



## 2011 Forum for State Appellate Court Judges

### *The Jury Trial Implosion: The Decline of Trial by Jury and Its Significance for Appellate Courts*

## **THE IMPACT OF THE VANISHING JURY TRIAL ON PARTICIPATORY DEMOCRACY**

Stephan Landsman\*

### *Executive Summary*

*In part I (“Jury Trials and the Enhancement of Democracy”) Professor Landsman traces the evolution of the jury from a source of information for the new Norman rulers of Britain in the 11<sup>th</sup> Century to a body of middle-class citizens who would weigh evidence provided by others, deliberate, and seek consensus on a conclusive, unanimous decision. The emergence of the function of making key decisions on behalf of the community led to a conviction that Britons had a right to this form of decision-making and self-governance. Jury trial was not without its opponents, however, as rulers discovered that jurors would not always reach the decisions desired by the government. But with the emergence of the jury’s independent streak came a realization that the jury could play a role in preserving newly secured freedoms. Unsurprisingly, this link between jury trial and personal freedom found fertile ground in England’s American colonies, where it became an instrument of resistance to repression. The jury played an important role in defending free speech and political debate, and its role was recognized and secured in proto-constitutions like the pronouncements of the Stamp Act Congress and the First Continental Congress, and eventually in the Declaration of Independence. Dedication to the jury as an institution of democracy was sufficiently strong that it was secured by the Sixth and Seventh Amendments to the Constitution in 1789, and observers like Tocqueville noted the symbiotic relationship between jury service and other kinds of participation in the overall democratic process—a relationship that has been strengthened by 20<sup>th</sup> Century improvements in the diversity of jury pools.*

*In part II (“Attacks on the Democratic Functioning of the Jury”), Professor Landsman reviews two prominent, and more recent, developments that undercut the*

*jury's role in American democracy. The first was the reduction of the size of juries in many jurisdictions to six members. This was validated by the U. S. Supreme Court on the mistaken premise that there was empirical evidence that such a change would improve jury efficiency—yet smaller juries tend to be less diverse, and they educate fewer citizens to the democratic adjudication process. The second development was the elimination of the requirement of unanimity for jury verdicts—a change that tended to reduce the amount of time spent in deliberation, and made it easier for majorities to ignore the concerns of minorities (both numerical and ethnic).*

*Part III (“Reducing Access to Jury Trials”) addresses the series of court decisions since the 1980s that have made it far harder to get disputes before a jury. A major trend in this period has been the imposition of arbitration requirements on consumers in a wide range of transactions, on the pretense that consumers have “agreed” to waive their Constitutional rights to jury trial. This trend has been aided by Supreme Court decisions holding that arbitration is “favored” over trial, even though the right to jury trial is protected by the Seventh Amendment. Professor Landsman notes the irony that the very businesses that impose arbitration on consumers now frequently insist on mediation as an alternative to trial when dealing with their economic equals. The second trend (again supported by Supreme Court decisions) is the liberalization of standards for summary judgment and dismissal, with the result that judges now often act as screeners of which cases should be decided by a jury. Other recent developments include the imposition of substantial fees for jury trial in many states and the significant loss of jury trial experience for both lawyers and judges alike.*

*In part IV (“Can We Reverse the Trend?”), Professor Landsman describes initiatives that may help to reverse the loss of jury trial’s democratizing potential. Two examples are the ABA’s recent adoption of its PRINCIPLES FOR JURIES AND JURY TRIALS and the Seventh Circuit’s American Jury Project, both of which seek to encourage courts to conduct more trials, to employ 12-member juries, and to allow more direct participation in trials by jurors themselves. Both projects hold out the possibility that jury trial’s “democracy dividend” may be realized more fully in the future.*

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## **I. Jury Trials and the Enhancement of Democracy<sup>1</sup>**

### **A. The English Background**

In the beginning the jury had nothing to do with democracy. It was an instrument by which the victorious Normans sought to extend their power throughout England. After their victory at Hastings in 1066, the conquerors began calling together groups of propertied local residents and commanding them, on the basis of their knowledge, to testify about property arrangements, local customs and taxable resources. Thus did the new rulers gain knowledge of their realm while expending little on the inquiry. One

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<sup>1</sup> The primary source for this section, unless otherwise noted, is Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L. REV. 579 (1993).

product of this process was the Domesday Book, which was recorded in 1085-86. The idea of using locals to deal with legal questions did not remain static. In the reign of Henry II, beginning in 1154, the jury was transformed into a genuine adjudicatory instrument—one asked to resolve property disputes. Still there was little notion that the jury was a weigher of facts or mechanism of representative governance. The jurors of Henry's day were more akin to witnesses than judges. They were locals who were supposed to decide property disputes and, later, other matters, on the basis of their personal knowledge of the underlying facts. If their decision was shown to be wrong they were punished as if they had committed perjury, using a mechanism called attain. Henry's innovation was extremely popular and spread to a wide variety of civil and criminal disputes. Its appeal is easy to understand. The jury mechanism was speedy, less risky and more likely to be factually sound than was the case with trial by combat, ordeal or oath (a sort of swearing contest)—the alternatives then available.

