

IS THE JURY STILL OUT?: A CASE FOR THE CONTINUED VIABILITY OF THE AMERICAN JURY

*The Honorable Jennifer Walker Elrod**

I.	305
II.	309
III.	317
IV.	322
V.	325
VI.	331

Thank you for your gracious invitation to Lubbock and to the Texas Tech University School of Law. I am honored to be able to speak to you today about the jury. As I will explain, the American jury system is under assault—as a practical matter, because it is being used to settle disputes less and less, and as a theoretical one, as it has become commonplace to deride the very idea of the jury. After all, why leave justice to the untrained public when almost every other trade has been the subject of increasing professionalism, when almost none of our global competitors have chosen the jury system for their own,¹ and when our nation’s business leaders seem to have chosen alternatives to the jury system?²

As an unabashed defender of the jury, I have come here today to set out the contrary case, to remind us why the jury is worth fighting for. This is a topic that is near and dear to my heart. Although I am now an appellate judge, separated from the hustle and bustle of the trial court, I started out as a trial judge. During the five and a half years I heard trials, I worked with juries almost daily. As a result of that experience, I developed a deep appreciation for their wisdom and for their important role as a check on the power of government. I have come to the conclusion that to give up the jury is to give up part of what has made the American democratic experiment successful. In short, the jury is as central to the American

* Circuit Judge, United States Court of Appeals for the Fifth Circuit. This text was delivered as the M.D. Anderson Visiting Public Service Professor Lecture at Texas Tech University School of Law on April 11, 2011, and has been adapted for this Essay format. I would like to thank my former law clerk, Raffi Melkonian, for his work in helping me to prepare this speech and to adapt my written remarks.

1. *See infra* Part I.
2. *See infra* Part III.

conception of the consent of the governed as an elected legislature or the independent judiciary.

I would like to begin by thanking Dean Susan Fortney and Dean Emeritus Walter Huffman. If it were not for them, I would not be here. I met Dean Huffman at a state bar dinner. He said he would invite me to Lubbock, and he did. He is a dedicated public servant who has inculcated the value of public service into the very fiber of this law school. On my first visit to Lubbock, I had the privilege of meeting Dean Fortney, and we discovered our shared interest in legal ethics. It is because of her that we will have a new initiative at the Texas Center for Legal Ethics.³ We will focus on collaboration with legal ethics professors throughout Texas in order to enrich the legal education that we do provide at the Center and to promote early involvement by the students in the field of legal ethics. Thanks to both of you, Dean Fortney and Dean Huffman.⁴

I would also like to thank the M.D. Anderson Foundation for bringing me to Texas Tech. Like so many Texans, Monroe Dunaway Anderson came to this great state in search of opportunity, migrating from Tennessee to Oklahoma City to Houston as his cotton business grew.⁵ He made Houston his home and spent the rest of his fruitful life there.⁶ As an adopted Texan, M.D. Anderson represented the best of Texas—he was a man of strong character who ceaselessly pursued the improvement of both himself and his community while leading a modest life.⁷ His late nephew Thomas D. Anderson wrote that his uncle’s “most prominent characteristics” were “[f]rugality and thrift, industry and integrity.”⁸ I would add generosity to the top of that list. M.D. Anderson was drawn to Texas by its robust economy and seemingly endless opportunities; his dedication to knowledge and education left it a changed place.⁹ His company became the largest merchant of the world’s most popular commodity, “King Cotton,” and, as he grew older, he committed to giving much of his great fortune to charity.¹⁰ We are all grateful for his generosity,

3. See generally TEX. CENTER FOR LEGAL ETHICS (2012), <http://www.legaethicstexas.com/home.aspx> (last visited Jan. 5, 2012).

4. Prior to becoming Interim Dean of the Texas Tech University School of Law, Dean Fortney served as a briefing attorney for Chief Justice Carlos Cadena of the Fourth Court of Appeals and also served as an attorney at the U.S. Securities and Exchange Commission. She became Interim Dean effective July 1, 2011. Dean Emeritus Walter Huffman joined the Texas Tech University School of Law after a distinguished twenty-five-year career in public service, including as Judge Advocate General and the top military lawyer for the U.S. Army.

5. See JAMES S. OLSON, MAKING CANCER HISTORY 25-26 (2009).

6. See *id.*

7. See Thomas D. Anderson, *Who Was M.D. Anderson?*, THE UNIVERSITY OF TEXAS MD ANDERSON CANCER CENTER, <http://www.mdanderson.org/about-us/facts-and-history/who-was-m-d-anderson-/index.html> (last visited Jan. 5, 2012).

8. *Id.*

9. See OLSON, *supra* note 5, at 26, 29.

10. *E.g.*, Anderson, *supra* note 7. One of the little known facts about M.D. Anderson is that he had no idea that a famous hospital would one day be named after him or indeed that his fortune would

lucky that such a man chose Texas as his home, and happy to celebrate his memory today. In fact, my first courtroom was in the Houston Cotton Exchange building.¹¹

In addition to the Foundation's well-known support of cancer research and initiatives, it generously supports Texas higher education, from which we have all benefitted. Past M.D. Anderson Jurists in Residence, who all wore bigger shoes than I can ever fill here today, include, among others, Judge Tom Reavley, Judge Fortunato Benavides, and Judge Lee Rosenthal.

I.

I have to start by admitting that the jury has long come in for harsh criticism. These criticisms are legion: jurors are said to disregard the law, choose between lawyers, or allow the prejudices with which they entered the courtroom to decide the case.¹² Other observers have complained about the institution of jury selection,¹³ while yet another set of criticism centers around the idea that jurors are uneducated or stupid, that the entire idea of a lay jury is hopelessly naive, that professional jurors or judges can inevitably do a better job of providing efficient and fair justice in increasingly complex cases, and that the institution of asking jurors to maintain their ignorance about the legal issues before them leads to error.¹⁴ As Mark

support wonderful programs like this one. See OLSON, *supra* note 5, at 29. Rather, the story of how Anderson came to let his riches loose to do such good is itself something of the triumph of law. By 1936, Anderson's fortune exceeded \$19 million, nearly \$300 million in today's dollars. *Id.* Diagnosed with heart failure, Anderson consulted with his personal lawyers, R.C. Fulbright, John H. Freeman, and William B. Bates, of the firm that would later become Fulbright & Jaworski L.L.P. *Id.*; see *About Us: Firm History*, FULBRIGHT & JAWORSKI L.L.P., http://www.fulbright.com/index.cfm?fuseaction=description.subdescription&site_id=220&id=576 (last visited Jan. 5, 2012). Those lawyers advised him to establish a trust with a general mission—the “establishment, support and maintenance of hospitals, homes and institutions for the care of the sick.” OLSON, *supra* note 5, at 30. That foundation was granted tax-exempt status by the IRS in 1941. See *id.* The inspiration of a Prussian immigrant, Ernst W. Bertner, combined wealth with the wealth of the M.D. Anderson foundation to create the Texas Medical Center. See *id.* at 27-30. By 1945, the core of the current Texas Medical Center was in place. Nicholas Lemann, *Super Medicine*, TEX. MONTHLY, April 1979, at 111, 119, available at <http://www.texasmonthly.com/preview/1979-04-01/feature3>.

11. See generally Interview by Sarah Canby Jackson with Thomas Anderson, in Harris County Archives, Hous., Tex. (Aug. 24, 2004) (discussing the history of the Houston Cotton Exchange Building and the role of the Anderson Clayton Company in Houston), available at <http://www.hctx.net/cmpdocuments/20/oral%20History/OH01Andersonfinalpdf.pdf>. The Houston Cotton Exchange building, now known as the Anderson Clayton Building, opened in 1924 on 310 Prairie Avenue. *Id.* at 16. M.D. Anderson's office was on the eleventh floor. *Id.* at 18. My chambers were on the eleventh floor as well.

12. See *infra* notes 118-20 and accompanying text.

13. See, e.g., Albert W. Alschuler, *Explaining the Public Wariness of Juries*, 48 DEPAUL L. REV. 407, 410 (1998) (“A familiar wisecrack is that in England the trial begins when the jury is selected; in America, that is when the trial is over.” (footnote omitted)).

14. See generally Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 459-60 (1899). As Oliver Wendell Holmes put it, “I confess that in my experience I have not found juries specially inspired for the discovery of truth. I have not noticed that they could see further into

Twain wrote in his classically acerbic style, “we have a criminal jury system which is superior to any in the world; and its efficiency is only marred by the difficulty of finding twelve men every day who don’t know anything and can’t read.”¹⁵ The former Dean of Harvard Law School, Erwin Griswold, agreed with Twain: “[J]ury trial, at best, is the apotheosis of the amateur. Why should anyone think that twelve persons brought in from the street, selected in various ways, for their lack of general ability, should have any special capacity for deciding controversies between persons?”¹⁶ Our jury system has come in for equally harsh criticism overseas.¹⁷ A prominent English lawyer has called trial by jury the “high point of amateurism, potentially a recipe for incompetence and bias.”¹⁸

The result of this skepticism has been a steady trend away from the adoption of the jury abroad, leaving the United States almost alone in its adherence to the jury system.¹⁹ Even the country from which the jury came to America, England, has gradually abandoned the jury in civil trials and even certain criminal trials.²⁰ Indeed, the United Kingdom recently held its

things or form a saner judgment than a sensible and well trained judge. I have not found them freer from prejudice than an ordinary judge would be.” *Id.* at 459. Of course, the Internet Age has brought forth a new problem: jurors who cannot help using the Internet to educate themselves about the case they are hearing and who—either intentionally or inadvertently—leak information about deliberations through social media. See *Facebook Juror Sentenced to Eight Months for Contempt*, BBC NEWS (June 16, 2011, 9:53 AM), <http://www.bbc.co.uk/news/uk-13792080> (discussing a juror jailed for eight months after communicating with the public through Facebook during deliberations); Christopher Hope, *Facebook Contempt Case: Juror Jailed for Eight Months*, THE TELEGRAPH (June 16, 2011, 6:23 PM), <http://www.telegraph.co.uk/news/uknews/law-and-order/8580604/Facebook-contempt-case-juror-jailed-for-eight-months.html>.

