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Jury System Management in the 21st Century: A Perfect Storm of Fiscal Necessity and Technological Opportunity

Paula Hannaford-Agor

Virtually all of the developments affecting jury system management since 2000 have been the result of two unrelated, but highly influential, factors: an economic climate that forced many courts to focus on the bottom line like no other time since the Great Depression, and technological improvements, especially Internet-based communication technologies, that dramatically

Paula Hannaford-Agor is the director of the Center for Jury Studies at the National Center for State Courts. She is an international expert on jury system management and jury trial procedure, and provides technical assistance and educational and research support to state and federal courts within the United States and internationally. She also writes extensively on these topics for professional and academic periodicals and teaches a seminar on the American jury at William & Mary Law School.

altered contemporary society including trial by jury. Like most societal disruptions, these factors were a mixed blessing, especially for civil jury trials. In many instances, they strengthened the jury system by making both the administrative infrastructure supporting jury operations and jury trial procedures more efficient. But they also brought new challenges, especially the impact of communication technologies that made it much more difficult to shield jurors from outside influences before and during trials. These factors threatened both the availability of jury trials and traditional notions about the impartiality of jurors, which in turn led to a resurgence in appreciation for the democratic pedigree of the traditional jury trial and impassioned efforts to save the jury trial from extinction. This chapter examines these three concurrent trends and offers some tentative thoughts about the future of the American jury trial as the 21st century progresses.

ECONOMIC RECESSIONS AND THE VANISHING TRIAL

The economic recessions in 2001–2003 and in 2008–2009 caused dramatic upheavals in the fiscal stability of state and federal courts. From 2001 to 2004, at least 34 states reported substantial budgetary shortfalls, to which many had to respond with hiring freezes and staff layoffs, increases in court fees, and reduced court services. Although the 2001–2003 recession was immensely disruptive for many state court systems, it paled in comparison with the impact of the 2008–2009 recession, during which many courts were forced to close courthouses, lay off administrative staff, consolidate court support functions into statewide and regional offices, and reduce the hours of court operations and the scope of services to court users. Jury operations were not immune from these effects. Some courts suspended civil jury trials, reduced juror fees, and eliminated juror amenities such as free coffee and snacks in jury assembly rooms and meals for deliberating juries. Other courts renewed proposals to eliminate the right to trial by jury for certain types of cases, to reduce jury sizes from the traditional 12 jurors, and to reduce the number of peremptory challenges allocated to parties.

The economic downturns further exacerbated the “vanishing trial” phenomenon that had been occurring in state and federal courts for decades.¹ Although civil case filings in federal courts have increased four-fold since the early 1960s, the percentage of civil cases disposed by trial

1. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEG. ST. 459 (2004).

decreased from approximately 11 percent to less than 2 percent by 2002.² Likewise, the percentage of criminal cases disposed by trial decreased from approximately 15 percent in 1962 to less than 5 percent in 2002.³ In states that maintain accurate records of bench and jury trials, trial rates also declined, albeit somewhat less dramatically compared to federal courts. From 1976 through 2002, civil trial rates fell from 36 percent to 16 percent in courts of general jurisdiction in 22 states,⁴ while felony trial rates declined from 9 percent to 3 percent. A 2015 study of civil litigation found that the jury trial rate had decreased to just 0.1 percent of nearly 1 million nondomestic civil cases filed in state courts in 10 urban counties.⁵

In 2001, the American Bar Association convened a symposium for academicians and practitioners to examine the causes of declining jury trial rates. A number of factors were identified for civil cases. One factor was the emergence of alternative dispute resolution (ADR) procedures. Some forms of ADR offered a formal process in which settlement negotiations could be facilitated by a neutral mediator that ostensibly could design a more mutually agreeable case outcome sooner and at less cost than jury trials. Arbitration offered a quasi-adversarial process in which litigants present information (which does not necessarily have to conform to strict evidentiary requirements) about their respective positions to a privately retained expert, who then decides the case based on established legal principles. Many courts offered ADR on either a voluntary or mandatory basis as a way to expedite case resolution and promote settlement to relieve overcrowded dockets.

