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DOES PLAINTIFF EXCLUSION HAVE A ROLE TO PLAY IN TWENTY-FIRST CENTURY NEGLIGENCE LITIGATION?

Giuseppe A. Ippolito[†]

PART I: INTRODUCTION

You're a doctor who delivered a child with severe birth defects. The child's parents decide that you injured the child during delivery, and sue you for malpractice.¹ At trial, the child's attorney wheels the child into the courtroom, and the child looks blankly at the bench, unaware of what is happening.² The jurors gasp, concluding that you must be guilty because injuries that severe just don't happen by accident.³ You trot out all manner of medical studies and legal doctrines proving your case, but the jury

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¹ This article will not address exclusion of a plaintiff with pre-existing or otherwise unrelated conditions and injuries. See Francis M. Dougherty, Annotation, *Physical Condition of Plaintiff in Personal Injury Action as Affecting Right to be Present at Trial*, 27 A.L.R. 4th 583 § 1 n.1 (2004) (making the same distinction when summarizing cases that have addressed plaintiff exclusion).

² See, e.g., *Reems v. St. Joseph's Hosp. & Health Ctr.*, 536 N.W.2d 666, 668 (N.D. 1995) (affirming exclusion from the liability phases of trial of a plaintiff who, according to her physicians, could aspire to little more in life than "to learn to smile, to sit up in a wheelchair and to be able to hold her own head").

³ See, e.g., *Frito-Lay, Inc. v. Cloud*, 569 N.E.2d 983, 991 (Ind. App. 1991) (noting, in a case stemming from a severe automobile accident, that "we refuse to believe that the jurors from Clark County, Indiana are made of such stone they can reasonably be expected to detach their emotions from the horrible tragedy suffered by Toni Cloud and her family during their deliberations on the issue of liability").

doesn't follow you.⁴ Your abstract defenses sound academic and

⁴ Compare Matthew A. Sokol, Cary v. Oneok, Inc.: *Oklahoma Supreme Court Upholds Plaintiff's Right to Attend Trial*, 19 PACE L. REV. 195, 211 (1998) ("Despite the criticisms, [a] basic assumption of the law has been that the jury can understand the case presented to it. Further, jury proponents believe that jurors are smarter than assumed by lawyers working from manuals.") (internal quotation marks omitted) with Edward L. Holloran, III, *Medical Malpractice Litigation in Florida: Discussion of Problems and Recommendations*, 26 NOVA L. REV. 331, 343 (2001) ("[T]he law seeks the benefit of the common person's judgment but asks that individual to apply legal rules often beyond the comprehension of one not trained in the law.") (internal quotation marks omitted). Aside from legal issues, lawsuits involving science and technology also can present complex factual issues that a reasonable jury cannot resolve without resorting to irrelevant or prejudicial emotions or outside personal experiences. See, e.g., *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1079 (3d Cir. 1980) ("A suit is too complex for a jury when circumstances render the jury unable to decide in a proper manner. The law presumes that a jury will find facts and reach a verdict by rational means. It does not contemplate scientific precision but does contemplate a resolution of each issue on the basis of a fair and reasonable assessment of the evidence and a fair and reasonable application of the relevant legal rules. A suit might be excessively complex as a result of any set of circumstances which singly or in combination render a jury unable to decide in the foregoing rational manner. Examples of such circumstances are an exceptionally long trial period and conceptually difficult factual issues.") (citation omitted); *ILC Peripherals Leasing Corp. v. IBM*, 458 F. Supp. 423, 447-48 (N.D. Cal. 1978) ("Throughout the trial, the court felt that the jury was having trouble grasping the concepts that were being discussed by the expert witnesses, most of whom had doctorate degrees in their specialties. This perception was confirmed when the court questioned the jurors during the course of their deliberations and after they were discharged. When asked by the court whether a case of this type should be tried to a jury, the foreman of the jury said, 'If you can find a jury that's both a computer technician, a lawyer, an economist, knows all about that stuff, yes, I think you could have a qualified jury, but we don't know anything about that.' Several of the other jurors indicated that they thought that the major stumbling block was the requirement that the verdict be unanimous. When they were questioned after the trial, most of the jurors indicated that they thought a complex antitrust case like this one should be tried to the court.") (citation omitted). But see *In re U.S. Fin. Sec. Litig.*, 609 F.2d 411, 431 (9th Cir. 1979) ("Not only do we refuse to read a complexity exception into the Seventh Amendment, but we also express grave reservations about whether a meaningful test could be developed were we to find such an exception. Where would the courts draw the line between those cases which are, and those which are not, too complex for a jury? The court

hypertechnical, compared to the descriptions of the child suffering in front of the jury's own eyes. Ultimately, the jurors follow their instincts and steel themselves to find a way to help the poor child.⁵

Defendants in negligence litigation dread the due process nightmare that the above scenario describes. Whenever defendants have to argue that they have not caused the injuries of plaintiffs with severe physical and mental injuries, they risk sounding as if they suggest that plaintiffs have exaggerated the extent of their suffering. Increased consumer or patient expectations of safety and success also affect defendants in negligence litigation.⁶

below found that the complexity of the present case was created primarily by the accounting and financial nature of the issues and evidence. The appellees generally assume that only antitrust and securities cases could qualify for the complexity exception. We acknowledge the complicated nature of the evidence and issues associated with the accounting and financial questions involved in antitrust and securities cases. Yet, almost all tax cases also involve the same type of evidence and issues; does this then mean that there should not be a right to jury trial in this broad class of cases as well?"

⁵ See Holloran, *supra* note 4, at 353-54 ("Together with their retained experts, attorneys present scientific evidence so far beyond the comprehension of average jurors that jurors often accept what is being said as true and give plaintiffs the benefit of the doubt.") (internal quotation marks omitted).

In addition to finding liability based on misunderstood evidence and instructions, a jury that decides that a physician defendant acted recklessly may impose punitive damages. See Christopher Vaeth, Annotation, *Allowance of Punitive Damages in Medical Malpractice Action*, 35 A.L.R. 5th 145 (2005) (surveying those cases in which juries awarded punitive damages in medical malpractice actions). Determinations of punitive damages can be even more subjective or confusing than determinations of liability, since juries have very few standards by which to assess an appropriate award. See generally CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE (2002) (demonstrating through experiments how psychological, economic, and other biases can lead jurors to ignore judges' instructions and influence the legal questions before them).

⁶ A court can declare a product unreasonable if reasonable consumer expectations rise sufficiently higher than industry standards. See, e.g., *McAlpin v. Elec. Furnace Co.*, No. 95-0758-R, 1996 U.S. Dist. LEXIS 12618, at *9-10 (W.D. Va. Aug. 9, 1996).

Manufacturers need to try harder than ever to anticipate side effects from the use of their products. In the medical field, some procedures always will carry the risk of severe injury, no matter how many precautions the health providers take. Unfortunately, however, modern medicine has become a victim of its own success,⁷ with patients suing based on adverse outcomes and not necessarily based on provider misconduct. These suits, which proceed more often in front of a jury than a judge,⁸ provide juries an opportunity to confuse whether defendants did anything that they ought not to have done—the liability phase of a trial—with how badly they hurt the plaintiffs in question—the damages phase of a trial.⁹ Juries can compound this potential confusion if they

⁷ See, e.g., Holloran, *supra* note 4, at 332 (“Perhaps one of the largest contributors to the rise in medical malpractice litigation is due to modern achievements in medicine. Indeed, physicians may have become the victims of their own success.”).

⁸ Sometimes, though, attorneys hurt their own cases because they perceive incorrectly that either a judge or a jury would be a more sympathetic trier of fact. Plaintiffs in medical malpractice cases win a higher percentage of bench trials than jury trials. See Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Trial by Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1136 tbl. 3 (1992). Plaintiff attorneys may seek jury trials anyway, because they perceive that judges would be more hostile. Compounding the misperception, plaintiff attorneys often take weak cases to a jury, because they foresee a verdict so large that they eschew settlement. See *id.* at 1163.

⁹ Put another way, defendants in medical malpractice and other negligence suits nowadays face the danger of a jury that makes a *res ipsa loquitur* inference from any severe or visually graphic injury, even when the injury would not otherwise meet the criteria for that kind of inference. See, e.g., Kimberly Haag, *Res Ipsa Loquitur: A Step Along the Road to Liability Without Fault*, 42 BRANDEIS L.J. 158-65 (2003) (noting that expansion of the *res ipsa* doctrine to medical malpractice has given plaintiffs unfair advantages if they still can call expert witnesses, and has created a de facto strict liability posture for medical malpractice); Aaron R. Parker, Comment, *Torts—Seavers v. Methodist Medical Center: Medical Experts May Testify to the “Fly Floating in the Buttermilk” as Part of a Res Ipsa Loquitur Instruction in Medical Malpractice Cases*, 30 U. MEM. L. REV. 701, 715-16 (2000) (conceding, in an argument supporting the combination of *res ipsa* theories and expert evidence, that “[t]here is valid concern that this decision opens the door to make medical professionals insurers of good results in inherently risky procedures, because jurors may be tempted to speculate as to exactly how an injury occurred. Further, due to the fact that a

decide subsequently to impose punitive damages, as plaintiffs' attorneys request, in an effort to create a zero-risk environment in the medical profession or the field of negligence law more generally.¹⁰

To mitigate the prejudice that defendants can face when plaintiffs present their injuries to juries, courts over the years have developed a concept known as plaintiff exclusion. Plaintiff exclusion allows defendants to keep plaintiffs out of a courtroom during the liability phase of a trial,¹¹ to allow a jury to determine negligence without the emotional impact of graphic injuries. Plaintiff exclusion also prevents graphic injuries from arousing stereotypes of defendants who belong to professional vocations.¹² For decades, plaintiff exclusion developed as a response to the increasing complexity of modern negligence litigation.

large number of medical procedures are performed while patients are under anesthesia or unconscious and because medical procedures are seldom completely without risk, there is additional danger that doctors may be held liable for circumstances completely beyond their control.”); Tracy L. Rabern, *Trends in New Mexico Law: 1993-94 Note: Tort Law—Supreme Court Opens the Door for Res Ipsa Loquitur in Medical Malpractice: Mireles v. Broderick*, 25 N.M. L. REV. 341, 348-53 (1995) (explaining that more medical malpractice cases will reach juries, unfairly, if plaintiffs can assemble explicit evidence of causation without losing the ability to advance a *res ipsa* theory).

¹⁰ See SUNSTEIN, *supra* note 5, at 62-73 (noting that jury awards for punitive damages rise in proportion to what plaintiff attorneys ask juries to award); *id.* at 206-07 (noting that juries are more likely than judges to believe in an infinite value of life award in an attempt to eliminate all risk).

¹¹ None of the courts in the early plaintiff exclusion cases contemplated bifurcating the trial into liability and damages phases. In fact, many of the early plaintiff exclusion cases occurred before adoption of the Federal Rules of Civil Procedure in 1939. Granting an exclusion motion in one of these early cases would have meant keeping plaintiff out of the courtroom during the contemplation of both liability and damages.

¹² See Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 DUKE L.J. 217, 217 (1993) (“The jury system seems to show a desire for punitive action and retribution above and beyond the degree of injury — ‘let’s get the rich doctor.’”).

Specifically, courts prior to the 1960s had not seen the issue of cognition before—that is, they had not seen plaintiffs whose severe cognitive injuries rendered them unable to assist counsel in any meaningful way.¹³ Judges facing this new wrinkle in negligence litigation needed a more sophisticated way to resolve the tension between plaintiffs' desire to appear at trial, and defendants' right to a trial free of undue prejudice. For decades, plaintiff exclusion provided state and federal courts with a way to balance plaintiff and defendant concerns, but this concept is in trouble now. In recent years, several state appellate courts used broad interpretations of their constitutions to forbid plaintiff exclusion from taking hold.¹⁴ One state that had adopted plaintiff exclusion recently changed its mind.¹⁵ Additionally, some momentum seems to be building for a complete elimination of plaintiff exclusion in all jurisdictions, on grounds that it discriminates against the disabled and robs them of their day in court. The emotion behind this momentum resembles the emotion that has fueled the victims' rights movement in criminal cases.¹⁶ Given plaintiff exclusion's forced exile from Indiana, and given the constitutional and discrimination arguments against it, the time has come to end *ad hoc* analysis of the concept and to reassess its fundamental purpose. Did plaintiff exclusion arise for a good reason, do the arguments against it justify complete abolition, and can it still play a useful role in twenty-first century negligence litigation?

¹³ For the sake of brevity during the rest of this article, the term "incapacitated plaintiffs" shall mean plaintiffs with sufficiently severe cognitive injuries that they do not understand that a trial is proceeding in their behalf, and that they cannot communicate with counsel in any meaningful way, even if they do respond generally to environmental stimuli.

¹⁴ See *infra* Part V.A.

¹⁵ See generally *Jordan ex rel. Jordan v. Deery*, 778 N.E.2d 1264 (Ind. 2002) (holding that plaintiff exclusion, absent waiver or extreme circumstances, violates plaintiff's right to attend trial).

¹⁶ See Alice Koskela, Casenote & Comment, *Victim's Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System*, 34 IDAHO L. REV. 157, 163 (1997) ("The aim of the victim's rights movement has been to give victims a 'voice' in the process. But this understandably impassioned voice may drown out less popular calls for fairness and an objective search for truth.").

This article will argue that plaintiff exclusion can continue to help courts face scenarios that the history of the right to trial by jury never could have anticipated. Part II will describe how the earliest plaintiff exclusion motions failed because of the simple fact patterns that early cases presented. Part II will show also how early negligence cases, though simple in their factual patterns, laid the foundation for modern plaintiff exclusion doctrine. Part III will note how plaintiff exclusion motions began to succeed in the last half-century, because courts could not adapt traditional analysis of the right to trial by jury to the more complicated fact patterns that they now faced. Part IV will illustrate that federal courts eventually adopted plaintiff exclusion, once state courts had proven its usefulness in dealing with complex fact patterns. Part V then will explore the inadequacies of the three major arguments against plaintiff exclusion. This article will conclude with Part VI, which proposes a formal plaintiff exclusion test that refreshes the concept by laying out a specific decision-making algorithm for courts entertaining plaintiff exclusion motions, and by incorporating safeguards against frivolous exclusion that various jurisdictions have developed.

PART II: THE FAILURE OF THE EARLIEST PLAINTIFF EXCLUSION MOTIONS, AND LAYING A FOUNDATION FOR FUTURE LITIGATION

Courts in early negligence cases most likely denied plaintiff exclusion motions because of the relatively simple facts of those cases. The early negligence cases¹⁷ presented plaintiffs who were otherwise healthy people, but sustained physical injuries of varying severity. Some of these plaintiffs sustained injuries while crossing

¹⁷ The earliest cases in which defendant filed a plaintiff exclusion motion seem to date back to the turn of the 20th century. In fact, *Sherwood v. City of Sioux Falls*, 73 N.W. 913 (S.D. 1898), may well be the first negligence case in which a court entertained a plaintiff exclusion motion.

railroad tracks,¹⁸ some while working at rock quarries,¹⁹ and some while driving cars and colliding into other vehicles.²⁰ In all of these cases, plaintiffs did not suffer cognitive injuries, and retained the full ability to participate in the subsequent negligence trial. At least cognitively, these plaintiffs resembled the typical plaintiffs that Seventh Amendment jurisprudence had contemplated: parties who turn to the judiciary for a redress of grievances, and whom a court at the turn of the twentieth century would have no reason to exclude from their own trial.²¹ As a result, from their origins to the middle of the twentieth century, plaintiff exclusion motions failed routinely.²²

Although the early plaintiff exclusion cases²³ failed to show how a plaintiff exclusion motion could succeed, they laid the foundation for future plaintiff exclusion jurisprudence by modifying analysis of the Seventh Amendment.²⁴ The plaintiff exclusion cases that began the re-examination of the Seventh Amendment drew from an earlier case that concerned fraud, not

¹⁸ See *Chicago Great W. Ry. Co. v. Beecher*, 150 F.2d 394 (8th Cir. 1945).

¹⁹ See *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76 (1919).

²⁰ See, e.g., *Fla. Greyhound Lines, Inc. v. Jones*, 60 So. 2d 396 (Fla. 1952).

²¹ See, e.g., *Beecher*, 150 F.2d at 399 (“At the commencement of the trial counsel for the defendant requested the court to exclude the infant plaintiff from the court room during the trial. The request was denied, the court saying, ‘I know of no rule of law which authorizes the court to exclude plaintiff, defendant, or any litigant from the court room’; and no authority was cited to the court in support of the request. Neither is any authority cited in the brief in this court to support defendant’s contention, and we have found none. We conclude that the contention is without merit.”).

²² A LEXIS-NEXIS and Westlaw search of cases involving plaintiff exclusion or the right to trial by jury shows that no court before the 1960s granted a plaintiff exclusion motion.

²³ I will use the term “plaintiff exclusion case” as shorthand for any negligence case in which defendant moves to exclude plaintiff from the courtroom for at least some part of the trial, out of concern that plaintiff’s presence alone will prejudice the jury.

²⁴ “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.” U.S. CONST. amend. VII.

negligence. In *Stewart v. Wyoming Cattle Ranche Co., Ltd.*,²⁵ a British cattle ranching company sued an Iowa rancher for misrepresenting the number of heads in a cattle sale.²⁶ After trial, the jury retired for deliberations, but then returned to court to ask the judge a question.²⁷ Neither the parties nor their counsel were present when the jury asked its question or when the judge answered it. The jury subsequently retired again and reached a verdict for plaintiff. Defendant appealed the verdict, arguing essentially²⁸ a Seventh Amendment argument: that the court ought not to have communicated with the jury without giving counsel for each side a chance to object to the communication.²⁹ The Court affirmed the verdict, holding in part that a judge may communicate with a jury as long as the communication occurs in open court.³⁰ Counselors for each side, according to the Court, bear responsibility for attending proceedings whenever the court is in session.³¹ The holding in *Stewart* laid the foundation for the discussion of Seventh Amendment rights in plaintiff exclusion cases because it implied that a court under the right circumstances could proceed to a fair verdict without the literal physical presence of the parties.

Admittedly, *Stewart* implied only subtly that the Seventh Amendment right to trial by jury and a right to attend trial were

²⁵ 128 U.S. 383 (1888).

²⁶ *See id.* at 383-84.

²⁷ *Id.* at 390.

²⁸ The text of the *Stewart* decision does not mention the Seventh Amendment explicitly.

²⁹ *See Stewart*, 128 U.S. at 390.

³⁰ *See id.*; *see also* *Ry. Express Agency v. Little*, 50 F.2d 59, 63 (3d Cir. 1931) (holding that a trial judge instructed a jury properly, where the instructions occurred in open court and where counsel waived the right to receive notice before the jury returned to open court).

