

The Civil Jury in America: Scenes from an Unappreciated History

by

STEPHAN LANDSMAN*

The purpose of the jury trial in . . . civil cases, [is] to assure a fair and equitable resolution of factual issues¹

I. Introduction

With these words the United States Supreme Court in 1973 began to dismantle one of the structures integral to the Anglo-American civil justice process for more than 700 years—trial by a jury of twelve. Rather than considering the rich and varied history or multiple functions served by the jury, the Court focused on only a single aspect of the jury's work as adjudicator. This constrained analysis of the jury's operations and history has been employed all too frequently by both courts and jury critics alike in interpreting the Seventh Amendment's mandate that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved."² This restricted approach to juries is evident not only in functional analysis cases, like *Colgrove v. Battin*,³ but also in proceedings in which the courts have employed a simplistic historical test that turns on whether a challenged jury regulation was part of English common law practice in 1791.⁴ In both

* Professor of Law, Cleveland-Marshall College of Law. B.A. 1969, Kenyon College; J.D. 1972, Harvard University. This Article is dedicated to the memory of Robert Hanley (1924-1991), a lawyer who knew a thing or two about juries. It grew out of a piece entitled *The History and Objectives of the Civil Jury System* prepared for the Brookings Institution and the American Bar Association Litigation Section. The original work was presented at the Symposium on the Future of the Civil Jury System in the United States held in Charlottesville, Virginia, in June 1992. I wish to thank a number of colleagues and friends for their generous assistance in reviewing earlier drafts of this piece, including Stephen Presser, Stephen Subrin, and David Millon. I also wish to thank Brenda Johnson for her invaluable research assistance.

1. *Colgrove v. Battin*, 413 U.S. 149, 157 (1973).

2. U.S. CONST. amend. VII.

3. *See also* *Tull v. United States*, 481 U.S. 412, 425-27 (1987) (Seventh Amendment guarantees jury determination of liability, not civil penalties, in suit by the government under the Clean Water Act).

4. There is ample historical justification for focusing on English common law practice in

instances, this technique has removed the jury's historic flexibility and multifaceted nature from the analysis. Ultimately, such an approach depreciates the jury's value and paves the way for ill-considered change.⁵

The Court's objective in reducing the jury's complex history and functioning to a simple tale is not clear. What seems likely, at least in cases like *Colgrove*, is that the strategy has been used to marginalize the jury, to render it less important and, therefore, more amenable to reform. Such an approach is also tempting in the jury context because it simplifies the crafting of decisions by obviating the need to sort out the ambiguities of a history that has as many strands as there were original colonies and as many interpretations as there were members of the committee that drafted the Seventh Amendment. Yet, defining the jury's complexity and mutability out of existence prevents us from fully appreciating the institution's past service, present value, and future potential.

The jury has been anything but a simple and unchanging icon of courtroom procedure. Its most pronounced characteristic has been its adaptability. The earliest jury served as an inquisitorial mechanism devoted to gathering data of the sort recorded in William the Conqueror's Domesday Book.⁶ Somewhat later it assumed the trappings of an executive agency enforcing myriad policies in the king's name, as well as adjudicating a broad range of disputes.⁷ While the jury's association with state authority and rule continued through the centuries, by the time of the Stuarts' reign it had been transformed into a bulwark of liberty, a means for citizens to resist excessive demands by government.⁸

The American jury has also gone through a host of changes. In early colonial times it was the essential instrument of governance, provid-

1791 when interpreting the scope of the Seventh Amendment. See *infra* text accompanying note 122. This approach, however, has frequently led the courts both to ignore the dynamic nature of the right to jury trial and to become preoccupied with the demonstrable presence or absence of a challenged procedure at one specific moment in time. See Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 744-45 (1973) (discussing basis of static historical view). This tendency is illustrated in the Supreme Court's ruling in *Dimick v. Schiedt*, 293 U.S. 474, 487 (1935) (constitutional provision for trial by jury in effect adopted the rules of the common law as those rules existed in 1791). On the irrationality of this historical methodology, see Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 74-75.

5. Many scholars believe this is precisely what happened when the twelve-member jury was abandoned. They contend that the jury has become less representative and more unpredictable. See Richard Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 644, 698-99 (1975); Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 715-20 (1971).

6. See *infra* text accompanying notes 19-22.

7. See *infra* text accompanying notes 22-28.

8. See *infra* text accompanying notes 53-68.

ing one of the few experimental conflicts that led to the forum in which the color of independence and democratic formative period, the jury became an invigorated judiciary.

As the country matured, jury power steadily ebbed, anchored the law to a goal was desired by judges but tort law.¹² While the experience of a narrowing of the reach of period as a vital institution, especially in tort litigation—

Despite its reinvention, it was subjected to some criticism as opponents challenged its right to exist. These criticisms were supported by empirical studies that ultimately

The American civil jury is in a remarkable condition. It has a host of vital tasks, including protection of the consumer, protection of the constitutional rights. However, it has not succeeded in both of these and who appear to be

This Article will suggest together an outline of the recent times, few scholars have written about the jury. In particular, the jury, especially with respect to its role over the last 300 years, has been culled from the wealth of the early development

9. See *infra* text accompanying notes 19-22.

10. See *infra* text accompanying notes 22-28.

11. See *infra* text accompanying notes 53-68.

12. See *infra* Part III.

13. See *infra* Part IV.

14. See, e.g., STEPHEN L. LISH, *THE AMERICAN AND THE ORIGINAL MISUNDERSTANDING*, after PRESSER, *THE ORIGINAL MISUNDERSTANDING*.

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ing one of the few experiences common to virtually every citizen.⁹ The conflicts that led to the American Revolution transformed the jury into a forum in which the colonists could express their concerns about judicial independence and democratic government.¹⁰ Later, during the republic's formative period, the jury came to be viewed as necessary to counterbalance an invigorated judiciary.¹¹

As the country matured during the course of the nineteenth century, jury power steadily ebbed. In this time of judicial ascendancy, the jury anchored the law to a greater measure of sympathy for the injured than was desired by judges bent on doctrinal rigor, especially with respect to tort law.¹² While the expansion of judicial power in the 1800s resulted in a narrowing of the reach of jury decisions, the jury emerged from this period as a vital institution whose control over a range of issues—especially in tort litigation—had, if anything, been enhanced.

Despite its reinvigoration, in the early twentieth century the jury was subjected to some of the sharpest criticism in its long history.¹³ Its opponents challenged its composition, its procedures, and its very right to exist. These criticisms eventually inspired a series of pathbreaking empirical studies that ultimately enhanced the jury's reputation.

The American civil jury has arrived in the late twentieth century in remarkable condition. It is the entity to which society has assigned a host of vital tasks, including the assessment of business morality, the protection of the consuming public, and the definition of a number of constitutional rights. However, it has also become the target of reformers who have succeeded in both reducing its size and altering its rules of decision, and who appear to be seeking its removal from all "complex" cases.

This Article will survey the historical progress of the jury. Piecing together an outline of the jury's story has not been an easy task. In recent times, few scholars have devoted their attention to the history of the jury. In particular, there has been little primary source research, especially with respect to what American juries have actually done and said over the last 300 years. The bits and pieces strung together here have been culled from the works of writers preoccupied with questions such as the early development of the judiciary,¹⁴ the birth and growing pains of

9. *See infra* text accompanying notes 75-85.

10. *See infra* text accompanying notes 91-95.

11. *See infra* text accompanying notes 117-142.

12. *See infra* Part III.

13. *See infra* Part IV.

14. *See, e.g.,* STEPHEN B. PRESSER, *THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICAN AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE* (1991) [hereinafter PRESSER, *THE ORIGINAL MISUNDERSTANDING*].

American legal doctrine,¹⁵ the transformation of tort law in the nineteenth century,¹⁶ and modern social science's analysis of jury behavior.¹⁷ The present discussion of the jury only scratches the surface and, because of the meager sources available, must be considered extremely tentative in its conclusions.

II. The Rise of the Civil Jury

The right to trial by jury . . . [is] not of the very essence of a scheme of ordered liberty.¹⁸

A. The English Background

Justice Cardozo's assertion in *Palko* notwithstanding, the history of the rise of the jury in both England and America has been inextricably intertwined with the creation and defense of fundamental rights. This Part will explore the complex story of the jury's growth and, in particular, the jury's association with claims of liberty.

The jury's origins are a matter of substantial scholarly uncertainty. Orthodox opinion, strengthened by the writings of great legal scholars such as Maitland¹⁹ and Thayer,²⁰ has held that the jury was a Norman import, brought to England by William the Conqueror and his minions after their victory at Hastings in 1066. More recent scholarly work by Dawson²¹ and others has shifted attention to the Anglo-Saxon antecedents of Norman jury procedure. Modern scholars have argued persuasively that important precursors to the jury existed in England prior to the Conquest and likely played a significant part in inducing Englishmen to place their trust in the jury trial mechanisms proffered by the conquerors.

Accounts of the early history of the jury indicate that the Normans pressed a rudimentary form of jury procedure into service to help them secure an administrative hold on the lands they had seized by force of arms. These early "juries" were bodies of citizens summoned by royal

command to testify about available resources in each manor. The jury's testimony was the dominant feature of the establishment of a manor court, a more powerful land than existed elsewhere. The jury's exercise of royal authority, its role in the adjudicatory process, its role as a corporate body to provide justice, and its uniqueness as compared to the actions of the litigants. These characteristics were the basis for centuries.

The jury's primary function at the time of Henry II, who created the jury by statutory enactments, known as the Assize, was a genuine instrument of justice. King Henry first used the jury to try knights who claimed to have free tenement unjustly. The jury was known as the assize of the king. It provided the opportunity for the knowledgeable local citizens to bring the king's Novel disseisin was "fulfilling success. It established the course of the next century. The reasons for its popularity were generally related to the

The Grand Assize is the business of the King, with the life and condition of the land and yet avoid the death penalty, an unexpected enduring infamy in which comes from the

15. See, e.g., WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* (1975).

16. See, e.g., Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946).

17. See, e.g., HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1971).

18. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

19. 1 SIR FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 74 (Lawyer's Literary Club, 2d ed. 1959) (1895).

20. JAMES B. THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 50 (Boston, Little, Brown & Co. 1898).

21. JOHN P. DAWSON, *A HISTORY OF LAY JUDGES* 118-20 (1960).

22. *Id.* at 118-23; THAYER.

23. SIR PATRICK DEVLIN.

24. 1 POLLOCK & MAITLAND. Pollock & Maitland persuasively argued that the main reason for the decline of seigniorial jurisdiction but the main reason for the decline of the legal framework of English law was the Millon for bringing this point.

25. DAWSON, *supra* note 21.

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command to testify about property arrangements, local customs, and tax-
 able resources in each neighborhood of the realm. One product of this
 testimony was the Domesday Book recorded in 1085-86. Another was
 the establishment of a more efficient governmental infrastructure in Eng-
 land than existed elsewhere in Europe. The historically noteworthy
 characteristics of this early jury procedure include its reliance on the ex-
 ercise of royal authority, its compulsion of jurors to participate in the
 adjudicatory process, its utilization of the men of the neighborhood in a
 corporate body to provide the information upon which to base decisions,
 and its uniqueness as compared to traditional approaches that relied on
 the actions of the litigants to settle disputes either by ordeal or combat.²²
 These characteristics would remain important facets of the jury's opera-
 tions for centuries.

The jury's primary function continued to be administrative until the
 time of Henry II, who came to the English throne in 1154. By a series of
 statutory enactments, known as assizes, Henry transformed the jury into
 a genuine instrument of justice.²³ Pollock and Maitland suggest that
 King Henry first used the jury trial to adjudicate the complaints of ten-
 ants who claimed to have been "disseised, that is dispossessed, of [their]
 free tenement unjustly and without judgment."²⁴ The new remedy,
 known as the assize of novel disseisin, offered claimants in such circum-
 stances the opportunity to submit their case to a jury of at least arguably
 knowledgeable local citizens rather than engage in trial by combat.
 Novel disseisin was "fully organized" by 1179²⁵ and was an overwhelm-
 ing success. It established a procedural pattern repeatedly copied over
 the course of the next century to address different sorts of legal claims.
 The reasons for its popularity were neatly summarized by the early trea-
 tise writer generally referred to as Glanvill:

The Grand Assize is a royal favor, granted to the people by one good-
 ness of the King, with the advice of the nobles. It so well cares for the
 life and condition of men that every one may keep his rightful freehold
 and yet avoid the doubtful chance of the duel, and escape that last
 penalty, an unexpected and untimely death, or, at least, the shame of
 enduring infamy in uttering the hateful and shameful word ["Craven"]
 which comes from the mouth of the conquered party with so much

22. *Id.* at 118-23; THAYER, *supra* note 20, at 54-57.

23. SIR PATRICK DEVLIN, *TRIAL BY JURY* 7 (1956).

24. 1 POLLOCK & MAITLAND, *supra* note 19, at 146. Professor S.F.C. Milsom has per-
 suasively argued that the main purpose of this process in Henry II's time was "not replacing
 seignorial jurisdiction but providing a sanction against its abuse." S.F.C. MILSOM, *THE*
LEGAL FRAMEWORK OF ENGLISH FEUDALISM 14 (1976). I am grateful to Professor David
 Millon for bringing this point to my attention.

