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# THE CASE FOR THE CIVIL JURY

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## SAFEGUARDING A PILLAR OF DEMOCRACY

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*Freedom of religion; freedom of the press; freedom of person under the protection of the habeas corpus; trial by juries impartially selected.*

*These principles form the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation.*

*The wisdom of our sages and the **blood** of our heroes have been **devoted** to their attainment.*

*They should be the creed of our political faith, the text of civil institution, the touchstone by which we try the services of those we trust; and should we wander from them in moments of error and alarm, let us hasten to retrace our steps and to regain the road which alone leads to peace, liberty and safety.*

—Thomas Jefferson

First Inaugural Address, March 4, 1801

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**BY JOANNE DOROSHOW**  
CENTER FOR STUDY OF RESPONSIVE LAW

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*The excellent order of trial by jury carries a much greater preponderation to discover the truth than any other trial whatsoever.\**

— **Matthew Hale, Chief Justice of the King's Bench (1676)**

*In the whole practice of law, there is nothing of greater excellency than trial by juries. Neither the wisdom of our ancestors could, nor could the present, nor after ages invent a better.*

— **Giles Duncombe, British Barrister (1725)**

*We are so firmly of the opinion that any person who shall endeavor to deprive us of so glorious a privilege as trials by juries is an enemy to this province.*

— **South Carolina General Assembly (1751)**

*Trial by jury is the inherent and invaluable right of every American.*

— **The Stamp Act Congress (1765)**

*Trial by jury is the principal bulwark of our liberties.*

— **William Blackstone (1768)**

*A tribunal without juries would be a Star Chamber in civil cases.*

— **Elbridge Gerry of Massachusetts (1787)**

*Trial by jury in civil cases and trial by jury in criminal cases stand on the same footing: they are the common rights of Americans.*

— **Richard Henry Lee of Virginia (1787)**

*It has been urged that the exclusion of trial by jury would prostrate our rights, but I hope that in this country, where impartiality is so admired, the laws will direct facts to be ascertained by a jury.*

— **John Marshall of Virginia (1788)**

*Trial by jury is the best appendage of freedom. I hope we shall never be induced to part with that excellent mode of trial. Guard with jealous attention the public liberty. Suspect everyone who approaches that jewel.*

— **Patrick Henry of Virginia (1788)**

*Trial by jury in civil cases is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.*

— **James Madison (1789)**

*It is through trial by jury that the people share in government, a consideration which ought to make our legislators very cautious how they take away this mode of trial by new trifling and vexatious enactments.*

— **Lord John Russell, On the English Government (1823)**

*What individual can so well assess the amount of damages which a plaintiff ought to recover for an injury he has received than an intelligent jury?*

— **Henry Peter Brougham, Lord Chancellor of England (1828)**

*The inestimable privilege of trial by jury in civil cases is conceded by all to be essential to political and civil liberty.*

— **Joseph Story, Supreme Court Justice (1833)**

*The civil jury is the most effective form of sovereignty of the people. It defies the aggressions of time and man. During the reigns of Henry VIII and Elizabeth I, the civil jury did in reality save the liberties of England.*

— **Alexis de Tocqueville, French Political Scientist (1835)**

*All attempts to tinker or tamper with trial by jury in civil causes should be discouraged as disastrous to the public welfare.*

— **Joseph Choate, ABA President (1898)**

*The jury system has come to stand for all we mean by English justice. The scrutiny of 12 honest jurors provides defendant and plaintiff alike a safeguard from arbitrary perversion of the law.*

— **Sir Winston Churchill (1956)**

*As a tribunal for dispensing justice, the centuries have proved the civil jury to be without equal.*

— **W.S. Martin, Canadian Queen's Counsel (1959)**

*The civil jury system is America's main claim to moral leadership in the world community.*

— **Charles W. Joiner, American Author (1962)**

*Jury trial represents courthouse democracy, the preservation of our funded experience in direct citizen participation in government.*

— **Thomas F. Lambert, Jr., Suffolk University Law Professor (1963)**

## PREFACE

The civil jury system of the United States embraces a fundamental precept of tested justice: that of ordinary citizens applying their minds and values to reach decisions on the facts in cases that often involve powerful wrongdoers. This form of direct citizen participation in the administration of justice was deemed indispensable by this nation's founders and was considered non-negotiable by the leaders of the American revolution against King George III. But the civil jury is more than a process toward bringing a grievance to resolution. The civil jury is a pillar of our democracy necessary for the protection of individuals against tyranny, repression and mayhem of many kinds and for the deterrence of such injustices in the future.

Crucial to protecting the right to a civil jury trial from its emboldened detractors and would-be destroyers is bringing its history and present importance to the forefront of public awareness. All citizens need to be afforded this awareness to appreciate how the right to trial by jury significantly enhances their ability to hold accountable those institutions and individuals who have misused their power over other peoples' lives and, at the same time, to shed feelings of powerlessness that so frequently are interpreted as apathy.

Jury verdicts in civil cases or the mere prospect of such a hearing has led to numerous improvements in the safety of consumer products, industrial machinery and health care procedures as well as commercial services in the marketplace. In addition, civil juries have stood to guard against arbitrary use of power by officials and employers. Access to the civil jury system is often the only means of redress for victims of civil rights and civil liberties violations.

Our civil jury institution is a voice for and by the citizenry in setting standards for a just society. Jury findings incorporated in appellate court decisions contribute to one of the few authoritative reservoirs of advancing standards of responsibility between the powerful and the powerless -- whether between companies and consumers, workers, shareholders and community or between officialdom and

taxpayers or citizens in general. Knowing the evolution of the common law and the civil jury provides compelling and ennobling evidence of this progression of justice.

But whenever the forces of centralized power become inebriated with their designs for more power, the civil jury is at risk. It is not an institution that can be bought. Jurors enter into their task with no further ambitions to be manipulated. Jurors operate under no internal bureaucratic motivations. They are held in check against any of their excesses by the trial judge and appellate review. Jurors come, deliberate and go back to their homes and work with themselves and the society better off for their endeavors. Jury duty is the only constitutional duty imposed on citizens and while prospective jurors may grumble over this responsibility, it is a continual source of astonishment how proud they are after they complete their duties.

Corporations and other institutions and powerholders who are held accountable by the civil jury are striving to weaken, limit and override the province of juries pursuant to a wholesale jettisoning of civil juries in large categories of cases. Some of their companies, led by insurers, have used expensive and focused media to persuade public opinion that civil juries are too costly to tolerate in their present state of access.

Manufacturers and professions that have been disciplined by civil jury factfinding and verdicts have pressed their allies in government to join in this mounting assault on this constitutional right to trial by civil jury. Their assaults, for the most part, are not yet that direct, but their angled intensity leaves no doubt that a weakened jury system is the first step toward abolition. The politicization of the judicial process, in the grip of statutory controls that regulate downward judge and jury and the common law processes of adjudication is the plain objective of the "corporate reformers."

There is need for an institution that communicates the worth of the civil jury to our society, that stimulates research into that history, that recommends ways to improve the judicial



administration of civil juries and that defends and improves this unique and decentralized muscle of our democracy.

Fortunately, a prime and continually nourished group of citizens, who have completed one or more tours of their civil jury duty, know first hand how the civil jury works even in the most complicated and lengthy cases. They realize what a bastion the civil jury is against unchecked power and its daily abuses just as the founders realized in their day. Former civil jurors are excellent advocates for defending the civil jury system and for giving it deeper roots in the public's consciousness.

This report sounds a call to all Americans concerned about the health of our democracy and the preservation of the Seventh Amendment to the U.S. Constitution. A National Association of Civil Jurors will provide the best effort to show legislators and corporations alike that tampering, undermining or destroying the practical access to this democratic institution will not be tolerated by an informed and alert citizenry.

— **Ralph Nader**

## EXECUTIVE SUMMARY

The civil jury system is a hallmark of democracy and an important safeguard of freedom. Civil juries have been called the conscience of the community. They stand as indispensable watchdogs over corporate negligence and corruption. Juries are the one arena where average citizens can participate directly in government, where they can have a direct impact on events and ultimately the state of their lives. The consensus among judges, lawyers and jurors themselves is that the system works extremely well.

Yet the civil jury system is today staving off fierce political attacks. A coalition of insurance trade associations, insurance companies, corporate and professional defense lobbies, corporate-funded think tanks, and their political allies, have been pushing hard for laws to prevent citizens from obtaining jury verdicts against corporate lawbreakers and other wrongdoers. A better effort is needed to show Congress, state lawmakers and the American public that the current civil jury system works and that criticisms are unjustified. This report and its recommendations are a major first step in this process.

### Background

The jury as we know it today, used in both civil and criminal cases, traces its roots to the Middle Ages when twelve "compurgators," essentially witnesses, were gathered together to take an oath that the party was honest, or to attest that they had witnessed a relevant transaction. The assumption was that God would intervene on the side of the innocent person. Gradually, the concept of witness jurors vanished, and juries acted purely as objective judges of facts. By the mid-18th century, the jury appeared similar to today's jury.

Unlike other, weaker democracies which have abolished the civil jury, our system has always considered the civil jury a critical part of our democratic government. The jury's roots are deep here. The American colonists, governed by English common law and parliamentary statutes, believed that trial by jury was an important right. Colonial juries were often used to counter

political oppression. England's repeated attempts to restrict the right to jury trial in the colonies was a major grievance leading to the Revolutionary War.

Although the early state constitutional drafters considered the civil jury an important instrument for the protection of individual liberties, the framers of the federal Constitution initially failed to secure the right to civil jury trial. Federalists like Alexander Hamilton believed that civil jury practice varied too widely from state to state to be included in the federal Constitution. Nevertheless, the mistake of excluding mention of the right to civil jury trial and other individual liberties aroused much opposition to the U.S. Constitution. In 1791, during its first session, Congress fixed the problem by passing the Bill of Rights, securing the right to civil jury trial in the Seventh Amendment.

The courts and Congress have developed several general principles for jury selection and make-up, with the fundamental precept that a jury must be drawn from a representative cross section of the community. This is to ensure that juries are impartial.

Most states select names for jury service from a combination of different civic lists, including voter lists, drivers' license lists, tax rolls, welfare rolls, telephone directories, and census lists. Jury service is a mandatory civic duty—it is integral to the proper functioning of courts and our system of justice. Failure to respond to a summons for jury duty is illegal in most jurisdictions. To ease the burden of jury duty, half the states have now adopted the one day/one trial rule whereby the term of a person called for jury duty is limited to one trial, and if not selected that day, the person is excused.

Study after study shows that individuals who serve on juries rate both their experience and the jury system uniformly high. The trial itself and the deliberation are very often major and moving experiences in the life of the citizen-juror. More than any other single institution, juries give citizens the chance to participate in government. Participation in government both

educates citizens and enhances their regard for the American system of justice.

### **Purposes of the Civil Jury**

A chief function of the jury system is to provide a check on official or arbitrary power. The civil jury is said to incorporate the idea that "justice is known to the ordinary citizen." Jurors are drawn from the whole community, not from an elite part of it, as are judges. They "inject" community values into judicial decisions, considering experience, common sense and a sense of society's tolerance for conduct. Civil juries also help develop community acceptance of tort law, since juries are continuously called upon to help redefine evolving concepts of "reasonable conduct," "ordinary person" and other basic precepts of tort law.

Jurors differ from judges in terms of the values they bring to cases and the freedom they have to apply those values. Unlike judges, juries historically have been able to "bend" the law to achieve justice in individual cases. The Supreme Court has emphasized repeatedly that one critical function of the jury is, when necessary, to depart from unjust rules or their unjust application. Sometimes, through civil jury nullification, verdicts have set into motion significant changes in civil law standards, such as the statutory repeal of contributory negligence and the adoption of comparative negligence rules in most states.

Juries also have wider latitude than judges in making difficult or unpopular decisions. They deliberate in secret, they need not explain their decisions and can immediately disperse, and they are usually protected by rules which often limit post-verdict interviewing of jurors.

Jury verdicts provide signals and markers that influence the outcome of a vastly larger number of cases that are settled (or abandoned) without trial. They also warn wrongdoers that certain types of conduct will not be tolerated in the community. It is well recognized that automobile and other product manufacturers, hospitals, pharmaceutical companies and other defendants in personal injury actions have redesigned products, improved medical care and taken other steps to improve or save lives following jury trials and verdicts.

The civil justice system deters unsafe conduct not only by imposing financial liability, but also

by forcing disclosure of important internal information about products, drugs, toxics and unsafe practices and processes, and by allowing dissemination of this information to millions of people through the mass media. Sometimes, it takes years of civil jury litigation before enough information is uncovered to force dangerous products off the market. Asbestos is one example.

In addition, civil jury verdicts are sometimes the only means available for obtaining justice in civil liberties, civil rights or violent crime cases, where the criminal justice system can occasionally fail.

### **Critiques of the Civil Jury**

Over the years, critics have argued that civil jurors cannot understand complex cases, that juries are arbitrary and emotional, and that jury trials are too cumbersome and costly. Yet virtually all reliable jury research disproves these statements. In fact, there is a significant body of evidence demonstrating that civil juries are competent, responsible and rational, and that their decisions are not arbitrary or emotional, but reflect continually changing community attitudes about corporate responsibility and government accountability.

Some jury critics say that jurors are unable to handle the evidence and law in particularly complex cases. A few courts recently have considered this "complexity argument," and opponents of the jury system have used it to advocate adoption of "expert tribunals" to resolve certain disputes, such as those involving occupational and toxic torts or medical malpractice. However, data from studies of hundreds of jury trials and jury simulations show that jury incompetence is a rare phenomenon. Because the deliberative process allows jurors to pool their collective memories, they are able thoroughly to recall and analyze the evidence and the law even in complex cases. Many studies show that jury deliberations are typically highly serious, highly relevant, and highly concerned with the facts of the case. Most courts that have considered a complexity "exception" to the Seventh Amendment have rejected it.

In addition, judges have many tools available to aid juries in understanding complex cases. For example, more and more judges are allowing

juries to take notes on testimony, and judges in at least 30 states are allowing juries to question witnesses and tell judges when they want more information. However, many judges do not provide juries with such assistance.

Civil jury critics also say that jurors decide damages impulsively, and sometimes reach arbitrary, compromise verdicts. They say that juries also allow emotions and sentimentality to enter improperly into their decision-making process, leading to exorbitant monetary awards. However, the evidence shows that jury awards are generally consistent and conservative, and that huge awards are rare and are often later reduced. There is no evidence that juries are arbitrary, and certainly no evidence that juries are any more arbitrary than are judges or arbitrators.

### **Attacks on the Civil Jury**

The first major assault on the civil jury system was the nationwide enactment of workers' compensation laws beginning in the early 1900s. Under workers' compensation laws, injured workers relinquish their right to jury trial in exchange for compensation for injuries, determined by an administrative board and set by statute. Studies today show that compensation awarded under workers' compensation is usually far from adequate. Having ceded their right to jury trial at a time when the law would have left most of their injuries uncompensated, workers now face serious disadvantages relative to those with access to the judicial system.

In recent decades, insurance and corporate lobbies have heightened attacks on the civil justice system in years when the property/casualty insurance industry has experienced self-inflicted cyclical downturns. In the mid-1980s, the campaign against victims' rights and the civil jury system approached new heights, aggravated by the property/casualty insurance industry's exaggerated response to its 1984 downturn. Well-funded advertising campaigns by the property/casualty insurance industry, lobbying by business interests, and efforts by their political allies including Reagan, Bush and Quayle, recently have led both to reductions in the power and authority of juries, and to elimination of jury trials in some cases. These provisions include caps on the damages which juries are allowed to award, no-fault proposals and other measures which prevent certain cases from reaching juries, and immunizing certain

wrongdoers from suit.

Inaccurate, anecdotal descriptions jury verdicts and misstatements of jury statistics, intended to outrage the reader or listener, have been the cornerstone of anti-jury advertising campaigns and public speeches. Moreover, research shows that exposure to these ads can influence jurors to lower verdicts.

Since the insurance crisis abated in the late 1980s, business interests have been advancing the notion that jury verdicts are having negative ramifications for the U.S. economy. Along with its companion argument—that the cost of litigation is damaging the U.S. economy—the claim that the system is hurting U.S. competitiveness has been used extensively by civil jury antagonists. These claims have been extensively discredited. Research and books by advocates of this viewpoint, such as the right-wing "think tank," the Manhattan Institute, and its senior fellow Peter Huber, are riddled with flaws and errors. Yet they have been widely quoted by right-wing politicians, ultra-conservative judges, and business publications as if they were true.

Courts have split over whether measures restricting the power and authority of the civil jury constitute an unconstitutional infringement on the civil jury system. For example, caps on damages have been struck down in a number of states because they unconstitutionally restrict the substantive right to jury trial and interfere with the separation of powers between the judicial and legislative branches. However, some courts have upheld caps. In addition, some judges have issued rulings preventing certain cases from going to juries, which may deprive the plaintiffs of their constitutional right to have a jury decide a dispute. However, most judges have not yet made such rulings, trusting the jury's ability to decide disputes.

### **Conclusion**

There is no question most Americans know little about our judicial system, and the civil jury is one of its least-understood features. Few citizens can refute false allegations made in insurance industry advertisements. Information in public libraries about the civil jury system is scarce. And very little is currently being done to educate the public about the history and importance of the civil jury.

The civil jury system needs a more focused advocate, one that can supply the public education and fortification necessary to protect this most cherished right. No group is better equipped for this than one composed of those who have actually served on civil juries. We recommend that a National Association of Civil Jurors, an independent organization of former civil jurors, be formed to be the system's advocate and defender.