From fairly early on, however, jury trials had deliberative and proto-democratic elements. It was probably never the case that all the jurors were actual witnesses to the litigated facts or events. Instead, because the jury was charged with reaching a collective verdict, there must have been discussion and consensus building. By the mid fourteenth century verdicts were required to be unanimous. Once jurors were compelled to harmonize their views into one conclusive verdict they had to debate, deliberate, vote and agree. With the requirement of unanimity came one of the key strands of juror democracy—shared discourse resulting in an agreed decision. Over time assumptions about jurors having personal knowledge of the facts were abandoned altogether and the perjury-like attain mechanism was dropped. By the middle 1500s jurors were no longer witnesses ~~on~~ in any sense but the auditors of evidence charged to come to a unanimous verdict.

Between 1400 and 1700 reliance on juries to adjudicate legal disputes continued to expand. Increasingly, this meant that Englishmen were being asked to make key decisions in the running of their communities. They played a central role in the enforcement of the law. By the middle 1600s there was an expectation that Englishmen had a "right" to this sort of responsibility and authority. The men who were ceded this power were not a cross section of the population but those who held real property at a time when ownership of land was rare. Yet, these were not aristocrats or great magnates but the "middling sort." The rich and powerful often fled from the onerous obligations of coming to court and deciding cases. Such chores were left to those lower down the social ladder. In this way "the practice of self-government" came to the middle class of England.<sup>2</sup> Indeed, scholars examining the history of the jury have concluded that in the 1600s it "was the most representative institution available to the English people,"<sup>3</sup> one that relied on, more or less, ordinary citizens to partake in governing.

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<sup>2</sup> JOHN P. DAWSON, *A HISTORY OF LAY JUDGES* 134 (1960).

<sup>3</sup> Stephen K. Roberts, *Juries and the Middling Sort: Recruitment and Performance at Devon Quarter Sessions, 1649-1670*, in *TWELVE GOOD MEN AND TRUE* 182 (J.S. Cockburn & Thomas A. Green, eds., 1988).

This democracy-enhancing jury mechanism came into direct conflict with the Crown as the seventeenth century drew to a close. The Stuart Kings who strove to establish the absolute power of the monarchy found jurors of the “middling sort” standing in their way. Pursuant to *Bushell’s case* in 1670, these jurymen were freed from the threat of punishment for their verdicts thus undermining royal control. Their independence was declared in the most emphatic way in 1688, when James II sought to compel the Anglican establishment to read aloud in churches across the nation a Declaration of Indulgences that was part of a program to undermine the Church of England. Seven Bishops, albeit humbly, refused and remonstrated with the King in a jointly-signed letter. At the King’s insistence the Bishops were charged with seditious libel for signing the letter. The case came before a London jury which acquitted the Bishops and thwarted the King’s efforts. The decision in the *Seven Bishops’ Case* has quite correctly been viewed as the beginning of the so-called Glorious Revolution of 1689 which swept away the Stuarts and replaced them with parliamentary democracy. John Beattie, one of the finest modern legal historians of this period, has called the era: “the heroic age of the English jury, for in the political and constitutional struggles of the reigns of Charles II and James II trial by jury emerged as the principle defense of English liberties.”<sup>4</sup>

The English jury had become an instrument for the securing and defending of democracy. It was an institution that spoke for the people and served as a counterbalance to executive and judicial power. As William Blackstone put it:

The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias toward those of their own rank and dignity; it is not to be expected from human nature that the few should be always attentive to the interests and good of *the many*.<sup>5</sup>

While the jury has undergone dramatic change in England one of the country’s great judges, Sir Patrick Devlin, underscores its ongoing importance to democracy when he described it as “a little parliament . . . trial by jury is more than an instrument of justice and more than one wheel of the Constitution: it is the lamp that shows that freedom lives.”<sup>6</sup>

## **B. The American Reception**

The jury came to America with the earliest colonists. It was available to Virginia settlers in 1624 and those in the Massachusetts Bay Colonies by 1628. It played an important, some historians have argued, pre-eminent, role in the governance of the

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<sup>4</sup> John M. Beattie, *London Juries in the 1690s*, in TWELVE GOOD MEN AND TRUE, *supra* note 3, at 214.

<sup>5</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 682 (Nourse Publishing Co., 1959) (emphasis in original).

<sup>6</sup> PATRICK DEVLIN, TRIAL BY JURY 164 (1956).

colonies. As the division between Great Britain and her American colonies grew it was often the jury that acted as the voice of the colonists. One of the most famous examples occurred in 1734, when the newly appointed Royal Governor of New York, William Cosby, instigated the prosecution of the publisher, John Peter Zenger for seditious libel. The case was tried before a New York jury which was instructed that it was obliged to convict if the defendant had published the words in question, whether they were true or false. Zenger's original attorneys were disbarred for having the temerity to press his case. In their place the great Philadelphia lawyer, Andrew Hamilton, appeared. Subtly, he invited the jury to reject the royal judges' instruction and find Zenger not guilty if what he had published concerning Governor Cosby was true. That is exactly what the jury did, establishing not only that truth is a proper defense in libel cases (a point eventually recognized even in England) but that colonial juries, like their English counterparts, were capable of defending fundamental rights—most particularly those affecting democratic political debate.

It is not surprising that in the 1760s, as the disputes between the colonies and the mother country sharpened, the jury was in the thick of the confrontation and often rejected royal decrees. This became so serious a challenge to Imperial authority that London, through a series of acts, sought to shift cases out of colonial courts where juries held sway into forums like the Admiralty Courts where no jury was required. The colonial reaction was swift and challenging. The Stamp Act Congress of 1765 declared: "trial by jury is the inherent and invaluable right of every British subject in these colonies."<sup>7</sup> The First Continental Congress a decade later echoed the same view: "the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law."<sup>8</sup> Finally, when the colonies cast off obedience to the Crown in the Declaration of Independence, they listed as a key grievance denial of "the benefits of trial by jury."<sup>9</sup> In the Revolutionary Era the jury was the voice of the people, the democratic outlet for sentiments otherwise stifled by an Imperial bureaucracy unwilling to heed the opinions of the governed.