In addition to court-annexed ADR, many commercial litigants began including binding arbitration clauses in standard contracts. Initially, these were implemented on a peer-to-peer basis between litigants with relatively equal bargaining power as a way for sophisticated litigants to ensure reasonably expeditious resolutions of any disputes that might arise in the future. Increasingly, however, such clauses have become standard in a wide variety of employment and consumer contracts (e.g., credit card agreements, cellular telephone agreements, utilities, residential leases). Although some courts initially ruled that binding arbitration clauses were contracts of adhesion and thus unenforceable under state law, more recent case law from the U.S. Supreme Court has greatly

2. *Id.* at 464–65.

3. *Id.* at 493.

4. *Id.* at 507.

5. PAULA HANNAFORD-AGOR, SCOTT GRAVES & SHELLEY SPACEK MILLER, *THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS* 25-28 (2015).

expanded the applicability of the Federal Arbitration Act to preempt state law in cases involving interstate commerce.⁶ The practical effect of these cases has been to steer disputes away from the court system entirely.

In federal courts, a number of U.S. Supreme Court cases have interpreted the Rules of Civil Procedure in ways that have tended to shift decision making on factual issues from juries to district court judges. In a trio of cases decided between 1993 and 1999, the Court responded to concerns about the reliability of expert evidence by introducing a judicial gatekeeping requirement.⁷ Historically, assessments of witness credibility and the weight to be accorded to expert evidence was the sole responsibility of the fact finder at trial. The *Daubert* trilogy interpreted Federal Rule of Evidence 702, which governs the admissibility of expert opinion as trial testimony, to require trial judges to make a pretrial determination that the expert's evidence satisfies established scientific principles before it may be admitted at trial. Many, but not all, states followed the Supreme Court's lead and adopted the *Daubert* test. Because most civil cases, and a large proportion of criminal cases, now rely heavily on expert testimony, many commentators viewed the decisions as a substantial infringement on the Sixth and Seventh Amendment right to jury trial.⁸

The increased use of dispositive motions, especially summary judgment motions, to decide cases pretrial has also reduced civil jury trial rates in federal courts. Summary judgment is a procedural option authorized by Rule 56 of the Federal Rules of Civil Procedure in which a trial judge evaluates whether the factual inferences from a party's proffered evidence are reasonable, applies the governing law to those factual inferences, and makes a determination of whether a valid legal claim exists. Summary judgment has been an acknowledged procedure since the U.S. Supreme Court issued its opinion in *Fidelity & Deposit Co. v. United States* more than a century ago,⁹ but litigants began using this procedure with

6. *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

7. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 597 (1993); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1996); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

8. Brandon Boxler, *Judicial Gatekeeping and the Seventh Amendment: How Daubert Infringes on the Constitutional Right to a Civil Jury Trial*, 14 RICH. J. L. & PUBL. INT. 479 (2011). The actual impact of the *Daubert* decision may be more muted than some commentators have feared, however. A 2005 study of the impact of *Daubert* motions in civil and criminal cases in the Delaware Superior Court found that counsel challenged the expert testimony in only 16 percent of product liability cases and 8 percent of felony murder and rape cases. NICOLE L. WATERS & JESSICA P. HODGE, *THE EFFECTS OF THE DAUBERT TRILOGY IN DELAWARE SUPERIOR COURT* (2005).

9. *Fid. & Deposit Co., v. United States*, 187 U.S. 315 (1902).

increased frequency and success in the 1980s. In contemporary practice, summary judgment authorizes the trial judge to determine whether “a reasonable jury could return a verdict for the non-moving party.”¹⁰ In other words, the trial judge “decides whether factual inferences from the evidence are reasonable, applies the law to any ‘reasonable’ factual inferences, and makes the determination as to whether a claim could exist.”¹¹ The net effect in federal courts is that approximately 19 percent of cases filed in federal court are now disposed by summary judgment.¹² In a 2015 study of civil litigation in state courts, however, the rate of successful summary judgment motions was only 1 percent.¹³