15. Mark Twain, *After-Dinner Speech*, in SKETCHES NEW AND OLD 234, 235 (1903). Mark Twain’s commentary is only unique in that it is witty. Other commentators view the jury with equal suspicion. Charles A. Boston, for example, lambasted jurors as “raw recruits who could not as a class do well in any one of the many activities which, in civilization, we require from any class in the community. . . . It is the residue, men of no great responsibility, men whose occupations do not as a rule develop mental acumen, that are left to serve as jurors.” Charles A. Boston, *Some Practical Remedies for Existing Defects in the Administration of Justice*, 61 U. PA. L. REV. 1, 11, 13 (1912).

16. RANDOLPH N. JONAKAIT, *THE AMERICAN JURY SYSTEM*, at xx (2003).

17. See Sir Louis Blom-Cooper, QC, *A Judge Can Do the Work of 12 Amateurs, and Better*, THE TIMES (LONDON), Oct. 21, 2003, at 10.

18. *Id.*

19. See *The Jury is Out: European Countries are Restricting Jury Trials; Asian Ones Expanding Them*, THE ECONOMIST, Feb. 12, 2009, at 1. The reasons for the trend away from the use of the jury have sometimes eloquently made the case for the jury itself. In Russia, for example, the jury was introduced as part of a series of democratic reforms in 1993. See *id.* As Russia has become less democratic over the subsequent twenty years, however, the jury has been abolished again for many crimes (including the crime of organizing demonstrations) other than murder. *Id.*

20. See *R v. Twomey*, [2011] EWCA (Crim) 8, [2011] All E.R. 136. The English courts decided that a 2003 law permitting nonjury trials was applicable to the facts at issue because the history of the case, which included apparent efforts by the defendants to hamper the operation of the jury, presented an extremely high risk of jury tampering. *Id.* In affirming the conviction, the English Court of Appeal concluded that “if criminals choose to subvert or attempt to subvert the process of trial by jury, they have no justified complaint if they are deprived of it.” *Id.*

first nonjury criminal trial in more than 400 years, startling English lawyers who still believed in the vitality of the jury trial.²¹

Where the jury trial does exist, it exists in a form that is fundamentally different than the all-lay, binding, jury system that exists in the United States. In the European countries that have retained jury systems, for example, those juries consist of mixed panels of lay persons and professional judges.²² Where the jury has been adopted or re-adopted, that jury system too has been different in important ways from the American jury. Japan presents an excellent example. After abolishing jury trials in 1943, few in Japan believed they would ever return.²³ But, in 2004, a law was passed to reinstate the jury system in a limited number of criminal cases in the hopes that involving citizens in trials would restore the Japanese citizenry's trust in the judicial system and in judges.²⁴ After lengthy consideration, Japan adopted a form of the mixed jury used in Europe.²⁵ Five years later, in 2009, Japan held its first jury trial under the new system.²⁶ Interestingly enough, despite initial misgivings, the jury system has been catching on unexpectedly well with both the public and with the jurors themselves.²⁷ As one of the "citizen judges" recently said,

21. See Seth Levine, *Practical Consequences of Twomey Case for Non-Jury Trials*, LAW SOCIETY GAZETTE (Apr. 15, 2010), <http://www.lawgazette.co.uk/in-practice/practice-points/practical-consequences-twomey-case-for-non-jury-trials> (observing that "successive administrations have sought to make inroads into the right to trial by jury" in part because such trials "are expensive and often result in acquittals"); see also Sandra Laville, *Heathrow Robbery Trial Breaks with 400-year Tradition of Trial by Jury*, THE GUARDIAN (Jan. 10, 2010, 6:27 PM), <http://www.guardian.co.uk/uk/2010/jan/10/heathrow-robbery-trial-jury-twomey>.

22. See generally John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, FACULTY SCHOLARSHIP SERIES, Paper 535 (1981), available at http://digitalcommons.law.yale.edu/fss_papers/535.

23. See Daniel Senger, Note, *The Japanese Quasi-Jury and the American Jury: A Comparative Assessment of Juror Questioning and Sentencing Procedures and Cultural Elements in Lay Judicial Participation*, 2011 U. ILL. L. REV. 741, 745 (2011) (discussing comparatively the Japanese and American experiences with lay participation in justice and suggesting that the Japanese quasi-jury has been successful to date in involving the Japanese public in the legal system).

24. See *id.* at 746.

25. Takuya Katsuta, *Japan's Rejection of the American Criminal Jury*, 58 AM. J. COMP. L. 497, 497 (2010).

26. Senger, *supra* note 23, at 746.

27. See *id.* at 765-66. Indeed, the Japanese example has since been followed by other countries. See *id.* at 748. Taiwan is currently considering a quasi-jury system where citizen panels consisting of five members advise judges in cases involving grave crimes. *Quasi-Juries Would be Good First Step in Judicial Reform*, THE CHINA POST (July 29, 2011, 10:26 AM), <http://www.chinapost.com.tw/editorial/taiwan-issues/2011/07/29/311425/quas-juries-would.html>. Under the proposed system, citizens ages twenty-three or above with at least a high-school-level education would be chosen by lottery to sit alongside judges, who could deviate from the jury's findings but would be required to provide reasons for their decision. *Id.* Malaysia has also considered reinstating the jury system in some form. See *Malaysia Considers Reviving Jury System*, ASIA CALLING (Dec. 19, 2010), <http://www.asia-calling.org/en/news/malaysia/1769-malaysia-considers-reviving-jury-system> (noting that the Law Minister, Nazri Aziz, said that "one head is not as good as seven heads to decide on the future of a person").

participating in the jury “was a precious and worthwhile experience.”²⁸ Perhaps Japan will become the new home of the jury. More realistically, however, even if the Japanese experiment with the jury is a success, and is perhaps imitated elsewhere, it is nothing more than a narrow exception to the general rule that the jury has been rejected by our global partners.

In the face of this onslaught, it might be tempting to give up on the American jury. After all, the fact is that the United States still stands virtually alone in its trust of layperson juries to decide questions of fact in both civil and criminal cases.²⁹ Why should we not bow to global precedent and simply accept the slow death of the jury trial?³⁰

I think such a surrender would be a serious mistake. Rather than a quaint but obsolete custom, the existence and vitality of the jury trial is central to our democracy.³¹ That is not just my view. To the contrary, American patriots ranging from our Founders to contemporary judges and statesmen have affirmed the importance of the jury to the structure of our republic.³² John Adams called trial by jury, along with popular elections, “the heart and lungs of liberty.”³³ Thomas Jefferson identified the jury “as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.”³⁴ Chief Justice William Howard Taft saw the jury as not only central to democracy, but kept vital by the virtues of a democratic people:

The jury system needs citizens trained to the exercise of the responsibilities of jurors. In common-law countries centuries of tradition have prepared a conception of the impartial attitude jurors must assume. The jury system postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire. One of its greatest benefits is in the security it gives the people that they, as jurors, actual or

28. David McNeill, *Praise for New Japanese Jury System*, THE INDEPENDENT (Aug. 6, 2009), <http://www.independent.co.uk/news/world/asia/praise-for-new-japanese-jury-system-1768198.html>.

29. See Michael D. Green, *The Impact of the Civil Jury on American Tort Law*, 38 PEPP. L. REV. 337, 340 n.19 (2011).

30. See Richard O. Lempert, *The Internationalization of Lay Legal Decision-Making: Jury Resurgence and Jury Research*, 40 CORNELL INT'L L.J. 477, 477 (2007) (explaining that the thrust of reform thirty years ago at least was to reduce the jury's sway to comport with international norms).

31. See *id.*

32. See Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury: Sparf and Hansen v. United States Reconsidered*, 46 AM. J. LEGAL HIST. 353, 353-55 (2004).

33. See Thomas J. Methvin, *Alabama—The Arbitration State*, 62 ALA. LAW. 48, 49 (2001) (“In 1774, John Adams stated: ‘Representative government and trial by jury are the heart and lungs of liberty. Without them, we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swines and hounds.’”).

34. Middlebrooks, *supra* note 32, at 353 (quoting 3 WRITINGS OF THOMAS JEFFERSON 71 (1961)).

possible, being part of the judicial system of the country, can prevent its arbitrary use or abuse.³⁵

More recently, Justice Antonin Scalia has observed that the right to a criminal jury trial is the “spinal column” of the Constitution.³⁶ The point is that Americans have long believed, and still believe, that the jury is at the center of our democracy. The question I will discuss today is how the jury came to be, why it is under assault, and what all of us can (and should) do to protect it.³⁷

II.

Those of you who have served on a jury have probably heard some variation of this charge read to you by the judge:

In any jury trial there are, in effect, two judges. I am one of the judges; the other is the jury. It is my duty to preside over the trial and to determine what evidence is proper for your consideration. It is also my duty at the end of trial to explain to you the rules of law that you must follow and apply in arriving at your verdict.³⁸

Those words come with certain assumptions that are so obvious to the modern mind that most jurors, or even lawyers, will never have even thought about them. For example, we assume that a juror will not know anything about the case before being seated; that the juror was chosen fairly from a cross-section of the population; and that the juror is not to be punished for his or her verdict. As a judge, I have read words like those to juries hundreds of times, and as an appellate judge, I read them each time I review a jury trial on appeal.

Despite the fact that the principles underlying the words I have just described seem obvious or commonplace, in reality those words convey an extraordinary idea—that ordinary citizens, drawn at random from the population, are to make decisions about people’s legal rights and obligations. Those frankly counterintuitive premises did not arise on their

35. *Balzac v. People of Porto Rico*, 258 U.S. 298, 310 (1922).

36. *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part and dissenting in part).

37. I sometimes discuss the right to a criminal jury and the right to a civil jury interchangeably in this Essay. Although I acknowledge that there are, of course, differences in how those rights have been viewed historically, it is my view that the jury system stands or falls as a whole. To erode the civil jury is to eventually erode the right to a jury trial in criminal matters, as our English counterparts have discovered. *See supra* note 20 and accompanying text.

