

LAW 798: THE AMERICAN JURY

University of Illinois College of Law Seminar – Fall 2011

Professor Justin Sevier

Tuesdays 4:30 p.m. – 6:20 p.m.

Course Description

This seminar examines the modern American jury, a controversial entity that empowers average citizens to participate in legal decisionmaking. Proponents of trials by jury defend jury decisionmaking as evidence of our shared commitment to democracy and liberty. Detractors argue, however, that juries are “the apotheosis of the amateur” and are often incompetent, irrational, and biased (both overtly and subconsciously). Drawing from the interdisciplinary writings of legal academics, historians, philosophers, psychologists, and economists, this seminar will examine the historical and philosophical underpinnings of the modern American jury and will critically evaluate how well jurors make legal decisions.

This course will familiarize you with the black letter law governing, issues surrounding, and unresolved questions concerning the modern jury. We will cover a wide array of topics, including the history of the jury, its formation, how well jurors process information (by themselves and in groups), verdicts and damages, and the death penalty. The course will focus on the use of empirical evidence to craft practical arguments for jury reform and to craft policy arguments about the jury’s role in legal decisionmaking.

Evaluation Methods

Research Paper	50%
Discussion Questions	20%
Participation	20%
Presentation	10%

Research Paper (50%)

Your paper should discuss, in-depth, some aspect of the American jury system. You have substantial freedom to choose your topic (for example, you may choose to argue for certain reforms or test a theory of juror behavior). I am available to discuss your paper with you or critique an outline of your paper if you so desire. Your paper should clearly articulate your thesis and provide ample support for that thesis with primary and

secondary source materials. Papers should be no more than 20 pages in length (but may be substantially shorter)¹ and are due by noon on Monday, December 12, 2011.

Discussion Questions (20%)

By noon before each class session you should post to the class discussion board three questions you would pose to your classmates based on the assigned readings. This will help shape the discussion during our seminar sessions. Questions should demonstrate clarity of thought, depth of understanding of the material, and originality of ideas.

Participation (20%)

I ask that every student contribute to the class discussion. Because this seminar draws on many disciplines outside legal academia, a wide range of viewpoints will enrich our collective understanding of the course material.

Article Presentation (10%)

Beginning with the third week of this course, each of you will present to your classmates one of the articles listed on the syllabus for that week (look for an asterisk). Your presentation should discuss the article’s key issues and important findings, and you should pose questions to your classmates. I will circulate a signup sheet during our second meeting.

Office Hours and Contact Information

Office Hours: Tuesdays from 11:00 a.m. – 12:00 p.m. or just stop by.
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Text

Neil Vidmar & Valerie P. Hans, *American Juries: The Verdict* (2007).

I have uploaded supplementary readings to the course website. These readings are also available online through the University’s library resources.

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¹ If you choose to fulfill the College of Law’s writing requirement through this seminar, your paper must be at least 6000 words in length (excluding footnotes). Please let me know by September 6, 2011 if you intend to fulfill the writing requirement through this seminar.

Class Topics and Readings

** Note: We may not focus on all of the assigned readings. I have assigned a variety of articles to cover many topics that may arise during the seminar. Before we end each class session, I will let you know which of the following week's readings you should focus on and which you may skim for general content.

Weeks 1-2: Background

Aug. 23: Introduction to the Modern American Jury

This week's readings include articles from a pop culture writer regarding his experience serving on a jury, a jury researcher explaining why he does what he does, and a federal judge with a provocative view of the value of juries. The final article chronicles the consequences for defendants when jury trials are not a fundamental right.

- Chuck Klosterman, The Drowsy Dozen, Esquire (Dec. 31, 2005).
- Richard Lempert, Why Do Jury Research?, in Inside the Juror (Cambridge Univ. Press 1993) (pp. 242-254).
- Judge Jerome Frank, The Jury System, in Courts on Trial (Princeton Univ. Press 1945) (pp. 108-125).
- Ellen Barry, After Dismissal of Jury, Judges Convict Russian, New York Times (December 28, 2010).