Another area of case law civil that has altered the right to trial by jury involves the standard for granting motions to dismiss for failure to state a claim on which relief can be granted.¹⁴ For most of the 20th century, pleading requirements in federal court and in most state courts required only “a short and plain statement of the claim showing that the pleader is entitled to relief.”¹⁵ In a pair of cases in 2007 and 2009, the U.S. Supreme Court changed the standard for deciding a motion to dismiss. Previously, federal trial courts were required to assume that the claim alleged in the pleadings was true when considering a motion to dismiss. In *Bell Atlantic Corp. v. Twombly*, the Court introduced a new requirement that trial courts consider the plausibility of the claim by stating that there must be “enough fact to raise a reasonable expectation that discovery will reveal evidence of the claim.”¹⁶ In *Ashcroft v. Iqbal*, the Supreme Court clarified the role of the trial court in making such determinations by permitting judges to “draw on [their] judicial experience and commonsense.”¹⁷ Critics of the *Twombly/Iqbal* decisions allege that, like summary judgment practice, the standards for deciding motions to dismiss have usurped litigants’ right to have the merits of their claims decided by jury.¹⁸

10. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

11. Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 143 (2007).

12. Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEG. ST. 861 (2007).

13. PAULA HANNAFORD-AGOR, SCOTT GRAVES & SHELLEY SPACEK MILLER, *THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 19-23* (2015).

14. FED. R. CIV. PROC. 12(b)(6).

15. FED. R. CIV. PROC. 8(a)(2).

16. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007).

17. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009).

18. Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss under Twombly and Iqbal*, 14 LEWIS & CLARK L. REV. 15 (2010).

Finally, a variety of tort reform initiatives have also contributed to the decline in jury trials. Some of these efforts imposed statutory caps on damage awards, especially for noncompensatory damages such as pain and suffering and for punitive damages, making cases potentially less profitable for plaintiff attorneys to encourage early settlement or even to forgo pursuing claims entirely. Many of these initiatives received favorable receptions in state and federal legislatures in response to sophisticated public relations campaigns by organizations such as U.S. Chamber of Commerce, the American Tort Reform Association, the American Legislative Exchange Commission, and other pro-business entities that claimed the urgent need for curbs on unpredictable, irrational, and excessive jury verdicts.

Criminal jury trial rates have also declined in both state and federal courts. The most commonly cited cause has been the development of sentencing guidelines in 1980s and 1990s in many states. Most states have followed the approach of the federal sentencing guidelines, which provide a downward departure for defendants who demonstrate acceptance of responsibility for the offense by accepting a plea agreement.¹⁹ Under the current guidelines, defendants who signal their intent to accept a plea agreement early may be eligible for a reduction of nine to 15 months incarceration based on the plea agreement offense, which may be a substantially less serious offense than the one originally charged.²⁰ Many commentators have characterized this practice as a “trial penalty” imposed on defendants who opt to exercise their right to a trial by jury.²¹ There has also been an increase in the number of diversionary programs for nonviolent offenders. Many of these “problem-solving courts” offer treatment and probation on the condition of acceptance of responsibility for the underlying offense, which can be a major incentive to waive the right to a jury trial.

Courts were not the only institutional actors affected by the economic downturns. Large segments of the practicing bar also experienced significant contractions as both commercial and individual litigants were forced to reduce expenditures for civil litigation. Similarly, state and local governments cut spending on the criminal justice system including funding

19. U.S. SENTENCING COMM’N, 2014 GUIDELINES MANUAL § 3E1.1(a) (“ If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.”).

20. Jeffrey T. Ulmer, James Eisenstein & Brian D. Johnson, *Trial Penalties in Federal Sentencing: Extra Guidelines Factors and District Variation*, JUSTICE Q. 1 (2009).