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*The right of trial by jury in civil cases at common law is  
fundamental to our history and jurisprudence....*

*A right so fundamental and sacred to the citizen,  
whether guaranteed by the Constitution or provided by statute,  
should be jealously guarded...."<sup>1</sup>*  
— U.S. Supreme Court Chief Justice William H. Rehnquist

## INTRODUCTION

The words are those of U.S. Supreme Court Chief Justice William H. Rehnquist. Along with a number of his colleagues, conservative Rehnquist has written eloquently in defense of the civil jury, warning against even limited intrusions into the right to civil jury trial. These words are in striking contrast to the frequent critiques of Rehnquist's predecessor, Warren Burger, one of the nation's staunchest civil jury critics. Fortunately, Burger's views are in the minority among jurists, most of whom consider the jury a hallmark of democracy and an important safeguard of freedom.

Juries advance democracy at many levels. They are the one arena where average citizens can participate directly in government, where they can have a direct impact on events and ultimately the state of their lives. And despite some administrative burdens associated with juries, the frustrations of some jurors and the occasional unsound jury verdict, the consensus among judges, lawyers and jurors themselves is that the system works extremely well.

Jurors, representative members of the community randomly chosen to sit in judgment of others, deliberate carefully, render competent and just verdicts and then fade anonymously back into the community. Their decisions reflect community values that judges may lack, and therefore their verdicts

may differ from judges' opinions. But as Chief Justice Rehnquist aptly noted, the right to civil jury trial was guaranteed in our Bill of Rights "precisely because the Framers believed that they might receive a different result at the hands of a jury of their peers than at the mercy of the sovereign's judges."<sup>2</sup>

Civil juries have been called the conscience of the community. They stand as indispensable watchdogs over corporate negligence and corruption. Not surprisingly, corporations and their insurers have been at the forefront of attacks on civil juries over the years. These business interests seek to limit their liability exposure by proposing to take compensation judgments away from juries. They seek to limit the power and authority of the civil jury, and in some cases, to replace the civil jury system with a statutory structure over which their political action committee money can have more control.

But unlike other, weaker democracies which have abolished the civil jury, our system, thus far, has largely withstood the assaults. The jury's roots are deeper here. The American colonists fought the Revolutionary War in significant part over England's repeated attempts to restrict jury trials. The U.S. Constitution was nearly defeated over its failure to guarantee the right to civil jury trial. (The Seventh Amendment eventually resolved

the problem.) The right to jury trial has been secured not only by the U.S. Constitution, but by every state as well.

Without question, however, the civil jury is today an embattled and vulnerable institution in the United States. The 1980s and 90s have seen a non-stop barrage of legislative and, in some cases, judicial attempts to significantly weaken the civil jury. In some states, the question as to whether this constitutionally protected institution deserves to function at all has been reduced to a budgetary issue. North Dakota in 1989, and Vermont in 1990, each reacted to state budget squeezes by suspending civil jury trials (although North Dakota's 18 month moratorium was later declared unconstitutional by the North Dakota Supreme Court).<sup>3</sup> Between November 1991 and February 1992, civil jury trials in New York came to a halt when budget cuts left the state judiciary without staff to handle them.<sup>4</sup> As this report later explains, the societal harm caused by such moves stretches far beyond the damage caused to parties in individual cases.

The American public has remained largely silent over such abrogation of its constitutional rights as a result of two main factors. First, the insurance industry and other corporate interests and allies, including the last two Republican administrations and corporate-funded "think tanks," are engaged in a systematic public relations assault on the civil jury. These "PR" campaigns are designed to turn the American mind against this most cherished institution, and they are starting to have an impact. Second, there is, tragically, very little public education or media attention in this country about the real history, the performance and the importance of the civil jury. Little is being done to counter these assaults.

Despite its historic and current importance, today's civil jury remains one of the least understood features of the U.S. judicial system. Most law-related education programs teach little, if anything, about the civil jury institution. Even groups dedicated to preserving the Bill of Rights inspire little public support for the right guaranteed by the Seventh Amendment.

This report examines the history, functions, and importance of the American civil jury, analyzes the civil jury's role in U.S. history

and as part of the current U.S. judicial system, and responds to arguments frequently proposed by jury critics. The report finds that the public lacks the information necessary to counter the political assaults on the civil jury currently being waged by various business interests. Therefore, it recommends the establishment of an organization dedicated exclusively to championing and preserving the civil jury system. The report concludes that a National Association of Civil Jurors, composed of former civil jurors who have seen the system's minor faults but are convinced of its fundamental, justice-dispensing purpose, would be best suited for this task.

## THE HISTORY OF THE CIVIL JURY

### A. Early Background of the Jury Institution—Anglo-Saxon Law

The jury as we know it today, as used in both civil and criminal cases, traces its roots to the Middle Ages, when "legal proof" was determined by an appeal to God, or to the supernatural. Trial by ordeal, or by the oath of "compurgators," were the typical methods for establishing proof, with the assumption that God would intervene on the side of the innocent person.<sup>5</sup>

Compurgators were usually 12 individuals, or some multiple of 12, called to decide cases either by taking an oath that the party was honest, or by attesting that they had witnessed a relevant transaction. These people were usually neighbors who were considered most likely and most competent to know the facts and to tell the truth concerning them. The jury was essentially a group of witnesses, and the judge, appointed by the king, was not involved in fact-finding or the verdict. The defendant was not required to convince the court. Rather, the defendant simply brought on the wrath of God if the defense were untrue.<sup>6</sup>

Trials by ordeals of fire and water were more common when the crime was particularly violent, or the individual was so disreputable that he could not find compurgators. The Church had been opposed to trial by ordeal from as early as the late 9th century. In 1215, Pope Innocent III forbade priests from participating in trial by ordeal, thus removing its religious sanction.<sup>7</sup> It was then abandoned.

William the Conqueror and the Norman kings introduced trial by battle for civil cases following the Norman conquest of England in 1066, but the institution of compurgation continued.<sup>8</sup> (Trial by battle was not abolished until 1819.<sup>9</sup>)

Eventually, certain people charged with some crimes could demand an "inquest" to obtain a court judgment proving innocence or guilt. By the 12th century, laws were passed to allow some private disputes to be resolved in court. More "sophisticated" people preferred this method over trial by battle and jury trial eventually became the predominant dispute-

resolving method. In addition, juries gained popularity with local rulers, since the judge or sheriff who presided over the jury received a fee.<sup>10</sup> Eventually, some trials were declared to be a matter of right even for those who could not afford to pay the fee.<sup>11</sup>

By the end of the Middle Ages, bribery of jurors became common, and jurors grew less fearful of God's wrath for not telling the truth. As jurors became less reliable witnesses, they developed into "fact-finders," basing decisions less on their knowledge, and more on outside evidence. Appearances by attorneys became more common.<sup>12</sup> And in order to sustain their power, judges became more involved in each case, eventually requiring that they be apprised of the facts.<sup>13</sup> Around the 15th century, judges began instructing the jury.<sup>14</sup>

Gradually, the concept of witness jurors vanished completely, and juries acted purely as judges of facts presented only by witnesses. By the mid-18th century, the jury appeared similar to today's jury.

### B. Today's Jury—Outside the United States

By the 19th century, no institution of English law had achieved as much universal endorsement as the jury system, although its use in criminal cases has been broader.<sup>15</sup> Napoleon supported the criminal jury system in France as a weapon against the old aristocracy. Other countries in the second half of the 19th century adopted the criminal jury system as well, including Spain, imperial Russia, Germany, Switzerland (the Swiss cantons), Norway and several Latin American nations. The post-World War I constitutions of Poland and Austria included guarantees of criminal jury trials. Belgium and Italy have used juries in certain criminal cases.<sup>16</sup>

In the last 50 years, however, use of the criminal jury system has been on the decline outside the United States.<sup>17</sup> Czechoslovakia abolished its criminal jury after World War I, when local juries began acquitting Slovak saboteurs.<sup>18</sup> Japan held its first criminal jury

trial in 1926, but Japanese courts were never bound by them. Japan suspended criminal jury trials in 1943 and does not use them today.<sup>19</sup> Throughout the United Kingdom, criminal juries are used infrequently.<sup>20</sup>

As far as civil juries, except for Canada which rarely uses them, no country outside the United States guarantees the right to civil jury trial.<sup>21</sup> Even in England, the civil jury has virtually disappeared during the last 50 years. Nowhere in the world does the jury have so large a say in the administration of justice as in the United States.

## C. Juries in the United States

### 1. *The Colonial Years*

The American colonists, governed by English common law and parliamentary statutes,<sup>22</sup> believed that trial by jury was an important right of freedom, as Blackstone and others had written.<sup>23</sup> (Blackstone had said, "The trial by jury ever has been, and I trust ever will be, looked upon as the glory of English law."<sup>24</sup>) Many believed that trial by jury could be traced back in an "unbroken line" to Chapter 39 of the Magna Carta, issued in 1215, which stated, "No free man shall be taken, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land."<sup>25</sup>

The Massachusetts Body of Liberties, enacted December 10, 1641, was the first colonial charter to provide for civil and criminal jury trials by name. By contrast, this same charter made no mention of rights of free speech and press, and secured freedom of religion for Christians only.<sup>26</sup>

Colonial juries were often used to counter political oppression. In one famous 1670 case, William Penn was indicted for illegal speech and assembly, although it was widely believed the motive behind the indictment was the king's dislike for his religious beliefs (Penn was a Quaker). A colonial jury found Penn not guilty, even though the court repeatedly threatened to punish the jurors for returning this verdict, and eventually did fine and imprison them. The case helped to abolish the English practice of punishing jurors for bringing what the Court considered to be the

wrong verdict.<sup>27</sup>

England repeatedly attempted to restrict the right to jury trial in the colonies, as colonial administrators made increasing use of judge-tried cases. On March 22, 1765, England passed the Stamp Act, which placed stamp duties on all legal documents, newspapers, pamphlets, college degrees and other documents. The British reasoned that since the American colonists had been the chief beneficiaries of the expulsion of the French after the 1754-63 French and Indian War, they should bear the financial responsibility for the government and defense of the American continent.<sup>28</sup>

The act aroused strong opposition, in large part because the admiralty courts, which operated without juries, were given jurisdiction to enforce the Act.<sup>29</sup> John Adams said:

[T]he most grievous innovation of all is the alarming extension of the power of courts of admiralty. In these courts, one judge presides alone! No juries have any concern there!<sup>30</sup>

The Stamp Act was finally repealed in 1766, having been in effect only a few months and never enforced.

In virtually every major document and speech delivered before the Revolution, the colonists portrayed trial by jury as, if not their greatest right, one that was indispensable. The colonists' Resolution of the Stamp Act Congress, passed on October 19, 1765, declared, "Trial by jury [is] the inherent and invaluable right of every British subject in these colonies."<sup>31</sup> Late in 1772, the Boston town meeting passed a resolution charging that the right of trial by jury was in jeopardy from the power of the vice-admiralty courts, which did not provide jury trials.<sup>32</sup>

In 1774, the First Continental Congress declared in its Declaration and Resolves that the colonists were entitled to the "great and estimable privilege of being tried by their peers of the vicinage."<sup>33</sup> Colonists called trial by jury "a great right" when describing this declaration to the French settlers of Quebec in 1774, in an address urging them to support the



American cause.<sup>34</sup> In the Declaration of the Causes and Necessity of Taking Up Arms in 1775, the colonists listed deprivation of "the accustomed and inestimable privilege of trial by jury, in cases affecting both life and property" as specific grounds for forcibly resisting English rule.<sup>35</sup>

And among the grievances against George III listed in the Declaration of Independence was "[D]epriving us, in many cases, the benefits of trial by jury."<sup>36</sup> (The only other Bill of Rights provision mentioned specifically in the Declaration of Independence was the prohibition against quartering troops.)

## 2. *The Civil Jury Trial as a Constitutional Right*

The early state constitutional drafters considered the civil jury an important instrument for the protection of individual liberties.<sup>37</sup> Section 11 of the Bill of Rights in the 1776 Constitution of Virginia, drafted by plantation and slave owner George Mason, stated "[I]n controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred."<sup>38</sup> The Constitution of Pennsylvania, dated August 16, 1776, followed Virginia's in affirming the right of trial by jury in civil cases: "[I]n controversies respecting property and in suits between man and man, the parties have a right to trial by jury, which ought to be held sacred."<sup>39</sup>

Similarly, the Constitution of North Carolina, dated December 14, 1776, stated, "[I]n all controversies at law, respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable."<sup>40</sup> Similar language is found in the constitutions of Vermont in 1777, Massachusetts in 1780, and New Hampshire in 1784.<sup>41</sup> In fact, legal scholars believe that "The right to trial by jury was probably the only one universally secured by the first American state constitutions...."<sup>42</sup>

The framers of the U.S. Constitution secured the right to jury trial in *criminal* cases by incorporating it directly into the main body of the Constitution.<sup>43</sup> However, they did not secure the right to civil jury trial, or for that matter any of the other individual liberties listed in the Bill of Rights. Federalists like

Alexander Hamilton believed at the time that civil jury practice varied too widely from state to state to be included in the federal constitution. Nevertheless, the mistake of excluding mention of the right to civil jury trial almost defeated the Constitution.<sup>44</sup>

There is scant evidence of debate over the issue during the constitutional convention, since the framers originally had considered it unnecessary—and too time-consuming—to include a listing of individual rights in the Constitution.<sup>45</sup> However, the civil jury trial issue came up during discussions among members of the "Committee on Style and Arrangement" who finalized the document's format after the "Committee on Detail" had completed its work.<sup>46</sup> During a discussion among committee members Nathaniel Gorham, Elbridge Gerry and George Mason, Gerry urged the "necessity of Juries to guard against corrupt Judges," later arguing that without juries, "The Judiciary will be a Star Chamber." Similarly, Mason complained, "There is no declaration of any kind, for preserving the liberty of the press, or the trial by jury in civil causes [cases]; nor against the danger of standing armies in time of peace."<sup>47</sup>

Thomas Jefferson also criticized the document for neglecting to preserve the civil jury trial. Jefferson listed among the rights he wished had been explicitly guaranteed "a trial by jury in all cases determinable by the laws of the land."<sup>48</sup> Jefferson later said, "I ' consider [trial by jury] as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution,"<sup>44</sup> and,

[w]ere I called upon to decide whether the people had best be omitted in the legislative or in the judiciary department, I would say it is better to leave them out of the legislative. The execution of the laws is more important than the making of them.<sup>50</sup>

Sensing the developing controversy which threatened ratification, federalist Alexander Hamilton devoted his longest Federalist essay, No. 83, to the civil jury trial, arguing that the constitution's drafters did not mean to abolish civil jury trials, but rather believed legislatures could better define the right through statutes.

However, Hamilton could not quiet the critics. According to one historian:

The almost complete lack of any Bill of Rights was a principal part of the Anti-Federalist attacks on the constitution and the lack of provision for civil juries was a prominent part of this argument; the Supreme Court's appellate jurisdiction in law and in fact was treated by the Anti-Federalists as a virtual abolition of the civil jury.<sup>51</sup>

Patrick Henry, speaking at the Virginia Constitutional Convention, said:

"Trial by jury is the best appendage of freedom.... We are told that we are to part with that trial by jury with which our ancestors secured their lives and property.... I hope we shall never be induced by such arguments, to part with that excellent mode of trial."<sup>52</sup>

Henry, George Mason and other anti-federalists may have used the "jury trial" issue to stir up political opposition to the constitution, which they opposed more for its usurpation of local political influence.<sup>53</sup> But populist sentiment was strongly in favor of a Bill of Rights, particularly the right to a civil jury trial. Delaware, Pennsylvania, New Jersey, Georgia and Connecticut ratified the constitution too quickly for organized opposition to form. But beginning with Massachusetts, which convened to discuss ratification in February, 1788, states began asking Congress to make certain changes to the constitution "to remove the fears and quiet the apprehensions" of the people. In addition to expressing fear of Congress' power to levy direct taxes, Massachusetts wanted three amendments germane to civil rights: grand jury indictment, civil jury trial and a declaration reserving to the states all powers not expressly delegated to Congress.<sup>54</sup>

In 1791, during its first session, Congress drafted the Bill of Rights, ratified as the first ten amendments to the constitution, securing the right to civil jury trial in the Seventh Amendment:

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.

By its language, the right is limited. It does not attach in *every* civil case, but only to suits at common law—legal terminology which has far less significance today than it did at the time the amendment was passed. In 1791, the U.S. civil justice system provided two distinct kinds of courts: common law courts, where legal remedies were obtained, and equitable courts, where equitable remedies were administered. The right to civil jury trial was intended to attach only in common law court cases, although even then, there was often "a very large overlap between law and equity cases."<sup>55</sup> However, in 1938, the Federal Rules of Civil Procedure merged the systems of law and equity into one civil court under Rule 2.

