Judicial Perspectives on the Jury

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at The George Washington University Law School

The Honorable Penney S. Azcarate,[*]
The Honorable Stephanos Bibas,[**]
The Honorable Jennifer Walker Elrod,[***]
The Honorable Paul L. Friedman[****]
& Renée Lettow Lerner[*****]

STEPHANIE SAUER: Welcome to the final panel of the Symposium. The Judges' Panel will be moderated by our very own Professor Lerner, an expert in the fields of United States and English legal history, civil and criminal procedure, and comparative law. Her book, *The Jury: A Very Short Introduction*, which discusses the history and practice of the jury around the globe, is the central focus of this Symposium.

PROFESSOR LERNER: Thank you all for being here. Welcome to the Judges' Panel, a vital feature of this Symposium. The judges on this panel will tell us what it is like to concretely work with juries in the legal system and what they see as the most pressing issues concerning juries. Today, we have a deeply distinguished and experienced bench with a nice mix of federal and state judges as well as trial and appellate judges. Collectively, they have presided over hundreds of jury trials and tried many cases before juries. I would like to introduce them, starting with Chief Judge Penney Azcarate, who is the Chief Judge of the Fairfax County Circuit Court in Virginia. She received her bachelor's degree from Old Dominion University, where she attended on a military scholarship. After graduation, she was commissioned as an officer in the Marine Corps. She served in Saudi Arabia during Operation Desert Storm as a communications officer and earned her JD from the law school at George Mason University. Following graduation from law school, she had a variety of roles. She was a prosecutor, a criminal defense lawyer, and a civil litigator in Fairfax County. I think it is fair to say that she has covered all the bases.

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For the past sixteen years, she has served on the circuit court and the general district court. She is also a member of the Judicial Council of Virginia, which is charged with studying and recommending reforms to the Virginia judicial system. Through this role, she has not only studied and recommended changes—she has made them. In 2018, she implemented the Fairfax County Adult Drug Treatment Court, and in 2015, she established the Veterans Treatment Docket. In spring 2022, she presided over the *Depp v. Heard* trial, which we heard about from our keynote speaker Mr. Benjamin Chew earlier today.

Next, we have Judge Stephanos Bibas, a judge of the United States Court of Appeals for the Third Circuit. He graduated from Columbia University, Oxford University, and Yale Law School. He clerked for Judge Patrick Higginbotham of the United States Court of Appeals for the Fifth Circuit and for Justice Anthony Kennedy on the United States Supreme Court. He was a litigation associate in Washington, D.C., and then an Assistant United States Attorney for the Southern District of New York. There, he prosecuted what has to be one of the most interesting criminal cases ever. He prosecuted the world's leading expert in Tiffany glass for hiring a grave robber to steal Tiffany windows from cemeteries. Judge Bibas also had a stellar career as an academic, concluding at the University of Pennsylvania Carey Law School, where he somehow found time to argue six cases before the United States Supreme Court. He is also the author of two books about the justice system: *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law* in 2017 and *The Machinery of Criminal Justice* in 2012.

We then have Chief Judge Jennifer Walker Elrod, who is Chief Judge of the United States Court of Appeals for the Fifth Circuit. She graduated from Baylor University and Harvard Law School. She clerked for Judge Sim Lake on the United States District Court for the Southern District of Texas and subsequently entered private practice, working in civil litigation. She was then appointed and twice elected as a judge in Harris County, Texas. She presided over more than 200 jury and nonjury trials in her five years as a state trial judge. Although she now serves as a federal appellate judge, she has not given up trials altogether. She still occasionally sits by designation in federal district courts throughout the Fifth Circuit so that she can keep her skills sharp by presiding over jury trials. And I think one time you got stuck with a bench trial, is that right?

CHIEF JUDGE ELROD: Yes. That's never as much fun, because you have to do findings after you finish the trial. When you finish a jury trial, you're done.

JUDGE FRIEDMAN: I had a twenty-day, nonjury civil trial during the COVID-19 pandemic virtually. I'm still working on the opinion. Juries are much better.

PROFESSOR LERNER: I think you can start to see why judges really like juries. In any event, Chief Judge Elrod has written several

academic articles about the jury, and notably and recently, she was the author of *Jarkesy v. SEC*, which we discussed extensively in the civil jury panel earlier today and in which she was affirmed by the United States Supreme Court. As we talked about in the civil jury panel, that case is likely to have profound reverberations in the justice system. She also has multiple talents that she has used to support the jury system: Earlier this year, for example, she produced and performed in a musical about juries.