21. See, e.g., HUMAN RIGHTS WATCH, AN OFFER YOU CAN’T REFUSE: HOW US FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY (2013).

for prosecution and public defense agencies. These cutbacks exacerbated an existing problem related to the lack of trial experience by the practicing bar that had been growing for decades. Lawyers were often reluctant to bring cases to trial due to their own inexperience and their distrust of juries that resulted from their lack of experience. Over time, lawyers without trial experience were appointed or elected to the bench, and were similarly reluctant to encourage trials for the same reasons. This recurring loop further reduced the number of cases being tried.

This lack of trial experience is one factor on which a variety of bench and bar organizations have focused attention as an area that might be addressed to reverse the vanishing trial trend, especially in civil litigation. Many of these organizations have identified pretrial expense and delay as the primary reason that ADR and other nontrial case resolution techniques have gained popularity. They surmised that making it possible for litigants to bring cases to trial more quickly and at less cost, especially in lower-value cases, would make it financially feasible to try cases and provide opportunities for young lawyers, especially, to gain valuable trial experience. Some of these programs attempted to streamline the pretrial process to get cases to trial faster, while others attempted to streamline the trial process itself.²² Although some of these programs date to the late 1980s, most are relatively new and do not yet have a strong enough track record to demonstrate that they will ultimately reverse the vanishing trial trend.

THE ROLE OF THE AMERICAN JURY IN DEMOCRACY

Declining trial rates over the past two decades have inspired renewed interest in and appreciation of the historical relationship between jury trials and democratic governance. Some of the early interest was closely related to recognition by judicial policy makers of the potential role of jurors in promoting public trust and confidence in the justice system. Public opinion polls in the 1990s revealed that jurors were the only cohort of court users whose confidence in the courts actually increased as a result of their service, whereas actual experience with the local court tended to have a negative effect on all other courts users (litigants, criminal defendants, witnesses). Thus, efforts to treat jurors in a dignified and respectful manner became a key component of many public outreach

22. PAULA HANNAFORD-AGOR ET AL., *SHORT, SUMMARY & EXPEDITED: THE EVOLUTION OF CIVIL JURY TRIALS* (2012).

campaigns. Declining trial rates threatened to reduce the number of potential goodwill ambassadors available to promote the message that local courts provided a fair and effective venue for resolving disputes.

Promoting public outreach and education about the importance of juries and jury trials was one of the primary motivations of American Bar Association (ABA) President Robert Grey (2003–2004) in appointing the ABA Commission on the American Jury. Grey's vision was to bring together the ABA Section on Litigation, the Tort, Trial and Insurance Practice Section, the Criminal Justice Section, and the Judicial Division to focus on the importance of the jury in the American democratic tradition as practiced at the beginning of the 21st century. The commission also developed a set of 19 principles for juries and jury trials that synthesized and built on a variety of jury management standards previously adopted by the participating ABA sections with the intent that the principles "refine and improve jury practice so the right to jury trial is preserved and juror participation enhanced."²³ The principles addressed key aspects of the structure, composition, comprehension, and culture of juries and jury trials. Since 2005, the commission has sponsored a series of biennial symposiums bringing trial and appellate judges, lawyers, and researchers together to learn about new developments in jury system management and trial procedures related to the principles.

Simultaneous with the ABA efforts to promote the American jury, another group of scholars began to investigate the impact of jury service on civic engagement and political democratic theory. Funded by a grant from the National Science Foundation, the Jury and Democracy Project undertook a multijurisdictional empirical study to investigate the hypothesis first articulated by Alexis de Tocqueville in his 1835 treatise *Democracy in America* that jury service is "one of the most efficacious means for the education of the people which society can employ."²⁴ The researchers obtained data about 13,237 citizens who were impaneled as trial jurors in a diverse selection of jurisdictions from 1997 to 2002 and matched those records against local voting records to gauge how frequently each juror voted before and after jury service. In one of the courts, researchers surveyed 3,380 jurors immediately after jury orientation, immediately after completing jury service, and a third time several months later. The combination of these diverse research methods yielded a rich dataset with objective information about the jury experience (e.g.,

23. ABA PRINCIPLES FOR JURIES AND JURY TRIALS pmb1. (2005).

24. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 334–37 (1835).