The Supreme Court has ruled that the right to civil jury trial should apply in any case which *would have* been tried in a court of law had the claim existed in 1791. The Court developed a two-part test to determine this: a jury is required in civil cases 1) where the action is analogous to an 18th-century English form of action, and 2) where the remedy sought is legal, as opposed to equitable, in nature.<sup>56</sup> Part two of this test has always been considered the more important factor. In fact, in one of his last dissents, Justice William Brennan argued for elimination of part one of the test, which he said "needlessly convolutes Seventh Amendment jurisprudence."<sup>57</sup>

Further, the Amendment only secures the right to civil jury trial in *federal* court cases. It is one of only three Bill of Rights provisions which the Supreme Court has not applied to states as well.<sup>58</sup> However, most state constitutions have independently established the right to civil jury trial. Only Louisiana has no constitutional reference, while the constitutions of Colorado and Wyoming have only indirect provisions.<sup>59</sup> However, jury trials in these states are secured through various state statutes.<sup>60</sup> In Texas, almost all civil actions, including suits

for injunctive relief, may be tried by jury<sup>61</sup>

In the early 1970s, the Supreme Court sanctioned the constitutionality of verdicts reached by non-unanimous juries in state court cases,<sup>62</sup> and the use of six-person juries in civil cases.<sup>63</sup> (Five-member criminal juries have been declared unconstitutional.<sup>64</sup>)

Although these measures were adopted as cost-saving devices (non-unanimity reduces the number of hung juries), studies show that they have not resulted in any significant savings of time or money.<sup>65</sup> On the other hand, they may have disserved the interests of fairness and justice. Smaller juries are by their nature less representative of diverse populations in the community. In a recently completed two-year study of the Los Angeles courts, the National Center for State Courts found that it is more than twice as likely that at least one black person will serve on a 12-person jury as on an eight-person jury.<sup>66</sup> Also, non-unanimity may weaken the deliberative process, since the jury need pay far less attention to dissenting views if unanimity is not required.

Some important Seventh Amendment developments, further defining its scope and effect,

- *Dimick v. Scheidt*,<sup>68</sup> a 1934 case in which the Supreme Court held, "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." The Court ruled that in cases where the amount of damages was uncertain, their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it.

- *Dairy Queen Inc. v. Wood*, U.S. Dist. J.<sup>69</sup> a 1962 case where the Supreme Court warned that even a limited intrusion into the right of jury trial "should be seldom made, and if at all, only when unusual circumstances exist." The Court ruled that "any legal issues for which a trial by jury is timely and properly demanded [must] be submitted to the jury."

- *Curtis v. Loether*,<sup>70</sup> a 1974 case which held that a jury trial was required in a case involving a Title VIII suit for damages based on unfair housing practices. The Supreme Court said, "when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law ... including new causes of action created by congressional enactment."

In *Curtis*, and in the 1990 case *Teamsters v. Terry*, the court suggested, but did not decide, that in employment discrimination cases under Title VII, jury trials were not required since the only remedies—back-pay and reinstatement—were equitable in nature.<sup>71</sup> However, with passage of the Civil Rights Act of 1991, Congress established damages as an appropriate remedy in cases of intentional discrimination under Title VII, and with it, assured the right to jury trials in cases where damages are sought.<sup>72</sup> Congress said:

The jury system is the cornerstone of our system of civil justice, as evidenced by the Seventh Amendment. Just as they have for hundreds of years, juries are fully capable of determining whether an award of damages is appropriate and if so, how large it must be to compensate the plaintiff adequately and to deter future repetition of the prohibited conduct.<sup>73</sup>

- *Pernell v. Southall Realty*, a 1974 case which established a jury trial requirement for tenant dispossession actions in Washington, D.C.<sup>74</sup>

- *Atlas Roofing Co. v. OSHA*, a 1977 case which upheld a limitation on the

Seventh Amendment.<sup>75</sup> The Supreme Court, rejecting the right to jury trial and upholding an Administrative Law Judge's ruling imposing fines, said, "Congress can create new 'public rights' and provide for administrative, rather than judicial determinations, consistent with the Seventh Amendment."

- *Lorillard v. Pons*, a 1978 case where the court found a right to a jury trial in a case where the statute created a private right of action for age discrimination in employment <sup>76</sup>

- *Parklane Hosiery Co. Inc. v. Shore*, 1979.<sup>77</sup> In a stockholders' class action against a corporation for Securities and Exchange Commission violations, the corporation was denied jury trial on certain issues. In his dissenting opinion, Justice Rehnquist lamented, "Regrettably, the erosive process [of the right to civil jury trial] continues apace with today's decision."<sup>78</sup>

- *U.S. v. Tull*. <sup>79</sup> In 1987 the Supreme Court determined that a jury trial was required to determine liability under the Clean Water Act. However, it was denied with regard to the determination of civil penalties.

## GENERAL PRINCIPLES FOR JURY SELECTION AND JURY SERVICE

### A. Jury Selection and Composition

In the United States, the courts and Congress have developed several general principles for jury selection and make-up. One fundamental precept is that a jury must be drawn from a representative cross section of the community. This is to ensure that juries are *impartial*, as required by the express language of the Sixth Amendment, and as extended to Seventh Amendment cases as well.<sup>80</sup> In *Swain v. Alabama*,<sup>81</sup> the Supreme Court declared unconstitutional the systematic exclusion of members of one race from a jury pool. In *Taylor v. Louisiana*,<sup>82</sup> the Court invalidated Louisiana's systematic exclusion of women from jury service, holding that no cognizable group may be systematically excluded from a jury panel. The Supreme Court has held that a defendant in a criminal case may challenge a prosecutor's purposeful exclusion from the jury of members of the defendant's racial group, which is a violation of the equal protection clause of the Fourteenth Amendment.<sup>83</sup> At least one lower court has extended this concept to civil cases.<sup>84</sup>

In enacting the federal Jury Selection and Service Act of 1968,<sup>85</sup> Congress declared that all citizens litigating before juries in Federal Court have the right to juries selected at random from a fair cross section of the community. No citizen may be excluded from jury service on account of race, color, religion, sex, national origin or economic status.<sup>86</sup> In a recent development, a federal judge ruled that exclusion from a jury of a deaf person, who was knowledgeable in sign language and had an interpreter, violated the Federal Rehabilitation Act.<sup>87</sup>

The Jury Selection and Service Act of 1968 also mandates that voter registration lists, or lists of actual voters, be the primary source for selecting federal jury panel members.<sup>88</sup> However, voter lists, while the most convenient source of names from an administrative point of view, have been criticized for including only about 60 percent of eligible voters.<sup>89</sup> Moreover, these lists can fail to represent young people, racial minorities, and the poor and transient.<sup>90</sup> An increasing number of state jurisdictions now supplement voter lists with

drivers' license lists, tax rolls, welfare rolls, telephone directories, census and other civic lists.<sup>91</sup>

Raymond Arce, Los Angeles County's senior director of operations for the Superior Court, was reported as saying in a recent interview that while race, gender and ethnicity discrimination is less of a problem in today's jury selection, an increasing number of citizens are being excluded from jury duty on the basis of age and economic status—specifically, the young and old, and those who work for firms with less than 50 people, particularly those in the trades, unskilled laborers or workers on small farms.<sup>92</sup> One reason is that most private firms will not pay employees' salaries for jury service, and those that do typically will only pay for 10 days. (Los Angeles County pays jurors only \$5 a day.) As a result, employees of the government and large firms such as insurance companies and large manufacturers, which typically will pay jurors' salaries for the length of trial, are already dominating juries for long trials in Los Angeles. Arce warned, "Unless we devise some sort of plan for making sure that all areas participate [such as requiring employers to pay salaries or establishing a public fund to do so],... it's going to be an exclusive group."<sup>93</sup>

Typically, once lists are pooled, names are randomly drawn, now often by computer, and summonses are issued.<sup>94</sup> For example, in Colorado, driver lists and voter lists are merged each year by the State Administrative Office. Upon a local court's requests, a computer generates and mails a summons to randomly selected individuals on this merged list, asking them to appear at the local court at a designated date and time. In New York, a state computer selects names merged from voter, driver and tax lists, and in certain larger jurisdictions, downloads the names directly into local computers.<sup>95</sup>

In Los Angeles County, names are randomly drawn by computer from voter registration and Department of Motor Vehicle records.<sup>96</sup> In 1988, out of the 5 million names on these lists, 1.9 million received jury service notices.



More than 766,000 notices were not acknowledged (there was no follow-up to determine why), and another 294,000 were returned by the Postal Service as undeliverable. Of the approximately 850,000 who acknowledged the notices, 200,000 were declared legally incompetent to serve usually because they were not U.S. citizens, they did not speak English, they were convicted felons or they had already served on a jury in the last two years. Approximately 400,000 were excused, primarily because of medical or financial reasons. Of the 250,000 receiving summonses to appear in court, another 100,000 were excused for medical or financial hardships. About 150,000 individuals served.<sup>97</sup>

A recent study found that 45 percent of adults in the United States have been called at least once for jury duty, up from 35 percent in 1984.<sup>98</sup> This increase is due to two main factors: the growing use of drivers' license lists and other lists as sources for jurors' names, and the adoption of the one day/one trial rule by a number of states. Under a one day/one trial system, a person may be on call for jury service for several days or weeks. But once called to report, the term is limited to one trial, or, if not selected that day, the person is excused.<sup>99</sup> This increases the need for potential jurors. According to Tom Munsterman of the Center for Jury Studies at the National Center for State Courts, 22 percent of jurisdictions have successfully implemented this system.<sup>100</sup>

Once summoned to appear for jury duty, a potential juror undergoes careful questioning before being allowed to serve, to determine if the juror will be able to impartially consider the case. During this preliminary questioning, called *voir dire*, jurors may be challenged for having a personal interest in the case, or because of their general beliefs or prejudices. (*Voir dire* is absent in most other countries which have jury trials.) Sometimes the judge questions the jurors, sometimes the attorneys. In addition to dismissals for cause, lawyers may challenge a certain number of jurors—usually six in civil cases—without giving a reason, called "peremptory challenges." Studies show that almost one-third of all prospective jurors in criminal and civil cases are eliminated by these peremptory challenges.lol

## B. Service

Jury service is a mandatory civic duty—it is integral to the proper functioning of courts and our system of justice. Congress has declared that all citizens must have the opportunity to be considered for service, and that they have an obligation to serve when summoned.<sup>102</sup> The *Handbook of Jury Service*, published by the Institute of Judicial Administration, says:

The role of jurors is vital to the accomplishment of justice in the courts... To serve as a juror when called fulfills a duty of citizenship. When the service is impartially, fairly and conscientiously performed, the right granted by the Constitution of the United States to trial by jury reaches its highest state.

Failure to respond to a summons for jury duty is illegal in most jurisdictions. Some jurisdictions, such as Boston, have filed criminal misdemeanor complaints or imposed fines against those who failed to appear, but this is rare.<sup>103</sup>

Many jurisdictions are addressing the problem of non-compliance by making jury duty less burdensome. One method is to allow jurors to call the court each morning to find out if they are needed that day.<sup>104</sup> The other, more popular innovation is the one day/one trial rule (see above).

Many states strictly prohibit employers from interfering with a worker's obligation to report for jury duty when called. In one recent Florida case, a Ft. Lauderdale hotel owned by Phillips Petroleum, as well as its sales director, were convicted of illegally firing a hotel employee because she insisted on fulfilling her jury duty obligations. The court said that her dismissal:

... has not only a chilling effect on all citizens called for jury duty, but it stabs at the very heart of our system of justice. No juror should have to come to jury duty fearful that his job, his source of

income, his very livelihood would be arbitrarily and wrongfully terminated.<sup>105</sup>

More than any other single institution, juries give citizens the chance to participate in government, which both educates and enhances one's regard for the American system of justice. In 1863, Alexis de Tocqueville wrote in *Democracy in America*:

The jury contributes powerfully to form the judgment and to increase the natural intelligence of a people; and this, in my opinion, is its greatest advantage... I think the practical intelligence and political good sense of the Americans are mainly attributable to the long use which they have made of the jury in civil causes... I look upon it as one of the most efficacious means for the education of the people which society can employ.

Study after study shows that jurors rate both their experience and the jury system uniformly high. The Center for Jury Studies of the National Center for State Courts has surveyed many jurors after trial. In a 1983 study of Pennsylvania courts, the Center found that approximately 90 percent viewed their experience favorably, as a "precious opportunity."<sup>106</sup> The project found that while many citizens ask to be excused from jury service for a great variety of reasons, those who actually serve are glad they did.<sup>107</sup> A 1991 Center study of a variety of state courts around the country confirmed these results, finding among other things that becoming a sworn juror has a positive effect on juror satisfaction.<sup>108</sup> The Center found it "comforting to know that satisfaction with jury duty is high and primarily determined by the process itself, that attitudes improve through jury service and that the actual hardship is often less than anticipated."<sup>109</sup>

In his well-known 1964 article *The Dignity of the Civil Jury*, jury scholar Harry Kalven observed:

[J]ury service does not disenchant but actually increases the public's preference for trial by jury. The trial itself and the deliberation is very often a major and moving experience in the life of the citizen--juror.<sup>110</sup>

Many former jurors, moved by their experiences, have over the years written personal tributes to the jury system. One juror, whose letter was published in *The New Yorker* magazine in the mid-1960s, wrote:

Last week, to my astonishment ... I spent two exhilarating days on jury duty.... Above all, the judge exhorted us to be guided by our experience and common sense—words that, he said, should be in capitals reading from the floor to the ceiling of the courtroom. Twelve Solomons, rather than 12 mere jurors, sat down round the table in the jury room....) 11

Another juror, who recently served and later joined a citizen's group working to improve the court system, wrote:

Serving on a trial is, for most jurors, an exciting and worthwhile experience. I certainly found it so... [Y]ou are in a sincere and conscientious search for the facts of the case. There is nothing casual about it. Most people have a high sense of the duty they have been given, of their responsibility to share their memories of the testimony, to sort out the inconsistencies in testimony, to decide what the facts are in the case, and finally to agree on a verdict. It is amazing what 12 individuals can accomplish together, and yes, sometimes it is downright inspiring.<sup>112</sup>

In a letter to the *New York Times*, another juror

r.  
wrote, "While viewing my responsibilities with appropriate solemnity, I enjoyed my service, and I am looking forward to my next notice..."<sup>113</sup> In another letter to the *New York Times*, a citizen who served on both a criminal and civil jury complained about a New York law which allows women to be easily excused from jury duty, saying they don't know what they're missing:

I've just spent, for the first time in my life, two splendid weeks [on jury duty]. In both instances my fellow jurors and I took our job very seriously and very conscientiously. Corny as it sounds, we felt we were contributing in our own small way to the exercise of justice.<sup>114</sup>

## THE FUNCTIONS AND IMPORTANCE OF CIVIL JURIES

### A. Values and Justice

The U.S. Supreme Court has recognized in numerous decisions that a chief function of the jury system is to provide a check on official or arbitrary power. For example, Chief Justice Rehnquist has written:

The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence... [T]hose who oppose the use of juries in civil trials seem to ignore [that] the founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.<sup>115</sup>

In *Taylor v. Louisiana*,<sup>116</sup> the Supreme Court explained that the purpose of the jury was to "guard against the exercise of arbitrary power—to make available the common sense judgment of the community as a hedge against the overzealous prosecutor and in preference to the professional or perhaps overconditioned or biased response of the judge."<sup>117</sup> While this case dealt with criminal juries, the same notion applies to civil juries which often are charged with deciding cases involving official misconduct, standards of justice or public health and safety.

The civil jury is said to incorporate the idea that "justice is known to the ordinary citizen."<sup>118</sup> Jurors are drawn from the whole community, not from an elite part of it, as are judges. They "inject" community values into judicial decisions, considering experience, common sense and a sense of society's tolerance for conduct. Civil juries also help develop community acceptance of tort law, since juries are continuously called upon to help redefine evolving concepts of "reasonable conduct," "ordinary person" and other basic precepts of tort law.<sup>119</sup>

Moreover, jurors differ from judges in terms of the values they bring to cases and on the freedom to apply those values. Juries can apply a measure of fairness and equity to a case that a judge, preoccupied with fine points of law, may ignore.<sup>120</sup> In addition, unlike judges, juries historically have been able to "bend" the law to achieve justice in individual cases, much to the chagrin of some jury critics.<sup>121</sup> The Supreme Court has emphasized repeatedly that one critical function of the jury is, when necessary, to depart from unjust rules or their unjust application.<sup>122</sup>

When juries reach verdicts which do not follow the law the judge says is governing, the result is known as "jury nullification." Jury nullification has a long-standing and widely accepted tradition in U.S. jurisprudence. One of the earliest and most famous examples of this practice involved the trial of publisher John Peter Zenger in 1735 for seditious libel. Zenger was prosecuted by a corrupt New York governor, and the King's judge instructed the jury that it had authority to decide only the facts, but not the law in the case. Zenger's lawyer Alexander Hamilton told the jury, "Jurymen are to see with their own eyes, to hear with their own ears, and to make use of their own consciences and understandings, in judging the lives, liberties or estates of their fellow subjects." The jury found Zenger not guilty.<sup>123</sup>

In later years, Northern juries would often "bend the law" to acquit abolitionists who assisted slaves in violation of the 1850 Fugitive Slave Laws. Juries thus became an important tool for abolitionists before the Civil War.<sup>124</sup>

Sometimes, through civil jury nullification, verdicts have set into motion significant changes in civil law standards. Boston Federal Judge Charles E. Wyzanski, Jr., wrote in 1952:

Traditionally, juries are the device by which the rigor of the law is modified pending the enactment of new statutes.... [I]n Anglo-American legal history, reform

has rarely come as a result of prompt, comprehensive investigation and legislation. The usual course has been by resort to juries, to fictions, to compromises with logic. Only at the last stages are outright changes in the formal rules announced.<sup>125</sup>

For example, one of tort law's harshest early doctrines—the fellow-servant rule—was abandoned during the 19th century after juries repeatedly refused to apply it.<sup>126</sup> The rule had provided that in actions for damages brought against an employer by an injured employee, the employer could escape liability by alleging that the negligence of another employee was partly or wholly responsible for the accident.