Judge Paul Friedman is a judge of the United States District Court for the District of Columbia. He is a graduate of Cornell University and the University at Buffalo School of Law. He had two clerkships. He clerked for Judge Aubrey Robinson of the United States District Court for the District of Columbia and for Judge Roger Robb of the United States Court of Appeals for the District of Columbia Circuit. He had an extensive career in both government service and private practice. He served as an Assistant United States Attorney for the District of Columbia and as an Assistant to the United States Solicitor General, where he argued six cases before the Supreme Court. He was an associate and partner at the firm White & Case. He was President of the District of Columbia Bar Association and an Associate Independent Counsel for the Iran-Contra investigation. And for many years, up until recently, he was Secretary of the American Law Institute and a member of its Council. In his over thirty years as a judge, Judge Friedman has presided over many prominent cases, one of which our keynote speaker Mr. Benjamin Chew mentioned: *In re Black Farmers Discrimination Litigation Settlement*, also known as the *Black Farmers Case*. That case was the largest civil rights class action settlement in the history of the country. He also presided over the District of Columbia–schools class action cases involving special needs students, as well as the hospital release petitions of John Hinckley, the man who attempted the assassination of President Reagan.

I would like to begin the panel with a relatively open-ended question: In each of your views, why are juries important?

JUDGE FRIEDMAN: Juries are important because they involve ordinary citizens in the legal process. They are important to our democracy and important to a public understanding of the court and the legal system. As Professor Amar mentioned, you get people from all parts of the city. In the District of Columbia, for example, you get laborers, government employees, lawyers, accountants, the unemployed, the retired, and people of all races, Black, Hispanic, Asian, white. They do not know each other, and they come from different backgrounds, but they come together because of the jury. People are reluctant to serve on juries, but as soon as that jury is selected and they are in the jury room, they are committed to doing the right thing and achieving a fair result. And they generally do. I like jurors because they take jury service seriously. They

actually get to know the other jurors, who are often types of people they may not have known before.

I often speak with jurors during the trial, not about anything substantive, and after the trial. I go into the jury room in the morning, and we make sure they have coffee and orange juice and pastries. I ask, "How are you doing this morning? Are you guys good? Did you have any trouble getting here today? We might be a little delayed this morning." We have a little chitchat. I also tell the lawyers in advance that once we have a jury in the box, we are not going to waste their time. We are not going to take long bench conferences, and we are not going to hear motions. If the attorney has an important legal issue, we will meet at eight o'clock in the morning because the jury will start on time. We are not going to let them sit idly in the jury room. Their time is too important.

I had a jury trial this past year. It was supposed to last four weeks, but it lasted nine weeks. These people were in as good a mood in week six and seven and eight as they were earlier because they wanted to see this case through to its conclusion. They were in good spirits when it was all over, too. They even had a party afterwards, a few weeks after the trial ended. This is democracy. This is enhancing the faith in and the understanding of the court system.

CHIEF JUDGE ELROD: That has also been my experience. I got called for jury duty twice this year, but even when I have been picked for the jury, I never seem to get to the verdict because they've settled the case after I was picked. As Judge Friedman said, being respectful of the jury's time is so important. I think Professor Amar would like to come to Texas, where the jurors in some courtrooms can ask questions if they want to. They always can have a notepad, get their own copy of the charge, and set their own schedule for deliberations. They can also reschedule jury duty for up to nine months in the future right from their phones. We have additionally made sure that they are paid appropriately. We are already doing many of the things that make juror service user-friendly and really respect the role of the jury, because we understand that they are judges in their cases. The jurors are cojudges. That is why those in the gallery stand when the judge comes in and also when the jury comes in. It is really important that we respect the jury, because it is essential for the rule of law that people come to court and see and participate in the justice system for themselves. It melts cynicism to actually participate in the process.

JUDGE BIBAS: Amen. What I want to add is that, even though my day job is as an appellate judge, I've made a point of sitting on and presiding over some civil and criminal jury trials. I really see what Tocqueville said, which is that I'm not sure whether the juries are necessarily better for the parties. But I think juries are really good for the jurors themselves. They come away with some sense that the process

and outcome were pretty fair. To echo others, people who are very different come into the jury room, put their heads together, work together, listen to one another, are persuaded by one another, and are able to do justice and see justice done. So much of our politics is the abstract screaming cartoon images of "the other side." But retail, face-to-face in the jury room, it becomes difficult to simply label someone as a hater. No, this other person is someone you are working with. You invariably come away with a certain respect for how seriously and well everyone conducted jury service together.