impaneled as juror or alternate, type of trial, trial outcome), actual voting behavior in state and local elections from 1992 through 2006, jurors' subjective assessment of their jury experience, and demographic and attitudinal characteristics for each juror.²⁵

The findings from the Jury and Democracy Project show that the impact of the jury service experience extends far beyond citizens' views about the justice system. In one of the earliest studies based on a single jurisdiction, the voter turnout rates in subsequent elections were 10 percent higher on average for jurors who deliberated to a verdict compared to those who deadlocked, who were dismissed during trial, or who served as alternates. This was true even after controlling for each juror's voting behavior before jury service—that is, the people who deliberated to a verdict were not inherently more likely to vote than those who did not deliberate. In a subsequent study, the researchers found that the effect of jury service was particularly strong for individuals who had not voted regularly before jury service. It really was the experience of jury deliberations that prompted more frequent voting behavior.²⁶

Other researchers and advocates have embraced the Jury and Democracy Project findings to combat legal and practical encroachments on the right to jury trial, especially in civil cases. In his widely acclaimed book, *Why Jury Duty Matters: A Citizen's Guide to Constitutional Action*, Andrew Ferguson argues that when people serve as trial jurors, they actually embody the core values articulated in our Constitution—due process, equal protection, liberty, accountability, fairness, protection for dissenting voices, deliberation, and the common good—in a way unlike any other form of civic participation.²⁷ In 2014, William & Mary Law School hosted a symposium titled *Civil Jury as a Political Institution* in which scholars prepared and presented papers on a variety of aspects of the civil jury and its relationship to deliberative, representative, and participatory democracy.²⁸

Also in 2014, the American Board of Trial Advocates (ABOTA) began its Save Our Juries Initiative to educate the public about the Seventh Amendment and to highlight threats to its continued viability as a result of contractual provisions in consumer contracts and pending legislation

25. JOHN GASTIL ET AL., *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* 39–51 (2010).

26. *Id.*

27. ANDREW G. FERGUSON, *WHY JURY DUTY MATTERS: A CITIZEN'S GUIDE TO CONSTITUTIONAL ACTION* (2013).

28. *Symposium: The Civil Jury as a Political Institution*, 55 WM. & MARY L. REV. 716 (2014).

in state and federal courts.²⁹ The most recent initiative is the creation of the Civil Jury Project at the NYU School of Law to examine the causes of declines in the rate of civil jury trials and the consequences for the American justice system and society more broadly.³⁰ In addition to basic research on these topics, the Civil Jury Project plans to develop education programs and publicity outlets for studies and policy proposals on the jury trial and to investigate ways for litigants to exercise their right to trial by jury in a manner consistent with speedy and efficient resolution of civil disputes.

Particularly with respect to the right to trial by jury in civil cases, a number of institutions and organizations are renewing interest in civil litigation improvements generally. ABOTA, in cooperation with the National Center for State Courts (NCSC) and the Institute for the Advancement of the American Legal System (IAALS), has begun efforts to introduce summary or expedited civil jury trial programs in a number of states. These programs are designed to provide litigants increased access to civil jury trials by placing restrictions on the number of days of trial, guaranteeing an early and certain trial date, and expediting the pretrial process.³¹ The Conference of Chief Justices (CCJ) also began its Civil Justice Initiative to identify best practices to reduce cost and delay in civil case processing. Although trial rates are not the primary focus of the CCJ effort, ensuring that litigants who want to resolve their dispute by jury trial can do so at reasonable cost and within a reasonable period of time is one of its objectives.³²

PERFORMANCE MEASURES AND JURY AUTOMATION

Even as trial rates plummeted, the fiscal cutbacks also spurred courts to adopt performance measures, both to identify operational strengths and weaknesses and to provide evidence of prudent use of public resources in budget requests to state and local legislative bodies. Many of these performance measures grew out of the Trial Court Performance Standards, a set of 68 performance measures addressing five discrete performance

29. See Save Our Juries, <http://www.saveourjuries.org>.

30. See Civil Jury Project at NYU Sch. of Law, <http://civiljuryproject.law.nyu.edu/>.

31. See IAALS ET AL., *A RETURN TO TRIALS: IMPLEMENTING EFFECTIVE SHORT, SUMMARY AND EXPEDITED CIVIL ACTION PROGRAMS* (2012).