³¹ *See Stewart*, 128 U.S. at 390 (“The absence of counsel, while the court is in session, at any time between the impaneling of the jury and the return of the verdict, cannot limit the power and duty of the judge to instruct the jury in open court on the law of the case as occasion may require . . .”).

two different principles. *Fillippon v. Albion Vein Slate Co.*³² made this distinction much more explicit—so explicit, in fact, that this case arguably made the concept of plaintiff exclusion possible. In *Fillippon*, a worker at a rock quarry sued the quarry for negligence. Plaintiff's work crew blasted out a large block of rock, and needed to place chains around it for attachment to a hoisting tackle.³³ Standard procedure for a rock of that size called for using sticks to place wedges further under the rock than a worker could place safely by hand.³⁴ Plaintiff asked for a stick to place a wedge the proper distance under the rock, but the foreman on site insisted that plaintiff go ahead and do it by hand.³⁵ While plaintiff complied with the foreman's wishes, the rock fell from its perch and crushed plaintiff's arm.³⁶ The injuries to plaintiff's arm warranted amputation.³⁷

At the conclusion of the trial in plaintiff's negligence suit, the jury received instructions from the judge and retired for deliberations.³⁸ During deliberations, the jury sent the judge a written inquiry about whether plaintiff committed contributory negligence. With regard to plaintiff exclusion history, what the judge wrote in response³⁹ does not matter as much as how the response reached the jury—"in the absence of the parties and their

³² 250 U.S. 76 (1919).

³³ *Id.* at 78. A tackle is "[a] system of ropes and blocks for raising and lowering weights of rigging and pulleys for applying tension." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000), available at <http://www.bartleby.com/61/91/T0009100.html> (last visited May 24, 2005).

³⁴ *Fillippon*, 250 U.S. at 78.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 78-79.

³⁸ *Id.* at 80.

³⁹ The judge responded that:

[i]f he was told to put it under as stated by the plaintiff and he did so, fully appreciating at the time the danger attending and having sufficient time to consider, when he was face to face with a situation that would have made a reasonably prudent man to disobey the orders of the foreman, notwithstanding, and he went ahead in spite of the dangers known to him and apparent, he is guilty of contributory negligence. *Id.*

counsel, without their consent, and without calling the jury in open court.”⁴⁰ This private communication⁴¹ with the jury differed from the open communication that occurred in *Stewart*, and it led the *Fillippon* Court to reverse the verdict for defendant and remand.⁴² The Court ruled that the whole point of objecting to a jury instruction was to change the judge’s mind on an erroneous legal interpretation, before that error hurts either side in a trial.⁴³ Reversing a judge’s instruction after the fact would not necessarily correct a legal error, because the error could prejudice the jury and force a mistrial.⁴⁴ Ultimately, the Court ruled that jury instructions must occur in open court and with notice to counsel, because

[T]he orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict.⁴⁵

Although no one could have known at the time, the most important part of the *Fillippon* decision, as it pertains to plaintiff exclusion, comprised three words that had not appeared in Seventh Amendment jurisprudence before. With those three words, the

⁴⁰ *Id.*

⁴¹ *Ex parte* communication is “A communication between counsel and the court when opposing counsel is not present. Such communications are ordinarily prohibited.” BLACK’S LAW DICTIONARY 296 (8th ed. 2004).

⁴² *Fillippon*, 250 U.S. at 84.

⁴³ *See id.* at 82.

⁴⁴ *See id.*

⁴⁵ *Id.* at 81. Incidentally, the rule requiring open jury instructions does not constrain a court to the point that a party could avoid an adverse jury instruction by refusing to come to court. A judge may communicate with the jury without a party’s presence, as long as the party knows in advance that such communication will occur. *See, e.g., Cook v. Green*, 6 N.J.L. 109, 109 (N.J. 1822).

Fillippon Court crystallized the distinction between the Seventh Amendment right to trial by jury and the right to attend trial. The Court wrote that a proper trial required parties “to be present in person or by counsel.”⁴⁶ In writing those three words, the *Fillippon* Court distanced itself from any assumption that a party to suit had to be present at trial under all circumstances.⁴⁷

Although courts continue to cite to *Fillippon* to this day,⁴⁸ the case and its impact on plaintiff exclusion remained dormant for decades. Through the 1950s, state and federal jurisdictions continued to assume that plaintiffs in personal injury trials had to be allowed to attend trial, if they wished. In *Chicago Great Western Railway Co. v. Beecher*,⁴⁹ for example, a freight train struck a three-year old child on a rail line crossed often by children

⁴⁶ *Fillippon*, 250 U.S. at 81 (emphasis added). Even when counsel appears in court alone, on plaintiff’s behalf, a plaintiff with sufficient cognition to direct the main strategy of a case will be allowed to do so. See *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (holding that an indigent criminal defendant has the right to make certain fundamental decisions in the case, but no right to direct appointed counsel to raise every possible nonfrivolous point, if counsel decides as a matter of professional judgment not to do so).

⁴⁷ What matters fundamentally is that each side make as full a case as it wants to make. See *Penon v. Ohio*, 488 U.S. 75, 84 (1988) (“The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question.”) (internal quotation marks and citation omitted).

Suppose, though, that a court issues an exclusion motion. As an unorthodox method of remaining available to consult with an attorney during the trial, can a plaintiff attend trial as a member of the public? Compare *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580-81 (1980) (holding that the public has the right to attend trials) with *Green v. N. Arundel Hosp. Ass’n*, 730 A.2d 221, 238 (Md. Ct. Spec. App. 1999) (holding that the public’s right to attend trials is not absolute and does not overcome concerns about jury prejudice), *aff’d*, 785 A.2d 361 (Md. Ct. App. 2001).

⁴⁸ See *Rushen v. Spain*, 464 U.S. 114, 119 (1983) (citing *Fillippon* when holding that a prisoner did not need habeas corpus relief, where a juror had two *ex parte* communications with the trial judge); 2-20 MOORE’S MANUAL—FEDERAL PRACTICE AND PROCEDURE § 20.05 (2004) (citing *Stewart* and *Fillippon* and noting that jury instructions not given in open court are not valid unless counsel waive explicitly the right to be present).

⁴⁹ 150 F.2d 394 (8th Cir. 1945).

and adults.⁵⁰ The court denied a motion by defendant to exclude the child from the courtroom out of concern for jury prejudice, holding that it did not know of any law that authorized it to exclude any litigant from the courtroom.⁵¹ The court noted additionally that defendant cited no authority that would justify exclusion of plaintiff.⁵² Other cases used similar reasoning, holding that plaintiffs in personal injury trials had the right to attend simply because they were parties to the suit at bar.⁵³

PART III: THE EMERGENCE OF COGNITION AS AN ISSUE, AND THE TWO FOUNDING CASES OF MODERN PLAINTIFF EXCLUSION

Beginning in the 1960s, courts hearing plaintiff exclusion cases began to face a new, more complex fact pattern. Plaintiff exclusion cases at this time began⁵⁴ to feature plaintiffs who

⁵⁰ *See id.* at 396-97.

⁵¹ *See id.* at 399.

⁵² *Id.*

⁵³ *See Fla. Greyhound Lines, Inc. v. Jones*, 60 So. 2d 396, 397 (Fla. 1952); *Bryant v. Kansas City Rys. Co.*, 228 S.W. 472, 475 (Mo. 1921) (en banc), *overruled in part on other grounds* by *Talbert v. Chicago, Rock Island & Pac. Ry. Co.*, 15 S.W.2d 762 (Mo. 1929); *E. Ohio Gas Co. v. Van Orman*, 179 N.E. 147, 149 (Ohio Ct. App. 1931); *Sanders v. Lowrimore*, 73 S.W.2d 148, 150 (Tex. Civ. App. 1934); *cf. In re Rogers' Estate*, 283 N.W. 906, 907 (Iowa 1939) (holding that the trial court should have granted plaintiff a continuance, where plaintiff had a severe throat infection and received advice not to attend trial for a few days); *Leonard's of Plainfield, Inc. v. Dybas*, 31 A.2d 496, 497 (N.J. 1943) (holding that the right to attend trial covered all phases except jury deliberations, and that the trial court thus should have issued a jury instruction in the parties' absence); *Miller v. Grier S. Johnson, Inc.*, 62 S.E.2d 870, 874 (Va. 1951) (ruling that defendant exclusion was proper where defendant had not proven his illness to the court's satisfaction, thus preventing defendant from invoking the right to attend to justify a continuance motion).

⁵⁴ Why didn't cognition and other complex personal injury issues arise before the 1960s? This article will speculate very briefly here that two factors may answer that question. One possible factor is the state of medical technology in the early twentieth century. None of the early plaintiff exclusion cases feature

suffered severe cognitive injuries, as well as physical injuries. These plaintiffs' cognitive injuries left them unable to communicate with counsel, and unable to follow trial proceedings.⁵⁵ The inability of incapacitated plaintiffs to contribute at all to their trials suddenly revived *Fillippon*: if attorneys under some circumstances could substitute at trial for plaintiffs capable of contributing to their own cases, then they should be able to substitute for plaintiffs when they are on their own because of their clients' incapacitation.

The emergence of cognition as a major factor in deciding plaintiff exclusion motions separates the early plaintiff exclusion

claims relating to birth defects, perhaps because infants born at that time would not have survived the conditions that plaintiffs bore in a case like *Jordan*. Another possible factor is society's increased expectations from modern medicine. Medical practitioners have noticed that advanced technology and increased health consciousness have made the concept of uncontrollable, chronic illness increasingly unacceptable. See, e.g., Nancy Pariser, *Springtime for Obstetrics and Gynecology: Will the Specialty Continue to Blossom?*, Letter to the Editor, 103 *OBSTETRICS & GYNECOLOGY* 197 (2004) (noting that obstetric residents are guaranteed to face litigation during their careers, despite their training, because modern obstetricians "are held to the impossible standard of delivering the perfect baby. Anything short of the perfect baby with our current system is guaranteed malpractice litigation."); Edward L. Van Oeveren, *The Past and Future of Medical Malpractice Litigation*, Letter to the Editor, 284 *JAMA* 827-29 (2000) (noting that medical malpractice litigation began in the mid-19th century, "following a period of increased religiosity, greater popular attention to physical fitness and health, and food reforms—all phenomena with contemporary analogues"); Charles Vincent, Magi Young, & Angela Phillips, *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 *THE LANCET* 1609-13 (1994) (noting, in a study of British malpractice litigation, that patients are more likely to sue when treated poorly and sue for reasons other than monetary compensation—to ensure that no one else will suffer the same way; to force a previously reticent health provider to explain exactly what happened; and to force someone in the medical community to take responsibility for the injuries).

⁵⁵ When plaintiff can follow trial proceedings, counsel can benefit from a number of roles that plaintiff can play. See Allen P. Grunes, *Exclusion of Plaintiffs from the Courtroom in Personal Injury Actions: A Matter of Discretion or Constitutional Right?*, 38 *CASE W. RES. L. REV.* 387, 396-97 (1988) (outlining the educative, strategic, moral, evidentiary, proprietary, and public roles that plaintiff can play at trial).

cases from the modern era⁵⁶ of plaintiff exclusion. In this context, *Dickson v. Bober*⁵⁷ was the first⁵⁸ plaintiff exclusion case of the modern era. In *Dickson*, defendant's automobile collided with plaintiff's motorcycle, leaving plaintiff with severe injuries that required an extensive hospital stay.⁵⁹ Since plaintiff was a minor at the time of the accident, his father brought suit on his behalf, and alleged negligence by the automobile driver.⁶⁰ Plaintiff's father would have had to commence the suit anyway, because the accident left plaintiff unable to make his own claims and unable to comprehend the trial.⁶¹ Defendant moved to exclude plaintiff from the courtroom during trial, out of concern for unfair jury prejudice.⁶² Defendant ultimately won the motion, and won the verdict, but an appellate court ordered a new trial based on plaintiff's absence from the first trial.⁶³ The *Dickson* court, in

⁵⁶ I will define the start of the "modern era" loosely as the mid-1960s, because cases around this time began to account for plaintiffs' cognition, and plaintiff exclusion at this time began to resemble closely the modern plaintiff exclusion doctrine that exists today.

⁵⁷ 130 N.W.2d 526 (Minn. 1964).

⁵⁸ Supporting *Dickson*'s status as the first modern plaintiff exclusion case is the complete absence, in the *Dickson* opinion, of citation to any earlier authority that separated cognitive from physical injuries.

⁵⁹ See *Dickson*, 130 N.W.2d at 529.

⁶⁰ See *id.*

⁶¹ "The accident changed Allan Dickson from a vital, intelligent, healthy youth to one unable to express or sustain himself, helpless and entirely dependent on others, and wholly unable to comprehend trial proceedings." *Id.*, 130 N.W.2d at 529.

⁶² Before the trial began, the trial judge observed plaintiff for himself and noted that

[h]is eyes seemed to function on detection of an unusual movement. Hideous and agonizing groans and sounds emanated from plaintiff. In this trial test, arranged so that the court would have some conception of what was involved, the above is a fair description of the depressing spectacle that in all likelihood could have been enacted if plaintiff's request [to present Allan to the jury] had been granted. *Id.*

⁶³ See *id.*

reversing the appellate court finding and remanding to restore the original verdict, noted that plaintiff had adequate legal representation.⁶⁴ Additionally, the court noted that plaintiff's absence could not have hurt his case, because "[t]he jury in this case determined that the accident was caused by negligence on the part of both drivers. It did not reach the question of damages."⁶⁵ Plaintiff's absence might have hurt him had the jury proceeded to a determination of damages.⁶⁶ In the damages phase, the *Dickson* jury would have had to look at plaintiff and his injuries to determine the severity of the disability sustained and the appropriate size of the award. Finally, the *Dickson* court examined a number of the early plaintiff exclusion cases.⁶⁷ The *Dickson*

⁶⁴ *Dickson*, 130 N.W.2d at 530.

⁶⁵ *Id.*

⁶⁶ The jury did not proceed to a determination of damages because Minnesota was a contributory negligence state at the time. *See id.* at 529. The *Dickson* jury may have proceeded to a damages phase under current Minnesota law, which follows a comparative negligence standard and allows for reduced awards as long as the award recipient is less than 50% liable. *See* MINN. STAT. § 604.01(1) (2004).

⁶⁷ *See, e.g.,* Chicago Great W. Ry. Co. v. Beecher, 150 F.2d 394, 399 (8th Cir. 1945) (ruling against plaintiff exclusion, where plaintiff suffered "personal injuries" with no mention of impact on cognition); Fla. Greyhound Lines, Inc. v. Jones, 60 So. 2d 396, 397 (Fla. 1952) (ruling against plaintiff exclusion, based on physical injuries alone); Bryant v. Kansas City Rys. Co., 228 S.W. 472, 475 (Mo. 1921) (en banc) (ruling against plaintiff exclusion where plaintiff lost a leg), *overruled in part on other grounds*, Talbert v. Chicago, Rock Island & Pac. Ry. Co., 15 S.W.2d 762 (Mo. 1929); E. Ohio Gas Co. v. Van Orman, 179 N.E. 147, 149 (Ohio Ct. App. 1931) (ruling against plaintiff exclusion where plaintiff's physical injuries left her unable to testify); Sanders v. Lowrimore, 73 S.W.2d 148, 150 (Tex. Civ. App. 1934) (ruling against plaintiff exclusion where plaintiff suffered physical injuries in a car accident); *cf. In re Rogers' Estate*, 283 N.W. 906, 907 (Iowa 1939) (holding that the trial court should have granted plaintiff a continuance, where plaintiff had a severe throat infection and received advice not to attend trial for a few days); Leonard's of Plainfield, Inc. v. Dybas, 31 A.2d 496, 497 (N.J. 1943) (holding that the right to attend trial covered all phases except jury deliberations, and that the trial court thus should have issued a jury instruction in the parties' absence); Miller v. Grier S. Johnson, Inc., 62 S.E.2d 870, 874 (Va. 1951) (ruling that defendant exclusion was proper where defendant had not proven his illness to the court's satisfaction, thus preventing defendant from invoking the right to attend to justify a continuance motion).

court distinguished the facts of its case by noting that the cases that gave plaintiffs a right to attend trial concerned plaintiffs with strictly physical injuries, and no mental impairment.⁶⁸

The reasoning from *Dickson* influenced *Morley v. Superior Court*,⁶⁹ which also attempted to balance plaintiff and defendant rights at trial and also became an influential plaintiff exclusion case. In *Morley*, an automobile accident left one plaintiff comatose and another with retrograde amnesia.⁷⁰ Defendant successfully bifurcated the trial, and the trial court, *inter alia*, granted a motion to exclude the comatose⁷¹ plaintiff from the courtroom during both phases of the trial.⁷² In reviewing the trial court's decisions, the *Morley* court considered the state of plaintiff exclusion in other jurisdictions.⁷³ Ultimately, the court decided to follow the ruling from *Dickson*, with its discussion of cognition as a separate issue

⁶⁸ See *Dickson*, 130 N.W.2d at 530.

⁶⁹ 638 P.2d 1331 (Ariz. 1981).

⁷⁰ *Id.* at 1332.

⁷¹ The *Morley* court described plaintiff Morley as living in a vegetative state. "This vegetative state, which will probably last the remainder of his life, requires a tracheostomy for him to breathe, and he is fed from a tube inserted in his stomach." *Id.*

⁷² *Id.*

⁷³ The *Morley* court cites to two other plaintiff exclusion cases that came after *Dickson* but before its own case. Technically, these cases are part of the modern era of plaintiff exclusion, as defined in note 56 *supra*. These cases, though, lack the precedential value of *Dickson* and *Morley* either because they ruled on narrow factual matters, or ruled only tangentially on the legal matters that affect plaintiff exclusion. For example, in *Talcott v. Holl*, 224 So. 2d 420 (Fla. Ct. App. 1969), two doctors appealed a judgment against them in part because the trial court allowed plaintiff's attorney to bring her into the courtroom on a stretcher for use as demonstrative evidence. *Id.* at 421. The appellate court upheld the verdict as to this issue, because plaintiff remained in the courtroom for only a few minutes. *Id.* at 422. In *Freeman v. Rubin*, 318 So. 2d 540 (Fla. Ct. App. 1975), a case concerning legal practice and not personal injury, the court noted at the end of its opinion, almost parenthetically, that plaintiff had been excluded from the courtroom and shouldn't have been, "in the absence of a showing that he was so incapacitated that he could not comprehend the trial proceedings" *Id.* at 544.

from physical injuries. As in *Dickson*, the court noted that the comatose plaintiff could not speak, and that he had adequate legal representation for the upcoming trial.⁷⁴ In allowing defendant to exclude plaintiff from the liability phase of trial, the *Morley* court rejected what it termed the “negative reasoning,”⁷⁵ that characterized the earliest attempts at arguments for a constitutional right to attend trial.⁷⁶

In adhering to *Dickson*, the *Morley* court also reversed the lower court on the exclusion of the comatose plaintiff during the damages phase of the trial.⁷⁷ The court recognized that once a jury finds defendant liable, the most direct evidence of injury that it can view is plaintiff’s own physical condition.⁷⁸ During the damages phase of trial,

[D]efendant cannot avoid responsibility for his or her conduct by preventing the jury from seeing the results of that conduct and applying community standards to

⁷⁴ “A plaintiff unable to at least communicate with counsel will have no right denied by exclusion from the courtroom during the liability phase of the trial.” *Morley*, 638 P.2d at 1334.