Notwithstanding its heroic part in the Revolution, the jury's popularity had begun to wane, at least in some quarters, by the time of the debates surrounding the drafting of the American Constitution in the 1780s. While all agreed that jury trial was necessary in criminal cases, civil litigation presented a distinct set of issues. A democratic voice in civil adjudication was perceived by some as less important because Imperial law had been replaced by statutes fashioned by locally-elected legislators and "Representatives of the people may be safely trusted in this matter."<sup>10</sup> Moreover, debtor-friendly jurors in a number of states were undermining the reliability of financial instruments and contracts

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<sup>7</sup> RESOLUTIONS OF THE STAMP ACT CONGRESS 1765, para. 7 reproduced in SOURCES OF OUR LIBERTIES 270 (Richard L. Perry & John C. Cooper, eds. 1952).

<sup>8</sup> DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS 1774, Res. 5 reproduced in SOURCES OF OUR LIBERTIES, supra note 7 at 288.

<sup>9</sup> THE DECLARATION OF INDEPENDENCE, para. 19 (U.S. 1776)

<sup>10</sup> These words were spoken by Mr. Gorham on September 12, 1787, according to James Madison. JAMES MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787 (1937) cited in Edith G. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 293 (1966).

thereby casting doubt upon the new nation's fiscal integrity. So the drafters of the original body of the Constitution did not require jury trial in civil cases. Alexander Hamilton, writing in *THE FEDERALIST*, argued that there is no "inseparable connection between the existence of liberty and the trial by jury in civil cases."<sup>11</sup> The exclusion of the civil jury ignited a firestorm of protest, one so strong that it threatened the Constitution's ratification. The Antifederalists insisted on the need for civil juries to check unwise laws and restrain corrupt or overactive judges. While the Antifederalists would have gladly scrapped the newly proposed Constitution altogether, cooler heads prevailed and a compromise was arranged. The vehicle of compromise was the Seventh Amendment which preserves the right of jury trial in civil matters. Charles Wolfram, a distinguished scholar of the Bill of Rights, has observed that the Antifederalists were the "generative force behind the seventh amendment [and] their arguments should be given due weight in determining the purpose behind [it]."<sup>12</sup>

The jury's development was far from finished but its core role as a democratic counterbalance to government authority in both criminal and civil matters was clearly established. Looking at the American jury some fifty years after the adoption of the Constitution, the celebrated French observer, Alexis de Tocqueville, noted its essentially "political" nature. By this he meant that the jury was a critical attribute of democracy, "one form of the sovereignty of the people . . . as direct and extreme a consequence of the dogma of the sovereignty of the people as universal suffrage."<sup>13</sup> Tocqueville discussed not only the systemic implications of jury trial but also its influence on individual citizens as jurors. Tocqueville believed that jury service could "instill some of the habits of the judicial mind into every citizen,"<sup>14</sup> "teach each individual not to shirk responsibility"<sup>15</sup> and serve "as one of the most effective means of popular education."<sup>16</sup>

Recent legal scholarship and social science research have powerfully reinforced Tocqueville's claims. Vikram David Amar, writing in the *CORNELL LAW REVIEW* not too long ago, made the sensible but seldom noted observation: "Jurors *vote* to decide the winners and losers in cases—that is what they do."<sup>17</sup> The link between the jury room and the ballot box is substantial, in terms of each citizen's right to participate and share in the task of democratic governance. That same connection has been dramatically documented in social science work carried out by Professor John Gastil and his colleagues at the University of Washington. Gastil and his team studied the behavior of citizens after they had served as jurors in King County, Washington (Seattle). Jurors' subsequent electoral voting records and personal attitudes were examined. What was found was quite striking: "deliberating on a jury causes previously infrequent voters to become more likely to vote

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<sup>11</sup> *THE FEDERALIST* No. 83, at 615 (Alexander Hamilton) (John C. Hamilton ed., 1904).

<sup>12</sup> Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 *MINN. L. REV.* 639, 673 (1973).

<sup>13</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 273 (J.P. Mayer ed., Harper-Perennial Books 1988) (1840).

<sup>14</sup> *Id.* at 274.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 275.

<sup>17</sup> Vikram D. Amar, *Jury Service as Political Participation Akin to Voting*, 80 *CORNELL L. REV.* 203, 205 (1995).

in the future elections.”<sup>18</sup> Not only that, such jurors were also increasingly inclined to other forms of “civil engagement” including “news media use, public conversation, strategic political action and community group participation.”<sup>19</sup> These findings remarkably verify Tocqueville’s hypothesis regarding the educational effect of jury service. They also offer at least one part of a program to respond to low voter turnout, political indifference and the seeming decline of citizen involvement in civic matters.