Aug. 30: History of the Jury

This week, we will examine the transformation from the trial by ordeal of the middle ages, to the trial by jury of the colonial days, to the modern trial by jury. We will also examine the disagreements among the framers with respect to the constitutional protections to afford a citizen who seeks a jury trial.

- Vidmar & Hans, chs. 1 & 2.
- The Federalist Papers # 83.
- Letters from the Federal Farmer II (pp. 230-234) and Essay of a Democratic Federalist (pp. 58-63) (Antifederalist Papers).
- The United States Constitution: Article III, Amendment 6, and Amendment 7.
- *Duncan v. Louisiana*, 391 U.S. 145 (1968).

Week 3: Forming the Jury

Sept. 6: Jury Selection (with guest Troy Lozar, Office of the State’s Attorney).

Professor Albert W. Alschuler wrote, “[I]n England, the trial begins when the jurors are selected; in America, that is when the trial is over.” This week’s readings will discuss how jurors are selected from the community and empanelled. You will notice a tension between the goal of empanelling a so-called “representative jury” and each party’s “right” to strike jurors peremptorily. You will also see whether social science bears out Professor Alschuler’s intuition.

- Vidmar & Hans, chs. 3 & 4.
- Clarence Darrow, How to Pick a Jury, Esquire (May 1936).
- *Batson v. Kentucky*, 476 U.S. 79 (1986).
- Andrea Lyon, Racism Common in Jury Selection, CNN (June 23, 2010).
- Susan Jones, Judge vs. Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor, 11 Law & Human Behavior 131 (1987).*

Weeks 4-7: In the Jury Box

Sept. 13: Impression Formation: How the Jury Views Lawyers, Defendants, and Witnesses (and Why that Matters).

Because judges and jurors are human, it is unsurprising that extra-legal factors can affect legal decisionmaking. The systematic effects of those extra-legal factors, however, may surprise you. They are the topic of this week’s readings.

- Erickson, Lind, Johnson & O’Barr, Speech Style and Impression Formation in a Court Setting: The Effects of “Powerful” and “Powerless” Speech, 14 Journal of Experimental Social Psychology 266 (1978).*
- Sigall & Ostrove, Beautiful but Dangerous: Effects of Offender Attractiveness and Nature of the Crime on Juridic Judgment, 31 Journal of Personality and Social Psychology 410 (1975).*
- Barge, Schlueter, & Pritchard, The Effects of Nonverbal Communication and Gender on Impression Formation in Opening Statements, 54 Southern Communications Journal 330 (1989).*
- Christine Ruva, How Pretrial Publicity Affects Juror Decision Making and Memory (Nova Publishers 2010) (pp. 27-41).*

Sept. 20: Information Processing at Trial I: Basic Competency

Professor Harry Kalven once said, “[A] jury trial is a process whereby laymen . . . apply law which they will not understand to facts which they will not get straight.” Empirical studies evaluating how (and how well) jurors accurately comprehend the facts and the law yield insight into the accuracy of Professor Kalven’s statement.

- Vidmar & Hans, ch. 7.
- Reid Hastie, What’s the Story? Explanations and Narratives in Civil Jury Decisions, in *Civil Juries and Civil Justice: Psychological and Legal Perspectives* (Bornstein, Wiener, Schopp & Willborn eds. 2008).*
- Ekman & O’Sullivan, Who Can Catch a Liar?, 46 *American Psychologist* 913 (1991).*
- Elizabeth Loftus, Reconstructing Memory: The Incredible Eyewitness, 8 *Psychology Today* 116 (1974).*
- Kassin & Sukel, Coerced Confessions and the Jury: An Experimental Test of the “Harmless Error” Rule, 21 *Law & Human Behavior* 27 (1997).*

Sept. 27: Information Processing at Trial II: Rationality

As both civil and criminal trials become more complex, and as courts more frequently allow expert testimony in those trials, jurors are asked to evaluate esoteric scientific and statistical evidence. This week’s readings examine how well jurors (who often lack specialized knowledge or expertise in these areas) evaluate this evidence. As you read, decide whether you think creating a “complexity exception” to the Seventh Amendment (which would take complex cases away from juries) would be a wise innovation.