⁷⁵ As examples of negative reasoning, the *Morley* court cited *Chicago Great W. Ry. Co. v. Beecher*, 150 F.2d 394, 399 (8th Cir. 1945) (“The request [for plaintiff exclusion] was denied, the court saying, ‘I know of no rule of law which authorizes the court to exclude plaintiff, defendant, or any litigant from the court room’; and no authority was cited to the court in support of the request. Neither is any authority cited in the brief in this court to support defendant’s contention, and we have found none. We conclude that the contention is without merit.”), and *Bryant v. Kansas City Rys. Co.*, 228 S.W. 472, 475 (Mo. 1921) (“We know of no court which ever excluded the parties to an action from the presence of the jury, and the authorities cited by appellant do not go so far. If they did, we would not follow them. Certain it is that no Missouri court has so ruled. This complaint of defendant is without merit.”), *overruled in part on other grounds*, *Talbert v. Chicago, Rock Island & Pac. Ry. Co.*, 15 S.W.2d 762 (Mo. 1929).

⁷⁶ *Morley*, 638 P.2d at 1333 (noting that “[t]he oldest cases simply applied negative reasoning—there is no authority to exclude a litigant from the courtroom, so the litigants have a right to be present”).

⁷⁷ *See id.* at 1334 (“Paul Morley should be permitted to appear before the jury to prove damages, should the jury find the City of Scottsdale liable.”)

⁷⁸ *Id.*

those results. A jury should not decide *liability* based on the severity of the plaintiff's injury, but certainly the jury should award *damages* based on the severity of the plaintiff's injuries.⁷⁹

Together, these two state cases opened a new dimension to plaintiff exclusion jurisprudence. By allowing courts to judge an exclusion motion based on the cognitive or physical nature of plaintiff's injuries, *Dickson* and *Morley* gave future courts a way to account for more factors when deciding an exclusion motion in negligence litigation.

PART IV: PLAINTIFF EXCLUSION ENTERS THE FEDERAL COURTS

Plaintiff exclusion might have remained an obscure state-level legal theory, but for an important development a few years after *Morley*: the complex fact patterns that reached the *Dickson* and *Morley* courts began to arrive at federal benches. From the issuance of *Dickson* in 1964 to the issuance of *Morley* in 1981, the modern era of plaintiff exclusion affected only state courts. Modern plaintiff exclusion reached maturity, when it gained some structure and a federal audience in *Helminski v. Ayerst Laboratories*.⁸⁰ In *Helminski*, plaintiff alleged⁸¹ that his autism resulted from his *in utero* exposure to Fluothane,⁸² a general anesthetic that his mother used routinely in her job as a nurse anesthetist.⁸³ Because of the alleged Fluothane exposure, plaintiff

⁷⁹ *Id.*

⁸⁰ 766 F.2d 208 (6th Cir. 1985), *cert. denied*, 474 U.S. 981 (1985).

⁸¹ Officially, plaintiff's parents sued on plaintiff's behalf, as his next friends. *Helminski*, 766 F.2d at 213.

⁸² "Fluothane is the trade or brand name of halothane; a general anesthetic, which is a central nervous system depressant. Ayerst received permission from the Food and Drug Administration to market Fluothane as a surgical anesthetic in 1958." *Id.* at 210 n.1.

⁸³ *Id.* at 210.

developed severe mental retardation.⁸⁴ Defendants moved successfully to bifurcate the trial, and then moved successfully to exclude plaintiff from the courtroom during the liability phase of the trial.⁸⁵ Plaintiff challenged the bifurcation, the exclusion, and the verdict of no cause of action, arguing that they infringed on his Seventh Amendment right to a jury trial and his Fifth Amendment right to due process of law.⁸⁶

The *Helminski* court upheld the trial court's rulings for three reasons. First, the *Helminski* court ruled that trial courts may bifurcate a personal injury trial into liability and damages phases when "the evidence pertinent to the two issues is wholly unrelated' and the evidence relevant to the damages issue could have a prejudicial impact upon the jury's liability determination."⁸⁷ Second, the *Helminski* court decided that "[n]either the Fifth Amendment's Due Process Clause nor the Seventh Amendment's guarantee of a jury trial grants to a civil litigant the absolute right to be present personally during the trial of his case."⁸⁸ The *Helminski* court concluded that the exclusion of plaintiff did not violate his due process rights under the Fifth Amendment.⁸⁹

⁸⁴ *See id.* ("Eventually, physicians determined that Hugh was autistic. As a result of this condition, Hugh requires 24-hour a day care; he does not speak, is not toilet trained, and has an extremely low IQ. Hugh's arrested neurological development is permanent and irreversible.").

⁸⁵ *Id.* at 211.

⁸⁶ *Id.*

⁸⁷ *Id.* at 212; *see also* 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2390 (2004).

⁸⁸ *Helminski*, 766 F.2d at 213 (citing *Faucher v. Lopez*, 411 F.2d 992, 996 (9th Cir. 1969)).

⁸⁹ *Id.* at 218-19 (finding no reversible error in the trial court's conduct). Some writers have questioned whether the Sixth Circuit should have made plaintiff exclusion a constitutional issue, as opposed to leaving it a procedural issue within the trial court's discretion. *See Grunes, supra* note 55, at 405-06. Courts in earlier times may not have needed to sort out the constitutional implications of plaintiff exclusion, but they will have to do so now if courts keep concluding, without historical evidence, that they cannot separate the right to a jury trial and the right to attend that trial. *See infra* Part IV.A for more discussion of this topic, but for now, if courts decide that the right to a jury trial and the right to attend that trial are one and the same, then they cannot avoid a re-examination of prior due process jurisprudence. *See, e.g., Tennessee v. Lane*, 541 U.S. 509, 523

A. Criteria for excluding plaintiffs: the “*Helminski* test”

When the *Helminski* court considered what to do with the facts before it, the court examined existing plaintiff exclusion case law, and grouped the cases into two categories.⁹⁰ One category comprised cases stating generally that plaintiffs had a right, in person or by counsel, to attend all phases of a trial.⁹¹ In cases in this category, allowing counsel to substitute for plaintiffs in some circumstances did not mean that courts could exclude plaintiffs arbitrarily under any circumstances.⁹² A second category of cases corresponds with “pre-modern”⁹³ plaintiff exclusion cases:⁹⁴ cases

(2004) (holding that the Due Process Clause of the Fourteenth Amendment “requires the States to afford certain civil litigants a ‘meaningful opportunity to be heard’ by removing obstacles to their full participation in judicial proceedings”) (citing *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)). In fact, the time may come when the vegetative plaintiff, who represents a once-unthinkable splitting of the rights to pursue a trial and literally to speak at it, forces explicit holdings that the right to trial by jury, as expressed in the Seventh Amendment and the state constitutions, is only the means to the end envisioned by the right to due process, and bows to the due process right when the two conflict and the jury trial right fails to give defendants a hearing free of unneeded prejudice.

⁹⁰ *Helminski*, 766 F.2d at 214.

⁹¹ See *id.* The cases that the *Helminski* court placed into this category are *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 81 (1919); *McKnelly v. Sperry Corp.*, 642 F.2d 1101, 1108 (8th Cir. 1981); *Arrington v. Robertson*, 114 F.2d 821, 823 (3d Cir. 1940); and *Florence v. Moors Concrete Prods., Inc.*, 193 N.W.2d 72, 75 (Mich. Ct. App. 1972).

⁹² *Helminski*, 766 F.2d at 214.

⁹³ See *supra* note 56 (defining the “modern era” of plaintiff exclusion).

⁹⁴ For this category, the *Helminski* court cited *Carlisle v. County of Nassau*, 408 N.Y.S.2d 114 (App. Div. 1978); *Purvis v. Inter-County Tel. & Tel. Co.*, 203 So. 2d 508 (Fla. Dist. Ct. App. 1967) (per curiam); and *Fla. Greyhound Lines, Inc. v. Jones*, 60 So. 2d 396 (Fla. 1952).

that deny exclusion motions, where plaintiffs happened⁹⁵ to have only physical injuries. The *Helminski* court distinguished its case from these two categories, and then set forth how trial courts could exclude plaintiffs without offending their Fifth Amendment⁹⁶ due process rights. Later cases eventually would refer to these guidelines as the "*Helminski* test."

The *Helminski* test is not so much a "test" or decision-making algorithm as it is a set of three guidelines. First, trial courts cannot exclude plaintiffs simply for having an injury, because "the focus of the inquiry should not be on the plaintiff's physical and mental condition; rather, the critical inquiry concerns the effect of such condition on the jury."⁹⁷ Second, when defendants want to exclude plaintiffs, they should do so through a formal motion,⁹⁸ which then requires a hearing.⁹⁹ Third, at a hearing on an exclusion motion, defendants bear the burden of persuasion. Defendants must prove not just that plaintiffs have a disability, or that plaintiffs have a cognitive disability that will prevent them from comprehending the trial,¹⁰⁰ but that plaintiffs' particular condition will prejudice the jury.¹⁰¹ The prejudice must prevent or substantially impair the jury from performing its fact-

⁹⁵ Of the three cases that the *Helminski* court placed into this category, only one contemplated what it might have done with a cognition-impaired plaintiff. See Purvis, 203 So. 2d at 510-11 (examining *Dickson* and then distinguishing it).

⁹⁶ Or Fourteenth Amendment, in the case of a state court.

⁹⁷ *Helminski*, 766 F.2d at 217.

⁹⁸ Under the *Helminski* test, the motion "in most cases" could come before trial, which leaves defendant the option to move for exclusion in the middle of a trial, as it deems necessary. See *Helminski*, 766 F.2d at 217.

⁹⁹ See *id.* at 217. Besides giving each side a chance to make its arguments, the hearing will allow the court to view plaintiff for itself, and to form its own opinion of plaintiff's condition. See *id.*

¹⁰⁰ "The requisite showing of prejudice cannot be satisfied simply by establishing that a plaintiff has a physical or mental injury; the party seeking exclusion must establish that the party's appearance or conduct is likely to prevent the jury from performing its duty." *Id.* at 218.

¹⁰¹ "We reiterate that a party's ability to comprehend the proceedings or assist counsel is not the relevant inquiry at this juncture—the issue is whether the party's presence will unfairly prejudice the proceedings in his favor." *Id.* at 218.

finding duties in accordance with the court's instructions.¹⁰²

Giving defendants the burden of persuasion, the *Helminski* court reasoned, would prevent reflexive motion practice that targets plaintiffs' disabled status, and assumes that juries never can be objective.¹⁰³ If defendants follow all of the guidelines of the *Helminski* test, then a judge may bifurcate the trial and exclude plaintiffs from the liability phase.¹⁰⁴ Exclusion would not apply to the damages phase of trials, when juries would need to examine the extent of plaintiffs' injuries to decide the size of injury awards.¹⁰⁵ The *Helminski* test thus accomplished an important feat besides bringing plaintiff exclusion into a federal jurisdiction for the first time. The *Helminski* test also provided guidance to other jurisdictions that had to adjudicate, for the first time, negligence cases involving incapacitated plaintiffs.

¹⁰² *Helminski*, 766 F.2d at 217-18.

¹⁰³ *See id.* at 217 ("To allow involuntary exclusion on any other basis [i.e., other than by giving defendant the burden of persuasion] would permit the presumption that an injured person's presence alone will always deter the jury from its factfinding mission. Such a presumption would only institutionalize a reaction based solely upon appearance. This we decline to do.").

¹⁰⁴ In an interesting sidenote to the case, the *Helminski* court ruled that the trial court excluded plaintiff improperly, under the *Helminski* test, because the exclusion occurred based on plaintiff's appearance alone. *See id.* at 218. Nonetheless, the *Helminski* court found no reversible error because:

[W]here the Helminskis acted as Hugh's next friends and legal representatives, where all parties agree that Hugh was completely unable to comprehend the proceedings, and where Hugh because of his extremely low IQ could not aid his attorney in any meaningful way, we conclude that Hugh's exclusion does not constitute reversible error.

Id.

¹⁰⁵ *See id.* at 217 ("Exclusion of a party from the damages portion of the proceedings is, however, inappropriate.").

B. Cases that followed *Helminski*

Other federal courts subsequently relied on *Helminski*, concluding that it balanced plaintiff and defendant concerns regarding a fair trial.¹⁰⁶ Citation to *Helminski* also occurs in that federal-state hybrid, the District of Columbia Court of Appeals.¹⁰⁷ Among the federal circuits, the First Circuit adopted the *Helminski* test and has faulted trial courts for not following its guidelines.¹⁰⁸ The Sixth Circuit has affirmed *Helminski* and extended it to voir dire proceedings.¹⁰⁹ The Eighth Circuit cited *Helminski* and its treatment of bifurcation when handling a consolidated action related to dioxin exposure.¹¹⁰ The Ninth and Tenth Circuits have cited to *Helminski* and its protection of plaintiffs with only physical injuries.¹¹¹

The *Helminski* test influenced state jurisdictions as well.¹¹²

¹⁰⁶ A LEXIS-NEXIS Shepard's report on *Helminski* shows that, as of May 24, 2005, the Second, Third, Fourth, Fifth, Seventh, Eleventh, and Federal Circuits have issued no decisions that adopted the *Helminski* test. In some of these circuits, a few district courts have cited *Helminski*. See *McEachron v. Glans*, 1999 U.S. Dist. LEXIS 21926 (N.D.N.Y. Aug. 23, 1999) (Second Circuit); *Adkins v. Serv. Wire Co.*, No. 3:02-0982, 2002 U.S. Dist. LEXIS 21089 (S.D.W. Va. Oct. 31, 2002) (Fourth Circuit); *Pittman v. Nabors Offshore Corp.*, No. 00-2051, 2001 U.S. Dist. LEXIS 5419 (E.D. La. 2001) (Fifth Circuit); *In re Del Rio*, No. 401CV65, 2001 U.S. Dist. LEXIS 24971, at *7 (S.D. Ga. Aug. 15, 2001) (Eleventh Circuit). No trial or appellate court in the Third, D.C., or Federal Circuits ever has cited *Helminski*.

¹⁰⁷ See *Levi v. District of Columbia*, 697 A.2d 1201, 1206 (D.C. 1997).

¹⁰⁸ See *Rubert-Torres ex rel. Cintron-Rupert v. Hosp. San Pablo, Inc.*, 205 F.3d 472, 478 (1st Cir. 2000).

¹⁰⁹ See *Preferred Props. v. Indian River Estates*, 2002 FED App. 0006P, 276 F.3d 790, 797-98 (6th Cir.).

¹¹⁰ See *O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1202 (8th Cir. 1990).

¹¹¹ See *Kulas v. Flores*, 255 F.3d 780, 786 (9th Cir. 2001); *Thompson v. Colorado*, 278 F.3d 1020, 1032 (10th Cir. 2001).

¹¹² See *Province v. Ctr. for Women's Health & Family Birth*, 25 Cal. Rptr 2d 667, 675 (Cal. Ct. App. 1993); *In re Doe Children*, 76 P.3d 578, 585 (Haw. Ct. App. 2003); *Gage v. Bozarth*, 505 N.E.2d 64, 67 (Ind. Ct. App. 1987), *overruled by Jordan ex rel. Jordan v. Deery*, 778 N.E.2d 1264 (Ind. 2002), *reh'g denied*, No. 75S05-0106-CV-310, 2003 Ind. LEXIS 287 (Mar. 26, 2003); *Reems v. St. Joseph's Hosp. & Health Ctr.*, 536 N.W.2d 666, 669 (N.D. 1995); *Caputo v.*

In *Green v. North Arundel Hospital Association, Inc.*,¹¹³ for example, Maryland adopted the *Helminski* test for the first time because it allowed trial judges to examine plaintiff's situation before granting defendant's exclusion motion.¹¹⁴ Plaintiff in *Green* brought an action¹¹⁵ against an array of health care providers for failing to diagnose a failed hydrocephalic shunt.¹¹⁶ The failed shunt increased plaintiff's hydrocephalic pressure, leaving him in a permanent vegetative state.¹¹⁷ Defendant moved to bifurcate the trial and exclude plaintiff from the liability phase, out of concern that "his presence served no purpose other than to prejudice the jurors against the defendants."¹¹⁸ In affirming the trial court's exclusion of plaintiff, the *Green* court quoted extensively from the trial court's decision that "any viewing of the [p]laintiff in person or by video would leave any party in a position

Joseph J. Sarcona Trucking Co., 204 A.D.2d 507, 508 (N.Y. App. Div. 1994); *In re Burkhart*, No. CA90-07-146, 1991 Ohio App. LEXIS 3937 (Ohio Ct. App. Aug. 19, 1991); *Bremner v. Charles*, 821 P.2d 1080, 1085 (Ore. 1991); *Burks v. Harris*, No. 02A01-9110-CV-00253, 1992 Tenn. App. LEXIS 913 (Tenn. Ct. App. Nov. 10, 1992).

¹¹³ 730 A.2d 221 (Md. Ct. Spec. App. 1999), *aff'd*, 785 A.2d 361 (Md. Ct. App. 2001).

¹¹⁴ *See id.* at 236 (noting that with the help of the *Helminski* test, the trial judge "went to great lengths to ensure that [plaintiff]'s constitutional rights were not violated by arbitrarily excluding him from trial").

¹¹⁵ As with other cases, plaintiff was a minor child; officially, his parents sued on his behalf, as his next friends.

¹¹⁶ *See* John P. Laurent, M.D., *Hydrocephalus / Shunts*, at <http://www.bcm.tmc.edu/pednsurg/disorder/hydro.htm> (last modified June 18, 1997) ("The standard treatment for hydrocephalus is surgery. The surgical procedure usually involves diverting CSF [cerebrospinal fluid] through a surgically implanted shunt. This shunt is a detour or bypass procedure that is made by placing a catheter in the ventricles in the interior of the brain. The fluid drainage is accomplished with a pressure-controlled valve, and usually the fluid is drained outside the brain into the abdominal cavity where it is reabsorbed along the belly wall.").

¹¹⁷ *See Green*, 730 A.2d at 226.

¹¹⁸ *Id.* at 224.

to be emotionally struck and otherwise feeling sympathy for the [p]laintiff.”¹¹⁹

The diversity of jurisdictions that have adopted *Helminski* independently suggests that the courts in question have not schemed to attack incapacitated plaintiffs for characteristics that those plaintiffs cannot control. Rather, plaintiff exclusion spread through state and federal jurisdictions because modern negligence cases have outgrown the traditional parameters of Seventh Amendment analysis. Courts that have dealt with incapacitated plaintiffs recognize that risking jury prejudice for responsive plaintiffs serves the higher purpose of enforcing the Seventh Amendment, whereas risking jury prejudice for incapacitated plaintiffs serves no such purpose. In that context, courts have developed plaintiff exclusion out of necessity, not out of whim or animus.

PART V: THE STATES RESPOND TO *HELMINSKI*: THREE ARGUMENTS AGAINST PLAINTIFF EXCLUSION AND WHY THEY FALL SHORT

Although the number of federal jurisdictions embracing *Helminski* has increased steadily, and although some states also have adopted the *Helminski* test, plaintiff exclusion appears to have entered a twilight phase. One state that had adopted the *Helminski* test later rejected it.¹²⁰ Other states chose not to follow *Helminski*;¹²¹ most others have yet to take up the matter in their courts. The states that forbid plaintiff exclusion have considered several different reasons for doing so. A close examination of these arguments shows that they ignore modern courts' need to deal with the increasing medical complexity of negligence cases. The arguments against plaintiff exclusion, discussed below, confuse responsive for incapacitated plaintiffs and thus do not address the fact patterns that face modern courts in plaintiff exclusion cases.