25. DAWSON, *supra* note 21, at 121.

disgrace, as the consequence of his defeat. This institution springs from the greatest equity. Justice, which, after delays many and long, is scarcely ever found in the duel, is more easily and quickly reached by this proceeding. The assize does not allow so many essoins²⁶ as the duel; thus labor is saved and the expenses of the poor reduced. Moreover, by as much as the testimony of several credible witnesses outweighs in courts that of a single one, by so much is this process more equitable than the duel. For while the duel goes upon the testimony of one sworn person, this institution requires the oaths of at least twelve lawful men.²⁷

The jury grew for two reasons other than its administrative efficiency and popularity with litigants. In 1215, Pope Innocent III and the Fourth Lateran Council prohibited ecclesiastical participation in trials by combat and ordeal. This prohibition effectively undermined the existing procedural alternatives to the jury and facilitated its rapid expansion. Professor Dawson has argued that the jury's growth may also be traced to the economic benefits it offered the Crown.²⁸ The adoption of jury procedure placed most of the work of the judicial system in the hands of unpaid local citizens. While a few professional judges were necessary to supervise the process, most duties were undertaken by men who did not have to be maintained at the king's expense. Thus, a great deal of judicial business could be handled inexpensively and, at the same time, substantial fees could be charged.

It has been suggested that in these early days jurors served primarily as witnesses.²⁹ There is a good deal of evidence in twelfth and thirteenth century practice to support such a contention. In William Forsyth's 1852 treatise on the jury, he recounted Glanvill's description of jurors as being bound to report to the court their ignorance of the facts of the case. In such situations, "others were chosen who were acquainted with the facts in dispute."³⁰ Such a procedure makes sense only when jurors are the key source of information.

The method of reviewing jury verdicts and reversing their results in these early days was known as attain.³¹ Professor Thayer found attain mentioned in cases as early as 1202.³² Attain led to a rehearing of the original evidence by a second, double-sized jury of presumably knowl-

edgeable local citizen. erred, the verdict was demned to severe perjury. Such treatment involved their re. As Forsyth concluded implied perjury in the within their own knowledge of error."³³

The treatment also supports the witness. nesses were generally document was at issue jury that was to decide of function consistent nesses of one sort or

While subscribing to the court, individuals the facts of the case. culminated in statutes vey the jurors' names that the parties could the same token, adj would feel at least so All of these procedu

Yet the jury was Dawson has ably po He noted that while eyewitness, the jury representing the major al views of the evidence that bound jurors to

26. Professor Dawson has defined essoins as "excuses for non-attendance." *Id.* at 295.

27. The passage from Glanvill is translated in THAYER, *supra* note 20, at 42 n.1.

28. DAWSON, *supra* note 21, at 293-94.

29. See, e.g., THAYER, *supra* note 20, at 100.

30. WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 105 (Burt Franklin ed., Lenox Hill Pub. & Dist. Co. 1971) (1878).

31. For an excellent analysis of attain, see David Millon, *Positivism in the Historiography of the Common Law*, 1989 WIS. L. REV. 669, 684-700.

32. THAYER, *supra* note 20, at 143.

33. FORSYTH, *supra*

34. THAYER, *supra* 1

35. *Id.* at 92.

36. 2 POLLOCK & M

37. DAWSON, *supra* closed that medieval jurors living more than five miles from witnesses. See Bernard W. the 1328 Lincolnshire Trial Cockburn & Thomas A.

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edgeable local citizens. If the second jury concluded that the first had erred, the verdict was overturned and the original jurors were condemned to severe punishment on the theory that they had committed perjury. Such treatment could be justified only if the original jurors' failure involved their refusal to disclose a truth of which they were aware. As Forsyth concluded: "Originally a wrong verdict almost necessarily implied perjury in the jurors. They were witnesses who deposed to facts within their own knowledge, about which there could hardly be the possibility of error."³³

The treatment accorded subscribing witnesses in medieval times also supports the witness-function hypothesis. Any and all subscribing witnesses were generally required to be produced when a deed or similar document was at issue. These witnesses were then "combined" with the jury that was to decide the case.³⁴ This amalgamation suggests a parity of function consistent with the argument that all of the jurors were witnesses of one sort or another.

While subscribing witnesses presumably had information to impart to the court, individual jurors were not necessarily well informed as to the facts of the case. To increase the jurors' knowledge, procedures that culminated in statutes enacted as late as 1427 required the sheriff to convey the jurors' names to the parties at least six days in advance of trial so that the parties could "inform" the veniremen of pertinent facts.³⁵ By the same token, adjudicatory procedures were arranged so that jurors would feel at least some "duty" to investigate the questions to be tried.³⁶ All of these procedures served to press jurors into the witnessing role.

Yet the jury was never simply a collection of witnesses. Professor Dawson has ably pointed out the weaknesses in the witness hypothesis. He noted that while it was never expected that every juror would be an eyewitness, the jury was always required to enter into a collective verdict, representing the majority's opinion rather than simply delivering individual views of the evidence.³⁷ Eventually, English procedure cut the ties that bound jurors to any sort of witnessing role. Perhaps the most signif-

33. FORSYTH, *supra* note 30, at 152.

34. THAYER, *supra* note 20, at 97-102.

35. *Id.* at 92.

36. 2 POLLOCK & MAITLAND, *supra* note 19, at 625.

37. DAWSON, *supra* note 21, at 123-25. In the criminal setting, a recent study has disclosed that medieval jurors were frequently drawn from a wide geographical area (a majority living more than five miles from the scene of the crime) and hence, were unlikely to be true witnesses. See Bernard W. McLane, *Juror Attitudes toward Local Disorder: The Evidence of the 1328 Lincolnshire Trailbaston Proceedings*, in *TWELVE GOOD MEN AND TRUE* 36-57 (J.S. Cockburn & Thomas A. Green eds., 1988).

icant step in this direction occurred in the mid-fourteenth century when jury verdicts were required to be unanimous.³⁸ While unanimity might seem a neutral proposition with respect to the juror-as-witness theory, a deeper examination suggests otherwise. When jurors are genuine witnesses, there are likely to be disagreements among them, as is the case with almost any group of a dozen observers. When jurors are compelled to harmonize their views into one conclusive verdict, their individual witnessing functions inevitably must be subordinated to the group's need for consensus.

Professor Dawson argues that unanimity was embraced by English judges so that they could "divest themselves of any duty to assemble or appraise the evidence. The fact-finding function was imposed instead on groups of laymen, whose ignorance was disguised by a group verdict and whose sources of knowledge the judges refused to examine."³⁹ It is not clear why unanimity was adopted, but litigant acceptance of juror-driven rather than judge-conducted factual inquiry was a likely cause.⁴⁰ In addition, the tremendous savings in time and money achieved by relying exclusively on juries rather than a corps of inquiring magistrates to sift through the evidence likely motivated this decision.⁴¹

The connection between witnessing and jury service was further eroded as the juror knowledge requirement, the attain procedure, and the mixed juror-witness deliberation mechanisms were altered or abandoned. Knowledgeable jurors were hypothesized as a possibility as late as 1670 when Chief Justice Vaughan made reference to them in *Bushell's Case*.⁴² Modern historians generally agree, however, that Chief Justice Vaughan was being purposefully anachronistic when he spoke.⁴³ By 1682 it had become a punishable offense to contact or inform jurors of any facts or law related to an impending trial.⁴⁴ Attain died out as a method of review no later than the early sixteenth century. In 1565 Sir Thomas Smith, a widely quoted observer, noted that attain was no longer in use.⁴⁵ But perhaps the earliest of these mechanisms to yield was the juror-witness mixed jury panel. Chief Justice Thorpe declared in a 1349 case that:

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38. DAWSON, *supra* note 21, at 125.

39. *Id.* at 126.

40. 2 POLLOCK & MAITLAND, *supra* note 19, at 620.

41. DAWSON, *supra* note 21, at 128, 293-95.

42. 124 Eng. Rep. 1006-12 (C.P. 1670).

43. THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE 242-45 (1985); John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 285 (1978).

44. LLOYD E. MOORE, *THE JURY* 70 (1973).

45. THOMAS SMITH, *DE REPUBLICA ANGLORUM* 111 (Harper & Row 1972) (1583).

46. THAYER, *supra* note

47. *Id.* at 102.

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49. SIR JOHN FORTE
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1400-1429, in *TWELVE G*

51. THAYER, *supra* note

52. *Id.* at 122-36.

teenth century when the unanimity might as-witness theory, a s are genuine witnesses, as is the case rors are compelled their individual witness the group's need for

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[W]itnesses . . . should say nothing but what they know as certain, *i.e.*, what they see and hear. If a witness is returned on the jury, he shall be ousted. A challenge good as against a juryman is not good against a witness. If the witnesses and the jury cannot agree upon one verdict, that of the jury shall be taken, and the defeated party may have the attain against the jury⁴⁶

Thayer has suggested that by the mid-1500s there was a complete separation of witnesses from the jury in almost all cases.⁴⁷

Perhaps as important as the decline of the jury's witnessing role was the rise of in-court testimony as the basis for decision. While it may be impossible to determine the precise moment that courtroom procedure shifted to testimonial presentations in open court, such presentations clearly came to dominate over the course of the fifteenth and sixteenth centuries.⁴⁸ In *De Laudibus Legum Anglie*, written in 1471, Sir John Fortescue described a judicial process that relied on the presentation of witnesses in open court. It should be noted, however, that juror knowledge may have still played a part.⁴⁹ In Thomas Green's pathbreaking research on the criminal jury, he noted the influx of a great flood of testimonial evidence by the middle of the sixteenth century.⁵⁰ Statutes requiring the testimony of one or more witnesses began to appear during the 1500s, making in-court inquiry essential in some cases.⁵¹ Throughout this era, barriers to live testimony, like charges of maintenance and conspiracy, were, albeit slowly, being dismantled.⁵² The final movement towards in-court testimony probably came in the mid-1600s when jurors were isolated from outside influences and were required to decide cases on the basis of what was presented in open court.

The early history of the English jury is remarkable not only because of its constant adaptation to new and different needs, but also because of its contribution to the establishment of certain fundamental principles of democratic governance. These principles, and the jury itself, came to play a critical part in the tumultuous events leading to the fall of the

46. THAYER, *supra* note 20, at 101.

47. *Id.* at 102.

48. For a careful analysis of how in-court testimony became a required part of courtroom procedure, see John M. Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST. 201 (1988).

49. SIR JOHN FORTESCUE, *DE LAUDIBUS LEGUM ANGLIE* 58-63 (S.B. Chrimes ed., 1942) (1471).

50. GREEN, *supra* note 43, at 105-52. For an argument focusing on the fifteenth century, see Edward Powell, *Jury Trial at Goal Delivery in the Late Middle Ages: The Midland Circuit, 1400-1429*, in *TWELVE GOOD MEN AND TRUE*, *supra* note 37, at 78.

51. THAYER, *supra* note 20, at 134-36.

52. *Id.* at 122-36.

242-45 (1985); John H. v. 263, 285 (1978).

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Stuarts, the rejection of absolute monarchy, and the rise of parliamentary government.

From its earliest days, the British jury was called upon to perform a wide range of tasks. Its administrative and adjudicatory activities made it possible for the king to achieve a greater level of centralized control in England than was possible anywhere else in Europe at the time. Yet as Professor Dawson has indicated, **relying on the jury and other lay decisionmakers such as justices of the peace had the unanticipated effect of training "English society, through its local leadership, in the skills and the practice of self-government."**⁵³ Over the course of 600 years, English jurymen learned to rule themselves. They developed traditions of independence from central bureaucratic authority.⁵⁴ These skills and attitudes did not spring up overnight, but were nurtured through centuries of jury work. When the struggle for political liberty was joined in the seventeenth century, Englishmen who had known and enjoyed self-governance were ready to fight for what they had come to perceive as their rights.

The jury was also responsible for introducing the "middling sort," men of neither the aristocracy nor upper gentry but still of independent means, to the responsibilities of governing.⁵⁵ Over time these citizens would become the bedrock of English political democracy. As Stephen Roberts explained, in the 1600s "the jury was the most representative institution available to the English people."⁵⁶ How this came about is not hard to imagine. From very early in the jury's history, the wealthy strove to avoid jury service and place others on the panels in their stead. Statutes from the time of Edward I (1285 and 1293) point to the evasive conduct of well-to-do potential jurors.⁵⁷ Those who became the main-

53. DAWSON, *supra* note 21, at 134.

54. GREEN, *supra* note 43, at 105.

55. P.G. Lawson described the majority of seventeenth century jurors, at least in Hertfordshire, in the following way:

Those contemporaries who implied that the jurors were primarily men of the "middling sort" were therefore closer to the mark than those who complained of men of "meane estate." But even the former description is somewhat misleading. It is correct insofar as it implies that most jurors stood between the gentry on the one hand and the laborers and smallest property owners on the other, but it is incorrect insofar as it implies that the jurors were, in economic terms, equally distant from the two. The jurors were men of property; they were above that fundamental barrier that separated those who owned property from those who did not.

P.G. Lawson, *Lawless Juries? The Composition and Behavior of Hertfordshire Juries, 1573-1624*, in *TWELVE GOOD MEN AND TRUE*, *supra* note 37, at 133 (citation omitted).

