

The Civil Jury: Reviving an American Institution

September 2021

Published by The Civil Justice Research Initiative, part of UC Berkeley School of Law, with support from AAJ's Robert L. Habush Endowment



ABOUT THE AUTHORS

Richard L. Jolly

Associate Professor of Law, Southwestern Law School

Richard L. Jolly is a research fellow for the CJRI and an Associate Professor of Law at Southwestern Law School, where he teaches torts and evidence. His research primarily focuses on the socio-political and structural role of lay participation in judicial decision making, namely through the use and nonuse of grand, civil, and criminal juries. His writing has appeared or is forthcoming in numerous law journals, including the Michigan Law Review, Boston College Law Review, Pepperdine Law Review, and DePaul Law Review.

Valerie P. Hans

Charles F. Rechlin Professor of Law, Cornell Law School

Valerie P. Hans is a member of the CJRI Advisory Board and the Charles F. Rechlin Professor of Law at Cornell Law School, where she teaches torts, social science and law, and a seminar on the contemporary American jury. She is one of the nation's leading authorities on the jury system. Author or editor of nine books and over 150 research articles, she has carried out extensive research and lectured, consulted, and written widely about jury decision making in both criminal and civil cases. Her books include *Business on Trial: The Civil Jury and Corporate Responsibility*; *American Juries: The Verdict* (coauthored with Neil Vidmar); and *The Psychology of Tort Law* (coauthored with Jennifer Robbennolt). Her current research, funded by the National Science Foundation, examines civil jurors' damage award decision making.

Robert S. Peck

President of the Center for Constitutional Litigation, P.C.

Robert S. Peck is a member of the CJRI Advisory Board and the president of the Center for Constitutional Litigation, P.C., a Washington, D.C. law firm with a national appellate practice. He has taught constitutional law at several law schools and has written more than 30 law review articles, including *The Right to Trial by Jury as a Fundamental and Substantive Right and Other Civil-Trial Constitutional Protections*, 96 Ore. L. Rev. 489 (2018) (with Dean Erwin Chemerinsky). Among his books are *The Temple of Karnak and Other Stories from the Supreme Court* (forthcoming and coauthored with Anthony Champagne); *The Bill of Rights and the Politics of Interpretation*, and *We the People: The Constitution in American Life* (companion volume to the 1987 PBS television series).

The authors thank Anne Bloom, Erwin Chemerinsky, Kevin Clermont, and Alexandra Lahav for their extraordinarily helpful comments on earlier drafts.

Executive Summary

The civil jury has served as a pivotal institution in the United States' social and constitutional structure since the founding. The Seventh Amendment of the U.S. Constitution and similar provisions in state constitutions protect the rights of litigants to rely upon juries to resolve most legal civil disputes. This liberty is deserving of this type of foundational protection because it ensures a significant degree of popular control over the application and development of the law.

Yet, legal, political, and practical attacks and challenges over time have hollowed the constitutional promise and role of the civil jury. As noted herein, these include:

- Procedural changes stripping juries of their fact-finding authority and empowering legislatures and judges in ways beyond their expertise and constitutional role
- Political and social elites, buoyed by moneyed interests, engaging in a decades-long campaign to denigrate the democratic role of juries in civil dispute resolution
- Recently, COVID-19's unique constraints on the empaneling and use of civil juries, grinding trials essentially to a halt

The majority of civil disputes today are resolved not by laypeople serving as jurors but through private and publicly funded settlement and arbitration proceedings. The result is a tragic loss of the demonstrable sociopolitical benefits of jury service, including the:

- Enhanced quality of jury fact-finding due to the diversity of voices and required deliberation in jury decision making
- Increased rates of civic engagement among those who have served as jurors to the point of issuing the final verdict
- Widespread allegiance to the legitimacy of the civil justice system and democratic self-governance through the public airing and resolution of private disputes

Much is risked if the attacks on the civil jury continue and if efforts are not taken to reverse the damage already done. Reforms for reviving the institution should be focused on removing barriers to jury access and enhancing fair and accurate jury fact-finding.

We offer the following research-based proposals:

- Return to a jury-trial default rule
- Eliminate legislation capping the jury's damage-setting authority
- Expand the use of innovative procedural tracks, such as expedited jury trial projects
- Ensure that juries represent the communities from which they are drawn
- Require the use of twelve-person civil juries
- Adopt active jury reforms

Introduction

The right to a civil jury trial has been integral to the United States' conception of justice since the founding. To be sure, King George III's efforts to restrain the civil jury motivated not only the First Congress of the American Colonies in 1765,¹ but was also explicitly listed in the Declaration of Independence as a grievance justifying the Revolution.² The ratification of the Constitution soon thereafter was in no small part secured by a promise to add civil jury protections as part of a Bill of Rights, which was realized in 1791 with the Seventh Amendment. What is more, the civil jury is not merely a feature of the federal government. The constitutions of all thirteen original states secured the institution—in fact, the civil jury was likely the only right so universally secured.³ By the time the Fourteenth Amendment was ratified in 1868, the constitutions of thirty-six out of thirty-seven states guaranteed the right.⁴ Today, Colorado, Louisiana, and Wyoming are the only states without civil jury guarantees in their state constitutions—though all three protect the institution by legislation in certain contexts.⁵ These foundations establish the civil jury as a core institution in the American government structure and system of justice.

Strong motivations impelled the adoption of this central role for the civil jury. The Founders knew from experience that the jury was not merely a tool for private dispute resolution, but more importantly was a political body imbued with the power to check the application and development of law as enacted and enforced by the government, and to serve as a bulwark against powerful social and economic actors.⁶ At the founding, jury service and voting were linked as forms of political participation; in fact, at least one scholar has recognized that “[i]n the hierarchy of political rights, the jury trumped voting in importance.”⁷ And as French thinker Alexis de Tocqueville recognized after studying the early American body, “[The] jury is, above all, a political institution.”⁸ Even today, to serve as a juror is a political designation: It is to be deputized as a constitutional officer worthy of resolving private disputes.⁹ The civil jury was so enshrined in the nation's founding documents specifically because of—not despite—it being a locus of great political power.

But notwithstanding these deep-rooted foundations, the civil jury today is at risk of falling into disrepair. Over the course of the twentieth century, the judiciary adopted procedures deliberately designed to limit the use of and role for the civil jury in resolving disputes by transferring power into the hands of unrepresentative judges.¹⁰ Legislatures, too, enacted laws restricting access to the jury by allowing for mandatory arbitration agreements, as well as limiting the jury's fact-finding role by restricting their authority to assess and award civil damages in certain contexts.¹¹ And businesses have engaged in a decades-long political campaign to convince the public, practitioners, and the judiciary that these restrictions on the civil jury are not only warranted but should be expanded. The jury, they say, is unqualified to decide complex disputes, and that twelve laypeople routinely bring not wisdom but prejudice against certain litigants—specifically those with business interests.¹²

These repeated attacks have been so effective that they have come close to nearly eradicating the civil jury as a meaningful component of the American justice system. Although at common law the civil jury was the primary means by which private legal disputes were resolved, the jury today is but an afterthought to the judiciary's business. In 2019—the last complete pre-pandemic fiscal year—juries disposed of just 0.53% of filed federal civil disputes.¹³ This means that on average each federal judge handled just 2.42 jury trials in that year.¹⁴ The trend is mirrored in state courts. Although figures are incomplete (in part because the federal government no longer collects them), data from the Court Statistics Project shows that of those reporting states in 2019, juries disposed of a median of only 0.09% of civil disputes.¹⁵ Hawaii reported just a single civil jury trial that year; Alaska reported zero.¹⁶ So while in theory the civil jury is

secured for use in all legal disputes to ensure the democratic application and development of the common law, the reality is that the institution has become drastically reduced.

The COVID-19 pandemic poses a new threat to the civil jury, with the potential to topple the institution entirely. From the beginning of the outbreak, it was clear that the aerosol spread of the disease posed unique challenges to the jury, which as a democratic, deliberative body requires some degree of interpersonal interaction. As a result, in the spring of 2020, many courts around the country responded by completely suspending civil jury trials. In Los Angeles Superior Court, for instance, all non-preference civil trials were postponed for all of 2020.¹⁷ This near complete lack of civil trials has been a boon for the private arbitration industry. As the American Arbitration Association advertises on their website: “With court delays caused by the COVID-19 pandemic, a jury trial is unlikely in the near future.”¹⁸ They are not wrong. Courts are widely reporting that the backlog just in criminal cases could take years to work through, let alone the pile of hundreds of thousands of actively pending civil cases that courts have only just begun to excavate. Moreover, there are an unknown number of civil cases that were not filed in 2020 as parties chose to wait out the pandemic. The Court Statistics Project estimates this number of “shadow cases” to be over 1.1 million for just the twelve states that reported their 2020 caseloads, and it warns that these cases “have the potential to overwhelm the civil justice system.”¹⁹ Factor in the continued underfunding of the judicial branch²⁰ and it is not alarmist to recognize that the already rare civil jury trial is likely to lay dormant for the foreseeable future, despite some admirable experiments in virtual trials.²¹

This long transformation and current crisis of the American civil justice system should give us pause. Empirical evidence shows that the civil jury provides a number of benefits not only for the administration of justice, but also to society broadly. Laypeople hailed from the community into the courtroom for one-off trials enhance fact-finding by bringing their diverse viewpoints to bear on a given dispute. This structural arrangement has advantages over deferring to legally trained judges, who because of their position as repeat players are likely to approach cases in a routinized fashion and fall victim to their own confirmation biases. Furthermore, jurors possess attributes that judges simply cannot. As representatives of the community, jurors are informed of societal norms from which the judicial class is often detached. What is more, unlike judges, jurors must deliberate in order to reach a decision, thus allowing for robust and multifaceted consideration of a dispute. These characteristics ensure that the law is applied and develops in a way that is grounded in community norms.

Beyond these judicial advantages, there is also strong evidence that jury service has sociopolitical benefits for those serving as jurors and for society writ large. Individuals who serve on civil juries to the point of issuing a final verdict tend to view their service favorably and as a form of civic engagement.²² Studies show that civil jurors who were required to reach a unanimous decision are significantly more likely to vote in elections after jury service than they were before serving.²³ It is not just the immediate jurors who benefit; the jury also enhances the legitimacy of civil justice more broadly. Bringing the public into the courthouse to hear a controversy and to serve as an integral part of its resolution provides transparency that is necessarily lacking from forms of private dispute resolution, such as mandatory mediation and arbitration. Resolving disputes in public provides information about the society’s current ills that policymakers may draw upon in addressing common harms.²⁴

The civil jury’s current crisis should not be ignored. Instead, active measures should be adopted to revive the institution’s prominence within the judiciary and the polity more generally. These strategies should be informed by research and motivated by the animating principles of citizen participation in resolving civil disputes, including the fair representation of the community and the emboldening role of jury

decision-making. We offer here six research-based strategies to revive the institution, which are designed to remove barriers to jury trials and improve the fairness and accuracy of jury fact-finding. The jury still has an important role to play. Adopting these strategies can help usher the institution through the current crisis and help rebuild it so that our communities may democratically address the disputes of the twenty-first century.

I. A Tale of Two Juries

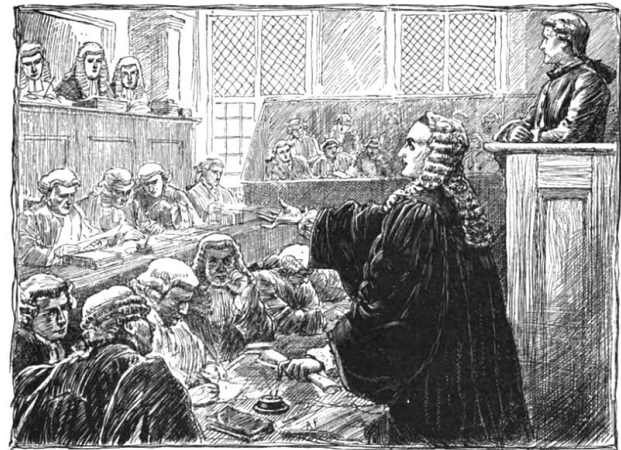
To understand the precarious position of the modern civil jury it is necessary to examine how the institution arrived at its current state. The civil jury has been so transformed over the last two and half centuries that the institution as constitutionalized at America's founding is meaningfully distinct from that which persists today. Whereas the jury in 1791 was celebrated as a sociopolitical institution designed to check abuses of power by the government and powerful actors, the jury today is largely viewed as merely one dispute-resolution tool among many at a litigant's disposal. In many ways, then, any discussion of the jury is a tale of two distinct bodies divided by time. Describing the differences between these bodies, and analyzing what brought these differences about, is necessary to fully understand what remains of the civil jury as an institution today and the challenges that still face it—particularly in light of the ongoing COVID-19 crisis.

A. The Jury at the American Founding

It is difficult to overstate the role that the civil jury played in the run-up to the American War of Independence and the founding of the United States. The jury at the time was a core channel through which the colonists challenged the distant and unrepresentative monarchy. In establishing their new system of government, many former colonists insisted that these jury protections be preserved in writing to act as a similar bulwark against the proposed American federal government. As such, the civil jury was constitutionalized not merely as a dispute resolution tool but as a democratic body meant to tie the hands of powerful actors to the mast of the community. It was an integral, structural component of the constitutional system itself.