32. See <http://ccj.ncsc.org/cji>. The report of the CCJ Civil Justice Improvements Committee is scheduled to be completed in early 2016.

areas.³³ These were subsequently refined into CourTools, a more manageable set of ten performance measures providing a balanced scorecard for trial courts to undertake self-assessments.³⁴ The two performance measures most frequently employed in jury operations were juror yield and juror utilization.³⁵ Jury yield measures the effectiveness of juror summoning and qualification procedures, and juror utilization measures the effectiveness with which courts use the jurors who are qualified and available for jury service. Both measures have been around for decades, but the economic climate since 2001 made it imperative that courts examine every area of court operations to identify areas of potential cost savings.

Juror utilization was perhaps the easiest for court policy makers to understand in terms of fiscal impact insofar that the measure is based on the number of prospective jurors who report for service but are ultimately not needed to impanel juries.³⁶ The court incurs costs for those unused jurors in the form of juror fees and mileage reimbursements as well as the administrative costs associated with summoning and qualifying those jurors so that they were available to report on the trial date. Many courts responded to the need to decrease operational costs by instituting standard panel size guidelines; implementing policies to reduce the frequency of day-of-trial settlements, plea agreements, and continuances; and reducing summoning rates for better calibration with routine demands for jurors.

33. *See, e.g.*, NANCY E. GIST, TRIAL COURT PERFORMANCE STANDARDS AND MEASUREMENT SYSTEM (Nov. 1995). The performance areas included access to justice; expedition and timeliness; equality, fairness, and integrity; independence and accountability; and public trust and confidence.

34. *See* <http://www.courttools.org>. The NCSC also developed the High Performance Court Framework as a model for courts to implement performance measures into a continuous improvement process. *See* BRIAN OSTROM & ROGER HANSON, ACHIEVING HIGH PERFORMANCE: A FRAMEWORK FOR COURTS (Apr. 2010).

35. COURTOOLS MEASURE 8: EFFECTIVE USE OF JURORS (2d ed. 2011).

36. Historically, there were two components of juror utilization: the percent of panel used, and the percent of jurors assigned to a courtroom for jury selection. The percent of panel used focused on calibrating the size of the jury panel sent to a courtroom for jury selection with the number of prospective jurors typically needed to impanel a jury while minimizing the number of jurors left unused—that is, not questioned and either selected as a trial juror or alternate, or removed for cause, for hardship, or by peremptory challenge. The percent of prospective jurors sent to a courtroom for jury selection (percent to voir dire) focuses on problems that arise when jurors report for service, but the trials for which they were summoned are cancelled or postponed due to day-of-trial plea agreements, settlements, or continuances. In 2011, the NCSC added a third component to the juror utilization measure: the percent of jurors reporting for service. This component focused on the administrative costs associated with summoning and qualifying jurors for service who are never told to report.

In the process of seeking areas of jury operations that could be performed more efficiently and cost-effectively, many courts also assessed their summoning and qualification procedures. Common strategies to improve jury yield included conversion from two-step to one-step jury operations; better maintenance of the master jury list to decrease undeliverable summonses; more effective follow-up on jurors who failed to respond to the qualification questionnaire or failed to appear for jury service; and making adjustments to the maximum term of service and to juror compensation policies to minimize the financial hardship on prospective jurors and the associated requests for excusal from service. Increase jury yields permitted courts to reduce their overall summoning rates, thus saving printing, postage, and staffing costs.

