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# Civil Jury Trials R.I.P. - Can It Actually Happen in America Essay.

Royal Furgeson

# ESSAY

## CIVIL JURY TRIALS R.I.P.? CAN IT ACTUALLY HAPPEN IN AMERICA?

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## I. THE PURPOSE OF THE ESSAY

Civil jury trials in America have been declining at a steady rate for the last thirty years. This trend has been well-documented.[1] If the trend continues, within the foreseeable future, civil jury trials in America may eventually become, for all practical purposes, extinct. The purpose of this essay is not, however, to pen a eulogy to the civil jury trial; rather, it is (1) to recite the reasons why the jury trial has been and continues to be crucial to America's civil justice system; (2) to examine the reasons why it is in decline; and, in so doing, (3) to suggest approaches that might return it to its rightful place in American jurisprudence.

The reasons for the decline of civil jury trials outlined in this essay are not, by and large, grounded in empirical research. Instead, the reasons are based on forty years of observations and experience in the civil court system. Consequently, the reasons take the form of argument. As such, the admonition of Justice

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1. *See, e.g.*, Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 464 (2004) (documenting the decreasing number of federal civil jury trials); Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 7–9 (2006) (providing statistics that evidence a significant decline in federal and state civil trials).

Oliver Wendell Holmes is always to be remembered: "Certitude is not the test of certainty."[2]

## II. THE IMPORTANCE OF THE CIVIL JURY IN AMERICA

### A. *Juries and the Declaration of Independence and the Constitution*

In America, we do justice with juries. Or, at least, that is what the Founding Generation intended. When Thomas Jefferson penned the Declaration of Independence, he observed that "a decent respect to the opinions of mankind" required those in rebellion to "declare the causes" that impelled them to separation, such as England's "depriving us in many cases, of the benefits of [t]rial by [j]jury."[3] When James Madison wrote the Bill of Rights, he anchored it around jury trials in criminal cases (the Sixth Amendment)[4] and jury trials in civil cases (the Seventh Amendment).[5] Jury trials have been central to justice in America and its states—most certainly in Texas[6]—since their inception.

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2. Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 40 (1918).

3. THE DECLARATION OF INDEPENDENCE paras. 1, 20 (U.S. 1776). Jefferson also decried the elimination of an independent judiciary, charging that the King of Great Britain "has made [j]udges dependent on his [w]ill alone, for the tenure of their offices, and the amount and payment of their salaries." *Id.* at 11.

4. U.S. CONST. amend. VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the [s]tate and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the [a]ssistance of [c]ounsel for his defen[s]e.

*Id.*

5. U.S. CONST. amend. VII. "In [s]uits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any [c]ourt of the United States, than according to the rules of common law." *Id.*

6. TEX. CONST. art. I, § 15 ("The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency. Provided, that the Legislature may provide for temporary commitment, for observation and/or treatment, of mentally ill persons not charged with a criminal offense, for a period of time not to exceed ninety (90) days, by order of the County Court without the necessity of trial by jury."); *see, e.g.*, THE DECLARATION OF INDEPENDENCE (Repub. Tex. 1836), *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1063, 1064–65 (Austin, Gammel Book Co. 1898) ("[The Mexican government] has failed and refused to secure, on a firm basis, the right of trial by jury, that

In his book, *America's Constitution: A Biography*, Professor Akhil Amar thoughtfully captured the central importance of the civil jury to colonial America.[7] During his examination of the constitutional ratification process, Professor Amar cataloged the great debates about juries between the Federalists and the Anti-Federalists.[8] It was the Anti-Federalists who challenged the adoption of the Constitution because, while Article III guaranteed juries in criminal cases, it did not do so in civil cases.[9] Criticisms such as this "had bite because late-eighteenth-century America placed great faith in her juries, civil and criminal, grand and petit."[10] There was a reason for such reliance.

> In the 1760s and 1770s, Americans used [colonial assemblies and colonial juries as] republican strongholds to assail imperial policies and shield patriot practices. In response, British authorities tried to divert as much judicial business as possible away from American juries . . . .
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> Revolted, Americans revolted. . . .
>
> Thus, when the Anti-Federalists accused the Federalists of undermining the . . . jury, this was a charge that mattered, and Federalists loudly proclaimed their innocence before the American people. Nothing in the Constitution, Federalists insisted, affirmatively abolished civil juries in federal courts. On the contrary, Federalists predicted—promised, really—that the First Congress would doubtless provide for civil juries in some fashion.[11]

James Madison kept that promise when he drafted the Seventh Amendment.

### B. *Juries from Their British Beginnings: The Rule of Law and Principle of Accountability*

One unassailable reason why juries are so important was explicated centuries ago by renowned British legal scholar Blackstone:

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palladium of civil liberty, and only safe guarantee for the life, liberty, and property of the citizen.").

7. *See generally* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005) (chronicling the evolution of the United States Constitution).

8. *See generally id.* at 205–47 (capturing the discussions of the United States Founders regarding the importance of the judiciary).

9. *Id.* at 333.

10. *Id.*

11. *Id.* at 233–34.