It is unsurprising that the Founders so entrusted the jury. Eighteenth-century jurists and scholars revered the jury for its sociopolitical significance. Perhaps most famous among these champions was English jurist William Blackstone. In his widely circulated *Commentaries*, Blackstone celebrated the jury with an almost religious zeal. He called it “the glory of English law,” “a privilege of the highest and most beneficial nature,” and the “the grand bulwark of [every Englishman's] liberties.”²⁵ It was, he said, a “strong and two-fold barrier . . . between the liberties of the people and the prerogative of the crown” because “the truth of every accusation . . . [must] be confirmed by the unanimous suffrage of twelve of [a defendant's] equals and neighbors indifferently chosen and superior to all suspicion.”²⁶

It was this politically active jury that the American colonists weaponized in the decades leading up to the Revolution. Colonists channeled their discontent with the Crown by refusing to uphold British laws. One of the early and most famous examples of the colonists exerting such political power is the seditious libel case of John Peter Zenger in 1735. Zenger was accused of printing allegations of corruption against the New York Governor, including the governor's attempt to recover a debt in an equity court so as to evade the debtor's right to a jury trial. At the trial, because it was agreed that Zenger had published the material, his attorney Andrew Hamilton argued in support of the jury's power to determine both law and fact and to acquit Zenger on the basis that the corruption allegations were truthful, despite the fact that truth was not a defense for libel under the law. Although the judge threatened Hamilton with disbarment for making the argument and the jurors with perjury if they returned a not guilty verdict, the jury acquitted Zenger. The outcome was celebrated throughout the colonies.²⁷



Although the judge threatened Hamilton with disbarment for making the argument and the jurors with perjury if they returned a not guilty verdict, the jury acquitted Zenger. The outcome was celebrated throughout the colonies.²⁷

The Zenger case proved no outlier. By the mid-eighteenth century, colonists were regularly employing the jury to nullify the excesses of the Crown. They did so both offensively—for instance, by refusing to enforce civil penalties against smugglers—and defensively—by awarding smugglers damages for harms resulting from the trespass of officers' searches.²⁸ In so doing, colonial jurors essentially rendered British law unenforceable, so much so that one governor complained, "[A] trial by jury here is only trying one illicit trader by his fellows, or at least by his well-wishers."²⁹ Another governor warned in 1761: "A custom house officer has no chance with a jury, let his cause be what it will. And it will depend upon the vigorous measures that shall be taken at home [(London)] for the defense of the officers, whether there be any Custom house here at all."³⁰

The Crown soon took vigorous measures against the jury, specifically by expanding the jurisdiction of juryless tribunals. This began with the Stamp Act of 1765, which required all printed documents used or created in the colonies to bear an embossed revenue stamp, with violations to be tried in juryless vice-admiralty courts. Over the next three years, the British passed a series of taxes known as the Townshend Acts, which also placed jurisdiction beyond juries in vice-admiralty courts. Since the Crown could not control the obstinate colonial jurors, steps were taken so that juries would simply be avoided.

The colonists met these acts with fierce objections. The Stamp Act, for instance, provoked the First Congress of the American Colonies in October of 1765, where the body declared that "trial by jury is the inherent and invaluable right of every British subject in these colonies," and that "[the Stamp Act], and several other acts, by extending the jurisdiction of the courts of admiralty

"The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States."

- Declaration of Independence, 1776

beyond its ancient limits, have a manifest tendency to subvert the rights and liberties of the colonists."³¹ A similar claim was made soon thereafter in the Declaration of Independence, with the founders

proclaiming that independence was justified in part because the Crown had “depriv[ed] [them] in many cases, of the benefits of trial by jury.”

Americans’ reverence for the jury did not diminish after the war. Congress under the short-lived Articles of Confederation required the use of civil juries in resolving certain disputes, and all thirteen states broadly secured the institution.³² Thus, it is somewhat surprising that the Constitution as originally drafted in 1787 only secured the right to trial by jury for all crimes, except those of impeachment; it did not secure civil jury protections. This absence was not because the drafters found the civil jury an unworthy institution of such protection or intended to destroy it. Instead, the drafters found it difficult to find language that would correspond with the different civil jury practices in the states and believed the right to be so ingrained that those in power would have no incentive to restrict it.³³

“What satisfaction can we expect from a lordly court of justice, always ready to protect the officer of government against the weak and helpless citizens, and who will perhaps sit at the distance of many hundred miles from the place where the outrage was committed?”

- A Democratic Federalist, 1787

Nevertheless, the initial lack of civil jury protections in the Constitution was met with great skepticism throughout the states. As Alexander Hamilton acknowledged, “The objection to the [Constitution], which has met with most success[,] . . . is that relative to the want of a constitutional provision for the trial by jury in civil cases.”³⁴ Anti-Federalists persuasively charged that the original Constitution’s granting the Supreme Court appellate jurisdiction “both as to law and fact” effectively abolished civil juries altogether. They wrote passionately on the horrors that would result if civil jury protections were not constitutionalized:

“What satisfaction can we expect from a lordly court of justice, always ready to protect the officer of government against the weak and helpless citizens, and who will perhaps sit at the distance of many hundred miles from the place where the outrage was committed?”³⁵

The civil jury, then, provided protection not only against executive abuses of power, but also those judges who might bless such abuses. As the Federal Farmer, a prolific Anti-Federalist, expounded: “[F]requently drawn from the body of the people . . . we secure to the people at large, their just and rightful control in the judicial department.”³⁶ And Thomas Jefferson, a reluctant supporter of the Constitution, went so far as to answer: “Were I called upon to decide, whether the people had best be omitted in the legislative or judiciary department, I would say it is better to leave them out of the legislative. The execution of laws is more important than the making of them.”³⁷ He continued, highlighting distrust of a permanent judiciary, noting that such “judges acquire an Esprit de corps,” and are liable to be misled “by a spirit of party” or “by devotion to the Executor or Legislative.”³⁸ “It is left therefore to the juries,” Jefferson said, “to take upon themselves to judge the law as well as the fact.”³⁹

Finally, the civil jury—and particularly the importance of constitutionalizing it—was thought necessary to guard against the national legislature, which might pass obnoxious and unpopular legislation, or even worse, seek to restrict the use of juries in cases arising under such legislation. So celebrated was the right to a civil jury that some Federalists’ response to this argument was that reasonable legislators would dare not restrict the right out of their own self-interest.⁴⁰ Prior to serving as one of the nation’s first Supreme

Court Justices, James Iredell earnestly contended that if jury protections were stripped “[Congress’] authority would be instantly resisted,” drawing upon the legislators “the resentment and detestation of the people” such that “they and their families . . . would be held in eternal infamy.”⁴¹ But, of course, it was precisely because legislators could not be trusted to draw the contours of significant rights that amendments were thought necessary to the proposed Constitution—the civil jury being chief among them.

The Anti-Federalists’ arguments struck a responsive chord among the American populace, who had in no small part just fought a revolution over the importance of civil jury protections. As part of the ratification process, eight of the nine states that submitted amendment proposals offered specific language for securing a civil jury right.⁴² Indeed, Massachusetts explicitly conditioned its ratification on the addition of such a clause.⁴³ Accordingly, it was the promise of what would come to be the Seventh Amendment that convinced many skeptics to sign on to the American experiment. Without such an implicit agreement on civil jury protections, the US Constitution may very well never have been ratified.⁴⁴

As this brief account demonstrates, the civil jury at the founding was anticipated to be more than one adjudicative body among many for resolving private disputes. It was instead established as a necessary institution within the constitutional structure, responsible for integrating laypeople into the administration of justice and checking abuses of power. Constitutional scholar Akhil Amar goes so far as to suggest: “If we seek a paradigmatic image underlying the original Bill of Rights, we cannot go far wrong in picking the jury.”⁴⁵ Indeed, the jury was the lynchpin tying the proposal together; lay citizens empowered to act as the nation’s true sovereigns. But over time this founding role for the institution has increasingly been viewed as antiquated. As addressed in the next section, the jury today is but a shell of that established and celebrated at the founding. It is, at least in some respects, an entirely different institution.

B. The Precipitous Decline of the Civil Jury



Despite its lofty beginnings, the civil jury faced criticism almost from the beginning of the republic, and these denunciations have grown into a steady drumbeat that led to a precipitous decline not only in its esteem but also in its use over the twentieth century and continues today. To be sure, for much of American history, the jury fell short of including all segments of the community, and its verdicts have not been immune to racism, sexism, and other forms of bigotry.⁴⁶ But whereas the jury at the founding was seen as a great well of community knowledge by injecting laypeople into the administration of justice, a mere decades into our history jurors had become—as one judge put it—“mere assistants of the courts, whose province it is to aid them in the decision of disputed questions of fact.”⁴⁷ This new conception, matched with substantial changes in civil procedure in the

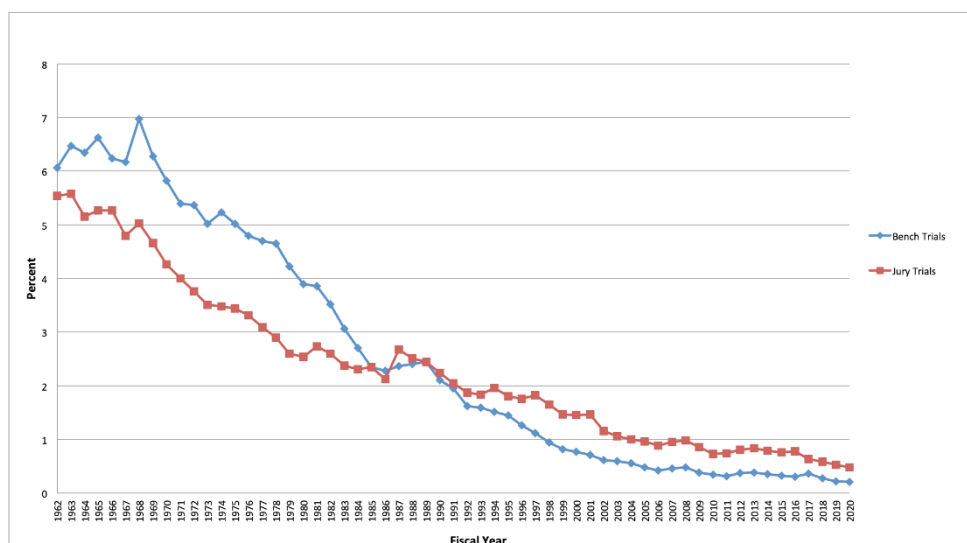
past 100 years, has made civil jury trials exceptionally rare. So uncommon are they today that at least one leading scholar has proclaimed: “The civil jury is dead.”⁴⁸

Before delving into some of the explanations that have been offered for this supposed death of the civil jury, it is important to note that this decline is not new. Scholars have voiced concerns about the decline of the civil jury going back at least to the late 1920s.⁴⁹ Their concerns were borne out. Starting in 1962, the year when federal judicial statistics become most reliable, a consistent decline has been readily apparent in the percent of civil cases disposed of by jury trial. That rate was 5.5% in 1962; 3.7% in 1972; 2.6% in 1982; 1.9% in 1992; 1.2% in 2002; 0.81% in 2012; and finally reaching its nadir of 0.48% in 2020.⁵⁰ A similar pattern has been experienced in state courts. In those states that kept accurate statistics, between 1976 and 2002 civil jury trials fell threefold from 1.8% to 0.6% in courts of general jurisdiction.⁵¹ And the most recent data from the Court Statistics Project shows that of those reporting states in 2019, juries disposed of a median of only 0.09% of civil disputes.⁵² Simply put, civil jury trials are the very rare exception and not the rule.

Critically, bench trials have also been falling during this time. At the federal level, 6% of civil cases were resolved by bench trial in 1962, versus just 0.21% in 2020.⁵³ Indeed, since 1987 there have been fewer bench trials than jury trials at the federal level. Figure 1 below depicts the decline in federal bench and jury trials since 1962.

Figure 1

Percent of Civil Cases Resolved by Bench and Jury Trials, U.S. District Courts, 1962–2020

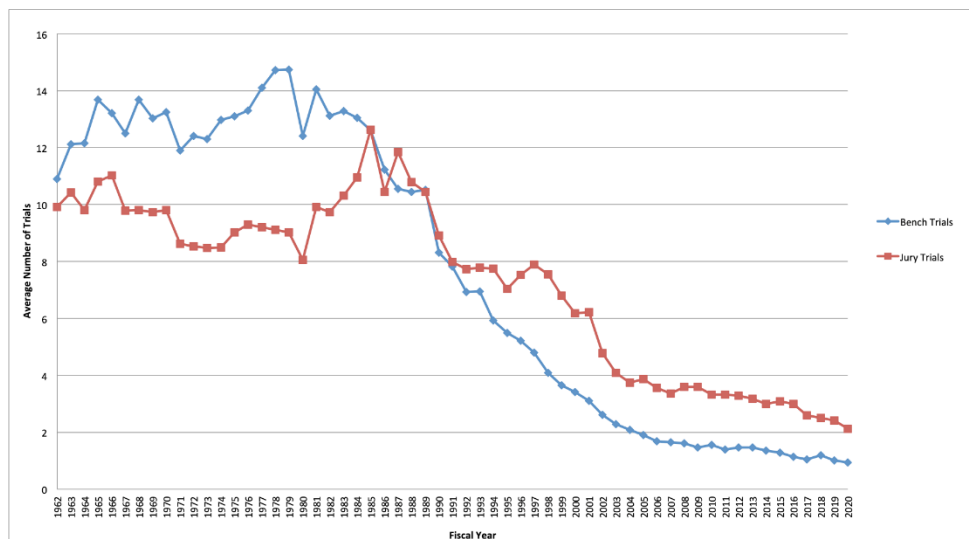


Source: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962–2020).

Perhaps unsurprisingly, this decline in bench and jury trials has also modified the role of judges. Despite a fourfold increase in the number of civil case filings since the 1960s, judges are conducting increasingly fewer civil trials than ever before.

Figure 2

Civil Trials per Judgeship, U.S. District Courts, 1962–2020.



Source: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962–2020).

As Figure 2 illustrates, until the mid-1980s, on average, federal judges conducted a few dozen bench and jury trials each year. However, the number of trials began a precipitous decline in the mid-1980s and has not recovered. The most recent data show an average of two jury trials and one bench trial per judge per year.

As these graphs make clear, jury trials are not being “replaced” with bench trials. Instead, the civil trial itself is disappearing; the system of civil justice is more broadly under assault. And understanding the multi-faceted reasons for this breathtaking disappearance is critical if the civil jury as an institution is to be revived.

II. Accounting for the Civil Jury’s Decline

The factors contributing to the civil jury’s decades-long decline are numerous and interrelated. The adoption of new procedures in the twentieth century altered the institutional relationship between the judge and the jury, empowering the former and divesting the latter of the authority that existed at common law. Judges hurried this transformation through their decisions denigrating jurors as incapable of deciding complex disputes or too impassioned to decide them impartially. Similarly, powerful economic actors have engaged in a drawn-out campaign to convince the public and policy makers that jurors should not be trusted. The result is a popular and judicial culture that does not value lay participation, such that when budgetary or, most recently, public health crises arise, the civil jury is easily sidelined.