One further democracy-enhancing aspect of the modern American jury trial mechanism should be noted—the summoning process today brings a truly diverse set of citizens into public life. That was not always the case. In eighteenth-century England only men of property sat on juries. In Colonial America, the jury pool was similar, if somewhat broader. As a general matter, women did not serve on juries until the success of the suffrage movement guaranteed them the vote in the 1920s. (Again, it is useful to note the linkage between voting and jury service.) African Americans were excluded even longer. Despite the condemnation of race-based exclusion from jury service in *Strauder v. West Virginia*<sup>20</sup>, in 1880, citizens of color were, again and again, shown to be systemically excluded from service in such cases as *Norris v. Alabama*,<sup>21</sup> *Smith v. Texas*,<sup>22</sup> and *Batson v. Kentucky*.<sup>23</sup> The latter case introduced a serviceable mechanism for challenging the exclusion of Black jurors, and in 1991 the Supreme Court recognized, in *Powers v. Ohio*,<sup>24</sup> that jurors have a constitutional right, akin to voting, to sit on juries.<sup>25</sup> The diversity of jury pools has been substantially increased in recent years as jury commissioners across the country have striven to obtain a real cross-section of their communities. This effort has been most successful when methods are employed to make service less onerous (as, for example, by the adoption of the one-day-one-trial rule that limits the time each potential juror must spend at the courthouse) and by the use of twelve-person juries (which increase the chances that minority group members will be seated).

## II. Attacks on the Democratic Functioning of the Jury<sup>26</sup>

### A. Jury Size

Since the early 1970s various democracy-enhancing attributes of the American jury have come under serious attack. Perhaps the two most significant of these are the requirements of a twelve person jury and jury verdict unanimity. In 1970, the Supreme

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<sup>18</sup> JOHN GASTIL et al., THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION 9 (2010).

<sup>19</sup> *Id.* at 126.

<sup>20</sup> 100 U.S. 306 (1880).

<sup>21</sup> 294 U.S. 587 (1935).

<sup>22</sup> 311 U.S. 128 (1940) (grand jury).

<sup>23</sup> 476 U.S. 79 (1986) (misuse of peremptory challenges).

<sup>24</sup> 499 U.S. 400 (1991).

<sup>25</sup> *Id.* at 407 (citing Tocqueville).

<sup>26</sup> The primary source for this section, unless otherwise noted, is Stephan Landsman, *The Civil Jury in America* in WORLD JURY SYSTEMS 381 (Neil Vidmar, ed., 2000).

Court, in *Williams v. Florida*,<sup>27</sup> upheld a Florida statute mandating six-person juries in all non-capital criminal prosecutions. The Court called reliance on twelve an “historical accident”<sup>28</sup> and opined that the criminal jury had no other function than to prevent government oppression. Based on that reductionist assumption the Court could see no difference between the efficacy of twelve- and six-person panels. Three years later, in *Colgrove v. Battin*,<sup>29</sup> the Justices extended the six-person rule to federal civil trials. That decision was particularly notable because the requirements of the Seventh Amendment were directly implicated. Notwithstanding what the term “jury” had meant for six centuries, it was no longer to be defined as a body of twelve. The Court’s determinations invited significant downsizing in both federal civil and state criminal and civil proceedings. All of this was justified in the name of efficiency.

The Court, in *Colgrove*, claimed that its analysis was supported by “convincing empirical evidence.”<sup>30</sup> Later examination would reveal that the evidence was hardly empirical and far from convincing. In fact, research indicated that smaller juries are no more efficient than larger ones, that smaller juries are particularly vulnerable to fluctuating verdicts, that smaller panel size reduces the opportunity for minority group jurors to serve, and that those minority group jurors who do serve feel extra pressure to conform to the views of the majority. As the evidence of the inferiority of six continued to mount the Court confronted a Georgia effort to reduce the size of its criminal juries to five. In *Ballew v. Georgia*,<sup>31</sup> the Court rejected such juries as constitutionally infirm. The arguments relied upon to justify drawing the line at six, however, were more appropriate to returning to juries of twelve than any substantially smaller number.

One might wonder what this has to do with jury democracy. The answer has a number of aspects. First, by halving the size of the jury far fewer citizens will have an opportunity to participate in the adjudicatory process, thereby reducing the democracy-enhancing impact suggested by Tocqueville and demonstrated by Gastil. What society loses is its potential voters and potentially engaged citizens. Perhaps as important, a smaller jury does not offer nearly as much room for minority participation. Where, for example, a minority group represents ten percent of a community’s population, the switch from twelve to six virtually guarantees that there will be no minority presence on a large majority of the juries constituted. When minority group members do sit on a smaller jury they will have few allies who might support their views, and they are likely to be overborne. Scientific research indicates that diverse juries engage in longer and more detailed deliberations. A minority presence affects the behavior of all jurors, making for greater sensitivity to minority views.<sup>32</sup> Jury downsizing undermines the quality of democratic exchange as well as the number of citizens who experience it.

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<sup>27</sup> 379 U.S. 78 (1970).

<sup>28</sup> *Id.* at 89.

<sup>29</sup> 413 U.S. 149 (1973).

<sup>30</sup> *Id.* at 159 n. 15.

<sup>31</sup> 435 U.S. 223 (1978).

<sup>32</sup> See NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 75-76 (2007).



## B. Jury Unanimity

As the Supreme Court was shrinking the jury it was also undermining insistence on jury unanimity. In 1972, the Court decided *Apodaca v. Oregon*<sup>33</sup> and *Johnson v. Louisiana*.<sup>34</sup> Each state allowed criminal juries to deliver a guilty verdict without the assent of all the jurors (10 to 2 in Oregon, 9 to 3 in Louisiana). Following the reductionist functional analysis undertaken in *Williams*, the Court concluded that unanimity was not necessary to serve the narrow goal of checking governmental power and suggested that juries will function in the same way whether they are required to reach a unanimous verdict or not. Once more, social science research has demonstrated the weakness of the Justices' understanding of jury behavior. What the researchers found is that non-unanimous juries tend to spend less time deliberating. Once they have reached the required majority, serious conversation stops and the minority is marginalized. This sort of deliberation is rated as less satisfying by jurors, produces less certainty among them about the soundness of their verdict, and majority jurors are less likely to be influenced by the arguments of those in opposition. Along with all this comes a heightening of tension and friction within the jury.