CHIEF JUDGE AZCARATE: All I would add is that the jury is the cornerstone of our democracy and of our judicial system. People are skeptical about juries, but the jury system does work and it works really well. The jury brings transparency to the judicial system and judiciary, because jurors are actually in the courtroom and they are an integral part of the system. And yes, when jurors first come in, nobody is really excited about jury service. As a judge, I have the responsibility to explain their civic duties. And I say we have a lot of privileges as citizens, but we also have responsibilities, and jury service is one of them. Some other citizens are in uniforms away from their families for a year at a time. I tell jurors, "I am not asking that of you; I am just asking for your attention in this case and to do your civic duty for this particular case." This kind of conversation really sets the tone, and we can go from there. It is amazing how jurors, who have no relation to one another, listen to the orders and instructions, go into deliberation together with facts and law they have never seen before, and come back with a decision. It is an amazing process, and it is fun to be a part of it.

PROFESSOR LERNER: For the next two questions, I will start out with civil juries and then move on to criminal juries. What do you all think civil juries are good at and what are they not so good at?

CHIEF JUDGE AZCARATE: In my opinion for civil juries, I think they are really good at determining liability and negligence. They really struggle with damages, both punitive and compensatory. I usually get a lot of questions back from jurors when they are trying to figure out damages because they want a formula. They are looking for something black-and-white, but there is no brightline rule or formula on determining damages. And I think they really struggle with that.

JUDGE BIBAS: I had a patent trial, and I think those technical cases can be difficult, but I actually put a majority of the blame there on the lawyers. A lot of patent lawyers have PhDs in engineering or hard sciences, and many have not learned how to simplify complex technical and scientific information for ordinary people. I constantly had to jump in and explain the acronyms that the lawyers kept dropping in. There are also tons of litigators out there who are not actually good trial lawyers. They call themselves litigators, but hardly anyone is a trial lawyer anymore. There's a real difference between a person who is comfortable

being in front of a jury and has experience breaking down difficult information and using visual guides and demonstrations. And then there are people who are scared stiff because they spent their whole lives doing discovery in some subbasement.

JUDGE FRIEDMAN: I agree completely. Litigators are not true trial lawyers anymore. There is a huge difference between asking questions to a witness to elicit the information that you want and conducting cross-examinations, opening statements, and closing arguments to a jury in an effective way juries can understand. Patent cases are a great example. Antitrust cases are another example. How do you simplify, simplify, simplify so that jurors understand what you are talking about, and how do you get your experts to testify in ways that jurors understand? This is a huge problem, and it often presents a vicious cycle because if you are a litigator with limited trial experience, you likely will not know how to help the jury understand the facts.

Now, jury trials in both civil and criminal cases are diminishing. This means that there are fewer and fewer lawyers who have tried a substantial number of cases. As a result, we also unfortunately wind up getting some judges as trial judges who have never really been trial lawyers.

CHIEF JUDGE ELROD: I do think that lawyers and judges can be trained, but Judge Friedman is right. Relatedly, there is increasing fear among lawyers of going to trial because many have never been to trial. Maybe you are a young partner and you have yet to go to trial. Then you are much more likely to settle a case than roll the dice on going to trial in a case that it would normally be strategically good to try. I remember an employment law case I once had while I was a state court judge, in which a young law firm partner came in to try the case. She could not get her evidence in because the other side would object and she could not prove up any of her company documents. I finally said, "Do you have any exceptions that might apply?" The attorney just looked at me like a deer in headlights. She then said, "I'm sorry, Your Honor; it's just that I've always gotten summary judgment." She ultimately did not get any of her exhibits in on the first day, but the next day when she came back, she had learned how to offer exhibits.

Chief Judge Azcarate's point about the challenges juries have with damages is also really true. The only case in which I had to grant a new trial was a case in which the jury zeroed out damages for pain and suffering for a torn rotator cuff. If you know anything about a torn rotator cuff, it's very, very painful and the only evidence in the record showed that it was very painful. No one thought the person was faking it, so I thought, "Well, I may have to grant a new trial here." Thankfully, the lawyers went out in the hall and they agreed to an additur. I didn't ask them to do that, but they didn't want to retry their case.

Another problem is the inconsistent verdicts that can arise from really long jury charges. I understand why we do not want overly

simple, broad jury charges. But some charge forms are now so detailed and granulated that jurors may get confused and record inconsistent answers. When we have twenty, thirty, forty pages of jury charge questions, it gets to be too much for jurors to handle.

PROFESSOR LERNER: Thank you all for your responses. Now I would like to switch gears to criminal cases. What are juries good at in criminal cases and what are they not so good at?

CHIEF JUDGE AZCARATE: In the state of Virginia, up until just last year, the defense or the prosecutor or the judge could have the jury sentence in a criminal case. Now, only the defendant can opt to do so with forty-five days' notice. Juries have trouble with jury sentencing and for good reason because they do not know all of the options. We have sentencing guidelines in Virginia, but they are discretionary, so the jury does not have to follow the guidelines. The jury is typically given a range—for example, from five years to life. We then have a sentencing hearing during which the jury decides on a sentence, but they often struggle. The jury will come back and say, "Can we give probation?" The answer is "no," but whatever their jury sentence is, the jurors do not know that I, as the judge, can go back and either reduce the jury sentence or add terms of probation. I can do all types of different programs, but the jury does not know that. So in Virginia, I often see criminal juries really struggle with wanting to actually get the defendant some assistance and not just being punitive with their sentence.