38. *See, e.g.*, SAMPLE JURY INSTRUCTION NO. 1, U.S. DISTRICT COURT OF NEW MEXICO, available at <http://www.nmcourt.fed.us/web/DCDOCS/Judges/Files/civstocksvet.pdf> (last visited Jan. 5, 2012).

own. They were paid for by thousands of years of slow progress and the sacrifice of brave people who stood up for liberty.³⁹

The jury as an idea has been around for a long time, extending even into man's mythological memory.⁴⁰ Perhaps the most famous example of the premodern jury was found in Ancient Greece. Athenian juries, called dicasts or dikasteria, "were composed of qualified citizens randomly selected by lot to serve on a particular case."⁴¹ A verdict did not require unanimity or even any sort of supermajority.⁴² Rather, the Athenian jury was an expression of the rollicking nature of Greek democracy, and a single person's vote could mean life or death.⁴³ Thus, when a criminal case was famously initiated against Socrates for impiety, a jury of 500 male citizens over the age of thirty was called to the agora, the civic center of Athens, to decide the case before the Archon, the chief legal magistrate.⁴⁴ After Socrates's accuser presented his case, the matter went to the jury for debate.⁴⁵ Ultimately, we believe that 280 jurors voted to find Socrates guilty and 220 innocent, and the great philosopher was condemned by the voice of the people he had sought to enlighten.⁴⁶ Even outside the relatively unique example of Greece, however, the observant reader of history can find primitive examples of the jury throughout Europe very early on. There is historical evidence of cases being decided by a body of sworn jurymen nominated by a tribal chief in Scandinavia.⁴⁷ Likewise, in early Germany, local landowners were often picked to decide questions of law and fact.⁴⁸

Despite these examples, however, the fact remains that suspicion of Athenian democracy contributed to the abandonment of juries for centuries after the fall of the great Greek city.⁴⁹ Consequently, a modern lawyer viewing Europe at the beginning of the Middle Ages would have found a legal structure that was far more barbaric than the raw democracy of

39. See generally Lempert, *supra* note 30, at 478-79 (noting the gradual formulation of the jury system).

40. See Morris B. Hoffman, *Peremptory Challenges Should be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 813 n.13 (1997) (describing Norse and Greek myths involving trial by jury). "The whole of the Norse mythic universe was ruled by a jury of sorts—twelve gods, each of whom held a 'judgment seat[.]' . . ." *Id.*

41. *Id.* at 814.

42. See generally *id.* at 814-15 (describing Athenian juries).

43. *Id.*

44. See Anthony D'Amato, *Obligation to Obey the Law: A Study of the Death of Socrates*, 49 S. CAL. L. REV. 1079, 1080 (1976).

45. See *id.* at 1085; PLATO, *THE APOLOGY OF SOCRATES* 19-20 (D.F. Nevill trans., London, F.E. Robinson & Co. 1901).

46. See D'Amato, *supra* note 44, at 1085-86.

47. See WILLIAM FORSYTH, *HISTORY OF TRIAL BY JURY* 16-18 (James Appleton Morgan ed., 1875).

48. See *id.* at 35-38.

49. I acknowledge, of course, that it is impossible to comprehensively explain a thousand years of history in a short speech such as this one. The incidents I discuss are only snapshots of a much more complex story, into which I encourage all readers to delve.

Athens. Before the Norman Conquest of 1066, for example, a chief method of resolving legal disputes in England was the ordeal—a test of fate that left justice, according to its proponents, in the hands of God himself.⁵⁰ One of the most common methods of ordeal in England, for instance, required the defendant to carry a red-hot bar in his bare hands for a certain distance, depending on the gravity of his alleged crime.⁵¹ The defendant's hands were bandaged for three days; if at the end of that time the burns had healed, then the defendant was pronounced innocent or nonliable.⁵² Things went less well for the defendant if the wounds had festered.⁵³

When the Normans invaded England, ordeal was gradually replaced by a no-less brutal method of adjudication—trial by combat.⁵⁴ God was said to decide the justice of the case by giving force to the victor's arms.⁵⁵ Because our predecessors realized that those methods of adjudication were inadequate—and, in the case of combat, resulted in the death of useful noblemen who could be otherwise employed—they continuously sought alternatives.⁵⁶ One method that became common at around the same time as trial by battle was compurgation—a “wager of law” in which the defendant presented a certain number of sworn witnesses to swear their belief in the defendant's innocence.⁵⁷ But it was well known that many compurgators were chosen for their willingness to lie, perhaps in favor of the person with the bigger wallet.⁵⁸ In short, the English legal structure at the beginning of the twelfth century was a hodgepodge of local courts, all

50. See William D. Bader & David R. Cleveland, *Precedent and Justice*, 49 DUQ. L. REV. 35, 37 (2011); Hoffman, *supra* note 40, at 816-17 & n.33.

51. See Bader & Cleveland, *supra* note 50, at 37; Hoffman, *supra* note 40, at 817 n.33.

52. See Bader & Cleveland, *supra* note 50, at 37 (describing trial by the ordeal of hot iron). The second primary method of ordeal was trial by water, in which the accused was thrown, bound, into a pool of water blessed by a priest. See, e.g., *United States v. Gecas*, 120 F.3d 1419, 1437 n.18 (11th Cir. 1997) (tracing the history of the trial by ordeal). An innocent man was accepted by the holy water and, therefore, sank. *Id.*

53. See Bader & Cleveland, *supra* note 50, at 37.

54. See *id.* at 38.

55. See Edward L. Rubin, *Trial by Battle. Trial by Argument.*, 56 ARK. L. REV. 261, 265-66 (2003). Trial by “[b]attle could be used in either civil or criminal cases.” *Id.* at 262. “In England, the duel was typically fought on foot . . . and with a baton, a sort of club, not with a sword and lance . . .” *Id.* at 263; see also 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 337 (Univ. of Chi. Press 1979) (1768) (noting the use of trial by battle).

56. See Rubin, *supra* note 55, at 268-69.

57. See Robert Wilson, Student Article, *Free Speech v. Trial by Jury: The Role of the Jury in the Application of the Pickering Test*, 18 GEO. MASON U. C.R. L.J. 389, 393 (2008) (describing compurgation); see also *Apodaca v. Oregon*, 406 U.S. 404, 408 n.2 (1972) (suggesting that the modern unanimity requirement arose from compurgation procedure). Others have observed that compurgation is a pro-defendant method of dispute resolution, because one assumes that most people would be able to gather a group of supporters. See Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179, 1191 (2007) (explaining that the pro-defendant nature of compurgation led in part to the Statute of Frauds).

58. See Jack Pope, *The Jury*, 39 TEX. L. REV. 426, 431 (1961). See generally *Developments in the Law: The Civil Jury*, 110 HARV. L. REV. 1408, 1414-15 (1997) (describing the practice of compurgation).

using various deeply flawed methods of adjudication. This was soil ripe for reform.

That work began with the reign of Henry II, who ascended to the English throne in 1154.⁵⁹ Among Henry's priorities was the reform of the court system, which he realized was crippling the governance of the realm.⁶⁰ He therefore established royal courts to which litigants could resort if they desired more expeditious adjudication, facilitated by a professional judge, than the local feudal courts could provide.⁶¹ But in addition, Henry's reforms included the precursor of the jury, a group of "neighborhood witnesses" called to testify based on their knowledge of the facts at issue in the case.⁶² That is, Henry II's jury was a sensible refinement of the compurgation model, calling upon the community to resolve the facts of the case rather than simply swear to one man's account or another.⁶³

Of course, parties wanted to explain to the jurors their positions, and pleadings, therefore, became increasingly part of the judicial process.⁶⁴ And, just as reasonably, juries trying to decide cases based on documents or contracts wanted to see those papers in order to decide.⁶⁵ As others have observed, therefore, the decision-making modern jury was built "precept upon precept," layer upon layer.⁶⁶ We all know the promise of the Magna Carta in 1254 that no man would be punished but by the "judgment of his peers," and that source certainly has long been believed to be the source of our guarantee of jury trial.⁶⁷ But viewed properly, the principle acknowledged in the Magna Carta, that the King did not have absolute power of justice over his noblemen without the consent of other nobles, was only one step on a more incremental path that had already been set on its way by Henry II.

Even as the jury system developed into a decision-making body presented with evidence and pleadings, medieval and early modern juries were still very different than how we think of juries today.⁶⁸ Significantly, the early jury did not have the right to reach an independent verdict.⁶⁹ To the contrary, juries even in early modern England could be punished for failing to reach the verdict desired by the government (that is, by the King) in criminal cases, or for reaching the "wrong" verdict in civil cases.⁷⁰ For

59. See Pope, *supra* note 58, at 431 n.29.

60. See *id.* at 431.

61. See *id.* at 432.

62. *Id.* at 439.

63. See *id.* at 432.

64. See *id.* at 439.

65. See *id.* at 439-41.

66. *Id.* at 439.

67. FORSYTH, *supra* note 47, at 91.

68. See generally Pope, *supra* note 58, at 434-45 (describing the medieval jury system).

69. See *id.*

70. See *id.* at 435-43.

example, a jury could be “attainted” by an aggrieved party in a civil case.⁷¹ In such circumstances, a second jury would be empaneled to judge the cause.⁷² If they disagreed with the first panel, members of the first jury were subject to imprisonment, forfeiture of lands and chattels, and denial of credit to borrow money.⁷³ In extreme cases, even death was an available penalty.⁷⁴

The independent jury that we think of today actually developed much later and at great personal risk to the jurors involved.⁷⁵ Although, of course, no development of this significance can possibly be the result of just one incident, the trial of the great Quaker leader William Penn in 1670, at just twenty-six-years-old, was probably the critical moment in the transformation from a jury subject to the whims of the government to the modern jury.⁷⁶ Penn had been indicted on the essentially political charge of disturbing the King’s peace by preaching nonconformist religious views at an outdoor meeting in London.⁷⁷ After hearing the case, four of the twelve jurors refused to convict Penn of the most serious charge, instead agreeing only that Penn was indeed speaking in public.⁷⁸ The court sent the jury back to deliberate again with stern admonishments to reach the proper decision convicting Penn.⁷⁹ After the second time they came back without the government’s desired verdict, the court decided to impose physical pressure on the jurors in order to persuade them to vote in favor of the Crown’s prosecution: “The court swore several persons, to keep the Jury all night without meat, drink, fire, or any other accommodation; they had not so much as a chamber-pot, though desired.”⁸⁰

Nonetheless, the jury returned again without the desired verdict.⁸¹ Unable to coerce the desired guilty verdict, the court accepted the jury’s judgment, but the jurors were fined and jailed for contempt of court, as the court had threatened.⁸² The jurors sued for habeas corpus.⁸³ In a

71. *See id.* at 441-43.