What Sidney Lumet extolled in the film *Twelve Angry Men* was the power of democratic discourse as twelve citizens were compelled to evaluate the proof before them in a manner that persuaded all. Where unanimity has been rejected there is no impetus for such discussions—those seeking to make the evening's ballgame or return to their Wall Street jobs are free to disregard the holdouts. This has particular significance because, psychologists tell us, one case in ten swings from the majority to minority point of view over the course of deliberations.<sup>35</sup>

As with twelve-person juries, there are serious implications for the democratic efficacy of jury trials when unanimity is abandoned. Within the jury there is less give and take. The minority is likely to be politely but firmly ignored once the magic majority number has been reached. This sends the not-too-subtle message that the minority's votes are meaningless. When the voting minority is congruent with a racial or ethnic minority the marginalizing effect is both powerful and damning. It suggests that the minority group member's vote does not count. Across America over the last decade real strides have been made in diversifying the jury venire. The result in many courts has been the constitution of jury pools that really reflect the makeup of the community. Yet, the progress made in representation can be destroyed where unanimity is discarded.

## III. Reducing Access to Jury Trials

Apart from undermining the democratic operation of the jury process both in the jury room and in the wider society, recent Supreme Court actions have had the clear effect of reducing the number of jury trials. Marc Galanter has explored this topic in great detail,

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<sup>33</sup> 406 U.S. 404 (1972).

<sup>34</sup> 406 U.S. 356 (1972).

<sup>35</sup> See SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 202 (1988).

demonstrating the extent of the vanishing trial (and vanishing jury trial) phenomenon.<sup>36</sup> In this section some of the reasons for that decline will be explored, as will a number of their anti-democratic implications.

### A. Arbitration

One way in which jury trials (indeed, any trials) have been spirited out of the courts has been through the extension of the reach of arbitration agreements.<sup>37</sup> In 1925, Congress passed the Federal Arbitration Act (FAA) to encourage the use of arbitration in settings where there was a mutual arms-length agreement to use that device. In 1983, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*,<sup>38</sup> the Supreme Court declared that the FAA established a strong federal mandate “favoring arbitration.”<sup>39</sup> The Court stated that virtually all ambiguities or reservations should be resolved in favor of requiring arbitration and that the arbitration regime should be understood as extending well beyond where it had reached before. It is, of course, the essence of arbitration that there will be no jury trial or, indeed, any trial at all. Arbitration proceedings are held in private before a privately-retained arbitrator, at the parties’ own expense. The proceedings are cloaked in secrecy and the results are, generally, not appealable.

In *Gilmer v. Interstate/Johnson Lane Corporation*,<sup>40</sup> the Court was asked whether mandatory arbitration could be forced on employees through the use of imposed adhesion contracts where there was no latitude for bargaining and statutorily mandated rights like those prohibiting discrimination might be affected. The Court’s answer was that arbitration trumps the claim of an employee to a public trial. This ruling has been extended to participants in virtually all sorts of adhesive transactions from the provision of health care to the purchase of extermination services, the use of credit cards, and the utilization of cell phones and other methods of communication. The form contract imposing arbitration on customers has become ubiquitous and, according to the Supreme Court, all-powerful. Its authority has been upheld even when the agreement to arbitrate is included in an envelope stuffer, inserted without discussion in an employee handbook, or written on shrink-wrap packaging.

Seventy years ago, Professor Friedrich Kessler, writing in the *COLUMBIA LAW REVIEW* pointed out that giving one side in a contractual setting the power to dictate terms through any adhesion contract is, in essence, allowing the drafting party the ability “to legislate in a substantially authoritarian manner.”<sup>41</sup> This means that a private party

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<sup>36</sup> See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUDIES 459 (2004).

<sup>37</sup> The primary sources for this section, unless otherwise noted, are Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. DISP. RESOL. 669 (2000-2001), and Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593 (2005).

<sup>38</sup> 460 U.S. 1 (1983).

<sup>39</sup> *Id.* at 24.

<sup>40</sup> 500 U.S. 20 (1991).

<sup>41</sup> Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629, 640 (1943).

with adhesion leverage may have the power to override democratically established procedures and processes. This anti-democratic override has occurred with respect to all sorts of procedural questions in arbitrations involving Title VII discrimination claims, Truth In Lending Act proceedings and Magnusson-Moss Warranty Act cases to name but a few. In all, restrictions have made things like the recovery of costs and fees less likely and generally rendered the enforcement of Congressionally-mandated rights more difficult. Not only has the arbitration mechanism closed the courthouse doors, it has reduced the sorts of inducements available to enterprising lawyers to take on claims for employees and consumers who cannot afford to front the money for lawyer fees.

A little-discussed but serious consequence of the enforcement of imposed arbitration requirements is to deprive those compelled to accept them of access to jury trials. Professor Jean Sternlight has argued that this deprivation flies in the face of traditional Seventh Amendment jurisprudence. The Seventh Amendment requires that: “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” When cases are brought to Federal Court, of course, the mandate of the Seventh Amendment applies. Yet, the courts have found in arbitration agreements a waiver of the right to jury trial in virtually all cases where an action has been filed but a motion to compel arbitration is made on the basis of a pre-existing arbitration agreement.