A. Procedures and Rules Divesting the Civil Jury of its Constitutional Authority

Civil procedures adopted over the course of the twentieth century have played a central role in the jury’s decline. Many point to the adoption of the Federal Rules of Civil Procedure in 1938 as a pivotal moment of transformation. The original drafters of the rules were radically anti-jury; as one scholar recognized, “Virtually everyone connected with urging uniform procedural rules denigrated juries.”⁵⁴ Charles E.

Clark—often considered the chief architect of the Federal Rules—disparaged the civil jury trial as the “town hall method of trying cases,” and claimed that juries “injected an element of rigidity—of arbitrary right—into a system wherein general rules of convenience should prevail.”⁵⁵ When Fleming James, one of the rule committee’s assistants, whittled the core objectives of united procedure down to just three, number two read: “The right of jury trial should not be expanded. This method of settling disputes is expensive, dilatory—perhaps anachronistic. Indeed, the number of jury trials should be cut down if this can be done so as to not jeopardize the attainment of other objectives.”⁵⁶

One way they accomplished this was by including a jury-waiver default rule, which was meant to discourage the number of jury trials. Whereas historically a litigant would need to affirmatively request a bench trial, the new rules required a litigant to affirmatively request a jury trial; failure to do so defaulted to a trial by judge. Clark was explicit in noting that under a jury-waiver default regime judges were more likely to sit without juries “since inertia leads to waiver and not to jury trial as under the old system.”⁵⁷ And as a contemporary practitioner noted just four years after the adoption of the federal default rule, “[t]he most effective device yet evolved for effectuating a more limited use of the jury and yet which preserves the constitutional right is that of requiring a party to make a timely demand or be deemed to have waived his rights.”⁵⁸ Automatic waiver allowed the drafters to limit jury trials under the guise of litigant preferences.

“Not long ago, we used to have trials without discovery: Now we have discovery without trials.”

- U.S. Supreme Court Justice Neil Gorsuch

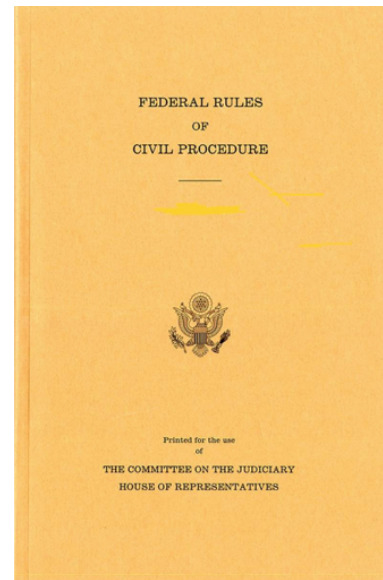
Beyond placing inertia against lay participation, the drafters also limited jury trials by rendering them, essentially, unnecessary through the adoption of procedures that had mostly been employed in juryless courts of equity—namely liberal discovery.⁵⁹

Whereas at common law trial was the premier opportunity for the competing sides to share evidence, pretrial discovery practices required by the Federal Rules allowed each side to assess the strength of their case in advance. Litigants could thus more accurately gauge the value of the case and, as they deemed desirable, enter settlement agreements. As United States Supreme Court Justice Neil Gorsuch pithily acknowledged: “Not long ago, we used to have trials without discovery: Now we have discovery without trials.”⁶⁰

The Federal Rules also led to fewer trials by permitting liberal joinder of parties and claims. To make sense of these more complicated proceedings, judges took on a more managerial role. In the 1960s, to facilitate case management, the judiciary abandoned master calendars and adopted an individual assignment system such that a single judge handled a case from filing to finish.⁶¹ At the same time, courts issued a handbook instructing judges to adopt a process of extensive pretrial conferencing, which was designed to help judges address discovery disputes and to identify and refine the issues in dispute.⁶² And by 1983, “facilitating settlement” was listed in the Rules as a core objective of pretrial conferencing. Trials were no longer the process of resolving disputes, but rather the result of a breakdown in the settlement process.

These trends were exacerbated by legislation and further rule changes in subsequent decades. Enacted in 1996, the Civil Justice Reform Act required all federal district courts to implement “expense and delay reduction plans” to “facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes.”⁶³ It promoted case management principles, guidelines, and techniques for courts to adopt and created a race among judges to dispose of cases as quickly as possible. Anything that short-circuited trial became preferable. Moreover, the 2015 changes to Rule 26 regarding discovery also emphasized the need for discovery to be reasonable and proportionate. These changes were designed, as the Advisory Committee Notes to the new rule explain, to encourage an even more managerial approach to judging.⁶⁴

Other explanations for the decline of civil jury trials focus on more recent interpretations of the Federal Rules, particularly those governing dispositive motions. The Supreme Court’s 1986 trilogy of cases concerning Rule 56’s summary judgment, for instance, empowered judges to dismiss cases in which they concluded that no genuine dispute of material fact existed so as to necessitate a trial.⁶⁵ The result is that a once rarely used procedure—indeed, once earnestly referred to by a leading academic as a “toothless tiger”⁶⁶—has had a major impact on the disposition of federal cases. Approximately 19% of federal cases are now resolved by summary judgment.⁶⁷ That figure is higher in cases involving certain fact patterns; for instance, a 2006 study found that courts granted in whole or in part 80% of defendants’ summary judgment motions in employment discrimination cases.⁶⁸





Roughly 20 years later, the Supreme Court took a similar approach with respect to Rule 12(b)(6)'s motion to dismiss for failure to state a claim. In dual cases, the court reformed the traditional standard—which for most of the twentieth century required a plaintiff to provide only “a short and plain statement of the claim showing that the pleader is entitled to relief”—to the far more restrictive requirement that plaintiffs plead “enough facts to raise a reasonable expectation that discovery will reveal evidence of [the claim].”⁶⁹ The Court tasked trial court judges with drawing upon their “judicial experience and common sense” in making that determination.⁷⁰ Accordingly,

judges—no longer required to accept all allegations as true—may decide for themselves if a plaintiff's claims are sufficiently plausible to allow for further proceedings.⁷¹

Another explanation for the decline in trials emphasizes the rise in mandatory arbitration. Although the 1925 precursor to what would come to be the Federal Arbitration Act anticipated only agreements between sophisticated actors—such as distant merchants who were increasingly reliant on the nation's railroad networks and desired enforceable private dispute resolution agreements—by the second half of the century the Supreme Court had dramatically expanded its application to nearly all agreements. Chasing what they hoped to be favorable treatment, powerful economic actors began including binding arbitration agreements in a wide variety of employment and consumer contracts. Much of the case law, especially at the federal level, has developed such that these binding agreements between actors of disparate sophistication are fully enforceable even against typical contract defenses such as fraud,⁷² illegality,⁷³ and unconscionability.⁷⁴ So widespread has this system of jury-less private adjudication grown that some have called it the “new litigation.”⁷⁵

Finally, some observers point to tort reform efforts to explain the decline in jury trials in state courts.⁷⁶ Specifically, the use of damage caps—both for economic and non-economic damages⁷⁷—has had a deleterious effect on the rate of public adjudication. Funded largely by pro-business interest groups, these tort reform efforts set a maximum value for certain types of injury claims, such as medical malpractice, products liability, and premises liability. These reforms not only arbitrarily supplant the jury as fact-finder of the value of a given dispute, but they also limit the incentive of litigants and their attorneys to bring such claims. This is because the costs of litigating certain cases are prohibitive when compared to the chance of receiving artificially limited compensation well below what a judge or jury would find appropriate.⁷⁸ As such, these caps simultaneously decrease the number of trials and render jury service less democratically meaningful.

The impact of these explanations for the jury's decline is difficult to measure, both due to their overlapping nature but also due to the lack of data. A 2020 study conducted by Shari Seidman Diamond and Jessica Salerno, and sponsored by the American Bar Association, sought to make sense of them by conducting a national survey of legal professionals on their understanding of why cases no longer proceed to jury trial. Participation was solicited from legal professionals across the country by inviting them to complete the online survey anonymously.⁷⁹ In total, the study involved 1,460 respondents: 173 judges, 70% state and 30% federal, and 1,282 attorneys, 63% who handle primarily civil cases, 33% who handle primarily criminal cases, and 4% who did not indicate whether they primarily handle civil or criminal cases.

The results are illuminating. The study showed that among the most commonly accepted reasons among legal professionals for the decline in trials was that “litigants would rather settle than go to trial.” Judges particularly felt this way, with 89% of them agreeing or strongly agreeing with that statement. Attorneys also indicated their agreement, with 63.6% of attorneys agreeing or strongly agreeing that preference for settlement resulted in fewer trials. As the authors note, “whether or not the perception was accurate in describing what most litigants want, it may explain why judges and attorneys encourage—or pressure—litigants to waive trial and accept a settlement.”⁸⁰

The study also measured systemic effects as sources of the reduction in civil jury trials. The survey asked respondents to evaluate the effects of five systemic changes: damage caps, mandatory binding arbitration, increases in successful summary judgment motions, increases in successful *Daubert* motions, and increases in successful motions to dismiss. Respondents indicated that damage caps and mandatory binding arbitration had the greatest influence on reducing trial rates. More than half of all respondents perceived these two features as causing medium or large reductions in the rate of jury trials, 61.6% for damage caps and 52.1% for mandatory binding arbitration. A significant proportion of respondents (39.9%) perceived the increased use of successful summary judgment motions as causing a moderate or large reduction in jury trials. In contrast, most respondents saw increases in successful *Daubert* motions and motions to dismiss as having little to no effect in reducing jury trials.

The 2020 study found that jury trials were considered among the fairest and most preferred dispute resolution procedures among respondents.

Also of interest, the study assessed how respondents compared jury trials to other modes of dispute resolution, such as bench trials, mediation, and binding arbitration. Respondents viewed jury trials as among the fairest procedures (second only to nonbinding mediation), and the procedure they preferred most. Attorneys who regularly represented either plaintiffs or defendants saw jury trials as fairer overall than bench trials; whereas, perhaps understandably, civil judges saw themselves as fairer than juries.⁸¹

However, respondents also acknowledged that jury trials are less predictable, slower, and less cost-effective than alternative procedures. As the authors note, “this suggests that perceived risk, costs, and delay deter the use of the jury trials despite their attractiveness on other important dimensions.”⁸² Thus, perhaps some of the strengths of the civil jury originally celebrated at the founding continue to live on in the popular conception of justice but have been hampered by procedures and attacks on the institution by powerful economic and political actors. These active attacks are an integral part of the story and explain a great deal about the jury’s diminished standing. But in application, the jury has become a disfavored mode of dispute resolution, replaced with what litigants believe are consistent, cheaper, and quicker options.

B. Critiques and Attacks on the Civil Jury

Judicial and economic elites have hurried the decline of the civil jury brought on by the practices just discussed by sustaining critiques and attacks on the institution. Although civil juries were celebrated in colonial America and in the nascent nation as a check on the exercise of arbitrary authority, it inevitably followed that those with influence and clout resented the loss of their natural institutional advantages when decision-making is placed in the hands of more common folk. In fact, “[e]ver since there have been

juries or jurylike tribunals . . . there have been attacks on their competence and even calls for their abolition.”⁸³

The critiques have hardly varied over time. Not very far removed from the time when a guarantee of the civil-jury right through the Seventh Amendment was a necessary promise to secure the Constitution’s ratification, Georgia Chief Justice Joseph Lumpkin observed that, while in “criminal proceedings, trial by jury cannot be too highly appreciated or guarded with too much vigilance,” “[w]e may, however, after all, *doubt the essentiality of trial by jury in civil cases.*”⁸⁴ Among the problems that existed when resort to civil juries was de rigueur, Lumpkin said, was the “time, trouble, and expense” involved.⁸⁵ Nearly a century later, in the 1930s, a number of judges, academics, and bar associations seemed to sour on civil juries, questioning both their expense and their competence.⁸⁶ Three decades later, many well-placed critics continued to express that view, as Harvard Law School dean Erwin Griswold asked in 1962, “Why should anyone think that twelve persons brought in from the street, selected in various ways, for their lack of general ability, have any special capacity for deciding controversies between persons?”⁸⁷

These various critiques gained a modern-day foothold in the U.S. Supreme Court when the Court was asked to decide whether the Seventh Amendment mandated trial by jury in stockholder derivative actions. The Court held that the “right to jury trial attaches to those issues in derivative actions as to which the corporation, if it had been suing in its own right, would have been entitled to a jury.”⁸⁸ The decision relied on the traditional dividing line of what aspects of such a case sounded in equity as opposed to being an action at law. That determination fully answered the question presented. The Court’s opinion divided the claims within the lawsuit to reach its conclusion and stated that the answer to the question of when a jury is required “depends on the nature of the issue to be tried rather than the character of the overall action.”⁸⁹ A footnote attached to that statement explained that one of the three factors that must be taken into consideration to determine the applicability of the jury-trial right was “the practical abilities and limitations of juries.”⁹⁰ That phrase has only appeared in one other Supreme Court opinion, also in a footnote, where the Court limited its meaning and application to instances where “Congress has permissibly entrusted the resolution of certain disputes to an administrative agency or specialized court of equity, and . . . jury trials would impair the functioning of the legislative scheme.”⁹¹ Still, the acknowledgement that a practical assessment of a generic jury’s capabilities became a talisman for those who continued to advance the criticism that lay jurors were ill-equipped to make factual findings when the issues were outside the average person’s experience.