¹¹⁹ *Id.* at 236 (alteration in original).

¹²⁰ See *Jordan ex rel. Jordan v. Deery*, 778 N.E.2d 1264 (Ind. 2002).

¹²¹ See generally *infra* Part V.A.

A. Constitutional arguments: the right to trial by jury

According to one of the arguments against plaintiff exclusion, keeping plaintiffs out of the courtroom during any part of their own trial violates their Seventh Amendment constitutional right to trial by jury. Allegations of a Seventh Amendment violation assume a pre-*Fillippon* posture, asserting in essence that the right to trial by jury and the right to attend that trial are so interwoven as to be plectonemic. Consequently, according to the argument, curtailing the right to trial by jury always harms plaintiff's right to trial by jury.

New York embraced this argument as early as 1978 in *Carlisle v. County of Nassau*.¹²² In *Carlisle*, a detective shot plaintiff during an altercation, leaving plaintiff a paraplegic.¹²³ Defendants tried to exclude plaintiff from jury selection proceedings, citing concern for improper influence on jury selection.¹²⁴ Plaintiff won the right to remain, because the court declared that his right to attend jury selection proceedings constituted a corollary to his right to a jury trial.¹²⁵ In creating this

¹²² 408 N.Y.S.2d 114 (App. Div. 1978).

¹²³ See *id.* at 115.

¹²⁴ See *id.*

¹²⁵ See *id.* at 116. In building a classical argument for the right to trial by jury that ignores the question of cognition, the *Carlisle* court relied on several authorities that presume a responsive plaintiff. See N.Y. CONST. art. I § 2 ("Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever . . ."); *Odum v. Corn Prods. Ref. Co.*, 173 Ill. App. 348, 352 (1912) ("[W]e know of no law that prevents interested persons from being present at the hearing of their case, even though their unfortunate condition was such as to enlist the sympathy of the jury, and we have not been referred by counsel to any case that, as we think, announces a different principle."); *Ziegler v. Funkhouser*, 85 N.E. 984, 986 (Ind. Ct. App. 1908) ("It is the right of every party litigant to be present in person in court upon the trial of his own case—the right to be heard by counsel—and every opportunity should be afforded the parties, who are brought into court to answer a charge of any kind, to make their defense."); *Leonard's of Plainfield, Inc. v. Dybas*, 31 A.2d 496, 497 (N.J. 1943) ("The right of the parties to the

corollary, the *Carlisle* court ruled more broadly than necessary, creating an “unqualified” right to attend jury selection. As a result, a New York appellate court that encounters an incapacitated plaintiff in a negligence case will have to overrule *Carlisle* if it wants to account for plaintiff’s cognition. Worse yet, the holding in *Carlisle* misinterpreted the motivation behind the plaintiff exclusion motion in that case, and cast suspicion over similar motions that defendants might file in future cases. The *Carlisle* court implied that defendants in negligence cases try to exclude plaintiffs as punishment for hiring an attorney, and reiterated accordingly that plaintiffs do not forfeit the right to attend all phases of a trial, simply because they have retained counsel.¹²⁶ Plaintiff exclusion motions, though, do not attempt to keep plaintiffs out of the courtroom because they have retained counsel. Even the earliest plaintiff exclusion cases refused to allow such arbitrary exclusion. Nonetheless, the *Carlisle* court linked the right to trial by jury to the right to attend trial, and established that link after an examination of the history of jury trials, dating back to the Magna Carta.¹²⁷ New York’s commitment to this constitutional argument continued in *Mason v. Moore*.¹²⁸ Connecticut¹²⁹ and Oklahoma¹³⁰ adopted similar constitutional

cause to be present in person and by counsel at all stages of the trial, except the deliberations of the jury, is basic to due process.”)

¹²⁶ Compare *Carlisle*, 408 N.Y.S.2d at 117 (noting that plaintiff’s right to attend trial “is in no way denigrated by the presence of retained or assigned counsel. The attorney is not the alter ego of his client, but his representative or agent. As such he may not supplant the client either at his or the court’s unbridled pleasure.”) with *Scott-Hourigan Co. v. Deprez*, 279 N.W.2d 150, 151 (Neb. 1979) (finding no error in a trial court’s decision to begin trial in the absence of plaintiff and his counsel, where plaintiff could not show that he suffered prejudice and an unfair trial) and *Ryfeul v. Ryfeul*, 650 P.2d 369, 373-74 (Alaska 1982) (holding that a trial court cannot exclude a party to a divorce from a modification hearing, simply because it thinks that the party would not contribute much to the hearing).

¹²⁷ See *Carlisle*, 408 N.Y.S.2d at 116.

¹²⁸ 641 N.Y.S.2d 195 (App. Div. 1996).

¹²⁹ See *Rozbicki v. Huybrechts*, 589 A.2d 363 (Conn. 1991).

¹³⁰ See *Cary v. Oneok, Inc.*, 1997 OK 60, 940 P.2d 201. But see Meredith Quinn Olearchik, Note, *Right to a Civil Jury Trial—State Constitutional Right to Civil*

reasons for curtailing plaintiff exclusion.¹³¹ Indiana subscribed to this argument in *Jordan v. Deery*.¹³² Nevada¹³³ just recently became the latest state to ignore that patients in persistent vegetative states likely did not exist 200 years ago,¹³⁴ instead signing off on the shibboleth that “the state constitutional right of trial by jury includes the ancillary right to be present in the courtroom during both the liability and damage phase of trial. This is so because without the right to be present, the right to trial by jury becomes meaningless.”¹³⁵

Relying on the right to trial by jury has both factual and legal problems. Regarding the factual problems, the plaintiffs in the cases that created a constitutional right to attend trial have full cognition, and only physical injuries. Plaintiff in *Carlisle*, though a paraplegic, had full mental and verbal capacity.¹³⁶ Connecticut’s

Trial by Jury in Indiana Includes the Right to Be Present in the Courtroom. *Jordan ex rel. Jordan v. Deery*, 778 N.E.2d 1264 (Ind. 2002), 35 RUTGERS L.J. 1517, 1526 (2004) (arguing that the *Cary* court relied on sufficiently different constitutional provisions that the Indiana Supreme Court should not have relied on *Cary* as much as it did).

¹³¹ Connecticut’s position on plaintiff exclusion actually appears to be somewhat more conflicted. In *Rozbicki* the state’s highest court did create a constitutional right to attend. *See Rozbicki*, 589 A.2d at 365 (“[A] party’s constitutional right to a civil jury trial encompasses the right to be present in the court during all phases of the trial”); *But see Wozniak v. New Britain Gen. Hosp.*, No. X03CV950502560S, 2001 Conn. Super. LEXIS 1547, at *8 (Conn. Super. Ct. June 1, 2001) (unpublished opinion) (“Neither [an unrelated case] nor *Rozbicki* involved a party who had no ability to comprehend the trial proceedings.”).

¹³² 778 N.E.2d 1264, 1272 (Ind. 2002), *reh’g denied*, No. 75S05-0106-CV-310, 2003 Ind. LEXIS 287 (2003).

¹³³ *See Mainor v. Nault*, 101 P.3d 308 (Nev. 2004) (per curiam).

¹³⁴ *See supra* note 54 for brief speculation as to why incapacitated plaintiffs did not transform the plaintiff exclusion concept until modern medicine developed the technology to keep them alive after their accidents.

¹³⁵ *Mainor*, 101 P.3d at 322-23.

¹³⁶ Accordingly, the focus in *Carlisle* shifted to whether a mentally competent plaintiff, who was capable of assisting counsel, could also assist counsel during jury selection. *See Carlisle v. County of Nassau*, 408 N.Y.S.2d 114, 117 (App. Div. 1978). *But see Monteleone v. Gestetner Corp.*, 531 N.Y.S.2d 857, 861

case law also makes this distinction,¹³⁷ and in Oklahoma, the case that created a constitutional right to attend trial involved a burn victim whose injuries did not implicate his mental capacity in any way.¹³⁸

Eliminating plaintiff exclusion through the right to a jury trial also creates two legal problems. The first legal problem is that courts seeking to eliminate plaintiff exclusion have written into legal history a right to attend trials that does not exist. The 790-year¹³⁹ history of the right to a jury trial never mentions, let alone supports, a categorical right to attend that supercedes all factual circumstances in a case. The earliest guarantee in Anglo-American jurisprudence of a right to trial by jury, as it resembles the guarantee in the Seventh Amendment, lies in the Magna Carta. At that time, English barons grew tired of King John's high taxes and capricious administration of justice.¹⁴⁰ After a demand for a charter of liberties and a capturing of London, the barons succeeded in forcing the king to grant a series of concessions to his subjects.¹⁴¹ Among other concessions, the king agreed that judicial

(Sup. Ct. 1988) (making a distinction, based on cognition, that *Carlisle* did not, and adopting the *Helminski* test in granting an exclusion motion). Ultimately, the Court of Appeals may have to decide exactly where New York stands on the issue of plaintiff exclusion. See *Cruz v. St. Luke-Roosevelt Hosp. Ctr.*, 722 N.Y.S.2d 490, 491 (App. Div. 2001) (excluding infant children of a plaintiff decedent from a courtroom during both phases of a medical malpractice action, even though they were plaintiffs themselves, because "they did not speak English, were incapable of assisting counsel in the presentation of the case and since their presence might well have impaired the jury's capacity for objective consideration of the facts"); *Caputo v. Joseph J. Sarcona Trucking Co.*, 611 N.Y.S.2d 655, 656 (App. Div. 1994) (adopting the *Helminski* test and excluding a plaintiff from the liability phase of a negligence trial when "he physically appeared to be in a state of unawareness" and when a court had declared him mentally incompetent before the trial began).

¹³⁷ See *Rozbicki*, 589 A.2d at 364.

¹³⁸ See *Cary v. Oneok, Inc.*, 1997 OK 60, ¶ 21, 940 P.2d 201, 206 (noting that plaintiff could recall the incident that burned him, and that the recollection could prove useful to plaintiff's attorney).

¹³⁹ Dating back to the Magna Carta in 1215.

¹⁴⁰ The British Library, *Magna Carta*, at <http://www.bl.uk/treasures/magnacarta/translation.html> (last visited May 24, 2005).

¹⁴¹ *Id.*

action would not proceed against any English subject “except by the lawful judgment of his equals or by the law of the land.”¹⁴² The Magna Carta says nothing about plaintiffs attending such jury trials; it says only that a jury of peers will judge the accused before the Crown bears down upon them.

When the American colonists embraced the right to trial by jury, they neither borrowed a right to attend trial from English jurisprudence—for no such right existed—nor created their own. Instead, the colonists simply wanted to make sure that judgments against them came from their peers,¹⁴³ and not from some aloof imperial power thousands of miles away.¹⁴⁴ After the Revolutionary War, the Framers left the common-law¹⁴⁵ understanding of jury trials untouched, deciding only to “preserve”¹⁴⁶ the right as it existed in the centuries following the Magna Carta. The Framers may have felt motivated to preserve the right to trial by jury, not out of any particular fondness for jury trials or attendance at them, but because they perceived that corruption might have a harder time taking root in part-time juries

¹⁴² MAGNA CARTA, cl. 39.

¹⁴³ In fact, early colonial juries had the power to resolve questions of law as well as of fact. Thomas Jefferson defended this power; “[t]he reason, he explained, was that ‘the common sense of twelve honest men’ enhanced the chances of a ‘just decision.’” LEONARD W. LEVY, *THE PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY JURY* 69 (1999).

¹⁴⁴ See *THE FEDERALIST* NO. 83, at *4 (Alexander Hamilton), available at <http://www.yale.edu/lawweb/avalon/federal/fed83.htm> (last visited May 24, 2005) (noting that trials by jury are more useful as defenses against monarchs than against public officials in a republic, and noting further that “I cannot readily discern the inseparable connection between the existence of liberty, and the trial by jury in civil cases.”).

¹⁴⁵ See *Jordan ex rel. Jordan v. Deery*, 778 N.E.2d 1264, 1269 n.4 (Ind. 2002) (noting that the colonies felt “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” (internal quotation marks omitted)).

¹⁴⁶ U.S. CONST. amend. VII.

than in full-time finders of fact.¹⁴⁷ The Seventh Amendment, as a means of preserving an established right and not expanding it, guarantees only that United States citizens who believe that fellow citizens have wronged them, have the right to make their case and express themselves before their peers.¹⁴⁸ To the extent that plaintiffs must attend trial to ensure a full expression of their grievances, they must be allowed to attend. To the extent that plaintiffs' evidence unfairly hurts defendants' ability to express themselves—that is, to the extent that plaintiffs' evidence unfairly prejudices the jury—the Seventh Amendment has not allowed plaintiffs to make their case without restrictions.¹⁴⁹ More

¹⁴⁷ See THE FEDERALIST NO. 83, at *4 (Alexander Hamilton), available at <http://www.yale.edu/lawweb/avalon/federal/fed83.htm> (last visited May 24, 2005) (noting that juries “summoned for the occasion” probably would have less motive to respond to a corrupt influence than “a standing body of magistrates”).

¹⁴⁸ Overall, the history of the right to trial by jury suggests that the purpose of the right is to allow a citizen to seek redress of grievance against a fellow citizen who has done wrong. Put another way, the right to trial by jury gives even the poorest citizen a chance to right wrongs without resort to tribalistic mob-style violence. See, e.g., *Joint Anti-Fascist Refugee Cmte. v. McGrath*, 341 U.S. 123, 179 (1951) (Douglas, J., concurring) (“It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.”). This fundamental desire for civilized justice neither endorses nor rejects plaintiff exclusion.

Note also that the Seventh Amendment's neutral position manifests itself in two ways. The Supreme Court never has included the Seventh Amendment in its incorporation doctrine, and never has declared trial by jury a fundamental right that all states must respect. As a result, states from the time of the Revolution have had the freedom to regulate the right to trial by jury as they saw fit. See, e.g., *Walker v. Sauvinet*, 92 U.S. 90, 92 (1876) (holding that the right to trial by jury is not a privilege or immunity of national citizenship under the Fourteenth Amendment, and that “[t]he States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way”); THE FEDERALIST NO. 83, at *7 (Alexander Hamilton), available at <http://www.yale.edu/lawweb/avalon/federal/fed83.htm> (last visited May 24, 2005) (arguing that an amendment holding the federal government to a single standard for jury trials was unnecessary, because the states at that time allowed, restricted, or forbade jury trials depending on the type of litigation).

¹⁴⁹ See *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 81 (1919).

importantly, to the extent that plaintiffs cannot make any expressions in their own behalf, plaintiffs' presence cannot implicate the Seventh Amendment unless the sight of plaintiffs in the courtroom, by itself, would affect the outcome of trials.

When plaintiff presence, by itself, could affect the outcome of a trial, plaintiffs themselves become demonstrative evidence.¹⁵⁰ Demonstrative evidence that shows the jury the severity of plaintiffs' injuries deserves full Seventh Amendment protection, once the jury finds defendants liable.¹⁵¹ While the jury assesses liability, demonstrative evidence cannot answer the abstract question of whether defendants did something that they ought not to have done. A doctor who did not act negligently regarding a child's injuries does not suddenly become negligent because the child happened to be hurt particularly badly.¹⁵² To say otherwise slants a jury unfairly against defendants, and when plaintiffs' presence in a courtroom threatens to do just that, a plaintiff exclusion motion will level the playing field without implicating the Seventh Amendment. The history of trial by jury does not support any other conclusion, and courts have admitted as much by citing, ironically, that they do not need to cite to any authority to

¹⁵⁰ Demonstrative evidence is “[p]hysical evidence that one can see and inspect (i.e., an explanatory aid, such as a chart, map, and some computer simulations) and that, while of probative value and usually offered to clarify testimony, does not play a direct part in the incident in question.” BLACK’S LAW DICTIONARY 596 (8th ed. 2004).

¹⁵¹ See *Morley v. Super. Ct.*, 638 P.2d 1331, 1334 (Ariz. 1981) (“The plaintiff should be allowed to prove damages by the most direct evidence available—the plaintiff’s own physical condition. It is true that the jury may still have a bias against the defendant because of the plaintiff’s condition, but the bias in the damages phase is grounded on relevant evidence.”).

¹⁵² See Kristy Freeman, *Civil Procedure: Exclusion of Injured or Disfigured Plaintiffs From Trial—Cary v. Oneok, Inc.—A Solution to the Exclusion Issue or Bad Precedent?*, 52 OKLA. L. REV. 109, 122-23 (1999) (“In *Cary*, the fact of consequence in the liability portion of the proceedings was whether Oneok was negligent. Eric’s injuries are not relevant to this determination. Eric’s injuries do not tend to make the defendant’s negligence more or less probable.”).

eliminate plaintiff exclusion on constitutional grounds.¹⁵³

A secondary legal problem arises from grounding the right to attend trial exclusively in the right to trial by jury, a problem that the dissent in *Jordan* discussed. Specifically, if plaintiffs' right to attend trial derives only from the right to trial by jury, then plaintiff exclusion could, theoretically, continue in bench trials.¹⁵⁴ This split authority has both practical and jurisprudential implications. On the practical side, as the dissent in *Jordan*

¹⁵³ See, e.g., *Freimann v. Gallmeier*, 63 N.E.2d 150, 153 (Ind. Ct. App. 1945) (“Citation of authority is not required to sustain the proposition that a party to an action is entitled to be personally present in court when a trial is held in which he, or she, is a party of record.”), cited in *Jordan ex rel. Jordan v. Deery*, 778 N.E.2d 1264, 1272 (Ind. 2002).

¹⁵⁴ Obviously, the issue of a split jurisprudential basis for a right to attend would arise whenever the parties volunteer to submit themselves to a bench trial. Additionally, this jurisprudential split requires attention because even an “inviolable” right to trial by jury, see, e.g., IND. CONST. art. I § 20, does not automatically lead to a jury trial in all circumstances. See, e.g., FED R. CIV. P. 38(b) (requiring parties to request trial by jury, and only for “any issue triable of right by a jury”); IND. ST. TRIAL P. 38(a) (2003) (“In case of the joinder of causes of action or defenses which, prior to said date, were of exclusive equitable jurisdiction with causes of action or defenses which, prior to said date, were designated as actions at law and triable by jury—the former shall be triable by the court, and the latter by a jury, unless waived; the trial of both may be at the same time or at different times, as the court may direct.”); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 335 (1979) (“A litigant who has lost because of adverse factual findings in an equity action is equally deprived of a jury trial whether he is estopped from relitigating the factual issues against the same party or a new party.”). Compare *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472-73 (1962) (“[W]here both legal and equitable issues are presented in a single case, ‘only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.’”) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-511 (1959)) with *Clermont & Eisenberg*, *supra* note 8, at 1135 (1992) (asserting that “parties have no right to jury trial in cases seeking *solely* equitable relief”) (emphasis added) and *id.* at 1136 (noting that “[w]hen the United States is a defendant, usually no jury right exists”) and *WRIGHT & MILLER*, *supra* note 87, § 2302.

mentioned,¹⁵⁵ courts like the *Jordan* court did not want to continue plaintiff exclusion except for waiver or extreme circumstances. A jurisprudential split that lets plaintiff exclusion survive would defeat this intent.¹⁵⁶

As for the jurisprudential implications, courts that expand the right to trial by jury need to find separate sources of authority for the right to attend analogous proceedings. History suggests that the rights to trial by jury and by bench derive from different sources.¹⁵⁷ Bench trials did not reappear widely in trials courts in this country until the twentieth century.¹⁵⁸ Even when discussing

¹⁵⁵ See *Jordan*, 778 N.E.2d at 1273 (Boehm, J., dissenting) (observing that “if the right is derived from the right to a jury trial, it would not be equally available in a bench trial”).

