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Foreword

Patrick Higginbotham

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THE use of juries in criminal cases seems to escape the criticism leveled at the use of juries in civil cases. Those who cry for "reform" on the civil side fall silent about juries deployed to decide whether a citizen will lose his life or liberty. It is fair to ask why juries are competent to decide if a man will live or die, but not competent to decide if that man must pay money damages. This suggests that the attacks upon the civil jury may be in part deflected or misguided responses to ills that we erroneously hold the civil jury accountable for. Critics move too quickly to the verdicts, the answers juries give, without pausing to examine the questions that were asked. Courts ask the jury to award punitive damages, telling them that punitive damages are to deter and to punish, often pointing out the size of the defendant's earnings. After this, we should not be surprised if the jury returns a very large verdict, a jury that took its instructions seriously. In short, the substantive law that generates the questions posed to the jury must be part of any examination of the civil jury's ability to make sound judgments.

This issue of the *SMU Law Review*, which contains five articles based on the jury study conducted by the *Dallas Morning News* is fresh air to the polemics and politics of jury bashing. The willingness of a major newspaper to fund a carefully crafted survey of the state judges of Texas and all federal trial judges should be applauded. This collection of data sheds valuable light on judicial attitudes. The results of the questionnaire disclosed information worthy of careful study, as the articles demonstrate. There is a tradition of reverence for the jury. It is the stuff of law day rhetoric curiously offered up by speakers who simultaneously support a variety of measures narrowing jury responsibility. Texas itself has both enshrined the jury by its constitutional provisions and expressed great distrust of the jury's work by its "special issue" practice. Under that practice, it was not uncommon to subject a civil jury to a hundred or more questions. While Texas has retreated from its special issue practice, this Janus-faced attitude emerges in other contexts.

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* The Honorable Patrick E. Higginbotham was appointed to the United States District Court, Northern District of Texas, in 1975 and to the United States Court of Appeals, Fifth Circuit in 1982. Judge Higginbotham received his B.A. and LL.B. degrees from the University of Alabama and an honorary Doctorate of Laws from Southern Methodist University. He is a member of the ALI and advisor to its project on Complex Litigation; Chair, Board of Trustees of the Southwestern Legal Foundation; President of the American Inns of Court Foundation; Fellow, American Bar Foundation; and member of the Committee on Ethics 2000, ABA.

Despite its support in the abstract, the reality is that the conflicting agendas of various groups often swirl around the jury. The large congressional fights over the 1991 Amendments to the Civil Rights Act of 1964 included the provision authorizing a jury trial. Civil rights advocates sought trial by jury in the 1991 Act. The same groups resisted jury trials in the 1964 Act, convinced that lay juries could not put aside their prejudices. Indeed, much of the work by the federal courts interpreting the 1964 Act insulated plaintiffs from any right to a jury trial. Issues of tort reform and products liability also spin around the role of the jury. Yet, despite its central role in our justice system, there is little empirical data to support most of the strongly-held views supporting or criticizing the jury. Anecdotal evidence has its place, and empirical work here is difficult at best, given the privacy of jury deliberations. Nevertheless, interdisciplinary work is needed. Considerable work of this kind has been done, with group dynamics for example, and it ought to be brought to bear. This issue of the *SMU Law Review* is a helpful contribution.

Any study addressing the costs and efficiency of the jury must also value the political role of the institution. The Seventh Amendment is a powerful allocator of power and an equally powerful expression of the values of representation. We will not tolerate secret trials of persons accused of crime, nor verdicts by professionals, at least over the objections of an accused. We must measure the jury's representative role in the political union in the studies of cost and benefit. On the criminal side, it seems those values are somehow perceived to be sufficiently high that the jury's role is not seriously challenged. I should say frontally challenged. Insisting that jury unanimity is not required may be such a challenge, or the beginning of one.

This is a rich topic worthy of study. Hopefully these readings will spark others to speak and write, some possessing actual experience with the institution.