JUDGE FRIEDMAN: In the federal system, juries do not have anything to do with sentencing, and they are specifically told in instructions that punishment is not their business if they convict the criminal defendant. Punishment is left to the judge. But I have a lot of confidence in criminal juries. Why? Because in a criminal case, the question is not, "Did he or she do it?" The question is whether the government has proven the alleged crime beyond a reasonable doubt. If the defense lawyer emphasizes this in her case and the jury instructions are very clear on that, I come away satisfied almost every time.

Once I went back and talked to a jury after a criminal case. A woman on the jury said, "I was a little concerned because at first I wasn't a hundred percent sure about this. I became more convinced that voting for acquittal was right. And some of my colleagues on the jury didn't agree, but we eventually all agreed on acquittal. Do you think that I was wrong?" And I said to her, "Could you explain to me your reasons for why you found the defendant not guilty?" She articulated her reasons, and I said to her, "Remember the instruction about reasonable doubt? You just explained to me how you followed those instructions because the doubt that you just explained was reasonable." This experience demonstrates the whole purpose of the judge's instructions to the jury in a criminal case.

JUDGE BIBAS: I, too, have found jurors to be very thoughtful about convictions and doubt. I actually would like to hear Chief Judge Elrod's perspectives, because I think Texas also has jury sentencing in noncapital criminal cases. I have written about some of the injustices that arise when prosecutors insist on mandatory minimum sentences just because someone goes to trial. In the eighteenth century, the jury was able to decide, "No, this person doesn't deserve a mandatory death penalty." Blackstone called this pious perjury. Juries knew what those punishments were, so I think it might be blinkered not to have the jury act as a counterbalance to the prosecutors arguing for mandatory minimum sentences. My question to Chief Judge Elrod is whether you believe that such a practice actually fits the system, because now, with the way that the laws are written, the system tells the jury not to consider sentencing. This, however, is not the historic practice from the eighteenth century.

CHIEF JUDGE ELROD: While I have sentenced people and taken their pleas, I have never presided over a criminal jury trial. But I do think that there could be a role for jurors as backup for the judge. Sometimes in civil matters with components that the judge is deciding, the jury will help the judge. The judge will consider the jury's decision as advisory. We could import something similar to the criminal context.

JUDGE FRIEDMAN: Sentencing in federal courts is very different than sentencing in state courts. As to the mandatory minimum sentences that Judge Bibas mentioned, there are around 162 statutes in the U.S. Code that have mandatory minimum sentences, which means that the judge cannot go below those sentences when they sentence. Then we have the Federal Sentencing Guidelines, which were supposed to be the brightline truth in the sentencing concept. You know what you are going to get: *X* number of months means *X* number of months with a few exceptions here and there. The guidelines were at first mandatory, so they were not really guidelines.

Then we got *United States v. Booker*, which held that the Federal Sentencing Guidelines are advisory, not mandatory. Some people, however, still have the mindset that if a criminal defendant pleads guilty, they automatically get a three-point reduction under the guidelines. That is a big incentive. Of course, after *Booker*, the court now has discretion to go beyond the guidelines.

What does a criminal defendant give up when agreeing to plead guilty? A lot of things, but one of the things you gain is certainty. You do not go to trial on five counts. You may plead to one count. I think one of the worst things that has happened is something called appeal waivers. In every plea agreement in federal court, you agree to waive your right to appeal with limited exceptions like ineffective assistance of counsel, but you can't appeal the Fourth Amendment search and seizure issue. Neither can you appeal the *Miranda* issue. The criminal defendant is

forced to give up all of these things in taking a plea agreement, and every single circuit has held that this is perfectly constitutional. I find it a problem that because of the nature of plea agreements and the number of pleas, we don't allow for our courts of appeals to develop the law in ways that they used to be able to.

PROFESSOR LERNER: I would like to make a brief note about what Judge Bibas said about pious perjury and the jury essentially acquitting or convicting on a lesser offense to avoid a more serious penalty. Very often, judges collaborated with juries to make that happen. Judges would actually tell juries that if they convicted the defendant of a certain crime, a specific lower penalty would result. Therefore, there was an effective partnership between judges and juries on that issue.

JUDGE BIBAS: Related to that, Professor Lerner has done work on times when judges used to feel much more comfortable commenting on the evidence presented to the jury. This doesn't mean that judges could force the jury—there was a famous case that held that judges could not imprison the jury or punish the jury. But judges in the nineteenth century started to retreat from this kind of conversation with the jury. Since then, it became this very rigid, fact-law dichotomy. Even so, judges did not feel that it was inappropriate to comment on evidence to the jury until many decades after the Founding.