Even though the Supreme Court itself ascribed little meaning to the footnote’s suggestion that the Seventh Amendment was cabined by jurors’ presumptively limited abilities, the phrase “practical abilities and limitations of juries” gained wider purchase among other federal courts, appearing in 34 federal appellate decisions and 114 district court opinions (yet only a mere 15 state court opinions). The phrase signaled to those who were dissatisfied with jury verdicts that critiques of civil juries might obtain traction with the courts sufficient to avoid jury trials. Perhaps it is only coincidence, then, that shortly thereafter a corporate public relations campaign took off that told the public that jurors

High damage awards in civil jury trials make the news because of their unusual man-bites-dog quality, but that leads readers to overestimate their frequency and in turn causes risk managers to overestimate liability exposure.

were unqualified to decide complex and sophisticated issues and tended to let sympathies override reason to reach supposedly unfathomably high verdicts. High damage awards in civil jury trials make the news because of their unusual man-bites-dog quality, but their appearance still leads readers to overestimate their frequency and in turn causes risk managers to overestimate liability exposure.⁹² Seizing on these news reports, corporate groups looking to tamp down verdicts against their sponsors circulated skewed and fictionalized stories about runaway juries giving large verdicts to undeserving plaintiffs⁹³ to create a political environment primed for jury-restrictive legislation while blaming plaintiffs' lawyers and juries for a broken civil justice system.⁹⁴

Attacks on civil juries not only encouraged legislation designed to take constitutionally secured prerogatives away from the jury, such as through damage-cap laws, but also influenced judicial thinking and legal doctrine. It caused judges even in some jurisdictions thought to be "plaintiff-friendly" to opine about the problems with juries. For example, the Alabama Supreme Court noted three frequent criticisms of jurors were the "helplessness and lack of sophistication of jurors obligated to resolve issues in complex litigation;" overcompensation of "injured tort victims for noneconomic damages;" and the "'unbridled' discretion jurors enjoy in imposing massive punitive damage awards."⁹⁵ The West Virginia Supreme Court of Appeals expressed a similar sentiment when it asserted that "[c]ourts understand that juries operate on largely emotive principles and that jury awards can be substantially in excess of what judges, educated in law as a science, would award in similar circumstances."⁹⁶ Yet, as we discuss, empirical research establishes that judges and jurors reach very similar conclusions about liability,⁹⁷ compensatory damages,⁹⁸ and punitive damages.⁹⁹



Perhaps there is no better example of how the campaign influenced judicial doctrine than in the area of punitive damages. To understand, it is important to stress that the Seventh Amendment both preserves civil trial by jury as it was practiced under the English common law when the Bill of Rights was added to the Constitution and prohibits reexamination of facts

determined by a jury.¹⁰⁰ The English common law recognized that "the jury are judges of the damages."¹⁰¹ Thus, if damage assessment was committed to the jury's determination, judges have no authority to substitute their own numbers for the jury's.¹⁰² And since at least 1851, the Supreme Court has recognized that the jury's preeminent role in assessing punitive damages was so well established that "the question will not admit of argument."¹⁰³

Despite the constitutional history, and the infrequency with which punitive damages were awarded,¹⁰⁴ a campaign developed that caught the Supreme Court justices' eyes.¹⁰⁵ Businesses used a comprehensive array of press releases to highlight outlier punitive damage verdicts, portraying them as typical. These tall tales, such as the infamous McDonald's "hot coffee" case, were further circulated by politicians hoping to score points with a well-heeled constituency.¹⁰⁶ Insurers and business groups bemoaned the "bet-the-company" consequences of an adverse punitive damages verdict, paid for studies that often utilized problematic methodologies to support the campaign's viewpoint,¹⁰⁷ and cited these studies and unfiltered examples from news reports in Supreme Court certiorari petitions and briefs¹⁰⁸ with a plea that unrestricted punitive damages constituted a form of excessive fines or violated due process.¹⁰⁹

The Supreme Court initially resisted entreaties to apply a constitutionally-based limit on punitive damages. However, usual swing justice Sandra Day O'Connor wrote a dissent bemoaning "skyrocketing" punitive damage awards and their supposed adverse effect on product innovation,¹¹⁰ apparently accepting the false portrayal of out-of-control juries. It was not long before a majority of the Court shared O'Connor's sentiment. They held that due process placed a constitutional limit on "grossly excessive" punitive damages.¹¹¹

After subjecting punitive damage verdicts to a due-process override, the natural next question was what to do when punitive damages were unconstitutionally excessive. Should the question be resubmitted to the jury, or should a judge choose the amount? The answer to that question depended on whether the Seventh Amendment applies. The constitutional history was clear; juries were "judges of the damages." But the Supreme Court adopted a fiction to conclude that judges could replace the jury's determination with their own. It declared that compensation was the type of fact reserved for a jury's determination, and that although punitive damages previously served a compensatory purpose, they no longer did.¹¹² Instead, the Court said, punitive damages were the jury's "expression of its moral condemnation" of egregious misconduct, not a factual determination.¹¹³ By reclassifying the jury's role with respect to punitive damages, the Court opened the door to revision of the verdict by both trial and appellate judges. Without any change in constitutional language and disregarding the longstanding regard of punitive damages as separate and above compensation,¹¹⁴ the Court limited the jury's role in determining punitive damages and increased the role of judges.¹¹⁵

Years later, the Court looked at carefully examined data and concluded that the empirical assumptions underlying this jurisprudential change were not well grounded. As the Court then recognized, "the most recent studies tend to undercut much of [the criticism of punitive damages]." Moreover, research "reveals that discretion to award punitive damages has not mass-produced runaway awards."¹¹⁶ Rather than the bill of goods they had been sold, the justices conceded that the data revealed "an overall restraint" on the part of juries.¹¹⁷ The die, however, had been cast. Judges would scrutinize and adjust punitive damage verdicts, and the jury's determination became more advisory.

The transformation of the jury's role in punitive damages followed a blueprint that has successfully transformed the law in other areas where juries play a constitutionally consecrated role as well. Step one is to appeal to the idea that jurors lack the sophistication necessary to assess complex information and give in too easily to emotion. Then, having established a level of agreement with that proposition, step two is to advocate for changes that limit the jury's scope.

Another area where this approach succeeded was to increase the authority of judges over expert evidence. First, the jury critics argued that juries could not be expected to understand complex scientific or other technical evidence. Then, giving examples of juries siding with seemingly incredulous expert testimony that was purposely presented in a damning light as "junk science,"¹¹⁸ a call was made to rethink the rules that would admit such evidence. And, as with punitive damages, the Court succumbed to the criticism and created a gatekeeper role so that judges would prevent juries from hearing certain expert testimony previously deemed admissible.¹¹⁹

To accomplish that result, the Court read the existing rule in a new way. The relevant rule on expert evidence states that such testimony is admissible if its probative value helps the jury understand a critical issue in a case,¹²⁰ such whether exposure to a toxic chemical caused the plaintiff's injury.

For years, courts admitted expert testimony to help the jury connect the dots when the evidence provided was generally accepted within the expert's field. However, because science advances, a general-acceptance standard failed to keep up with new research. To address that concern, the Court reinterpreted the expert evidence rule to permit the admission of novel scientific evidence so long as it was based on scientifically acceptable methodologies.¹²¹ The change appeared to liberalize the admissibility of expert evidence. At the same time, however, the Court also enhanced the gatekeeper role that judges play in deciding the expert-evidence admissibility question.

The corporate public-relations machine then moved into high gear, proclaiming a great victory against "junk science." Conferences, articles, and continuing legal education programs emphasized the judges' gatekeeper role in keeping expert evidence from coming before a jury, rather than the broader admissibility of new or novel science. Judges' understanding of the new precedent aligned with that publicity. The result was a more restrictive approach to expert evidence that ended up constricting juries in the discharge of their constitutionally consecrated role as fact-finders with some frequency. As with punitive damages, the empirical evidence did not catch up in time. Studies do not bear out the inaccurate caricature of juries completely befuddled by scientific evidence.¹²²

C. A Culture Discouraging of Civil Jury Trials Encourages Shortcuts in a Crisis

The artificial barriers constructed through legislation, rules, and judicial doctrine have played a significant role in diminishing the uses and prevalence of jury trials. Meanwhile, other developments, such as budgetary crises, have compounded the problem and further diminished juries. If not for a cultural predilection that believes juries to be an antiquated luxury that is expensive, antiquated, and unnecessary, years-long postponements of civil jury trials would not be seen as a solution to nearly every crisis.

Examples abound. Tightened state budgets have resulted in court systems deferring civil jury trials despite state constitutional promises against "unnecessary delay" and an "inviolable" right to a jury trial.¹²³ For more than a decade, states have cut overall budgets, resulting in reductions of money allocated to state courts by as much as 20%.¹²⁴ New Hampshire started a trend as this money crunch occurred by suspending civil jury trials.¹²⁵ In California, where the courts have been hit hard by budget cuts, the 2021 budget proposal contains an increase in funding, but insufficiently large so that the legislature's budgetary analysis arm projects that they will still need to reduce expenditures by a minimum of \$50 million in 2021–22.¹²⁶ As an expensive item for trial courts, civil jury trials may well be suspended—again. Florida faces an overall budget deficit of \$5.4 billion over the next two years, while its courts estimate that nearly one million more cases will be added to trial courts dockets by mid-2021.¹²⁷ The policy choice to cut these budgets is part of a broader, growing notion that civil trials can be easily discarded with if done in furtherance of some vague notion of efficiency.¹²⁸

The COVID-19 pandemic has further exposed this cultural disposition to devalue the jury and exacerbated the effects. Health concerns have required courts to adjust their approaches to conducting jury trials in order to ensure public safety, but courts around the country largely took the approach of simply refusing to hold civil jury trials rather than find ways to make it work. Like many states, New Mexico instituted a suspension of jury trials in response to surging COVID-19 cases at the end of 2020 and only began those trials again on February 1, 2021.¹²⁹ The federal court system acted similarly, with the Administrative Office of U.S. Courts reporting in November 2020 that “[a]bout two dozen U.S. district courts have posted orders that suspend jury trials.”¹³⁰ The result left hundreds of thousands of civil cases languishing in standstill courts and has discouraged litigants from bringing new cases, leading to a looming backlog of cases some estimate to number in the millions.¹³¹ And though as of Summer 2021, state and federal courts are starting to reopen, the more than a year of treating civil jury trials as expendable has both short-term and long-term effects.



Over the short-term, the decision to forgo civil jury trials creates significant backlogs, causing court systems to look for ways to cut corners and reduce the number of cases requiring juries because of the time and resources needed. The public loses its opportunity to be involved in resolving disputes during a time when it is perhaps most necessary that they be involved. And in the long-term, atrophy of lay participation sets in, leading litigants and jurists to believe that their business does not require public scrutiny. Even more people will be driven to private adjudication services, further diminishing the number of jury trials. With jury trials a rarity, few new lawyers will learn the art of trying a case before a jury, thereby creating an endless cycle of lawyers opting not to go the jury route.¹³² The cost to society will be substantial, recalling an observation Alexis de Tocqueville made in a preface to his book, *Democracy in America*:

If the lights that guide us ever go out, they will fade little by little, as if of their own accord. Confining ourselves to practice, we may lose sight of basic principles, and when these have been entirely forgotten we may apply the methods derived from them badly; we might be left without the capacity to invent new methods and only able to make a clumsy and an unintelligent use of wise procedures no longer understood.¹³³

It is critical that the benefits of the civil jury and jury service be fully analyzed and appropriate acts be taken to revive it, lest the institution’s light be fully extinguished, and the associated benefits be completely lost.

III. The Benefits of the Civil Jury

Our overview of the jury’s historical development has identified important justifications for the civil jury as well as criticisms of the civil jury’s competence and fairness. Over the last sixty years, researchers have examined how the civil jury operates in practice. We summarize the empirical evidence on four dimensions: (1) the civil jury’s competence in fact-finding; (2) the extent to which civil juries allow for

community input into the resolution of civil disputes; (3) the civil jury's impact on civic engagement of the citizenry; and (4) the contributions of civil jury trials to the transparency and legitimacy of the legal system.

A. Enhancing the Quality of Fact-Finding

Civil juries add to the quality of fact-finding in civil decision-making. Some observers of civil trials might be surprised at that claim. After all, judges are elite, legally trained, and experienced in adjudication, compared to jurors who are drawn from all walks of life and have, in the vast majority of civil cases, no special training or experience.¹³⁴ Expertise in a particular subject matter can be very helpful in aiding decision-making, especially in complex trials.¹³⁵ Jurors' diverse backgrounds and perspectives, and even their lack of experience, however, offer some fact-finding advantages.



A lay citizen's lack of specialized knowledge and experience confers some benefits even over an experienced and expert judge. Judges are repeat players; a jury decides one case at a time. As judges sit in case after case over the years, judicial fact-finding becomes routinized. Judges may jump to premature conclusions because of similar fact patterns in prior cases, might regularly favor one party over the other, and might even become jaded about the process of civil litigation. Judges may be affected by confirmation bias, the unconscious psychological process in which people look for evidence that confirms their previous views and

experiences, interpreting evidence in ways that are consistent with their existing views.¹³⁶ This is especially so when prior cases are presented by the same legal counsel. Despite differences in facts and even trial strategy, the presence of the same advocate or even the same opponents can cause the judge to view the case through a lens that is not there. Because lawyers often regularly appear in a single jurisdiction, this can occur with surprising frequency, particularly when both lawyers practice in a specialized field. Jurors deciding a single case come with a fresh perspective.

Relatedly, judges' personal characteristics and their prior legal work experiences are correlated with their decisions.¹³⁷ For example, judges who worked in corporate law or as prosecutors before becoming judges are less likely to favor employees in employment discrimination cases.¹³⁸ Research has also documented a link between campaign contributions and judges' decisions.¹³⁹ The same is true for a judge's race and political affiliation.¹⁴⁰ Senator Sheldon Whitehouse points to the increasing politicization of judicial appointments and increased special interest funding in judicial elections as causes for concern, both of which underscore the value of having a civil jury trial option.¹⁴¹

Judges operate within a laudable system of accountability. Their judgments and written opinions are part of the public record, are reviewed by appellate courts, and may be considered in retention and promotion. However, some studies of judicial decision-making have found a downside to these consequences. Judges facing reappointment or retention elections impose more severe sentences or show less favorability toward capital defendants' appeals, according to research.¹⁴²

Considering these aspects of judicial decision-making, one can see that lay citizens can operate as an important check on a jaded or biased judiciary. The civil jury trial combines the valuable expertise of the professionally trained judge with the independent collective perspectives of the jury.