More than forty years of jurisprudence has established that jury trial waivers must be “knowing, voluntary, and intentional.”<sup>42</sup> The case law has also determined that language designed to waive the jury trial right must be conspicuous and clear, that form waivers are profoundly suspect, that all ambiguities are to be interpreted against waiver, and that waivers must be signed by the waiving party.<sup>43</sup> In the agreement to arbitrate context all of this case law has been thrown out the window. Why? The Supreme Court’s answer appears to be that, because of the FAA, “arbitration is favored.” If a Congressional statute like the FAA can override a Constitutional Amendment then the superiority of the Constitution recognized in *Marbury v. Madison*<sup>44</sup> may be negated.

Almost as disturbing as the jury-terminating effect of arbitration is the Court’s failure to consider the importance of the jury trial right. Few cases have addressed the issue and it appears as if the Supreme Court views the Amendment as an irrelevancy or anachronism in the efficiently-driven world of business and adhesion contracts. This attitude is in sharp contrast with the widespread reappraisal of arbitration now under way in business circles. Arbitration has been losing traction in America, especially among large corporations making arms-length agreements with their equals. In their negotiations

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<sup>42</sup> Sternlight, *supra*, note 37 at 678-679. See also Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial* and David S. Schwartz, *State Judges as Guardians of Federalism: Resisting the FAA’s Encroachment on State Law* in THE PRIVATIZATION OF JUSTICE? MANDATORY ARBITRATION AND THE STATE COURTS (Pound Civil Justice Institute, 11<sup>th</sup> Annual Forum for State Appellate Court Judges, 2003), available at <http://www.poundinstitute.org/images/2003ForumReport.PDF>.

<sup>43</sup> *Id.* at 680-695.

<sup>44</sup> 5 U.S. (1 Cranch) 137 (1803).

with equals such entities have, over the past decade, come, more and more, to favor mediation. It is said that corporations do not like the loss of control, escalation of costs and lack of appellate review that come along with the arbitration mechanism. It is hard to believe that these considerations apply only to corporate actors. Perhaps the best evidence of corporate attitudes is to be found in the business-interest lobbying efforts that led to the passage of the 1990 and 1996 Administrative Dispute Resolution Acts<sup>45</sup> that barred the federal government from imposing arbitration on its corporate contractors.

A significant piece of evidence concerning the Supreme Court's outdated attitude about arbitration is contained in its recent ruling in *AT&T Mobility LLC v. Concepcion*.<sup>46</sup> There the question was not jury trial but access to class action arbitrations. The California Supreme Court had held as a matter of state law that contracts barring class relief are unconscionable. Despite the fact that this rule applied to contractual waivers of class relief in all sorts of contracts (not just those involving arbitration) the Supreme Court held that it fell afoul of the FAA's ban on specially targeted state discriminations against arbitration. The underlying dispute involved an allegedly fraudulent charge of \$30.22 imposed by the communications giant, AT&T Mobility, on thousands of its customers. The Court held that California could not invalidate AT&T Mobility's adhesion contract prohibition of class relief in the arbitrations it insisted its customers had to use to redress grievances. This meant, in practical terms, that each customer who felt wronged had to request and pursue an individual arbitration to recover the \$30.22 at issue. Of course, this meant that no real recovery or rectification would take place. The Court declared that "efficiency" was of paramount importance, that class arbitrations are not efficient, and that they can be prohibited by adhesion contract drafters.

This ruling produces a situation in which small wrongs and frauds committed against tens of thousands of consumers can never be corrected so long as there is a contract mandating arbitration and banning class proceedings. The deterrence of corporate abuse is disregarded by the Court and the power of adhesion contract drafters to rewrite the law of remedies in their favor has been rendered all but impregnable. The two most striking things about *AT&T Mobility* are its cavalier rejection of the need for class remedies (in other words, access to adjudication) and its twice-repeated observation that the FAA can bar "ultimate disposition by the jury" or "arbitration-by-jury." These jury references are not only gratuitous but fail to make any effort to scrutinize the Seventh Amendment issues discussed above. It is as if remedies for small wrongs are best suppressed in the name of efficiency and any thoughts about the requirement of the Seventh Amendment are best forgotten. In this environment whenever arbitration is imposed by the stronger on the weaker the opportunity for adjudication may be stifled and the jury made to vanish. Thus is the engine of democratic governance swept out of all consumer and employment transactions without a backward glance at the demerits of the arbitration mechanism.

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<sup>45</sup> 5 USC 571 et seq.

<sup>46</sup> 131 S.Ct. 1740 (2011).