CHIEF JUDGE ELROD: When I was a state judge, I could not comment. As a federal judge, however, I see federal district judges explaining to juries during voir dire that judges can comment, but the jury does not have to agree with the judge. So for example, if I were a federal district judge, I could tell the jury that I did not believe a certain witness at all, and the jury would have been instructed that they were free to agree or disagree with me. We have some judges that take this sort of approach. But Judge Bibas is correct: It is really old school.

PROFESSOR LERNER: That is an old school approach. I wonder how many judges would actually do that. They may say that they can do it—and of course they can because it is in the federal rules—but whether they will is another story.

CHIEF JUDGE ELROD: Well, I've been on a stage wearing disco clothes.

PROFESSOR LERNER: Chief Judge Elrod is ready for anything!

I now have a question that might be somewhat provocative for this panel. This is a quote from a High Court judge named James Fitzjames Stephen in England in the mid-nineteenth century. As a High Court judge, he presided over hundreds of jury trials and also found time to write a great book, *A History of the Criminal Law of England*. In that book, he wrote the following: "[T]he institution of trial by jury is so very pleasant to judges that they may probably be prejudiced in its favour." My question to this distinguished bench is why might he have written that?

CHIEF JUDGE ELROD: Because he didn't want to write findings after the trial. Just kidding, Professor Lerner.

CHIEF JUDGE AZCARATE: Well, the jury has the onus of being the factfinder. I, as the judge, am just the gatekeeper. I am just making sure that the jury hears the proper evidence and the rules of evidence. Once the evidence passes a motion to strike, the jury has their elements for their cause of action and now it is on the jury. So jury trials do take some weight off of the judge.

JUDGE BIBAS: I agree. There is also a disjunction between doing justice for a particular party, which is the mission of the jury, and the investment that society and the media makes in what that party stands for. Consider the Dreyfus affair and the O.J. Simpson trial, among others. The public wants *X* or *Y*, putting pressure on prosecutors and judges. But if you do it right, the jury really tunes all of that out and can act as a guard against the pressure to scapegoat somebody.

PROFESSOR LERNER: We discussed in the criminal jury panel earlier today whether peremptory challenges should be abolished. I have the same question for this panel.

JUDGE BIBAS: Yes.

JUDGE FRIEDMAN: Well, when I was thinking about this today, my answer was no. Then I heard Professor Akhil Amar speak earlier today during his panel. I do not know that we can eliminate peremptory challenges for *Batson v. Kentucky*-related things, such as striking someone on the basis of race. Certainly, the Supreme Court, as Professor Oldham said earlier today, has expanded beyond race to gender and ethnicity and so on. That is something we have to protect. But should we consider the idea of not letting prosecutors have peremptory challenges? Prosecutors have so many cards in their deck and so many weapons at their disposal, but the defendants do not. The prosecutor can strike potential jurors for no particular reason as long as it is not for, for example, racial reasons, so defendants ought to be able to do the same. But why the prosecutor should have that power, I hadn't thought about that until earlier today.

CHIEF JUDGE ELROD: There may be reasons why we have them. I wonder if it would affect the way the judges use their for-cause strikes. Because sometimes the judge will say, "I'm not going to find that that's cause, but you can use one of your peremptories." That's a very common thing that the judge says. So, is the judge going to recalibrate and find more for-cause challenges? I don't know. So I have to read some more scholarship and maybe somebody will bring it as an argument in a brief, but I don't know because of those concerns.

And there's also the idea that you have to give reasons for a strike. For the same reasons that someone might not want to say to their neighbor down the road, "I don't like you," sometimes we don't want to give specific reasons for a strike. What if there's some really, really annoying

person that we don't think we can be fair to? We don't necessarily want to say that out loud. It is a benefit to get us off the case without us having to say that. It's a conundrum, so I'm not exactly sure.

JUDGE BIBAS: The positive law is what it is. We are required to allow peremptory challenges. For that reason, I allow them in every trial I am in, but I am persuaded by the arguments that if this is democratic voting, then we should not allow them. I am fine with striking down a potential juror for being a relative, close friend, or financial advisor of a party. Those are the same things that would cause me to recuse myself as a judge, but we can handle those kinds of things with for-cause challenges.

CHIEF JUDGE AZCARATE: I could say that as a judge, if there were no strikes or voir dire, I think I could go out into the streets around the courthouse, find twelve people, bring them into the box, and we would have a good jury and do the case. As a defense attorney, I loved having the strikes because there might be somebody I do not want in the jury. For example, if my client was charged with assault on a law enforcement officer and there is a law enforcement officer on the jury not getting out for cause because he can be impartial, is that somebody I want on this jury? I can use my peremptory strike and take care of that issue. As a defense attorney, I get to start the narrative with the jury. Voir dire is not just about selecting the jury, but it is also about beginning the defense's narrative for the case.