B. The Civil Jury's Fact-Finding Advantages Over Judges

The jury's comparative advantage in community representativeness offers a significant benefit for fact-finding. A group of jurors is more likely than elite judges are to represent the range of backgrounds, experiences, views, and attitudes of the community at large. A substantial body of theory and research on juror decision-making confirms that jurors draw on these life experiences, attitudes, and perspectives as they assess and weigh evidence in the trial.¹⁴³ The story model of juror decision-making posits that jurors rely on their world knowledge to interpret evidence in the case and to develop a narrative account of what happened in the events that led to the trial. Knowledge of the world varies with life experiences. Therefore, it is not surprising that demographic and attitudinal characteristics such as gender, race, and political affiliations are associated with distinctive decisions by jurors¹⁴⁴ and by judges as well.¹⁴⁵ A group of lay fact-finders drawn from a cross-section of the community is better able to reflect the community's social and political characteristics, and to be informed about community norms. The civil jury is in an ideal position to incorporate the community's views and attitudes about responsibility and the valuation of injuries in its legal judgments.

Research on public reactions to a police car chase video that was integral to the Supreme Court's decision in *Scott v. Harris* offers a vivid illustration of the superior ability of a representative community group to reflect the diverse range of citizens' opinions.¹⁴⁶ The majority of the justices asserted that "no reasonable juror" could conclude that the car's driver did not pose a substantial risk,¹⁴⁷ but when researchers surveyed the public, a substantial minority expressed that view. African Americans, low-income workers, and residents of the Northeast, as well as individuals who characterized themselves as liberals and Democrats, were all more likely to disagree with the Supreme Court's conclusion as to the risk posed by the driver.¹⁴⁸



Other benefits accrue from the group nature of the decision-making. Juries engage in the process of deliberation, which offers the opportunity to compare, contrast, and test differing evaluations of the trial evidence. It is said that "[twelve] heads are better than one;" jury research confirms that insight.¹⁴⁹ Deliberation and group decision-making are especially robust and strong when the jury is composed of individuals with diverse backgrounds and experiences.¹⁵⁰ Furthermore, the robustness of jury deliberation is greater when juries are required to reach unanimous as opposed to majority decisions.¹⁵¹

In short, although professional judges possess advantages of legal expertise and experience, juries bring diverse perspectives, experiences, and a strong grounding in community norms to the fact-finding task. Deliberation aids jurors in testing their interpretations of evidence and in developing a sound common

account of the events leading to the lawsuit. A representative jury is thus able to fulfill one of the major purposes of trial by jury envisioned by the Founders – to stand in for the community in legal fact-finding.

Research on civil jury decision-making supports the strength of the jury as a fact-finder.¹⁵² Interviews and post-trial questionnaire research confirm that the vast majority of jurors take their jury duty seriously.¹⁵³ Researchers have examined real jury verdicts and compared them to judicial decisions or judicial evaluations in similar types of cases; they have also used experimental methods to examine the decision processes in civil disputes.¹⁵⁴ In judge-jury agreement studies, judges presiding over jury trials are asked to record the jury's verdict, and to indicate what verdict they themselves would have reached had they been trying the case as a bench trial. The first such study occurred in the 1950s, and revealed that the judge agreed with the jury's verdict in civil trials 78% of the time.¹⁵⁵ Interestingly, in that study, the disagreements between judge and jury were symmetrical; judges would have found for the plaintiff when the jury reached a defense verdict in 10% of the trials, and judges would have found for the defendant when the jury decided the case for the plaintiff in 12% of the trials.¹⁵⁶ Subsequent studies using a similar methodology have found similar agreement rates.¹⁵⁷ Importantly, several studies have found that the complexity of evidence in the case is unrelated to the agreement rates between juries and legal experts; a relationship would have been expected if jury incompetence led juries to choose a different verdict.

Studies of money damage awards in civil cases, too, offer some reassurance.¹⁵⁸ Jury damage awards reflect the community's assessment of the value of an injury, considering the context and circumstances of the injury and the identities and behavior of the parties.¹⁵⁹ The need to examine each case's specific facts, and the ability to handle uncertainty and the intangibility of some injuries, make the representative jury a societally appropriate decision-maker on damages. Such a jury can draw on its collective experiences with injuries and their financial consequences as they engage in the necessary fact-finding.¹⁶⁰ Statistical analyses of jury damage awards have uncovered regular patterns. First, the overall severity of plaintiffs' injuries is strongly related to jury damage awards.¹⁶¹ In states that separate out economic and noneconomic damages, the amount of economic damages is the most powerful predictor of the amount of noneconomic damages.¹⁶² Empirical research on jury decision making with respect to punitive damages offers reassurance that the civil jury acquits itself well; punitive damages are generally proportionate to compensatory damages.¹⁶³

In sum, the civil jury's "report card" would make the Founders proud. Nevertheless, some challenges to the civil jury's ability to do its job remain. As we explained, the jury's representative quality is a key element that promotes strong fact-finding. Although jury representativeness has increased over time, juries today still fall somewhat short of fully representing all segments of our communities. Inadequate source lists, statutory exclusions, mailing errors, differential response to jury summons, and the granting of excuses all contribute to jury pools that are less than fully reflective of the community.¹⁶⁴

Research on jury size shows that verdicts reached by twelve-person juries are more representative, more reliable, and less influenced by outlier juror preferences than those verdicts reached by smaller-sized juries.

The decisions that many jurisdictions have made to reduce the civil jury's size from the traditional number of twelve have also reduced the ability of today's civil juries to fully represent the local community.¹⁶⁵ Judge Patrick Higginbotham, Judge Lee Rosenthal, and Professor Steven Gensler surveyed the frequency of different jury sizes in federal district courts, discovering that

in recent years the most common size was an eight-person civil jury.¹⁶⁶ Research on jury size shows that there is much to recommend larger juries of size twelve; the decisions of larger juries are more representative, more reliable, and less influenced by outlier juror preferences.¹⁶⁷ Still, even compared to smaller-sized civil juries, judges as a group are less representative of the American population.¹⁶⁸

Today's juries hear cases of variable complexity and difficulty, creating another challenge to the jury's ability to do its job. Recognizing this fact, many courts have experimented with specific procedures to assess whether they help jurors. Procedural innovations include providing the jury with preliminary substantive legal instructions, allowing jurors to take notes and ask questions, and permitting jurors to discuss the evidence as the case is going on, rather than requiring them to wait until the final deliberation.

A substantial body of research has tested these "active jury" reforms, finding some positive effects and little to no negative consequences when they are implemented.¹⁶⁹ For instance, in a Seventh Circuit research project examining the impact of preliminary substantive legal instructions in jury trials, more than 80% of the jurors said that hearing these instructions helped them better understand the law.¹⁷⁰ Most judges and lawyers agreed that these instructions increased the jurors' comprehension of the law. As then-Chief Judge James Holderman stated, "I have found that preliminary instructions helped to orient the jurors to the case and allowed the jurors to start making connections between the evidence and the disputed issues in the case more quickly."¹⁷¹ With respect to notetaking, jurors express greater satisfaction when they are permitted to take notes; and some studies show that notetaking leads to significant improvements in evidence comprehension, memory, and decision making.¹⁷² Similarly, jurors who are permitted to ask questions of the witnesses under carefully controlled circumstances report being better informed and say their questions clarified the evidence.¹⁷³ Allowing jurors to discuss the case throughout the trial, rather than waiting until the deliberation, is more controversial, as some fear that jurors might prematurely judge the case. Field experiments in which civil juries were randomly assigned to either allow or not allow trial discussions, however, showed no evidence of prejudgment.¹⁷⁴ In fact, jurors in one study noted that trial discussions with other jurors helped to correct misunderstandings of the evidence.¹⁷⁵



That brings us to a final challenge. Courts have recognized that for some litigants, the time and cost of a full civil jury trial can be prohibitive, deterring them from exercising their right to seek community judgment of their disputes. In the 1990s, states around the country began to address the problem by

experimenting with expedited jury trials. These alternative trial procedures offer abbreviated jury trials designed to resolve factually and legally straightforward cases with lower-value damages quickly, often in a single day. The specifics of these procedures differ among jurisdictions, though they often involve a trial before fewer than twelve jurors (varying between four and eight), mandatory damage caps or high-low agreements, and the jury's verdict may or may not be binding on the parties.¹⁷⁶

C. Jury Participation Promotes Civic Engagement

The French political thinker Alexis de Tocqueville observed that participation as civil jurors operates as an ever-open “public school” that educates American citizens about the law.¹⁷⁷

The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. . . . It invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge toward society; and the part which they take in the Government.¹⁷⁸

One phenomenon has been widely documented is the largely favorable reaction that citizens have to the experience of jury service.¹⁷⁹ Although many citizens express concern about receiving a jury summons, once they participate as jurors, they generally recognize their experience as a positive form of civic engagement. In one of the largest studies, over 8,000 US jurors from 16 federal and state courts completed questionnaires following their jury service. Fully 63% said that their view of jury service became more favorable after serving.¹⁸⁰ In other research, jurors are more apt to say that they see the courts as fair and have more favorable views about the justice and equity of the legal system.¹⁸¹

Jury service is a form of civic participation, a responsibility-taking institution.¹⁸² So perhaps it should not surprise us that participating as a juror— in either a criminal or a civil trial— boosts other forms of citizen engagement. John Gastil and his colleagues put Tocqueville's observation to an empirical test in a set of studies that examined the links between jury service and voting.¹⁸³ They obtained jury service data from seven U.S. states, and linked these records with jurors' voting history before and after jury service. Citizens who served in criminal cases and who were infrequent voters boosted their voting after jury service.¹⁸⁴ Jurors who served on civil juries of 12 persons or juries that were required to reach a unanimous decision—in other words, the traditional form of trial by jury—were significantly more likely to vote following their service, controlling for their pre-service voting history.¹⁸⁵ Civil jurors who decided cases with organizational (as opposed to individual) defendants also showed increased voting behavior.¹⁸⁶

D. Civil Jury Trials Promote the Legitimacy of the Justice System and Democratic Self-Governance

Disputants who are able to discuss their differences and reach fair and equitable resolutions through mediation or other private settlement mechanisms may not need to resort to the courts. As the Diamond and Salerno survey discussed earlier found, people often are satisfied with these private remedies.¹⁸⁷ But for others, and for the rest of us, the public trial, and in particular the civil jury trial, offers several advantages. In her book, *In Praise of Litigation*, Alexandra Lahav identifies the multiple ways in which litigation protects important democratic values:

Litigation helps democracy function in a number of ways: it helps to *enforce* the law; it fosters *transparency* by revealing information crucial to individual and public decision-making; it promotes *participation* in self-government; and it offers a form of *social equality* by giving litigants equal opportunities to speak and be heard.¹⁸⁸

With respect to the values of enforcement and transparency, jury trials, and public litigation more generally, add value because they produce information about what otherwise might be unfair hidden practices and procedures.¹⁸⁹ The trial is a transparent and public event. Citizens are able to observe the evidence and arguments presented by each side. Others, potentially liable under the same circumstances, also see the results and can take additional safety measures as a form of self-regulation, improving their products or services and filling gaps in our system of formal regulation.¹⁹⁰ Consider how the #MeToo movement gained visibility and strength by publicity surrounding high-profile instances of sexual harassment and sexual assault. The litigation and attendant publicity encouraged other women to come forward, which gave us as a society a better idea of the frequency and impact of this problem. Holding civil defendants publicly accountable for their wrongs through litigation serves as a deterrent, helping to reinforce lawful behavior.

Litigants have their day in court; their arguments and evidence are heard. The opportunity to present one's views and the chance to be heard are key elements contributing to procedural justice, a sense that fair processes are used to resolve a dispute.¹⁹¹ In turn, a sense that one has been heard and treated fairly in a dispute resolution procedure increases the perceived legitimacy of the procedure.¹⁹²

The transparent and public nature of civil jury trials, allowing the presentation of evidence on both sides, providing litigants the opportunity to be heard, and giving citizens the right to decide the outcomes, operates to reinforce democratic self-government.

Because it takes place in a public forum and because there is a framework for appealing the results, there are possibilities for error correction. Private adjudication does not typically have the same corrective potential.

In sum, the transparent and public nature of civil jury trials, allowing the presentation of evidence on both sides, providing litigants the opportunity to be heard, and giving citizens the right to decide the outcomes, operates to reinforce democratic self-government. For all these reasons, we recommend taking action now to preserve and strengthen the institution of the civil jury.

IV. Research-Based Recommendations for Reviving the Institution of the Civil Jury

Given the centrality of the civil jury in the United States' democratic structure, as well as the benefits the jury offers for the fair, accurate, and public administration of civil justice, it is imperative that active measures be taken to revive the institution to its once premier role. This is particularly true given the challenges that the COVID-19 pandemic poses and is likely to continue to pose to the institution for the foreseeable future. Critically, strategies for reviving the institution should not be based on speculation or misrepresentation of the jury, but instead on empirical support and research to ensure that the benefits

of lay judicial participation are more fully realized. Drawing on such research, we offer here the following six recommendations designed to (A) remove barriers to civil jury trials to make them more likely to occur in those instances in which the parties so desire, and (B) promote better civil jury fact-finding to ensure more accurate dispute resolution.

A. Removing Barriers to Civil Jury Trials

The first step to reviving the civil jury as an institution is ensuring that all litigants who desire a jury trial are able to receive one. The following research-based recommendations are designed to remove barriers to civil jury trials and thereby lower costs associated with employing juries.