In many respects, efforts to improve jury yield became feasible due to rapid increases in the technological functioning of jury automation systems, especially the development of Internet and interactive voice response (IVR) interfaces with jury automation systems that permit jurors to respond to their jury summons and perform routine administrative tasks (e.g., update name or address, reschedule jury service to a more convenient date, request to be excused for hardship) 24/7 without personal assistance from jury staff. Online and IVR tools often ensured more complete and accurate responses from jurors compared to paper submissions by requiring mandatory responses and verifying formatting before jurors could continue to additional system options. The ability to document e-mail addresses and cellular telephone number also provided tools for courts to communicate more effectively with jurors over the course of their jury service. Finally, these systems made it possible for courts to implement other cost-saving steps such as using postcards to summon jurors rather than first-class letters, thus saving printing, postage costs, and staff processing costs.³⁷

Although the development of sophisticated Internet-based communication technologies presented courts with a variety of opportunities to increase the efficiency and effectiveness of their jury operations, they also posed some new challenges, namely that the jurors themselves were also taking advantage of these technologies to learn about the cases in which

37. One unexpected benefit of postcard summonses was an increase in response rates in many jurisdictions. It appears that jurors are more likely to respond to the postcard immediately upon receiving the postcard, perhaps because the instructions are considerably more direct compared to the detailed information included with the traditional jury summons.

they were empaneled. Beginning in the late 2000s, first trial courts and then appellate courts heard a succession of cases in which jurors had disobeyed the jury instructions concerning *ex parte* information and used the Internet to do independent research or communicate about their cases, causing mistrials, posttrial hearings, and even overturned verdicts. The phenomenon eventually became so widespread that courts across the country, and even throughout the world, developed a new name for these cases: "Google mistrials."

The response by judges, lawyers, and court administrators has been somewhat chaotic. Trial court judges who viewed the problem as one of incomplete and inadequate jury instructions quickly developed new jury instructions that provide more specificity concerning prohibited conduct as well as more explanation about the underlying rationale for these restrictions. Others introduced new juror oaths, both orally and in writing, to encourage a greater degree of moral obligation from jurors to comply with the admonitions. Some appellate courts expressed concern that existing case law governing juror misconduct did not adequately address the potential magnitude of the problem, concluding that the more easily visible electronic footprint left by jurors online would jeopardize public confidence in the impartiality of juries and create a higher presumption of prejudice from Internet-related misconduct compared to "old-fashioned" misconduct.³⁸ Interestingly, very few courts responded by placing new restrictions on access to electronic devices in the courthouse, perhaps because so many courts had invested in these technologies precisely to increase access and transparency to the justice system.

Currently, there is a still relatively small, but growing, sense among some judges and lawyers that all of these efforts to discourage Internet-related juror misconduct is simply an exercise in rearranging deck chairs on the Titanic. As younger "digital natives" gradually replace the older "digital aliens" in the jury pool, the expectation that preventive measures will be sufficient to dissuade all but the most recalcitrant jurors from using Internet technologies is disappearing. Judges and lawyers are beginning to reframe traditional notions of juror impartiality and uncouple that concept from the requirement of complete isolation from *ex parte* information. For trial lawyers, this means that they should expect that if information can be found online, one or more jurors can and will find it, so the lawyers should be sure to address that information in the context

38. *Dimas-Martinez v. State*, 385 S.W.3d 238 (Ark. 2011),

of their trial presentation. For judges, it means that the law on juror misconduct must focus on the nature of the information received by jurors and its potentially prejudicial effects on juror decision making rather than on the intent of the juror in violating the instructions against Internet use.

MOVING FORWARD

There is some irony that jury trials and other forms of lay participation in the justice system are increasingly being adopted around the world, but are declining rapidly here in the United States. Many emerging democracies recognize the need for transparency and accountability in their criminal justice systems to overcome well-established (and mostly deserved) public distrust and lack of confidence. Some counter that the American justice system is sufficiently mature and the judicial bench is well respected as competent and conscientious, that heavy reliance on trial by jury is no longer as necessary to preserve public trust and confidence in the judicial branch. Given current concerns about social inequality, lack of social mobility, and political corruption, however, one wonders whether such a blithe attitude about continued public confidence in the courts is wholly warranted. It does not necessarily follow that a resurgence of jury trials would adequately immunize the courts against further public malaise, but at the current time, nothing has presented itself as a reasonable replacement for the role that the jury has traditionally played in the American justice system.