56. Stephen K. Roberts, *Juries and the Middling Sort: Recruitment and Performance at Devon Quarter Sessions, 1649-1670*, in *TWELVE GOOD MEN AND TRUE*, *supra* note 37, at 182.

57. Two statutes were aimed at correcting these abuses. One was 13 Edw. 1 (West 2) c.38

stay of the jury system there were many complaints that such jurors were not from the yeomanry "formed by the yeomanry" which resulted in a significant per economic strata of those most highly placed.

The jury became even more important as it soared in the sixteenth century. In the thousand-person village, actions were filed between neighbors and jurors played a critical role. Jurors were assigned this task to the problems of government. The middling sort came

[A] competent jury must be selected from among those who are not glibly glib, but who are glibly truthful and powerful individual flagrant invasion of oppression must be not appointed till the law is ascertained, the law serves in the hands in the administration of the more powerful

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58. Lawson, *supra* note 55.

59. Lawson, *supra* note 55.

60. ALAN MACFARLANE.

61. 3 WILLIAM BLACKSTONE, *Commentaries on the Laws of England* (Nourse Publishing Co., 1963).

62. GREEN, *supra* note 43.

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stay of the jury system were men of modest property holdings.⁵⁸ While there were many complaints in the sixteenth and seventeenth centuries that such jurors were not "sufficient freeholders," it would appear that the yeomanry "formed the social backbone" of the jury system.⁵⁹ This resulted in a significantly broader distribution of power through the upper economic strata of English society, and helps to explain the alarm of those most highly placed in society.

The jury became even more important when the volume of litigation soared in the sixteenth and seventeenth centuries. A recent study of the thousand-person village of Earls Colne found that more than 200 legal actions were filed between 1589 and 1593.⁶⁰ In such litigious times, jurors played a critical role in regulating society. That the middling sort were assigned this task bespeaks their access to real power and exposure to the problems of governing. Blackstone aptly summarized the role that the middling sort came to play:

[A] competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth and the surest guardians of public justice. For the most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of trial; and that, when once the fact is ascertained, the law must of course redress it. This, therefore, preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens.⁶¹

In the seventeenth century the Stuart kings increasingly sought to intrude upon these and other traditional power arrangements.⁶² The predictable response from juries was a rising tide of resistance. John Beattie, one of the finest modern historians of seventeenth and eighteenth century legal practice, has declared that "[t]he late seventeenth century was the heroic age of the English jury, for in the political and constitutional

in 1285, which recited a practice of using poor, diseased, and decrepit men so as to spare the rich. Also, St. of 21 Edw. 1 in 1293 recited similar troubles stemming from sparing the rich when they were likely to know the facts of the case. THAYER, *supra* note 20, at 90.

58. Lawson, *supra* note 55, at 133; Roberts, *supra* note 56, at 212.

59. Lawson, *supra* note 55, at 133.

60. ALAN MACFARLANE, RECONSTRUCTING HISTORICAL COMMUNITIES 183 (1977).

61. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 683 (1978) (Nourse Publishing Co., 1959) (1783).

62. GREEN, *supra* note 43, at 105-06.

struggles of the reigns of Charles II and James II, trial by jury emerged as the principle defense of English liberties."⁶³

One of the most important moments for the jury came in 1670 when the Quakers William Penn and William Mead were prosecuted for preaching in public.⁶⁴ A jury of twelve Londoners stood firm in their acquittal of Penn and Mead despite strong judicial pressure. Upon entry of the jury's verdict, the judge fined and jailed the jurors, including Edward Bushell. Bushell refused to pay his fine and brought a habeas corpus proceeding challenging the legality of his incarceration. In a precedent-setting ruling⁶⁵ Sir John Vaughan, Chief Justice of Common Pleas, barred the jailing or fining of jurors except in cases of overtly corrupt behavior. Vaughan's ruling sharply curtailed judicial control over the jury.

Alarmed by *Bushell*,⁶⁶ the judiciary sought, especially in seditious libel cases, to narrow the options available to jurors by tightly circumscribing the questions they were asked to decide. In 1688 these efforts were undermined in the *Seven Bishops Case* when another courageous London jury acquitted seven Anglican bishops of seditious libel for signing a letter that indicated their opposition to the reading of James II's second *Declaration of Indulgences* in their churches.⁶⁷ The acquittal of the bishops has been viewed as the true beginning of the Glorious

63. J. M. Beattie, *London Juries in the 1690s*, in *TWELVE GOOD MEN AND TRUE*, *supra* note 37, at 214.

64. For a description of Penn and Mead's trial, see GREEN, *supra* note 43, at 221-36.

65. *Id.* at 236-49.

66. 124 Eng. Rep. 1006 (C.P. 1670).

67. Lord Thomas Gabington Macaulay described the production of the bishops' letter in the following way:

On the eighteenth a meeting of prelates and of other eminent divines was held at Lambeth. . . . After long deliberation, a petition embodying the general sense was written by the Archbishop with his own hand. It was not drawn up with much felicity of style. Indeed, the cumbrous and inelegant structure of the sentences brought on Sancroft some raillery. . . . But in substance nothing could be more skilfully framed than this memorable document. All disloyalty, all intolerance, was earnestly disclaimed. The King was assured that the Church still was, as she had ever been, faithful to the throne. He was assured also that the Bishops would, in proper place and time, as Lords of Parliament and members of the Upper House of Convocation, show that they by no means wanted tenderness for the conscientious scruples of Dissenters. But Parliament had, both in the late and in the present reign, pronounced that the sovereign was not constitutionally competent to dispense with statutes in matters ecclesiastical. The Declaration was therefore illegal; and the petitioners could not, in prudence, honour, or conscience, be parties to the solemn publishing of an illegal Declaration in the house of God

2 THE WORKS OF LORD MACAULAY 153 (Lady Trevelyan ed., 1866) reprinted in STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY* 12 (2d ed. 1989).

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68. Austin W. Scott, *The* 669, 676 (1918).

69. *Id.* (citing *The Englishmen's Lives*).

70. *Id.* at 676-78.

71. *Wilkes v. Wood*, 9

72. See MARK PETER (1987).

73. *Id.* at 489-99.

74. JOHN CARSWELL, (1973).

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Revolution and had the effect of catapulting the jury to popularity "as a bulwark of liberty, [and] as a means of preventing oppression by the Crown."⁶⁸ Treatises extolling the jury flooded the market⁶⁹ and profoundly influenced eighteenth century American as well as English views about jury trial.⁷⁰

The jury came to operate as a defender of rights in both the criminal and civil settings. During the 1760s, a member of Parliament named John Wilkes engaged in a series of radical political actions, including publishing a broadsheet called the *North Briton*. In Number 45 of that paper, Wilkes appeared to accuse King George III of lying about ongoing peace negotiations with France. Although Wilkes was quickly arrested and charged with seditious libel, the case against him was dismissed on a technical point involving parliamentary privilege. Wilkes immediately commenced a damages action for false arrest, trespass, and theft of personal papers. The jury awarded him the extraordinary sum of £1000 as damages against a number of officials including Lord Halifax, the head of the government.⁷¹ This decision's inclusion of substantial punitive damages was remarkable because it is generally agreed to have been the first occasion on which an avowedly punitive award was permitted.⁷² The jury's power to award punitive damages in order to protect the rights of citizens in civil cases was emphasized by Lord Chief Justice Pratt, who declared that juries had authority

to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.⁷³

Wilkes's case and his ongoing conflicts with the British administration were a matter of keen interest in the American colonies. In the early 1770s, South Carolina went so far as to provide Wilkes monetary support for one of his political campaigns.⁷⁴ From the era of the Glorious Revolution to the time of Wilkes's struggles, the jury was the very es-

68. Austin W. Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 676 (1918).

69. *Id.* (citing *The Englishman's Right*, *The Guide to English Juries*, and *The Security of Englishmen's Lives*).

70. *Id.* at 676-78.

71. *Wilkes v. Wood*, 98 Eng. Rep. 489, 499 (C.P. 1763).

72. See MARK PETERSON ET AL., PUNITIVE DAMAGES: EMPIRICAL FINDINGS 1-2 (1987).

73. *Id.* at 489-99.

74. JOHN CARSWELL, FROM REVOLUTION TO REVOLUTION: ENGLAND 1688-1777 141 (1973).

sence of liberty, a fundamentally democratic institution that served as a check on the tyrannical and oppressive power of government.

B. The American Reception

The jury came to America with the earliest settlers. The 1606 charter given by James I to the Virginia Company has been read as incorporating the right to jury trial.⁷⁵ By 1624 juries were available for all civil and criminal cases in Virginia.⁷⁶ The Massachusetts Bay Colony followed a similar pattern by introducing jury trials in 1628 and codifying jury procedure in the Massachusetts Body of Liberties in 1641.⁷⁷ The Colony of West New Jersey followed suit in 1677, as did Pennsylvania under William Penn's proprietorship in 1682. Eventually, all the colonies embraced trial by jury.

The jury played a critical role in early colonial history. Focusing on developments in Massachusetts, William Nelson concluded that in pre-revolutionary days the jury was the central instrument of governance.⁷⁸ Its wide-ranging activities starkly contrasted with the circumscribed operations of both the royal executive and colonial legislature. Massachusetts juries had responsibilities strikingly similar to those assigned to juries in medieval England. They were the chief assessors of legal claims and the primary enforcers of legal rights for their communities. According to Nelson, they maintained the economic and social stability of colonial society by enforcing rather strict codes concerning debt and morality.⁷⁹

Nelson has argued that Massachusetts juries had vast authority and independence in the colonial era because they, like their forebears in the Glorious Revolution, had power over questions of law as well as fact.⁸⁰ Their freedom appears to have been enhanced because trials were conducted before three judges, each of whom was free to state his divergent view of the law in closing instructions, thereby providing the jurors with several versions from which to choose. The jurors' critical assessment of the law was further encouraged by counsel who were permitted to argue legal questions in their closings. It is legitimate to surmise, as Nelson

75. Harold M. Hyman & Catherine M. Tarrant, *Aspects of American Trial Jury History*, in *THE JURY SYSTEM IN AMERICA* 24 (Rita J. Simon ed., 1975).

76. *Id.* at 25.

77. MASSACHUSETTS BODY OF LIBERTIES para. 29 (1641), reprinted in *SOURCES OF OUR LIBERTIES* 151 (Richard L. Perry & John C. Cooper eds., 1952).

78. NELSON, *supra* note 15, at 13-23.

79. *Id.* at 45-47.

80. *Id.* at 3.

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has, that the jury had broad control over legal as well as factual issues and was therefore the ultimate authority in the courtroom process.⁸¹

Despite the jury's broad authority, it did not exercise unlimited control over the adjudicatory process. A range of constraints operated to rein in jury power. Among these were a set of evidentiary rules that directed jurors to treat oath-supported testimony as binding,⁸² a social consensus so strong and pervasive that it limited the jury's freedom of action, a modest number of cases that were litigated, and a judiciary that was comprised of locally prominent men⁸³ capable of exerting significant influence over their neighbors.⁸⁴ In Massachusetts, it seems likely that the judge and jury maintained a balance of power. Each prevented the other from exercising arbitrary power or ignoring the needs of society.

The Massachusetts arrangement may not have been typical. In his study of Virginia, A.G. Roeber concluded that lay justices of the peace wielded the real power in the early days of that colony.⁸⁵ Whatever the situation in individual states, people throughout America were preoccupied with safeguarding the jury right, relying upon the jury to restrain government. For example, in 1734 journalist John Peter Zenger was charged with seditious libel for accusing William Cosby, the Governor of New York, of corruption, misfeasance, and usurpation of the right to jury trial. The case was tried to a jury instructed that it was obliged to convict if the defendant had published the words in question, a matter clearly established by the proof. Counsel for Zenger, however, argued that the jury was free to reject the judge's instructions if it found that the journalist's accusations against the Governor were true. The jury verdict acquitting Zenger established that: the press should be free to criticize the government, truth should be a defense to libel charges, judges do not necessarily have absolute control over questions they designate as "legal," and colonial juries, like their English counterparts, were fully capable of defending fundamental rights.⁸⁶ Even though *Zenger* was a criminal case, its repercussions were felt in civil jury proceedings as well.

81. *Id.* at 28-30. For a similar analysis of the operation of American juries in general during the eighteenth century, see SHANNON C. STIMSON, *THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL* (1990).

82. NELSON, *supra* note 15, at 25.

83. *Id.* at 33.

84. Nelson rejects this idea. *Id.* There is ample evidence, however, that seventeenth century English judges were extremely skillful at controlling juries. See J.S. COCKBURN, *A HISTORY OF ENGLISH ASSIZES: 1558-1714* 122 (1972).

85. A.G. ROEBER, *FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS* 11-12 (1981); see generally BRUCE MANN, *NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT* (1987) (describing decline in Connecticut jury power).