1. Adopt a Jury-Trial Default Rule

One of the easiest ways to revive the civil jury is for courts to once again adopt a jury-trial default rule. This means that litigants would receive a civil jury trial unless they affirmatively waive their right to one, as opposed to the current approach in which litigants must affirmatively demand a jury trial. As noted above, the current rule was adopted at the federal level in 1938 purposefully to limit the number of jury trials, and reverting to the original rule may have the opposite effect. Indeed, there is a robust economic literature on the power of default rules to nudge actors toward preferred outcomes while not substantively limiting alternative choices.¹⁹³ Restoring the jury-trial default rule has been championed by jurists including now-Supreme Court Justice Neil Gorsuch and U.S. Court of Appeals for the Ninth Circuit Judge Susan Graber, who argue that this rule should be adopted because it would: (1) “encourage jury trials;” (2) increase “simplicity” and result in “greater certainty,” particularly for pro se litigants and in cases removed from state courts; and (3) “honor[] the Seventh Amendment more fully.”¹⁹⁴ Scholars who have researched this proposal have concluded that while it is unclear the extent to which this change would increase the total number of jury trials, there is little question that a jury-trial default rule better respects the jury as a core institution in our government structure and places systematic inertia toward behavior in line with the original understanding of the Seventh Amendment.¹⁹⁵

2. Remove Damage Caps

As the American Bar Association study previously cited shows, artificial caps on damages undermine the availability of jury trials by changing the “practical and economic realities of mounting a jury trial.”¹⁹⁶ When a plaintiff’s attorney must finance the costs of the litigation and take into account the uncertainty of a return on the investment for both the client and counsel’s time, as one Texas lawyer colorfully put it, “You’re talking about a lot of money, and—in other words—it makes the juice not worth the squeeze.”¹⁹⁷ The caps make it particularly problematic to move forward in a legitimate case for those who are unlikely to have significant lost wages or income that might ameliorate a cap’s effect on noneconomic damages.¹⁹⁸ As a result, retirees, children, full-time caregivers, and those living in poverty will be unable to seek compensation in states with capped damages because the litigation’s costs will often exceed the potential recovery.¹⁹⁹ The simple solution to this problem is to repeal the caps, which have not been shown to have any positive effect on the availability or affordability of health care, the most frequent justification offered,²⁰⁰ but plainly create a significant obstacle to access to the courts and to jury trials.

3. Expand Expedited Jury Trial Projects with Twelve-Person Juries

Another way to revive civil jury trials is to expand the use of alternative procedural tracks, such as expedited jury trial projects, aimed at providing speedy access to abbreviated jury trials. Make no mistake, as they are currently designed, these projects are not an ideal solution. They cut against the full benefits of lay judicial participation by limiting the responsibility of jurors to resolve whole factual disputes and at times operate with as few as four jurors. However, there are certain benefits. By ensuring court access and limiting incentives to overinvest, litigants and the judiciary receive many of the benefits of jury trials while avoiding some of the detriments. Moreover, shorter trials may prove less of a hardship, financial and otherwise, on the people serving, thereby allowing for a greater diversity of voices to be represented. And if the programs were modified to require full juries of twelve—which research shows better represent the community and are more reliable fact-finders compared to smaller bodies—expedited trials could prove significantly valuable.

As such, with this recommendation, the benefits may outweigh the detriments. Put simply, having some jury trials is better than having no jury trials. And given the ongoing impact of COVID-19, expedited jury trials could provide a method for managing the backlog of civil cases in a way that provides some, albeit more limited, space for community involvement. Expedited jury trials also provide a way to address the concerns of those litigants who, correctly or incorrectly, believe that even during non-pandemic times that jury trials are too slow, risky, and expensive.²⁰¹ Critically, these alternative procedures should be optional and not forced on those litigants who desire a complete jury trial.

B. Promoting Fair and Accurate Jury Fact-Finding

Reviving the civil jury also requires strategies for increasing the fairness and accuracy of jury fact-finding. The following research-based recommendations can help make litigants more confident in the outcomes of their disputes while also ensuring that the jury as an institution continues to fulfill its constitutionally anticipated socio-political role.

1. Ensure Representative Juries

The jury that decides a civil trial is drawn from a jury venire, ideally one that constitutes a representative cross-section of the community. Our laws do not guarantee a representative trial jury, but they do require representative venires from which those juries are picked. In many jurisdictions, jury venires still fall short of fully reflecting the community. And the COVID-19 pandemic has made summoning a representative cross-section of the population even more challenging. This is disturbing considering the research we have summarized that diverse juries engage in more robust and thorough fact-finding. Vigorous deliberation can give voice to people with differing perspectives to debate their views and arrive at a verdict that incorporates the multiple perspectives in the community. Perhaps for that reason, diverse juries are seen as more legitimate.

Therefore, we urge courts to examine and, if necessary, modify jury selection procedures to ensure the fullest possible community representation. Techniques to maximize community participation in juries

include the use of multiple source lists for venires, multiple follow-ups to jury summonses, and the development of effective community outreach efforts.

2. Return to Twelve-Person Civil Juries

Related to the above, the jury's size is related to its ability to represent the community. Larger juries are much better able to reflect the range of diverse backgrounds, experiences, and viewpoints in a community. Research also documents the superior fact-finding ability of larger juries. In short, jurors are clearly "better by the dozen." Yet many jurisdictions use juries of six or eight persons, even for high profile and significant cases. The original motivation was undoubtedly one of efficiency. But the modest time savings and logistical benefits that might accrue from smaller juries are outweighed by the increased representativeness and the superior fact-finding of twelve-person juries.

Judge Higginbotham and colleagues propose one immediate solution, that federal judges use their discretion to seat twelve-person juries. In addition, we recommend that local and federal laws, rules, and practices be altered so as to once again mandate twelve-person civil juries.

3. Adopt Active Jury Reforms

Civil jury trial procedures seem to be based on an image of the jury as a quiescent, passive group of citizens. Jurors are instructed to refrain from talking to one another about the case and from reaching premature conclusions until all the evidence is presented. At the end of evidence presentation, the judge then instructs the jury, and the members adjourn to the deliberation room, relying on one another's memories to assess the evidence and reach a decision. The assumption seems to be that a passive role is essential to impartiality in the adversary system. Therefore, jurors asking questions and talking to one another as the case proceeds are discouraged or outright forbidden.

Research on jury decision making, though, confirms that although jurors may be sitting quietly, they are actively interpreting evidence as it is presented and integrating it into a coherent narrative of what happened in the case. The confirmation of an active jury suggests the wisdom of active-jury reforms. We recommend specific reforms that have been tested and vetted in real-world cases: (a) preliminary substantive legal instructions; (b) notetaking; (c) question asking; and (d) engaging in trial discussions. Research with preliminary instructions in the law that applies to the case at hand helps jurors know what legal requirements apply as they hear trial evidence. Allowing jurors to take notes, ask questions of witnesses under controlled circumstances, and permitting jurors to discuss the case during trial breaks have all proved their worth in the jurisdictions and courts that use them. These research-based reforms can further strengthen jury decision making in civil cases as well as help the civil jury cope in cases with extremely complex evidence.

Conclusion

Americans insisted on the right to trial by jury as the price for forming a more powerful national government under the Constitution. They recognized, then, as William Blackstone warned nearly two and a half centuries ago, of "secret machinations, which may sap and undermine [the jury]," and cautioned that no matter how "convenient these may appear at first . . . delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty."²⁰² Criticisms of the jury for

adding to cost and delay, still heard today, have proven overblown. The jury serves as an essential bulwark of justice, engrafting the community's collective wisdom into the judicial department to limit the potential arbitrariness and predilections of a single individual entrusted as judge.

Still, in this time when the future of American democracy is in greater peril than we have ever experienced in our lifetimes, which coincides with our slow emergence from the ravages of a life-changing and deadly pandemic, we cannot forget that jury service provides a form of public participation and grassroots governance that the Founders considered as important in maintaining a democratic republic as voting itself.

Americans ought to be alarmed that the civil jury has fallen into disrepair and neglect, ceding authority reposed by the Constitution in the people to unrepresentative judges, legislative bodies with little regard for our system of justice, and private actors who have locked the courthouse doors. The COVID-19 pandemic has accelerated evaporation of this essential institution, creating a backlog of civil cases that will take years to address. The near complete loss of this institution should not be taken lightly. The jury provides unique benefits to the administration of justice, the legitimacy of the court, and society writ large that cannot be recreated by judges, administrative systems, or private arbiters. Deliberate action must be taken to ensure that the promise of the Seventh Amendment is maintained, and that lay judicial participation is restored to its central role in our judiciary, our democratic spirit, and our governance structure.

References

- ¹ See RESOLUTION VII OF THE STAMP ACT CONGRESS (1765).
- ² THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).
- ³ See Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 655 (1972).
- ⁴ See Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 115 (2008).
- ⁵ See Eric J. Hamilton, *Federalism and the State Civil Jury Rights*, 65 STAN. L. REV. 851, 858 (2013).
- ⁶ See NANCY S. MARDER, *THE JURY PROCESS 10–14* (2005) (discussing the jury’s political role); SUJA A. THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* 58–62 (2016).
- ⁷ Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1119 (2014) (reviewing the expansion of the right to serve as a juror).
- ⁸ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 272 (J.P. Mayer ed., George Lawrence trans., 1969) (1835).
- ⁹ See Ferguson, *supra* note 7, at 1115–34.
- ¹⁰ See *infra* notes 58–76 and accompanying text.
- ¹¹ See *infra* notes 76–78 and accompanying text.
- ¹² See *infra* notes 92–94 and accompanying text.
- ¹³ ADMIN. OFFICE OF THE U.S. COURTS, *JUDICIAL BUSINESS OF THE U.S. COURTS, 2019 ANNUAL REPORT OF THE DIRECTOR*, tbl.C-4 (2019).
- ¹⁴ *Id.*
- ¹⁵ See Sarah Gibson, Bree Harris, Nicole Waters, Kathryn Genthon, Amanda Fisher-Boyd & Diane Robinson, COURT STATISTICS PROJECT, *Trial Court Caseload Overview, Caseload Detail–Civil* (2019), <https://www.courtstatistics.org/csp-stat-nav-cards-first-row/csp-stat-civil>.
- ¹⁶ *Id.*
- ¹⁷ See Super. Ct. L.A. County, Gen. Order No. 2020-GEN-023-00, Administrative Order of the Presiding Judge Re: COVID-19 Pandemic (Oct. 9, 2020) at 10.
- ¹⁸ American Arbitration Association, *The Arbitration Solution to COVID-19-Stalled Court Litigation*, www.ADR.ORG, <https://www.adr.org/litigation-to-arbitration> (last visited June 7, 2021).
- ¹⁹ See Diane Robinson & Sarah Gibson, COURT STATISTICS PROJECT, *Pandemic Caseload Highlights, Court filings and disposition, 2019–2020* (March 22, 2021), https://www.courtstatistics.org/_data/assets/pdf_file/0022/61519/2020_4Q_pandemic.pdf.
- ²⁰ See, e.g., Mandi Hunter, “Who pays if Kansas doesn’t fund its court system adequately? You, eventually,” *Kansas City Star*, Apr. 30, 2021, <https://www.kansascity.com/opinion/readers-opinion/guestcommentary/article251037774.html>; Tom Coulter, “Officials: Budget cuts likely to have effects on court system,” *Rawlins Times*, Oct. 13, 2020, <https://perma.cc/4AA5-Z78Z>.
- ²¹ See, e.g., NAT’L CTR. FOR STATE COURTS, *Coronavirus and the Courts*, <https://www.ncsc.org/newsroom/public-health-emergency> (providing links to state court experiments with virtual jury trials); ONLINE COURTROOM PROJECT, Advisory Task Force, <https://www.onlinecourtroom.org/> (describing efforts by trial consultants and others to study and improve online trials).
- ²² See, e.g., Shari S. Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 282, 298–300 (Robert E. Litan ed., 1993).
- ²³ See Valerie P. Hans, John Gastil & Traci Feller, *Deliberative Democracy and the American Civil Jury*, 11 J. EMPIRICAL LEGAL STUD. 697, 710–12 (2014).
- ²⁴ See, e.g., CARL T. BOGUS, *WHY LAWSUITS ARE GOOD FOR AMERICA* 3–5 (2001); ALEXANDRA LAHAV, *IN PRAISE OF LITIGATION* 1–2 (2017).
- ²⁵ 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* *379 (1765).
- ²⁶ *Id.*
- ²⁷ For a review of the Zenger trial and its significance, see generally JAMES ALEXANDER, *A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER* (1963).
- ²⁸ See, e.g., *Erving v. Cradock*, Quincy 553 (Mass. 1761).
- ²⁹ STEPHEN BOTEIN, *EARLY AMERICAN LAW AND SOCIETY* 57 (1983) (quoting Governor William Shirley).
- ³⁰ Letter from Governor Francis Bernard to Thomas Pownall (Aug. 28, 1761), in JOSIAH QUINCY, JR., *REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY 1761–1772*, at 555 n.2 (1865).
- ³¹ RESOLUTION VII OF THE STAMP ACT CONGRESS (1765).
- ³² See Wolfram, *supra* note 3, at 655.
- ³³ See AKHIL REED AMAR, *THE BILL OF RIGHTS* 90 (1998).
- ³⁴ THE FEDERALIST NO. 83 (Alexander Hamilton).