72. *Id.* at 437.

73. James B. Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 357, 374 (1892).

74. *See id.* at 373. As might be expected, juries empaneled to judge the work of a prior jury were extremely reluctant to attain their predecessors because of the extreme penalties involved. *See id.*

75. *See id.* at 384-86.

76. *See* FORSYTH, *supra* note 47, at 337-44. It is significant that the U.S. Courts provide on their educational website a play depicting the trial of William Penn as a teaching tool. *See Mock Trial of William Penn*, U.S. COURTS, <http://www.uscourts.gov/EducationalResources/ClassroomActivities/MockTrialOfWilliamPenn.aspx> (last visited Jan. 5, 2012).

77. *See* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 21-22 (1986) (giving a brief overview of the Penn trial).

78. *See* 6 COBBETT’S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME 962 (1810).

79. *See id.* at 962-63.

80. *Id.* at 964.

81. *See id.*

82. *See id.* at 967-68.

momentous opinion by Lord Chief Justice Vaughan, the principle that juries were to be left alone to come to their decisions was finally established beyond doubt.⁸⁴ As Vaughan observed in his written opinion, if a jury could be punished, then its verdict was of no value:

[I]f the Judge having heard the evidence . . . shall tell the jury . . . the law is for the plaintiff, or for the defendant, and you are under the pain of fine and imprisonment to find accordingly, . . . every man sees that the jury is but a troublesome delay . . . and therefore the tryals by them may be better abolish'd than continued; which were a strange new-found conclusion, after a tryal so celebrated for many hundreds of years.⁸⁵

Over the next century, this new, independent jury became a cornerstone of the English legal system, so much so that by 1766 the jury was being called the “grand bulwark of [English] liberties” by Blackstone.⁸⁶ Of course, as colonists arrived in the new world of America, they brought their law with them as well. For example, the Massachusetts Body of Liberties, enacted in December of 1641, provided for both civil and criminal jury trials.⁸⁷ And the much later 1776 constitution of Virginia provided that “in 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.”⁸⁸

The jury in America became much more than just a way to adjudicate disputes, however. In 1735, the American publisher John Peter Zenger was charged with libeling the reviled Royal Governor of New York, William Cosby.⁸⁹ Defended by Alexander Hamilton, the American jury quickly acquitted Zenger of the charges, despite the fact that the judges picked to preside over the trial had been hand-picked by the governor himself.⁹⁰ As Gouverneur Morris, known to history as the Penman of the Constitution, observed of the Zenger trial, it “was the germ of American freedom—the

83. *See id.* at 969.

84. *See* *Bushell's Case*, (1669) 124 Eng. Rep. 1006, 1006-10. It is therefore no accident that when Penn himself drafted the first Pennsylvanian constitution, the 1682 Pennsylvania Frame of Government, he provided a right to public trial by jury, which was the right to final judgment. *See* SUSAN N. HERMAN, *THE RIGHT TO A SPEEDY AND PUBLIC TRIAL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 15 (2006); *see also* William Penn, *The Frame of Government of Pennsylvania: 1681-1682*, in 2 *THE PAPERS OF WILLIAM PENN* 135, 221-22, art. VIII (Richard S. Dunn & Mary Maples Dunn eds., U. Pa. Press 1982).

85. *See* *Bushell's Case*, at 1010.

86. 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 342 (Univ. of Chi. Press 1979) (1769).

87. Massachusetts Body of Liberties (1641), *reprinted in* *COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY* 70, 75 (Donald S. Lutz ed., 1998).

88. VA. CONST. of 1776, § 11.

89. *See* Simon Stern, Note, *Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After Bushell's Case*, 111 *YALE L.J.* 1815, 1852 (2002).

90. *See id.* at 1852-53.

morning star of that liberty which subsequently revolutionized America.”⁹¹ Henceforth, Americans grew to rely on the jury as a bulwark against British oppression, rejecting attempts to force American juries to find other Americans guilty of illegal British regulations.⁹² That resistance caused the British to attempt to do away with the jury for disputes between the British colonial government and the colonists.⁹³ For example, violators of the infamous Stamp Act were to be tried in admiralty courts in London, depriving them of a local jury.⁹⁴ Thus, it is no accident that one of the grievances we listed in our Declaration of Independence was that King George was guilty of “depriving us, in many Cases, of the Benefits of Trial by Jury.”⁹⁵ If it is too much to say that we fought the Revolutionary War for the jury, then we can at least say that the jury right occupied a prominent part of the minds of our Founders.

When the war was over and the time came to draft a permanent constitution after the failure of the Articles of Confederation, the thoughts of our Founders turned again to the jury system.⁹⁶ At that point, each state guaranteed both criminal and civil jury trials.⁹⁷ But the guarantees of the individual states were quite different.⁹⁸ Those differences led to considerable difficulty at the Constitutional Convention.⁹⁹ While establishing the right to jury trial in criminal cases was not controversial,¹⁰⁰ the delegates could not agree on the same right in civil matters.¹⁰¹ Under time pressure, when they finally reached the judicial articles of the draft constitution in the late summer of 1791, the Founders discovered that they

91. 2 LECTURES ON THE GROWTH AND DEVELOPMENT OF THE UNITED STATES 11 n† (Edwin Wiley & Irving E. Rines eds., 1916).

92. See Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 52-53 (2003).

93. See *id.*

94. *Id.* at 53. As Barkow goes on to recount, “John Adams and the Town of Braintree decried the Stamp Act for ‘mak[ing] an essential Change in the Constitution of Juries.’” *Id.*

95. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776). We had complained about the Crown’s attempt to limit the trial by jury in two previous declarations as well, in 1774’s Declarations and Resolves, which encouraged colonists to boycott English goods, and the Second Continental Congress’s Declaration of the Causes and Necessity of Taking up Arms. See Barkow, *supra* note 92, at 53-54.

96. See Barkow, *supra* note 92, at 53-59.

97. See Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 396-401 (1999); Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 295-300 (1996).

98. See THE FEDERALIST NO. 83, at 486-88 (Alexander Hamilton) (ABA Classics ed. 2009); Henderson, *supra* note 97, at 292-94.

99. See Harrington, *supra* note 97, at 398-405.

100. See *Neder v. United States*, 527 U.S. 1, 31 (1999) (Scalia, J., concurring in part and dissenting in part). As Justice Scalia has observed, the right to a jury trial in criminal cases was so well established that it is the only right that appears in both the Constitution as well as the Bill of Rights; it was included in the “12 state constitutions that predated the Constitutional Convention, and it has appeared in the constitution of every State to enter the Union thereafter.” *Id.*

101. Michael L. Wells & Edward J. Larson, *Original Intent and Article III*, 70 TUL. L. REV. 75, 109-12 (1995).

could not reach agreement on exactly which jury trials would be guaranteed by the Constitution and how the practices of the various states would be reconciled.¹⁰² So they decided to punt by leaving the Bill of Rights, and the attendant right to a jury trial in civil cases, for later resolution.¹⁰³ But that omission galvanized opposition to the ratification of the Constitution.¹⁰⁴ Even as George Mason, the drafter of Virginia's constitution, rode away from Philadelphia, he wrote down his basic objections to the new document.¹⁰⁵ Chief among them was the omission of a bill of rights, and especially the omission of a right to a jury trial in civil cases.¹⁰⁶ As other Founders returned from the Constitutional Conventions, they faced similar questions from citizens concerned that the right to jury trial had been nullified.¹⁰⁷

In response, Hamilton devoted one of his longest Federalist essays to the civil jury trial, arguing instead that the right to civil jury trial could be left to the state and federal legislatures to decide.¹⁰⁸ While conceding that the strongest argument in favor of a constitutional guarantee of a right to civil jury trial was "security against corruption," Hamilton argued that the lack of a constitutional guarantee, far from abolishing the right, gave the people's representatives the flexibility to craft a jury right that made sense.¹⁰⁹ In that essay, Hamilton anticipated some of the modern criticisms of the jury.¹¹⁰ Hamilton observed, in discussing the fact that courts of equity often did not provide for jury trials, that some matters are simply too complicated and demanding for men untrained in the law to decide:

Besides this, the circumstances that constitute cases proper for courts of equity are in many instances so nice and intricate, that they are incompatible with the genius of trials by jury. They require often such long, deliberate, and critical investigation as would be impracticable to men called from their occupations, and obliged to decide before they were permitted to return to them.¹¹¹

The resolution of the debate between Hamilton and Mason was telling. Despite Hamilton's efforts, the first Congress acted days after convening to

102. See HANS & VIDMAR, *supra* note 77, at 35-37.

103. See *id.*

104. See Henderson, *supra* note 97, at 294-99.

105. See Thomas B. McAfee, *The Federal System as Bill of Rights: Original Understandings, Modern Misreading*, 43 VILL. L. REV. 17, 105 n.328 (1998).

106. See, e.g., HERMAN, *supra* note 84, at 18; see also McAfee, *supra* note 105, at 17, 105 n.328 (listing other objections to the failure to include the right to a jury trial in the Bill of Rights).

107. See Wells & Larson, *supra* note 101, at 111-12 (describing objections to the Constitution directed towards delegates returning home after the convention).

108. See THE FEDERALIST NO. 83, *supra* note 98, at 487, 492.

109. See *id.* at 485-87.

110. See *id.* at 484-89.

111. See *id.* at 489.

enact the Judiciary Act of 1789, which established a right to a civil jury trial for all “issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction.”¹¹² At the same time the Judiciary Act was passed, Congress proposed the Sixth and Seventh Amendments, which were adopted just two years later, constitutionalizing once and for all the rights to both criminal and civil jury trial in the United States.¹¹³ Shortly thereafter, Judge Story, writing for the federal Circuit Court for the District of Massachusetts, held that the jury trial was available in all trials where it would have been under English law.¹¹⁴ This was the natural culmination of the development of the jury that began when those Athenian dicasts voted to condemn Socrates so long ago—an independent citizen jury, guaranteed by the Constitution of the United States, available to judge the facts in almost all cases, both civil and criminal.¹¹⁵ Once established, the jury stayed at the forefront of the American system of justice, through the highs and lows of our sometimes turbulent history, through war and strife, through dramatic changes like the end of Jim Crow and the addition of women to the ranks of citizens eligible to serve and to judge.¹¹⁶ Each new state to join the Union included a right to a jury trial in its constitution without exception.¹¹⁷ Until the recent past, it seemed as if the jury trial was, as the Founders had intended, an indelible part of our framework of government.