## B. Summary Judgment and Dismissal

A second Supreme Court step that has had the effect of closing the courthouse to litigants seeking jury trials is the expansion of judicial screening mechanisms designed to encourage trial judges to dismiss cases that do not appear to them to warrant a trial. Pre-trial screening has been growing in importance for some time. It gained significant traction in the Federal Courts in the middle 1980s and was confirmed (perhaps invigorated) by a trilogy of summary judgment cases decided in 1986.<sup>47</sup> There has been substantial scholarly debate about the part played by summary judgment in the decline of the trial but little doubt that it has had some impact.<sup>48</sup> Summary judgment after discovery may be defended in Seventh Amendment terms because of the formula the courts use to decide such cases—that there is “no set of facts” upon which the claimant could secure the relief sought. Some legal academics, however, have argued that even this sort of judicial weighing of the facts falls afoul of the Amendment’s requirement that the jury serve as exclusive factfinder.<sup>49</sup> Be that as it may, recently the Supreme Court has gone a good bit further in *Ashcroft v. Iqbal*<sup>50</sup> by requiring judges on a preliminary challenge to the pleadings to dismiss a case if the judge believes that the pleader’s claim, stripped of all legal “conclusions” does not present a “plausible” claim for relief.<sup>51</sup>

A number of commentators have noted that the “plausibility” standard has two sorts of effects. First, it forces pleading in the Federal Courts back toward the nineteenth century paradigm of “fact pleading” rather than the “noticed pleading” called for in the Federal Rules of Civil Procedure in 1938.<sup>52</sup> Second, it requires the judge to subjectively weigh the factual assertions of the pleader and decide whether they seem plausible.<sup>53</sup> It is impossible to undertake such a weighing without making a merits-based judgment in

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<sup>47</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

<sup>48</sup> See Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Case: Drifting Toward Bethlehem or Gomorrah?* 1 J. EMPIRICAL LEGAL STUDIES 591 (2004). See also Stephen B. Burbank, *Pleading, Access to Justice, and the Distribution of Power*, and A. Benjamin Spencer, *Pleading in State Courts after Twombly & Iqbal*, in IN BACK TO THE FUTURE: PLEADING AGAIN IN THE AGE OF DICKENS? (Pound Civil Justice Institute, 18<sup>th</sup> Annual Forum for State Court Judges, 2010), available from Pound Civil Justice Institute, [info@poundinstitute.org](mailto:info@poundinstitute.org).

<sup>49</sup> See Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007).

<sup>50</sup> 129 S.Ct. 1937 (2009).

<sup>51</sup> *Id.* at 1950-1951.

<sup>52</sup> See, e.g., Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010). See also Arthur R. Miller, *The Ascent of Summary Judgement and its Consequences for State Courts and State Law*,

<http://www.poundinstitute.org/images/2008PoundForumProfMillerPaper.pdf> and

Georgene M. Vairo, *Defending Against Summary Justice: The Role of the Appellate Courts*,

<http://www.poundinstitute.org/images/2008PoundForumProfVairoPaper.pdf> in

SUMMARY JUDGMENT ON THE RISE: IS JUSTICE FALLING? (Pound Civil Justice Institute, 16<sup>th</sup> Annual Forum for State Appellate Court Judges).

<sup>53</sup> *Id.*; Kenneth S. Klein, *Ashcroft v. Iqbal Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB L. REV. 261 (2009).

factuality.<sup>54</sup> Such an assessment is a direct conflict with the Seventh Amendment which requires that juries, not judges, weigh the facts.<sup>55</sup>

Why has the Court gone down this jury-proscriptive path? Its concerns appear to be with the filing of frivolous cases and the use of costly discovery proceedings.<sup>56</sup> But there is a real question about whether such problems exist on a significant scale and whether trial courts have been unable to weed out bogus claims using the highly developed summary judgment mechanism. Most disturbing, however, in terms of access to jury trial, is the Court's closing of the courthouse by a mechanism that allows judicial pre-screening of the facts despite the mandate of the Seventh Amendment. The Amendment was not even mentioned in *Iqbal*. As in the arbitration cases, it is as if jury trials are irrelevant. Of course, in such a setting the jury trial and the values it imports into the adjudicatory system are undercut. *Iqbal* and *AT&T Mobility* not only close the courthouse doors to specify sorts of cases, they marginalize the entire idea of jury trial.

### C. Cost of Trial by Jury

A number of fiscal problems have exacerbated the trend to fewer jury trials. Jury trials are more expensive than bench trials. They take somewhat longer and involve the service of jurors who deserve compensation. These time and financial considerations make jury trials a tempting target as states, counties and localities look for ways to reduce expenditures in straightened financial circumstances. In some jurisdictions this has led to long delays and in others to the outright suspension of jury trials in civil matters.<sup>57</sup> In other places it has meant the disappearance of courtrooms and the reduction in judicial staff available to conduct trials.<sup>58</sup>

Some states have adopted rules requiring substantial fee increases in all cases filed or whenever a jury is demanded. This was the case in Maine in 1991, when the courts, by administrative rule, imposed a fee of \$300 whenever a jury demand is made. The fee is not tailored to cases actually assembling a jury but to all cases where a jury demand is entered. The obvious result is to discourage exercise of the right to jury trial. Confronted with a challenge to the fee, the Supreme Judicial Court of Maine upheld the fee in *Butler v. Supreme Judicial Court*.<sup>59</sup> This sort of ruling is troublesome not only because of its impact on the number of jury trials but also because it displays a judicial willingness to view jury trials as far less important than budgetary constraints and to accept their reduction through administrative fiat.

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<sup>54</sup> See Klein, *supra* note 52.

<sup>55</sup> *Id.*

<sup>56</sup> See Miller, *supra* note 51.

<sup>57</sup> See, e.g., Justice John Dooby, *Judicial Funding in Times of Budget Crisis* 34 VERMONT BAR JOURNAL 34 (Winter 2008-2009).

<sup>58</sup> *Id.*; ABA Special Committee on Funding the Justice System, *The Justice System Funding Crisis: What Can We Do About It?* 32 No. JUDGES' J. 6 (1993) (reporting on judicial funding crisis in the 1990s).

<sup>59</sup> 611 A.2d 987 (1992).