¹⁵⁶ The irony of eliminating plaintiff exclusion from jury trials, but not from bench trials, is that bench trials are not as susceptible to an unfairly prejudicial trier of fact. See *id.* at 1273-74 (Boehm, J., dissenting) (“Although I find little direct relevant authority, it seems to me that the right to be present is at least as strong in a bench trial where the countervailing factor of fairness to the other party may be of diminished weight.”); see also Ellen E. Sward, *Special Issue on the History of the Trial: A History of the Civil Trial in the United States*, 51 KAN. L. REV. 347, 358-59 (2003) (noting that bench trials do not require as strict an enforcement of the rules of evidence, because of a lower chance of unfair prejudice by the trier of fact).

¹⁵⁷ See Sward, *supra* note 156, at 355 n.50 (noting, in a history of the merger of law and equity courts in the English legal system, that “[i]n the early English common law, there were no bench trials. Unless one of the ancient modes of trial survived and was selected, the jury was the prescribed method of trying issues of fact until 1854”). In addition to a different history, bench trials reflect a different motive: expedience. See Samuel R. Gross, *Settling for a Judge: a Comment on Clermont and Eisenberg*, 77 CORNELL L. REV. 1178, 1181-82 (1992) (“Since bench trials are comparatively cheap, both sides can save money by waiving a jury Judges too prefer bench trials—they are cheaper, less formal and more flexible, take less court time, and allow the judge to exercise greater power. In an area of litigation in which bench trials are the rule, judges may be quick to frown upon a party that insists on a jury.”).

¹⁵⁸ Compare Susan C. Towne, *The Historical Origins of Bench Trials for Serious Crime*, 26 AM. J. LEGAL HIST. 123 (1982) (“Although some American colonies permitted bench trials for felonies, this practice disappeared prior to the

only jury trials, the intensity of the right to attend fluctuates with the specific trial context.¹⁵⁹ If bench trials and jury trials have different histories and different purposes, then the history of jury trials cannot carry over to bench trials. Partially for this reason, the dissent in *Jordan* favored grounding the right to attend in due process.¹⁶⁰

B. Procedural limits and extreme circumstances

The second argument against plaintiff exclusion flows from a concern for plaintiffs' due process rights. This argument theoretically accepts plaintiff exclusion as an option that should be available to judges, but then raises the hurdle for the exercise of the option to practically impossible heights, out of concern for due process violations. The hurdle is the term "extreme circumstances." For example, when the *Jordan* court decided that defendants no longer could file plaintiff exclusion motions, it left defendants with a theoretical loophole: barring a voluntary waiver by plaintiffs, defendants still could keep plaintiff out of the courtroom if "extreme circumstances" existed.¹⁶¹ The insertion of this term into *Jordan* resembles a token conciliatory gesture toward defendants, given that the court declined to define what the term means, relative to plaintiff exclusion.¹⁶² Defining when

Revolution . . .") with Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 325 (2003) (noting that bench trials in the criminal setting did not gain prominence until the 20th century).

¹⁵⁹ See *Jordan*, 778 N.E.2d at 1274 (Boehm, J., dissenting) (noting that an incarcerated civil litigant's right to attend his civil suit depends on factors such as the logistics of ferrying plaintiff from jail to the courtroom).

¹⁶⁰ See *id.* at 1274 (Boehm, J., dissenting) ("Thus both precedent and reason lead me to reject the jury trial right as the source of the right to be present."); *id.* at 1275 (concluding that the Due Process Clause of the Fourteenth Amendment "does not guarantee the right to be present. Rather, it guarantees fundamental fairness to all parties.").

¹⁶¹ See *id.* at 1272.

¹⁶² See *id.* at 1272 n.8 ("We decline to articulate a bright-line rule to determine what are and what are not 'extraordinary circumstances.' Such determinations must be made on a case-by-case basis. We merely observe that on this record extraordinary circumstances have not been shown."). Only recently has the

“extreme circumstances” exist could have enormous implications for defendants in Indiana and in other jurisdictions¹⁶³ that choose to adopt such language. Plaintiff exclusion may yet survive in these jurisdictions if defendants have a low hurdle to clear before claiming that “extreme circumstances” exist. In contrast, plaintiff exclusion in jurisdictions that adopt the “extreme circumstances” qualifier is effectively dead if courts set the hurdle high to prevent parties from actually clearing it.¹⁶⁴ One practitioner involved in *Jordan* has remarked that “[s]uch a vague standard makes it always an *ex post facto* determination by an appellate court. It gives no real guidance to the trial judge. It would be about as useful to tell

Indiana Supreme Court given any hint as to what it means by the term “extreme circumstances.” See *Niksich v. Cotton*, 810 N.E.2d 1003, 1008 (Ind. 2004) (“As we recently observed in [*Jordan*], even where the right to a jury trial applies, the right of a party to be present is not absolute. Rather, under ‘extraordinary circumstances’ presence of a party may not be required. An incarcerated plaintiff may present such circumstances. [Appellant in this case, a prisoner] may seek to submit the case through documentary evidence, to conduct the trial by telephonic conference, to secure someone else to represent him at trial, or to postpone the trial until his release from incarceration. We think the trial court has wide discretion in selecting any of these options after evaluating the prisoner’s need to be present against concerns of expense, security, logistics and docket control.” (citations omitted)).

¹⁶³ In addition to embracing constitutional arguments against plaintiff exclusion, see *supra* Part V.A, New York adopted the similar term “unusual circumstances.” See *Mason v. Moore*, 641 N.Y.S.2d 195, 197 (App. Div. 1996). Oklahoma’s approach to extreme circumstances is confusing. Oklahoma bars plaintiff exclusion absent waiver or extreme circumstances, but also allows defendants to demonstrate such circumstances by meeting the burdens of the *Helmski* test. See *Cary v. Oneok, Inc.*, 1997 OK 60, ¶ 13, 940 P.2d 201, 204 (Okla. 1997).

¹⁶⁴ One practitioner with whom the author communicates periodically likens the difficulty of meeting the “extreme circumstances” standard to meeting the pornography standard of “I’ll know it when I see it.” Email from Robert M. Greene, Esq., Partner, Phillips Lytle LLP, to author (Mar. 12, 2004) (on file with author).

the trial judge to ‘do the right thing.’”¹⁶⁵

Unfortunately, the case law offers little guidance for anyone who attempts to define what constitutes extreme circumstances. The Supreme Court case of *Beacon Theatres, Inc. v. Westover*¹⁶⁶ reinforces the suspicion that an extreme circumstances exception serves only as a euphemism for plaintiffs’ absolute right to attend trial. In *Beacon Theatres*, two California movie theaters litigated over whether one theater’s contracts with a movie distributor violated antitrust laws, where the contracts granted exclusive “first-run” access to new movies for an entire metropolitan area.¹⁶⁷ A district judge had ruled that defendant sought only equitable relief, and thus did not have a right to a jury trial. In reversing the district court’s decision and the circuit court’s affirmation, the Supreme Court emphasized the importance of the right to a jury trial—any limits on that right “should be scrutinized with the utmost care.”¹⁶⁸ Essentially, the Court ruled that plaintiff never loses the right to a jury trial, simply because plaintiff has mixed the legal claim implicating the jury right with an equitable claim.¹⁶⁹ The Court did not state its holding that simply, though. The Court decided to create the theoretical possibility that “most imperative circumstances”¹⁷⁰ could override plaintiff’s right to a jury trial, but then stated that it could not anticipate what those circumstances would be.¹⁷¹ No case citing *Beacon Theatres* has yet found that imperative circumstances actually existed under related fact patterns.¹⁷²

¹⁶⁵ Email from Mark Lienhoop, Esq., Partner, Newby Lewis Kaminsky & Jones LLP, to author (Feb. 24, 2004) (on file with author).

¹⁶⁶ 359 U.S. 500 (1959).

¹⁶⁷ *See id.* at 503.

¹⁶⁸ *Id.* at 501 (quotation marks omitted).

¹⁶⁹ *See id.* at 511.

¹⁷⁰ *Id.*

¹⁷¹ *See id.*

¹⁷² *See, e.g., Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Stewart v. KHD Deutz of Am. Corp.*, 75 F.3d 1522 (11th Cir. 1996); *Nunez v. Superior Oil Corp.*, 572 F.2d 1119 (5th Cir. 1978); *Reliability Research v. Computer Assocs. Int’l*, 851 F. Supp. 58 (E.D.N.Y. 1993); *In re Equity Funding Corp.*, 396 F.

Other cases also set a seemingly impossibly high threshold to meet before extreme circumstances exist.¹⁷³ These cases leave some clues about the term through the types of examples ruled not to be extreme. For example, no cause of action for malicious prosecution exists without extreme circumstances like launching multiple frivolous suits simultaneously, and harassing an adverse party, to the point of causing actual damages.¹⁷⁴ During pre-trial discovery, a court will dismiss a complaint for failure to follow discovery orders only when plaintiff knows clearly that failure to comply will result in dismissal.¹⁷⁵ In the field of elder law, courts have trouble assessing legal competence in all but the extreme circumstances of raving or comatose patients.¹⁷⁶ Returning to tort law and personal injury cases, exceptional circumstances in an automobile accident refer to whether a driver could have avoided an accident by doing nothing more than exercising the slightest degree of care.¹⁷⁷ Medical equipment that can heighten the drama of a trial, in contrast, generally will not create extreme circumstances.¹⁷⁸ *Helminski*, itself a personal injury case, looked

Supp. 1266 (C.D. Cal. 1975); *Williams v. Travenol Labs., Inc.*, 344 F. Supp. 163 (N.D. Miss. 1972); *Swofford v. B & W, Inc.*, 34 F.R.D. 15, 18 (S.D. Tex. 1963).

¹⁷³ Plaintiff exclusion appears to have a lower threshold when a judge feels a need to maintain decorum. See *Cavendish v. Sunoco Service of Greenfield, Inc.*, 451 F.2d 1360, 1368 (7th Cir. 1971) (holding that a trial judge did not abuse his discretion to maintain decorum when he ordered plaintiff's four-year old son removed from the courtroom during the last half of final arguments, where the boy was making no noise but where the jury allegedly felt distracted by the boy's playing with a toy truck).

¹⁷⁴ See *Barreto-Almeyda v. First Nat'l City Bank*, 288 F. Supp. 99, 100 (D.P.R. 1968).

¹⁷⁵ *Rogers v. Charity Hosp.*, 537 So. 2d 1267, 1268 (La. Ct. App. 1989).

¹⁷⁶ See Alison Patrucco Barnes, *Elder Law: Beyond Guardianship Reform: A Reevaluation of Autonomy and Beneficence for a System of Principled Decision-Making in Long Term Care*, 41 EMORY L.J. 633, 689 (1992).

¹⁷⁷ See *Dolberg v Paltani*, 549 N.W.2d 635, 639 (Neb. 1995).

¹⁷⁸ See, e.g., *Talcott v. Holl*, 224 So. 2d 420, 421 (Fla. Ct. App. 1969) (allowing plaintiff's attorney to bring in plaintiff just once during trial, on a stretcher, and for just a few minutes); *Sherwood v. City of Sioux Falls*, 73 N.W. 913, 914

at several criminal cases that established that obstreperous conduct¹⁷⁹ curtails defendants' trial rights, which are not absolute anyway.¹⁸⁰

Finally, a court will exclude plaintiffs who create extreme circumstances by disrupting the proceedings.¹⁸¹ The disruption must do more than just draw the attention of the trier of fact, though—plaintiffs' presence must force the court to stop the trial and address plaintiffs' presence as an independent issue.¹⁸² An extreme example of disruption of courtroom proceedings occurred in *Kulas v. Flores*.¹⁸³ In *Kulas*, plaintiff, a prisoner, represented himself in a Section 1983¹⁸⁴ civil rights action. Plaintiff pestered witnesses so often with irrelevant questions that the trial judge had to stop and warn plaintiff repeatedly to reach his point faster.¹⁸⁵ Worse, plaintiff interrupted a particular cross-examination with frivolous objections so often, that the trial judge stopped the proceedings at one point and had plaintiff escorted from the courtroom for the remainder of that cross-examination.¹⁸⁶

(S.D. 1898) (allowing plaintiff in a negligence case to enter the courtroom on a cot, and blaming defendant for possible jury sympathy because “[i]f the verdict of the jury was sustained by the evidence, as we must assume it was, and plaintiff’s condition was such as to excite sympathy, it was the result of defendant’s negligence, not plaintiff’s fault.”).

¹⁷⁹ See *Illinois v. Allen*, 397 U.S. 337, 343 (1970).

¹⁸⁰ See *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975); *United States v. Brown*, 571 F.2d 980, 986-87 (6th Cir. 1978).

¹⁸¹ See, e.g., *Helminski*, 766 F.2d 208, 214 (6th Cir. 1985), *cert. denied*, 474 U.S. 981 (1985).

¹⁸² See *Purvis v. Inter-County Tel. & Tel. Co.*, 203 So. 2d 508, 511 (Fla. Dist. Ct. App. 1967) (per curiam) (holding that the trial court should not have excluded plaintiff from the courtroom because his description as “argumentative, somewhat irrational and of such mental attitude and physical appearance that the jury might be influenced” was too vague). Sometimes, though, even short-lived courtroom disruptions will not overcome plaintiff’s right to attend trial. See *Kopplin v. Kopplin*, 71 N.E.2d 180, 182 (Ill. Ct. App. 1946) (holding that a trial court erred in excluding plaintiff, even after she interrupted a direct examination to accuse a witness of lying).

¹⁸³ 255 F.3d 780 (9th Cir. 2001).

¹⁸⁴ 42 U.S.C. § 1983 (2005).

¹⁸⁵ *Kulas*, 255 F.3d at 785.

¹⁸⁶ *Id.* at 785-86.

Overall, the “extreme circumstances” argument has two critical flaws: it begs the question of whether plaintiff exclusion violates plaintiffs’ due process rights, an assumption subject to debate,¹⁸⁷ and it is so vague that no one knows how to file or argue a successful exclusion motion. A little more detail could salvage the concept, and make it useful when courts that allow the filing of exclusion motions face adverse circumstances beyond the scope of the *Helminski* test. From the cases mentioned above, and from the general needs of a court trying to run an orderly trial, this article now will propose specific criteria to help a court determine when extreme circumstances exist in a plaintiff exclusion trial.¹⁸⁸ First, extreme circumstances exist when plaintiffs exhibit any behavior so loud and disruptive that it drowns out anyone speaking, or otherwise forces a court to stop the proceedings to address plaintiffs. Extreme circumstances exist also when plaintiffs’ attendance requires bringing into the courtroom any medical equipment so large and disruptive (because of sounds, or because of moving too much furniture around) that it falls beyond any notion of a reasonable accommodation that disability legislation might define. If plaintiff be a minor child, too young to testify under oath even if healthy, then a court can declare that extreme circumstances exist, and allow the next friends (or whoever brought the suit on plaintiffs’ behalf) to testify for the child.¹⁸⁹

¹⁸⁷ *Contra Helminski v. Ayerst Labs.*, 766 F.2d 208, 213 (6th Cir. 1985), *cert. denied*, 474 U.S. 981 (1985).

¹⁸⁸ The proposed definition of “extreme circumstances” set forth here can be considered a fifth step in the plaintiff exclusion test proposed *infra* in Part VI.

¹⁸⁹ *See, e.g., Cary v. Oneok, Inc.*, 1997 OK 60, ¶ 1, 940 P.2d 201, 206 (Opala, J., dissenting) (arguing to uphold exclusion of a minor plaintiff where “his status is now and was below that of a *nonparty*—a person *non sui juris* whose action was brought in his name, as it must be, by *another (as next friend)*”); FED. R. CIV. P. 17(c) (“An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian *ad litem*.”) (alteration in original); IND. CODE § 34-9-2-1(2) (2003) (authorizing courts of the state to allow next friends to sue on a party’s behalf); OKLA. STAT. tit. 12, § 2017(c) (2004) (“If an infant or incompetent person does not have a duly appointed

Additionally, a court can keep plaintiffs out of the courtroom if, for some reason, some part of the trial requires examining defendants' confidential business records *in camera*.¹⁹⁰ Finally, a court can sanction plaintiffs with expulsion from the courtroom if they or their attorneys knowingly exaggerate or dramatize their injuries, with intent to sway jury opinion.¹⁹¹ Any one of these criteria can establish extreme circumstances; extreme circumstances cannot exist in their absence.

C. The Americans with Disabilities Act ("ADA")¹⁹²

The third argument against plaintiff exclusion holds the entire concept in violation of the ADA. How the ADA impacts plaintiff exclusion is an issue of first impression in all jurisdictions; a few courts have addressed the issue only parenthetically.¹⁹³

representative he may sue by his next friend or by a guardian *ad litem*." (alteration in original).

¹⁹⁰ See *Binney & Smith Inc. v. Rose Art Indus., Inc.*, 1995 U.S. Dist. LEXIS 3151, at *7-8 (N.D. Ill. 1995) (granting a motion to strip the documents from a prior proceeding of confidential status, and holding that litigation concerning popular consumer products "should be available for public scrutiny, absent exceptional circumstances").

¹⁹¹ Parading a plaintiff may not occur often, yet it can happen, which is why a trial court needs plaintiff exclusion as a discretionary tool to stop it. See *Helmski*, 766 F.2d at 218 n.8 ("While we are mindful that in some instances counsel may seek to parade a handicapped plaintiff before the jury in a deliberate attempt to elicit sympathy, we do not believe that this is a common occurrence. However, should such improper conduct occur, a trial court has the discretion to preserve courtroom decorum."); *Fla. Greyhound Lines, Inc. v. Jones*, 60 So. 2d 396, 397 (Fla. 1952) (noting that plaintiff entered the courtroom of a non-bifurcated trial "when she was on a stretcher and, apparently, in a weak and stupefied condition and attended by a nurse and hospital attendant") (alteration in original); *Talcott v. Holl*, 224 So. 2d 420, 421 (Fla. Ct. App. 1969) (ruling against plaintiff exclusion, where plaintiff entered the courtroom only once, on a stretcher, and remained in the courtroom for only a few minutes).

¹⁹² 42 U.S.C. §§ 12101-12213 (2005).