86. Paul Finkelman, *The Zenger Case: Prototype of a Political Trial*, in *AMERICAN*

When the jury right was threatened in the colonial era, citizen reaction was generally swift and hostile. This was the case in New York when royal governors tried to expand the operation of the chancery court, a court which operated without a jury.⁸⁷ The most dramatic clashes concerning this issue took place during the 1720s and 1730s between Governors William Burnet and William Cosby, on the one side, and the New York legislature and the common law courts, on the other. In 1727 the legislature passed a resolution condemning both Governor Burnet and the chancery court. In the 1730s New York Chief Justice Lewis Morris denied Governor Cosby's motion to hear a case concerning his salary in a non-jury forum and the governor promptly dismissed the Chief Justice from office.⁸⁸

Shortly after his dispute with Morris, Governor Cosby exercised his powers as Chancellor of the Chancery Court to award a tract of land to certain of his allies. Because of his actions in this so-called affair of the "oblong tract," Cosby was publicly compared to Lord Chancellor Jeffreys who, during the last years of the Stuart monarchy, abused his equitable powers by undermining municipal charters that had guaranteed parliamentary rights to a number of communities opposed to the king.⁸⁹ When Governor Cosby died in 1736, the dispute cooled. However, the threat of chancery trials without juries, especially in cases determining the question of land title, were a source of continuing anxiety for New Yorkers.

In the mid-1700s, jury caseloads across America appeared to soar. Roeber reports that in Virginia between 1750 and 1774 jury trials underwent an explosive increase. Debt cases, which for decades had been resolved by summary judgment, were now vigorously fought. **Juries in these cases were increasingly likely to act sympathetically toward debtors.**⁹⁰ It would appear that juries were far less willing than they once had been to enforce rigid rules regarding debt. Instead, juries became one of

POLITICAL TRIALS 21, 21-42 (Michael R. Belknap ed., 1981). It should be noted, however, that other historians have argued that the *Zenger* case had very little impact until a later time. See Introduction, JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER PRINTER OF THE NEW YORK WEEKLY JOURNAL 30-35 (Stanley N. Katz ed., 2d ed. 1972).

87. Stanley N. Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, in *LAW IN AMERICAN HISTORY* 257, 274-82 (Donald Fleming & Bernard Bailyn eds., 1971).

88. This dispute was one of the questions explored by Peter Zenger's newspaper. Finkelman, *supra* note 86, at 25-26.

89. See G.W. KEETON, *LORD CHANCELLOR JEFFREYS AND THE STUART CAUSE* (1965).

90. See ROEBER, *supra* note 85, at 128.

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the agents of change helping to introduce new values into the law and society.

In the 1760s the struggle over jury rights shifted to the admiralty and vice-admiralty courts, which were non-jury courts used by British royal officials in the enforcement of the Navigation Acts and other laws designed to control colonial commerce.⁹¹ While both courts usually dealt with criminal matters such as smuggling and failure to pay customs duties, both could, and did, deprive colonists of civil jury trials, especially regarding the seizure of vessels and conversion of cargoes.⁹² The denial of jury trials was a strong irritant in relations between America and Great Britain, featuring prominently in formal colonial complaints in the 1760s and 1770s. The Stamp Act Congress of 1765 specifically declared that "trial by jury is the inherent and invaluable right of every British subject in these colonies."⁹³ The clear purpose of this declaration was to challenge the denial of the right to jury trial pursuant to the provisions of the Stamp Act.⁹⁴

Immediately before the Revolution, questions regarding the right to jury trial and the responsibilities of jurors took on heightened importance for the colonists. In 1773 a dispute erupted between the British authorities and Massachusetts residents regarding the compensation of colonial judges.⁹⁵ The British administration insisted that judicial salaries were under its control even though these salaries had previously been regulated by the colonial legislature. The new arrangement created a clear threat to judicial independence and led to a call for Massachusetts judges to resign. Four justices refused royal salaries, but Chief Justice Peter Oliver accepted. The legislature voted to impeach him, but this action was thwarted by the British governor. When Chief Justice Oliver appeared to hear cases in circuit court, jurors around the colony refused to take the oath of office from him or participate in cases over which he presided. These jurors became spokesmen, articulating colonial resolve with respect to judicial independence.

In the mid-1770s, the American colonists held a series of congresses to protest the oppressive behavior of British authorities in enforcing the so-called Intolerable Acts and similar measures. These congresses trumpeted the right to trial by jury in both civil and criminal cases and

91. Hyman & Tarrant, *supra* note 75, at 29.

92. Wolfram, *supra* note 4, at 654-55 n.47.

93. RESOLUTIONS OF THE STAMP ACT CONGRESS 1765, para. 7, reproduced in SOURCES OF OUR LIBERTIES, *supra* note 77, at 270.

94. *Id.* at 267.

95. Hyman & Tarrant, *supra* note 75, at 29.

excoriated royal administrators for tampering with that right. Such was the case during the meeting of the First Continental Congress in 1774. In particular, its fifth resolve stated: "the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law."⁹⁶ This declaration was aimed at both a series of acts that sought to remove certain categories of cases to England for trial, and royal regulations that interfered with the selection of jurors in Massachusetts.⁹⁷

The colonists' concern about jury trials was reiterated in the Second Continental Congress's Declaration of the Causes and Necessity of Taking Up Arms, issued in July 1775, which specifically challenged Parliament's passage of statutes "extending the jurisdiction of courts of admiralty and vice-admiralty beyond their ancient limits [and] . . . depriving . . . [the colonies] of the accustomed and inestimable privilege of trial by jury, in cases affecting both life and property."⁹⁸ The work of the congresses culminated in the Declaration of Independence on July 4, 1776. The Declaration listed the denial of "the benefits of trial by jury" as one of the grievances that had led to the creation of the new nation.⁹⁹

In the period between the 1760s and the Revolution, the jury represented the most effective means available to secure the independence and integrity of the judicial branch of the colonial government. Because of the jury's power, the British authorities increasingly sought to either control or avoid jury adjudications. The struggle over jury rights was, in reality, an important aspect of the fight for American independence and served to help unite the colonies.

For obvious reasons, juries were exceedingly popular with the drafters of the revolutionary constitutions fashioned by the newly independent states. Virginia set a pattern in 1776 by specifically including the right to both civil and criminal jury trials in its Bill of Rights. The majority of other states quickly followed suit: "The right to trial by jury was probably the only one universally secured by the first American state constitutions . . ."¹⁰⁰ It has been hypothesized that a common allegiance to the right to jury trial played an important part in drawing the new nation

96. DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS, 1774, Res. 5, reproduced in SOURCES OF OUR LIBERTIES, *supra* note 77, at 288.

97. *Id.* at 281-82.

98. DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS (1775), reproduced in SOURCES OF OUR LIBERTIES, *supra* note 77, at 296.

99. THE DECLARATION OF INDEPENDENCE para. 19 (U.S. 1776).

100. Wolfram, *supra* note 4, at 655, (quoting LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 281 (1960)).

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104. See Wolfram, *supra*

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106. Edith G. Henderson, 289, 292 (1966).

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CONTINENTAL CONGRESS, 1774, at 77, at 288.

TAKING UP ARMS (1775), reproduced in U.S. 1776).
W. LEVY, LEGACY OF SUPPRESSION IN AMERICAN HISTORY 281 (1960)).

closer together.¹⁰¹ The right to a jury trial was appealing because of both its association with the revolution and its fundamentally participatory character.

In the early 1780s, democratic aspirations led Americans to fashion state governments in which the legislative branches were preeminent and the national government little more than a loose confederacy. These arrangements did not prove thoroughly satisfying: citizens began to feel that insufficient protection was being accorded the right to property and that anarchy might overwhelm the nation. This fear was heightened by a series of provocative events that took place between 1784 and 1787. In this period, both North Carolina and Rhode Island shamelessly manipulated their currencies to assist debtors: "[W]hen Rhode Island's supreme court ruled in behalf of a creditor who refused to accept . . . depreciated paper [currency], the legislature censured the court and replaced the judges."¹⁰² In Massachusetts, taxpayers began an open revolt against the payment of the state's debts. Many Americans believed that this movement, which became known as Shays' Rebellion, threatened the very foundation of order in New England.¹⁰³

This background may help to explain how the civil jury, which had been the most popular vehicle of courtroom justice in the period leading up to and including the Revolution, came to be ignored by the drafters of the Constitution in 1787. The delegates who drafted a new plan of government were, for the most part, creditor-oriented¹⁰⁴ nationalists.¹⁰⁵ They were deeply troubled by recent events in the country and were committed to creating a strong national government that would put an end to the threat of anarchy. They spent most of their time and energy fashioning the executive and legislative branches of this new, stronger central government.

Matters concerning the judiciary "ran a poor third as a focus of interest,"¹⁰⁶ and the civil jury was mentioned only twice, on September

101. Hyman & Tarrant, *supra* note 75, at 30.

102. FORREST McDONALD, *NOVUS ORDO SECLORUM* 156 (1985).

103. Whether Shays' Rebellion actually threatened the political and social integrity of Massachusetts and surrounding states is a difficult question. McDonald argues that the rebellion's scope was greatly exaggerated by a number of contemporary observers, most particularly Henry Knox, the Confederation's Superintendent of War. See *id.* at 176-78.

104. See Wolfram, *supra* note 4, at 677.

105. McDONALD, *supra* note 102, at 185-88. But see Akhil R. Amar, *The Bill of Rights As a Constitution*, 100 YALE L.J. 1131, 1134-36 (1991) (emphasizing the "states rights tradition" among the drafters of the Constitution).

106. Edith G. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 292 (1966).

12 and 15, 1787.¹⁰⁷ In these two brief discussions, the drafters decided to refrain from including the civil jury in the text of the Constitution. The civil jury was excluded because "[t]he Representatives of the people may be safely trusted in this matter,"¹⁰⁸ and a host of drafting problems made inclusion of a civil jury guarantee impossible.¹⁰⁹ The Constitution, without any reference to the civil jury, was transmitted to the Continental Congress on September 17, 1787.

While it is not likely that the drafters intended to eliminate the civil jury from America's courts, the omission of the jury from the Constitution signalled a profound shift in the way an exceedingly powerful segment of society had come to view the institution. Most scholars have concluded that claims about drafting difficulties were disingenuous.¹¹⁰ Instead, there was a growing belief that the jury should play only a modest part in the governance of post-revolutionary America. Commentators have offered at least three justifications for the jury's declining importance. First, because the British government no longer controlled the judiciary, there was no need to insist on the presence of juries to counterbalance judges biased in favor of England. Second, the Revolution had resulted in the installation of democratically elected legislatures. Thus, the right to jury review or nullification of laws was less important amidst legitimately established democratic laws.¹¹¹ Third, jury decisions were bound to be *ad hoc* and, frequently, anti-creditor. If America's financial system was to be placed in order, it may have been necessary to curtail jury action in favor of more predictable and consistent rulings guaranteeing the rights of investors.¹¹²

The omission of the civil jury triggered a firestorm of protest. In response, the Federalists sought to assuage worries about the right to civil jury trial. To this end, Alexander Hamilton wrote Number 83 of *The Federalist*. He began by acknowledging the adverse reaction to the exclusion of the civil jury right from the Constitution. He assured his readers that its omission was not intended as an attempt to abolish jury trials, and he went on to extol the jury's virtues in the following terms:

The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by

107. *Id.* at 293.

108. Mr. Gorham spoke these words on September 12, 1787. They were originally reported in JAMES MADISON, *DEBATES IN THE FEDERAL CONVENTION OF 1787* (1937), cited in Henderson, *supra* note 106, at 293.

109. Henderson, *supra* note 106, at 293-94.

110. See, e.g., *id.*

111. McDONALD, *supra* note 102, at 41.

112. See *id.* at 290-91.

jury: Or if there is former regard it as it as the very palladium. He then proceeded, however, as used by Justice Cardozo, there is no "inseparable" the trial by jury in civil argued that the civil jury was not a blanket justification that juries were inappropriate like those concerning equity in which the common folk.¹¹⁶ He emphasized to jury trial to the legislature safely reduced in democratic

Hamilton's argument has been particularly compelling right to jury trial under the law saw juries as nothing more than a populist response to these federalists treated the rejection of the Constitution and other jury critics, the best mechanism to the sensitive national legislature debtors from the influence provided a means of civil Antifederalists' argument not become the exclusive

The Antifederalist response was a famous statement:

The impartial persons and our process be entirely entrusted generally selected by

113. THE FEDERALIST (1904).

114. See *supra* note 18 at

115. THE FEDERALIST (1904).

116. *Id.* at 621.

117. Wolfram, *supra* note

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jury: Or if there is any difference between them it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.¹¹³

He then proceeded, however, in terms strikingly similar to those later used by Justice Cardozo in *Palko*¹¹⁴ to set forth the Federalist view that there is no "inseparable connexion between the existence of liberty and the trial by jury in civil cases."¹¹⁵ Employing an attenuated analysis, he argued that the civil jury's only special value was as a hedge against judicial corruption. While this analysis ensured some respect for juries, it was not a blanket justification for their employment. Hamilton argued that juries were inappropriate in cases involving international relations, like those concerning prizes seized on the high seas, and in cases assigned to equity in which the problems were too "nice and intricate" for common folk.¹¹⁶ He emphasized the benefits of leaving the issue of the right to jury trial to the legislature and intimated that the jury's role could be safely reduced in democratic post-revolutionary America.