> [A] competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice. For the most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of trial; and that, when once the fact is ascertained, the law must of course redress it. This therefore preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens. Every new tribunal, erected for the decisions of facts, without the intervention of a jury . . . is a step towards establishing aristocracy, the most oppressive of absolute governments.[12]

Many themes run through Blackstone's ode to juries, but the most important is that juries bring accountability to the law and to society. All persons, even the "more powerful and wealthy" ones, are accountable under the law.[13] Indeed, the principle of accountability is crucial to the very rule of law. When the American Bar Association recently defined the rule of law, the first of its four elements was accountability.[14]

The importance of law and accountability was fixed in the American mind six months before the Declaration of Independence by Thomas Paine in *Common Sense*.[15] He wrote that "so far as we approve of monarchy . . . in America THE LAW IS KING. For as in absolute governments the king is law, so in free countries the law *ought* to be king; and there ought to be no

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12. 3 WILLIAM BLACKSTONE, COMMENTARIES *349, *380 (translated by the author).

13. *Id.*

14. William H. Neukom, *Finding Our Collective Strength Through the Rule of Law*, 46 JUDGES' J. 1, 1 (2007). The ABA's four elements of the rule of law are:

> 1) A system of self-government in which all persons, including the government, are accountable under the law;
> 2) A system based on fair, publicized, broadly understood, and stable laws;
> 3) A robust and accessible process in which rights and responsibilities based in law are enforced impartially; [and]
> 4) Diverse, competent, independent, and ethical lawyers and judges.

*Id.*

15. THOMAS PAINE, COMMON SENSE AND OTHER POLITICAL WRITINGS (Nelson F. Adkins ed., 9th prtg. 1976) (1975).

other."[16] Indeed, when the great Chief Justice John Marshall wrote that America was "emphatically [a nation] of laws . . . and not of men,"[17] he articulated this very understanding. And he certainly conceived of it within the framework of the jury trial, which all members of the Founding Generation viewed as central to America's fledgling special and unique tradition of justice. They knew, because they were steeped in Blackstone, that the jury trial was where law and accountability began.

As important as the law and accountability have been to America in the past, it is now arguably the very glue that unites the country. Americans are a fractious people, constantly debating across cultural, political and religious divides. Yet, there is one thing that Americans seem willing to agree on: Everyone from the President down is accountable under the law. As Anthony Lewis has observed, "We do not have ethnic solidarity to hold us together. We do not have the romance of kings and queens. In America, we have the law."[18] It is no stretch to assert that, deep inside the American imagination, the law and accountability go hand in hand with juries, both civil and criminal.

### C. *Juries and the Citizens' Control of the Judiciary*

For America as a nation state, there are further, crucial reasons for reliance on jury trials, and an important one was articulated in *Blakely v. Washington*.[19] Beyond respect for long-standing precedent, there is "the need to give intelligible content to the right of jury trial" under the Constitution.[20] "That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, [the] jury trial is meant to ensure their control in the judiciary."[21] While *Blakely* is a criminal case dealing with sentencing, the ruling should apply equally to jury trials in civil cases. After all, both are

16. *Id.* at 32.

17. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

18. Anthony Lewis, *The Undermining of the Rule of Law in America Since September 11, 2001*, 44 JUDGES' J. 7, 7 (2005).

19. Blakely v. Washington, 542 U.S. 296 (2004).

20. *Id.* at 305.

21. *Id.* at 305–06.

preserved respectively in the Sixth and Seventh Amendments.[22]

Professor Suja Thomas has suggested:

> [I]t would be fitting for the [Supreme] Court to examine this issue [of the right to jury trial] in the context of the Seventh Amendment. In the last seven years, in interpreting the Sixth Amendment, the Court has given power back to the criminal jury, emphasizing the historical role of the jury. In comparison, the text of the Seventh Amendment, which requires the court to follow the "common law," dictates an even more significant role for history in the preservation of the right to a civil jury trial under the Seventh Amendment.[23]

### D. *Juries and Democratic Legitimacy*

United States Judge William Young from the District of Massachusetts has distilled the important essence of trial by jury, especially in civil cases, in an "open letter" to his brothers and sisters on the federal bench.[24] To him:

> The American jury must rank as a daring effort in human arrangement to work out a solution to the tensions between law and equity and anarchy.
>
> No other legal institution sheds greater insight into the character of American justice. Indeed, as an instrument of justice, the civil jury is, quite simply, the best we have. . . . The acceptability and moral authority of the justice provided in our courts rests in large part on the presence of the jury. It is through this process, where rules formulated in light of common experience are applied by the jury itself to the facts of each case, that we deliver the very best justice we, as a society, know how to provide.
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> . . . .
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> One could scarcely imagine that the Founders would have created a system of courts with appointed judges were it not for the assurance that the jury system would remain.
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> In a government "of the people," the justice of the many cannot be left to the judgment of the few. Nothing is more inimical to the

22. *See* U.S. CONST. amend. VI (establishing a criminal defendant's "right to a speedy and public trial, by an impartial jury"); U.S. CONST. amend. VII (establishing the right to a jury trial in federal civil lawsuits).

23. Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 180 (2007).