The 1960 case of *Henningsen v. Bloomfield Motors*<sup>127</sup> is a somewhat unusual example of a single jury verdict highlighting such unfairness in liability standards that the appeals court, in upholding the verdict, outright changed the law. In that case, Mr. Henningsen had signed a purchase order for a used car, containing small print which established manufacturer and dealer liability for injuries suffered only by the buyer. The car, which had a faulty steering system, crashed with Mr. Henningsen's wife at the wheel. Despite the purchase order's clear language, the jury ruled in favor of Mrs. Henningsen, finding, in effect, an "implied warranty of merchantability." The appeals court agreed and upheld the verdict, establishing the principle that any lawful occupant of a car may sue the manufacturer for injuries caused by defects.<sup>128</sup>

Another well-known example of civil jury nullification leading to the rejection of an unjust liability doctrine was the refusal of juries to apply regularly the doctrine of contributory negligence. Contributory negligence prohibits a victim who is even the slightest bit negligent from recovering any compensation for injuries. In his 1949 book *Courts on Trial*, former Second Circuit Judge Jerome Frank criticized juries severely for "making law" by "uniform[ly] reject[ing] the legal rule about contributory negligence."<sup>129</sup> The Pennsylvania Supreme Court noted in a 1955 decision:

The doctrine of comparative negligence ... is not recognized by the Courts of Pennsylvania, but as a practical matter [it is] frequently taken into consideration by a jury. The net result, as every trial judge knows, is that in a large majority of negligence cases where the evidence of negligence is not clear ... the jury brings in a compromise verdict...<sup>130</sup>

Jury nullification contributed to the statutory repeal of contributory negligence and the adoption of comparative negligence rules in most states. As one commentator noted:

The doctrine of contributory negligence was developed as a jury control mechanism to protect infant industries from liability in the opening decades of the Industrial Revolution.... The recent legislative trend towards comparative negligence attests to the wisdom of what juries had been doing all along.<sup>131</sup>

Juries also have wider latitude than judges in making difficult or unpopular decisions. They deliberate in secret (over 30 jurisdictions have laws specifically forbidding the recording of jury deliberations<sup>132</sup>), they need not explain their decisions and can immediately disperse, and they are usually protected by rules which often limit post-verdict interviewing of jurors.<sup>133</sup> (To interview a juror either in person or through a questionnaire following a trial, a researcher usually is required to obtain permission from the presiding judge. The judge may withhold permission if, for example, he or she fears information developed from interviews could provide a losing side with grounds for appeal.<sup>134</sup>)

Numerous scholars, legal and otherwise, have over the years attested to the wisdom of the jury system for many of these reasons. For example, legal scholar John H. Wigmore wrote in the 1920s:

The jury, in the privacy of its retirement, adjusts the general



rule of the law to the justice of the particular case.... That is what jury trial does. It supplies that flexibility of legal rules which is essential to justice and popular contentment.<sup>135</sup>

In 1863, De Tocqueville wrote in *Democracy in America*, "When the jury acts on civil causes, its application is constantly visible.... It affects all the interests of the community.... It is gradually associated with the idea of justice itself.... "

Winston Churchill said in *A History of the English Speaking Peoples*, "The jury system has come to stand for all we mean by English justice, because so long as a case has to be scrutinized by twelve honest men, defendant and plaintiff alike have a safeguard from arbitrary perversion of the law."

In his book *We, the Judges*, the late U.S. Supreme Court Justice William O. Douglas wrote:

A jury reflects the attitudes and mores of the community from which it is drawn. It lives only for the day and does justice according to its lights. The group of 12 who are drawn to hear a case, makes the decision and melts away. It is not present the next day to be criticized. It is the one governmental agency that has no ambition. It is as human as the people who make it up. It is sometimes the victim of passions. But it also takes the sharp edges off a law and uses conscience to ameliorate a hardship. Since it is of and from the community, it gives the law an acceptance which verdicts of judges could not do.<sup>136</sup>

Similarly, Chief Justice Rehnquist observed, "Jurors bring to a case their common sense and community values; their 'very inexperience is an asset because it secures a fresh perception of each trial, avoiding the stereotypes said to infect the judicial eye'" (citing the landmark 1966 book *The American*

*Jury* by professors Harry Kalven and Hans Zeisel<sup>137</sup>).

Also, in passing the Jury Selection and Service Act of 1968, Congress noted, "It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it."<sup>138</sup> Senator Larry Pressler (R-S.D.) wrote in 1983:

It is clear that the public's confidence and participation in the judicial process would be undercut seriously by the elimination of civil jury trials.... While many have suggested the elimination of this right in civil cases, the abolition of such an historic principle will not be taken lightly by a people who consider it fundamental to our democratic society.<sup>139</sup>

And one commentator observed, "Bringing the law to the people may not make it more just in all cases, but it will make it the law of the people, which is what it should be in a constitutional democracy."<sup>140</sup>

## B. Signals and Deterrence

University of Wisconsin law professor Marc Galanter has argued that the influence of jury verdicts in tort cases, of which there are relatively few (for example, jury verdicts make up only 3-4 percent of paid medical malpractice claims brought by injured victims, according to a 1985 study<sup>141</sup>) is vastly disproportionate to their number. Jury verdicts provide signals and markers that influence the outcome of a significantly larger number of cases that are settled (or abandoned) without trial. He calls the "transmission and reception of these signals" a "crucial aspect of the jury institution."<sup>142</sup>

By contrast, these signals do not exist in other countries, where civil jury trials are not available. As a result, wrongdoer defendants are not similarly pressured to offer victims fair settlements. For example, in Britain several years ago, Eli Lilly Co.'s settlement offer to victims of the company's arthritis drug Opren (Oraflex), which had caused debilitating illnesses or death, averaged out at less than

£1,800 (about \$3,150) each.<sup>143</sup> (The drug has been linked to 74 deaths and nearly 4,000 cases of illness in Britain, and at least 49 deaths and 916 injuries in the United States. Lilly pleaded guilty to criminal charges in connection with its marketing of this drug in the United States.)<sup>144</sup> By contrast, in one U.S. case—a Georgia suit filed by the estate of one of the U.S. victims—a jury awarded \$6 million. (Lilly later settled the case for an undisclosed sum.)<sup>145</sup> Lilly paid its U.S. victims millions of dollars in settlements.

The jury's transmission of signals does not merely encourage fair settlements, however. It also warns wrongdoers that certain types of conduct will not be tolerated in the community. The foreman of the Houston, Texas jury which assessed \$10.53 billion against Texaco for improperly interfering with a merger between Pennzoil Co. and Getty Oil, was clear on this point. In a post-trial interview he said, "We wanted to send a message to corporate America that they can't get away with this type of action and not be punished."<sup>146</sup>

Deterrence of unsafe practices through imposition of financial liability has always been considered a critical function of the U.S. civil justice system.<sup>147</sup> Conservative theorist Richard Posner has written that the tort system's economic function is deterrence of non-cost-justified accidents, and that tort law creates economic incentives for "allocation of resources to safety."<sup>148</sup> The possibility of tort liability deters culpable manufacturers, builders, doctors and other wrongdoers from repeating their negligence or misconduct, and gives them the proper economic incentives to become more safe and responsible. In cases where criminal laws are violated but are not properly enforced, the potential for civil damages can become a more effective deterrent than criminal sanctions.

Jury critics say the jury system is out of control because of the unpredictable nature of the common law and jury awards.<sup>149</sup> Yet the cost unpredictability of jury verdicts is the essence of this deterrence function. Professor Richard L. Abel has written that years of research on the deterrent effect of sanctions has confirmed repeatedly that the *potential* of liability and of suffering punishment is more influential on deterring dangerous conduct than a sanction's severity.<sup>150</sup>

A study of hazardous waste litigation by a Massachusetts Institute of Technology research team led by Dr. Nicholas Ashford, found that wrongdoers who are not assessed the full cost of damages they cause do not take sufficient precaution to prevent future harm. The researchers found that "The tort system seems to be the most significant mechanism to keep risk aversion in the market."<sup>151</sup> Many studies of the workers' compensation system, which forces injured workers into non-jury trial administrative systems in order to collect compensation, have found the system to be an ineffective deterrent against workplace dangers.<sup>152</sup> Similarly, in their study of alternative dispute resolution programs in medical malpractice disputes, Schwartz and Komesar concluded, "Replacing the present tort system with a no-fault insurance scheme ... might well abolish the deterrent signal or distort clinical decision making." They found that the fault system, which assesses damages against negligent doctors, sends "signals" to other doctors that discourage future carelessness and reduce future damages.<sup>153</sup>

The civil justice system deters not only by imposing financial liability, but also by forcing disclosure of important internal information about products, drugs, toxics and unsafe practices and processes, and by allowing dissemination of this information to millions of people through the mass media. When disputes are resolved without trial and without a public record, wrongdoers often can suppress information about dangerous products, malpracticing physicians, unsafe workplaces and other wrongdoing. It is well recognized that automobile and other product manufacturers, hospitals, pharmaceutical companies and other defendants in personal injury actions have redesigned products, improved medical care and taken other steps to improve or save lives following jury trials and verdicts. This was confirmed by a survey released in 1987 by the industry-funded Conference Board, which interviewed 232 risk managers of large U.S. corporations. The Board concluded:

Where product liability has had 3. notable impact—where it has most significantly affected management decision making—has been in the quality of the products

themselves. Managers say products have become safer, manufacturing procedures have been improved, and labels and use instructions have become more explicit.<sup>154</sup>

Jury verdicts which have forced innumerable unsafe products off the market, improvements in health care and elimination of many unsafe practices have saved millions of people from death or injury.<sup>155</sup> In other countries where laws are much less protective of victims and where civil jury trials are unavailable, similar improvements have not been made.

For example, DES is a synthetic drug which was administered to women in the United States between 1940 and 1971 to prevent miscarriages. The drug proved useless at preventing miscarriages, and caused reproductive problems in children of women who took the drug, including vaginal and cervical cancer in DES daughters. Drug companies marketed the product in the United States before conducting proper testing. In one of the leading DES cases, *Bichler v. Eli Lilly Co.*,<sup>156</sup> the plaintiff was a DES daughter stricken with cancer at age 17, resulting in severe and permanent damage to her internal reproductive organs. The jury found that, had they performed proper testing, Lilly and other DES manufacturers would have learned of the effects of DES on offspring and would not have marketed the drug. The jury awarded \$500,000.

Lawsuits forced the drug off the market in the United States. But DES continues to be marketed overseas, particularly in some Third World countries where women can still purchase it over the counter.<sup>157</sup> Sometimes, it takes years of civil jury litigation before enough information is uncovered to force dangerous products off the market. Asbestos is an example. Asbestosis, or asbestos disease, was reported for the first time in Britain in 1900, and for 40 years, the U.S. asbestos industry suppressed data about asbestos hazards. As a result, it is estimated that between eight and ten thousand Americans who have worked with asbestos will die from asbestos-related cancer each year for the next 30 years.<sup>158</sup>

The first jury to hear an asbestosis lawsuit,

brought in 1971 by a worker with asbestosis, awarded only \$68,000 in actual damages. Punitive damages were not requested. It took several years of similar civil jury trials before victims' attorneys finally obtained enough documents to demonstrate that many asbestos manufacturers had known about asbestos hazards and had covered up the information. As this evidence became available, judges allowed juries to consider and award punitive damages against asbestos manufacturers.<sup>159</sup> For example, in the 1986 case *Fisher v. Johns--Manville*,<sup>160</sup> a jury awarded compensatory damages of \$86,000 to James Fischer and \$5,000 to Geneva Fischer and punitive damages totalling \$300,000.<sup>161</sup> Because of information released in connection with asbestos cases, millions have learned of the dangers of asbestos and have taken their own precautions, while public officials have enacted stronger health and safety standards.<sup>162</sup>

The Ford Pinto case is another example of litigation which has saved lives. In *Grimshaw v. Ford Motor Co.*,<sup>163</sup> a thirteen year-old child who had been a passenger in a Ford Pinto, which was hit in a rear-end crash resulting in a gas tank explosion, sued Ford. The victim's lawyers introduced evidence at trial which demonstrated that Ford management knew the tanks were defective, yet chose not to recall the cars. Relying on courtroom testimony of a former Ford engineer and executive that "management's decision was based on the cost savings which would inure from omitting or delaying the fixes,"<sup>164</sup> the jury awarded the victim \$127 million. (The judge later reduced the award to \$3.5 million.) As a result of this and other cases, Ford redesigned the gas tank.

One particularly outspoken critic of such outcomes is author Peter Huber, Senior Fellow at the right-wing think tank, the Manhattan Institute for Policy Research. Huber suggests in his 1988 book *Liability: The Legal Revolution and its Consequences*, that Ford should not have been forced to pay such compensation and redesign the tank. He acknowledges that "the Ford Pinto obviously had its problems, and that other compact cars "had problems as well." However, he argues that these cars "are more compact and inexpensive than others for precisely the same reason that they are less safe."<sup>165</sup>

His reasoning is entirely unsupported by the

trial testimony which was the basis for the jury verdict in *Grimshaw*. A former Ford engineer and executive in charge of crash tests testified at the trial that top Ford management made the decision to go forward with the production of the Pinto, knowing that the gas tank could have been made safer at the nominal cost of only \$10 per car, and that by not doing it, the gas tank was vulnerable to puncture and rupture at low rear impact speeds creating a significant risk of death or injury from fire<sup>166</sup>

Huber not only disagrees with outcomes like *Grimshaw*, but asserts further that jury verdicts "retard safety, rather than advance it."<sup>167</sup> He argues that when juries "stamp as defective products like vaccines and therapeutic drugs that, though risky in some degree, [are] clearly vital to the public health,"<sup>168</sup> the public health and safety suffers. He says the Dalkon Shield litigation proves his point.<sup>169</sup> The Dalkon Shield intrauterine device (IUD), which caused serious infections in women and spontaneous abortions, was removed from the U.S. market and recalled worldwide as a result of U.S. litigation. In one Dalkon Shield case, *Palmer v. A.H. Robins Co.*,<sup>170</sup> in which the victim's injuries forced her to undergo a total hysterectomy, trial evidence showed that A. H. Robins marketed the IUD knowing of its adverse health implications. The jury awarded the plaintiff \$600,000 in compensatory and \$6.2 million in punitive damages, which the appeals court said reflected "the conscientious decision of a jury to punish a wrongdoer with a penalty commensurate with the seriousness of the misconduct and the financial ability of the offender to pay and, concomitantly, to deter Robins and others from similar misconduct in the future."<sup>171</sup> After approximately ten years of litigation, Robins was forced to issue a public health warning about the Dalkon Shield, and to offer to pay for the removal of the product from the market.<sup>172</sup>

Huber concedes that the Dalkon Shield was "inferior." He complains, however, that following these cases, courts and juries began condemning not only "good" IUDs, but "birth control pills (which occasionally cause kidney failure or strokes) and ... the spermicides used with condoms and diaphragms (blamed for birth defects)."<sup>173</sup> He says that FDA approval should settle all safety inquiries,<sup>174</sup> and that "in all of these cases, the products reached the end user in precisely the condition the manufac-

turer and the FDA intended."<sup>175</sup> Huber again disregards facts. For example:

- IUDs are safe for only a small market: older women with children. Yet Searle, the manufacturer of the Copper-7 IUD which Huber calls one of the "good" IUDs taken off the market, intended and marketed this product to reach the more lucrative market of young, non-monogamous women who had never had children—precisely the wrong population. In getting this product approved, Searle also misrepresented data to the FDA. It is for these reasons that Searle has been held financially responsible for injuries caused by this product.<sup>176</sup>

- IUDs remain on the market for safe populations. As a result of litigation, users must now first be informed of the IUD's potential hazards. Since the safe market for IUDs is so small, however, it is hardly surprising that few companies remain in the IUD business.

- The market for birth control pills remains huge and extremely lucrative. Yet only through litigation have manufacturers been forced to inform doctors of some of the pill's side effects. For example, the 1984 Kansas case *Wooderson v. Ortho Pharmaceutical Corp.* involved a woman who suffered hemolytic uremic syndrome (HUS), resulting in kidney failure caused by the use of Ortho-Novum 1/80 oral contraceptive.<sup>177</sup> Eventually, both of her kidneys had to be removed as well as one third of her large intestine. The jury penalized the manufacturer, Ortho Pharmaceutical Corp., with a \$2.75 million punitive damage award because the

company failed to warn doctors of this dangerous side effect, even though there were 21 reported cases of HUS in women using oral contraceptives. The verdict was upheld at the appellate level.

- Many FDA-approved drugs have been removed from the market after causing birth defects, deaths and serious injuries, including DES, the acne drug Acutane, the high blood pressure drug Selacryn, the pain killers Oraflex, Zomax and Suprol, and the antidepressants Meritol and Wellbutrin.<sup>178</sup> Far from guaranteeing safety, FDA approval is often the product of concessions to powerful lobbies. Approval also may stem from manufacturer fraud or faulty reporting, or from the fact that adverse reactions may not be detected during brief testing periods.<sup>179</sup> Manufacturers often discover product dangers after a drug or device is marketed, and often, the FDA does not force a recall. For example, although the manufacturer of the Bjork-Shiley heart valve knew that over 100 patients had been injured by a defect in the device and that there were many resulting fatalities, the FDA resisted recall despite the persistent petitioning of Public Citizen.

Huber's complaint with juries' verdicts in product liability cases is not simply disagreement with their definition of reasonable or excusable corporate conduct. Central to his argument is a contemptuous view of jurors' abilities. Huber believes, for example, that juries are easily manipulated, and are incompetent and irresponsible. He writes cynically of the juror:

... pulled off the voter lists at random, solemnly sworn to his duty, and instantly educated in

a contest of courtroom experts—solemnly sworn too, of course, and paid by the hour for their particular form of swearing. The member of the public judged incompetent to make wise choices in the marketplace for himself was now being called upon to make wise choices in the jury box for others. It was a theory of the idiot/genius, incapable of dealing with the objects that lay within his own experience, but infinitely capable of errorless flash judgment when it comes to the experience of others....<sup>180</sup>

Also,

[Juries] do not accurately represent their own members' will on matters of public policy; what they accurately represent is individual compassion for individual tragedy, within the bounds that the law permits them to express.<sup>181</sup>

It can be documented in a variety of ways that Huber is wrong.<sup>182</sup> Jurors do not make "flash judgments" in reaching verdicts, but rather, reach verdicts after careful deliberation over evidence presented by both sides—unlike marketplace judgments which consumers must make on limited information and usually on the basis of company advertising alone. Moreover, there is a significant body of evidence demonstrating that civil juries are competent, responsible and rational, and that their decisions are not arbitrary or emotional, but reflect continually changing community attitudes about corporate responsibility and government accountability. (These points are discussed in more detail in §IV, *infra*.)