III.

In the modern era, however, disparaging the jury has become more fashionable than revering it. Both nonlawyers and legal commentators have questioned the value of trial by jury, especially in the civil context.¹¹⁸ The general public, moreover, has increasingly negative perceptions about jury awards in civil cases.¹¹⁹ As Professor Arthur Miller explains, many cases with allegedly excessive damage awards “have been highlighted by the

112. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77.

113. See, e.g., Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 54 (1923).

114. See *United States v. Wonson*, 28 F. Cas. 745, 750-51 (C.C.D. Mass. 1812) (No. 16,750).

115. See *supra* notes 40-46 and accompanying text. I note that there is an interesting debate about whether the Sixth Amendment right to a criminal jury trial includes, as a matter of original interpretation, a jury right for sentencing. See, e.g., Stephanos Bibas, *Two Cheers, Not Three, for Sixth Amendment Originalism*, 34 HARV. J.L. & PUB. POL’Y 45 (2011).

116. See Stephen Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 581 (1993).

117. See *id.* at 598.

118. See *id.* at 579.

119. See Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 987-88 (2003).

media and made to appear silly.”¹²⁰ However, in his view, in many instances “the facts of the cases either have been distorted or unduly simplified when described.”¹²¹

For their part, businesses perceive jury trials as being unpredictable, slow, and costly.¹²² The general public and businesses are not alone in criticizing the jury, however. Legal commentators have also offered plenty of criticisms of their own:

- Jury awards are arbitrary, and the jury is easily swayed by irrelevant factors.¹²³
- Juries tend to award excessive compensatory and punitive damages to sympathetic individuals at the expense of large, faceless corporations.¹²⁴
- Juries, not being trained in the law, are not equipped to understand and correctly apply complicated legal standards.¹²⁵
- Juries are not intelligent enough to handle cases involving scientific and technical complexities.¹²⁶

This last concern even seemed to animate the Supreme Court’s decision in *Daubert*, requiring trial judges to protect juries from unreliable expert testimony.¹²⁷

Right or wrong, the critics are getting their way. Civil jury trials have steadily declined to become rare and noteworthy events, even as the number of cases filed continues to increase.¹²⁸ In 1962, there were about 5,800 civil

120. *Id.* at 988.

121. *Id.*

122. See Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 U. ILL. L. REV. 1, 4 (2010) (noting that “[c]onventional wisdom suggests that businesses choose binding arbitration mainly because it is perceived to be different from litigation,” providing benefits such as “cost savings, shorter resolution times,” and “expert decision makers”).

123. See, e.g., Roselle L. Wissler et al., *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751, 755 (1999) (“The critics of the civil jury assert that awards generally are unreliable, capricious, and ‘out of control.’”).

124. See, e.g., *id.* (“More specifically, general damages are alleged to be both excessive and influenced by inappropriate considerations, such as sympathy for the victims and the defendant’s apparent ability to pay.”).

125. See, e.g., Judith L. Ritter, *Your Lips Are Moving . . . But the Words Aren’t Clear: Dissecting the Presumption That Jurors Understand Instructions*, 69 MO. L. REV. 163, 164 (2004).

126. See, e.g., Dan Drazan, Student Article, *The Case for Special Juries in Toxic Tort Litigation*, 72 JUDICATURE 292, 294 (1989) (arguing that “complex scientific and medical evidence . . . are beyond the jury’s reach” and proposing that complex toxic tort cases be decided by “special juries made up of scientific and medical experts”).

127. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (holding that it is the judge’s responsibility to perform a “gatekeeping role” to prevent the jury from considering unreliable expert testimony); see also *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004) (“[F]or every argument why juries are more accurate factfinders, there is another why they are less accurate.”).

128. See Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 7-12 (2006).

trials in the federal district courts.¹²⁹ In 2004, there were only about 4,000 civil trials, despite the fact that five times as many cases were filed.¹³⁰ And those 4,000 trials represented only 1.7% of the cases closed that year.¹³¹ The same story is playing out in the state courts.¹³² The available data shows that the number of jury trials fell by one-third between 1976 and 2002, with less than 1% of cases being disposed of by a jury in 2002.¹³³ As an appellate judge, this phenomenon affects the mix of cases I see in my work. Appeals from criminal verdicts are infrequent, and appeals from civil verdicts are rarer still.¹³⁴ A recent statistical report from the Fifth Circuit reported that less than 20% of cases filed were civil appeals once bankruptcy, administrative agency, and prisoner habeas appeals are removed from that category.¹³⁵

Where are the trials going? More and more cases are being resolved by summary judgment, or now, under the heightened pleading standards of *Iqbal* and *Twombly*, leading one professor to describe the motion to dismiss as “the new summary judgment motion.”¹³⁶ Alternatively, parties are giving up their rights to jury trials, either by not making a demand for a jury, or by *ex ante* decisions, such as entering into binding agreements that waive the right to jury trial or promising to resolve any disputes through Alternative Dispute Resolution (ADR).¹³⁷ A study of thousands of major corporate contracts filed with the Securities and Exchange Commission (SEC) concluded that parties to certain types of contracts were more likely to include a jury trial waiver provision.¹³⁸ Such clauses were used in over half of the credit commitments and security agreements in the study’s sample.¹³⁹ Other contracting parties are also fleeing the court system altogether.¹⁴⁰ “Provisions for binding arbitration of disputes are now employed in virtually all kinds of contracts, making arbitration a wide-ranging surrogate for civil litigation.”¹⁴¹ In short, an ever increasing number of litigants are doing everything they can to avoid jury trial.

129. *Id.* at 7.

130. *Id.* at 7-8.

131. *Id.* at 8.

132. *Id.* at 9-11.

133. *See id.* at 9.

134. *See, e.g.*, STATISTICAL SNAPSHOT, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (2010), <http://www.ca5.uscourts.gov/clerk/StatisticalSnapshot.pdf>.

135. *Id.*

136. Suja A. Thomas, *Oddball Iqbal and Twombly and Employment Discrimination*, 2011 U. ILL. L. REV. 215, 225 (2011).

137. *See* Theodore Eisenberg & Geoffrey P. Miller, *Do Juries Add Value? Evidence From an Empirical Study of Jury Trial Waiver Clauses in Large Corporate Contracts*, 4 J. EMPIRICAL LEGAL STUD. 539, 540-41 (2007).

138. *See id.* at 552-53.

139. *Id.*

140. *See id.* at 541-42.

141. Stipanowich, *supra* note 122, at 1.

My view is that it is still possible to resolve matters quickly, efficiently, and fairly by trial, and lawyers who try to avoid trial are often doing their clients and civil society a disservice. I emphatically reject the idea that “ordinary folks” are not up to the task of judging complex cases, and the associated suggestion that complex disputes are better decided by individuals with elite educations and professional legal backgrounds. As an ordinary girl from Baytown who does have that type of complex training and background and who has supervised hundreds of jury trials, in my opinion, juries almost always get it right.

In fact, most judges—those most familiar with jury trials—share my confidence in the jury.¹⁴² For example, a 2005 survey of 145 trial judges in Georgia asked: “Based on your experiences *in your courtroom* within the last twenty-four months, in what percentage of tort cases did you believe that jury awards were disproportionately high compared to the evidence of damages being presented?”¹⁴³ The survey revealed 96.5% of the judges responded 0-10% of the time.¹⁴⁴ Closer to home, in a recent survey of federal and state trial judges in Texas, over 98% thought juries did “very well” or “moderately well” in reaching “fair and just” verdicts.¹⁴⁵ In my experience, “runaway juries” do not award outrageous sums or unwarranted and excessive punitive damages. Quite the opposite: juries have returned verdicts that correspond with both common sense and with the law, exactly as they were supposed to.

Empirical studies confirm the accuracy of my own anecdotal evidence.¹⁴⁶ Contrary to popular belief, the data does not indicate bias against “big business” defendants with deep pockets, even in the face of highly sympathetic plaintiffs.¹⁴⁷ A recent study of one year of trials from around the country concluded that “[j]uries and judges award punitive damages at about the same rate, and their punitive awards bear about the same relation to their compensatory awards.”¹⁴⁸

Moreover, the alternatives that have taken the place of the jury trial have not improved the quality or speed of the disposition of cases in this country. Take, for example, the thousands of would-be jury trials that have disappeared into the vortex that is ADR.¹⁴⁹ To be sure, ADR can be more

142. See Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 FLA. ST. U. L. REV. 469, 481 (2005) (“Surveys of judges also suggest that the judiciary generally holds a positive view of the jury.”).

143. Thomas A. Eaton, *Of Frivolous Litigation and Runaway Juries: A View from the Bench*, 41 GA. L. REV. 431, 434 (2007) (emphasis added).

144. *Id.* at 435.

145. John B. Attanasio, *Foreword: Juries Rule*, 54 SMU L. REV. 1681, 1684 n.8 (2001).

146. See generally Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 745-46, 770 (2002) (citing studies that contrary to popular belief, juries rarely award large punitive damages).

147. See *id.* at 750.

148. *Id.* at 779.

149. The trend towards ADR has been especially pronounced with respect to commercial litigation,

efficient and achieve better results in some circumstances than the civil justice system, especially when compared to a civil justice system where judges are not focused on providing efficient justice.¹⁵⁰ These advantages are based roughly on the following ideas: the fact that there is limited fact discovery in arbitration, that resolution of the case is likely to be less expensive and faster, and that arbitration allows litigants to avoid the unpredictable results of jury trials.¹⁵¹ Despite these apparent advantages, however, ADR is not the panacea that its proponents have made it out to be.

