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Improving Jury Comprehension in Criminal and Civil Trials

Robert MacCoun

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PREFACE

This publication contains the written statement of Robert MacCoun submitted on July 27, 1995, to the Judiciary Committee of the California State Senate. Dr. MacCoun is an associate professor of public policy at the University of California at Berkeley and a consultant to the Institute for Civil Justice at RAND, where he was a staff member from 1986 to 1993.

In his testimony, Dr. MacCoun evaluates seven proposals for improving juror performance: (1) revised jury instructions, (2) juror note taking, (3) question asking, (4) juror discussion during trial, (5) minimum education requirements, (6) complexity requirements, and (7) guidance in determining awards.

Improving Jury Comprehension in Criminal and Civil Trials[1]

Robert MacCoun

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Mr. Chairman and Members of the Committee, thank you for inviting me here today. My name is Robert MacCoun, and I'm an Associate Professor of Public Policy at the University of California at Berkeley, and a consultant to the Institute for Civil Justice at RAND, where I was employed as a Behavioral Scientist from 1986 to 1993. My presentation will be brief, but I've provided the committee with two published essays that offer more detail.[2] Given our time constraints, I will immediately proceed to the items on this session's agenda.

(1) Revised Jury Instructions, (2) Juror Note Taking, and (3) Question Asking

I can be very concise in evaluating the first three proposals: I strongly endorse efforts to improve jury instructions, allow note taking, and allow jurors to ask questions. Research suggests that these interventions can lead to significant improvements in juror performance,[3] and they also help to reduce juror frustration. One caveat: While there are theoretical reasons to endorse "tailoring [jury instructions] to the facts of cases," we do need more research on this particular proposal.[4]

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[1] Statement to the Judiciary Committee of the California State Senate, Los Angeles, Thursday, July 27, 1995.

[2] MacCoun, "Experimental Research on Jury Decision Making," *Science*, 1989, v244, 1046-1050; MacCoun, "Inside the Black Box" in Litan, *Verdict: Assessing the Civil Jury System* (Brookings Institution, 1993).

[3] This literature is reviewed by various chapters in Litan (ed.), *Verdict: Assessing the Civil Jury System* (Brookings, 1993). More recent references include Bourgeois et al., *Journal of Applied Psychology*, v80, 1994, 58-67; ForsterLee et al., *Law & Human Behavior*, 1994, v18, 567-578; and Heuer & Penrod, *Law & Human Behavior*, 1994; v18, 121-150.

[4] Pennington & Hastie in *Cardoza Law Review*, 1991, v13, 5001-5039; Smith in *Journal of Personality and Social Psychology*, 1991, v61, 857-872.

(4) Juror Discussion During Trial

In its call for allowing jurors to discuss cases during trial, the Arizona Supreme Court Committee made several accurate observations (briefing paper, p. 23). Many juries do indeed discuss the evidence during the trial despite the judge's admonitions, and jurors do actively process information during the trial. Nevertheless, I respectfully suggest that these observations are not sufficient to warrant the inference that formal discussion during trial would improve performance. What the Arizona Committee perhaps misunderstood was that psychologists do not consider "active information processing" to be an unequivocally good thing. These cognitive processes facilitate selective recall rather than total recall, and can make us form a biased impression of the evidence.

A strength of the jury is that deliberation provides an opportunity for individual biases to "cancel each other out." The danger of formal discussions during trial is that jurors will prematurely adopt the same shared biases before hearing all the evidence, undermining some of the benefits of post-trial deliberation.[5] Note-taking, question-asking, and pretrial instructions are more certain and less risky means for achieving the same end.[6] If the Judiciary Committee does choose to pursue this proposal, I urge you to test it on an experimental basis before widespread implementation.

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[5] MacCoun in *Criminal Justice & Behavior*, 1990, v17, 303-314. Kerr, MacCoun, & Kramer in Davis & Witte (Eds.), *Understanding Group Behavior* (Vol. 1): *Consensual Action by Small Groups* (Hillsdale, NJ: Erlbaum, in press).

[6] It is also possible that fewer jurors would violate proscriptions against discussing the evidence if we took greater care in explaining to them why such discussions are inappropriate. See Diamond, Caspar, & Ostergren in *Law & Contemporary Problems*, 1989, v52, 247-268.

(5) Minimum Education Requirements and (6) Complexity Limits

One dimension of trial complexity involves evidence quantity.[7] Theory and research suggest that, everything else being equal, juries should be superior to judges in this respect, because collective memory is generally superior to individual memory--if one or two members of a group correctly recall a fact, the entire group benefits.[8] Note-taking and question asking should further enhance memory performance.

But trial complexity also involves the inherent complexity of some technical evidence and legal concepts. Here, the relative strengths of the jury and the judge are less clear. The average judge will outperform the average individual juror, but the jury has some chance of containing at least one member with more relevant expertise than the trial judge.