- Vidmar & Hans, ch. 8.
- *Daubert v. Merrell Dow Pharmaceuticals*, 43 F.3d 1311 (9th Cir. 1995) (Kozinski, J.) (on remand).
- Cooper, Bennett, & Sukel, Complex Scientific Testimony: How Do Jurors Make Decisions?, 20 *Law & Human. Behavior* 379 (1996).*
- Schweitzer & Saks, The CSI Effect: Popular Fiction About Forensic Science Affects Public Expectations About Real Forensic Science, 47 *Jurimetrics* 357 (2007).*
- Thaddeus Hoffmeister, Did CSI Effect Sway Anthony Jury?, CNN (July 7, 2011).

- Thaddeus Hoffmeister, New Ohio Jury Instructions: Don't Rely on Judge Judy, Juries Blog (May 26, 2010).

Oct. 4: Information Processing at Trial III: Racial Bias

Judge Jerome Frank once referred to prejudice as “the thirteenth juror” and stated that “Mr. Prejudice” and “Miss Sympathy” are witnesses “whose testimony is never recorded but must nevertheless be reckoned with in trials by jury.” This week’s readings focus on the overt racial prejudices that pervaded early 20th century trials in the South, the expansion of federal jurisdiction to correct those injustices, and a new brand of prejudice that is harder to detect but no less insidious.

- Faust Rossi, The Scottsboro Trials: A Legal Lynching (Parts I & II), 29 Cornell Law Forum 1 (2002).
- Michael Klarman, From Jim Crow to Civil Rights (2004) (jury service: pp. 39-42 & 55-57; criminal procedure: pp. 117-134).
- Sommers & Ellsworth, Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions, 26 Personality and Social Psychology Bulletin 1367 (2000).*
- *McCleskey v. Kemp*, 481 U.S. 279 (1987).
- Editorial, *Warren McCleskey is Dead*, New York Times (Sept. 29, 1991).

Weeks 8-9: Behind Closed Doors

Oct. 11: Jury Deliberation I: The Law

Jury deliberation is a topic in which Supreme Court opinions clash with social psychological theories of group decisionmaking. This week’s readings will lay out the structural requirements of juries under the federal Constitution. Next week’s readings examine the social science evidence that calls into question key assumptions of the Supreme Court decisions that interpret those requirements.

- Vidmar & Hans (pp. 142-145).
- *Apodaca v. Oregon*, 406 U.S. 404 (1972).
- *Williams v. Florida*, 399 U.S. 78 (1970).
- *Ballew v. Georgia*, 435 U.S. 223 (1978).
- *Burch v. Louisiana*, 441 U.S. 130 (1979).

Oct. 18: Jury Deliberation II: The Reality

- Valerie Hans, Deliberation and Dissent: *12 Angry Men* versus the Empirical Reality of Juries, 82 Chicago-Kent Law Review 579 (2007).*
- Charlan Nemeth, Interactions Between Jurors as a Function of Majority vs. Unanimity Decision Rules, 7 Journal of Applied Social Psychology 38 (1977).*
- Michael Saks et al., A Meta-analysis of the Effect of Jury Size, 21 Law & Human Behavior 451 (1997).*
- Kassin, Smith & Tulloch, The Dynamite Charge: Effects on the Perceptions and Deliberation Behavior of Mock Jurors, 14 Law & Human Behavior 537 (1990).*
- St. Clair & Sweeney, Blago Holdout Worries About Next Jury, Chicago Tribune (April 20, 2011).

Weeks 10-12: The Verdict

Oct. 25: Civil Juries: Compensatory and Punitive Damages Awards

Large damages awards by civil juries have become fodder for newspaper headlines, political speeches, and late night talk show hosts. This week's readings will clarify how prevalent large damages awards actually are, what steps courts have taken to rein in excessive awards, and how juries arrive at these awards.

