



Why bother with local juries?



Welcome to the World Baseball Classic! Watching the team from the Dominican Republic kick Team USA's collective butts will give us all a better understanding of this country's outsourcing problem. Why can't we train qualified shortstops anymore? It turns out that even Barry Bonds' steroids were imported from Mexico! On a related note, do we think Barry Bonds actually has the nerve to sue the authors of "Game of Shadows" for libel?

I know that most of you eagerly anticipate the arrival of the folded sheet of glossy, full-color joy that is **THE JURY BOX** every couple of months. I do recognize that some of you are away from your offices for weeks at a time or simply prefer not to add any more paper clutter to your desktop. With these concerns in mind, **THE JURY BOX** will be available for electronic delivery via e-mail beginning in May. You will be able to receive it electronically, on paper, or both. Keep an eye out for an e-mail from me, outlining the process (just a couple of mouse clicks) for specifying your delivery preferences. In the meanwhile, remember that **THE JURY BOX** is archived at www.eps-consulting.com/jurybox for your convenience.

In this issue, I use a recent case that some of you may have heard of to illustrate the relevance of using local juries, even in modern America. Certain issues afford juries the opportunity to exercise discretion in keeping with local customs and attitudes. I also examine the punitive award in a recent Oregon tobacco case with an eye towards the constitutionality of the verdict.

— Edward P. Schwartz

During the debate over the drafting of the U.S. Constitution and the Bill of Rights, the only really thorny issue related to jury trial was **vicinage**. For those from outside the legal profession, vicinage describes the "neighborhood" or geographic region from which jurors are drawn. Some of the founders favored very local jurors while others advocated only limiting jurors to the state in which the crime (or civil violation) took place. Students in my law school course often wonder what all the fuss was about.

One issue that did not generate any debate was the right of the jury to be the arbiter of both the law and the facts. Juries had been so instrumental to colonial resistance to English tyranny, through their right to nullify or creatively interpret the law, that every person at the Constitutional Convention understood this to be an integral part of trial by jury. With the jury exercising so much discretion to act as the conscience of the community, one can then understand why it was so important to define the boundaries of that community.

As the American legal community evolved through the 19th century, with a growing class of experienced judges and lawyers, jurists grew increasingly uneasy with the idea of jurors disregarding judicial instructions on the law in favor of their own interpretations. Finally, in the case of *Sparf and Hanson v. U.S.* (1895), the Supreme Court formalized the modern legal oxymoron that the jury has the power but not the right to nullify the law. The result is that a modern jury is given little official discretion to interpret the law, save for those circumstances where the jury is explicitly authorized to give content to ambiguous legal terms. On the other hand, when a jury does nullify the law, there is not much that can be done about it.

With jurors limited to "factual" questions, it makes sense to wonder how much it matters that jurors are locally drawn. Does it really matter whether the jurors are from Massachusetts, Michigan, Maryland or Montana? There are some obvious types of cases where the answer is "yes," such as capital cases or those involving the definition of pornography. In addition, some localities, such as the Bronx, NY, have developed reputations for granting civil plaintiffs enormous damage awards. What may be less obvious is that a common jury issue, like the definition of reasonable care, can have a local flavor.

"I still think that the accuracy was enormously important."

Consider a hypothetical case: Mr. C, the Vice President of a large western democracy, goes on a hunting trip with several friends and financial supporters at a privately owned ranch. One guest, Mr. W, arrives late and, in his rush to join the others, makes a movement that is mistaken by Mr. C for the flight of a quail. Mr. C fires his shotgun, hitting Mr. W in the face and causing serious injuries. How would a Texas jury react to any criminal or civil charges brought against Mr. C?

It turns out that hunting cases provide excellent examples of the importance of local juries. The definition of reasonable care might sensibly differ depending on whether the shooter were holding the shotgun in downtown Philadelphia or the mountains of Wyoming.

Shoot first, accessorize later...

Consider the 1989 case of Donald Rogerson, a hunter from Bangor, Maine, who killed Karen Wood, when he mistook her for a white-tailed deer. Mrs. Wood had stepped out of her own backdoor only moments earlier and was shot within 130 feet of her own house. The consensus of the local community was that the victim was foolish to leave her house wearing white mittens during deer hunting season. Despite the fact that Maine law requires a hunter to identify a buck by its antlers and prohibits shooting within 300 feet of a house, the initial grand jury refused to indict Rogerson. When it was learned that the defense attorney's nephew had been on the grand jury, a

second was empanelled and it returned an indictment. The petit jury, however, returned a not-guilty verdict. According to the victim's husband, "You have to get a sense that community support was markedly in favor of the shooter."