Minimum educational requirements would almost certainly enhance juror performance with respect to legal and evidentiary complexity, but the effects might be more modest than anticipated. Not every member of a jury needs to meet some minimum standard for the jury as a whole to correctly comprehend complex issues. Better educated jurors tend to dominate jury deliberations,[9] and as long as at least one (and preferably two or three) jurors comprehend the issues, the jury as a whole can benefit.[10]

Of course, there are multiple criteria for evaluating jury performance (see Appendix).[11] Interventions that provide attractive solutions with respect to one goal can undermine another. Thus, minimum education requirements and complexity

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[7] I proposed three dimensions -- dispute complexity, evidence complexity, and decision complexity--in a 1987 RAND Institute for Civil Justice Note. The taxonomy was refined in a statistical study by Heuer and Penrod in *Law & Human Behavior,* 1994, v18, 29-51.
[8] See MacCoun, "Experimental Research" at 1048. I say "everything else being equal" because the existing research compares individuals and groups with the same characteristics, whereas it is conceivable that with experience, judges may naturally develop cognitive strategies for organizing trial information. Still, I would expect that juries are superior to individual judges in handling evidence quantity.
[9] See, e.g., Hans & Vidmar, *Judging the Jury* (Plenum, 1986).
[10] Single jurors have difficulty prevailing, even when they are correct. Having at least one other supporter greatly enhances a juror's effectiveness when debating strictly factual issues; psychologists call this a "Truth-Supported Wins" model.
[11] MacCoun, "Black Box."

exceptions may pose a tradeoff between fact-finding competence and community representativeness. A loss of community representation might reduce perceived legitimacy and public support for the courts, particularly in impoverished minority communities where distrust of the legal system is already high.

The 1994 LA Times poll suggests citizens might support juror education requirements, but further survey research is warranted. In an earlier survey in the 1980s, Tom Tyler and I found that most citizens endorsed 12-person unanimous juries over more "streamlined" juries or trial by judge; community representation was a key reason for this preference.

(7) Guidance in Determining Awards[12]

With respect to attempts to influence jury awards, I recommend caution. A failure to understand how jurors compute damages can lead to unintended consequences. Let me give two quick examples. First, under some circumstances, imposing a ceiling on awards can actually result in significantly larger awards on average, because many jurors use the ceiling as a starting point (or "anchor") for their deliberations, then tend to stick near that point.[13] As a second example, my recent research suggests that when jurors are prevented from awarding punitive damages, they may inflate the pain and suffering award as another way to punish the defendant.[14]

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[12] The briefing paper (p.26) notes that "some argue that only the most outrageous civil jury decisions make it into the mass media." Let me illustrate this with some data from a recent study of reported jury awards in Time, Newsweek, Business Week, Fortune, and Forbes magazines during the 1980s. Although plaintiffs actually win only half of all tort cases, they won 85% of the cases reported in the magazines. The median tort award in state courts (1992) was $51,000; the median award in the national news magazines was almost two million dollars ($1,750,000)--34 times greater. See Bailis & MacCoun, "Estimating Liability Risks with the Media as your Guide: A Content Analysis of Media Coverage of Civil Litigation," under editorial review, 1995. Also, bear in mind that while some awards do appear excessive, many are significantly reduced by post-trial interventions. See Shanley and Peterson, *Posttrial Adjustments to Jury Awards* (RAND ICJ, 1987); Broder, in *Justice System Journal*, 1986, v11, 349-269; Ostrom et al. in *Justice System Journal*, 1993, v16, 97-116.

[13] Hinsz & Indahl in *Journal of Applied Social Psychology*, 1995, v25, 991-1026; MacCoun, "Black Box."

[14] Anderson & MacCoun, "Juror Assessment of Punitive Damages," presented at the Fifth International Conference on Social Justice Research, Reno, Nevada, June 27, 1995.

In essence, plaintiff and defendant recommendations about award size already serve as de facto range recommendations; most jurors already advocate awards that fall in this range,[15] though this is not always the case.[16] But any new interventions should be tested experimentally to ensure that they have their intended effects on fact-finding competence, and to assess any tradeoffs involving other goals for the jury system.

Thank you.

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[15] Zuehl, 1982, cited in MacCoun 1993; Raitz et al. in *Law & Human Behavior*, 1990, v14, 385-395.
[16] Diamond & Casper in *Law & Society Review*, v26, 513-563.

APPENDIX

Criteria For Evaluating The Jury System

(from MacCoun, "Black Box," 1993)

- **REPRESENTATIVENESS**
  - representation of an approximate cross-section of the community
  - representation and expression of a diversity of viewpoints
- **IMPARTIALITY**
  - no extralegal biases in deliberation
  - no systematic patterns of extralegal bias in verdicts
- **LEGAL COMPETENCE**
  - comprehension of relevant laws and legal standards
  - compliance with relevant laws and legal standards
- **FACT-FINDING COMPETENCE**
  - thorough and accurate recollection of evidence
  - logical coherence of inferences drawn from the evidence
- **DECISION ACCURACY**
  - attribution of guilt or liability supported by evidence
  - plausible calculation of economic damages in civil litigation
- **DECISION CONSISTENCY**
  - consistency across jury verdicts in similar cases
  - consistency across jury verdicts in different jurisdictions
- **DISPUTE RESOLUTION**
  - do the disputants perceive that the decision process was fair?
  - do the disputants accept the decision and end the dispute?
- **LEGITIMACY**
  - public perception that jury composition and verdicts are fair
  - educative function and sense of efficacy derived from participation
- **EFFICIENCY**
  - reasonable trial duration
  - reasonable trial expense