PROFESSOR LERNER: My next question is about the special difficulties of jury selection in political cases or cases involving celebrities. What is jury selection in those cases like, and what is it like to try a high-profile case? Additionally, what are your opinions on cameras in the courtroom?

CHIEF JUDGE AZCARATE: In Virginia, not many cases have cameras in the courtroom. We did have cameras for *Depp v. Heard* because it was a high-profile case. A high-profile case is typically all about the facts of the case, and it is usually a criminal case. Sometimes a case is high profile because of the specific litigants involved, which was the case here. Most people who watched the case did not realize that this case was a defamation case because it was all about the celebrity litigants. That is what made *Depp v. Heard* high profile.

For this particular case, we received over 1,500 media requests from all over the world including Ukraine and Germany. Additionally, with the high volume of spectators that wanted to come into the courtroom for the case, we received many needs-based requests, such as requests for sign language interpreters, service animals, and front-row seating. We then decided that by televising the case, we were able to resolve all of the ADA accommodation requests and media requests.

This solution also kept noise out of the courtroom because it afforded a lot of people the opportunity to watch the case remotely.

Because *Depp v. Heard* was such a high-profile case, we had so much noise around us that we typically never have to consider. We had a lot of security orders and gag orders in place. Although in hindsight, I didn't realize that celebrities have PR teams. So I had gag orders that didn't include PR teams. Ultimately, the case was televised so that we could contain the noise and focus on the case.

A challenge we faced with such a high-profile case was selecting a jury that had not heard about the case. The day before jury selection, *The Washington Post* published a major news article about case. For this particular case, I had the attorneys tell me their voir dire questions ahead of time, and we had objections done before the jury appeared to conserve jury time. We established a script for voir dire questions. Obviously they could expound on some questions depending on the answers. After eliminating people who couldn't sit for six weeks, we were left with 150 people. The key was to ask narrow rather than broad questions. We could not, for example, ask, "Do you know Johnny Depp?" Most people would get disqualified by that question. Instead, we asked, "Have you heard about this case?" For those who had heard about the case, we took one person at a time into the courtroom and asked, "What have you heard about the case and is what you know going to materially affect you?" This questioning strategy proved to be successful because we began and finished jury selection all in one day.

JUDGE FRIEDMAN: My colleague, Judge Reggie Walton, had Scooter Libby, who was the Chief of Staff and National Security Advisor to Vice President Cheney, as a defendant. He also had Roger Clemens, the baseball player, as a litigant. These were high-profile individuals and high-profile cases that everybody was interested in. I asked Judge Walton whether he used a jury questionnaire, and he said that he did not and that he never does. He explained that while jury questionnaires can be very useful, he thinks they disadvantage the less educated who may have trouble reading and writing. Instead, he did one-on-one voir dires, as Chief Judge Azcarate did. I do the same. I bring potential jurors in one at a time. After we ask the basic questions, they fill out a three-by-five card and we talk about their answers.

I also asked Judge Walton whether he sequestered the jury in either of those cases, which would have been a big burden on the juries to isolate them in hotel rooms. In those cases, he did partial sequestration, which required the jurors to meet every morning at a central place for the marshals to pick them up and bring them into the courthouse through a private entrance so the press would not hound them. And the marshals took them back at night. Additionally, we never refer to a juror or a potential juror by name during selection or thereafter. We always refer to them by their juror numbers.

During these high-profile cases involving Scooter Libby and Roger Clemens, Judge Walton was concerned about the press and any

intimidating impact on the jury. This is when he created a media room in the courthouse so that the media could observe trials without engaging with the jury. He also designated lead press liaisons, including a lead print-media person, a lead electronic-media person, and a lead blogger person. These people acted as the liaison to the rest of their respective press so that the courtroom was free of any distractions from media personnel.

At that time, the court also created secondary or spillover courtrooms. The public was really interested in this concept, and it was widely posted about. Again, Judge Walton wanted to protect the jury and parties from media coverage and interference. Another thing he did, which I had never heard of before, was to get law students to look at prominent newspapers and manually cut out anything about his high-profile litigants before jurors could read them.

Turning now to the January 6 cases, we had about 1,500 of these cases. We borrowed prosecutors, defense lawyers, probation officers, and court reporters from all over the country. We did not borrow any judges. We decided we have our own court culture, so our twenty judges handled all of the cases. Jury selection for the January 6 cases was very complicated because of the polarizing nature of the event. A lot of people are pro-Trump and more people in the District of Columbia are anti-Trump. A lot of people across the country were pro-police and a lot of people, particularly since the murder of George Floyd, were anti-police. A lot of people also worked or lived on Capitol Hill, which meant that on January 6, many of these individuals could not get home due to National Guard presence. For business owners, this meant loss of business.