White-tailed deer season seems to pose particular problems for fashion conscious women in rural neighborhoods. In 2003, Michael Berseth was acquitted of reckless homicide and negligent homicide charges, in the shooting death of his neighbor, Deborah Prasnicky, whose white scarf Berseth claims to have mistaken for the tail of a deer. Again, despite the defendant's familiarity with the area and his failure to "identify his target," the jury took just over two hours to return a not-guilty verdict. I fear that Lands End will soon need to add disclaimers in their catalogues about not wearing certain colors of outerwear during hunting season, lest the company be sued for wrongful death.

The sadly ironic hunting accident award perhaps should go to the case of Kevin P. O'Connell, who fatally shot James Spignesi, Jr., a Connecticut Department of Conservation officer, who was investigating O'Connell for illegal hunting practices. Wearing camouflage clothing so as to avoid detection, Spignesi and his partner were mistaken for deer by O'Connell. The defense attorney convinced the jury that the agents' clothing choice absolved O'Connell of any responsibility for Spignesi's death. The jury took less than two hours to return the not-guilty verdict.

These three verdicts share the fact that local juries were willing to forgive hunters who shot recklessly at anything that moved, while blaming victims for behavior that would certainly be innocuous under almost any other circumstances.

♪ "For Three Strange Days..." ♪

So, what of our hypothetical defendant, Vice President C? As the cases outlined above suggest, jurors tend to sympathize with defendants with whom they can identify. They can't help but think, "There, but for the grace of God, go I." As such, a rural Texas jury is unlikely to convict defendant C for shooting his hunting partner.

There are, however, exceptions to this rule. If the behavior in question is especially egregious, those who identify with the defendant may prefer to distance themselves from his conduct. For instance, a juror who is in the military might be sympathetic to a fellow officer who finds himself in legal trouble; however, should that behavior be particularly reprehensible, that same juror might become especially punitive. His own reputation and status with other jurors becomes tangled with the defendant's conduct. He needs to declare independence, "That's not how an honorable officer (like me) would behave. Let's throw the book at him!" In my own work, I have seen mothers turn on other mothers whose behavior seems particularly irresponsible.

So, while Mr. C's accidental shooting of Mr. W is unlikely to result in a conviction, in and of itself, there are suspicious elements of the event that might get the defendant in trouble, even with die-hard hunters. First, there appears to be evidence

that the defendant had been drinking prior to the incident. Hunting while intoxicated might be frowned upon by those dedicated to keeping hunting safe and legal. Secondly, Mr. C delayed in reporting the incident to authorities. Hunters who see themselves bound by certain protocols might resent the defendant's decision to circumvent standard channels and go over the heads of local officials.

In the News

Wherefore art thou, o' State Farm?

After Jesse Williams, a lifelong smoker from Oregon, died of lung cancer, his widow sued the cigarette manufacturers for both negligence and fraud. The fraud claim was based on the company's longstanding campaign to undercut published reports about the dangers of smoking.

The jury found for the plaintiff on both causes of action and awarded \$800,000 in compensatory damages and \$79.5 million in punitive damages. The case has already been to the U.S. Supreme Court once, resulting in it being remanded to the Oregon courts for reconsideration in light of the ruling in *Campbell v. State Farm* (2003). Despite that ruling, the Oregon Supreme Court once again allowed the punitive award to stand. While the U.S. Supreme Court's *State Farm* holding expresses skepticism towards punitive awards more than ten times greater than their compensatory counterparts, the ratio in this Oregon case was 100:1.

While the Oregon Supreme Court recognized the admonition in *State Farm* that "Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in [the] range of 500 to 1, or, ... 145 to 1," it also took note of the U.S. Supreme Court's recognition that "A greater ratio might comport with due process if a particularly egregious act has resulted in only a small amount of economic damages." In theory, the reprehensibility of the defendant's conduct is a factual question, properly left to the discretion of the jury. As such, the state court's interpretation of the reasonableness of the jury's conclusion on the question is entitled to substantial deference (again, in theory). It remains to be seen whether the U.S. Supreme Court adheres to its professed commitment to federalism in this case.

The majority in *State Farm* made great use of the fact that the jury in that case had heard testimony of the defendant's conduct throughout the country, lending support for its conclusion that State Farm was being punished in Utah for mostly out-of-state conduct. While this issue is not as central to the Oregon case, it will be interesting to see whether this rationale is invoked when the case comes back before the U.S. Supreme Court, as it most certainly will.

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