- Vidmar & Hans, chs. 14 & 15.
- Hastie, Schkade, & Payne, Do Plaintiffs' Requests and Plaintiffs' Identities Matter?, in Punitive Damages: How Juries Decide (2002) (pp. 62-74).*
- Hastie, Schkade, & Payne, Looking Backward in Punitive Judgments: 20-20 Vision?, in Punitive Damages: How Juries Decide (2002). (pp. 96-108).*
- Michael Saks et al., Reducing Variability in Civil Jury Awards, 21 Law & Human Behavior 243 (1997).*

Nov. 1: Criminal Juries: Convictions, Acquittals, and Nullification

This week's readings examine the current state of the criminal jury. As with civil juries, perceived miscarriages of justice are followed by strong calls to reform the criminal system (as in the cases of John Hinckley and O.J. Simpson). We will evaluate the merits of proposed jury reforms and the law's complicated relationship with jury nullification.

- Vidmar & Hans, chs. 9 & 11.
- Vidmar et al., Should We Rush to Reform the Criminal Jury: Consider Conviction Rate Data, 80 *Judicature* 286 (1997).*
- Hazelwood & Brigham, The Effects of Juror Anonymity on Jury Verdicts, 22 *Law & Human Behavior* 695 (1998).*
- Barbara Liston, Man Sent to Jail for Actions during Casey Anthony Trial, Reuters (July 26, 2011).
- *People v. Kriho*, 996 P.2d 158 (Colo. Ct. App. 1999).
- Paul Butler, In Defense of Jury Nullification, 31 *Litigation* 46 (2004).
- Irwin Horowitz, The Effect of Jury Nullification Instruction on Verdicts and Jury Functioning in Criminal Trials, 9 *Law & Human Behavior* 25 (1985).*

Nov. 8: Post-Verdict Issues

It is exceedingly difficult for a defendant to have a jury verdict against him overturned. Jury deliberations are protected from disclosure through FRE 606(b) (which forbids jurors from impeaching their own verdicts) and through deferential appellate review generally. The following readings shed light on and critically evaluate these jury-insulating mechanisms. They also discuss the potential hardships jurors may face after they have completed their service.

- Randolph Jonakait, The Finality of Verdicts, in *The American Jury System* (Yale Univ. Press 2003) (pp. 265-278).
- Federal Rule of Evidence 606(b).
- *Tanner v. United States*, 483 U.S. 107 (1987).
- Ken Strutin, Social Media Misbehavior by Jurors Afflicts Trial Process, *New York Law Journal* (March 16, 2011).
- Ashby Jones, When Jurors Change Their Minds: The Ronnie Gardner Saga Goes On, *Wall Street Journal Law Blog* (June 16, 2010).
- Jeff Weiner, Casey Anthony Verdict: Tampa PR Firm Offers Pro Bono Work for Jurors, *Orlando Sentinel* (July 8, 2011).

Weeks 13-14: Capital Juries

Nov. 15: Capital Juries: Guilt Phase

The readings for our final sessions empirically examine the maxim that “death is different.” We will examine the unique structure of a capital trial, the uniqueness and competency of capital jurors, and the ways in which we can improve capital trials.

- Vidmar & Hans, ch. 12.
- *Lockhart v. McCree*, 476 U.S. 162 (1986).
- William Bowers, *The Capital Jury: Is it Tilted Toward Death?*, 79 *Judicature* 220 (1996).*
- Dillehay & Sandys, *Life Under Wainwright v. Witt: Juror Dispositions and Death Qualification*, 20 *Law & Human Behavior* 147 (1996).*

Nov. 29: Capital Juries: Sentencing Phase

- Nancy King, *How Different is Death? Jury Sentencing in Capital and Non-Capital Cases Compared*, 2 *Ohio State Journal of Criminal Law* 195 (2004).*
- *Ring v. Arizona*, 536 U.S. 584 (2002).
- *Free v. Peters*, 12 F.3d 700 (7th Cir. 1993).
- Diamond & Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 *Judicature* 224 (1996).*
- Editorial, *Justice Powell’s New Wisdom*, *New York Times* (June 11, 1994).