24. William G. Young, *An Open Letter to U.S. District Judges*, 50 FED. LAW. 30 (2003).

> essence of democracy than the notion that government can be left to elected politicians and appointed judges. As Alexis de Tocqueville so elegantly put it, "[t]he jury system . . . [is] as direct and as extreme a consequence of the sovereignty of the people as universal suffrage." Like all government institutions, our courts draw their authority from the will of the people to be governed. The law that emerges from these courts provides the threads from which all our freedoms are woven. It is through the rule of law that liberty flourishes. Yet there can be no universal respect for law unless all Americans feel that it is *their* law. Through the jury, the citizenry takes part in the execution of the nation's laws, and, in that way, each citizen can rightly claim that the law belongs partly to him or her.
>
> Only because juries may decide most cases is it tolerable that judges decide some. However highly we view the integrity and quality of our judges, it is the judges' colleague in the administration of justice—the jury—that is the true source of the courts' glory and influence. The involvement of ordinary citizens in a majority of a court's tasks provides legitimacy to all that is decreed. When judges decide cases alone, they are still surrounded by the recollection of the jury. Judicial voices, although not directly those of the community itself, echo the values and the judgments learned from observing juries at work. In reality, ours is not a system in which the judges cede some of their sovereignty to juries, but rather it is one in which the judges borrow their fact-finding authority from the jury of the people.[25]

As Judge Young has suggested, the jury is America's preeminent institution of democracy. When a jury renders a verdict, it is the only time in America's governmental structure that our people make the final decision. Of course, that verdict may not be correct in every instance, but it will certainly be correct in the vast number of cases.[26] However, as important as a correct decision is, it is also just as important that the decision is made by our people. In his book *The Wisdom of Crowds*,[27] James Surowiecki has made the point succinctly and precisely: "The

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25. *Id.* at 31 (citations omitted).

26. Research has shown, for example, "that considerable agreement exists between judges and juries on trial verdicts." *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1426 n.38 (1997).

27. JAMES SUROWIECKI, THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES AND NATIONS (2004).

decisions that democracies make may not demonstrate the wisdom of the crowd. The decision to make them democratically does."[28]

### E. *Juries and the Truth of the Matter*

Please indulge a personal note: As a law clerk to United States District Judge Halbert Woodward for one year, as a practicing trial lawyer in West Texas for twenty-four years,[29] and as a United States District Judge for fifteen years, I have participated in hundreds of jury trials. Of those hundreds of jury trials, only a handful have ever needed judicial revision of any kind. Almost every verdict was within a reasonable decisional boundary. This was true despite the kinds of errors by lawyers and judges that always attend trials. Under the circumstances, it is understandable why the mantra of trial judges has been and will always be that a jury verdict cures all ills.

Judge Young is right by stating that with a jury, "we deliver the very best justice we, as a society, know how to provide."[30] For that reason, each year when new law clerks enter my chambers, I emphasize the critical role a jury plays in rooting out the truth, because to determine the facts of a case is to seek the truth of what actually happened. The best way yet devised to determine the facts, and therefore the truth, is in a trial before a jury. Advocates argue their version of the facts, and then the jury decides. If the lawyers and the judge do a halfway reasonable job of presenting the case and conducting the trial, the jury will almost always determine the truth of the matter reasonably, thoughtfully, and correctly. This proposition holds regardless of whether the case is civil or criminal, straightforward or complex. Of course, juries are not perfect, and juries can make mistakes. No human endeavor is immune from error. Yet, juries come as close to perfection in the conduct of human affairs as any enterprise in existence.

The view that juries "get it right" is not universally held. Justice O'Connor has had her doubts: "[J]urors are not infallible

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28. *Id.* at 271.

29. After some years of trying cases, I quit counting the number of trials that I presented to a jury, primarily because I kept losing more than I won. Even without counting, however, I knew that when I finished my trial practice, I was batting in the range of Ted Williams's career average, which was .344.

30. William G. Young, *An Open Letter to U.S. District Judges*, 50 FED. LAW. 30, 31 (2003).

guardians of the public good.... Arbitrariness, caprice, passion, bias, and even malice can replace reasoned judgment and law as the basis for jury decisionmaking."[31] Jerome Frank has had his doubts too: "The general-verdict jury-trial, in practice, negates that which the dogma of precise legal predictability maintains to be the nature of law. A better instrument could scarcely be imagined for achieving uncertainty, capriciousness, lack of uniformity, disregard of former decisions—utter unpredictability."[32] While such criticisms certainly merit attention and concern, the scholarship of Professors Valerie Hans and Neil Vidmar discussed later in this essay is an effective rebuttal.

After forty years in the civil justice system and after observing hundreds of juries, my experience strongly validates the efficacy of juries. Accordingly, in my view, juries get to the truth better than any other fact-finding enterprise in existence. Hence, jury verdicts are entitled to the highest regard and should be overturned or revised only in the most exceptional of circumstances.

### F. *Juries and Even-Handed Respect and Open Access*

Juries are the great levelers of our courts. They treat every litigant, from the most powerful to the most humble, with even-handed respect. Better than judges, they bring the fact-finding talents of our citizens to bear on court deliberations. They represent a cross-section of our communities. They are fair, conscientious, and clear-headed. They have no agenda. Juries have made justice work in America for centuries and our people know it. Indeed, jury verdicts, even controversial ones, have far more acceptance among our people than single-judge decisions ever would.