Hamilton's arguments in *The Federalist* Number 83 could not have been particularly comforting to jury proponents. He sought to place the right to jury trial under the absolute control of the federal legislature and saw juries as nothing but a restraint on judicial venality. The Antifederalist response to these ideas was emphatically negative. In fact, the Antifederalists treated the absence of a civil jury guarantee as warranting the rejection of the Constitution in its entirety. In responding to Hamilton and other jury critics, they stressed three points: First, the jury was the best mechanism to thwart application of unwise laws enacted by an insensitive national legislature; second, it provided a method of protecting debtors from the inflexible rules that regulated commerce; and third, it provided a means of checking corrupt or overactive judges.¹¹⁷ All of the Antifederalists' arguments centered on their belief that the courts should not become the exclusive province of the judges.

The Antifederalists frequently cited with approval Blackstone's famous statement:

The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in

1787. They were originally re- NTION OF 1787 (1937), cited in

113. THE FEDERALIST No. 83, at 614 (Alexander Hamilton) (John C. Hamilton ed., 1904).

114. See *supra* note 18 and accompanying text.

115. THE FEDERALIST NO. 83, at 615 (Alexander Hamilton) (John C. Hamilton ed., 1904).

116. *Id.* at 621.

117. Wolfram, *supra* note 4, at 673-710.

the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity; it is not to be expected from human nature that *the few* should be always attentive to the interests and good of *the many*.¹¹⁸

It was critical to the Antifederalists that the jury serve the interests of democracy by injecting the values of the "many" into judicial proceedings. They refused to accept an unconstrained federal judiciary in which judges were free to act like England's Lord Mansfield, whose "habit of controlling juries does not accord with the free institutions of this country."¹¹⁹

Because of the Antifederalist agitation, at least seven of the states ratifying the Constitution called for immediate amendment to secure the right to jury trial in civil cases. While the Antifederalists failed in their campaign to prevent the Constitution from being adopted, they were the “generative force behind the seventh amendment [and] their arguments should be given due weight in determining the purpose behind [it].”¹²⁰

It proved less difficult to draft the text of the amendment than Hamilton had supposed. In order to encompass the great range of jury practice in America, the drafters couched the amendment in broad terms.¹²¹ These terms were in accord with earlier Antifederalist arguments that had rejected contentions about drafting difficulties by stressing the utility of "reference . . . to the common law of England, which obtains through every State."¹²²

The triumph of the jury right was reflected not only in the Seventh Amendment but also in the Judiciary Act of 1789. That Act held equity tightly in check and emphasized remedies at law with their concomitant jury trial. This emphasis is not surprising given the fact that the Act was being drafted at precisely the same moment the Seventh Amendment was making its way through Congress.¹²³

Jury developments did not cease with the adoption of the Seventh Amendment. The jury, which had served as a symbol of democracy and restraint on judicial power in the Antifederalist campaign against the Constitution, took on a somewhat different role in American society between 1790 and 1810. It became an instrument of compromise that tem-

118. 3 BLACKSTONE, *supra* note 61, at 682.

119. Comment by a Virginia judge in *Hague v. Stratton*, 8 Va. 84, 85 (1786), *quoted in* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* 142 (1977).

120. Wolfram, *supra* note 4, at 673.

121. Henderson, *supra* note 106, at 336.

122. *A Democratic Federalist*, PENNSYLVANIA PACKET October 23, 1787, quoted in Henderson, *supra* note 106, at 297.

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

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pered both the ardent Federalist desire for a strong judiciary and the Republican radicals' thirst for a simplified law without courtrooms or lawyers. Events in Pennsylvania, Massachusetts, and on the national level all illustrate these trends.

In 1800, Alexander Addison, a strong-willed Federalist Pennsylvania state court judge, did not allow one of his fellow judges, a Republican, to address a grand jury to which Addison had made a speech concerning the merits of the recent election of a Republican governor.¹²⁴ This ban, and another like it several months later, provoked the Pennsylvania Legislature to impeach Addison. At his subsequent trial before the State Senate, Addison, who maintained his "insolent, arrogant and overbearing conduct,"¹²⁵ was convicted and removed from office.

Addison was the archetypal overzealously political judge, ever ready to interfere with and seek control over the jury. His removal signaled the acceptance of a widely held belief that such conduct was unacceptable and that excessive interference with the jury, especially when couched in political terms, would not be tolerated. Addison's removal opened up the possibility of a partisan review of the performance of all sitting judges. Pennsylvania's Republican legislators flirted with the idea of a political purge before eventually rejecting it. Instead, they appeared to accept a compromise that left judicial independence intact so long as the judges respected the jury and refrained from pursuing overtly political objectives.

Pennsylvania's jury system came under attack not only from high-handed Federalist judges but also from Republican radicals. The radicals sought to remove as many disputes as possible from traditional courts, to make drastic modifications in courtroom procedure, and to utilize arbitration whenever possible. Their espoused goal was to free the people from lawyers and law courts. The radicals' proposed program became an important issue in the hard-fought 1805 election that pitted them against more moderate Republicans.¹²⁶ The moderates' victory preserved the traditional adjudicatory system with its emphasis on an independent judiciary working in tandem with a jury. In both this political contest and the Addison affair, the jury was seen not as a panacea but as a compromise that insured the preservation of the status quo.

During this same era, a dispute regarding the power of the jury arose in Massachusetts. The conflict focused particularly on whether the

124. See RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS* 164-83 (1971).

125. *Id.* at 165.

126. See generally *id.* at 174-81 (discussing debate during 1805 election over constitutional reform to make the government more responsive to the electorate).

jury had the right to decide questions of law as well as fact.¹²⁷ Massachusetts juries had traditionally been free to disregard judicial instructions concerning the law and to return general verdicts that conflicted with established doctrine. Federalists were deeply troubled by this practice and, as part of a larger reform package, sought to curtail the jury's power as a law finder. In 1803 Supreme Court Justice Theodore Sedgwick solidified Federalist reform objectives when he called for the adoption of a judicial circuit riding mechanism very similar to the English *nisi prius* system, a limitation on appeals, and a suspension of the practice of permitting juries to interpret the law. As to the last point Sedgwick argued:

In all instances where trial by jury has been practiced, and a separation of the law from the fact has taken place, there have been expedition, certainty, system and their consequences, general approbation. Where this has not been the case, neither expedition, certainty nor system have prevailed.¹²⁸

The legislature quickly enacted the *nisi prius* mechanism and other reforms perceived as technical, but Federalists and Republicans came into sharp conflict over proposed limitations on the jury's power to interpret the law.¹²⁹ The Republicans were loath to curtail jury power or cede additional authority to an already formidable judiciary. They countered the Federalist demands by calling for the expansion of the jury's authority to question witnesses and by pushing for the adoption of a rule barring appellate review of jury decisions. The latter proposal was viewed by some as a challenge to the maintenance of any fixed law. Massachusetts moderates eventually resolved this dispute by reaffirming the independence of the judiciary and by insisting on the use of juries vested with the sort of powers they had previously held.

This pattern of conflict and compromise was acted out even more dramatically on the federal level. Jefferson's election in 1800 sent shock waves through the Federalist establishment. Seeking to secure their power in the overwhelmingly Federalist judicial branch, the lame duck Federalist Congress enacted the Judiciary Act of 1801¹³⁰ and several pieces of related legislation. These acts were intensely partisan, creating posts designed to be filled hurriedly by the outgoing Federalist administration. They also altered a variety of procedural and jurisdictional requirements in ways advantageous to Federalist constituencies.

The Jeffersonian Re- serious challenge. Event- tionally questionable cou- to deliver outstanding (under the Federalists' e challenge confronted by bury, Chief Justice Mars- cial authority to review t the Republicans, howeve- sion and thereby averted the executive.¹³² By av- sides seemed to strike a l to recognize the judicial agree to refrain from usi- san political objectives.¹

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127. See *id.* at 184-229.

128. *Id.* at 190.

129. *Id.* at 191-206.

130. Judiciary Act of 1801, ch. 4, 2 Stat. 89 (repealed 1802).

131. 5 U.S. (1 Cranch) 13.

132. ELLIS, *supra* note 12.

133. *Id.* at 69.

134. *Id.* at 69-75.

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The Jeffersonian Republicans perceived the Federalists' actions as a serious challenge. Eventually, President Jefferson pursued the constitutionally questionable course of repealing the legislation. His decision not to deliver outstanding commissions to those in line for appointment under the Federalists' enactments provoked the famous constitutional challenge confronted by the Court in *Marbury v. Madison*.¹³¹ In *Marbury*, Chief Justice Marshall fashioned an opinion that emphasized judicial authority to review the constitutionality of legislation. He yielded to the Republicans, however, on the specific question of Marbury's commission and thereby averted a direct confrontation between the judiciary and the executive.¹³² By avoiding a constitutional confrontation, the two sides seemed to strike a bargain. The Republicans appeared to be willing to recognize the judiciary's independence and power if the judges would agree to refrain from using their judicial positions to pursue clearly partisan political objectives.¹³³

This *modus vivendi* seemed to unravel when John Pickering, a mentally unbalanced federal judge from New Hampshire, was impeached and removed from office. Pickering was ousted after a heated Senate debate that focused on whether mental incompetence amounted to one of the "high Crimes and Misdemeanors" denominated as the only legitimate grounds for removal by Article II, section 4 of the Constitution.¹³⁴ In Pickering's case, a majority of senators eventually took a broad view of the impeachment power.

Partly on the strength of this expansive interpretation, Congress turned its attention almost immediately to another Federalist judge, Supreme Court Justice Samuel Chase. The gravamen of the charge against Chase was that he had conducted himself in a partisan fashion. All seven articles of impeachment focused upon his alleged bias. One article addressed his delivery of an inappropriately political charge to a grand jury in Baltimore. The other six focused on his conduct in both the treason trial of John Fries and the seditious libel trial of James Callender.

In the *Fries* case,¹³⁵ Chase was accused of stifling the defense counsel by issuing a preemptive legal opinion that prevented counsel from

131. 5 U.S. (1 Cranch) 137 (1803).

132. ELLIS, *supra* note 124, at 64-66.

133. *Id.* at 69.

134. *Id.* at 69-75.

135. PRESSER, THE ORIGINAL MISUNDERSTANDING, *supra* note 14, at 108-18. My analysis of Chase's impeachment draws extensively upon the outstanding work of Professor Presser. It should be noted that by contemporary standards, Fries's trial may not have been the travesty it seems when viewed in late twentieth century terms. Sanderson reported that at the

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arguing certain questions of law to the jury. Chase's opinion cut off the only viable avenue of defense and led counsel to withdraw from the proceedings in protest. Chase then announced that he would act as the defendant's counsel. Despite this commitment, Chase's closing remarks were strongly biased in favor of the prosecution.¹³⁶ In addition, he reminded the jury that Fries had been previously tried and convicted (even though the earlier conviction had been reversed on appeal). Fries was convicted of treason and sentenced to death.

Chase's involvement with the seditious libel case against James Callender, a scurrilous journalist, was similar to his role in the *Fries* case. Callender's main objective at trial was to challenge the constitutionality of the Sedition Act under which he was charged.¹³⁷ Chase preemptively intervened, however, barring counsel from both presenting certain evidence and arguing the law to the jury. Counsel once again chose to resign rather than comply with Chase's ruling. After an abbreviated trial, Callender was convicted.

Chase's real offense in both *Fries* and *Callender* was having invaded the province of the jury, most particularly by removing certain legal issues from their purview.¹³⁸ In acting as he did, he also opened himself to charges of judicial oppression. The Jeffersonians likened him to George Jeffreys, the worst of the Stuart judges, and accused him of having trespassed on territory set aside for the jury in such celebrated cases as *Zenger* and *Seven Bishops*.¹³⁹ Even though Chase was eventually acquitted by the Senate, his impeachment trial underscored the jury's continuing importance as adjudicator of law as well as fact.

The observations of Alexis de Tocqueville, an observer of American society in the early 1830s, are useful in understanding the role of the jury in his time. In *Democracy in America*, de Tocqueville concluded that the American jury was a fundamentally "political institution"¹⁴⁰ the primary function of which was to place political power in the hands of the governed. According to de Tocqueville, the jury also served as the "gratuitous public school"¹⁴¹ that taught citizens how to take charge of society's

close of proceedings, Fries thanked Justice Chase for the way he conducted the trial. Stephen Presser, *Et tu, Raul? or the Original Misunderstanding Misunderstood*, 1991 B.Y.U. L. REV. 1475, 1482 & n.31.

136. PRESSER, THE ORIGINAL MISUNDERSTANDING, *supra* note 14, at 113-14.

137. *Id.* at 136-37.

138. *See id.* at 18.

139. *Id.* at 13-14.

140. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 281 (Alfred A. Knopf, 15th ed. 1985) (1830).

141. *Id.* at 285.

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142. *Id.* at 286.

143. *See, e.g.,* HORWITZ

144. Malone, *supra* note

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supra note 14, at 113-14.