Despite this evidence, and the obvious positive impact of product liability laws, a coalition of corporate defense lobbies and insurance companies have pushed hard for years to codify and weaken the common law of product liability, to prevent consumers from obtaining jury verdicts against corporations that place dangerous products in the

marketplace or workplace.

Senator Robert Kasten (R-Wisc.), has sponsored various manufacturer-supported, product liability legislation each year since 1981,<sup>183</sup> with the support of both presidents Reagan and Bush.<sup>184</sup> These federal proposals would preempt state judicial authority, restricting downward the authority of state judges and juries. (See discussion in §V, *infra*.) They would destroy the common law, developed over decades of careful evolution by juries and judges, replacing it with a system over which wealthy and influential special interests have more control. To date, Congress has resisted enacting radical changes to the product liability system or other features of our civil liability and jury laws. However, unless a better effort is made to show Congress, state lawmakers and the American public that the current system works and that criticisms of the jury system are unjustified, these antagonists to the jury may ultimately succeed.

### C. Beyond Personal Injury Suits

Corporations and industries now attacking the U.S. jury system have limited their rhetoric essentially to complaints about verdicts in personal injury suits in response to their conduct. In fact, most civil litigation in the United States involves not personal injury suits, but zoning, education and taxation.<sup>185</sup> One study shows that, of the largest categories of civil cases filed in Colorado from the years 1987-1988, only 6.8 percent were personal injury cases. Fifty-two percent concerned real estate or real property, and 27.8 percent were other types of money demands, such as collections on credit cards or improperly withheld insurance claims. Moreover, according to a recent National Center for State Courts survey of 13 state court jurisdictions, "the most dramatic increases in the civil caseload tended to be for real property rights cases or contract cases, not tort cases."<sup>186</sup>

Clearly, many Americans rely on the civil jury system for reasons other than monetary compensation. In her book *The Swing of America: Why and How We Take Each Other to Court*, Marlene Adler Marks observed, "The use of lawsuits is an affirmation that the individual can fight against big corporations, the government, his own employer, the faceless bureaucracies that rule his life—that he has

equal power against his adversaries through the courts."<sup>187</sup> Jury verdicts are sometimes the only means available for obtaining personal justice. In one case described by Marks, John Henry Faulk, a popular radio announcer during the 1950s, sued a red-baiting group called AWARE, Inc. which was spreading false rumors that Faulk was a Communist. Faulk was able to restore his reputation only after a jury found AWARE liable and awarded Faulk \$3.5 million (later reduced to \$550,000).

Victims of violent crime, such as rape, are also turning in increasing numbers to civil trials. In Corpus Christi, Texas, for example, a rape victim sued the company which managed her townhouse, which had refused to allow her to install a lock that could be opened only from the inside. She was raped by a man who broke into the management offices, found her name after looking through leases kept in an unlocked file cabinet, and took a key from a board hanging in the office. In August, 1991, a jury found the management company liable for \$17 million.<sup>188</sup>

Jury trials have historically been an important tool for protecting civil rights in the United States. In a 1965 civil rights action, *Basista v. Weir*, a federal court, citing a 1919 case in which the plaintiffs were denied their right to vote, said:

In the eyes of the law this right is so valuable that damages are presumed from the wrongful deprivation ... and *the amount of the damages is a question peculiarly appropriate for the determination of the jury, because each member of the jury has personal knowledge of the value of the right...*<sup>189</sup> [emphasis added]

The court added that the same principles are "equally applicable in all Civil Rights cases."

Often it is only through sustained litigation before a civil jury that important facts about civil rights violations are discovered—facts that could not have been obtained publicly through other means. For example, in separate prosecutions in the early 1980s, two juries—one of which was all white—acquitted Ku Klux Klan and Nazi party members for the

murders of demonstrators in a 1979 Greensboro, North Carolina protest, after being charged by what some considered corrupt or indifferent prosecutors. It took years of discovery and a subsequent civil trial brought by the victims' families for a jury to conclude that five Klansmen and Nazis, with the cooperation of two Greensboro police officers and a police informer, were indeed responsible for murdering and seriously injuring three of the victims.<sup>190</sup>

In another well-known case, a federal jury in 1987 awarded \$7 million against the United Klans of America for the 1981 lynching of 19-year old Michael Donald. In response to the verdict, Bill Stanton, director of Klanwatch, connected with the Southern Poverty Law Center (SPLC) which brought the suit, noted, "Victims of Klan violence now have a precedent to seek damages from the corporate Klan behind the perpetrators of these kinds of violent acts."<sup>191</sup>

In 1990, SPLC obtained a \$12.5 million jury verdict against Tom Metzger, leader of the White Aryan Resistance, his son and two skinheads, for the 1988 beating death of an Ethiopian man. The award included \$3 million in punitive damages against the organization. SPLC's Morris Dees, who brought the case intending to bankrupt Metzger's organization, said, "This jury has said the hate business will be shut down forever and there will be a new season for justice in the Northwest."<sup>192</sup>

In these cases, civil trials allowed a diligent and sustained inquiry into the facts by the victims' attorneys, in addition to, or in lieu of, a probe by government prosecutors. The pre-trial discovery process ensured that crucial facts were uncovered, probed and tested before trial by the opposing parties; and because the evidence was judged by a representative jury acceptable to both plaintiffs and the defendants, the legitimacy of these verdicts was guaranteed.<sup>193</sup>

The following cases illustrate the kinds of civil rights disputes typically confronting juries:

- *O'Dell v. Basabe*.<sup>194</sup> O'Dell was improperly fired for supporting a colleague who had complained of sexual harassment in the workplace.

The jury awarded \$415,000 compensatory and over \$1 million in punitive damage.

- *K-Mart Corp. v. Ponsock*.<sup>195</sup>

The Nevada Supreme Court upheld a jury award of compensatory and punitive damages for bad faith discharge and oppressive malice of employers. (The employer had maliciously discharged the plaintiff, who was only 6 months away from retirement, to avoid paying retirement benefits).

- *Walker v. Parzen*.<sup>196</sup> A jury ordered \$4.3 million in compensatory and punitive damages against a psychiatrist who enslaved and sexually abused his patient.

- *Thomas v. City of New Orleans*.<sup>197</sup> An unjustly fired police officer sued under civil rights statutes and the U.S. Constitution. The jury awarded \$17,399 in back pay and \$50,000 in punitive damages.

- *Rhodes v. Horvat*.<sup>198</sup> The jury awarded \$5,000 for unlawful arrest and 45-minute detention, and \$2,500 in punitive damages.

- *Jackson v. Duke*.<sup>199</sup> **The plaintiff** was pistol-whipped, beaten, falsely arrested and jailed. The jury awarded \$5,000.

In other areas as well, juries are occasionally asked to resolve disputes with profound policy implications. For example, in 1986, W.R. Grace agreed to pay \$9 million to families who sued Grace for death and injuries resulting from Grace's chemical pollution of drinking water wells in Woburn, Massachusetts. Grace, which had denied any responsibility for polluting the wells, agreed to settle only after a federal jury found that Grace "substantially contributed" to the pollution.<sup>200</sup>

Among other important cases are "bad faith" suits against insurance companies. In *Hawkins v. Allstate Insurance Co.*,<sup>201</sup> the Arizona Supreme Court ordered reinstatement of a \$3.5 million punitive damage jury award against Allstate for 18 years of "reprehensible misconduct" in "chiseling" small amounts on property damage claims under collision coverage. The jury found a deliberate corporate policy to reduce money owed to policyholders in settling claims.



## WHY THE CRITICS ARE WRONG

Over the years, critics have argued that jurors cannot understand complex cases, that juries are arbitrary and emotional, and that jury trials are too cumbersome and costly. Yet virtually all reliable jury research disproves these statements. And as the Supreme Court and constitutional scholars have repeatedly pointed out, the right to civil jury trial was embraced by our nation's founders not because juries were the most economical way of resolving disputes, but, far more fundamentally, because "in important instances ... [a] jury would reach a result that the judge either could not or would not reach."<sup>202</sup>

### A. Incompetence

Some jury critics say that jurors are unable to handle the evidence and law in civil cases, particularly complex ones. A few courts recently have considered this "complexity argument," and opponents of the jury system have used it to advocate adoption of "expert tribunals" to resolve certain disputes, such as those involving occupational and toxic torts or medical malpractice.

In the 1930s, Judge Jerome Frank, and Leon Green, dean of the School of Law at Northwestern University, wrote that juries do not understand law or facts.<sup>203</sup> In *Skidmore v. Baltimore*,<sup>204</sup> Frank accepted the constitutional requirements of the Seventh Amendment, but argued for limitations on juries' powers. These arguments were adopted in later years by former Harvard Law School Dean Griswold, and former Chief Justice Warren Burger, who maintained that civil jury trials should be eliminated.<sup>205</sup>

Recent legal literature has focused on the case of *Japanese Electronic Products Antitrust Litigation*,<sup>206</sup> in which the federal Third Circuit Court of Appeals created a "complexity exception" to the Seventh Amendment's guarantee of a civil jury trial. The court endorsed the view that in certain extremely complex cases, a jury may be unable to evaluate rationally the evidence, in which case trial by jury may violate a defendant's Fifth Amendment right to due process.<sup>207</sup> The court concluded that the violation of due process was of more fundamental concern than the

loss of the right to jury trial, and in cases where these rights conflict, the right to jury trial should be forfeited. The court conceded, however, that resort to such a "complexity exception" constitutional balancing test was appropriate only in the most extreme circumstances:

Because preservation of the right to jury trial remains a constitutionally protected interest, denials of jury trial on the grounds of complexity should be confined to suits in which due process clearly required a nonjury trial. This implies a high standard. It is not enough that trial to the court would be preferable. The complexity of a suit must be so great that it renders the suit beyond the ability of a jury to decide by rational means with a reasonable understanding of the evidence and applicable legal rules.<sup>208</sup>

Other courts, however, have rejected the notion of a complexity exception. In *In Re Financial Securities Litigation*,<sup>209</sup> the Ninth Circuit observed, "Although judges are lawyers, they generally do not have any more training or understanding of computer technology or economics than the average juror." As one merger and acquisitions litigator put it, "I think everybody who's critical of the jury system doesn't look at the other side of the coin which is the quality of judges."<sup>210</sup> (See also, § V, *Assaults, Rules and Judicial Controls, infra.*)

Questions about the competence of specific jurors occasionally do arise. For example, in one recent case, a hearing was ordered to determine whether a verdict should be set aside after jurors submitted affidavits to the court stating that during deliberations one juror had been disoriented and confused.<sup>211</sup>

However, as professors Valerie P. Hans and Neil Vidmar found in their 1986 book *Judging the Jury*, data from studies of hundreds of jury trials and jury simulations show that actual incompetence is a rare

phenomenon.<sup>212</sup> Because the deliberative process allows jurors to pool their collective memories, they are able thoroughly to recall and analyze the evidence and the law. One study examining jurors' memory for facts and law found that, individually, jurors' memory was only moderate. But its collective memory was large, recalling 90 percent of the evidence and 80 percent of the instructions. Difficulties in understanding the judge's instructions were often cleared up during deliberation<sup>213</sup>

In their landmark work *The American Jury*, frequently cited in Supreme Court and lower court decisions, University of Chicago professors Harry Kalven and Hans Zeisel similarly found that juries operate by collective recall, remembering far more than most of its members could as individuals.<sup>214</sup> Kalven wrote:

Often in the debate over the jury the capacity of one layman is compared to the capacity of one judge.... The distinctive strength and safeguard of the jury system is that the jury operates as a group.<sup>215</sup>

Hans and Vidmar also found "much evidence that most people, once actually serving in a trial, become highly serious and responsible toward their task and toward the joint effort to deliberate through to a verdict."<sup>216</sup> Similarly, John Guinther's review of jury studies dating from the 1950s indicates that "jury discussions are highly serious, highly relevant, and highly concerned with the facts of the case."<sup>217</sup> And sociologist Martha Myers, who researched 201 criminal juries in Indianapolis, found that in the rare instance where a jury departed from the judge's instructions, the departures were due to perceptions as to what the jury considered fair and just, not to incompetence.<sup>218</sup>

Kalven and Zeisel analyzed jury behavior by comparing jury verdicts and judges' opinions in approximately 4,000 civil trials, and found that in civil cases, judge and jury agreed on the verdict 78 percent of the time (47 percent of the time in favor of the plaintiff and 31 percent for the defendant). In 10 percent of the cases, the judge favored the plaintiff and the jury the defendant; in 12 percent, the

judge favored the defendant and the jury the plaintiff—roughly balanced.<sup>219</sup> They found it "quite striking ... that the overall level of agreement between jury and judge is roughly the same whether the business is criminal or civil."<sup>220</sup>

Kalven and Zeisel found no relationship between the difficulty of the case, and judge/jury agreement, finding agreement just as often in difficult cases as in easy cases. When judges spoke of why they believed juries differed from their own views, the judges rarely said the juries failed to understand the case.<sup>221</sup>

In a less extensive survey of lawyers conducted by the federal government, more than 90 percent expressed confidence in jurors' ability to understand the evidence and the law in medical malpractice cases.<sup>222</sup> Moreover, some judges have written that trial by jury in complex cases actually sharpens the lawyers' presentation of their cases, allowing not only the jurors, but the judge to understand them better.<sup>223</sup>

Jury critics also argue that juror incompetence results in too many hung juries. For example, they cite the hung jury in *ILC Peripherals Leasing Corp. v. IBM*,<sup>224</sup> after which the judge ordered that any retrial be by bench because of jury incapacity to understand the issues. However, in checking the trial transcript of this case, author John Guinther found that most of the jurors' problems with the case arose not from their inability to understand the evidence, but from the judge's instructions.<sup>225</sup>

Studies show that juries deadlock in only about 1 case in 20. These jurors typically report feeling that they have let the court down. Even so, jury scholar Zeisel has called the hung jury a treasured phenomenon, because it symbolizes our legal system's respect for the minority view that is held strongly enough to thwart the will of the majority.<sup>226</sup>

In addition, judges have many tools available to assist juries in understanding complex cases. For example, more and more judges are allowing juries to take notes on testimony, and judges in at least 30 states are allowing juries to question witnesses and tell judges when they want more information.<sup>227</sup> For example, Judge Robert Landry, presiding judge of the

Milwaukee County Circuit Court, has allowed jurors to ask questions for over 10 years. He described the process:

After the attorneys exhaust their questions, I ask the jury if they have any questions. They write them out, and I go into chambers with the parties and lay the questions out in front of the attorneys, who can object to them. Sometimes, the questions are repetitive, sometimes they ask for hearsay and are inadmissible. I make a ruling and take full responsibility. Then I ask the question of the witness myself, and the attorneys can follow up.... This was a classic example of how the system works. The result was overwhelmingly in support of the jury, its responsiveness and reflectiveness. We've created 12 people who are good apostles<sup>228</sup> for the justice system.

