

THE MODERN JURY

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Why trust justice to amateurs?

Professional jurors would become wise to lawyers' ways, but something valuable would be lost.

By Nathaniel Bruno

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MANY INDUSTRIOUS CITIZENS, no matter how civic-minded, dread the afternoon they will stumble home from a stressful day at work, only to find the cruel obligation of a jury summons in the mail. Perhaps the time has come for a system of professional jurors.

Some may say the idea of professional jurors is ridiculous. However, in light of the numerous jury reform proposals passed by the American Bar Association House of Delegates in 2005, it seems that the idea of employing professional jurors deserves serious contemplation and debate. Only a fool would entrust his physical health to a part-time medical amateur. So why place the integrity and accuracy of the judicial system in the hands of legal novices? And why should summonses be dealt out unpredictably, like bad cards in a losing hand of poker?

The idea of swearing in professional jurors is simple. Cut out the laborious, scattershot summoning process and, instead, hire people willing to make jury service their full-time careers. Each county or district would have its own pool of professional jurors whose job would be to arrive at the courthouse each day and participate in jury selections until actually chosen to serve on a case. At the conclusion of the case, back into the pool they would go. This would be particularly reasonable for grand juries, on which jurors serve for months at a time.

Would a system of professional jurors withstand constitutional scrutiny? Possibly so. The Constitution says very little about how juries must be composed. See U.S. Const., art. III, § 2,

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cl. 3, and amends. V-VII. The most concrete instructions are found in the Sixth Amendment, which provides that juries must be "impartial" and must be "of the State and district wherein the crime shall have been committed." Nowhere is it ordained that "impartial" is synonymous with "amateur" or "random rotating summoning process." Certainly, nothing in the text of the Constitution itself mandates those characteristics. Even such an important matter as the number of jurors seated in a case is left open to variation. See *Colgrove v. Battin*, 413 U.S. 149, 158-160 (1973) (six-person jury permissible in civil cases); *Williams v. Florida*, 399 U.S. 78, 102-103 (1970) (six-person jury permissible in criminal cases).

While the U.S. Supreme Court has recognized the importance of juries composed of laypeople to protect against overzealous prosecutors and government oppression when ruling in the criminal context—see *Williams*, 399 U.S. at 100; *U.S. v. Gaudin*, 515 U.S. 506, 510, n.2 (1995); *Ballew v. Georgia*, 435 U.S. 223, 229 (1978); *Ludwig v. Massachusetts*, 427 U.S. 618, 625 (1976); *Duncan v. Louisiana*, 391 U.S. 145, 156-157 (1968); *U.S. ex rel. Toth v. Quarles*, 350 U.S. 11, 18 (1955)—it also has recognized that the definition of "jury" is very malleable. See *Williams*, 399 U.S. at 86-100. So long as the jury pool contains a relatively heterogeneous mix of professional jurors who are indifferently chosen, much of the little-dissected penumbral concern regarding the provision of a jury of peers may be satisfied. See *id.* at 86-87, 91 n.27; *J.E.B. v. Ala. Ex. Rel. T.B.*, 511 U.S. 127, 142 n.14, 143 n.16 (1994); *Duncan*, 391 U.S. at 156; *cf.* also *Batson v. Kentucky*, 476 U.S. 79, 85-86 and n.6 (1986), and its progeny; but *cf.* *Powers v. Ohio*, 499 U.S. 400, 423-424 (1991). Moreover, it is not necessarily true

that professional jurors would, on the whole, be less impartial or less peerlike than once-in-a-blue-moon jurors.

'Untrained laymen'

In fact, the Supreme Court has directly recognized the "long debate" over whether it is wise to "[permit] untrained laymen to determine the facts in civil and criminal proceedings." See *Duncan*, 391 U.S. at 156-157. It admits there are "powerful voices on either side," and notes the debate is especially intense regarding civil juries, where fear of government oppression is not so acute. See *id.* at 157; *cf.* also *Henderson v. Kibbe*, 431 U.S. 145, 151, n.9 (1977). Also, the Supreme

Court has recognized its own "willingness to re-examine earlier decisions about the nature of 'jury trial' in almost every respect." See *Williams*, 399 U.S. at 92 n.31; *Duncan*, 391 U.S. at 158 and n.30.

Thus, it appears that the Supreme Court invites deliberation on the questions of fact regarding professional jurors. To that end,

it is interesting to note that each potential advantage of a professional juror system seems a two-edged sword.

First, professional jurors would be skilled experts—masters at navigating trials. Instead of being awed, confused and intimidated by the foreign nature of abstruse trial proceedings, in the courtroom a professional juror would feel at home. After studying hundreds of witnesses in various trials, professional jurors would become insightful judges of character and credibility. They would be proficient, dispassionate evaluators of facts with internal barometers for determining when the weight of evidence is substantial enough to be a preponderance or, perhaps, beyond a reasonable doubt.

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Professional jurors would excel at discerning which pieces of evidence are crucial or pertinent, and which are extraneous or irrelevant. Like trained legal bloodhounds, they could sniff out the meatiest portions of the case. They also would be immune to the varying styles of attorneys, and attorneys' personalities would cease to be a factor in the outcome of trials.