ERICA 281 (Alfred A. Knopf, 15th

affairs. Putting his finger on the essence of the Jeffersonian compromise, he concluded that "in no country are the judges so powerful as where the people share their privileges."¹⁴²

The high drama of the Jeffersonian period gave way to more prosaic and materialistic times in which the jury's function was significantly altered. Historians have concluded that merchants', bankers', and industrialists' demands for a more predictable, and perhaps sympathetic, system led to the curtailment of the jury's power, especially with respect to the determination of law.¹⁴³ The next two sections of this Article will explore the nature of some of the alterations made in the jury's operations and some of the limitations on the curtailment hypothesis. What follows will not be a systematic tracing of the history of the jury over the last 150 years, but rather an examination of several critical moments in that history—moments that reveal both change and continuity.

III. The Jury as Anchor in a Sea of Shifting Doctrine: Tort Law in the Nineteenth Century

Courts wanted to control juries during the last century, they want to control them today, and they will probably want to control them in the future. If we take away contributory negligence from the judges, they will find some other way. It's hard to beat judicial ingenuity.¹⁴⁴

The nineteenth century has been described as the era of the greatest judicial ingenuity. Morton Horwitz,¹⁴⁵ William Nelson,¹⁴⁶ and other outstanding legal historians have contended that throughout the century, judges labored to reformulate doctrines in areas such as tort law to better serve the needs of the business elite in a rapidly industrializing society. These historians have argued that as part of this reformist effort, judges were inclined to take ever more forceful steps to control juries. This description of nineteenth century developments does not, however, encompass the entire story. First, there was appreciable resistance to the "new" tort law, and juries continued to interject notions of common decency and fairness into the cases they heard. Second, shortly after the century's end, the backlash against one-sided and harsh, judicially-created tort doctrines resulted in a renewed reliance on the jury to humanize the law, a trend that has continued to the present.

142. *Id.* at 286.

143. *See, e.g.,* HORWITZ, *supra* note 119, at 140-41; NELSON, *supra* note 15, at 8.

144. Malone, *supra* note 16, at 182.

145. HORWITZ, *supra* note 119.

146. NELSON, *supra* note 15.

The doctrine of contributory negligence was foremost among the substantive tort principles created by the nineteenth century judiciary to control the jury. This rule, in its most rigorous form, requires that a plaintiff be denied all recovery if she is found to have contributed, even in the slightest degree, to her injury.¹⁴⁷ The doctrine of contributory negligence was treated as neither new nor special when it made its first appearance in the 1809 English case of *Butterfield v. Forrester*.¹⁴⁸ The fact that its originality was thus overlooked is something of a mystery. It has been suggested that the court had no intention of creating a new, broad-ranging doctrine, but was simply reiterating traditional, perhaps even medieval, notions about liability in cases involving a sequence of wrongful acts.¹⁴⁹ Be that as it may, over the course of the 1800s the doctrine grew into the foremost barrier to recovery in tort cases. Professor Lawrence Friedman found that the defense was used in about half of all railroad cases—the most important category of tort cases—litigated in Alameda County, California, between 1880 and 1900.¹⁵⁰

Contributory negligence served as an effective barrier in tort cases because it shifted the focus of judicial attention from the defendant's liability to the plaintiff's conduct. It required that compensation be denied if the plaintiff could not prove that certain self-protective measures were taken (such as stopping, looking, and listening before crossing a railroad track). If the plaintiff could not provide such proof, the judge could dismiss the case as a matter of law, without ever submitting the matter to the jury.¹⁵¹ Alternatively, the judge could sharply narrow the jury's deliberations by giving strict judicial instructions concerning the plaintiff's failure of proof.¹⁵²

In 1946 Professor Wex Malone wrote what has generally been treated as the definitive history of the rise of the contributory negligence principle in America.¹⁵³ He focused his study on the growth of the doctrine in New York state, one of the nation's early industrial leaders. New York first applied the doctrine in 1829, but it grew slowly, appearing in only four appellate decisions in twenty years.¹⁵⁴ In the period between

147. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 65, at 451-53 (5th ed. 1984).

148. 103 Eng. Rep. 926, 927 (K.B. 1809).

149. See Fleming James, Jr., *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704, 704-05 (1938).

150. Lawrence M. Friedman, *Civil Wrongs: Personal Injury Law in the Late 19th Century*, 1987 AM. B. FOUND. RES. J. 351, 367.

151. Malone, *supra* note 16, at 164-65.

152. *Id.* at 167-69.

153. *Id.*

154. *Id.* at 153.

1850 and 1860, however, a dozen decisions, nine of which were in the decade and doubled in dramatic upsurge in the 1850s to "a seething, although [judges and lawyers] felt the corporate defendants."¹⁵⁵

The judiciary came to be seen as handing the new industrial revolution an irremediably biased agenda of assumptions, judges' social policy analysis was neatly summed up in *Erie Railroad*.¹⁵⁷

We can not shut our eyes to the fact that between the weak and the gigantic corporation the honest and generous man is at a disadvantage, and apparently exercises over the delinquent a power which is not honorable to them and which is in violation of the principles of law and of manifest propriety in those cases in which

Juries came to be seen as the province it is to aid the Declaration of Independence in its subordinate place in the contributory negligence cases of critical question to be determined exclusively by the jury could steer the case as

Had this been the case in favor of recognizing contributory negligence had been overwhelming¹⁶⁰ disappearing from tort cases in the underp

155. *Id.* at 155.

156. *Id.*

157. 13 Barb. 2 (N.Y. S.

158. *Id.* at 15-16.

159. *Ernst v. Hudson R.R.*, 158 F. 158, 158-59, *supra* note 16, at 158-59.

160. See *supra* note 144

foremost among the century judiciary to form, requires that a contributed, even in of contributory negligence it made its first appearance.¹⁴⁸ The fact of a mystery. It has creating a new, broad-based, perhaps even a sequence of wrongs in the 1800s the doctrine cases. Professor Lawrence about half of all railroad cases—litigated in 1900.¹⁵⁰

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that has generally been contributory negligence the growth of the doctrine industrial leaders. New slowly, appearing in In the period between

1850 and 1860, however, contributory negligence was relied upon in a dozen decisions, nine after 1855.¹⁵⁵ The doctrine's use tripled in the next decade and doubled in the decade after that. Malone argued that the dramatic upsurge in the use of contributory negligence was attributable to "a seething, although somewhat covert, dissatisfaction over the part [judges and lawyers] felt the jury was destined to play in . . . cases against corporate defendants."¹⁵⁶

The judiciary came to believe that the jury was incapable of comprehending the new industrial reality. Judges also assumed that jurors were irremediably biased against corporate defendants. Based on these assumptions, judges sought to curtail the jury's authority. The courts' analysis was neatly summarized by Judge Barculo in *Haring v. New York and Erie Railroad*:¹⁵⁷

We can not shut our eyes to the fact that in certain controversies between the weak and the strong—between a humble individual and a gigantic corporation, the sympathies of the human mind naturally, honestly and generously, run to the assistance and support of the feeble, and apparently oppressed; and that compassion will sometimes exercise over the deliberations of a jury, an influence which, however honorable to them as philanthropists, is wholly inconsistent with the principles of law and the ends of justice. There, [sic] is therefore, a manifest propriety in withdrawing from the consideration of the jury, those cases in which the plaintiff fails to show a right of recovery.¹⁵⁸

Juries came to be viewed as "mere assistants of the courts, whose province it is to aid them in the decision of disputed questions of fact."¹⁵⁹ Declarations such as these were utilized to justify confining the jury to a subordinate place in the litigation process. Courts applied the doctrine of contributory negligence to enforce this subordination by converting a series of critical questions about the plaintiff's conduct into issues of law to be determined exclusively by the judge. Thus empowered, the judge could steer the case as he believed the needs of society demanded.

Had this been the end of the matter, Professor Malone's argument in favor of recognizing and yielding to judicial "ingenuity" would have been overwhelming¹⁶⁰ and the jury would have been well on its way to disappearing from tort cases. There were, however, substantial weaknesses in the underpinnings of the contributory negligence doctrine.

155. *Id.* at 155.

156. *Id.*

157. 13 Barb. 2 (N.Y. Sup. Ct. 1852).

158. *Id.* at 15-16.

159. *Ernst v. Hudson River R.R.*, 24 How. Pr. 97, 105 (N.Y. 1862), quoted in Malone, *supra* note 16, at 158-59.

160. See *supra* note 144 and accompanying text.

ON THE LAW OF TORTS § 65,

tional Doctrine, 47 YALE L.J.

Law in the Late 19th Century,

Most importantly, the rule was premised on the notion that jurors are foolish laymen incapable of exercising judgment in tort cases. The available evidence suggested otherwise. In his empirical examination of actual jury decisions in Alameda County, Professor Friedman found that while jurors tended to favor plaintiffs, they did not do so "crudely or inevitably."¹⁶¹ They appeared to exercise careful and discriminating judgment. This information, assuredly similar to that to be observed in New York's courts, must have weakened the New York judges' arguments against the jury.

Classical contributory negligence doctrine had other serious flaws as well. Application of the doctrine provided virtually no incentive for improvements in safety. A good example of this phenomenon occurred in the railroad industry in the late nineteenth century. Although efficient railway air brakes were invented in 1868, they were not adopted by the railway industry until legislation was passed compelling installation in the mid-1880s.¹⁶² Adoption was likely delayed because contributory negligence and other restrictive tort doctrines allowed railways to avoid liability despite reliance on shoddy equipment.

Contributory negligence was also troublesome because it granted the court an extremely broad power "to accept or reject jury participation at its pleasure."¹⁶³ However, a court's unbridled discretion was potentially as lawless and unpredictable as a jury's. In an effort to curb this discretion, at least in the railroad cases that made up the bulk of tort actions, courts developed certain geography-based rules. These rules rejected railroad liability in rural settings where there appeared to be a clear view of trains approaching intersections, but allowed cases to go to the jury in urban environments.¹⁶⁴ The intellectual poverty of this mechanical approach to adjudication is obvious.

Perhaps the most troubling feature of contributory negligence was the way it dehumanized the law by excluding the jury's real-world concerns from the adjudicatory process. Nineteenth century tort doctrine became an inflexible set of rules that ignored such issues as powerlessness, sympathy, fear of corporate oppression, and compassion in order that judges might pursue the allegedly majestic "principles of law."¹⁶⁵ John Noonan has exposed the terrible human toll these judicial con-

structs—these "masks"—human considerations a favor of an abstract and

Visions of judicial contributory negligence, since the doctrine probably because those visions of contributory negligence were fell into progressively emerged as a full participant never have been banished than New York, including the fact that contributory negligence in the late nineteenth century resulted in eliminating the

Even assuming that in the early 1900s its hold on Thompson's *Commentary* on contributory negligence as "crucial to the negligence of mankind."¹⁷⁰ The law when Congress enacted which barred reliance on contributory negligence of railway workers. FEL parative negligence, the fact that employers had contributed to the first state to shift all negligence basis.¹⁷² The c

161. Friedman, *supra* note 150, at 375.

162. Malone, *supra* note 16, at 161.

163. *Id.* at 169.

164. *Id.* at 170-72.

165. See *supra* text accompanying note 158.

166. JOHN T. NOONAN,

167. See *id.* at 19-28.

168. See, e.g., Gary T. America: A Reinterpretation New Hampshire Supreme Court excuse, and the California Street by street cars).

169. SEYMOUR THOMPSON (1901), quoted in Friedman,

170. Friedman, *supra* note

171. Federal Employers 45 U.S.C. § 53 (1988)).

172. KEETON ET AL., s

e notion that jurors are in tort cases. The available examination of accor Friedman found that not do so "crudely or useful and discriminating to that to be observed in New York judges' argu-

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ntributory negligence was the jury's real-world con-nth century tort doctrine such issues as powerless- and compassion in order tic "principles of law."¹⁶⁵ an toll these judicial con-

structs—these "masks"—can take.¹⁶⁶ Such masks invite judges to ignore human considerations and the potential harmfulness of legal doctrines in favor of an abstract and often insidious set of principles.¹⁶⁷

Visions of judicial ingenuity's triumph through the doctrine of contributory negligence, such as Professor Malone's, are flawed not only because the doctrine produces results of such dubious quality, but also because those visions miss the most important chapter of the story. Contributory negligence was not society's last word on torts. The doctrine fell into progressively greater disfavor until the jury eventually re-emerged as a full participant in the tort process—indeed, the jury may never have been banished to the degree Malone suggests. In states other than New York, including New Hampshire and California, there is evidence that contributory negligence was a relatively disfavored doctrine in the late nineteenth century and that its invocation did not regularly result in eliminating the jury from the process.¹⁶⁸

Even assuming that contributory negligence was victorious, by the early 1900s its hold on the law had begun to crumble. In 1901, Seymour Thompson's *Commentaries on the Law of Negligence* labeled contributory negligence as "cruel and wicked."¹⁶⁹ Thompson declared that contributory negligence "shocks the ordinary sense of justice of mankind."¹⁷⁰ The law began to move away from the doctrine in 1908 when Congress enacted the Federal Employers Liability Act¹⁷¹ (FELA), which barred reliance on contributory negligence in most cases involving railway workers. FELA utilized the jury and premised recovery on comparative negligence, thereby facilitating partial recovery even when workers had contributed to their injuries. In 1910, Mississippi became the first state to shift all its personal injury actions to a comparative negligence basis.¹⁷² The comparative negligence doctrine grew slowly but

166. JOHN T. NOONAN, *PERSONS AND MASKS OF THE LAW* 19 (1976).

167. *See id.* at 19-28.