¹⁹³ See *LeCompte v. Freeport-McMoran*, No. 94-437, 1995 U.S. Dist. LEXIS 6555 (E.D. La. May 12, 1995) (unpublished opinion) (allowing a physically disfigured teenager to testify at trial, where "[t]his young lady is capable of

Nonetheless, momentum seems to be building for a pioneer case that adopts the ADA argument.¹⁹⁴ The argument subordinating plaintiff exclusion to the ADA, as advanced by plaintiff attorneys,¹⁹⁵ proceeds as follows. Congress passed the ADA after finding that disabled Americans face numerous types of discrimination.¹⁹⁶ Accordingly, the ADA carries a mandate to eliminate discrimination occurring solely on the basis of disabled status.¹⁹⁷ When defendants try to exclude plaintiffs from trials, they imply that prejudice will occur based solely on plaintiffs'

hearing, understanding, and answering any question posed and is quite candid and unembarrassed to discuss any matter. She is intelligent, mature and conducts herself very well.”); *Jordan ex rel. Jordan v. Deery*, 778 N.E.2d 1264, 1267 (Ind. 2002); *Green v. N. Arundel Hosp. Ass’n, Inc.*, 730 A.2d 221, 233 (Md. Ct. Spec. App. 1999) (finding the allegation of an ADA violation irrelevant because “the ADA allows for action only *against the public entity for prospective injunctive relief*—there is nothing in the ADA that provides a basis for reversing the judgment of a lower court in a civil dispute between private parties”), *aff’d*, 785 A.2d 361 (Md. Ct. App. 2001); *cert. Cary v. Oneok, Inc.*, 1997 OK 60, ¶ 18, 940 P.2d 201, 205.

¹⁹⁴ See generally, e.g., Brief for United States as Intervenor, *Bowers v. Nat’l Collegiate Athletic Ass’n*, 2002 WL 32390595 (3d Cir. 2002) (Nos. 01-4226, 01-4492, 02-1789); Bessie M. Taylor, *Jordan ex rel. Jordan v. Deery* Pl. Pet. to Transfer (2000), at 8-12 (on file with author); Bessie M. Taylor, *Jordan v. Deery* Mem. of Law in Support of Pet. To Transfer (2000), at 19-21 (on file with author); *Green v. N. Arundel Hosp. Ass’n*, Pet. for Writ of Cert. to the United States Supreme Court, No. 01-1303, 2002 WL 32134682 (Feb. 2002), *cert. denied*, 535 U.S. 1055 (2002).

¹⁹⁵ See, e.g., Bessie M. Taylor, *Jordan ex rel. Jordan v. Deery* Pl. Pet. to Transfer (2000), at *8-12 (on file with author); Bessie M. Taylor, *Jordan ex rel. Jordan v. Deery* Mem. of Law in Support of Pet. To Transfer (2000), at *19-21 (on file with author).

¹⁹⁶ See 42 U.S.C. § 12101(a)(3) (2005) (finding discrimination “in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services”).

¹⁹⁷ See 42 U.S.C. § 12101(b)(4) (2005) (calling on Congress “to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities”).

appearance.¹⁹⁸ Excluding plaintiffs simply for their disabled condition is discrimination based on status, and the ADA forbids such categorical targeting.¹⁹⁹ Excluding plaintiffs also cannot be reconciled with the requirement that state agencies must offer reasonable accommodations to the disabled.²⁰⁰

Although the ADA argument against plaintiff exclusion recognizes the nation's sympathy toward the plight of the disabled, it has four critical flaws that render it ineffective in abolishing plaintiff exclusion. All four flaws relate to the confusion between excluding plaintiffs from the courtroom, *a priori*, because they are disabled; and excluding from the courtroom people who would present prejudicial evidence . . . *and who just happen to be disabled*. Each flaw merits a closer examination.

1. Plaintiff Exclusion Motions Do Not Target Plaintiffs for Their Disabled Status *Per Se*

The first major flaw in the ADA argument is that it assumes a *per se* discriminatory animus against the disabled. Congress crafted the ADA to eliminate disparate treatment against broad classes within society.²⁰¹ Disparate-impact claims also

¹⁹⁸ Admittedly, some defense attorneys move so reflexively to exclude plaintiffs, that they file the exclusion motion before even having met plaintiff. *See, e.g., LeCompte*, 1995 U.S. Dist. LEXIS 6555, at *1-2 (noting that “without even so much as having met Miss LeCompte, Freeport had moved the Court based on the ‘severe deformity’ of the child”).

¹⁹⁹ Plaintiff in *Green*, in a more dramatic invective, described plaintiff exclusion as “practically the same as saying: ‘No disabled allowed.’ The State of Maryland is telling its disabled citizens: ‘As far as we are concerned you do not exist.’ It sends the message that disabled citizens have a lower legal status in society.” *Green v. N. Arundel Hosp. Ass’n, Pet. for Writ of Cert. to the United States Supreme Court*, No. 01-1303, 2002 WL 32134682 (Feb. 2002), *cert. denied*, 535 U.S. 1055 (2002).

²⁰⁰ *See* Nondiscrimination on the Basis of Disability in State and Local Government Services, 28 C.F.R. § 35.130 (2005) (construing disabilities as only physical, not cognitive, and discrimination as a matter only of physical access to government services).

²⁰¹ *See* *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003) (noting, in an action alleging an ADA violation, that “‘disparate treatment’ . . . is the most easily

receive recognition under the ADA.²⁰² Congress, however, did not design the ADA for courtroom civil procedure applied to individuals as individuals, and not as members of broad classes.²⁰³ For plaintiff exclusion to constitute an ADA violation, plaintiffs would have to be excluded automatically, without a hearing, as soon as the court found out that plaintiff had a disability. That exclusion would have to occur either because plaintiff belonged to the class of disabled individuals, or because the court applied to plaintiff some observation that was generally true of disabled people, but not necessarily true of plaintiff. Instead, plaintiff exclusion is just one tool that can help place both sides of a lawsuit on equal footing before a jury, when circumstances threaten to prejudice a jury unfairly against a party.

2. Plaintiffs in Negligence Cases Are Not Qualified Individuals with a Disability

Another problem with the ADA argument concerns the

understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or [other protected characteristic].” (citing *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)) (alteration in original).

²⁰² See *id.* at 53 (“Both disparate-treatment and disparate-impact claims are cognizable under the ADA.”) (citing 42 U.S.C. § 12112(b) (2005)).

²⁰³ The Supreme Court has held that analogous statutes pertaining to age and sex discrimination follow similar analysis. See, e.g., *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 449 n.7 (2003) (noting that the Equal Employment Opportunity Commission issues the same guidelines for compliance with Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the ADA, or the Equal Pay Act of 1963). Accordingly, the focus on individuals that appears in analogous cases can apply to plaintiff exclusion and alleged violations of the ADA. See *Los Angeles, Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978) (“[Title VII’s] focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.”).

ability of incapacitated plaintiffs to fit under its definitions. The ADA sets out to eliminate discrimination against qualified individuals with a disability that occurs by reason of such disability.²⁰⁴ The ADA defines the term “qualified individual with a disability” as

[A]n individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.²⁰⁵

At this point, the inquiry breaks down further into whether excluded plaintiffs have a disability, and then whether they meet some kind of eligibility requirement that would warrant the term “qualified.”

Given that plaintiffs under the *Helminski* test must have severe cognitive impairments to qualify for exclusion, they would meet the ADA’s definition of “disability” easily.²⁰⁶ The inquiry

²⁰⁴ “Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132 (2005).

²⁰⁵ *Id.*

²⁰⁶ Under the ADA, a plaintiff can have a disability in three different ways. First, plaintiff can have a physical or mental impairment that substantially limits one or more major life activities. 42 U.S.C. § 12102(2)(A) (2005). Physical or mental impairment does not include simple physical characteristics such as hair color; socioeconomic factors such as a prison record; or naturally occurring factors such as age. H.R. REP. NO. 101-485(III), at 27-28, *reprinted in* 1990 U.S.C.C.A.N. 445, 450-51. Physical and mental impairments do include, *inter alia*, any conditions that have neurological, musculoskeletal, or psychological effects. *Id. But see* *Sheridan v. Michels*, 282 B.R. 79, 92 (B.A.P. 1st Cir. 2002) (holding that a dopamine deficiency does not constitute a disability), *vacated on other grounds by* 362 F.3d 96 (1st Cir. 2004); *Access Now v. Town of Jasper*,

into whether the ADA shields plaintiffs from exclusion motions thus shifts to whether they meet the ADA's definition of "qualified." To qualify for ADA protection, as noted above, plaintiffs must meet the essential eligibility requirements of a government program or service, with or without reasonable accommodation. Terms such as government programs or services connote direct aid, outputs from a public entity that a recipient takes without a contract or any hint of a *quid pro quo*.²⁰⁷ Just as

268 F. Supp. 2d 973, 980-81 (E.D. Tenn. 2003) (holding that mild spina bifida is not a disability under the ADA).

Second, plaintiff can have a record of a limiting physical or mental impairment. 42 U.S.C. § 12102(2)(B) (2005). Third, plaintiff can qualify as disabled if others perceive her as having a limiting physical or mental impairment. *See* 42 U.S.C. § 12102(2)(C) (2005).

²⁰⁷ *See* H.R. REP. NO. 101-485(II), at 37 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 318-19 (discussing the motivation for passing the ADA in the context of "recipients of Federal assistance" and "funding sources" of government programs); *see also* Penn. Dep't of Corrs. v. Yeskey, 524 U.S. 206, 211 (1998) (holding that a prison library is a public service because prisoners "are free to take or leave [it]"); *Bay Area Addiction v. City of Antioch*, 179 F.3d 725, 731-32 (9th Cir. 1999) (holding that zoning is a public service because it is a normal government function in line with Congress's broad mandate to eliminate discrimination); *Loritz v. CMT Blues*, 2003 U.S. Dist. LEXIS 17127 at *6-7 (S.D. Cal. 2003) (holding that prisoner vocation and rehabilitation programs are government services because the prisoners receive training in how to function as lawful citizens when their sentences expire); *Filush v. Town of Weston*, 266 F. Supp. 2d 322, 328 (D. Conn. 2003) (holding that hiring and promotions fell under the employment provisions of Title I of the ADA, not the public services provisions of Title II); *New York v. County of Delaware*, 82 F. Supp. 2d 12, 17-18 (N.D.N.Y. 2000) (holding that running polling places constitutes a government service); *Soto v. City of Newark*, 72 F. Supp. 2d 489, 494 (D.N.J. 1999) (holding that conducting weddings constituted a government service); *Saunders v. Horn*, 960 F. Supp. 893, 899 (E.D. Pa. 1997) (holding that police and fire services constitute government services); *Clark v. Va. Bd. of Bar Examiners*, 880 F. Supp. 430, 442 (E.D. Va. 1995) (holding that granting law licenses constitutes a government service); *Galloway v. Super. Ct.*, 816 F. Supp. 12 (D.D.C. 1993) (holding that jury constitutes a government service).

obtaining a job does not constitute a receipt of public services,²⁰⁸ a government-run court does not equate to a public benefit program that offers direct aid to plaintiffs the way that, say, home heating assistance does. Plaintiffs would argue even more implausibly to the contrary if they referred to a federal court. The ADA applies only to state and local governments; while state and local courts would fall under ADA purview, federal courts would not.²⁰⁹

Even if courts constituted some kind of public service or benefit, no reasonable accommodation exists that the ADA would impose on defendants in plaintiff exclusion cases. The federal regulations implementing the ADA require public entities to make reasonable modifications to their operations to accommodate the disabled, “unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”²¹⁰ What would a reasonable accommodation of a judiciary system mean, though, for an incapacitated plaintiff who cannot communicate with counsel and may not even understand that something called a trial is occurring?²¹¹ A court

²⁰⁸ See *Zimmerman v. Ore. Dep’t of Justice*, 170 F.3d 1169, 1175-76 (9th Cir. 1999).

²⁰⁹ See *Sheridan v. Michels*, 282 B.R. 79, 92 (Bankr. App. Panel for 1st Cir. 2002), vacated on other grounds by 362 F.3d 96 (1st Cir. 2004).

²¹⁰ 28 C.F.R. § 35.130(b)(7) (2005).

²¹¹ See *Green v. N. Arundel Hosp. Ass’n*, 366 Md. 597, 617-18 (Md. 2001) (holding that the federal regulations implementing the ADA, 28 C.F.R. §§ 35.101-35.190 (2005), exist to force public entities to make reasonable accommodations regarding physical access, and that “[n]owhere in these regulations is there stated, or even suggested, that, where the complaint concerns the exclusion of a disabled person from the courtroom by judicial ruling, reversal of the judgment entered in the case is a permissible remedy [i]ndeed, the inappropriateness of such a remedy becomes unmistakably clear when one considers that a violation of the ADA based on wrongful exclusion from a courtroom does not depend on the excluded person’s status as a party in the pending case; a member of the public who is excluded from a public courtroom because of his/her disability has the same complaint under the ADA as a party excluded by reason of disability. Surely, it would be inappropriate, and not within the contemplation of Congress, to vacate judgments entered in cases proceeding in the courthouse because a disabled member of the public was wrongfully excluded from entering or remaining in the courthouse or in particular courtrooms.”).

could not compensate, through reasonable accommodations, for the inability to communicate by assisting counsel plan trial strategy. Assisting counsel would fundamentally alter the court's role as an impartial arbiter between the competing arguments from each side.²¹² Alternatively, a court could focus on the more narrow accommodation of bringing plaintiffs into the courtroom for the duration of a trial. Even then, a court would fundamentally alter its environment if it knowingly permitted the presence of plaintiffs who presented a substantial prejudice risk to defendants. Plaintiffs whose attorneys are on their own during trial, because of their inability to communicate, will suffer no disadvantage during trial proceedings that would require the kind of accommodation that federal regulations contemplate.²¹³ Ultimately, the reasonable accommodation for plaintiffs lacking capacity even to launch the suit would be to let guardians or next friends file and manage the suit, on their behalf.²¹⁴

²¹² See 28 C.F.R. § 35.150(a) (2005) (ordering public entities to operate so as to be readily accessible to the disabled, but not requiring a public entity "to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens . . .").

²¹³ See *Memmer v. Marin County Cts.*, 169 F.3d 630, 633 (9th Cir. 1999) (holding that a visually impaired plaintiff suffered no disadvantage during pre-trial proceedings that did not require her to read any documents or examine any exhibits); cf. *Hatch v. Sec'y of Me.*, 879 F. Supp. 147, 148 (D. Me. 1995) (holding that Maine did not have to issue a driver's license to plaintiff, where plaintiff could not show that any accommodation of his visual impairment would allow him to drive safely).

²¹⁴ See FED R. CIV. P. 17(c) ("An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem.").

3. Plaintiffs in Negligence Cases Do Not Face the Type of Discrimination that Congress Attempted to Eliminate Through Passage of the ADA

Plaintiff exclusion cannot constitute discrimination against the disabled, in part because granting a plaintiff exclusion motion does not amount to the kind of conduct that Congress targeted when enacting the ADA. Congress passed the ADA to address pervasive²¹⁵ discrimination against the disabled in many areas of public life.²¹⁶ Much of the discrimination that Congress identified concerns physical access to public services, and the physical barriers that keep the disabled from meaningful

²¹⁵ In writing the ADA's statement of purpose, Congress went as far as to describe the disabled as a "discrete and insular minority" who have a history of unequal treatment and political powerlessness. 42 U.S.C. § 12101(7) (2005).

²¹⁶ Congress identified areas of public life such as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services. 42 U.S.C. § 12101(3) (2005). Additionally, before passing the ADA Congress heard testimony from individuals who shared their experiences with discrimination. One witness noted that "[w]hen I was 5 my mother proudly pushed my wheelchair to our local public school, where I was promptly refused admission because the principal ruled that I was a fire hazard. I was forced to go into home instruction, receiving one hour of education twice a week for 31/2 years." H.R. REP. NO. 101-485(II), at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 311. The Education Committee also noted, for example, that "in March, 1988, the Washington Post reported the story of a New Jersey zoo keeper who refused to admit children with Down's [sic] Syndrome because he feared they would upset the chimpanzees." *Id.* Finally, the Education Committee noted that disabled people faced lower employment rates and lower salaries primarily because "their major obstacles are not inherent in their disabilities, but arise from barriers that have been imposed externally and unnecessarily." *Id.* at 35, *reprinted in* 1990 U.S.C.C.A.N. 303, 316-17 (quoting Sen. Lowell Wiecker, *Testimony Before the House Subcomm. on Select Educ. and Senate Subcomm. on the Handicapped*, Sept. 27, 1988, S. Hrng. 100-926, at 3).

enforcement, through the courts, of their constitutional rights.²¹⁷ Concern about physical access affects the judiciary only to the extent that states should “weigh the fundamental importance of access to the courts to our justice system, that the perpetuation of the current physical barriers force people with disabilities to either forgo their right to be present in court or be carried into court, and that the remedy is often inexpensive and simple.”²¹⁸ Excluding plaintiffs out of concern for jury prejudice does not constitute the sort of physical barrier that would impede physical access to court buildings.²¹⁹ No court to date has expanded the concept of physical barriers beyond the literal meaning of a physical structure that prevents disabled people from entering and exiting reasonably.²²⁰ At most, courts have expanded the concept of physical access to psychiatric disorders,²²¹ which Congress intended to include in the ADA.²²² Such disorders have an

²¹⁷ See *Lane v. Tennessee*, 315 F.3d 680, 682 (6th Cir. 2003), *aff'd*, 541 U.S. 509 (2004). See generally H.R. REP. NO. 101-485(I) (1990), *reprinted in* 1990 U.S.C.C.A.N. 267 (noting that many of the problems that the disabled face concern physical access to public accommodations and public transportation).

²¹⁸ *Lane*, 315 F.3d at 682.

²¹⁹ See *Matthews v. Jefferson*, 29 F. Supp. 2d 525, 534 (W.D. Ark. 1998); *Galloway v. Super. Ct.*, 816 F. Supp. 12, 18-19 (D.D.C. 1993); *Green v. N. Arundel Hosp. Ass'n*, 785 A.2d 361, 372 (Md. 2001) (citing *Layton v. Elder*, 143 F.3d 469, 472-73 (8th Cir. 1998); *People v. Caldwell*, 603 N.Y.S.2d 713, 715-16 (N.Y. Crim. Ct. 1993)).

²²⁰ See *Green*, 785 A.2d at 372 (“Whether the exclusion of a disabled person from a civil court trial, not by reason of some physical barrier but in order to avoid disruption or prejudice, would constitute a violation of the ADA is as yet unclear. No case deciding that issue has been cited to us by any of the parties or amici, and, like the Court of Special Appeals, we have been unable to find one.”).

²²¹ See *State v. P.E.*, 664 A.2d 1301, 1305 (N.J. Super. Ct. 1994) (holding that failure to appoint counsel for a mentally ill defendant, who insisted on proceeding *pro se* but lacked the mental capacity to do so, violated the ADA’s reasonable accommodation requirement).

²²² See H.R. REP. NO. 101-485(III), at 27-28, *reprinted in* 1990 U.S.C.C.A.N. 445, 450-51 (“[Physical or mental impairment] also means any mental or

arguably physical origin,²²³ and are distinguishable from pre-trial exclusion motions that courts consider on the merits.