- ³⁵ *Essay of A Democratic Federalist*, reprinted in 3 THE COMPLETE ANTI-FEDERALIST 58, 61 (Herbert J. Storing ed., 1981).
- ³⁶ *Letters from the Federal Farmer (XV)*, reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 35, at 320.
- ³⁷ Letter from Thomas Jefferson to L'Abbé Arnold (July 19, 1789), in 3 WORKS OF THOMAS JEFFERSON 81–82 (Wash. ed. 1854).
- ³⁸ *Id.*
- ³⁹ *Id.*
- ⁴⁰ See Wolfram, *supra* note 3, at 654–55.
- ⁴¹ James Iredell in the North Carolina Ratifying Convention (July 29, 1788), in 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTIONS 120 (J. Elliot ed. 1836).
- ⁴² See Lochlan F. Shelfer, *How the Constitution Shall Not Be Construed*, 2017 B.Y.U. L. REV. 331, 353.
- ⁴³ See Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 298 (1966).
- ⁴⁴ See Parsons v. Bedford, 28 U.S. 433, 446 (1830) (Story, J.).
- ⁴⁵ AMAR, *supra* note 33, at 96.
- ⁴⁶ For a brief history of the issue, see Samuel R. Sommers, Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 204–08 (2001). See also Donald G. Gifford & Brian Jones, *Keeping Cases from Black Juries: An Empirical Analysis of How Race, Income Inequality, and Regional History Affect Tort Law*, 73 WASH. & LEE L. REV. 557, 559 (2016).
- ⁴⁷ *Ernst v. Hudson River R.R. Co.*, 24 How. Pr. 97, 100 (N.Y. 1862).
- ⁴⁸ Renée Lettow Lerner, *The Uncivil Jury, part 4: The Collapse of the Civil Jury*, WASH. POST (May 28, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/28/the-uncivil-jury-part-4-the-collapse-of-the-civil-jury/>.
- ⁴⁹ See Herbert M. Kritzer, *The Trials and Tribulations of Counting “Trials”*, 62 DEPAUL L. REV. 415, 416 (2013) (collecting sources).
- ⁵⁰ See ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR, tbl.C-4 (1962–2020).
- ⁵¹ See Brian J. Ostrom, Shauna Strickland & Paula Hannaford, *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 765 (2004).
- ⁵² See Gibson et al., *supra* note 15.
- ⁵³ ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR, tbl.C-4 (1962–2020).
- ⁵⁴ Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 963 (1987).
- ⁵⁵ CHARLES E. CLARK, CODE PLEADING 53 (1928).
- ⁵⁶ Fleming James, Jr., *Trial by Jury and the New Federal Rules of Procedure*, 45 YALE L.J. 1022, 1026 (1936).
- ⁵⁷ Charles E. Clark, *The New Illinois Civil Practice Act*, 1 U. CHI. L. REV. 209, 212 (1933).
- ⁵⁸ Harry W. Henry, *The Proposed Code of Civil Procedure for Missouri Parties and Pleadings*, 7 MO. L. REV. 1, 6 (1942).
- ⁵⁹ Alan K. Goldstein, *A Short History of Discovery*, 10 ANGLO-AM L. REV. 257, 266 (1981).
- ⁶⁰ Tony Mauro, *In Speech Notes, Neil Gorsuch Painted a Dark Picture of Litigation*, NAT'L L.J. (Mar. 13, 2017), <http://www.nationallawjournal.com/id=1202781242573/>.
- ⁶¹ See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 377 (1982).
- ⁶² See *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351 (1960).
- ⁶³ 28 U.S.C. § 471.
- ⁶⁴ FED. R. CIV. P. 26 advisory committee notes to 2015 amendment (noting, *inter alia*, that “[t]he parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes”).
- ⁶⁵ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 578–80 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 244–47 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 319–323 (1986).
- ⁶⁶ Arthur R. Miller, *The Pretrial Rush to Judgment*, 78 N.Y.U. L. REV. 982, 1056 (2003).
- ⁶⁷ Joe S. Cecil, Rebecca N. Eyre, Dean Miletich & David Rindskopf, *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 861 (2007).
- ⁶⁸ See Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1033.
- ⁶⁹ See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).
- ⁷⁰ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
- ⁷¹ Some authors have noted how similar the standard for motion to dismiss and summary judgment have now become under the Court’s new standard. See Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 18 (2010).
- ⁷² See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).
- ⁷³ See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006).
- ⁷⁴ See *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2778 (2010).
- ⁷⁵ Thomas J. Stipanowich, *Arbitration: The “New Litigation”*, 2010 U. ILL. L. REV. 1, 8.

- ⁷⁶ See Ronen Avraham, Database of State Tort Law Reforms 6.1 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=902711 (collecting and sorting the multitude of tort reform measures from around the country); see also Joanne Doroshow, *Tort Reform: Blocking the Courthouse Door and Denying Access to Justice*, in 2 COLLECTED ESSAYS ON EXPANDING ACCESS TO JUSTICE 57 (New York Law School, Impact Center for Public Interest Law and Racial Justice Project, 2016), https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1429&context=fac_articles_chapters (arguing that tort reforms have limited access to justice and reduced jury trials).
- ⁷⁷ The distinction between economic and noneconomic damages is often overstated in the policy and popular discourse. Both forms of damages aim to compensate the victims of private harm by making them whole, rather than punish tortfeasors for their wrongdoing. Economic damages compensate a victim for more easily calculable losses, such as medical bills, lost income, or property loss; whereas noneconomic damages compensate a victim for harms that are not readily translated into monetary terms, such as disfigurement or loss of reproductive capacity. For a fuller discussion on this, see generally Herbert M. Kritzer, Guangya Liu & Neil Vidmar, *An Exploration of "Non-Economic" Damages in Civil Jury Awards*, 55 WM. AND MARY L. REV. 971 (2014). Still, the "calculation of lost wages and future medical care can be hotly contested trial issues." Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391, 439 (2005). As a result, assessing economic damages may oftentimes be just as challenging as determining noneconomic damages.
- ⁷⁸ Stephen Daniels & Joanne Martin, *Damage Caps and Access to Justice: Lessons from Texas*, 96 OR. L. REV. 635, 660–71 (2018); see also Mohammad Hossein Rahmai, David A. Hyman, Bernard Black & Charles Silver, *Insurance Crisis or Liability Crisis? Medical Malpractice Claiming in Illinois, 1980–2010*, 13 J. EMPIRICAL LEGAL STUD. 183, 202 (2016) (examining Illinois data and concluding that, with caps, smaller damage cases "all but disappeared" and led to an "increase in mean and median payouts [that] led many to conclude that the med mal system has become more generous to plaintiffs, when the opposite was closer to reality").
- ⁷⁹ Shari Seidman Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 LA. L. REV. 120, 127 (2020).
- ⁸⁰ *Id.* at 131.
- ⁸¹ *Id.* at 137, Fig. 5.
- ⁸² *Id.* at 121.
- ⁸³ Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL'Y & L. 788, 789 (2000).
- ⁸⁴ *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 206 (1848) (emphasis added).
- ⁸⁵ *Id.* at 207.
- ⁸⁶ Stanley E. Sacks, *Preservation of the Civil Jury System*, 22 WASH. & LEE L. REV. 76, 79 (1965).
- ⁸⁷ Hans Zeisel, *The Debate over the Civil Jury in Historical Perspective*, 1990 U. CHI. LEGAL F. 25, 26 (1990) (quoting 1962–63 Harvard Law School Dean's Rep. 5–6).
- ⁸⁸ *Ross v. Bernhard*, 396 U.S. 531, 532–33 (1970).
- ⁸⁹ *Id.* at 538.
- ⁹⁰ *Id.* at 538 n.10.
- ⁹¹ *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n.4 (1989).
- ⁹² See Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 LAW & HUM. BEHAV. 419, 436 (1996); Steven Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes*, 1998 WIS. L. REV. 237, 250.
- ⁹³ For a debunking of the tall tales that were circulated, see generally Marc Galanter, *An Oil Strike in Hell: Contemporary Legends about the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998).
- ⁹⁴ See, e.g., THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* 26 (2004) ("The notoriety of tort litigation, combined with the powers of persuasion of corporate and professional interests, has put personal injury lawsuit reform at the top of the antilitigation agenda."); STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* 21 (1995) (describing the political clout, resources, and propaganda utilized to sell the ideas of runaway juries and a system out of whack).
- ⁹⁵ *Central Alabama Electric Cooperative v. Tapley*, 546 So. 2d 371, 376 (Ala. 1989).
- ⁹⁶ *Roberts v. Stevens Clinic Hosp., Inc.*, 345 S.E.2d 791, 803 (W. Va. 1986).
- ⁹⁷ NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 147–190, 281–302 (2007).
- ⁹⁸ *Id.* at 281–302.
- ⁹⁹ Theodore Eisenberg, Neil LaFountain, Brian Ostrom, David Rottman & Martin T. Wells, *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 779 (2002) ("Juries and judges award punitive damages at about the same rate, and their punitive awards bear about the same relation to their compensatory awards.").
- ¹⁰⁰ U.S. CONST. amend. VII.
- ¹⁰¹ *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998) (quoting *Lord Townshend v. Hughes*, 2 Mod. 150, 151, 86 Eng. Rep. 994, 994–995 (C.P. 1677)).
- ¹⁰² *Hetzel v. Prince William Cty.*, 523 U.S. 208, 211 (1998) (per curiam).

- ¹⁰³ Day v. Woodworth, 54 U.S. 363, 371 (1851).
- ¹⁰⁴ See Thomas H. Cohen & Kyle Harbeck, U.S. DEPARTMENT OF JUSTICE OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, *Punitive Damage Awards in State Courts, 2005* 1 (March 2011), <https://www.bjs.gov/content/pub/pdf/pdasc05.pdf> (reporting that “[p]unitive damages were awarded in 700 (5%) of the 14,359 trials where the plaintiff prevailed” and that the “median punitive damage award for the 700 trials with punitive damages was \$64,000 in 2005”).
- ¹⁰⁵ See PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 3–10 (1988).
- ¹⁰⁶ See Deborah Jones Merritt & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 Ohio St. L.J. 315, 316 (1999).
- ¹⁰⁷ See Michael L. Rustad, *The Closing of Punitive Damages’ Iron Cage*, 38 Loy. L.A. L. Rev. 1297, 1298 (2005).
- ¹⁰⁸ See, e.g., Exxon Shipping Co. v. Baker, 554 U.S. 471, 501 n.17 (2008) (declining to rely upon an Exxon-funded studies that used “mock juries” to demonstrate the unpredictability of punitive damage awards and describing the studies as part of “a body of literature running parallel to anecdotal reports.”).
- ¹⁰⁹ Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276, 278 (1989) (finding the due-process argument was not preserved and rejecting the applicability of the Excessive Fines Clause).
- ¹¹⁰ *Id.* at 282 (O’Connor, J., dissenting) (citing HUBER, *supra* note 105, at 152–71).
- ¹¹¹ BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996).
- ¹¹² Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432, 437–38, 438 n.11 (2001).
- ¹¹³ *Id.*
- ¹¹⁴ See Lake Shore & M.S. Ry. Co. v. Prentice, 147 U.S. 101, 107 (1893) (recognizing that punitive damages are awarded “not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others”); see also Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 164 (2003) (taking issue with Supreme Court’s historical and functional understanding of punitive damages).
- ¹¹⁵ See, e.g., Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 14 (1990) (describing press kits and publicity tactics highlighting tales and anecdotes about punitive-damage verdicts, while skewing the available data to support a political end).
- ¹¹⁶ Exxon Shipping, 554 U.S. at 497.
- ¹¹⁷ *Id.* at 499.
- ¹¹⁸ See PETER W. HUBER, *GALILEO’S REVENGE: JUNK SCIENCE IN THE COURTROOM* 1–9 (1991).
- ¹¹⁹ See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).
- ¹²⁰ FED. R. EVID. 703.
- ¹²¹ Daubert, 509 U.S. at 588, 592–93.
- ¹²² See, e.g., Richard O. Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 181–247 (Robert E. Litan ed., 1993) (concluding that “the weight of the evidence indicates that juries can reach rationally defensible verdicts in complex cases”).
- ¹²³ See, e.g., WASH. CONST. art. I, §§ 10, 21.
- ¹²⁴ Richard Y. Schauffler & Matthew Kleiman, *State Courts and the Budget Crisis: Rethinking Court Services 2010*, THE BOOK OF THE STATES 289, 289.
- ¹²⁵ *Id.* at 290; Abby Goodnough, *Jury Trials to Be Halted in One State Feeling Pinch*, N.Y. TIMES (Dec. 8, 2008), <https://www.nytimes.com/2008/12/09/us/09court.html>.
- ¹²⁶ CALIFORNIA LEGISLATIVE ANALYST’S OFFICE, *The 2021–22 Budget: Trial Court Operations Proposals* 1 (Feb. 11, 2021), <https://lao.ca.gov/Publications/Report/4362>.
- ¹²⁷ Andrew Strickler, *State Court Budget Forecast: Stormy, with Rising Case Backlogs*, LAW 360, at 1 (Nov. 23, 2020), <https://www.law360.com/articles/1331216/state-court-budget-forecast-stormy-with-rising-backlogs>.
- ¹²⁸ Robert S. Peck & Erwin Chemerinsky, *The Right to Trial by Jury as a Fundamental and Substantive Right and Other Civil-Trial Constitutional Protections*, 96 ORE. L. REV. 489, 493 (2018).
- ¹²⁹ New Mexico Courts, *Jury Trials Resume*, Feb. 1, 2021, www.nmcourts.gov, <https://www.nmcourts.gov/news/>.
- ¹³⁰ United States Courts, *Courts Suspending Jury Trials as COVID-19 Cases Surge*, Nov. 20, 2020, www.uscourts.gov, <https://www.uscourts.gov/news/2020/11/20/courts-suspending-jury-trials-covid-19-cases-surge>.
- ¹³¹ See Robinson & Gibson, *supra* note 19.
- ¹³² Some judges have grown particularly concerned with this phenomenon and have adopted “Junior Attorney Rules” encouraging litigants to give standup roles to attorneys with less than five years’ experience. See e.g., Next Generation Lawyers, *Judicial Orders Providing/Encouraging Opportunities for Junior Lawyers* (May 25, 2016), <https://nextgenlawyers.com/wp-content/uploads/2013/04/Judicial-Orders-re-Next-Gen-5.25.16.pdf>.
- ¹³³ TOCQUEVILLE, *supra* note 8, at 464.
- ¹³⁴ Special juries, in which individuals are selected for specific education, training, or experience to serve as civil jurors, are an option in the United States, but their usage has declined dramatically in recent years. See generally JAMES OLDHAM, *TRIAL BY JURY*:

THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 174–212 (2006) (reviewing the history of special juries in the United States).

¹³⁵ See Valerie P. Hans, David H. Kaye, B. Michael Dann, Erin J. Farley & Stephanie Albertson, *Science in the Jury Box: Jurors' Comprehension of Mitochondrial DNA Evidence*, 35 LAW & HUM. BEHAV. 60, 69 (2011) (showing jurors with more education and more science courses did better on DNA quiz).

¹³⁶ JENNIFER K. ROBBENOLT & VALERIE P. HANS, THE PSYCHOLOGY OF TORT LAW 80–81, 212 (2016).

¹³⁷ JOANNA SHEPHERD, JOBS, JUDGES, AND JUSTICE: THE RELATIONSHIP BETWEEN PROFESSIONAL DIVERSITY AND JUDICIAL DECISIONS 12–16 (2021) (finding that federal district court judges with corporate backgrounds and backgrounds as prosecutors were significantly less likely to favor employees in employment discrimination cases, even controlling for other factors and limiting the analysis to Obama judges).

¹³⁸ *Id.*

¹³⁹ Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L. & SOC. SCI. 203, 211 (2017) (citing D. M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decisionmaking*, 7 STATE POLITICS POL'Y Q. 281, 281–97 (2007); J. M. Shepherd & M. S. Kang, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 69–130 (2011)).