An excellent example of the acceptance of a jury verdict in a controversial case, in the criminal context, is the decision by the jury in the Twentieth Hijacker case, *United States v. Moussaoui*,[33] to give Mr. Moussaoui a life sentence, not the death penalty.[34] If the presiding judge in the case, United States District Judge

31. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 474 (1993) (O'Connor, J., dissenting).

32. JEROME FRANK, LAW AND THE MODERN MIND 172 (spec. ed. 1985) (1930).

33. United States v. Moussaoui, 483 F.3d 220, 224 n.1 (4th Cir. 2007).

34. *Id.*; Special Verdict Form for Phase II at 1–13, United States v. Moussaoui, No. 01-455-A (E.D. Va. May 3, 2006).

Leonie M. Brinkema, had made the decision, it is easy to predict that the outcry from the public would have been much more vociferous, notwithstanding the fact that Judge Brinkema is a highly regarded jurist. By and large, Americans trust juries and jury verdicts.

Another principle of our justice system has been open access to our courts, at least in part because the jury trial represents democracy in action. The United States Supreme Court reasoned in *Richmond Newspapers, Inc. v. Virginia*,[35] that open courts facilitate the proper functioning of a trial, "thus giving assurance that the proceedings were conducted fairly to all concerned and discouraging perjury, the misconduct of participants, or decisions based on secret bias or partiality."[36]

### G. *Juries and Social Capital*

Professor Robert Ackerman noted the relationship between social capital in America and jury service. Quoting from Robert Putnam's book *Bowling Alone*,[37] Professor Ackerman recognized that "social capital—the connections between individuals that build social networks—[is] critical to the norms of reciprocity and trustworthiness that allow us to function as a civil society."[38] To Professor Ackerman, juries are the epitome of the concept of social capital because "[j]ury service provides an exceptional opportunity for participatory citizenship."[39] He subscribes to the view of Alexis de Tocqueville that the jury is "a 'political institution,' educating citizens in the responsibilities of democracy."[40] Moreover, unlike voting, "jury service requires that one listen and watch closely, deliberate with one's neighbors, and make a collective decision that has a direct impact on one or more members of the community."[41] Professor Ackerman also

35. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

36. *Id.* at 556.

37. ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000).

38. Robert M. Ackerman, *Vanishing Trial, Vanishing Community? The Potential Effect of the Vanishing Trial on America's Social Capital*, 2006 J. DISP. RESOL. 165, 166 (2006) (quoting ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 19–20 (2000)).

39. *Id.* at 175.

40. *Id.*

41. *Id.*

agrees with the view expressed by Jeffrey Abramson in his book *We the Jury*[42] that "[n]o other institution of government rivals the jury in placing power so directly in the hands of citizens."[43] The special role of jurors as representatives of their fellow citizens in a democratic process alone suggests a worthwhile function for this institution, but that is not all:

> I will argue for an alternative view of the jury, a vision that defends the jury as a deliberative rather than a representative body. Deliberation is a lost virtue in modern democracies; only the jury still regularly calls upon ordinary citizens to engage each other in a face-to-face process of debate. No group can win that debate simply by outvoting others; under the traditional requirement of unanimity, power flows to arguments that persuade against group lines and speak to a justice common to persons drawn from different walks of life. By history and design, voting is a secondary activity for jurors, deferred until persons can express a view of the evidence that is educated by how the evidence appears to others.[44]

Professor Ackerman writes:

> To the extent juries can actually behave, or even attempt to behave, in the manner Abramson describes, they represent the communitarian ideal. Interaction, accountability, responsibility, and engagement are hallmarks of good jury conduct. Participation is active and genuine, not passive or superficial. A juror may not vote merely on a whim; rather, she must justify her vote, consider the arguments of others, and weigh actual evidence, using the law and, ultimately, her conscience as her guide. Jury service demands engagement across group boundaries and respectful attention to the views of others. In short, it creates an extraordinary opportunity for the building of bridging social capital.
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> As Putnam has noted, occasions for this type of constructive engagement have become increasingly rare in America. We should therefore nurture the concept of jury service, not only for the good it does for the trial process (and the litigants who use it), but for the good it does for the community at large. Diminishing opportunity for first-hand participation in the justice system isolates us from our fellow citizens, creates alienation from the workings of government,

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42. JEFFREY ABRAMSON, WE THE JURY (1994).

43. Robert M. Ackerman, *Vanishing Trial, Vanishing Community? The Potential Effect of the Vanishing Trial on America's Social Capital*, 2006 J. DISP. RESOL. 165, 175 (2006) (citing JEFFREY ABRAMSON, WE THE JURY 1 (1994)).

44. JEFFREY ABRAMSON, WE THE JURY 8 (1994).

and causes citizens to view the justice system with suspicion. Justice becomes "them," not "us." The justice system becomes a vicarious experience, not a participatory one, and the concept of justice becomes more an abstraction and less a reality.