4. Sovereign Immunity Would Bar Legal or Equitable Claims under the ADA

The fourth critical flaw with the ADA argument against plaintiff exclusion is that plaintiffs will have no applicable remedy under the ADA, should they litigate in response to the granting of an exclusion motion.²²⁴ Plaintiffs would have to litigate separately from the original negligence action, if they alleged that the granting of a plaintiff exclusion motion violated the ADA.²²⁵ At

psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”).

²²³ See, e.g., JAMES H. SCULLY, *PSYCHIATRY* 6 (3d ed. 1996) (noting the importance of the clinical laboratory in screening patients for underlying medical conditions that may be inducing the psychiatric symptoms, monitoring blood levels of psychotropic medications, and identifying biological markers that aid diagnosis and treatment).

²²⁴ Cf., e.g., FED R. CIV. P. 12(b)(6) (creating grounds for dismissal of an action for “failure to state a claim upon which relief can be granted”).

²²⁵ Plaintiffs could appeal a granting of a plaintiff exclusion motion on the grounds that the trial court employed originally—the likelihood of jury prejudice. In this context, plaintiffs could argue, within the same action and without naming government entities as separate parties, that jury prejudice is not nearly as likely in the case at bar as the trial judge thought. The drive to eliminate plaintiff exclusion through the ADA does not argue so narrowly, though. See *supra* note 183 (discussing attempts by some plaintiffs’ attorneys to disparage plaintiff exclusion as an attempt to reduce the disabled to second-class citizens). According to the argument against plaintiff exclusion, a court granting an exclusion motion will have done more than abuse its discretion, see BLACK’S LAW DICTIONARY 11 (8th ed. 2004) (defining the abuse of discretion standard as “[a]n appellate court’s standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence”), or err as a matter of law. The court will have taken an action that denied plaintiffs’ constitutional rights, leaving them eligible for relief apart from any relief connected to the alleged negligence.

The original negligence action, though, almost certainly will not have named as a defendant the public entity that allegedly violated the ADA; besides, lumping a subsequent and distinct wrongdoing in a pre-existing suit would make sense. Thus, plaintiffs alleging an ADA violation from the granting of an

that point, sovereign immunity would end the action. Plaintiffs alleging harm from the granting of an exclusion motion would not be able to sue the state in question in federal court for legal relief.²²⁶ Congress can abrogate state sovereign immunity from legal relief, but only when it clearly intends to do so and when it acts pursuant to a valid grant of constitutional authority.²²⁷ Regarding the ADA, Congress has met the first part of the abrogation test by writing its intent explicitly in the ADA.²²⁸

exclusion would have to commence a new action and name the relevant public entity. See *Goldberg v. Marc's Disc. Store*, No. 79173, 2002 Ohio App. LEXIS 200, at *4-5 (Ohio Ct. App. 2002) (requiring that the public entity be a named party in a Title II ADA action, and declining "to create a new means of ADA enforcement that was not adopted by Congress, or included by the Attorney General in the regulations adopted to implement the ADA") (construing 42 U.S.C. § 12133 (2004); 42 U.S.C. §§ 2000e-5(f)-(k), 2000e-16 (2004); 29 U.S.C. § 794(a) (2004); 28 C.F.R. §§ 35.101-190 (2005)). Commencing the ADA action would have to follow a specific protocol. See *In re Rodriguez*, No. 98CA007073, 1999 Ohio App. LEXIS 3517, at *22 (Aug. 4, 1999) (unreported opinion) (citations omitted) (noting that an ADA action "begins with filing a complaint with a designated agency. If appropriate, the agency will refer the case to the Department of Justice, which may file suit in a federal district court. An alternative procedure is for a private individual to directly initiate an action, with or without waiting for the federal administrative procedure to run its course. The action may be in equity, which indicates that there is a possibility of enjoining a public entity from taking action in violation of the ADA."); see also *Goldberg*, 2002 Ohio App. LEXIS 200, at *4-5 (citing *Rodriguez*).

²²⁶ See U.S. CONST. amend. 11 ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."); *Ex parte Young*, 209 U.S. 123, 150 (1909) (holding that the Eleventh Amendment applies to citizens suing their own states in federal court); *Bd. of Trs. v. Garrett*, 531 U.S. 356, 363 (2001) ("The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court.") (citing *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000)).

²²⁷ *Garrett*, 531 U.S. at 363 (citing *Kimel*, 528 U.S. at 73).

²²⁸ See 42 U.S.C. § 12202 (2005) ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this Act.");

Congress likely would fail the second part of the test as it applies to Title II²²⁹ and plaintiff exclusion,²³⁰ just as it failed that part of the test as it applies to Title I.²³¹ Congress cannot rely on Article I of the Constitution for abrogation authority,²³² but may rely on its authority to enforce the Fourteenth Amendment.²³³ Congress may not invoke its Fourteenth Amendment abrogation authority, without documenting an extensive history of state conduct that

Garrett at 364 (citing the abrogation section of the ADA); 42 U.S.C. § 12101(b)(4) (2005) (invoking authority to enforce the Fourteenth Amendment).

²²⁹ Courts often refer to the ADA by the titles that it contained in its original text, apart from subsequent classification under United States Code. Title I of the ADA, 42 U.S.C. § 12112 (2005), prohibits discrimination in the area of employment. *See, e.g.,* Laura Hartman, *The Disabled Employee and Reasonable Accommodation Under the Minnesota Human Rights Act: Where Does Absenteeism Attributable to the Disability Fit into the Law?*, 19 WM. MITCHELL L. REV. 905 (1993) (reviewing the Title I litigation posture and arguing that blocks of disability time after surgeries do not constitute absenteeism). Title II, 42 U.S.C. § 12132 (2005), prohibits discrimination in government services. Title III, 42 U.S.C. § 12182 (2005), prohibits discrimination in places of public accommodation. *See, e.g.,* PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001) (reviewing the Title III litigation posture and allowing a professional golfer with a circulatory disorder in his leg to use a cart while competing). Plaintiff exclusion would implicate Title II of the ADA, if it violated the ADA at all.

²³⁰ Whether Title II exceeded congressional authority to abrogate state sovereign immunity under the Fourteenth Amendment remained an open question after *Garrett*. The U.S. Supreme Court recently answered the question partially, regarding physical access to the courts and a wheelchair-bound man's refusal to crawl up stairs to enter a courthouse. *See* *Tennessee v. Lane*, 124 S. Ct. 1978 (2004). *Lane* does not resolve whether Congress could abrogate state sovereign immunity in response to motion practice that a court resolves on the merits.

²³¹ *See* *Garrett*, 531 U.S. at 360 (announcing the holding that suits for money damages under Title I of the ADA are barred by the Eleventh Amendment).

²³² *See* *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996) ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.").

²³³ *See* U.S. CONST. amend. 14 § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) ("[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.") (citation omitted).

offends the Fourteenth Amendment.²³⁴ An extensive history of states discriminating against the disabled does not exist in the text of the ADA: the congressional statement of purpose focuses on conduct by private individuals and entities.²³⁵ Without a more detailed finding that states have discriminated against the disabled, any relief that plaintiffs sought under the Title II of the ADA would be disproportionate to the alleged harm flowing from an exclusion motion granted pursuant to the *Helminski* test.²³⁶ Thus, Congress cannot abrogate state sovereign immunity under Title II of the ADA.²³⁷ Plaintiffs who endeavor to seek monetary damages

²³⁴ See *Garrett*, 531 U.S. at 368 (noting that congressional authority to enforce the Fourteenth Amendment “is appropriately exercised only in response to state transgressions” and that “[t]he legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.”).

²³⁵ See 42 U.S.C. § 12101 (2005) (describing how the disabled face various forms of discrimination that Congress wants to address through the ADA); *Garrett*, 531 U.S. at 369 (“The record assembled by Congress includes many instances to support such a finding [of discrimination against the disabled]. But the great majority of these incidents do not deal with the activities of States.”); see also *Thompson v. Colorado*, 278 F.3d 1020, 1034 (10th Cir. 2001) (holding that “Title II’s accommodation requirement appears to be an attempt to prescribe a new federal standard for the treatment of the disabled rather than an attempt to combat unconstitutional discrimination. In this respect, Title II resembles the Religious Freedom Restoration Act, which the Supreme Court struck down Thus, Title II is not a valid abrogation of the states’ Eleventh Amendment immunity.” (citations omitted)).

²³⁶ See *Garrett*, 531 U.S. at 374 (“Congress is the final authority as to desirable public policy, but in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation. Those requirements are not met [for Title I], and to uphold the [ADA’s] application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court in [prior cases]. Section 5 does not so broadly enlarge congressional authority.”).

²³⁷ See *Jones v. Dep’t of Welfare*, 164 F. Supp. 2d 490, 493 (E.D. Pa. 2001) (holding that the then-new Supreme Court holding in *Garrett* “is clearly

against states for discrimination against the disabled can seek alternative means of maintaining an action, such as having the federal government serve as plaintiff²³⁸ or suing under state laws.²³⁹

Plaintiffs excluded from trials could try to sue states in federal court for equitable relief,²⁴⁰ but the specific performance

applicable to this case and requires a reversal of our earlier conclusion that Congress abrogated states' Eleventh Amendment immunity under Title II of the ADA"); *State v. Rendon*, 832 So. 2d 141, 146 (Fla. Ct. App. 2002) (holding that the state of Florida could collect a fee for handicapped driver placards, where *Garrett* maintained Florida's sovereign immunity from individual suits under Title II, and where *Garrett's* defense of sovereign immunity rendered a ban on such fees, under 28 C.F.R. § 35.130(f) (2005), unconstitutional), *vacated by, remanded by* 541 U.S. 1059 (2004). The U.S. Supreme Court vacated *Rendon* to allow Florida appellate courts to consider the possible impact of the new *Lane* decision, but even *Lane* likely will not permit Congress to abrogate state sovereign immunity over reasonable administrative fees. *But see* *Dare v. California*, 191 F.3d 1167, 1173 (9th Cir. 1999) (holding that California may not charge fees for handicapped driver placards because Title II does abrogate state sovereign immunity).

²³⁸ *See Garrett*, 531 U.S. at 374 n.9 (explaining that even when the Eleventh Amendment bars an action, an individual may seek relief through state courts, through an action where the United States is a plaintiff, or through an *Ex parte* Young application for equitable relief).

²³⁹ *See id.* at 368 n.5 ("It is worth noting that by the time that Congress enacted the ADA in 1990, every State in the Union had enacted such measures. At least one Member of Congress remarked that 'this is probably one of the few times where the States are so far out in front of the Federal Government, it's not funny.'") (citation omitted).

²⁴⁰ *See Ex parte Young*, 209 U.S. 123, 166 (1909) (allowing individuals to seek equitable, though not legal, relief against their own states because "[s]uch remedy is undoubtedly the most convenient, the most comprehensive, and the most orderly way in which the rights of all parties can be properly, fairly and adequately passed upon"). Congress codified a waiver of sovereign immunity for any plaintiff seeking equitable relief against any federal officer, thus superseding *Ex parte Young* to this extent. *See* 5 U.S.C. § 702 (2005) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground

that they likely would request could force a court to override what it deemed a legitimate application of the rules of evidence concerning prejudicial evidence.²⁴¹ Plaintiffs under these circumstances should not be allowed to rewrite the rules of evidence, especially without proposing how to deal with legitimate concerns about the impact of plaintiff presence on a jury. Additionally, the Federal Anti-Injunction Act²⁴² already prevents a federal court from micromanaging the ongoing case of a state court.²⁴³ “Surely, it would be inappropriate, and not within the contemplation of Congress, to vacate judgments entered in cases proceeding in the courthouse because a disabled member of the public was wrongfully excluded from entering or remaining in the courthouse or in particular courtrooms.”²⁴⁴

For all of the foregoing reasons, the *Jordan* court opined correctly that plaintiff exclusion survives the ADA.²⁴⁵ More broadly, all four arguments against plaintiff exclusion, as discussed throughout this part, fail to understand that plaintiff exclusion arose as a practical response to an unprecedented fact pattern in negligence litigation. Nonetheless, plaintiff exclusion developed before passage of the ADA, and courts should seriously consider the ADA’s general concern that the disabled should not face discrimination because of factors beyond their control. In a nod to

that it is against the United States or that the United States is an indispensable party.”).

²⁴¹ *Cf. id.* at 163 (holding that the right to seek injunctions against state officials “does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature . . . and an injunction against a state court *would be a violation of the whole scheme of our government*”).

²⁴² 28 U.S.C. § 2283 (2005).

²⁴³ “A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.” *Id.*

²⁴⁴ *Green v. N. Arundel Hosp. Ass’n*, 785 A.2d 361, 373 (Md. Ct. App. 2001).

²⁴⁵ *See Jordan ex rel. Jordan v. Deery*, 778 N.E.2d 1264, 1267 (Ind. 2002) (“In fact, the weight of authority suggests that the *Helminski* test has survived enactment of the ADA.”).

the "spirit" of the ADA,²⁴⁶ the final part of this article will combine safeguards that various jurisdictions have developed into a single, enhanced plaintiff exclusion doctrine that all jurisdictions can apply.

PART VI: REAFFIRMING *HELMINSKI*: A PROPOSAL FOR ENHANCED PLAINTIFF EXCLUSION

Amazingly, the *Helmski* test already accomplished what the ADA later set out to do, in that defendants in negligence trials never could exclude plaintiffs for physical injuries alone, and never could exclude plaintiffs by simply pointing out that they had cognitive impairments.²⁴⁷ Still, the passage of the ADA and the development of additional plaintiff safeguards²⁴⁸ in the last twenty years²⁴⁹ make the *Helmski* test due for some touch-up work. This article now proposes rearranging some of the procedures in the *Helmski* test, and crystallizing *Helmski* into a discrete set of steps. The steps in this proposed Enhanced Plaintiff Exclusion Test (EPET) can guide a judge in a negligence trial, and let attorneys know the standard by which a court will assess their motions.

Step 1: Bifurcation. A personal injury trial must have separate liability and damages phases before a court can consider excluding plaintiff.²⁵⁰ The negligence cases that have supported plaintiff exclusion already have featured bifurcated trials, and this

²⁴⁶ See *LeCompte v. Freeport-McMoran*, No. 94-437, 1995 U.S. Dist. LEXIS 6555, at *3 n.1 (E.D. La. May 12, 1995) (unpublished opinion) ("Indeed, the court questions the legality of barring an individual from open court based on her physical impairment alone. While such an action might not be a specific violation of the ADA, it certainly contravenes the very spirit of the law.").

²⁴⁷ See *Helmski v. Ayerst Labs.*, 766 F.2d 208, 215 (6th Cir. 1985) ("We agree with the proposition . . . that a plaintiff's physical condition alone does not warrant his exclusion from the courtroom during any portion of the proceedings."), *cert. denied*, 474 U.S. 981 (1985).

²⁴⁸ See *infra* Step 4.

²⁴⁹ That is, the time that has passed since the court issued *Helmski* in 1985.

²⁵⁰ Unlike plaintiff exclusion itself, which originated in the common law, bifurcation of trials has statutory support. See, e.g., FED. R. CIV. P. 42(b).

requirement should continue.²⁵¹ Defendants must file for bifurcation and bear the burden of proving that bifurcation will serve some meaningful purpose—clarity, or enhancement of judicial economy,²⁵² for example. Defendants cannot use as a reason for bifurcation the chances of proving jury prejudice at a later EPET stage. Taking away possible future prejudice as grounds for bifurcation would not represent a departure from the Federal Rules of Civil Procedure,²⁵³ because avoiding prejudice would remain the ultimate motive for bifurcation. EPET simply would require defendants to name some other reason immediately, to avoid a speculative situation in which defendants could obtain a benefit immediately in exchange for something that they might not be able to prove later. Forcing defendants to come up with independent grounds for bifurcation will protect plaintiffs, because defendants will not be able to gain both bifurcation and exclusion from a single allegation that they would prove only later, if they succeed in proving it at all.

When advancing a reason for bifurcating a trial, defendants must prove that the evidence between the proposed liability and

²⁵¹ See *Helminski*, 766 F.2d at 212 (trial to be bifurcated as soon as last expert witness testifies); *Morley v. Super. Ct.*, 638 P.2d 1331, 1332 (Ariz. 1981) (trial was bifurcated); *Dickson v. Bober*, 130 N.W.2d 526, 529 (Minn. 1964) (trial technically was not consolidated but the jury had not reached the question of damages).

²⁵² See 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2390 (2004) (“A competent study concludes that [bifurcated cases] take 20% less time than do cases tried routinely, with the liability and damage issues submitted simultaneously to the jury. The same data show, however, that although defendants win in 42% of the cases tried routinely, they win in 79% of the cases in which the liability issue is submitted alone. These figures suggest that juries are moved by sympathy when they have heard evidence of the extent of the plaintiff’s injuries and that this influences their decision on the liability issue.”); *Kisteneff v. Tiernan*, 514 F.2d 896 (1st Cir. 1975) (per curiam) (allowing trial bifurcation to prevent delaying a trial until one medical expert could arrive and testify).

²⁵³ See FED. R. CIV. P. 42(b) (authorizing trial bifurcation “in furtherance of convenience or to avoid prejudice . . .”) (emphasis added).

damages phases will not overlap. If evidence from an eventual damages phase somehow relates to the liability phase, then plaintiff must have a chance to present a full case at the earlier stage. As for timing, bifurcation in a negligence trial cannot occur after a trial begins.²⁵⁴ The jury will have seen plaintiff by that time, and plaintiff exclusion would be pointless.²⁵⁵

Step 2: Filing the exclusion motion. Defendants must move for exclusion within some period of time after a court grants a bifurcation motion, and always before a trial begins.²⁵⁶ Theoretically, defendants could file for exclusion at any time during the liability phase of trial, as long as the jury has not seen plaintiff yet. Requiring an earlier motion gives plaintiffs ample notice, which will allow plaintiffs to contemplate which of the possible safeguards, described below, to invoke. Requiring defendants to move for exclusion before trial also serves the interests of judicial economy. An exclusion motion granted improperly during trial may cause irreversible error and force the parties to start all over again, with a new jury.

Step 3: Exclusion hearing. No exclusion motion should

²⁵⁴ An absolute deadline obviates the need for one of the prejudice debates that occurred in *Helminski*. In *Helminski*, defendant did not move for bifurcation and exclusion until plaintiff presented his final expert witness, and counsel subsequently announced his intent to bring plaintiff to the stand as a witness. The court then realized that the bifurcation request should have come earlier. See *Helminski v. Ayerst Labs.*, 766 F.2d 208, 211-12 (6th Cir. 1985).

The *Helminski* court rejected defendant's concern that plaintiff's counsel sprung plaintiff on them, as a surprise witness. See *id.* at 211 n.2. Generally, though, surprise witnesses can be a concern in plaintiff exclusion trials, if defendant loses the right to move for bifurcation after a trial begins. Thus, under EPET courts would not allow plaintiffs to testify at trial for any reason, without notice to defendants before trial.

²⁵⁵ For this reason, EPET places bifurcation ahead of proving jury prejudice, the opposite of what *Helminski* did. Demonstrating likely jury prejudice becomes a heart-rending academic debate if the court ultimately can do nothing about it. A court should know in advance that it has the power to correct any prejudice that defendants offer later.