However, there are drawbacks to this approach. As Judge John D. Farrell of Superior Court in Los Angeles, observed, "jurors are not supposed to begin deliberating until all the evidence is in, [b]ut by asking questions, jurors begin sending signals to each other about their thinking."<sup>229</sup>

On the other hand, Landry's jurors valued the experience. One commented, "It was a great help to be able to ask questions," and "if we hadn't asked questions, I think we'd still be deliberating today." The experience also made them more likely to want to serve on a jury again.<sup>230</sup>

Another judge recently described how he assists juries in complex cases:

[He] has attorneys provide him with materials for juror notebooks, including a cast of characters, a seating chart, a witness list, a glossary, preliminary instructions, and blank paper for juror notetaking; has all documents

put on transparencies (as opposed to passing paper around), and copies placed in jurors' notebooks; uses simple instructions in lay language, and after trial, meets with the jury so they can ask questions and provide him with feedback.<sup>231</sup>

However, many judges do not provide juries with this kind of support. In an effort to keep jurors' minds uncluttered, many judges place strict controls on jurors' activities. In addition to prohibiting jurors from taking notes, fearing it will distract their attention, judges typically do not allow jurors to question witnesses or take home copies of the judge's instructions. Some even refuse to have portions of testimony read back.<sup>232</sup>

Conversely, John Guinther's survey of experienced Philadelphia civil and criminal attorneys revealed that only one of 81 Philadelphia common pleas judges was considered fully competent to hear all kinds of cases by more than 75 percent of the interviewees, and only three were considered fully competent by two thirds of the respondents.<sup>233</sup> Federal judges were more highly regarded, although even there 10 percent of the judges were considered less than fully competent.<sup>234</sup>

And while they may be more competent as a group than state court judges, federal judgeships are increasingly viewed as politicized offices in the United States, and widely perceived to have been selected for their political philosophy or bias, rather than their competence. Unlike jurors who act "free from any concern for the political or professional ramifications of their decisions," federal trial judges who wish to be nominated for the courts of appeal must continue to satisfy the ideological and political biases of the executive branch.<sup>235</sup> In other countries, such as India, similar "politicalization" of the judiciary has led to a general decline in the prestige of, or the public's confidence in the legal system.<sup>236</sup> And in France, where only 50 percent of the public perceives the judiciary to be independent, of the government and only 48 percent considers it independent of the police, there is widespread distrust of the judiciary.<sup>237</sup>

Indeed, judges in the United States may be incompetent or *biased*. While jurors are screened and challenged for bias before being allowed to decide a case, judges are not. Yet most judges were once attorneys, so it is reasonable to expect that their thinking might be colored by their past exposure to clients with analogous problems. "All good lawyers and judges have some background partiality,"<sup>238</sup> observed legal scholar Charles Joiner. In addition, oft-repeated appearances by injured victims before a judge in case after case may lead a judge to become jaded or calloused to human misery.<sup>239</sup> In his 1956 article *A Kind Word For the Civil Jury*, Judge David N. Edelstein wrote:

Backgrounds and value standards are not altered when one puts on a judicial robe.... The occupational hazard of the judiciary is hardening of the categories, and when a judge sees similar situations before him, time and time again, year after year, they may, unconsciously on his part, merge into one.... [There is] less likelihood that a verdict may be distorted by the personality factor of any one juror.<sup>240</sup>

Another commentator observed:

For some reason, most judges are reluctant to award punitive damages. Perhaps they simply see too many bad actors to become indignant. So they rarely get outraged when they encounter a corporate thug. Juries are different. They do not see a steady stream of villains day by day.<sup>241</sup>

Donald P. Lay, chief judge of the United States Court of Appeals for the 8th Circuit, wrote recently:

My more than 30 years' experience as a trial lawyer, trial judge and appellate judge convinces me of the clear superiority of the jury over the

judge as a finder of fact.... A judge is just one person with much built-in bias. Repetitive experience in the courtroom, often engages in a stereotyped analysis of the witnesses and the case. A judge is no expert in complex factual matters.<sup>242</sup>

Judge Abner Mikva, of the Court of Appeals for the District of Columbia, was in charge of the Wichita research team for the seminal University of Chicago study conducted by Kalven and Zeisel. He has remarked that although he went into the project "very lukewarm about the idea of juries, particularly in civil cases," he came away from the five-month project "absolutely convinced that the best way to get at the facts is with a jury."<sup>243</sup>

## B. Emotional and Arbitrary Verdicts

Civil jury critics say that jurors decide damages impulsively, and sometimes reach arbitrary, compromise verdicts. They say that juries also allow emotions and sentimentality to enter improperly into their decision-making process, leading to exorbitant monetary awards.

There is no question that jurors have always introduced a sense of equity and fairness into the deliberative process, reflecting values that a judge may lack. That is their historic purpose. As one former civil juror put it, "One thing people can rest easy about is that the jury will try to be fair. They will try."<sup>244</sup> But there is no evidence that juries are arbitrary, and certainly no evidence that juries are any more arbitrary than are judges or arbitrators. According to a poll of lawyers, in arriving at a damage figure during settlement conferences, judges in 72 percent of the cases recommend that the sides arbitrarily split the difference between the two disputing sides.<sup>245</sup> Another study found that adjusters in the same insurance firm varied widely on the dollar values they gave a sample case.<sup>246</sup>

On the other hand, the case of *Tucker v. City of New York*<sup>247</sup> illustrates how surprisingly consistent juries can be when faced with similar factual situations. In that case the jury awarded \$51,500 for the wrongful death, and \$25,000 for the conscious pain and suffering of a 70-year old man during the 29 days before he died. On appeal, a judge ordered a

new trial unless the plaintiff agreed to a reduced award. The plaintiff would not agree. After the new trial, a second jury awarded \$45,000 for the death and \$20,000 for pain and suffering. This time on appeal, the court, while reversing the wrongful death award, upheld the pain and suffering award, stating, "In doing so, we are influenced by the fact that a second jury had indicated its belief that such an amount is not excessive."<sup>248</sup>

In arguing that jury verdicts are too emotional or arbitrary, insurance companies and other jury critics often misuse and misstate statistics, and occasionally cite alarmist or unsubstantiated data which is refuted by other evidence. For example, these groups sometimes cite *average* jury award figures (which ignore zero verdicts and are heavily influenced by a few large ones) released by Jury Verdict Research (JVR), an Ohio legal publishing firm, to demonstrate that jury awards are out of control.<sup>249</sup> But JVR's chairman Philip Hermann denies that JVR's data substantiate these claims.<sup>250</sup> Hermann has written that juries are generally consistent and conservative. Huge awards are rare and are often later reduced. Of the only 2,564 million dollar verdicts in the 25 year period between 1962 and 1986, many of which were settled for lower sums prior to appeal,<sup>251</sup> 22 percent were for wrongful death, 20 percent for brain damage, 15 percent for spinal cord injuries, and eight percent for arm and/or leg amputation.<sup>252</sup> Moreover, the Rand Corporation Institute for Civil Justice studies of median jury verdicts, which are representative of typical awards, show that median jury verdicts have remained stable since the late 1950s, in constant dollars.<sup>253</sup>

The General Accounting Office also noted in a 1988 report that "total awards for compensatory damage show a strong relationship to the severity of the injury and the underlying economic losses."<sup>254</sup> Similarly, in his research, John Guinther found no indication of a "deep pocket" factor at work. He found, instead, that in reaching a verdict, juries factor in a number of practical considerations. If the award is higher than the plaintiffs proven damages, "it usually arises from the intent to punish or to identify societally unacceptable conduct, not to promiscuously pick some insurance company's pocket."<sup>255</sup>

Similarly, the Rand Corporation Institute for Civil Justice says that juries rarely assess punitive damage in personal injury cases, and most frequently assess them against defendants who have intentionally harmed the victim. Most punitive damage awards are "modest" and any recent rise in punitive damage awards is attributable to business litigation, not to tort cases.<sup>256</sup>

These findings are consistent with those of Professor Michael Rustad in his recent comprehensive two-year study of state and federal product liability cases for the Roscoe Pound Foundation.<sup>257</sup> Professor Rustad and research assistants searched for all reported and unreported state and federal product liability trial verdicts between 1965 and 1990, not an easy task since there exists no comprehensive reporting system for such cases.<sup>258</sup> They conducted these searches both manually and by computer, researching every available source including over 100 trial verdict and appellate opinion reporters, periodicals, court records where possible, and actual interviews with attorneys.<sup>259</sup> After months of research, Professor Rustad found only 355 punitive damage awards in total, and found that in most of these cases, the verdict was either thrown out or reduced by the court. Moreover, the median award in these 355 cases was \$625,000, only slightly above the median compensatory damage award of \$500,100.<sup>260</sup>

According to a 1987 Rand report, the average amount paid to victorious plaintiffs is only 71 percent of the original jury award. Rand remarked, "Most criticism of large jury awards has ignored the fact that the current liability system already has a mechanism for reducing excess awards."<sup>261</sup> In fact, many believe judges overuse or abuse their discretionary power to reduce or throw out verdicts, nullifying much of what juries otherwise would accomplish for the victims' and society's benefit.<sup>262</sup>

### C. Delay and Inefficiency

Jury trials also are criticized for contributing to delays in the civil justice system. For example, jury selection can add two or more days to a complex trial. Sidebar conferences and other delays take time.

One study of 1980 federal court statistics indicated that 77 percent of bench trials were

completed in three days or less, but so were 60 percent of jury trials. Of trials four days or longer, 58 percent were bench trials, including the longest one.<sup>263</sup> Moreover, to the extent there is delay associated with jury trials, it is often due to the quality of advocacy and the way judges manage these trials.<sup>264</sup>

Concerns over delay, however, are trivial when compared to the democratic principles at stake. As Chief Justice Rehnquist has stated:

The right to a jury trial was not guaranteed in order to facilitate prompt and accurate decision of lawsuits. The essence of that right lies in its insistence that a body of laymen not permanently attached to the sovereign participate along with the judge in the fact-finding necessitated by a lawsuit. And that essence is as much a part of the Seventh Amendment's guarantee in civil cases as it is of the Sixth Amendment's guarantee in criminal prosecutions....

The guarantees of the Seventh Amendment will prove burdensome in some instances; the civil jury surely was a burden to the English governors who, in its stead, substituted the vice-admiralty court. But, as with other provisions of the Bill of Rights, the onerous nature of the protection is no license for contracting the rights secured by the Amendment.<sup>265</sup>

Similarly, Sen. Larry Pressler (R-S.D.) has stated:

While delays and backlogs in our judicial system are certainly a threat to public confidence in the administration of justice, the abolition of the civil jury trial will not restore any lost public confidence. There are other means of dealing with the

problem arising from costly delays. It certainly can be argued that the size of our courts should be growing with our population and with the number of cases filed.... It also is important to note the argument that justice actually is expedited by the use of a jury trial. More cases may be brought to settlement.<sup>266</sup>

## THE NATURE OF ASSAULTS ON THE CIVIL JURY SYSTEM

In 1973, constitutional scholar Charles W. Wolfram warned of efforts by Chief Justice Burger and others to repeal the Seventh Amendment. He noted, "Because of the prominence of their sponsors, these proposals probably must be taken seriously."<sup>267</sup> In the 19 years since this article, assaults on U.S. citizens' right to civil jury trial have only intensified. Well-funded advertising campaigns by the property/casualty insurance industry, widely disseminated books and videos by corporate-supported "think tanks" like the Manhattan Institute and the Brookings Institution, and efforts by industry allies Reagan, Bush and Quayle, have led both to reductions in the power and authority of juries, and to elimination of jury trials in some cases.

### A. Advertising

Studies show that juries consider many competing values in reaching a verdict, which ultimately reflects evolving community attitudes about what conduct should be punished or condoned. Television and advertising clearly can have an impact on juror values and attitudes.<sup>268</sup> One federal judge recently went so far as to order that commercials promoting a corporate defendant in a case be pulled from local airwaves because of "their effect on potential jurors or on the perceived or actual impartiality of the process."<sup>269</sup>

Since the 1950s, property/casualty insurance companies have used advertising to try to change the civil jury system, as well as juror attitudes. In the 50s, 60s and 70s, Crum and Foster, Aetna and St. Paul launched direct advertising assaults on the civil jury system. These ads, claiming that large jury verdicts ultimately would effect jurors' pocketbooks through higher premiums for everyone, were clear attempts to reach and affect potential civil jurors.<sup>270</sup> (Some of these advertisements are reproduced in *Appendix A*.) Ads published in the late 1950s were aimed at reaching one out of every three potential jurors—over 70 million people.<sup>271</sup> In the 1970s, the industry spent \$5.5 million on ads published in 18 national publications, including the *New York Times*, *Wall Street Journal*, *Business Week*, *Time*, *Newsweek* and *Readers' Digest*—an

estimated audience of 30 million.<sup>272</sup>

These ads contained so many flagrant errors that even the insurance industry trade publications, like *Business Insurance* magazine, criticized them.<sup>273</sup> The magazine reported that figures cited on the number of product liability suits filed in the late 1970s—one million per year, according to the ads—were blatantly exaggerated. The figure was more like 70,000, according to the magazine. The ads also described fictitious cases, such as Crum and Foster's infamous "lawnmower as a hedgeclipper" advertisement. In that case, an individual supposedly was awarded millions of dollars by a jury for injuries sustained when he improperly used a power lawnmower to trim his hedges. Both *Business Insurance* and a congressional committee confirmed that the case was a total fabrication.<sup>274</sup>

At least one court considered these ads "jury tampering." In the 1978 case *Quinn v. Aetna Life and Casualty Co.*, the New York Supreme Court found that two Aetna ads were misleading and might convince some jurors to reduce arbitrarily personal injury awards. The court held that these ads "violate[d] the state public policy against jury tampering, unduly burden[ed] plaintiffs' right to an impartial jury, and distort[ed] the trial process by providing otherwise inadmissible insurance evidence..."<sup>275</sup> Moreover, because the ads contained so many inaccuracies, Crum and Foster and Aetna were forced to sign consent orders with state insurance commissioners in Connecticut and Kansas, agreeing to stop publishing these ads.<sup>276</sup>

In 1984, the insurance industry began a new "massive effort to market the idea that there is something wrong with the civil justice system in the United States."<sup>277</sup> To support this effort, in 1986 the Insurance Information Institute (III) purchased \$6.5 million worth of print and television ads, designed to reach 90 percent of all U.S. adults, in order "to change the widely held perception that there is an 'insurance crisis' to a perception of a 'lawsuit crisis'."<sup>278</sup>

Print ads included such misleading headlines as *The Lawsuit Crisis is Bad for Babies, The*

*Lawsuit Crisis is Penalizing School Sports and Even Clergy Can't Escape the Lawsuit Crisis*, and appeared in *Readers' Digest*, *Time* and *Newsweek*, as well as in Sunday magazine supplements.<sup>279</sup> In 1986, Congressman John J. LaFalce (D-N.Y.) asked the Insurance Information Institute to submit information to Congress to back up the "clergy" ads, for example. During 1986 congressional hearings, LaFalce announced:

The information they gave us would lead us to conclude that there are only about a dozen of these religious malpractice cases pending throughout the country, and that the only one that has gone to trial was dismissed in favor of the defendant. In other words, ... at the time these ads were run, the insurance industry had not yet paid out one cent pursuant to any court judgment in any of these cases. Yet, they form an integral part of its national advertising campaign.<sup>280</sup>

As in the past, inaccurate descriptions of anecdotal jury verdicts, intended to outrage the reader or listener, have been the cornerstone of recent advertising campaigns and public speeches. The case of Charles Bigbee is one example. Bigbee's leg was severed after a car hit a phone booth in which he had been trapped (the door jammed after he noticed the car coming towards him).<sup>281</sup> Because the phone company had placed the booth near a known hazardous intersection, and because the door was defective, he sued the phone company. (After winning preliminary motions before the California Supreme Court, Bigbee settled with the phone company for an undisclosed sum.<sup>282</sup>) After hearing his story repeatedly distorted in public speeches by President Reagan, on national television by insurance industry executives, and on editorial pages of papers like the *Wall Street Journal*, Bigbee, along with several other victims, testified before Congress in 1986, in an attempt to clear the record regarding their cases. Bigbee testified:

I believe it would be very helpful if I could talk briefly about my case and show how

it has been distorted not only by the President, but by the media as well. That is probably the best way to show that people who are injured due to the fault of others should be justly compensated for the damages they have to live with the rest of their lives.<sup>283</sup>

In 1987, much of the industry's campaign changed focus to address the insurance industry's image problems, which were overwhelmingly negative and causing political problems for their anti jury campaign. The \$7 million image advertising blitz that year included television commercials shown about 200 times around the country.<sup>284</sup> In 1988, the insurance industry moved major advertising funds—\$80 million—into California, in an unsuccessful attempt to defeat the Voter Revolt initiative, Proposition 103. Prop. 103 enacted extensive pro-consumer changes in California's insurance laws. In response to their devastating loss in California, the III announced plans for an even bigger three- to five-year \$90 million nationwide public relations campaign to improve its public image. According to III president Melchin Moore, the industry hopes to "rebuild the industry's credibility with the public in utilizing all the contemporary techniques of communication, from national television advertising to targeted direct mail to one-on-one dialogue with thought leaders and the media."<sup>285</sup>

While the insurance industry trade associations were redirecting their advertising budgets toward long-range image building, Aetna initiated new advertising attacks directly on lawsuits and juries. Beginning in early 1987, Aetna began placing ads in the *Wall Street Journal* and other national publications, and in 1988, Aetna launched a sophisticated anti-jury print and radio advertising campaign in four targeted markets—Denver, New Orleans, St. Louis and Rochester, New York. Each ad mentioned an "800" number which citizens could call for more Aetna materials. (See *Appendix A.*)

Perhaps stung by jury tampering lawsuits in the 1970s, these ads did not attempt to draw a direct connection between jury verdicts and jurors' insurance premiums. Rather, they



stressed an alleged impact of jury verdicts on the availability of services. For example, these ads charged that jury verdicts were causing doctors to leave the profession and parks to close, while neglecting any mention of the root cause of high liability insurance premiums—an unregulated, inefficient and mismanaged property/casualty insurance industry. Recent studies still indicate that most jurors believe high jury awards lead to higher insurance premiums.<sup>286</sup>

Research shows that exposure to these ads could influence jurors to lower verdicts. According to research conducted in the 1970s by professor Elizabeth Loftus, "even a single exposure to one of these ads can dramatically lower the amount of award a juror is willing to give."<sup>287</sup> Moreover, a group in Texas called "Citizens Against Lawsuit Abuse" recently has been buying advertisements and billboard space in the Rio Grande Valley with the message "Lawsuit Abuse: Guess Who Picks Up the tab? You Do!"<sup>288</sup> Martin Connor, president of the American Tort Reform Association, announced that as a result of this campaign, "There has been a dramatic and measurable change in the outcome of civil trials in the Valley."<sup>289</sup>

In 1989, the Texas Supreme Court ruled that a lower court's refusal to allow a plaintiff to question potential jurors concerning prospective bias resulting from media coverage of the "lawsuit crisis" and tort reform constituted a denial of a fair trial.<sup>290</sup> As one lawyer put it, "It is unthinkable for a lawyer not to defuse the possibility that members of a jury might consider 'tort reform' in their deliberation."<sup>291</sup>

## **B. Legislation and Policy**

### *1. Early Attacks*

Some of the earliest renouncements of the jury system date from the early 1900s, when a coalition of businesses and bar associations began promoting the use of arbitration tribunals, independent of the courts, to resolve commercial disputes. Use of arbitration panels had been growing since the early 1880s. According to Professor Christine B. Harrington, "delay, congestion, and 'formality' in procedures were continually cited as the reasons why conservative, law-abiding businessmen were 'ready to settle for 50

percent' of the amount in dispute rather than be subject to a law suit, even in a court which has been considered peculiarly the 'businessman's court in the metropolis."<sup>292</sup> In the early 1900s, state and local bar associations began passing resolutions urging "the bar and business men generally to pull together in each locality for the prevention of unnecessary litigation."<sup>293</sup>

In New York in 1916, the Joint Committee of the Chamber of Commerce Committee on Arbitration of the State of New York and the New York State Bar Association Committee on the Prevention of Unnecessary Litigation formed to promote commercial arbitration. "Backed by the brains of New York law and the money of the New York merchants," the groups drafted a proposal for the judicial arbitration of commercial disputes.<sup>294</sup> These efforts led to the formation of the Arbitration Society of America in 1922, which the American Judicature Society described as "men prominent on the bench, at the bar and in the business world ... unite[d] to promote voluntary adjudication under arbitration statutes."<sup>295</sup>

A far more devastating assault on the civil jury system, however, was the nationwide enactment of workers' compensation laws beginning in the early 1900s. State legislatures passed these laws in large part due to a growing perception that the negligence-oriented civil justice system did not provide adequate compensation to employees who suffered work-related injuries. Under workers compensation laws, injured workers relinquish their right to jury trial in exchange for compensation for injuries, determined by an administrative board and set by statute. No compensation is allowed for pain and suffering. This process generally is a worker's exclusive remedy against an employer.

