive damages varied depending on case type (i.e., financial vs. bodily injury). Thus, although archival analyses of punitive damages are somewhat inconsistent, it is clear that one cannot simply conclude that one group of decision makers is somehow outperforming the other.

With regard to criminal trials, there is some evidence that juries treat defendants more harshly. King and Noble⁹ found that in two states (Virginia and Arkansas) that authorize jury sentencing in non-capital cases, juries meted out more severe sentences for most offenses. The authors argue that this difference reflects demographic and attitudinal differences between judges and jurors less than it shows the influence of procedural factors, such as greater restrictions on the sentencing options available to juries.

JUDGE-JURY AGREEMENT

The classic study of judge-jury agreement was conducted by Harry Kalven and Hans Zeisel, who asked judges in thousands of cases to report both how the jury decided the case and how they would have decided if it had been a bench trial.¹⁰ In civil cases, they found an agreement rate of 75-80% as to liability.¹¹ With regard to damages, judges would have awarded more in 39% of cases and less in 52% of cases, resulting in an overall tendency for judges to favor smaller awards. In criminal cases, they likewise found an agreement rate of approximately 75%. Again, however, the disagreements were somewhat asymmetrical: In the majority of cases where judges reported favoring a different verdict from that reached by juries, juries were more lenient (i.e., acquitting when judges would have convicted). In explaining the reasons for these disagreements, judges mentioned a variety of defendant characteristics capable of producing sympathy: age (i.e., youth or old age), gender, attractiveness, remorse, family responsibilities, and occupation (e.g.,

veterans, police officers, or clergy). Defendants who were rated as sympathetic engendered a higher disagreement rate than non-sympathetic defendants.

Kalven and Zeisel’s findings have stood up well under the test of time. Sentell found that a large majority (86%) of Georgia superior-court judges reported their agreement rate with jury verdicts in negligence cases as “about the same” as Kalven and Zeisel’s,¹² and a recent study by Eisenberg and colleagues of judge-jury agreement in criminal trials obtained a virtually identical agreement rate of 75%.¹³ Although the latter study found the same sort of asymmetry as the earlier Kalven and Zeisel study (i.e., judges more likely to convict in cases where there was disagreement), the pattern was more nuanced, in that judges were actually more likely than juries to acquit when judges viewed the evidence favoring conviction as weak, but they were more likely to convict when they viewed the evidence as medium or strong.

Overall, then, these studies suggest considerable agreement between judges and juries; yet in the minority of cases where they do differ, judges could be characterized as somewhat “tougher”: They would award less in civil cases, and they *may be* (depending on the strength of the evidence) more likely to convict in criminal cases.

EXPERIMENTAL VIGNETTE STUDIES

A number of experimental studies have presented judges with mock trials and asked them to evaluate the cases and render hypothetical verdicts. This approach, which has much in common with the jury-simulation literature, sacrifices the complexity and realism of an actual trial to obtain greater experimental control. The nature of the method affords a comparison between judges and laypeople (mock jurors), either directly, as part of the same study, or indirectly, where similar studies of laypeople have been performed.

The most comprehensive such study, conducted by Chris Guthrie and colleagues, assessed whether judges were susceptible to five different “cognitive illusions” to which laypeople (including jurors) are generally susceptible: anchoring (making estimates based on normatively irrelevant starting points, such as an *ad damnum*); framing (treating economically equivalent gains and losses differently); hindsight bias (perceiving events to have been more probable after one knows the event has occurred, also referred to as the “knew-it-all-along” effect); the representativeness heuristic (undervaluing relevant background statistical information, or base rates); and egocentric biases (overestimating one’s own abilities).¹⁴ They found that judges were just as susceptible as laypeople to three of the five

7. Hersch & Viscusi, *supra* note 3.

8. Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743 (2002); Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. EMPIRICAL LEGAL STUD. 263 (2006).

9. Nancy J. King & Rosevelt L. Noble, *Jury Sentencing in Noncapital Cases: Comparing Severity and Variance with Judicial Sentences in Two States*, 2 J. EMPIRICAL LEGAL STUD. 331 (2005).

10. HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* (1966).

11. The exact percentage varies depending on how one treats hung juries.

12. R. Perry Sentell, *The Georgia Jury and Negligence: The View from the Bench*, 26 GA. L. REV. 85 (1991).

13. Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel’s The American Jury*, 2 J. EMPIRICAL LEGAL STUD. 171 (2005).