First, ADR may not in fact be cheaper and faster than litigation. For one thing, civil courts have responded to the jurisdictional competition by becoming faster and more efficient.¹⁵² For example, when I served as a trial judge, my practice was to give anyone a trial in forty-five days for the mere cost of a filing fee. Even an arbitration panel would be hard-pressed to match that speed. Moreover, although discovery is indeed more limited in the arbitration context, the amount of discovery in arbitration has been increasing, reducing the cost and time advantages that arbitration once enjoyed.¹⁵³ Indeed, “[a] recent study of the Corporate Counsel International Arbitration Group (CCIAG) found that 100% of the corporate counsel participants believe that international arbitration ‘takes too long’ . . . and ‘costs too much.’”¹⁵⁴ The narrowing of the gap between litigation and arbitration has given rise to the term “litarbigation,” to mean either arbitration-like litigation or litigation-like arbitration.¹⁵⁵ These increased

depriving the legal world of precedent in this important area of the law. See Eisenberg & Miller, *supra* note 137, at 552-53. In fact, if you buy a cell phone, an electronics product, or even download software, you are usually waiving your right to a jury trial. *Id.* One day, I tried to see if I could use Adobe Acrobat without waiving my jury trial right and suffice to say, I was not successful.

150. See generally Robert M. Bloom, *Jury Trials in Japan*, 28 LOY. L.A. INT'L & COMP. L. REV. 35, 42-46 (2006) (discussing various civil-law countries and how judges have sole authority over most cases).

151. See Stipanowich, *supra* note 122, at 4.

152. See Henry S. Noyes, *If You (Re)build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y 579, 584 (finding the average time to resolve an arbitration—the time from the date of filing the demand to the date of the award—is 16.5 months).

153. See Zela Claiborne, *Six Steps to Fair and Efficient Arbitration*, THE RECORDER (Sept. 21, 2010), http://www.jamsadr.com/files/Uploads/Documents/Articles/Claiborne_Mediation-Recorder_9-21-10.pdf.

154. See Lucy Reed, *More on Corporate Criticism of International Arbitration*, KLUWER ARBITRATION BLOG (July 16, 2010), <http://kluwarbitrationblog.com/blog/2010/07/16/more-on-corporate-criticism-of-international-arbitration/>; see also Daniel Schimmel & Melissa E. Byroade, *Does 28 U.S.C. § 1782 Allow U.S. Courts to Order Discovery for Use in Private International Arbitration?*, 792 PRACTISING L. INST. 187, 189, 207 (2009) (explaining that “increasing costs and time involved in disclosing information and documents in arbitration proceedings” have caused corporations to “no longer view international arbitration as their preferred mechanism to resolve international disputes”); Jane Spencer, *Companies Ask People to Waive Right to Jury Trial*, WALL ST. J., Aug. 17, 2004, at D1 (explaining that employers have reacted against the increasing costs of arbitration by including jury-waiver clauses in employee contracts).

155. Richard Chernick & Robert B. Davidson, *The Search for Cost Effective and Efficient International Commercial Arbitration: There is a Solution*, in THE INTERNATIONAL COMPARATIVE

costs have become so well known that even the arbitrators themselves have begun advertising services that are more efficient than their now litigation-like traditional arbitrations.¹⁵⁶

Moreover, while there may be some truth to the idea that juries can return unpredictable damage awards, arbitrations are more likely to end in split-the-difference results.¹⁵⁷ Whether motivated by even-handedness or by a desire to be rehired, such Solomon-like decisions leave both sides unsatisfied, even when one side's legal case is stronger. Moreover, when things go wrong, there is no mechanism to correct the decision.¹⁵⁸ The civil justice system is based in part on the premise that even the most competent decision maker can err, and therefore cases are reviewed by multiple levels of judges.¹⁵⁹ That opportunity for review often does not exist when litigants choose arbitration.¹⁶⁰ In short, then, a sober weighing of the costs and benefits of arbitration should not necessarily lead to the conclusion that it is preferable to litigating in a modern, well-run court.

IV.

Now, I bet you are asking yourself, why should I care about whether people trust and believe in juries?¹⁶¹ Other countries survive perfectly well without the jury system. Moreover, if the death of the trial leads to the

LEGAL GUIDE TO: INTERNATIONAL ARBITRATION 2011, at 8, 8, available at <http://www.iclg.co.uk/khadmin/Publications/pdf/4660.pdf> ("Commercial arbitration is often now referred to as the 'new litigation' or by such portmanteau terms as 'Litarbigation.'"). For a discussion of how even the filing costs of an arbitration can outstrip the minimal costs to file a suit in court, see Noyes, *supra* note 152, at 586-87.

156. See, e.g., 10 (No. 2) JAMS DISPUTE RESOLUTION ALERT (Jan. 2011) at back cover, available at <http://www.jamsadr.com/files/uploads/documents/dra/dra-2011-01.pdf>. A good example is a recent advertisement posted by JAMS, which reads: "Litarbigation: If you're finding their costs hard to tell apart, you'll welcome our new procedural options." *Id.* The advertisement promises "new procedural options that can help you tailor a budget that is commensurate with the dispute." *Id.*

157. See, e.g., David E. Bloom, *Empirical Models of Arbitrator Behavior Under Conventional Arbitration*, 68 REV. ECON. & STAT. 578, 585 (1986) (finding that conventional arbitrators split the difference between the parties' final offers); *New Survey Shows that In-House Lawyers Believe Arbitrators Still "Split the Baby,"* 29 ALTERNATIVES TO HIGH COST LITIG. 76, 76 (Mar. 2011) (observing that corporate counsel believe that arbitrators evenly divide awards, regardless of the case's merits, rather than ruling strongly in favor of one party); David S. Steuer, *A Litigator's Perspective on the Drafting of Commercial Contracts*, 1780 PLI/CORP 459, 467 (2010) (noting that "[c]ommon wisdom suggests that arbitrators tend to 'split the difference' in deciding disputes"). But see Stephanie E. Keer & Richard W. Naimark, *Arbitrators Do Not "Split the Baby": Empirical Evidence from International Business Arbitrations*, 18 J. INT'L ARB. 573, 578 (2001).

158. See generally Maureen A. Weston, *The Other Avenues of Hall Street and Prospects for Judicial Review of Arbitral Awards*, 14 LEWIS & CLARK L. REV. 929, 949 (2010) ("The very essence of arbitration is the expectation of finality.").

159. See *The U.S. Courts of Appeals and the Federal Judiciary*, FED. JUDICIAL CENTER, http://www.fjc.gov/history/home.nsf/page/courts_of_appeals.html (last visited Jan. 8, 2012).

160. See Weston, *supra* note 158, at 931-34.

161. See, e.g., Jennifer Walker Elrod, *W(h)ither the Jury? The Diminishing Role of the Jury Trial in Our Legal System*, 68 WASH. & LEE L. REV. 3, 19 (2011).

efficient disposition of disputes between private parties, what difference does it make whether that is accomplished through summary disposition or some other private adjudication rather than through the combat of trial?¹⁶²

Let me first appeal to your self-interest. If you dream of representing a client in court before a jury, that dream may be vanishing along with the jury trial. Your generation's experience in the practice of law will be shaped by a reality in which civil jury trials are becoming the rare exception rather than the rule. Unfortunately, the lack of jury trials has already killed off many of the "interesting lawyer jobs" that have not already been lost due to the recession. Gone are most opportunities to be a modern-day Clarence Darrow, Mark Lanier, or even—lowering the bar quite a bit—a Lionel Hutz.¹⁶³ Those jobs have largely been replaced by less interesting duties such as managing discovery and preparing for settlement. When I was a law student, I interviewed at a large, Texas-based law firm. I said that I wanted to be a "litigator." The corner-office partner responded, "Litigation is what lawyers do on the east coast to keep out of court. What you want to be is a 'Texas Trial Lawyer.'" Unfortunately, today I can assure you that Texas law firms are filled with litigators.¹⁶⁴

In addition, lack of experience may make you unwilling to try a case even when trial would be good for your client. Let me explain: if you get to the point where you are a partner, you are expected to know how to try a case. If you have never tried a case, or perhaps only tried one, however, you probably would be ill-prepared for trial, and you certainly would not want anyone to find out that you have no idea how to pick a jury. So, you might be tempted to settle when you should not, or you might recognize that trial is necessary and then make a mess of it. On that point, I have witnessed dismal performances by law firm partners who lack the skills necessary to persuasively communicate to a jury or to navigate a trial. In one employment law case that I heard as a trial judge, an attorney at a major civil law firm had great difficulty getting any of her exhibits into evidence on the first day of trial. She could not overcome the most basic hearsay

162. See Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 196 (2003) (describing the argument that the jury trial is vanishing).

163. Lionel Hutz is the fictional television lawyer from *The Simpsons* (Fox animated TV series, 1989-Present). For other fictional lawyers, see William A. Hilyerd, *Hi Superman, I'm a Lawyer: A Guide to Attorneys (and other legal professionals) Portrayed in American Comic Books: 1910-2007*, 15 WIDENER L. REV. 159 (2009).

164. I am not the first to lament the distinction between trial lawyers and litigators. Indeed, many other commentators have also noticed the trend away from courtroom litigation. See, e.g., Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399 (2011) (explaining that lawyers used to learn how to be "trial lawyers" and not litigators by going to court and observing senior lawyers); R. Johan Conrod, Jr., *The Young Lawyer's Dilemma, Part 2: Gaining Perspective*, 57 FED. LAW. 4, 4 (2010) ("Last year in this space I wrote about the vanishing civil trial and what it might mean for today's young litigators (few of whom have enough experience to be called trial lawyers)." (emphasis omitted)).

objection for what should have been straightforwardly admissible business records. The next day she came in prepared and promptly got all of her exhibits admitted. She apologized to me for the previous day's delay saying, "I am sorry, Your Honor. I have never actually had to get an exhibit admitted. I always get summary judgment." And she was a partner. Once she became familiar with the rules in my courtroom, it became obvious she was an effective lawyer, and she went on to win her trial.

The diminished opportunities to go to court have rendered trial litigation a lost art, as firm lawyers often see their first jury in their fourth or fifth years, if at all.¹⁶⁵ By that point, the opportunity to garner valuable experience has passed, and you are stuck as a senior lawyer with no substantive courtroom experience. With ever increasing frequency, I now counsel young lawyers who are eager to experience the thrill of a jury trial to go to the District Attorney's office, the U.S. Attorney's office, or the Federal Public Defender's office, as they are not going to get trial experience otherwise. For those of you in private practice, one solution may be to take on pro-bono assignments where there is a prospect of trial.