Workers' compensation laws have been upheld under the theory that the right to jury trial attaches only to causes of action recognized by law. It is the legislature's prerogative to define or abolish causes of action under its state police powers. If a legislature eliminates a cause of action, the right to jury trial can be abolished as well.<sup>296</sup>

Unlike today's tort system, the common law tort system in the early part of the century

made it almost impossible for injured workers to obtain reasonable compensation for injuries. In addition to the doctrines of contributory negligence, which defeated a claim if the worker was even the slightest bit responsible for the accident, and the fellow-servant rule which barred recovery where the accident was caused by the negligence of another employee, the common law recognized only limited duties of care by the employer.<sup>297</sup>

However, over the course of this century, the common law has evolved so injured victims now have the legal tools necessary to win cases and obtain fair compensation for injuries. In fact, having ceded their right to jury trial at a time when the law would have left most of their injuries uncompensated, workers now face serious disadvantages relative to those with access to the judicial system.<sup>298</sup> According to a 1980 U.S. Department of Labor study, only 15 percent of an estimated 410,000 workers severely disabled by work-related injuries receive adequate long-term compensation.<sup>299</sup> A 1979 study of injured workers found that wages lost due to work related injuries were replaced at a rate of only 42 percent, and that one-half to three-quarters of those surveyed in this study could not maintain their pre-injury standard of living.<sup>300</sup>

In 1987, the Illinois Public Action Council released a report comparing workers' compensation with the federal system under which railroad employees are compensated for work-related injuries established by the Federal Employers' Liability Act (FELA). Unlike workers' compensation laws, the FELA allows workers to sue their employers for damages if the worker (or union) and the railroad claims agent cannot resolve the dispute. In a number of cases studied which proceeded to trial, compensation awarded by juries or through settlement negotiations was significantly higher than what could have been awarded under workers' compensation laws.<sup>301</sup> For example, in one case, a worker whose foot was crushed in a railyard, resulting in four operations and eventual permanent disability, was awarded \$460,000 by a jury. Under workers' compensation, the victim would have received a maximum of only \$18,000.<sup>302</sup>

IPAC also found that, in many instances, lawsuits by employees which would have been prohibited by workers' compensation laws

forced employers to make significant safety improvements. The report concluded that replacing the FELA compensation system with a workers' compensation-type law would "inevitably reduce railroad concern for investment in safety."<sup>303</sup> For example, as a result of the above case, the railroad equipped all employees with steel-toed work boots.<sup>304</sup>

Researchers at the Rand Corporation Institute for Civil Justice have also expressed misgivings about the adequacy of the financial incentive which workers' compensation systems provide for safety. In particular, "workers' compensation incentives are inadequate for both insureds and self-insureds because the employer incurs less than the full economic and noneconomic costs of an injury."<sup>305</sup>

UCLA Professor Richard Abel found that because workers' compensation systems are designed not to reflect the full costs of accidents, they are an ineffective deterrent against workplace dangers.<sup>306</sup> In sum, evidence gathered over the years shows that the workers' compensation system, which prohibits jury trials, has hurt victims and have weakened employers' incentives for safety.

## 2. Recent Attacks

It is now well-recognized that in recent decades, insurance and corporate lobbies have heightened attacks on the civil justice system in years when the property/casualty insurance industry has experienced cyclical downturns. These "insurance crises" are self-inflicted phenomena, described by *Business Week* magazine in a January, 1987 editorial:

Even while the industry was blaming its troubles on the tort system, many experts pointed out that its problems were largely self-made. In previous years the industry had slashed prices competitively to the point that it incurred enormous losses. That, rather than excessive jury awards, explained most of the industry's financial difficulties.<sup>307</sup>

These price cuts were the result of the insurance industry's competition for premium

dollars in years of high interest rates. In the early 1980s, many companies lowered prices and insured certain poor risks in order to obtain premium dollars which were then invested for maximum return.<sup>308</sup> When interest rates dropped, and investment income decreased accordingly, the industry responded by sharply increasing premiums and reducing availability of coverage. A similarly mismanaged "crisis" occurred in the mid-1970s, also provoking talk of a "litigation explosion" and out-of-control juries.<sup>309</sup>

In the mid-1970s, a number of states caved in to insurance industry pressure and began to pass laws to restrict juries' powers to award compensation. California, for example, passed a law prohibiting juries in medical malpractice cases from awarding more than \$250,000 for non-economic damages.<sup>310</sup> In 1978, Pennsylvania enacted a law immunizing all Pennsylvania municipalities from most kinds of liability suits and limiting liability for even catastrophic events to \$500,000 per occurrence.<sup>311</sup> (Notably, after this law was passed, insurers did not lower rates or stop cancelling the insurance policies of cities and towns.<sup>312</sup>)

In the mid-1980s, the campaign against victims' rights and the civil jury system approached new heights, aggravated by the property/casualty insurance industry's exaggerated response to its 1984 downturn. As interest rates dropped, insurance companies began to increase dramatically insurance premiums, reduce coverage, and cancel policies of small businesses, doctors, local governments, and so on. According to evidence gathered by over a dozen state attorneys general for an antitrust class action filed in 1988, a number of foreign and domestic insurance and reinsurance companies in fact conspired to restrict coverage to their commercial customers, thus raising prices, and creating an atmosphere intended to lead states into changing liability laws.<sup>313</sup>

As intended, those frustrated businesses, professional groups and municipalities who could not get affordable insurance, and who were naturally eager to limit their own liability from lawsuits, began to fight for measures to weaken the civil justice system. They were told that making it more difficult for injured victims to sue, and limiting their own liability for the injuries and damages they caused,

would cause insurance rates to drop. (See *Appendix B* for examples of measures introduced in state legislatures in 1989 to restrict juries' powers and limit victims' rights.) Had they asked insurers to prove that lawsuits were forcing rates up (no state at that time had meaningful reporting or disclosure laws for insurance companies, and most still do not<sup>314</sup>), they would have learned that enactment of these "tort reforms" would have little or no impact on insurance rates and availability, which were the function of the insurance industry's business cycle.<sup>315</sup>

As the "insurance crisis" abated in the late 1980s, industry needed new reasons to justify continuing to advocate changes to liability laws, and new enemies of the civil jury emerged. For example, the Manhattan Institute for Policy Research, a "well-heeled right-wing think tank,"<sup>316</sup> has produced several books advancing the claim that jury verdicts are having negative ramifications for the U.S. economy. The principal argument is that the U.S. civil justice system, particularly jury verdicts, hurts "technological innovation" and U.S. "competitiveness."

Competitiveness has been called "the latest buzzword" to justify weakening the civil justice system.<sup>317</sup> Along with its companion argument—that the cost of litigation is damaging the U.S. economy—the claim that the system is hurting U.S. competitiveness has been used extensively by enemies of the civil jury. It has been extensively discredited.

For example, the industry-funded Conference Board confirmed in its 1987 report that "product liability and insurance availability have left a relatively minor dent on the economics and organization of individual large firms, or on big business as a whole."<sup>318</sup> A Louisiana study examining factors which business executives consider in determining whether to relocate to the state found that "there is no evidence of any relationship at all between the tort law of a state and that state's relative attractiveness as a place to do business."<sup>319</sup> In its 1990 study on U.S. manufacturing competitiveness, Congress' Office of Technology Assessment (OTA) found that the four most influential factors influencing U.S. competitiveness were: capital costs, the quality of human resources, technology transfer and technology diffu-

sion.<sup>320</sup> OTA did not even *mention* product liability laws as playing a role in harming U.S. competitiveness.

Moreover, the highly exaggerated cost figures which have been asserted by Manhattan Institute Senior Fellow Peter Huber in his book *Liability: The Legal Revolution and its Consequences*—that annual "direct costs" of the tort liability system are \$80 billion and total costs are \$300 billion each year—are completely unfounded. In doing research for his scholarly 1990 Stanford Law Review article, which solidly refutes Huber's book, Professor Mark Hager discovered that the \$80 billion was lifted from an completely undocumented statement by the Chairman of the Business Roundtable's product liability task force, who does not even characterize his figure as "direct costs," in a 1986 article from a magazine for corporate chief executives.<sup>321</sup> Hager notes that these figures "are widely in excess of other estimates," such as the Rand Corporation's."<sup>322</sup>

To arrive at the \$300 billion total figure, Huber determines "indirect costs," i.e., the cost of attempts to avoid and minimize liability payments, to be \$280 billion annually.<sup>323</sup> He reaches this figure by multiplying his inflated \$80 billion "direct cost" figure by 3.5—a multiplier derived from a study published in the *Journal of the American Medical Association*, which estimated that the cost to doctors of changes in practice to avoid liability in 1984, was roughly 3.5 times the cost of malpractice premium hikes that year.<sup>324</sup> Finding the flaws in Huber's analysis to be "almost too numerous to mention," Hager notes six basic errors, including the fallacy of using a figure derived from a single study of a single industry in a single year, to determine a general, economy-wide societal estimate.<sup>325</sup> Finally, as Hager points out, Huber arrives at the \$300 billion figure by adding together \$80 and \$280, and then subtracting \$60 billion for completely unexplained reasons.<sup>326</sup>

Despite the fact that Huber's book is riddled with flaws and errors, it unfortunately has received quite a bit of attention, having been widely quoted by right-wing politicians, ultra-conservative judges, and business publications. Its figures have been repeated by Vice President Quayle<sup>327</sup> and in the report by the President's Council on Competitiveness (which

Quayle heads) advocating extensive changes in the civil justice system.<sup>328</sup> This and other misinformation is also contained in the Manhattan Institute's 30-minute videotape attacking the civil justice system, narrated by Walter Cronkite, which is being widely distributed to community groups and to public television stations, in the hopes of national or local broadcasts.<sup>329</sup>

The Manhattan Institute's Huber also joined forces with the corporate-backed Brookings Institution, jointly producing a book entitled *The Liability Maze: The Impact of Liability Law on Safety and Innovation*. This book contains similarly misleading and unfounded information. As Ralph Nader noted in recent congressional testimony:

The preface to this book states that "A 1989 study by Tillinghast, a leading insurance industry consulting firm, estimates gross U.S. liability expenditures at \$117 billion in 1987." However, congressional testimony before the Joint Economic Committee revealed that the Tillinghast number covers *all* liability costs, including the immense costs of operating the highly inefficient insurance industry.... If consumer advocates came to Congress asking for a complete overhaul of the nation's regulatory laws based on made up and mischaracterized numbers like these, we would rightfully be laughed out the door.<sup>330</sup>

Brookings has now launched an even more ambitious project, one far more potentially damaging to the civil jury system called "A Symposium on the Future of Civil Jury-Based Litigation in the United States." Brookings, in conjunction with the American Bar Association Litigation Section, is preparing for a major conference in June, 1992, during which it hopes to reach some "consensus" among a select group of 150 individuals, on what is "wrong" with the civil jury, and what should be done about it, including a recommendation possibly to repeal the Seventh Amendment.<sup>331</sup>

In October, 1991, President Bush issued an Executive Order calling for adoption of 50 proposals recommended in August by the President's Council on Competitiveness.<sup>332</sup> These, and other proposals are aimed specifically at modifying jury behavior or reducing jury awards. Each of these measures also weakens the deterrent potential of the civil justice system.

Courts have split over whether such measures constitute an unconstitutional infringement on the civil jury system. Most provisions have been upheld on the theory that controls on juries' powers do not unconstitutionally restrict the substantive right to jury trial, or interfere with separation of powers. No-fault proposals and other measures which prevent certain cases from reaching the jury, or abolish causes of action, may be upheld under similar constitutional theories as have workers' compensation laws.

Some of the major changes proposed by these business interests groups are:

- **Caps on non-economic damage awards.** Non-economic damages compensate for the human suffering accompanying injuries caused by wrongful conduct. Such caps not only hurt victims, but they usurp the authority of juries and judges, who listen to the evidence, to decide compensation on the basis of the facts in each specific case. In a number of recent federal and state cases, caps have been held unconstitutional, violating the right to a civil jury trial, and interfering with the proper functioning of the courts.<sup>333</sup> (The Civil Rights Act of 1991, while assuring the right to jury trial in certain civil rights cases, caps both compensatory and punitive damages.<sup>334</sup>)

- Elimination of joint and several liability, a centuries-old legal doctrine. Under joint and several liability, if one of the guilty parties in a lawsuit cannot pay its share of the damages, the other defendants who have been found responsible must make up the shortfall. In other words, joint and several liability ensures that victims injured by more than one culpable party obtain the full compensation the jury determines is appropriate. Most states have enacted some restrictions on joint and several liability.

- **Repeal of the collateral source rule.** The collateral source rule says that a wrongdoer is not entitled to reduce damages awarded against him or her by showing that the victim's economic losses were lessened by funds from outside sources unrelated to the defendant, such as pension or welfare benefits. Repealing this rule undermines a jury's judgment as to what damages a wrongdoer should have to pay.

- **Mandatory periodic payments of damages,** allowing insurers to pay out damages in installments, over a number of years. In cases where a victim is hit soon after an injury with large medical costs, or must make adjustments in transportation and housing, a jury may decide that the victim needs full compensation right away, or at least should have the option of deciding how to use this money. This provision frustrates the jury's intent in such situations. Meanwhile, insurance companies pocket the interest, and in some cases, upon the plaintiff's death may keep the money not yet paid out. In June, 1988, the Kansas Supreme Court found unconstitutional Kansas' periodic payments law for medical malpractice cases.<sup>335</sup>

- **Prohibitions or caps on punitive damages** against those who commit reckless or deliberately harmful acts. At least three states—Connecticut, Kansas, and Ohio—and several federal statutes, permit only judges to assess punitive damages in certain cases, even when jury trials are required on other issues.<sup>336</sup> As one commentator noted, "Legislation to shift damage assessments from jury to judge will face much lower political costs than legislation seeking the same substantive result, but by the more open means of eliminating the nominal rights at stake."<sup>337</sup>

The Bush administration advocates a rule whereby the amount of punitive damages in a case could only be determined by a judge, at a separate phase of the proceeding, and the amount could never exceed actual damages no matter how egregious the misconduct.<sup>338</sup> Some proposals would prohibit punitive damages where drugs or medical devices are subject to pre-market approval or licensure by the federal Food and Drug Administration. Drug manufacturers would be immune from punitive damages even if the company discovered a drug's dangers after a drug or

device is marketed, and resisted modification or recall.

- **Limits on lawyers' contingency fees.** The contingency fee system, which allows plaintiffs' attorneys to take a certain percent-age of a verdict or settlement, provides many victims with access to the courts and the jury system since plaintiffs pay no lawyers' fees up front. And since the attorney only gets paid upon winning, it helps screen out frivolous lawsuits.

- Provisions to allow a court to **impose costs and attorneys fees against any plaintiff who loses in court.** With such a rule in place, even victims with very strong cases may fear pursuing a legitimate court case, on the chance they would lose and be economically devastated by having to pay legal costs on top of medical bills. This measure is advocated by the Bush administration.<sup>339</sup>

- Mandatory mediation provisions, limiting victims' right to a jury trial by forcing victims to first present cases before an informal mediation panel without procedural or evidentiary protections, and before full discovery begins. In many proposals, plaintiffs are penalized for exercising their right to jury trial. For example, a plaintiff who rejects a panel's ruling and goes to trial but obtains a less favorable verdict may be forced to pay the defendant's costs.

- **Measures immunizing doctors** who commit malpractice in certain cases, such as in emergency rooms against indigent patients, denying victims any opportunity to pursue court action. These laws prevent juries from considering liability and awarding full damages when malpractice is involved.

- **Expansion of government immunity,** including limits on local government liability, or exemptions from certain types of damages, such as punitive damages. These limits would restrict or prevent compensation to, for example, a person seriously injured in an accident involving a city-owned truck.

Suits against the government are already difficult because of the Eleventh Amendment and the doctrine of sovereign immunity. The Eleventh Amendment states, "The judicial power of the United States shall not be

construed to extend to any suit in law or equity, commenced or prosecuted, against one of the United States, by Citizens of another State, or by Citizens or Subjects of any Foreign States." Sovereign immunity, derived from British common law, bars private citizens from suing the United States without its consent.<sup>340</sup> It flowed from the theory of divine right—i.e., "the King can do no wrong." No rationale explains it in this country. Yet the Supreme Court incorporated sovereign immunity into U.S. jurisprudence in 1846,<sup>341</sup> and courts and legislatures have continued to broaden it.