#### **D. Loss of Jury Trial Experience**

Such trend is not only troublesome in its own right but because it contributes to a vicious circle that accelerates the decline of the jury trial. If jury trials are hard to come by then young lawyers will have fewer and fewer opportunities to hone their skills.<sup>60</sup> Faced with an option that few have the experience to manage, most lawyers will avoid jury trials as too risky and unpredictable.<sup>61</sup> This decision, in turn, will stoke the cycle. The problem is likely to grow as young judges take the bench. For them the jury trial will be an oddity with which few have had significant experience. It is only the hardiest of young judges who will cheerfully launch into the unknown (or little known) of a jury trial. If this scenario seems farfetched consider the disappearance of the civil jury in England. According to Lord Devlin the key moment in the jury's decline came during and immediately after World War I. Because of a lack of jurors (so many men being off fighting the war) jury trial was suspended. After the war a new generation of barristers and solicitors came into the profession with scant jury trial skill or experience. The British bar had lost the habit of and confidence in jury trial.<sup>62</sup>

I presently serve on the American Bar Association (ABA) Standing Committee on the Federal Judiciary and in that capacity I help to vet potential federal judicial candidates. While my observation is not empirical and the specifics of the Committee's action are confidential and privileged, it is my sense that the young candidates sent to us by the White House have, in most cases, only a very few civil jury cases tried to verdict. With many candidates the number is less than ten. I submit that it is extremely difficult to amass the sort of experience and confidence necessary to insure robust use of the civil jury trial with only a handful of trials under one's belt. It may be (and, indeed, is) argued that there are still a good number of criminal trials for young lawyers willing to serve as prosecutors or defense counsel. But the data from the criminal courts suggest a sharp decline in the number of trials. More than that, I believe that the rough and tumble of the criminal process with its speedy trial rules, dearth of discovery, and modest expectations regarding preparation, make it a poor training ground for the lawyers we hope will vigorously press complex civil claims in an effective, skillful and professional manner.

#### **IV. Can We Reverse the Trend?**

Professor Galanter's data suggest that the slide away from jury trials has been long. What is more, in England, the birthplace of the jury trial, the civil jury has virtually disappeared. The abandonment of twelve-person juries and the requirement of unanimity, the reduction in access to civil jury trials, and the chilling effect of draconian penalties on those who insist on a criminal jury trial have all taken their toll. The consequence is the curtailment of democratic activity in the jury room and in society at large. Despite all this, there are steps being taken that both enhance the prospects for jury trials and democratic activity within the jury itself. In 2005, the ABA adopted a new set of

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<sup>60</sup> See AMERICAN COLLEGE OF TRIAL LAWYERS, THE "VANISHING TRIAL," THE COLLEGE, THE PROFESSION, THE CIVIL JUSTICE SYSTEM 22(2004).

<sup>61</sup> *Id.* at 22-23.

<sup>62</sup> Devlin *supra* note 6 at 131-133.

Principles for Juries and Jury Trials. These Principles have drawn on the best in empirical research to propose a series of jury trial-enhancing steps. Among these is a return to twelve-person juries and unanimous verdicts. The Principles urge courts to allow jurors to take notes and submit written questions for witnesses, among other measures. The aim is to foster active and engaged jurors. Such jurors will be prepared for the sort of democracy-enhancing debate and examination of issues that the jury trial can offer. The Principles also urge practices that will produce more diverse and representative juries which truly reflect the communities from which they are drawn. Across the board the Principles strive to enhance jury engagement and participation. They go so far as to suggest that states consider allowing interim jury discussions when all jurors are present so that a full airing of issues will occur. The whole package of reforms is designed to encourage effective citizen participation in dispute resolution.

Yet, the best jury principles in the world are meaningless if there are no jury trials. In response to the ABA's adoption of the Principles, the Seventh Circuit in 2005 committed itself to the so-called Seventh Circuit American Jury Project, to try, on an experimental basis, a number of the proposed reforms. These included juror submission of written questions for witnesses, preliminary substantive jury instructions, interim statements by counsel in longer trials, the use of twelve-person juries, and the augmentation of voir dire through the use of written questionnaires in appropriate cases. These reforms were tested in fifty civil jury trials and were, generally, found to enhance the trial process. Judges who used twelve-person juries have tended to stick with them and since the conclusion of the experiment there has been a significant upsurge in the number of jury trials. None of this is definitive, but it offers a way forward and some promise of success.

The National Center for State Courts has recently done a survey of jury practice in the United States in its 2007 *State-of-the-States Survey*.<sup>63</sup> It noted that in 2006 there were approximately 150,000 jury trials in America, about one-third of them civil. It also found that 1.5 million jurors were impaneled in 2006. In 1977 there was only a 6 percent chance that an American would serve on a jury. By 2006, the elimination of jury exemptions and the expanding diversity of jury rolls had had a dramatic effect—the chance of serving on a jury had increased six-fold, to 37 percent.<sup>64</sup> If our citizens are summoned, are placed on juries and guided by effective procedures the future of the jury trial may not be as bleak as data from the past might suggest and we may actually get the democracy dividend the jury can provide.

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<sup>63</sup> GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, *THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT* (National Center for State Courts, 2007), available at [http://www.ncsconline.org/D\\_Research/cjs/pdf/SOSCompendiumFinal.pdf](http://www.ncsconline.org/D_Research/cjs/pdf/SOSCompendiumFinal.pdf).

<sup>64</sup> *Id.* at 7-8.