Diminishing public participation in the justice system also allows the courts to be depicted as elitist and undemocratic. A fair amount of political demagoguery attends these claims, often made by members of the legislative and executive branches of government in the wake of an appellate court's exercise of its constitutional power. There is, nevertheless, an element of truth to the charge. To the extent that courthouses are depopulated by citizen-jurors, who are replaced by judges and clerks, and to the extent that decision-making becomes mechanical and technical, devoid of the human touch, the judicial branch of government becomes more remote and less democratic. While those of us who have made law our calling may prefer the professionalism of judges, magistrates, special masters and clerks to the unpredictable and even arbitrary decisions of juries, we disparage the jury at our peril. Adherence to, and execution of, the law is dependent upon the buy-in of the citizenry and the social capital created through public participation in legal institutions. Lose that, and we might lose it all.[45]

## H. *Juries and Bias and Prejudice*

Over the years, there have been claims that juries are biased in favor of the disadvantaged and prejudiced against the powerful and the wealthy. Yet, systematic studies spanning five decades have not substantiated such views.[46] Professors Valerie Hans and Neil Vidmar have been researching juries from their first jury book, *Judging the Jury* (1986),[47] to their latest jury book, *American Juries: The Verdict* (2007),[48] and "[a]fter evaluating all of the evidence, [have come down] strongly in favor of the American jury."[49] They found, consistent with my observations,

45. Robert M. Ackerman, *Vanishing Trial, Vanishing Community? The Potential Effect of the Vanishing Trial on America's Social Capital*, 2006 J. DISP. RESOL. 165, 176–77 (2006) (citations omitted).

46. *See* Valerie P. Hans & Neil Vidmar, *The Verdict on Juries*, 91 JUDICATURE 226, 226–27 (2008) (explaining that because studies spanning five decades have shown that judges agree with jury verdicts in most cases, suspicions of jury biases and prejudices are unfounded).

47. VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY (1986).

48. VALERIE P. HANS & NEIL VIDMAR, AMERICAN JURIES: THE VERDICT (2007).

49. Valerie P. Hans & Neil Vidmar, *The Verdict on Juries*, 91 JUDICATURE 226, 230

"that judges agree with jury verdicts in most cases."[50]

> A key element contributing to jury competence is the deliberation process. A representative, diverse jury promotes vigorous debate. One of the most dramatic and important changes over the last half century is the increasing diversity of the American jury. Heterogeneous juries have an edge in fact finding, especially when the matters at issue incorporate social norms and judgments, as jury trials often do.[51]

Professors Hans and Vidmar also have "explored the claims of doctors and business and corporate executives about unfair treatment by juries" and have found that those claims are not supported by empirical evidence.[52] Studies have shown that:

> [J]urors subject plaintiffs' evidence to strict scrutiny. Most members of the public adhere to an ethic of individual responsibility, and many wonder about the validity of civil lawsuits . . . .
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> Although the research finds that juries treat corporate actors differently, the differential treatment appears to be linked primarily to jurors setting higher standards for corporate and professional behavior, rather than to anti-business sentiments or a "deep pockets" effect. Members of the public, and juries in turn, believe that it is appropriate to hold corporations to higher standards, because of their greater knowledge, resources, and potential for impact. The distinctive treatment that businesses receive at the hands of juries is a reflection of the jury's translation of community values about the role of business in society.[53]

## I. *Juries and Judicial Independence*

Judicial independence is one of the hallmarks of the rule of law;[54] yet, it is coming under increasing challenge.[55] Without juries, these challenges would have a much greater chance of

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(2008).

50. *Id.* at 227.

51. *Id.*

52. *Id.*

53. *Id.*

54. *See* William H. Neukom, *Finding Our Collective Strength Through the Rule of Law*, 46 JUDGES' J. 1, 1 (2007) (listing an independent judiciary as one of the requirements for a community based on the rule of law).

55. *See generally* Carolyn Dineen King, *Challenges to Judicial Independence and the Rule of Law: A Perspective from the Circuit Courts*, 90 MARQ. L. REV. 765 (2007) (noting the increasing threats to judicial independence).

taking root and creating havoc for the judiciary and the nation. In this regard, juries make the crucial difference.

> The citizen jury confers legitimacy on judicial actions by identifying the actions of [the] government with those of the people, both actually and vicariously. The jury is the institution through which community values enter the judicial process and through which the legal system maintains its connection with public sentiment.
>
> [Moreover], the jury promotes public acceptance of the legal system by deflecting and neutralizing criticisms of verdicts. A jury is a decentralized body that convenes on a discontinuous basis .... Jurors also constitute diffuse targets that are more difficult to criticize than judges; the very fact that a jury is composed of a group of individuals (as opposed to a lone judge) helps disperse and diffuse any dissatisfaction with its verdicts.
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> ....
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> ... [In addition,] [t]he shroud of secrecy surrounding jury deliberations enables the jury to operate as the safety valve of the legal system, to deflect criticism from judges in a way that allows judges to "cop out" in close and ambiguous cases. [It accordingly makes sense that] [w]hen legal rules and reasoning provide no definitive answers, "we like to disguise the arbitrariness, we like to save ourselves the trouble of nice and doubtful discriminations." Therefore, "as we get near the dividing point, we call in the jury."[56]

The jury provides the greatest protection for the judiciary and judicial independence. It should be noted, as an aside, that a strong and independent bar of lawyers also provides essential protection for the third branch, as events in Pakistan have recently illustrated.

### J. *Juries and Complex Cases*

One of the most salient criticisms of juries is that complex cases are beyond juror competence. A balanced discussion of this issue can be found in the *Harvard Law Review*'s examination of the civil jury in 1997.