Unfortunately, practice and routine might breed cynicism and complacency. The quality and accuracy of verdicts could suffer at the hands of professional jurors who tune out in the middle of a trial because they believe they have heard it all before. Such jurors may become too dependent upon their evaluations of demeanor and forsake skillful factual analysis. Professional jurors may actually develop a special disdain for attorneys, who often rely on similar formulas, stories and techniques for advancing the cause of their clients. That scorn could improperly influence jurors' votes.

Professional peers

A cherished aspect of the current system is that common sense can play a role in a jury's decision. See *Ludwig*, 427 U.S. at 625; *Williams*, 399 U.S. at 100. Under a new system, verdicts might suffer as professional jurors become robotic, emotionless legal scientists, meticulously picking apart every minor detail of a case until the main theme is lost. Justice might be sacrificed if their expertise causes them to forgo their street smarts.

And can a professional really be a peer? Professional jurors would not be ordinary people "just like us." They would be trained experts, imbued with a special understanding of the judicial process. Even worse, they might become an inseparable part of the system, woven into the fabric of government against whose tyranny vigilance is required. It seems a conflict for jurors to be employed by the system against whose power they are supposed to act as a protective buffer.

Also, much of the diversity found on any given jury will be sacrificed in a system of professional jurors. When serving as jurors, citizens draw upon their own personal history, occupational knowledge and daily environment. That wealth of varied experience and insight would largely be lost with professional jurors, whose only working environment would be inside a courthouse—truly, an existence apart from the outside real world.

The second two-edged sword of benefit and burden is that litigation outcomes would be more predictable. After casting votes in a number of

cases and being interviewed by litigating attorneys, professional jurors would develop profiles. These profiles would not be based on the generic indicators that now fuel jury selection, such as age and occupation. Instead, the profiles would be based on an actual record of voting within specific factual contexts.

So jury selection would become an informed, practical, useful process, as opposed to a blindfolded game of legal pin-the-tail-on-the-juror. In fact, improper biases of professional jurors with respect to certain types of cases would be more readily detected. When choosing legislators and judges, citizens draw on campaign platforms, voting records, party affiliations and written opinions to help select individuals with a modicum of predictability. A system of professional jurors would conform nicely to the relatively high level of outcome predictability found in surrounding legal contexts.

On the other hand, professional jurors might turn the legal system into a high-stakes fantasy league of preordained verdicts. Once professional jurors become widely known and their profiles are disseminated, litigation may depend entirely upon maneuvers that take place during the all-important jury selection. Victory would be guaranteed if an attorney could amass a lineup of old pro jurors who are sure to vote a certain way. Litigation would become entirely about tactics, and nothing about truth. Rather than serving the Constitution's ideal of impartiality, professional jurors might actually become more entrenched in their own biases and preconceptions. Instead of a panacea of reason and order, such a system might become a horror of predictable outcomes.

Third, the change would create many civil service jobs. Simply put, a system of professional jurors would rescue many people from unemployment. It would not be a particularly lucrative career, but a steady, respectable, moderately well-paid position for many excellent and well-meaning available laborers.

Cheap labor

Of course, someone must pay the salaries. That someone, most probably, would be the local government—essentially, the taxpayers. Local governments already struggle to provide services such as libraries and public safety. A key benefit of lay juries is that jurors can be paid next to nothing for their time because the engagement is so short. Thus, the courts draw on a huge supply of labor and pay the workers a mere pittance. Professional jurors would require a living wage

and benefits, and many would simply be sitting around much of the time, waiting for the next jury selection to begin. The costs could be tremendous.

Still, the existing summoning system surely creates an incredible administrative burden for courts that could be assuaged by a system of professional jurors. Currently, prospective jurors continually try to change their appearance dates or secure exemptions. Requests must be reviewed and processed. Inevitably, some prospective jurors simply fail to show up on their designated dates.

Professional jurors would not have excuses. It would be their job to be at the courthouse, available for service. The huge burden of finding available jurors, before even approaching the issue of juror fitness, would be jettisoned.

In practice, professional jurors might actually create more administrative headaches for courts. Instead of dealing with juror excuses and postponements, courts would have to deal with juror requests for vacation and sick leave. A whole new system of payroll, benefits and seniority would be necessary. And the turnover rate of professional jurors could be high. A perpetual system of applications, interviews and background checks would be necessary. The administrative costs could simply outweigh the potential benefits.

So, what does the public say in the matter of professional jurors? Every cogent argument in favor of a system of professional jurors is answered by an equally forceful counterargument against it, save for one—that regular citizens no longer would have to dread the inconvenience of being summoned to serve on a jury.

Not all people are so selfish and short-sighted as to despise the thought of jury service. An abundance of citizens find it fascinating to sit on juries, and cherish the honor of serving the justice system, cognizant of the privilege of meaningful participation in both political and judicial affairs. Thus, it appears there may be a hung jury on the question of professional jurors.

Still, wouldn't it be lovely to reach down for the arms of my sparkingly precious kindergarten-aged little girl, sweep her up into the air, ask her what she wants to be someday, and hear her cooingly excited reply, "I wanna be a professional juror when I grow up!"? **NLJ**

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