During jury selection, we paid careful attention to how potential jurors received their news. We asked about their device, platform, and channel preferences for news reception, including whether they consumed news on television broadcasts or social media and on which specific channels. Some people only watch Fox News. Others only watch MSNBC. Some may not receive their news from television, but through print media, such as *The Wall Street Journal*, *The Washington Post*, or *The New York Times*. Some may not read the news at all or only read the sports section. There is an incredibly wide range of manner of news reception and consumption.

One pattern we found among jurors was that because so many January 6 cases were going to trial very quickly, those who had already served on a January 6 jury—when serving on a subsequent January 6 case—could not eliminate from their minds the images and videos they had seen in the prior January 6 case they served on, even if the second defendant was in a completely different part of the Capitol and the videos showed different parts of the attack. We then adopted a rule that if an individual served on a January 6 jury within the last few weeks, they were automatically excused from serving as a juror on another January

6 case. These are some of our key efforts regarding juries for January 6 cases.

PROFESSOR LERNER: Thank you all for your thoughtful responses. My next question is about lawyering that you find effective or ineffective before juries. Several of you have already mentioned that there is a lack of lawyers who understand how to speak to jurors. What kinds of lawyers or lawyering work well with juries?

CHIEF JUDGE AZCARATE: As we've discussed, there are differences between litigators and trial attorneys. Trial attorneys tell a story right away, from the beginning. They start the story from the opening statement and continue the story through the witnesses. The entire trial is a narrative that the jury can follow, and it works really well. Trial attorneys also have to know the rules of evidence backward and forward because anything can happen.

For direct examinations, many attorneys write out their questions, but writing out what you want from a witness instead of your own questions may be more productive because you never know how a witness may respond. Cross-examination is more of an art. The only way to really learn how to conduct effective cross-examinations is practice.

The best attorneys are able to go with the flow. Things often change in a trial, which is why litigators have trouble. They are so used to rigid depositions, discovery, and emotions. Trials, however, are not always predictable. A judge could rule against evidence that the attorney was certain would be admitted. Great trial attorneys are fluid like water. They adapt and try their case, but this takes practice.

CHIEF JUDGE ELROD: Effective lawyering really is an art. Entering evidence into trial, for example, is not just a simple matter of labeling the exhibits and timely admitting all of the thousands of pages. You cannot just assume that the jury will go back to the jury room and read them. You have to weave the exhibits into your story and take the time to figure out how to weave which exhibits into your story. Lots of attorneys do not spend the time to do this critical act of preparation before trial. The best lawyers know the specific exhibits they intend to use with each of their witnesses and will have the exhibits they are actually going to use in order, laid out, and ready. It's a thing of beauty when done well.

Lawyers today also really need to be more adept with courtroom technology. Courtroom technology is important because it allows for the display of visual guides and many jurors are visual learners who require or can benefit from strong visual components. Most courts permit attorneys to practice with their technology. You cannot spend trial time fumbling with technology or depend on another lawyer to figure out the technology during trial.

JUDGE FRIEDMAN: I presided over a particular trial, which demonstrated really good lawyering and really bad lawyering in the

same trial. The defense lawyer was like a ballet dancer in the courtroom and the jury could not take their eyes off of him. When we got to closing argument, the prosecutor got up, opened her manila folder, took out her notes, and gave her closing argument. The defense lawyer got up and immediately began his closing argument without any notes or folders. He briefly and clearly explained reasonable doubt and gave the jury five reasons why the jury should have a reasonable doubt. And I'm sitting there and I'm keeping a poker face. I'm saying to myself, "This is nuts." Then the prosecutor got up again, opened another manila folder, and took out a sheet of paper on which she had written out her rebuttal in advance of the trial. Four of the reasons the defense counsel gave the jury were complete smoke and mirrors and one of them was a maybe. But the defendant was acquitted of a lot of the counts, all because of good lawyering.

What the prosecutor should have done—even if she had notes—was throw the notes down, get up in front of the jury without any notes, and say, "Ladies and gentlemen of the jury, Mr. Smith told you five reasons why you should have a reasonable doubt. Let's talk about each of those reasons one at a time. Number one, number two," and so on. Effective lawyering especially before the jury is an art, as we were saying, and it is something you learn through practice.

PROFESSOR LERNER: We talked a lot earlier today about the decline of jury trials in both civil and criminal cases, and I have one last question for this panel: What should be done about the decline of jury trials?