> Because criticisms of jury performance in complex cases are based largely on anecdotal evidence from particular cases, using the criticisms to evaluate specific reform proposals poses three related

56. *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1433–35 (1997) (footnotes omitted).

problems. First, each criticism may be colored by the biases of individual observers, so that it lacks a generalizable factual basis. Second, because they derive from isolated observations in different cases, the criticisms would, if applied too generally, lead to unpredictable consequences. Third, the criticisms lack substantial empirical bases.

In addition, available empirical findings cast doubt on the contention that jury decisions in complex cases differ substantially from the decisions that judges, commonly perceived as the primary alternative to jurors, would make in these cases. Although this state of affairs does not mean that reform is unnecessary in complex cases, it does mean that reformers should be careful in attributing concerns about the outcomes of complex cases to flaws in the jury system rather than to more general concerns about the way that complex cases are managed.

Finally, critics sometimes espouse the benefits of their reform proposals without adequately accounting for possible constitutional constraints on their implementation.... To this end, widespread adoption of jury empowerment reforms, such as juror note-taking and question-asking, is certain to pass constitutional scrutiny, but jury limitation reforms, such as a complexity exception or the increased use of special masters, are of uncertain constitutional validity. Judges and lawyers should therefore concentrate on jury empowerment reforms unless Congress or the Supreme Court clearly states that limiting the civil jury's role in complex cases is allowable.[57]

The approach suggested by the *Harvard Law Review* on the complexity issue is a sound one. Jury empowerment reforms are advisable to aid in juror comprehension. Keeping the jury involved in all cases, from the simple to the complex, should be the first order of the day until and unless empirical evidence can show with some proper degree of certainty that juries simply are not equipped to deal with complex cases.

## III. THE DOCUMENTED DECLINE OF CIVIL JURY TRIALS

Yet, as important as juries and jury trials are to the health of justice in America, something has been happening to the institution on the civil side of the docket: juries and jury trials are disappearing. As noted at the beginning of this essay, this

57. *Id.* at 1511–12 (footnotes omitted).

phenomenon has been best documented by Professor Marc Galanter, who has observed, for example, that the "portion of federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2002, continuing a long historic decline."[58] More startling to Professor Galanter was "the 60 percent decline in the absolute number of trials since the mid 1980s."[59] This decline is not limited to federal courts; it also includes state courts.[60] Interestingly enough, while trials in the federal courts have been decreasing, filings and dispositions have been increasing. From 1962 to 2002, dispositions grew "by a factor of five—from 50,000 to 258,000 cases."[61]

In observing this decline, Judge Patrick E. Higginbotham from the United States Court of Appeals for the Fifth Circuit has noted a large change in federal courts, one that is "most easily described as a syndrome with two conspicuous symptoms: the decline in trials, and the nigh parallel surge in private dispute resolution. These symptoms are further defined by the attending decline in participation of lay citizens and the state in our justice system."[62] The research and observations of Professor Galanter and Judge Higginbotham are unassailable. What is not clear at this point is whether the declining trend in trials will continue, slow down, turn around or stop. Regardless, over a long period of time, trials have significantly declined in America.

To the person most responsible for drafting the Seventh Amendment, James Madison, this decline would be a cause for concern, given his view that "'[t]rial by jury in civil cases is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.'"[63] Of course, more than two centuries have passed since Madison penned the Bill of Rights and the Seventh Amendment. Today's America is far different from Madison's America. Changes in the civil justice system are to be expected and, indeed, welcomed. Given the very size of the

58. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 460 (2004).

59. *Id.* at 461.

60. *Id.* at 460.

61. *Id.* at 461.

62. Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1407 (2002).

63. Mark W. Bennett, *Judges' Views on Vanishing Civil Trials*, 88 JUDICATURE 306, 307 (2005).

country, it would be both unreasonable and unrealistic to require every dispute to be resolved by juries. America needs multiple dispute resolution venues to address the variety of conflicts that arise in a modern society.

However, in light of the complexity of the world today, does this mean trials, and particularly jury trials, are no longer needed? Judge Higginbotham has given a clear answer to that question:

> We need trials, and a steady stream of them, to ground our normative standards—to make them sufficiently clear that persons can abide by them in planning their affairs—and never face the courthouse—the ultimate settlement. Trials reduce disputes, and it is a profound mistake to view a trial as a failure of the system. A well conducted trial is its crowning achievement.[64]

Judge Higginbotham is right, for all the right reasons. America's civil justice system needs trials. It can certainly be argued that the system might not need as many now as decades ago, but trials are still needed. Equally important, procedural barriers should not be erected to unnecessarily and artificially diminish the number of civil trials. A balance is needed and that balance is being lost. Why is that so? For many reasons, and one of the purposes of this essay is to examine those reasons and to consider ways to restore the balance.

In doing so, it is appropriate to recognize the good work in this area of observers such as Judge Young, Professor Ackerman, Professor Galanter, Professor Hans, Professor Vidmar, Judge Higginbotham, Patricia Lee Refo and United States District Judge Mark Bennett from the Northern District of Iowa. While my own limitations may not allow me to rise to their level of analysis or articulation, my admiration for juries compels me to at least make the effort.

## IV. THE REASONS FOR THE DECLINE OF CIVIL JURY TRIALS

In the May-June 2005 issue of *Judicature*, United States District Judge Mark Bennett listed the culprits or "usual suspects" for the vanishing civil jury trial as follows:

> [i]ncreased use of [alternative dispute resolution], rising litigation costs, rising stakes/amounts at issue, increasing use of summary

64. Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1423 (2002).