Second, we should protect the jury system because to protect it is to protect the development of law. We have a common law system that is enriched by progression and development of law through cases later resolved on appeal.¹⁶⁶ Such development only happens if cases are tried in public in courts of law. Arbitrations with no public record do not develop the law in any way. The decisions of the arbitrators do not become precedent. More troubling, the fact that arbitrators do not necessarily provide written explanations of their decisions means, especially with respect to cases dealing with the application of important public statutes, we cannot know that our laws have been fairly applied.¹⁶⁷ Without cases, our common law will stagnate and the case law method of legal education will end. Just the other day, I was sitting in Professor Arnold H. Loewy's class and had the privilege of reliving my law school days with the Socratic method, which of course requires, to be effective, the rich factual record

165. See Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 570-85 (1983). Derek Bok, the former President of Harvard, presciently recognized twenty years ago that the legal landscape was changing, and therefore argued that law schools should train their students for "the gentler arts of reconciliation and accommodation." *Id.* at 582-83. His vision is today reflected in the growth of ADR programs in law schools throughout the country, including here at Texas Tech itself. See, e.g., *Advanced ADR Clinic*, TEX. TECH UNIV. SCH. OF LAW, <http://www.law.ttu.edu/acp/programs/clinical/adr/> (last visited Jan. 8, 2012).

166. See Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 13 n.47 (2004) (quoting Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 357 (1978)).

167. See Diane P. Wood, *The Brave New World of Arbitration*, 31 CAP. U. L. REV. 383, 397 (2003). Moreover, exposing cases involving parties with disparate power to arbitration might have the effect of limiting the development of the facts. See *id.* As another circuit judge has observed, the lack of discovery ordered by a court also might mean that the weaker party is unable to develop facts that the opposing party does not want exposed to scrutiny. See *id.*

and explicative legal reasoning found only in cases.¹⁶⁸ Without cases, lawyers and judges will be unable to continue in their work of perfecting the law.

Third, juries are essential to our freedom. If we fail to purposefully guard and defend the jury, we risk losing one of America's greatest traditions and protectors of our liberty—the indispensable barrier between the liberties of the people and the prerogatives of the government. We should always remember that inconveniences suffered by the jury trial pale in comparison to the lamentable loss of freedom and justice that would accompany the elimination of this institution. As Blackstone stated over two hundred years ago:

[H]owever *convenient* these [new and arbitrary methods of trial] may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.¹⁶⁹

Likewise, over 150 years ago, Alexis de Tocqueville recognized that “[t]he institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority [and] invests the people, or that class of citizens, with the direction of society.”¹⁷⁰ By losing the jury, we may lose something far greater than simply a mechanism of resolving disputes between parties. A new generation of lawyers, judges, and citizen jurors must be educated and empowered to preserve the jury system as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people.

V.

What, then, should we do? How can we make sure that the jury trial remains the palladium of liberty in the United States? All of us—lawyers, courts, legislators, and litigants—can help.¹⁷¹ To start with the judiciary,

168. Professor Loewy is the George R. Killam Jr. Chair of Criminal Law at the Texas Tech University School of Law.

169. 4 BLACKSTONE, *supra* note 86, at 344.

170. *Powers v. Ohio*, 499 U.S. 400, 407 (1990) (quoting 1 DEMOCRACY IN AMERICA 334 (Schocken ed., 1961)) (second alteration in original). Tocqueville also observed, “I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation; and I look upon it as one of the most efficacious means for the education of the people which society can employ.” *Id.*

171. Elrod, *supra* note 161, at 21.

trial judges should remember that taking a case to trial is not a failure of the system; rather, trial is the way we have chosen to resolve matters freely and openly in our democratic society.¹⁷² As the replacement civil society has chosen for ordeal, combat, and compurgation, trial by jury is actually the triumph of our legal structure and of our laws. To be sure, I understand the trial judge's impulse to view the individual cases on his or her docket as simply pieces of work to move along as quickly as possible. But we, as judges, should resist that temptation. As my colleague, Judge Patrick Higginbotham has said, if we are not to have trials, then "why do we call them trial courts?"¹⁷³ It is incumbent on judges to avoid banishing parties to mandatory mediation, to provide clear scheduling orders for parties, and to expeditiously decide issues of law that allow cases to proceed so that those people who want trials can have them.¹⁷⁴

Trial judges should also seek to make jury trials more efficient in terms of both cost and time. Judges can keep pretrial costs down by taking seriously their responsibility to monitor each case. Not every case requires a special master to copy every hard drive, not every wide-ranging discovery request should be granted, and not every deposition is necessary. Judges must be diligent to set trials quickly and prevent parties from saddling cases with endless delay.¹⁷⁵ They must also ensure that once a trial begins, it ends in a timely manner. Most can be resolved within forty-five days, and all but the most complex case can be tried in 180 days. Appellate courts, too, have

172. See Royal Furgeson, *Civil Jury Trials, R.I.P.? Can it Actually Happen in America?*, 40 ST. MARY'S L.J. 795, 814 (2009) (recounting a federal judge's memory of a trial being described as a failure of the system).

173. Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1405 (2002).

174. See, e.g., Hon. Cecelia G. Morris & Mary K. Guccion, *The Loss Mitigation Program Procedures for the United States Bankruptcy Court for the Southern District of New York*, 19 AM. BANKR. INST. L. REV. 1, 46 (2011) (observing that federal courts manage their dockets by employing various administrative devices such as scheduling orders and mandatory mediation programs); Lewis F. Powell, Jr., *Jury Trial of Crimes*, 23 WASH. & LEE L. REV. 1, 10-11 (1966) (noting that although "[a]ppropriate steps are indeed long overdue to assure genuinely fair selection of jurors and impartial administration of justice, . . . in accomplishing needed administrative reforms care must be exercised to preserve the jury system itself"). It is unclear to me why judges need the legislature to mandate what they had the power to do already and what I did routinely while a Texas judge. Moreover, appellate courts must take special care not to supplant the jury's fact-finding province. See, e.g., *United States v. Moreland*, No. 09-60566, 2011 WL 6187430, at *15 (5th Cir. 2011) (Jolly, J., dissenting) ("The record does not reflect whether the jury box had more than twelve chairs, but we do know—and we know for sure—that two more jurors are trying to crowd into the box. I respectfully dissent from the majority opinion, which is little more than a presentation of the defendant's case and the substitution of the views of judges for the views of jurors."); *Garriott v. NCsoft Corp.*, 661 F.3d 243, 248 (5th Cir. 2011) ("NCsoft now asks for a mulligan. Courts look skeptically at such claims for a do-over, especially in the context of a jury verdict. Indeed, to hold otherwise would transform the trial court into a trial run." (internal citations omitted)).

175. See Furgeson, *supra* note 172, at 816. As one judge has written, "the best docket control mechanism ever invented is a reasonable, realistic, and firm trial date. It concentrates the mind of each litigant and each attorney." *Id.*

a responsibility to get their work done and to issue clear opinions so that parties have a resolution within three to six months of oral argument.¹⁷⁶

Next, all lawyers have a responsibility to ensure that jurors are enthusiastic about their service. We cannot have a jury system without willing jurors. Unfortunately, jurors often begin their service biased against the experience. Lawyers are often the first to tell people “how to get out of jury duty.” Indeed, lawyers cavalierly talk about biased judges and stupid juries, contributing to the distrust that ordinary citizens have for their legal system. In addition, I have overheard judicial law clerks, who work in the courts every day, saying that they “don’t want to bother people” by calling them for jury duty. I am likewise dismayed at the public’s lack of response to the jury summons. The Harris County district clerk recently reported that “only 20 percent of those summoned for jury service actually respond or report to serve.”¹⁷⁷

This attitude can change. Indeed, I know that many of the jurors who came before me when I was a trial judge ended their service proud that their legal system was working so well. Helping jurors relish their opportunity to serve when they are called will help ensure that we have a broad spectrum of people ready to truly provide our citizens with a jury of their peers.

In addition, the jury should adapt to the increasing complexity and difficulty of litigation. Both lawyers and judges can collaborate to empower the jury by giving them the tools to reach rational decisions in even the most challenging cases. There are many ways to potentially empower a jury. A few examples—and I make no claims that these suggestions comprise the entire world of possible juror empowerment tools—are instructive.

Juror Note-Taking. Jurors, in recent years, have increasingly been allowed to take notes, allowing them to write down and to later remember important moments of trial. This is actually against historical precedent—jurors previously were not permitted to take notes.¹⁷⁸ Notes assist jurors to organize, understand, and recall large amounts of information during lengthy and complex trials.¹⁷⁹ In addition to allowing jurors to take notes, the ABA recommends juror notebooks, “which may include such items as the court’s preliminary instructions, selected exhibits which have been ruled

176. See generally Tex. H.R. Res. 274, 112th Leg., R.S. (2011) (amending § 22.004 of the Texas Government Code). The Texas legislature has passed a statute mandating expedited treatment of certain cases with claims totaling less than \$100,000 to “address the need for lowering discovery costs in these actions.” *Id.* Some observers believe that the legislation will lead to more trials where it is applicable. See Angela Morris, *Attention-Getting Loser-Pays Not the Star of H.B. 274*, TEX. LAW., June 6, 2011. Rules to implement the legislature’s mandate are currently in the process of being promulgated. *Id.*

177. Loren Jackson, *Reporting for Jury Service Matters*, HOUS. CHRON. (Sept. 14, 2009, 5:30 AM), <http://www.chron.com/disp/story.mpl/editorial/outlook/6617164.html>.

178. See *Price v. State*, 887 S.W.2d 949, 951 (Tex. Crim. App. 1994).

179. See *Developments in the Law*, *supra* note 58, at 1509-10.

admissible, stipulations of the parties and other relevant materials not subject to genuine dispute.”¹⁸⁰ As a trial judge, I always allowed jurors to take notes, and I encourage lawyers and judges to make sure that this happens in their courtrooms.

Juror Questions. Traditionally, jurors would never have been permitted to ask questions of a witness or the defendant, even during a civil trial.¹⁸¹ Questions were for the lawyers, and perhaps the judge, to ask. More recently, trial judges have permitted jurors to ask questions during trial of witnesses. Some have done this by simply allowing the juror to intervene orally. But more commonly, jurors have been asked to submit written questions to the judge, subject to objection by both parties.¹⁸² All but one federal circuit of appeals allows the practice, and I think it is an excellent tool for a trial judge to use, albeit with caution.¹⁸³ For example, our circuit has previously allowed it when only one question was at issue.¹⁸⁴ As we observed, “the proper handling of juror questions is a matter within the discretion of the trial judge.”¹⁸⁵ One of my former colleagues, Judge Martha Hill Jamison, routinely allowed jurors to ask questions. When I had the occasion to sit for her, I used the method in her court. Nothing extraordinary occurred; the jurors simply asked for certain facts to be clarified. To be sure, this is just one example. Widespread juror questioning might have the effect of changing the nature of the adversarial process and needs further careful study.