168. *See, e.g.,* Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1744-45, 1751-52 (1981) (suggesting that the New Hampshire Supreme Court appraised collisions in a way that gave victims a presumptive excuse, and the California Supreme Court required only "ordinary care" from pedestrians hit by street cars).

169. SEYMOUR THOMPSON, 1 *COMMENTARIES ON THE LAW OF NEGLIGENCE* 168-69 (1901), *quoted in* Friedman, *supra* note 150, at 356.

170. Friedman, *supra* note 150, at 365-67.

171. Federal Employers Liability Act, Ch. 149, 35 Stat. 66 (1908) (codified as amended at 45 U.S.C. § 53 (1988)).

172. KEETON ET AL., *supra* note 147, § 67, at 471.

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L. REV. 286, 289 (1901).

Review,¹⁷⁸ he challenged the jury, most particularly in civil cases, as an inefficient mechanism in need of substantial overhaul.¹⁷⁹ While Coxe acknowledged the ability of the jury to resolve many factual questions, he believed it was incapable of addressing truly complex matters.¹⁸⁰ He pointed to the unanimous decision rule as a substantial deterrent to effective adjudication¹⁸¹ and stressed the need to improve the quality of the venire.¹⁸² Coxe's argument is striking not only because of the contemporary sound of his complaints, but also because both his criticisms and proposed solutions lacked any empirical grounding. He assumed that the jury's flaws, as well as appropriate reforms, were self-evident. Apparently, he viewed rhetoric as ample justification for change.

The rhetoric of efficiency grew in popularity over the succeeding thirty years. A brief survey of the *Index to Legal Periodical Literature* indicates that the number of efficiency-concerned, jury-critical articles grew from approximately 16 between 1899 and 1906 to approximately 39 between 1924 and 1932.¹⁸³ One of the leading critics of this era was Professor Edson Sunderland of the University of Michigan Law School.¹⁸⁴ In 1915 he wrote a seminal article entitled *The Inefficiency of the American Jury*,¹⁸⁵ in which he argued that judges should be granted extensive powers to comment upon the quality and implications of the evidence in their closing remarks. This approach, relied upon in English practice, had been sharply curtailed in America on the theory that it allowed excessive judicial intrusion into the jury's province.¹⁸⁶

Sunderland contended that judicial commentary could substantially improve efficiency by reducing the time needed to select jurors and pres-

178. *Id.*

179. *Id.* at 290-91.

180. *Id.* at 291.

181. *Id.* at 292, 294.

182. *Id.* at 296-97.

183. From 1899 to 1906, there were 96 articles in the *Index* section entitled "Jury." Of these, 66 were neutral, inapposite, or unavailable. From 1924 to 1932, there were 184 articles in the appropriate section. Of these, 128 were neutral, inapposite, or unavailable. Because some of the relevant data were unavailable, the number of efficiency-concerned jury-critical articles in each period may be greater than the number reported in the text. In light of the total number of articles written in each period, however, it does not seem likely that the ratio would change dramatically.

184. Professor Sunderland would eventually play a critical part in drafting the Federal Rules of Civil Procedure. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 967 & n.342 (1987).

185. Edson R. Sunderland, *The Inefficiency of the American Jury*, 13 MICH. L. REV. 302 (1915).

186. *Id.* at 305.

ent the evidence, as well as affording the court an opportunity to correct errors that might otherwise lead to appeals and new trials.¹⁸⁷ The judge, through his wise counsel, would properly guide all but the most recalcitrant jurors. While some argued that this approach might rob the jury of its independence, Sunderland replied that the jury remained free at all times to decide as it felt proper and that it could never be forced into a decision against its will.¹⁸⁸ The inconsistency between these two propositions was either ignored or not recognized. Sunderland made no effort to produce any empirical evidence to demonstrate how judicial commentary would work. In response to the objection that judicial commentary is inconsistent with the jury's political role as a check on the judiciary, Sunderland adopted a narrow functionalist strategy claiming: first, that in a democracy the jury has little political significance; and second, that the jury's only real job is to properly resolve questions of fact. Sunderland's approach is strikingly similar to that adopted sixty years later by Justice White in *Colgrove v. Battin*.¹⁸⁹

Sunderland revisited the jury issue on several occasions over the next ten years. In 1920 he campaigned for the use of special verdicts, which he presented as a means of curtailing jury authority by requiring jurors to detail the basis for their decisions.¹⁹⁰ In 1926 he returned to the inefficiency theme when he repeated his article from eleven years earlier virtually verbatim.¹⁹¹ Interestingly, in a new section of this article, he attacked various rules of evidence and called for empirical data to justify regulations that he felt were premised "upon the merest speculation."¹⁹² Unfortunately, he did not require the same kind of proof to support his criticism of the jury or his assertions about the benefits of judicial commentary on the evidence.¹⁹³

Sunderland's articulation of a selective empirical concern should not come as a complete surprise. In certain legal circles in the 1920s, there was a decided shift away from a rhetorical and formalist¹⁹⁴ approach to

187. *Id.* at 310-12.

188. *Id.* at 309-10.

189. *See supra* note 1.

190. Edson R. Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253, 259-60 (1920).

191. *See* Edson R. Sunderland, *The Problem of Trying Issues*, 5 TEX. L. REV. 18 (1926).

192. *Id.* at 22 (referring specifically to the statute of frauds).

193. Sunderland eventually gathered data on jury operations and reported them in a speech he gave in 1937. Edson R. Sunderland, *Trial by Jury*, 11 U. CIN. L. REV. 119, 120-30 (1937).

194. Wallace Loh has provided a fine brief definition of formalism. He says formalism "conceived of law as a closed, deductive body of logically ordered rules." WALLACE D. LOH, *SOCIAL RESEARCH IN THE JUDICIAL PROCESS* 612 (1984).

the law. The legal realist in the writings of Oliver Wendell Holmes has not been logic; it has been study the law in operation. The prominent realists explained because the necessary basic prerequisites for reform.

Empirical work was the center of this activity was Yale University faculty member.¹⁹⁷ Clark opined:

Jurists of experience, the expense, and the aleatoric more and more restricted safety valve for the judiciary and the odium of decisional injury actions, very high.¹⁹⁸

In 1927 Clark and a number of cases filed in the New York courts substitute for the vague philosophical concrete information,¹⁹⁹ and to use these

By 1934 Clark had a database of more than 2000 cases, the strength of this data on the jury in an article entitled *Administration*.²⁰⁰ The justification for criticism used in only four percent of cases, four percent of trial time

195. OLIVER W. HOLMES, JR., *THE COMMON LAW* 1 (1881).

196. John H. Schlegel, *American Legal Experience*, 28 BUFF. L. REV. 1 (1979).

197. Clark would eventually become a judge. *See* Subrin, *supra* note 1.

198. Charles E. Clark, *The Jury*, 22 YALE L.J. 707, 711 (1923) (1923).

199. Charles E. Clark, *The Jury*, 22 YALE L.J. 707, 711 (1923) (1923).

200. Charles E. Clark, *The Jury*, 22 YALE L.J. 707, 711 (1923) (1923).

201. *Id.* at 882.

portunity to correct trials.¹⁸⁷ The judge, but the most recalcitrant might rob the jury of remained free at all never be forced into a when these two propositions and made no effort to judicial commentary judicial commentary is on the judiciary, Sunning: first, that in a and second, that the of fact. Sunderland's years later by Justice

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ical concern should not cles in the 1920s, there ormalist¹⁹⁴ approach to

the law. The legal realist movement was taking hold, perhaps inspired by the writings of Oliver Wendell Holmes who declared: "The life of the law has not been logic; it has been experience."¹⁹⁵ The realists wanted to study the law in operation and reform inefficient aspects of it. As several prominent realists explained: "The reformers have failed [in the past] because the necessary basic research was lacking We regard facts as the prerequisites for reform."¹⁹⁶

Empirical work was begun on a number of topics. One of the centers of this activity was Yale Law School, where Charles E. Clark was a faculty member.¹⁹⁷ Clark was no friend of the jury. In a 1923 article he opined:

Jurists of experience find little to say in support of the delays, the expense, and the aleatory results of trial by jury. In England it is being more and more restricted. Its real advantage seems to be as a kind of safety valve for the judicial system. It relieves the judges of the burden and the odium of deciding close questions of fact in cases, such as personal injury actions, where the feelings of litigants are apt to run high.¹⁹⁸

In 1927 Clark and a number of his Yale colleagues began an examination of cases filed in the New Haven Superior Court. Their objective was "to substitute for the vague generalizations of the older economists and philosophers concrete information based on adequate statistical information,"¹⁹⁹ and to use these data as a springboard for reform.

By 1934 Clark and co-author Harry Shulman had amassed a database of more than 23,000 cases brought between 1919 and 1932. On the strength of this data base they attempted to survey the worth of the jury in an article entitled *Jury Trial in Civil Cases—A Study in Judicial Administration*.²⁰⁰ They argued that their findings provided empirical justification for criticisms of jury efficiency. They found that juries were used in only four percent of civil cases while consuming as much as forty-four percent of trial time,²⁰¹ that the vast preponderance of jury cases

195. OLIVER W. HOLMES, JR., *THE COMMON LAW* 1 (1898).

196. John H. Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 *BUFF. L. REV.* 459, 468 (1979) (quoting A Program of Research in the Administration of the Law, App. A at 1 (n.d. Summer 1926) (Hutchins papers)).

197. Clark would eventually be the primary architect of the Federal Rules of Civil Procedure. See Subrin, *supra* note 184, at 961-75.

198. Charles E. Clark, *Union of Law and Equity and Trial by Jury Under the Codes*, 32 *YALE L.J.* 707, 711 (1923) (footnotes omitted).

199. Charles E. Clark, *Fact Research in Law Administration*, 1 *MISS. L.J.* 324, 324 (1929).

200. Charles E. Clark & Harry Shulman, *Jury Trial in Civil Cases—A Study in Judicial Administration*, 43 *YALE L.J.* 867, 869 (1934).

201. *Id.* at 882.

1, 29 *YALE L.J.* 253, 259-60

es, 5 *TEX. L. REV.* 18 (1926).

ions and reported them in a 1 *U. CIN. L. REV.* 119, 120-30

ormalism. He says formalism ed rules." WALLACE D. LOH,

clustered in the negligence area,²⁰² and that, because of the need for alternates and the discarding of potential jurors through voir dire, jury trial consumed the time of substantially more than twelve jurors, all leading to higher costs for the state.²⁰³ On the basis of these findings, they concluded:

Whatever the political, psychological or jurisprudential values of the jury as an institution may be, its use in the civil litigation covered by this study is certainly not impressive. The picture seems to be that of an expensive, cumbersome and comparatively inefficient trial device employed in cases where exploitation of the situation is made possible by underlying rules. Persuasive reasons are found in the facts set forth for the definite limitation of the right of jury trial to the role of safety valve; and for the greater use of the summary judgment in the debt cases, the requirement of substantial jury trial fees, and the reduction in the number of jurors required for a petit jury to nine or even six.²⁰⁴

These arguments seem less than convincing. The data are not tightly focused on jury operations. Many of the statistically-based insights are modest and the authors failed to consider the jury's role as either trend-setter or political mechanism. Indeed, Clark and Shulman stacked the debate by adopting a reductionist strategy that failed to consider the great variety of functions that the jury served. They also neglected to determine whether their data were typical of the broader American scene. In fact, in 1930, Professor Silas Harris of Ohio State Law School had indicated that the Connecticut data were seriously skewed because juries there were atypically anti-plaintiff in their orientation.²⁰⁵ An idiosyncratic 1854 jury selection law compelled the choice of a superabundance of conservative rural jurors. This, in turn, discouraged plaintiffs from opting for the jury with the same frequency noted in other jurisdictions. This information underscored the need for a broader research effort that looked beyond raw court statistics and focused on more than a single locale. Unfortunately, by the middle 1930s the realist movement's empirical efforts were beginning to falter. The failure of the research to yield substantial support for reform combined with its considerable expense put a damper on further inquiry.²⁰⁶

Large scale jury research resumed in the 1950s when Hans Zeisel, Harry Kalven, and the University of Chicago Jury Project turned their attention to the subject.²⁰⁷ The Project focused on particular localities,

like Manhattan's congressional series of samples. The assessments that were internal workings and search, it is not surprising on the question of decisions were approximately. Zeisel also concluded, great and was more to the process.²¹⁰ According means of a series of cases.

In their research Kalven and Zeisel's view was the finding that approximately 78 percent of the jurors were favorably with agreement with society, including dissenting evaluators for Zeisel conducted a random sample to conclude that the jury generally functioned as intended.²¹⁴ These findings provided empirical defense of the jury system in 1990:

Over the past century, the jury has become nearly universally believed in the importance of the jury system. Kalven and Hans Zeisel's research was the most ambitious and comprehensive analysis, the authors concluded, for adjudicating cases. The jury served as an enforcement, and a check on the decision-making process.

202. *Id.* at 870.

203. *Id.* at 876.

204. *Id.* at 884 (footnote omitted).

205. See Silas A. Harris, *Is the Jury Vanishing?*, 7 N.Y.U. L. REV. 657, 667 (1930).

206. Schlegel, *supra* note 196, at 572-75.

207. KALVEN & ZEISEL, *supra* note 17, at 33-54.

208. See HANS ZEISEL,

209. *Id.* at 9.