JUDGE BIBAS: Trials have become long, expensive, and cumbersome, and many people are afraid of going to them. I have noticed that there are a lot of cases that just sit around, and people expect that they are eventually going to settle or plead. Particularly for small cases, the amount of discovery that the Federal Rules of Civil Procedure authorizes is way in excess of what you need for a small case. Getting to trial also requires lots of time and costly resources. That causes a lot of people to plead guilty to minor crimes because they are locked up, they did not make bail, and they'll just plead guilty for time served. We have to move cases fast with less discovery in small to midsize cases.

We also have a whole host of issues with trials themselves. Potential jurors should be allowed to fill out jury questionnaires, if used, in advance as opposed to filling out the questionnaires for two or three hours in court. We should send potential jurors e-fillable forms, truncate or eliminate peremptory challenges, and streamline voir dire to actual causes of bias. Legal arguments over motions eat up trial time and jury time. We can do legal arguments at another time like before the trial day, after the trial day, or at lunchtime. Instead, attorneys during voir dire should tell a simple story. I do not particularly advocate for time limits, but with some lawyers, they are necessary because the lawyers

just don't know how to get to the point. If the lawyers would focus on the story, many cases could be tried more quickly.

Another challenge we have is with jury instructions. Have you ever looked at them? They are impenetrable. I try to rewrite them in plain English because juries often come back and say that they do not understand what the instructions mean. With each trial I do, they get shorter and clearer. Courts are guilty of promulgating pattern jury instructions that are just hard to understand. Many judges also do not allow jurors access to hard copies of the instructions or even to take notes. If we want jurors to make informed decisions, we have to rethink and streamline many of the processes surrounding jury selection and jury trials.

CHIEF JUDGE ELROD: As others have been saying, the decline of juries is partially judges' fault. Many of us take too long. One of the reasons people started going to arbitration is because courts take too long on discovery and many other things.

In my view, courts always move faster when they have a plan. For example, my mentor, Judge Sim Lake, conducted the *Enron* jury selection in one day in Houston, Texas. He did do a questionnaire, but he was able to accomplish jury selection relatively quickly because he had a plan. Jury selection is like a performative production that requires meticulously planned steps. Prior to jury selection, the judge must know how they are going to get the questionnaire, when potential jurors are going to fill it out, and when the lawyers are going to review the questionnaire, among other questions. In this way, the judge acts like a producer. We bear responsibility to the jurors and to the rule of law.

JUDGE FRIEDMAN: Judges have to be case managers from the day a case comes into our courts. One of our responsibilities as case managers is to set firm dates for everything, including motions and trials. I have an order of trial procedures for attorneys that addresses motions in limine, witness examinations, expert witnesses, and the like so that attorneys can think these procedures through in advance of their trials. Additionally, status conferences take time, but they can move cases along by requiring attorneys to take certain actions.

Jury questionnaires in advance, or at least some sort of questionnaire in advance, is helpful. I have also had time limits for trials that I knew were going to be longer and lawyers often meet those time limits without issues. There are things we the judges can do, as case managers, to prevent juror frustration and wasting jurors' time.

Once after a trial, we went in the jury room with the lawyers and a juror said to one of the lawyers, "You're lucky you had a sympathetic client and you had a good case because you guys were driving us nuts. You were repetitive, you were redundant, and you were wasting our time." Very candid.

CHIEF JUDGE AZCARATE: State courts, compared to federal courts, are like little ponds that judges are in charge of. I run the docket.

For civil cases, from the date of notice, we have a year to set the cases for trial. For criminal cases, we have to set them for jury trial within the two-month term. We had eighty-eight criminal jury trials and about seventy civil jury trials last year. These are not large numbers, but we still have jury trials.

The reason for the decline of juries in criminal cases in my particular jurisdiction is that in the last fifteen years, about seventy-five percent of my criminal cases have been drug related. Whether the cases are about possessions or distributions, they are typically drug related. We now have alternatives for drug-related cases. We have drug court, veterans treatment dockets, and mental health dockets that we can divert defendants into.

Another reason for the decline of criminal juries in Fairfax is that we have a progressive prosecutor, who frequently dismisses cases. Drug-related criminal cases and a progressive prosecution are the two primary reasons that our criminal jury trials have gone down.

CHIEF JUDGE ELROD: In federal court, we have a whole bunch of cases sitting in multidistrict litigation. Our MDL judges work very hard, but we have so many cases sitting in MDLs waiting to settle that could be on our dockets set for trial. MDLs are forests ripe for the picking. If we could get those cases back into the system to be tried, the ones that need to settle can settle, but many can go to jury trial.

PROFESSOR LERNER: Thank you all so much. We have heard from an extraordinary array of judges today about an institution that is central to the common law system. There is much material here for further thought, and many ideas have been presented to nourish potential reforms going forward.