Juror Pay and Benefits. During a recession, the facts are that many people have trouble serving on a jury because of financial reasons. We should think about efforts to ameliorate these concerns. Jurors are currently paid flat rates per day both in the federal system and in many state

180. American Bar Association, *Principles for Juries and Jury Trials*, Principle 13B, available at <http://www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.authcheckdam.pdf> (last visited Jan. 7, 2012).

181. See Larry Heuer & Steven Penrod, *Some Suggestions for the Critical Appraisal of a More-Active Jury*, 85 NW. U. L. REV. 226, 229 (1990) (citing a nationwide survey of more than 500 judges indicating that 77% of them never allow jurors to ask witnesses questions).

182. See American Bar Association, *supra* note 180, at Principle 13C.

183. See Sarah E. West, Comment, “*The Blindfold on Justice is Not a Gag*”: *The Case for Allowing Controlled Questioning of Witnesses by Jurors*, 38 TULSA L. REV. 529, 538-39 (2003). My own circuit has permitted juror questioning where the jury wanted to ask a single question, correctly observing that “[t]he proper handling of juror questions is a matter within the discretion of the trial judge.” *United States v. Callahan*, 588 F.2d 1078, 1086 n.2 (5th Cir. 1979). All the circuits that have permitted juror questioning, however, have required a number of sensible prophylactic measures to reduce the potential for prejudice to any party. A series of sensible prophylactic measures are listed as follows: (a) the court should instruct the jurors about the function of the questioning procedures in clarifying factual issues; (b) the court should direct the jurors to remain neutral; (c) the court should instruct the jury that they should not take offense if the court does not ask a specific question; (d) the court should permit the counsel to request the witness after the juror question is done. *United States v. Rawlings*, 522 F.3d 403, 408 (D.C. Cir. 2008).

184. *Callahan*, 588 F.2d at 1086 n.2.

185. *Id.*

systems.¹⁸⁶ Some proposals envision paying jurors more for a long or complex trial. Jurors might also be compensated for childcare or transportation.¹⁸⁷ Moreover, to the extent local rules permit lawyers to ask for greater jury compensation, it might make sense for parties to agree to ask for such increases.

Jury Charge Reform. We need plain language charges. Many times, the verdict sheet is complicated and may lead to contradictory verdicts.¹⁸⁸ As Professor Friedman observed in his comprehensive *A History of American Law*, instructions have become “technical, legalistic, utterly opaque[, and] . . . almost useless as a way to communicate with juries.”¹⁸⁹ Judge Kane recently gave an example concerning this problem.¹⁹⁰ “[I]n a more than seven month long Robinson-Patman Act trial between Liggett & Myers and Brown and Williamson tobacco companies, the judge gave no instructions before or during trial. Without giving the jury copies of the instructions” he read “eighty-one pages of gobbledegook such as this: ‘The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of supply and demand between the product itself and the substitutes for it.’”¹⁹¹ The Supreme Court reversed the verdict in this case and said: “A reasonable jury is presumed to know and understand the law, the facts of the case, and the realities of the market.”¹⁹² Judge Kane noted that “[i]n the face of such mind numbing instructions delivered only once after more than seven months of technical economic testimony, that presumption evanesces into pure fantasy.”¹⁹³

Technology. In addition to the use of notes and questions and plain language charges, practitioners can use technology to better inform the jury about the case.¹⁹⁴ People in the modern world are used to technology and

186. See, e.g., TEX. GOV'T CODE § 61.001 (West 2011). Under the Texas rules, for example, each grand juror or petit juror is entitled to not less than \$6 a day for the first day or fraction of a day the person is in attendance in court, and not less than \$40 for each day the person is in attendance after the first day. *Id.* Texas does not require payment of wages during jury service. Texas does, however, prohibit employers from terminating employment because of jury service. TEX. CIV. PRAC. & REM. CODE ANN. § 122.001 (West 2011). The federal rules are much more extensive and provide for reimbursement for many expenses other than simply a flat fee, including travel allowances and toll charges. See 28 U.S.C. § 1871 (2009).

187. See, e.g., *Compensation: Juror Information*, TEX. COURTS ONLINE, <http://www.courts.state.tx.us/tjc/juryinfo/compensation.asp> (last visited Jan. 6, 2012) (stating that it is within the county's discretion to provide for additional forms of juror reimbursement such as transportation costs).

188. See JONAKAIT, *supra* note 16, at 271-73.

189. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 399 (2d ed. 1986).

190. See John L. Kane, *Giving Trials a Second Look*, 80 DENV. U. L. REV. 738, 739 (2003).

191. *Id.*

192. *Id.* at 739-40.

193. *Id.* at 740.

194. See Julie K. Plowman, Note, *Multimedia in the Courtroom: Valuable Tool or Smoke and Mirrors?*, 15 REV. LITIG. 415, 417 (1996).

expect its use to help them understand difficult concepts.¹⁹⁵ I encourage lawyers to use it and judges to permit it. When using technology, it is important to remember that it can be a double-edged sword. Take, for example, the use of deposition video at trial, which is permitted when a witness is otherwise unable to testify.¹⁹⁶ The wrong way is to just play them straight through, broken up by evidentiary objections. The jury will be bored, and you will be unable to make your point. The right way is to create a story—to put the videos in the right order to make your points.

Trial graphics. Trial graphics are also a double-edged sword. On one hand, they can help a jury understand the complexities of a modern case.¹⁹⁷ Charts, graphs, and other tools of that type are useful. But they can also be a distraction—too slick a presentation may take jurors away from the questions they really should be considering.¹⁹⁸ And what may be clever to you may miss the point entirely with the jury.

Civic Education. Education is also of utmost importance—especially for young people. Justice O'Connor is blazing a trail with iCivics, “a web-based education project designed to teach students civics and inspire them to be active participants in our democracy.”¹⁹⁹ ICivics launched its first online civics games, *Do I Have A Right?* and *Supreme Decision* in August 2009, and it recently released *Argument Wars*—an online simulation where players argue landmark Supreme Court cases.²⁰⁰ They also recently added *Immigration Nation*, which informs people about how to become citizens, and *Court Quest*, where people around the country need your help to navigate our court system.²⁰¹

If we are to preserve the jury, we must follow Justice O'Connor's example and educate the public about the importance of jury duty, and we must do so in entertaining and engaging ways. Moreover, we must strive to correct any public misconception that the courts are overworked and backlogged. To me, this is part of my duty as a judge and a lawyer—to ensure that my fellow citizens appreciate the remarkable privilege that we have been given by our founding fathers and to preserve it for future generations.

195. *See id.*

196. *See generally* Michael J. Henke & Craig D. Margolis, *The Taking and Use of Video Depositions: An Update*, 17 REV. LITIG. 1, 1 (1998).

197. *See* Samuel H. Solomon, *Tips on Trial Graphics*, 35 APR TRIAL 24, 24 (1999).

198. *See id.*

199. *What is iCivics?*, ICIVICS, <http://www.icivics.org/about> (last visited Jan. 6, 2012).

200. *Id.*

201. *Id.*

VI.

John Adams has said that trial by jury is “the heart and lungs of liberty.”²⁰² We have been talking about the lungs, but we are also losing the heart. Great trials have been an essential part of the American fabric, from the movies that inspired us to become advocates for those less fortunate, like Atticus Finch in *To Kill a Mockingbird*, to the movies that have made us laugh, like *My Cousin Vinny*, or the true-life events that captivate a nation, like *Inherit the Wind*.²⁰³ Not only do we lose this part of our culture, but we may no longer have the great closing arguments of real-life trials.²⁰⁴ John Adams himself understood the importance of our jury, as he beseeched his peers defending the soldiers in the Boston Massacre: “Facts are stubborn things, . . . and whatever may be our wishes, our inclinations, or the dictums of our passions, they cannot alter the state of facts and evidence.”²⁰⁵ Then, of course, there is our greatest trial lawyer, Clarence Darrow, defending himself against charges of jury tampering, closing his own defense with a stirring argument, causing the judge and jury to come to tears, and resulting in a verdict of not guilty.²⁰⁶ He closed with the following:

There are people who would destroy me. There are people who would lift up their hands to crush me down. I have enemies powerful and strong. . . . [But] I have friends throughout the length and breadth of this land, and these are the poor and the weak and the helpless, to whose cause I have given voice. If you should convict me, there will be people to applaud the act. But if in your judgment and your wisdom and your humanity, you believe me innocent, and return a verdict of not guilty in this case, I know that from thousands and tens of thousands and yea, perhaps of the weak and the poor and the helpless throughout the world, will come thanks to this jury for saving my liberty and my name.²⁰⁷

Finally, I want to leave you with a quote from Bobby DeLaughter, the prosecutor in the assassination case of the civil rights leader, Medgar Evers, in Mississippi.²⁰⁸ In 1994, after three trials and thirty-one years, Mr. Evers’s murderer was brought to justice.²⁰⁹ In his closing argument, DeLaughter paid homage to the jury and its central role in American justice:

202. Methvin, *supra* note 33, at 49 and accompanying text.

203. See *INHERIT THE WIND* (Stanley Kramer Productions 1960); *MY COUSIN VINNY* (20th Century Fox Film Corp. 1992); *TO KILL A MOCKINGBIRD* (Universal International Pictures 1962).

204. See MICHAEL S. LIEF ET AL., *LADIES AND GENTLEMEN OF THE JURY: GREATEST CLOSING ARGUMENTS IN MODERN LAW* 102 (1998).

205. DAVID MCCULLOUGH, *JOHN ADAMS* 52 (2001).

206. See LIEF ET AL., *supra* note 204, at 102.

207. *Id.*

208. *Id.* at 292-93.

209. *Id.* at 295.

“Justice in this case, in whatever case, is what the jury says it is. Justice in this case is what you twelve ladies and gentlemen say it is. So, in this case, in effect, you are Mississippi.”²¹⁰

210. *Id.* at 302.