¹⁴⁰ See, e.g., Rachlinski & Wistrich, *supra* note 139, at 216–222 (summarizing research on the impact of judges' personal characteristics on decisions). For examples of relevant research, see generally JEFFREY A. SEGAL & HAROLD SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002) (documenting decision making differences in judgments by judges appointed by Republican and Democratic presidents); Christina L. Boyd, Lee Epstein & Andrew Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL'Y SCI. 389 (2010) (finding judge gender affects decisions in sex discrimination cases).

¹⁴¹ Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of Our Government*, 55 WM. & MARY L. REV. 1241, 1266–67 (2014).

¹⁴² See, e.g., Rachlinski & Wistrich, *supra* note 139, at 210 (citing G. A. Huber & S. C. Gordon, *Accountability and Coercion: Is Justice Blind when it Runs for Office?* 48 AM. J. POLITICAL SCI. 247, 247–63 (2004); John H. Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 SO. CAL. L. REV. 465, 465–503 (1999); J. M. Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. LEGAL STUD. 169, 269–206 (2009)).

¹⁴³ NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS (2000); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 520–29 (1991) (describing story model and research program); VIDMAR & HANS, *supra* note 97, 132–35 (describing story model of juror decision making and citing research support).

¹⁴⁴ In civil jury decision making, for example, see EDIE GREENE & BRIAN H. BORNSTEIN, DETERMINING DAMAGES: THE PSYCHOLOGY OF JURY AWARDS 79–94 (2003) (describing research showing demographic effects on damage award decision making).

¹⁴⁵ See *supra* notes 137–142 and accompanying text.

¹⁴⁶ 550 U.S. 372 (2007).

¹⁴⁷ *Id.* at 380.

¹⁴⁸ See Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?: Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841 (2009).

¹⁴⁹ Phoebe C. Ellsworth, *Are Twelve Heads Better than One?* 52 LAW & CONTEMP. PROBS. 205, 206 (1989). On jury size, see Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 DEL. LAW REV. 1, 28 (2001).

¹⁵⁰ Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 604 (2006).

¹⁵¹ Shari S. Diamond, Mary R. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Nonunanimous Civil Jury*, 100 NW. U. L. REV. 201, 229–30 (2006) (describing problematic aspects of the nonunanimous jury); Hans, *supra* note 149, at 23–24 (summarizing empirical evidence of the benefits of a unanimity decision rule and larger jury size).

¹⁵² See, e.g., HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 63–65 (1966); Valerie P. Hans, *What's it Worth? Jury Damage Awards as Community Judgments*, 55 WM. & MARY L. REV. 935, 937 (2014). See also Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1148–55 (1991–1992) (contrasting perceptions of civil juries with realities of their decision making).

¹⁵³ See, e.g., Diamond, *supra* note 22, at 288.

¹⁵⁴ VIDMAR & HANS, *supra* note 97, at 19, 267–79 (2007) (describing multiple methods used (at 19); presenting research findings about juror judgments of civil liability (at 267–79)).

¹⁵⁵ KALVEN & ZEISEL, *supra* note 152, at 63.

¹⁵⁶ *Id.* at 64. See comparison of judge and jury verdicts in Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, CORNELL L. REV. 119, 142–47 (2002–2003); Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1961–64 (2008).

¹⁵⁷ Shari Seidman Diamond, Neil Vidmar, Mary Rose, Leslie Ellis & Beth Murphy, *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZONA L. REV. 1, 67 n.108 (2003) (77% agreement); Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 LAW & HUM. BEHAV. 29, 49 (1994). (63% agreement).

- ¹⁵⁸ See, e.g., VIDMAR & HANS, *supra* note 97, 281–320 (presenting research on compensatory and punitive damage award decision making by juries); Hans, *supra* note 152, at 939.
- ¹⁵⁹ Harry Kalven, Jr., *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158, 160 (1958).
- ¹⁶⁰ Hans, *supra* note 152, at 939.
- ¹⁶¹ Randall R. Bovbjerg, Frank A. Sloan & James F. Blumstein, *Valuing Life and Limb in Tort: Scheduling “Pain and Suffering”*, 83 NW. U. L. REV. 908, 941 (1989) (summarizing evidence showing the strong relationship between injury severity and damage awards; those who are more severely injured generally receive higher damage awards).
- ¹⁶² Herbert Kritzer, Guangya Liu & Neil Vidmar, *An Exploration of “Noneconomic” Damages in Civil Jury Awards*, 55 WM. & MARY L. REV. 971, 1012–13 (2014).
- ¹⁶³ Theodore Eisenberg, Valerie P. Hans & Martin T. Wells, *The Relation Between Punitive and Compensatory Awards: Combining Extreme Data with the Mass of Awards*, in CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL AND LEGAL PERSPECTIVES 105, 106 (Brian H. Bornstein, Richard L. Wiener, Robert F. Schopp & Steven L. Willborn eds., 2008) (finding strong relationship between compensatory and punitive damages); Valerie P. Hans & Valerie F. Reyna, *To Dollars from Sense: Qualitative to Quantitative Translation in Jury Damage Awards*, 8 J. EMPIRICAL LEGAL STUD. 120, 135 (2011) (finding strong relationship between compensatory and punitive damages).
- ¹⁶⁴ See VIDMAR & HANS, *supra* note 97, at 76–79 (2007) (describing points in the jury selection process that contribute to decreases in jury representativeness).
- ¹⁶⁵ See Shari S. Diamond, Destiny Peery, Francis J. Dolan & Emily Dolan, *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. EMPIRICAL LEGAL STUD. 425, 434 (2009).
- ¹⁶⁶ Patrick E. Higginbotham, Lee H. Rosenthal & Steven S. Gensler, *Better by the Dozen: Bringing Back the Twelve-Person Civil Jury*, 104 JUDICATURE 47, 49 (2020) (reporting study of jury size in 15 district courts during 2016–2018 and finding that 61.4% of civil juries in these district courts were eight-person juries).
- ¹⁶⁷ *Id.* at 51–53 (summarizing the empirical research).
- ¹⁶⁸ Tracey E. George & Albert H. Yoon, AM. CONSTITUTION SOC’Y, *The Gavel Gap: Who Sits in Judgment on State Courts?* 3 (2016), <https://www.acslaw.org/wp-content/uploads/2018/02/gavel-gap-report.pdf> (documenting that women and racial and ethnic minorities are substantially underrepresented in state court judiciaries); FEDERAL JUDICIAL CENTER, *Demography of Article III Judges, 1789–2020*, <https://www.fjc.gov/history/exhibits/graphs-and-maps/demography-article-iii-judges-1789-2020-introduction> (demographic information for federal judges by race or ethnicity and gender).
- ¹⁶⁹ For summaries of active jury reforms and related research on their effectiveness, see generally JURY TRIAL INNOVATIONS 113–139 (G. Thomas Munsterman, Paula L. Hannaford-Agor & G. Marc Whitehead 2nd ed., 2006); B. Michael Dann & Valerie P. Hans, *Recent Evaluative Research on Jury Trial Innovations*, 41 CT. REV. 12, 12–18 (2004); Valerie P. Hans, *Empowering the Active Jury: A Genuine Tort Reform*, 13 ROGER WILLIAMS U. L. REV. 40, 55–70 (2008); Valerie P. Hans & Michael J. Saks, *Improving Judge and Jury Evaluation of Scientific Evidence*, 147 DAEDALUS 164, 164–175 (2018).
- ¹⁷⁰ SEVENTH CIRCUIT AMERICAN JURY PROJECT, FINAL REPORT 28 (2008), https://www.uscourts.gov/sites/default/files/seventh_circuit_american_jury_project_final_report_0.pdf.
- ¹⁷¹ *Id.*
- ¹⁷² Research studies on notetaking include: Lynne ForsterLee, Irwin A. Horowitz & Martin Bourgeois, *Effects of Notetaking on Verdicts and Evidence Processing in a Civil Trial*, 18 LAW & HUM. BEHAV. 567, 574–75 (1994); Larry Heuer & Steven D. Penrod, *Juror Notetaking and Question Asking During Trials: A National Field Experiment*, 18 LAW & HUM. BEHAV. 121, 135–40 (1994); David L. Rosenhan, S. L. Eisner & R. J. Robinson, *Notetaking Can Aid Juror Recall*, 18 LAW & HUM. BEHAV. 53, 59–60 (1994) (identifying benefits of note taking).
- ¹⁷³ Heuer & Penrod, *supra* note 172, at 142.
- ¹⁷⁴ Diamond et al., *supra* note 157, at 74; Paula L. Hannaford, Valerie P. Hans & G. Thomas Munsterman, *Permitting Jury Discussions During Trial: Impact of the Arizona Reform*, 24 LAW & HUM. BEHAV. 359, 378 (2000).
- ¹⁷⁵ Diamond et al., *supra* note 157, at 74.
- ¹⁷⁶ See generally Paula L. Hannaford-Agor, NAT’L CTR. FOR STATE COURTS, *Short, Summary and Expedited: The Evolution of Civil Jury Trials* (2012), <http://www.ncsc.org/~media/Files/PDF/Information%20and%20Resources/Civil%20cover%20sheets/ShortSummaryExpedited-online%20rev.ashx> (reviewing expedited and summary jury trial programs around the country).
- ¹⁷⁷ TOCQUEVILLE, *supra* note 8, at 274.
- ¹⁷⁸ *Id.*
- ¹⁷⁹ Diamond, *supra* note 22, at 298–300 (summarizing the research).
- ¹⁸⁰ JANET T. MUNSTERMAN, G. THOMAS MUNSTERMAN, BRIAN LYNCH & STEVEN D. PENROD, THE RELATIONSHIP OF JUROR FEES AND TERMS OF SERVICE TO JURY SYSTEM PERFORMANCE 6 (National Center for State Courts, 1991).
- ¹⁸¹ Diamond, *supra* note 22, at 286.
- ¹⁸² Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381, 2382 (1999).

- ¹⁸³ JOHN GASTIL, E. PIERRE DEESS, PHIL WEISER & CINDY SIMMONS, THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION 46–47 (2010); John Gastil, E. Pierre Deess, Phil Weiser, & Jordan Meade, *Jury Service and Electoral Participation: A Test of the Participation Hypothesis*, 70 J. POLITICS 351, 358–60 (2008); John Gastil, E. Pierre Deess, & Phil Weiser, *Civic Awakening in the Jury Room: A Test of the Connection Between Jury Deliberation and Political Participation*, 64 J. POLITICS 585, 586 (2002).
- ¹⁸⁴ GASTIL ET AL., THE JURY AND DEMOCRACY, *supra* note 183, at 46–47.
- ¹⁸⁵ Hans et al., *supra* note 23, at 710–12.
- ¹⁸⁶ *Id.*
- ¹⁸⁷ Diamond & Salerno, *supra* note 79, at 132.
- ¹⁸⁸ LAHAV, *supra* note 24, at 1–2.
- ¹⁸⁹ *Id.* at 56; *see also* Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L. REV. 1657, 1683 (2016).
- ¹⁹⁰ *See, e.g.*, CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA 138–169 (2001) (using examples from the automobile industry). *See also* Stephan Landsman, *Juries as Regulators of Last Resort*, 55 WM. & MARY L. REV. 1061, 1067 (2014), <https://scholarship.law.wm.edu/wmlr/vol55/iss3/11> (discussing the civil jury’s role in filling in gaps in the regulatory regime).
- ¹⁹¹ *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 19–68 (2016).
- ¹⁹² *See id.*
- ¹⁹³ *See generally* RICHARD H. THALER & CASE R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 1–16 (2008).
- ¹⁹⁴ *See* Hon. Neil M. Gorsuch & Hon. Susan P. Graber, Suggestion 16-CV-F in COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (Jan. 3, 2017), http://www.uscourts.gov/sites/default/files/2017-01-standing-agenda_book_0.pdf.
- ¹⁹⁵ *See* Richard Lorren Jolly, *Toward a Civil Jury-Trial Default Rule*, 67 DEPAUL L. REV. 685, 687 (2018).
- ¹⁹⁶ Diamond & Salerno, *supra* note 79, at 144.
- ¹⁹⁷ Daniels & Martin, *supra* note 78, at 660.
- ¹⁹⁸ In some states, however, damage caps limit total damages, economic and non-economic, and may not even compensate fully for medical expenses caused by the tortious conduct. *See, e.g.*, COLO. REV. STAT. § 13-64-302; IND. CODE § 34-18-14-3; LA. REV. STAT. ANN. § 40:1299.42; NEB. REV. STAT. § 44-2825; VA. CODE ANN. § 8.01-581.15.
- ¹⁹⁹ *See* Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1266 (2004).
- ²⁰⁰ *See, e.g.*, David A. Hyman, Charles M. Silver & Bernard S. Black, *Does Tort Reform Affect Physician Supply? Evidence from Texas*, 442 INT’L REV. L. & ECON. 203, 217 (2015); *see also* Myungho Paik, Bernard Black & David A. Hyman, *Damage Caps and the Labor Supply of Physicians: Evidence from the Third Reform Wave*, 18 AM. L. & ECON. REV. 463, 463 (2016).
- ²⁰¹ Diamond & Salerno, *supra* note 79, at 121.
- ²⁰² 4 WILLIAM BLACKSTONE, COMMENTARIES *343–44 (1769).

Index of Images

Page 1	Carol M. Highsmith, East courtroom, Judge's Bench and Jury Box, Howard M. Metzenbaum U.S. Courthouse, Cleveland, Ohio (2009).
Page 7	Martha J. Lamb, The Famous Zenger Trial, Wall Street in History (1883).
Page 10	Jack Delano, Jury section in the Courtroom in Franklin, Heard County, Georgia (1941).
Page 14	Federal Rules of Civil Procedure, House Committee on the Judiciary (2018).
Page 15	Carol M. Highsmith, Door, Thurgood Marshall U.S. Courthouse in the Financial District of New York City (2013).
Page 19	Theodor Horydczak, U.S. Supreme Court Exterior (1920).
Page 22	Justice Requires Jurors, Harris County District Court (2021).
Page 24	First woman jury, Los Angeles, Los Angeles Times (Nov. 3, 1911).
Page 25	Still Image of Police Dashcam Footage, <i>Scott v. Harris</i> , 550 U.S. 372 (2007).
Page 28	Marilyn Church, The Robert Chambers Trial Jury Listening to a Court Reporter Reading the Transcript of the Trials (1988).