²⁵⁶ Under EPET, plaintiff exclusion after the start of a trial could occur only if plaintiff meets the criteria for "extreme circumstances" described earlier in this article. See *supra* Part V.

issue without a hearing on the merits, which plaintiff must attend. The court should observe plaintiff directly, and not through documents, photos, or “day in the life” videos.²⁵⁷ “Day in the life” videos, which rarely depict all of plaintiff’s activities from dawn to dusk,²⁵⁸ can include many techniques to enhance the sympathy of the court beyond what the judge would feel in plaintiff’s presence.²⁵⁹ Direct observation will give the court a chance to calculate for itself how likely a jury would blur liability and damages, and hold defendants liable because of the severity of the injuries.

As for the merits of the motion, defendant will bear the burden of proving each of two distinct points. First, defendant must prove that plaintiff suffers from a cognitive impairment that

²⁵⁷ A “day in the life” video is a short film documenting the activities and, presumably, the struggles of a plaintiff in a negligence suit. The video aims to give the trier of fact a better understanding of the alleged suffering that plaintiff endures constantly. *See, e.g.,* Cisarik v. Palos Comm. Hosp., 579 N.E.2d 873, 874 (Ill. 1991) (allowing the use of “day in the life videos” because they constitute a form of demonstrative evidence). *But see* Gregory T. Jones, *Lex, Lies & Videotape*, 18 U. ARK. LITTLE ROCK L. REV. 613, 638-39 (1996) (“By definition, a day-in-the-life documentary is problematic. The underlying concept is that the video accurately portrays a ‘typical’ day when, in fact, there may be no such thing While virtually the same problem arises with all evidence that is not equally accessible to all parties, a real danger posed by the admission of day-in-the-life videos stems from the lack of any practical restraint on how the jury will use the information contained therein. In short, despite a judge’s limiting instruction, the potential exists that jurors may view that which is supposed to be mere *illustrative* evidence as *substantive* evidence. Moreover, jurors may unconsciously fill in gaps in the proof with whatever happens to be shown in the video.”). (emphasis added) (footnotes omitted).

²⁵⁸ *See* 39 AM. JUR. *Trials* § 4 (2004) (noting that attorneys who decide to produce documentaries about plaintiffs should strive to depict the full extent of plaintiffs’ disabilities and diminution in quality of life, and that the full range of plaintiffs’ disabilities rarely, if ever, manifest themselves in any one 24-hour span).

²⁵⁹ *See generally id.* §§ 37-59 (describing low-angle shooting, camera fades, lighting, and other means by which plaintiffs’ attorneys can amplify the emotional impact of documentaries about their clients).

prevents meaningful²⁶⁰ communication.²⁶¹ Out of respect for *Helminski*, the ADA, and plaintiff's due process rights, defendant cannot exclude plaintiff for purely physical injuries that allow for communication with counsel.²⁶² Second, defendant must prove that the mere sight of plaintiff's injuries will prejudice a jury.²⁶³ The alleged prejudice must exceed a threshold beyond which a set of instructions to the jury could not compensate.²⁶⁴ The alleged jury prejudice also must be something that any reasonable juror would feel, especially when encouraged to do so.²⁶⁵ On this point,

²⁶⁰ For the purposes of EPET, "meaningful communication" shall mean any communication, offered in response to communication from counsel, that would help counsel determine what events to emphasize, which witnesses to interview, and which motions to file; or that would otherwise help counsel manage plaintiff's trial.

²⁶¹ This requirement comes at a later point in the *Helminski* test; it comes first in EPET because even *Helminski* says that prejudice from plaintiff presence is irrelevant if plaintiff can communicate with counsel. See *Helminski*, 766 F.2d at 216-17.

²⁶² Communication with counsel almost always will be possible if plaintiff's injuries were strictly physical. See generally, e.g., JEAN-DOMINIQUE BAUBY, *THE DIVING BELL AND THE BUTTERFLY* (Jeremy Leggatt trans., Knopf 1997) (describing one man's ordeal with Locked-in Syndrome, a rare and crippling stroke to the brain stem that left him unable to communicate with the outside world, except by blinking his left eyelid; the patient wrote the book himself, dictating each letter of each word by blinking).

²⁶³ See *In re Bendectin Litig.*, 857 F.2d 290, 324 (6th Cir. 1988).

²⁶⁴ Unfortunately, instructions designed to minimize jury sympathy, proposed often as an alternative to plaintiff exclusion, probably won't work if the jury can't understand them. Compare Sokol, *supra* note 4, at 213 ("Sympathy may also be controlled using pretrial voir dire to eliminate potential jurors, who, in counsel's mind, will likely succumb to sympathy.") with Holloran, *supra* note 4, at 352 ("One author went as far as describing jury instructions as 'complex and grammatically constructed in the most confounding way, rife with subordinate clauses and double negatives.' Juries tend to comprehend judicial instructions at an appallingly low level. One court has gone so far as to state that the presumption that jurors understand and follow the court's instructions seems highly artificial.") (internal quotation marks omitted).

²⁶⁵ For example, plaintiff attorneys at trial often disguise appeals to sympathy by describing plaintiff's plight, but then referring ostensibly to jurors' sense of "responsibility." See Neal R. Feigenson, *The Rhetoric of Torts: How Advocates Help Jurors Think About Causation, Reasonableness, and Responsibility*, 47 HASTINGS L.J. 61, 84 (1995). Cf. *In re Richardson-Merrell, Inc. "Bendectin"*

defendants can invoke procedural and evidentiary rules as necessary.²⁶⁶

Prods. Liab. Litig., 624 F. Supp. 1212, 1222-23 (S.D. Ohio 1985) (“A trial court is always faced with the same inherent problem. Trial attorneys do not seek an impartial jury. They seek a sympathetic jury. While it may be assumed that under the adversarial system the two efforts will cancel each other out and that, in fact, a fair and impartial jury will be impaneled, attempts to engender sympathy will always continue.”). Attorneys also can induce prejudice in juries indirectly, by screening for jurors whose inexperience with the issues at hand leaves them more vulnerable to emotional appeals. See, e.g., Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 503 (1997) (“Modern exemption statutes and peremptory challenges both serve to remove individuals who might be experienced in the field that is the subject of the lawsuit or who might be more qualified to serve as jurors. Furthermore, individuals who might overcome inexperience because of better educational background, for example, are often weeded out of the jury pool.”). But see Linda Miller Atkinson, *When Plaintiffs Can't Speak for Themselves*, 41 TRIAL 60, 62 (Jan. 2005) (“The real problem created by a severely injured plaintiff's attendance in court is not related to sympathy—in fact, it is quite the opposite. Most jurors react with distaste to the brain-damaged or grossly disfigured plaintiff. They may involuntarily turn away in disgust or embarrassment, or they may believe that your client's situation is so hopeless that no verdict can possibly help.”).

²⁶⁶ Jury sympathy for a plaintiff in a trial can have evidentiary implications. Plaintiff's presence in the courtroom, though not submitted to the court as formal evidence, nonetheless constitutes demonstrative evidence of the injuries sustained. “Demonstrative evidence (a model, map, photograph, X-ray, etc.) is distinguished from real evidence in that it has no probative value in itself, but serves merely as a visual aid to the jury in comprehending the verbal testimony of a witness.” *W.R. Smith v. Ohio Oil Co.*, 134 N.E.2d 526, 530 (Ill. App. Ct. 1956). “If it appears that the exhibit was used for dramatic effect, or emotional appeal, rather than factual explanation useful to the reasoning of the jury, this should be regarded as reversible error . . .” *Id.* at 531. See also *Lillie v. United States*, 953 F.2d 1188, 1190 (10th Cir. 1992) (holding that a judicial view in the absence of counsel required a new trial, and noting that “any kind of presentation to the jury or the judge to help the fact finder determine what the truth is and assimilate and understand the evidence is itself evidence”). As evidence, plaintiff's presence on the courtroom must survive scrutiny for relevancy and unfair prejudice. See, e.g., FED. R. EVID. 401 (defining the term “relevant evidence”); FED. R. EVID. 402 (disallowing irrelevant evidence); FED.

Step 4: Exclusion safeguards. Only if defendants survive scrutiny during the first three steps can a court then exclude plaintiffs²⁶⁷ from the liability phase of trial.²⁶⁸ At this point, a trial court can exercise its discretion regarding a request for an accommodation such as closed-circuit television.²⁶⁹ Plaintiffs who cannot even understand that a trial has begun, for their sake, may not benefit from closed-circuit television viewing, but neither would such an offer cause any harm. Should defendant win the motion to exclude plaintiff, plaintiff's attorney or expert witnesses should have the opportunity, upon request, to explain to the jury why plaintiff will not appear at trial.²⁷⁰ The court itself could offer the explanation, to give the jury the impression that plaintiff might have wanted to attend trial. One unusual safeguard consists of having a plaintiff who will not attend trial meet briefly with

R. EVID. 403 (excluding relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . .")

For the above reasons, plaintiffs cannot avoid a discussion of evidentiary rules. Plaintiff cannot claim simultaneously that exclusion violates his rights to present a full case, and that his presence should be allowed because he will not prejudice the jury. Plaintiff's absence could violate his rights if and only if his presence, by itself, would affect the outcome of a trial. If, in contrast, plaintiff presence would have absolutely no impact on a jury, then who cares whether an incapacitated plaintiff with nothing to contribute attends or not?

²⁶⁷ EPET never will apply to the next friends or guardians *ad litem*—if they had standing to bring the suit, then they can stay for all proceedings.

²⁶⁸ No cases in the history of plaintiff exclusion ever suggested that plaintiff exclusion should extend to the damages phase of a trial. *See, e.g., Morley v. Super. Ct.*, 638 P.2d 1331, 1334 (Ariz. 1981). For the purposes of developing EPET for the phase of trial discussed most extensively in the case law—the liability phase of trial—this article will not challenge that principle. Nonetheless, whether plaintiff's presence could induce a jury to overestimate the size of a damages award merits further discussion.

²⁶⁹ *See Bendeclin*, 857 F.2d at 325 (offering minor plaintiffs excluded from trial a closed-circuit television viewing).

²⁷⁰ The *Morley* court noted further that "jurors are less likely to believe a lawyer's explanation for a client's absence than a medical expert's explanation. There is no reason to chance misleading the jury." *Morley*, 638 P.2d at 1335.

members of the prospective jury pool.²⁷¹ Letting potential jurors meet plaintiff at such an early phase would allow defense attorneys to know immediately which potential jurors might react too strongly to graphic injuries.²⁷² This tactic helps defendant not by shielding the jury from prejudice, but rather by helping defense counsel make more judicious use of challenges for cause and peremptory challenges.²⁷³ Whatever the form, some explanation for plaintiff's absence will prevent the jury from inferring that

²⁷¹ Prior cases have employed this safeguard. See Rubert-Torres *ex rel.* Cintron-Rupert v. Hosp. San Pablo, Inc., 205 F.3d 472, 476 (1st Cir. 2000).

²⁷² Bringing plaintiff into the courtroom during jury selection also might counterbalance some of the tactics that plaintiff attorneys use to pick, some of which would appear offensive in any other context. For example, officially trial attorneys may not use peremptory challenges to eliminate prospective jurors on the basis of race. See Miller-El v. Cockrell, 537 U.S. 322, 328 (2003) (reiterating a three-part test that the U.S. Supreme Court uses to determine whether a peremptory challenge violated the Equal Protection Clause); *But see, e.g.,* Walter K. Olson, *Courting Stupidity: Why Smart Lawyers Pick Dumb Jurors*, REASON, Jan. 1, 2003, at 22 (noting that attorneys in jury selection use manuals telling them that women are prejudiced against women whose attractiveness they envy, that Mexican-American jurors are "passive," and that "Orientals . . . tend to go along with the majority"; noting also that U.S. Supreme Court prohibitions on such conduct are difficult to enforce). Peremptory challenges based on religious beliefs appear to enjoy more support. See, e.g., United States v. DeJesus, 347 F.3d 500, 510-11 (3d Cir. 2003) (adopting Seventh Circuit analysis distinguishing religious affiliation from religious beliefs, and allowing peremptory challenges "on the basis of a belief that would prevent him from basing his decision on the evidence and instructions, even if the belief had a religious backing . . ."); Jeff Johnson, *Trial Lawyers Question Jurors' "Strong Religious Beliefs,"* Cybercast News Service, Dec. 18, 2003 (on file with author) (describing how the Association of Trial Lawyers of America has issued a new guide for trial lawyers that warns them about potential jurors with "traditional family values" and "strong religious beliefs").

²⁷³ Having plaintiff meet prospective jurors strikes a balance between plaintiff's to meet the jury and defendant's desire to exclude plaintiff entirely, but courts granting this safeguard must be careful that it doesn't undermine any subsequent exclusion.

plaintiff is not interested in attending her own trial.²⁷⁴ At the same time, the explanation will have to avoid detailing plaintiff's injuries, to prevent the jury from imagining that the injuries are more severe than they are.²⁷⁵ Plaintiff's attorney can explain simply that plaintiff will not appear for the first half of trial, pursuant to the rules of trial procedure for that case.

Together, the safeguards that exist in EPET will make exclusion difficult, though not impossible.²⁷⁶ EPET will protect plaintiffs²⁷⁷ in negligence cases from reflexive motion practice, while forcing both sides to recognize the fundamental interests in a fair trial that lie behind the positions that they advance

²⁷⁴ See *Morley*, 638 P.2d at 1335 (describing the court's agreement with plaintiff's concern that "[t]he jury will be left to speculate as to the reasons for [Morley's] absence and may well infer that he either has something to hide or simply isn't interested in the litigation") (alteration in original).

²⁷⁵ See *id.* ("No prejudice will result to the City of Scottsdale so long as petitioners' witness is limited to explaining the nature of Paul Morley's condition as it relates to his inability to testify and does not add gratuitous details of Morley's condition aimed at prejudicing the jury.").

²⁷⁶ For example, EPET and even *Helminski* would have allowed plaintiff in *Jordan* to attend her trial. Some question existed whether plaintiff could respond to her environment with the help of a laptop computer. See *Jordan ex rel. Jordan v. Deery*, 778 N.E.2d 1264, 1266 n.3 (Ind. 2002) (raising a question as to whether plaintiff could communicate with counsel with the help of a laptop computer). Where a court cannot resolve such a question definitively, it should give plaintiffs the benefit of the doubt.

²⁷⁷ This article has assumed that plaintiff would be the party excluded, and that bifurcation or exclusion would hurt plaintiff. This article will not address those rare circumstances when plaintiff is not the target of the exclusion, or when bifurcation and exclusion together would hurt defendant. See, e.g., *Moss v. Associated Transp., Inc.*, 344 F.2d 23, 25-26 (3d Cir. 1965) (overruling defendant's protest that bifurcation prevented him from presenting his injuries to a jury, which he needed to do to balance the sympathy that the jury would feel for the two plaintiff widows); Luther A. Granquist, *Unlawful Discrimination or a Necessity for a Fair Trial?: Exclusion of a Law Clerk with a Disability from the Courtroom During Jury Trial of a Personal Injury Case*, 30 WM. MITCHELL L. REV. 455, 480 (2003) (noting that a recent case in Minnesota denied plaintiff's request to exclude the judge's law clerk from the courtroom, where the clerk had a more severe disability than plaintiff and where the jury allegedly reasoned that plaintiff deserved no award if a more severely disabled person could work).

empirically.²⁷⁸ This article does not argue that all plaintiffs should be excluded,²⁷⁹ or that any given plaintiff should be excluded.²⁸⁰ Rather, like a gag order for a high-profile trial, plaintiff exclusion should remain one of many tools that trial judges can use to balance the “substantial rights of the parties.”²⁸¹ Balancing

²⁷⁸ Cf. LEE G. BOLMAN AND TERRENCE E. DEAL, REFRAMING ORGANIZATIONS: ARTISTRY, CHOICE, AND LEADERSHIP 187 (2d ed. 1997) (noting that “positional bargaining,” the practice of staking out a position and then retreating from it reluctantly, misses opportunities to create an agreement that helps both parties).

²⁷⁹ Although this article *does not* call for a *per se* rule of plaintiff exclusion in bifurcated trials, the author concedes that the arguments marshaled herein *could* support an argument for such a rule. After all, none of the exclusion motions judged so far under the *Helminski* test would have had a different outcome under EPET, and EPET would serve primarily to reaffirm the *Helminski* test. The lack of change in any prior outcomes may prompt the question of how, or under what circumstances, graphic injuries would not raise the risk of jury prejudice. The answer to that question may lie in a court’s subjective assessment of whether a reasonable juror would have had any routine exposure to the type of injury that plaintiff suffers. A broken arm in a sling, for example, should not by itself disturb any reasonable juror. On the other hand, no one except veteran surgeons or military physicians would have routine exposure to conditions such as elephantiasis from radiation exposure, head trauma that required partial skull removal, comas that require hookup to several life support machines, accident trauma that distorts facial features, etc.

What to do then, about any future attempt to argue for a *per se* rule of exclusion? For now, standing firm against exclusion without an expressed concern about prejudice should suffice. Nonetheless, this article will leave open the possibility that a *per se* rule may be necessary someday, as an extreme measure to protect defendants’ due process rights, if plaintiffs’ position at trial continues to strengthen unchecked through developments such as the expansion of the *res ipsa loquitur* doctrine. See *supra* note 9.

²⁸⁰ See, e.g., *Galloway v. Super. Ct.*, 816 F. Supp. 12, 18 (D.D.C. 1993) (“Yet, just as no *per se* rule of exclusion should be employed against blind persons who wish to serve as jurors, no *per se* rule of inclusion should apply either.”)

²⁸¹ Freeman, *supra* note 152, at 119 (citing OKLA. STAT. tit. 12, § 78 (2003)). Oklahoma statutes also prohibit reversal of trial court judgments unless a miscarriage of justice would result. See OKLA. STAT. tit. 20, § 3001.1 (2004) (“No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury

plaintiff and defendant rights at the trial level also will help determine the appropriate amount of appellate scrutiny.²⁸² Ultimately, if we can “trust the jury,”²⁸³ then surely we can trust the judge, too.

PART VII: CONCLUSION

Plaintiff exclusion jurisprudence has grown substantially in its complexity since its debut at the turn of the twentieth century. In a sense, plaintiff exclusion evolved as society did, addressing new issues like cognition when society forced the courts to do so—through the rise of modern medicine, for example. As passage of the ADA demonstrated, society must not grow coarse and exclude plaintiffs simply because of who they are. Still, concern for the disabled does not need to come at the expense of defendants. Through the modifications to the *Helminski* test proposed in EPET, plaintiff exclusion jurisprudence can continue to meet the challenges of twenty-first century litigation, and continue to ensure a fair trial to all parties who come before the courts.

or for error in any matter of pleading or procedure, unless it is the opinion of the reviewing court that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.”).

²⁸² See Freeman, *supra* note 152, at 118 (noting that plaintiff in *Cary* had no recollection of his accident, meaning that he had nothing to contribute to the trial, and that, in turn, his exclusion could satisfy Oklahoma’s abuse of discretion standard); cf. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) (instructing federal appellate courts to apply the abuse of discretion standard to trial court decisions to exclude evidence).

²⁸³ Sokol, *supra* note 4, at 227.