According to the National Conference of State Legislatures, "1987 should be remembered as the year of immunities,"<sup>342</sup> with 36 states enacting some form of, at least limited, sovereign immunity. States extended sovereign immunity not only to local governments such as cities and counties, but to state firefighting schools, state National Guard installations, local weed districts, state volunteers and public employees including police officers, court clerks and members of local governing boards.<sup>343</sup>

- **Product liability legislation,** making it harder to sue manufacturers or sellers of defective products. One common provision would protect manufacturers from liability in cases where a product is unsafe, but there is no safe practical design alternative. This provision would force plaintiffs, who are at a distinct disadvantage when it comes to knowledge about technical design alternatives, to prove the existence of such alternatives when the defense is raised. And it rewards companies or industries for failing to pursue continuing research and development on the product's safety, relieving those responsible for putting dangers in the workplace or marketplace of responsibility for compensating those injured.

In 1986, at least 100 product liability bills were introduced in 29 state legislatures, according to the National Conference of State Legislatures.<sup>344</sup> Since then, many states have enacted some anti-victim product liability measures. For example, after heavy lobbying pressure by the tobacco and pharmaceutical industries, New Jersey passed a comprehensive product liability bill in 1988, which has been used as a model in other states and in Congress.<sup>345</sup>

As discussed earlier, federal product liability legislation has been circulating in Congress for years. These proposals would federalize laws which have been matters of state jurisdiction since the founding of our country, and in each piece of legislation proposed so far, would downgrade the state common law rights of injured consumers. The most recent U.S. Senate proposal, S.640, sponsored by senators Robert Kasten (R-Wis.) and Jay Rockefeller (D-W.V.), has been reported out of the Senate Committee on Commerce, Science and Transportation.

- **Alternative Dispute Resolution (ADR)** systems. Among the long list of changes to the U.S. civil justice system are various types of alternative compensation systems to replace the jury system as the means to compensate injured victims. These have been advanced not only by industry, professional groups and governmental bodies, but also by several members of the Supreme Court, members of the Advisory Committee on Civil Rules, members of Congress, and some academicians.<sup>346</sup>

In 1987, seven states enacted some form of mandatory arbitration or alternative dispute resolution.<sup>347</sup> In the 1990 federal Civil Justice Reform Act, which requires U.S. district courts to develop "civil justice expense and delay reduction plans," Congress encouraged "utilization of alternative dispute resolution programs."<sup>348</sup>

The chief consequence of such systems is to protect corporations, professional groups and governmental bodies from lawsuits and liability. Whereas the judicial system is structured more to neutralize resource and power imbalances between the parties, ADR systems require victims to resort to compensation systems where more powerful corporate interests can and do prevail.<sup>349</sup> As a result, victims often receive less compensation. Moreover, other important functions of the tort system are disrupted—deterrence of unsafe practices and the disclosure of dangers to the public, and the evolution of written precedents, which develop individual rights and restrain abuses of power by one party over others.

As a corollary, these proposals infect the bilateral bargaining/settlement process,

through which most disputes are resolved.<sup>350</sup> Ordinarily, the victim's warning that he or she is prepared to take a case before a jury helps ensure a fairer settlement. Without the prospect of a jury trial, the wrongdoer's leverage in any settlement negotiation is greatly increased.

There are currently many and varied non-statutorily mandated ways of resolving disputes outside the court system. For example, it is common for disputing parties voluntarily to settle before trial. But what distinguishes the above proposals from voluntary forms of settlement are the restrictions they place on the rights of injured people to a jury trial. Many proposals are based on the workers' compensation model, where victims give up their right to a jury trial in exchange for presenting their claim to a hearing board or administrative judge in an informal proceeding. Compensation is set by statute, and no compensation is allowed for pain and suffering.

Some proposals are based on the premise that expert tribunals or "blue-ribbon" panels, rather than jurors, should decide certain kinds of cases, despite their biases.<sup>351</sup> Advocates of this idea sometimes cite the Supreme Court case of *Atlas v. OSHA*,<sup>352</sup> where the Court accepted Congress' limitation on the Seventh Amendment by giving authority to an "expert agency" to decide an OSHA case.<sup>353</sup>

In response to a 1980 proposal by Senator Gary Hart (D-Colo.) to relegate occupational disease claims to administrative tribunals, removing them from the courts, Professor Laura Macklin observed:

It seems unlikely that these tribunals would serve as a useful source of information about occurrence and causes of occupational diseases. Many administrative forums provide for only minimal fact-finding generally, no fact determination on issues of fault or responsibility, and little or no release of information to the public.<sup>354</sup>

In 1988, the American Medical Association proposed that states establish fault-based administrative systems to resolve medical

malpractice claims, under which a panel of experts would decide all medical malpractice, entirely replacing the jury system. The medical lobbies introduced such proposals in a number of 1988 state legislative sessions.

Other proposed alternative compensation schemes are modeled on Virginia's Birth-Related Neurological Injury Compensation Act, which established an injury compensation fund for claims of catastrophically injured newborns.<sup>355</sup> The program is the exclusive remedy for children with compensable injuries delivered by participating obstetrician-gynecologists. Infants may recover neither non-economic damages nor punitive damages against even the most reckless doctors. (Florida passed such a measure in 1988.<sup>356</sup>)

No-fault automobile insurance is another common variation, which requires accident victims to file claims with and collect compensation from their own automobile insurance company, regardless of fault. Typically, suits are not allowed unless the injury is serious enough to meet certain monetary or injury thresholds. Some have advocated no-fault systems for other types of injuries, such as those caused by medical malpractice. Property/casualty insurance companies began a new push for no-fault auto plans after California's Voter Revolt insurance reform initiative passed in 1988 in California, hoping to counter popular consumer efforts to enact major insurance reform.

In conclusion, the commercial liability crisis of the mid-1980s led most states to consider measures to weaken the civil jury institution. Colorado was one example, where rates were soaring, policies were being cancelled, and juries were being blamed. Denver's major paper carried Aetna ads warning, "Lawsuit abuse is out of control."<sup>357</sup> As a result, over the last six years, Colorado's "conservative, business-oriented legislature" enacted 68 laws to restrict juries' powers and weaken the civil justice system, including many of those discussed above.<sup>358</sup> "The idea," according to a recent *Wall Street Journal* article, "was to make insurance more available, knock down premiums, ... give businesses a breather from costly litigation, ... [and to] redress what they perceived as an injustice: the prevalence of unpredictable and often unjustified jury awards spurred on by avaricious lawyers

working for contingency fees."<sup>359</sup>

The *Journal* examined the impact of Colorado's new laws on both injured victims and insurance policyholders. The case of former schoolteacher Roxie Lypps, one of 14 injured in a propane gas explosion in the mountain resort of Crested Butte in March 1990 (three were killed), was a case the paper looked at:<sup>360</sup>

Roxie Lypps ... was buried beneath bricks and debris and had severe burns over 40 percent of her body. After two years of painful burn therapy and skin grafts, Ms. Lypps is still unable to work full time and faces an increased risk of skin cancer.

A Denver state court jury awarded Ms. Lypps \$1.5 million last November. Of that amount, \$486,000 was for punitive damages intended to punish [the gas supplier] Salgas [which had violated more than a dozen state safety regulations] and its parent, Empire Gas Co. of Lebanon, Mo., for negligence. The rest was compensation for injuries. But in December, a judge was forced to reduce the total amount by more than half. One reason: The jury's award of \$600,000 for pain and suffering was over the state limit [cap] of \$250,000.

That reduced Ms. Lypps' compensatory damages to \$621,642. Then another Colorado law came into play: Individual defendants in civil suits can't be forced to pay more than their share of the blame when others at fault have no money [i.e., limits on joint and several liability]. In this case, Empire and Salgas blamed the blast on a repair two' previous owners had made. The previous owners were out of business and



uninsured. But the jurors weren't told this because another Colorado law prohibits lawyers from disclosing whether defendants have insurance. When the jury divided blame equally among all four companies, the net effect was to cut Ms. Lypps' remaining compensation to \$310,822.

That, in turn, knocked down the punitive damages because Colorado law prohibits juries from assessing more in damages to punish wrongdoers than they award to compensate victims. Ultimately, Ms. Lypps expects to receive a total of about \$316,000 after all her legal fees and other expenses are deducted.<sup>361</sup>

As Ms. Lypps told the *Wall Street Journal*:

[T]he court system should allow the jury to award what they feel is fair.... To me it's totally unfair. We end up being the victims again.<sup>362</sup>

While jury verdicts and settlements have decreased and fewer cases are being filed in Colorado, insurance premiums predictably have barely dropped at all.<sup>363</sup> One small construction company said that after six years of *increases* its rates finally dropped in 1990—but this 15 percent drop did not make up for the increases.<sup>364</sup>

A 1986 poll by the American Tort Reform Association (ATRA) showed that the American public does not support the organization's agenda to weaken this country's civil justice system and restrict the power of the civil jury. The poll found that "at first glance the public appears receptive to a broad range of solutions to the liability problem, but focus group discussions reveal that this receptivity is easily reversed when objections to reforms are raised."<sup>365</sup>

In Colorado, legislative leaders now want to reverse direction, at least somewhat. For

example, Republican House Majority Leader Scott McInnis, who had supported restricting victims' rights, is now reportedly backing legislation to restore the liability of government entities (as well as to create an office of consumer advocate to fight insurance industry rate increases).<sup>366</sup> However, with large advertising and lobbying budgets dedicated to attacking and destroying the U.S. civil justice system, the many coalitions of insurance trade associations, insurance companies, corporate and professional defense lobbies and corporate-funded think tanks appear undaunted in their attempts to further restrict the power and authority of the civil jury.

### C. Rules and Judicial Controls

The Supreme Court has held, in a number of decisions, that the Seventh Amendment was designed to protect "the basic institution of civil jury trial in only its most fundamental elements," not procedural forms and details which at the time of the Amendment's adoption varied widely from state to state.<sup>367</sup> Beginning about 1850, the courts began implementing procedural controls on juries' powers, perhaps due to the fading memory of colonial oppression, or to the appointment of more well-trained judges.<sup>368</sup>

In 1896, in *Sparf and Hansen v. the U.S.*, the Supreme Court curtailed the right of juries to deliver verdicts at odds with the evidence. Congress later empowered the Supreme Court to prescribe procedural rules for federal civil jury trials.<sup>369</sup> By the time the Federal Rules of Civil Procedure were adopted in 1938, the federal courts had developed or refined numerous procedures which limited the civil jury's powers, including summary judgment, directed verdict, new trial on the weight of the evidence, remittitur, judgment notwithstanding verdict, special verdict (where the jury is only allowed to answer certain questions about the facts of the case) and general verdict with interrogatories.<sup>370</sup> As these are "procedural" rules, courts have not viewed them as impairing the Seventh Amendment's substantive right.<sup>371</sup>

These rules provide judges with discretionary tools to control juries. But in exercising this discretion, many believe judges' rulings have sometimes deprived plaintiffs of their constitutional right to have a jury decide a dispute.<sup>372</sup> For example, as discussed earlier,

one issue which has emerged over the last few decades, has been the role of juries in deciding complex cases. At least one court has recognized a "complexity exception" to the Seventh Amendment, denying a jury trial in a case which was otherwise properly before a jury.

Further, in some recent toxic tort and pharmaceutical cases, judges who have no particular scientific or technical competence, have ruled that only they, and not juries, are capable of resolving conflicting scientific or technical expert testimony. Some judges have dismissed an injured party's case before it even gets to a jury, after deciding that because the views of the plaintiffs expert(s) were "outside generally accepted scientific thought," they were entitled to no weight before a jury.<sup>373</sup> For example, in the Agent Orange case *Lilley v. Dow Chemical Co.*, Judge Weinstein decided that the views of the plaintiffs experts, whose opinions of causation differed from the government's studies which were submitted by the *defendant*, were too incredible for a jury to hear.<sup>374</sup> He ruled, "[C]ourts must assess the admissibility of testimony based on a novel scientific technique by balancing the relevance, reliability, and helpfulness of the evidence against the likelihood of waste of time, confusion, and prejudice."<sup>375</sup>

In another case involving injuries from exposure to the herbicide Tordon 10K, the judge dismissed a case "even though the defense presented no evidence refuting the plaintiffs expert and there were no studies suggesting absence of a correlation" between the injuries and the exposure to the chemical.<sup>376</sup>

The view that juries are incapable of deciding the reliability and credibility of expert testimony has received support from the Manhattan Institute's Peter Huber in his latest book, *Galileo's Revenge: Junk Science in The Courtroom*, as well as from Vice President Quayle's Council on Competitiveness.<sup>377</sup> The problem, according to Huber and Quayle's group, is that plaintiffs' experts rely on "junk science" and "scientific frauds" to substantiate their claims, and that this evidence easily sways jurors, who react emotionally and are incapable of competently evaluating the evidence.<sup>378</sup> Such assertions contradict the entire body of empirical data and other

evidence discussed above, demonstrating that juries are competent, serious, and neither arbitrary nor emotional. But rather than address this evidence, Quayle and Huber try to outrage the reader by recounting anecdotal jury verdicts, such as one described as follows:

With the backing of "expert" testimony from a doctor and police department officials, a soothsayer who decided she had lost her psychic powers following a CAT scan persuaded a Philadelphia jury to award her \$1 million.<sup>379</sup>

This case, *Haimes v. Temple University et al.*,<sup>380</sup> is one frequently mentioned by jury critics but as is typical, is never accurately or completely described. As the judge who ordered a new trial in the case stated, "lobby groups, legislatures, and government agencies [have] perverted the facts of this case and the basis of the jury verdict."<sup>381</sup> Those facts are as follows:

Judith Haimes went to the hospital for a CAT scan because she was suspected of having Von Recklinghausen's disease which causes tumors to grow all over one's body. The CAT scan was done without dye, to which she was severely allergic. However, while waiting on a stretcher, Dr. Judith Hart insisted that the dye be injected, eventually convincing Ms. Haimes. After 7-10 drops of the dye had entered her arm, she went into anaphylactic shock and nearly died. As a result of this egregious malpractice, she has been unable to work due to severe, debilitating headaches. Prior to this, she had been making about \$50,000 a year, working for, among others, Crime Commissions and local police departments in two states, for whom she had found missing bodies and victims.

While some judges have adopted the approach advocated by Huber and Quayle, most have not, trusting the jury's ability to evaluate conflicting scientific or technical testimony and to determine the weight of expert evidence, one of its fundamental tasks. However, as one commentator wrote, "the 'strict scrutiny' camp [whereby judges keep cases from juries] by second-guessing experts] seems to be an accelerating modern movement and is the direction of the future."<sup>382</sup>

## CONCLUSION AND RECOMMENDATION

Jury scholar Harry Kalven once wrote, "in the course of many years of study ... I, personally, have become increasingly impressed with the humanity, strength, sanity and responsibility of the jury."<sup>383</sup> The civil jury system is a cornerstone of our democracy. It is fundamental to the protection of individual rights, public health and safety, and restraining abuses of power.

Although the civil jury system has been under seige since the early 1900s, today the system is staving off its fiercest political attacks. Yet there is no question most Americans know barely anything about our judicial system, and the civil jury is one of its least understood features. Few can refute false allegations made in insurance industry advertisements. Information in public libraries about the civil jury system is scarce. And very little is currently being done to educate the public about the history and importance of the civil jury. Even groups involved with law-related education focus little attention, if any, on the civil juries.

For example, the ACLU's public education division, which distributes materials on the Bill of Rights, publishes almost nothing about the Seventh Amendment. The Seventh Amendment is virtually forgotten in today's discussions of civil liberties. As a result, few are aware that the first colonial charter guaranteed both criminal and civil jury trials but not freedom of speech, press or religion; or that the right to jury trial was a key issue over which the American Revolution was fought; or that the failure to secure the right to civil jury trial in the Constitution almost caused its defeat? How many know that jurists and scholars from Jefferson to Rehnquist have written eloquently in praise of the civil jury? And who really understands how the civil jury has checked corporate, government and professional irresponsibility?

One immediate impact of the lack of credible public education on this issue, is that people are not showing up for jury service. In September 1990, the chief judges of the federal and local courts in the District of Columbia announced the start of a continuing education project about the civil jury, "to draw

attention to the growing problem that people don't understand the importance of serving and don't show up."<sup>384</sup>

Consumer and victims' groups working to preserve the civil justice system, as well as the American Board of Trial Advocates and the Association of Trial Lawyers of America, have produced educational and organizing material to counter information generated by the insurance industry and other groups pushing to weaken the civil justice system. But the civil jury system needs a more focused advocate; one that can supply the public education and fortification necessary to protect this most cherished right.

No group is better equipped for this than one composed of those who have actually served on civil juries. Study after study shows that immediately after a trial, jurors have very strong impressions about their experiences. Almost all will say the experience was positive and that the system works well. Mistakes, they believe, are due to the ineptitude of the judge or the attorneys.

We recommend that a National Association of Civil Jurors, an independent organization of former civil jurors, be formed to be the system's advocate and defender, with a full-time staff and office which policymakers and the media would know to call for information and responses. This organization would produce research and reports for policy makers, the media and the public at large about the history, functions and importance of the civil jury; would work with schools in developing school curriculum and new educational materials on the civil jury; and would speak on behalf of the civil jury in public appearances, letters to public officials, op-ed pieces, letters to the editor, magazine articles or other publications.

We need a National Association of Civil Jurors, composed of former civil jurors who are convinced of the system's fundamental, justice-dispensing value. Without such a group, we might find it more difficult to, in Jefferson's words, "regain the road to peace, liberty and safety."

**-End-**