14. Guthrie et al., *supra* note 4.

illusions; they were less susceptible to the other two (framing and representativeness), though they were still not completely immune to their effects.

Other studies have obtained generally comparable results. Judges, like most people, are not very successful at ignoring information they have been told to disregard,¹⁵ and they actually *make* decisions based on factors other than those that they *believe* influence their decisions.¹⁶ Conflicting with the results of King and Noble's archival analysis, at least one experimental study has found that judges tend to be somewhat harsher than mock jurors (to the extent that they differ at all) in criminal sentencing.¹⁷ With respect to civil cases, vignette studies have demonstrated that trial-court judges and jury-eligible citizens behave quite similarly: They rely on more or less the same factors, and award roughly comparable amounts, in both non-economic and punitive damages.¹⁸ Consistent with the archival studies, mock juror awards do tend to be more variable.

CONCLUSIONS

These methodologies differ in a number of important respects. For example, studies of judge-jury agreement and vignette studies compare jury verdicts with judges' opinions for the *same* cases, whereas archival studies compare verdicts in cases tried by juries to verdicts in similar, yet still completely *different*, cases tried by judges. Thus, it is possible that the cases tried before juries and judges are in some respects fundamentally different. For example, lawyers and litigants might base the decision of whether to have a bench or a jury trial on subtle case characteristics, or they might choose to present different kinds of evidence depending on who the fact-finder is. Moreover, each method suffers from its own particular limitations: Archival studies can suffer from incomplete verdict reporting, experimental studies lack consequences for the participants and fail to embody the complexity of real trials, and judges offering post hoc opinions on a jury trial they oversaw might display retrospective memory bias or feel pressure to validate the jury's verdict.

On the other hand, the advantage of these multiple methodologies is that they potentially offer *convergent validity*, meaning that if different methods all point to the same general finding, then it is unlikely that the finding is limited to the particular circumstances of any single approach. With respect to the question of whether judges and juries differ, the research suggests that although there are some differences, the overall pattern of decision making is quite comparable for the two groups. On the whole, judges' decision making adheres to the same psychological principles as jurors' decision making; they

are much more similar than they are different, including their susceptibility to errors in reasoning. Moreover, any discrepancies might reflect countervailing tendencies. For example, most evidence suggests that judges are more likely to convict, but there is also some indication that they award less severe sentences than juries. Thus, there might be reasons for preferring a jury or a bench trial for certain types of cases (e.g., depending on the strength of the evidence, the nature of the injury, etc.), but an expectation that one or the other will reach a "fairer," "better," or "more favorable" verdict does not appear to be among them.

RECOMMENDED READING

Edith Greene & Lawrence Wrightsman, *Decision Making by Juries and Judges: International Perspectives*, in HANDBOOK OF PSYCHOLOGY IN LEGAL CONTEXTS § 3.5 (D. Carson & R. Bull eds., 2d ed., 2003).

Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001).

Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?* 32 FLA. ST. U. L. REV. 469 (2005).



Brian H. Bornstein, Ph.D. (University of Pennsylvania), M.L.S. (University of Nebraska), is professor of psychology and courtesy professor of law at the University of Nebraska-Lincoln, where he is associate director of the Law-Psychology Program. His main research interests are jury decision making, eyewitness testimony, and perceptions of justice. He can be reached at bbornstein2@unl.edu.

15. Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113 (1994); Andrew J. Wistrich, Chris Guthrie, & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005).

16. Ebbe B. Ebbesen & Vladimir J. Konecni, *Decision Making and Information Integration in the Courts: The Setting of Bail*, 32 J. PERS. & SOC. PSYCH. 805 (1975).

17. Shari S. Diamond & Loretta J. Stalans, *The Myth of Judicial*

Leniency in Sentencing, 7 BEHAV. SCI. & L. 73 (1989).

18. Roselle L. Wissler et al., *Decision-Making about General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751 (1999) (non-economic damages); Jennifer K. Robbennolt, *Punitive Damage Decision Making: The Decisions of Citizens and Trial Court Judges*, 26 LAW & HUM. BEHAV. 315 (2002) (punitive damages). There is some indication that, when judges and juries do differ in civil cases, jurors award greater damages. Wissler et al., *supra*; see also W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. LEGAL STUD. 107 (2001).