210. *Id.*

211. *Id.* at 8-18.

212. KALVEN & ZEISEL,

213. See, e.g., Shari S. Dworkin, *Decisions*, in 2 THE MAKING OF DECISIONS, ed. by Kalven & Zeisel, 1961.

214. KALVEN & ZEISEL,

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like Manhattan's congested courts, and the nation at large by means of a series of samples. The samples consisted of both juror and judge case assessments that were analyzed to provide information about the jury's internal workings and reliability. Given the historical context of the research, it is not surprising that the first book-length monograph focused on the question of delay.²⁰⁸ Zeisel and his colleagues found that jury trials were approximately forty percent slower than bench trials.²⁰⁹ Zeisel also concluded, however, that the jury system's total cost was not great and was more than justified by the values it introduced into the process.²¹⁰ According to Zeisel, the delay problem was best addressed by means of a series of case and trial management techniques.²¹¹

In their research on the broader question of the efficacy of the jury, Kalven and Zeisel's work disclosed some important facts. Perhaps key was the finding that the judge and jury agree about trial outcome approximately 78 percent of the time.²¹² This level of agreement compares favorably with agreement among other decisionmakers in American society, including diagnosing physicians and psychiatrists as well as grant evaluators for the National Science Foundation.²¹³ Kalven and Zeisel conducted a range of sophisticated analyses that led them to conclude that the jury generally "follows the evidence and understands the case."²¹⁴ These findings and a number of others established a strong empirical defense of the jury system. Professor George Priest concluded in 1990:

Over the past quarter century . . . support for the civil jury has become nearly unanimous. In large part, the overwhelming modern belief in the importance of the civil jury can be attributed to the influential work of the University of Chicago Jury Project led by Harry Kalven and Hans Zeisel. In its time, the Kalven-Zeisel Jury Project was the most ambitious empirical study of jury decisionmaking that had ever been attempted. As a result of their extensive empirical analysis, the authors claimed that the civil jury was a superior institution for adjudicating disputes involving complex societal values, that the jury served as an important instrument of popular control over law enforcement, and that the jury brought a superior sense of social equity to the decisionmaking process. Indeed, the authors interpreted their

208. See HANS ZEISEL ET AL., *DELAY IN THE COURT* (1959).

209. *Id.* at 9.

210. *Id.*

211. *Id.* at 8-18.

212. KALVEN & ZEISEL, *supra* note 17, at 55-65.

213. See, e.g., Shari Seidman Diamond, *Order in the Court: Consistency in Criminal-Court Decisions*, in 2 *THE MASTER LECTURE SERIES: PSYCHOLOGY AND THE LAW* 123 (Sheirer and Hammonds eds., 1982).

214. KALVEN & ZEISEL, *supra* note 17, at 149.

empirical findings to confirm simultaneously each of these assertions.²¹⁵

While it is possible to question Priest's claim regarding the uncritical reception of the jury in light of *Colgrove* and other Supreme Court decisions, Kalven and Zeisel did refocus the debate on empirical questions, forcing policy makers to begin thinking about social science analysis.

V. The Jury Redux

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 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. Indeed one reason why I believe in our practice of leaving questions of negligence to them is what is precisely one of their gravest defects from the point of view of their theoretical function: that they will introduce into their verdict a certain amount—a very large amount, so far as I have observed—of popular prejudice, and thus keep the administration of the law in accord with the wishes and feelings of the community. Possibly such a justification is a little like that which an eminent English barrister gave me many years ago for the distinction between barristers and solicitors. It was in substance that if law was to be practised somebody had to be damned, and he preferred that it should be somebody else.²¹⁶

Like Oliver Wendell Holmes's solicitors, the late twentieth century jury stands in the unenviable position of being damned on a regular basis because it must decide the most difficult questions before the courts. For example, courts regularly ask juries to review the propriety of business transactions of the most ambiguous or troubling sort. The Pennzoil Corporation turned to a jury, not a judge, when Texaco interfered with a lucrative deal involving the Getty Oil Company.²¹⁷ From the beginning, the behavior of the principals in this affair was riddled with unsavory practices, including bad faith bargaining, the destruction of evidence, and apparent efforts to buy influence.²¹⁸ This mass of misstatements and greed was eventually turned over to a group of twelve ordinary citizens

215. George L. Priest, *The Role of the Civil Jury in a System of Private Litigation*, 1990 U. CHI. LEGAL F. 162 (1990).

216. Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 459-60 (1899).

217. *Texaco, Inc. v. Penzoil Co.*, 729 S.W.2d 768 (Tex. Ct. App. 1987), cert. dismissed, 485 U.S. 994 (1988), appeal dismissed on agreement of the parties, 748 S.W.2d 631 (Tex. Ct. App. 1988).

218. See generally THOMAS PETZINGER, JR., *OIL AND HONOR: THE TEXACO-PENNZOIL WARS* (1987); Robert H. Mnookin & Robert B. Wilson, *Rational Bargaining and Market Efficiency: Understanding Pennzoil v. Texaco*, 75 VA. L. REV. 295 (1989).

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The most striking vested in the jury and the process. The corporeal manner, the law themselves at their pet the appearance of impr was society's last hope wrong. As Holmes put damned."

Judicial control provoked the expanded Modern juries have been questions, those affecting the absence of any other and product defects have been far from ideal the jury has at least re

Among the most smokers and tobacco ers' claims, viewing the ery.²²² The declarative Rose Cipollone power these cases.²²³ After award was made to "Why do I have to be responsible for smoki

219. Mnookin & Wilson, *supra* note 218, at 300 (calculating compensatory damages and \$3 million in punitive damages).

220. In nine states for 82% of all jury trials. See (unpublished manuscript, on file with author).

221. For an excellent analysis of the jury's response to *Butterfield v. Martin*, see 177, 198-201 (1989) (document toward holding corporation liable).

222. *Id.* at 99 n.119 (citing TRIAL DIPL. J. 18 (1987) lawsuits brought against the jury).

223. *Cipollone v. Liggett Group, Inc.*, 955 F.2d 681 (3d Cir. 1992), part and rev'd in part, 893 F.2d 1091 (3d Cir. 1992).

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who rendered one of the largest, most widely discussed and sharply criti-
cized verdicts in American history.²¹⁹

The most striking feature of this case was the incredible power
vested in the jury and the abysmal failure of every other participant in
the process. The corporate players behaved in a shameless and reprehens-
ible manner, the lawyers representing virtually every party showed
themselves at their pettifogging worst, and the judiciary was tainted by
the appearance of impropriety. The jury, whether it acted well or badly,
was society's last hope for correcting a transaction gone desperately
wrong. As Holmes put it, the jury was there if "somebody had to be
damned."

Judicial control of negligence litigation in the nineteenth century
provoked the expanded use of juries in twentieth century tort cases.²²⁰
Modern juries have been called upon to decide the most difficult tort
questions, those affecting the lives and health of countless Americans. In
the absence of any other remedial mechanism, the victims of toxic torts
and product defects have turned to the jury. Jury decisions in these areas
have been far from ideal but, in the absence of any effective alternative,
the jury has at least responded.

Among the most interesting jury verdicts have been those involving
smokers and tobacco companies.²²¹ Juries have generally rejected smok-
ers' claims, viewing the plaintiffs' voluntary actions as a barrier to recov-
ery.²²² The declaration of one juror in the recently concluded case of
Rose Cipollone powerfully dramatizes the difficulty that jurors face in
these cases.²²³ After the conclusion of that case, the first in which any
award was made to a smoker, juror Ralph Eliseo plaintively asked,
"Why do I have to have the responsibility of deciding if a person was
responsible for smoking, was responsible for their own death? If Rosie

219. Mnookin & Wilson, *supra* note 218, at 296. The jury awarded \$7.53 billion in com-
pensatory damages and \$3 billion in punitive damages.

220. In nine states for which figures are available, tort cases make up between 46% and
82% of all jury trials. See Marc Galanter, *Are Civil Juries a Good Thing?* 7 (May 26, 1992)
(unpublished manuscript, on file with author).

221. For an excellent analysis of jury behavior in the tobacco cases, see Valerie P. Hans,
The Jury's Response to Business and Corporate Wrongdoing, 52 LAW & CONTEMP. PROBS.
177, 198-201 (1989) (documenting the tensions and ambivalence prevalent in public reactions
toward holding corporations responsible for individual behavior).

222. *Id.* at 99 n.119 (citing David Gidmark, *The Tobacco Juries—An In-Depth Study*, 10
TRIAL DIPL. J. 18 (1987) (before 1988, tobacco companies won all the approximately 300
lawsuits brought against them)).

223. *Cipollone v. Liggett Group, Inc.*, U.S. Dist. Ct. No. 83-2864 (D.N.J. 1988), *aff'd in
part and rev'd in part*, 893 F.2d 541 (3d Cir. 1990) *aff'd in part and rev'd in part*, 112 S. Ct.
2608 (1992).

knew she was smoking a bad product why didn't she stop? I didn't think it was fair that she put this burden on me."²²⁴ Yet Mr. Eliseo and his fellow jurors did shoulder this burden, as jurors have been doing for hundreds of years. When juries get the answer right very little is said. When they get it wrong, or even when they make a "hard" decision, they are likely to be criticized. Yet their behavior, especially in products liability actions like the tobacco cases, suggests that they take a more thoughtful and measured approach than is generally acknowledged.

Juries today have also been asked to rule on matters of the greatest constitutional gravity. This is clearest in the criminal setting, in which the Supreme Court has emphasized the value of having juries decide the question of life or death in capital cases. But it is also true in the civil setting. In defamation cases like that between Ariel Sharon, the Israeli politician, and *Time Magazine*,²²⁵ juries have determined the appropriate limits of the freedom of the press and the nature of the public's right to be informed. They have generally handled such matters with great sensitivity. In the *Sharon* case, the jury harshly criticized *Time*, but recognized the strictness of the constitutional limitations on libel.²²⁶ As in the time of Peter Zenger,²²⁷ the jury stood ready to sort out questions of libel while respecting the principle of free expression.

Examples like *Pennzoil*, *Cipollone*, and *Sharon* establish very little on their own. Equally, examples of the worst jury errors prove virtually nothing. More than one hundred years ago, Forsyth cautioned against arguments by anecdote. As he explained, "It would not be difficult for an opponent of the system to cite ludicrous examples of foolish verdicts, but they would be a very unfair sample of the average quality; and nothing can be more unsafe than to make exceptional cases the basis of legislation."²²⁸ The cases mentioned in this section are the end product of a long and complex history. An appreciation of that history requires avoiding simplistic thinking about the jury. The jury is not a simple device. It has served, and still serves, as a political check on the judiciary, an infuser of democratic principles into the adjudicatory process, a barrier to oppressive conduct, and a preserver of humanity and common sense in decisionmaking. Whenever these jury functions are forgotten, insightful analysis is undermined. History teaches us that the jury has

224. STEVEN BRILL ET AL., TRIAL BY JURY 416 (1989). The *Cipollone* verdict was reversed and the case remanded for retrial. See *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541 (3d Cir. 1990) *aff'd in part and rev'd in part*, 112 S. Ct. 2608 (1992).

225. *Sharon v. Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984).

226. BRILL ET AL., *supra* note 224, at 132.

227. See *supra* note 86 and accompanying text.

228. FORSYTH, *supra* note 30, at 376.

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been protean, repeatedly adapting to the needs of changing times. It was William I's engine of inquisition, but it was also a bulwark of resistance to James II. Recent history suggests that if we are really to understand this changing organ of government we will have to pursue diligently the empirical work Kalven and Zeisel began almost forty years ago. It is no coincidence that when we engage in serious discussions about the jury system, we turn to social scientists, as well as lawyers. The time for unsubstantiated rhetoric is long past. Careful analysis and thoughtful experiment are needed.

The civil jury is not invincible. Its disappearance in England over the twenty years between the First World War and the Great Depression provides proof, if any is needed, of its mortality.²²⁹ If the American jury is not to suffer the same fate, we must be sensitive to de Tocqueville's observation:

The institution of the jury, if confined to criminal causes, is always in danger; but when once it is introduced into civil proceedings, it defies the aggressions of time and man. . . . The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged and with the notion of right. If these two elements be removed, the love of independence becomes a mere destructive passion. It teaches men to practice equity; every man learns to judge his neighbor as he would himself be judged. And this is especially true of the jury in civil causes; for while the number of persons who have reason to apprehend a criminal prosecution is small, everyone is liable to have a lawsuit. . . . It invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society and the part which they take in its government. By obliging men to turn their attention to other affairs than their own, it rubs off that private selfishness which is the rust of society.²³⁰

If we do not heed this advice we are likely to lose one of the most flexible and democratic of our governing devices. We would be deprived of an institution that has proven itself uniquely capable of adapting to the needs of an ever changing America.

229. Devlin argues that the main reason for the jury's demise in English civil cases was that both barristers and solicitors got out of the habit of jury practice during the hiatus imposed by World War I and its aftermath. DEVLIN, *supra* note 23, at 131-33.

230. DE TOCQUEVILLE, *supra* note 140, at 284-85.