> judgment, uncertainty of outcome, judges' views of their role as case managers, ... stricter requirements for expert evidence post-*Daubert*, lack of trial experience among judges, tort reform, lack of judicial resources, and external market constraints.[65]

He is absolutely correct. Indeed, there are additional culprits that will be analyzed in this essay. The focus will be primarily federal, although state issues will not be ignored.

### A. *Problems in the Trial Courts*

As Judge Higginbotham noted, "the federal trial judge has over the last half century been the single most important person in the system, demanding the widest range of skills and training. [A trial judge must have] [a] sense of proportion and measured use of great power."[66] Given the central role of the trial judge in our courts, it is imperative that trial judges do everything possible to preserve and protect our remarkable system of justice. There are now instances where trial judges, including me, are falling short. A "sense of proportion" should encourage us to find better balance.

#### 1. Trial Judges As Case Managers

##### a. A Failure of the System?

Please forgive another personal note. When I was in "new judges school" at the Federal Judicial Center (FJC) in Washington, D.C., in the fall of 1994, I sat next to United States Judge Nancy Gertner from the District of Massachusetts. In January 2008, Judge Gertner and I had an opportunity to renew our acquaintance at a gathering sponsored by the American College of Trial Lawyers and, interestingly enough, the one instruction from our school experience fourteen years earlier that stood out in our memory was the admonition that trial judges should manage cases in order to settle cases. A trial was described as a failure of the system.[67] Judge Gertner remembered, when she

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65. Mark W. Bennett, *Judges' Views on Vanishing Civil Trials*, 88 JUDICATURE 306, 307 (2005).

66. Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1422–23 (2002).

67. This was before Judge Higginbotham had published his law review article *So Why Do We Call Them Trial Courts?*, and thus the word had not yet gotten to the FJC. The word has now arrived, and today the FJC is much more balanced in its presentation of

heard the instruction, that her immediate reaction was, "That's not my view, and that's not why I signed on to do this job." My reaction was the same.

In her excellent analysis of the vanishing trial, Patricia Lee Refo noted the problem thusly:

> For whatever reason, some judges are simply anti-trial. Judith Resnick of Yale documented judges who view trials as "failures" that occur only when lawyers have not done their job and obtained a negotiated resolution. These judges view themselves as case-resolvers—the faster the better. They have their ways of exacting a toll on those who want to hold out for a jury trial.[68]

My hope is that my colleagues on the trial bench who are "anti-trial" will re-examine their views. After all, we are called trial judges because we are thought to try cases. Is not that our role, by definition?[69]

b. Primary Role As Trial Judges

It is true that trial judges have heavy dockets and need to be good case managers. Still, trial judges cannot lose sight of the fact that managing and settling cases should never become the primary focus of the bench. One can, in fact, "manage" a case through a trial. Again, Judge Young has said it best:

> Of course, most cases ought settle. Of course, we must embrace all forms of voluntary ADR. Of course, we must be skilled managers. But to what end? . . . We ought to remember, as the RAND study and all of its progeny confirm, the best case management tool ever devised is an early, firm trial date.
>
> The truth of the matter is that good management and traditional adjudication go hand in hand. We ought to confirm that basic truth, study how it is done, trumpet it, budget for it, and fight for it. The district court judiciary ought to be the nation's most vigorous advocates of our adversary system and the American jury. We fail at our own peril.[70]

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juries and trials.

68. Patricia Lee Refo, *Opening Statement: The Vanishing Trial*, 30 LITIG. 1, 2 (2004).

69. *See* Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1423 (2002) ("We have long insisted that trial judges have considerable trial experience, a prerequisite to appointment. Its necessity is no longer apparent.").

70. William G. Young, *An Open Letter to U.S. District Judges*, 50 FED. LAW. 30, 33 (2003).

One point should be underscored: the best docket control mechanism ever invented is a reasonable, realistic, and firm trial date. It concentrates the mind of each litigant and each attorney.[71]

2. The Problem with Discovery

a. The Concerns

Perhaps the most acute challenge in today's civil justice system is discovery. The more complex the case becomes, the more difficult the challenge becomes. This is highlighted in *Bell Atlantic Corp. v. Twombly*,[72] where in footnote six the Supreme Court cited a law review article by Chief Judge Frank Easterbrook of the United States Court of Appeals for the Seventh Circuit discussing such difficulty.[73] The purpose of the footnote was to address a concern expressed in the dissent:

> The dissent takes heart in the reassurances of plaintiffs' counsel that discovery would be "phased" and "limited to the existence of the alleged conspiracy and class certification." . . . But determining whether some illegal agreement may have taken place between unspecified persons at different [Incumbent Local Exchange Carriers] (each a multibillion dollar corporation with legions of management level employees) at some point over seven years is a sprawling, costly, and hugely time-consuming undertaking not easily susceptible to the kind of line drawing and case management that the dissent envisions. Perhaps the best answer to the dissent's optimism that antitrust discovery is open to effective judicial control is a more extensive quotation of the authority just cited, a judge with a background in antitrust law. Given the system that we have, the hope of effective judicial supervision is slim: "The timing is all wrong. The plaintiff files a sketchy complaint (the Rules of Civil Procedure discourage fulsome documents), and discovery is launched. A judicial officer does not know the details of the case the parties will present and in theory *cannot* know the details. Discovery is used to find the details. The judicial officer always

71. *See* G. Thomas Eisele, *Differing Visions—Differing Values: A Comment on Judge Parker's Reformation Model for Federal District Courts*, 46 SMU L. REV. 1935, 1965 (1993) ("[T]he most important, indispensable, element is setting the trial. The certainty of a real trial on a fixed date is the engine that makes the system work both well and efficiently.").

72. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007).

73. *Id.* at 1967–68 n.6.

> knows less than the parties, and the parties themselves may not know very well where they are going or what they expect to find. A magistrate supervising discovery does not—cannot—know the expected productivity of a given request, because the nature of the requester's claim and the contents of the files (or head) of the adverse party are unknown. Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. Requesters have no reason to disclose their own estimates because they gain from imposing costs on rivals (and may lose from an improvement in accuracy). The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define 'abusive' discovery except in theory, because in practice we lack essential information."[74]

A fair reading of footnote six shows that seven of the Justices of the United States Supreme Court appear, for all practical purposes, prepared to give up on discovery, at least in complex cases. In fact, they seem ready to narrow access to the federal courts as the best way of dealing with the problem of discovery, by instituting a new "plausibility rule" for pleading claims.[75] Without question, this is a wake-up call to the trial bench and trial bar to fix the problem. To ignore *Twombly* is unwise. It is time to take the problem of discovery very seriously.

Yet, it is not only Supreme Court Justices who are concerned with discovery; it is lawyers, too. One example comes from a discussion regarding *Twombly* at the William Sessions Inn of Court in San Antonio, Texas, in January 2008. A survey of lawyers yielded these responses:

- I personally think that we should rethink the full disclosure philosophy that was adopted in a different time (the 1930s). We are simultaneously pricing many, many litigants out of the process, delaying justice, and wasting money and the lives of the young lawyers who are doing the reviewing and for what? In Europe they exchange trial exhibits and that's about it, and the world continues to turn and disputes

74. *Id.* (citations omitted).

75. *Twombly* announced that the pleading rule stated in *Conley v. Gibson*, 355 U.S. 41 (1957), was to be supplanted by a new rule of plausibility, which seems, at least at first glance, to put complaints under stricter scrutiny. *Twombly*, 127 S. Ct. at 1968. See the discussion in section B(3).

continue to get resolved. I think it's time to try something like that here, perhaps in certain types of cases, or in one of the states. I am not talking about changing HSR procedures, or other regulatory procedures. I am talking about civil litigation only, where the burden is preponderance. We need an Ediscovery Lite set of rules for the smaller cases and the arbitrations, and right now there's nothing on the horizon.

- Discovery is far too wide ranging, even under current rules. A requesting party should be required to pay the cost of assembling electronic documents and screening them. Otherwise, a plaintiff can make discovery so expensive the case becomes uneconomic to defend, even if without merit. The rules on what is discoverable should be pared down to a very limited number of documents, or at least a limit put on requests for production, and only admissible documents discovered.
- Oftentimes, early on in the case, you are still gathering documents and may not necessarily know what you have—this is especially true regarding electronic documents (such as emails) so it makes it difficult to respond to discovery requests sent early on in the case.
- If your hearing on the motion to compel is not held timely or you don't receive a timely ruling, it can create a logjam in the case because the parties won't produce any more information until they have a ruling from the Court.
- There needs to be a way to narrow down the document production requirements in cases with significant numbers of e-documents.
- With the advent of electronic discovery we need to turn the clock back to pre-Charles Clark rules—get permission from the court to take discovery—have the plan reviewed first by the court. Electronic discovery is killing litigation.

These are thoughtful comments by thoughtful lawyers. They highlight continuing issues with electronic discovery that still require much thought and much refinement. Indeed, the problems of electronic discovery now loom large over America's civil justice system, with no good answers presently in sight. Indeed, it is very possible that, while discovery has made it to the twenty-first century, our approach to it has not.

As a consequence of discovery problems, lawsuits are increasingly about pretrial work and pretrial squabbles, with the parties so exhausting themselves that their cases are seldom tried. The result is that important issues do not get to a jury for resolution. As United States District Judge Sarah S. Vance has aptly observed, something very important is lost in the process. Without a trial, there "is no verdict, no appeal, no precedent."[76]

b. One Answer: Start at the End

Judge Patrick E. Higginbotham of the United States Court of Appeals for the Fifth Circuit has had extensive experience first as a trial lawyer and then as a federal trial judge. He has shared with me, by e-mail, his formula for supervising discovery, which is a near-perfect prescription for getting it right. I recommend to all trial judges what he has shared with me:

> I have one thought about discovery control. I deployed as a district judge a technique I was taught as a young trial lawyer: Write the charge early and outline the closing argument you would like to make. In major securities and antitrust litigation I insisted that counsel at a very early stage develop the jury questions and a draft charge. At first they were puzzled but they came to see that it offered a guy wire to tie to a destination to which all, including the tiers of underlings on the case were to be snapped. It is a non too subtle device for constructing a benchmark for relevance otherwise absent in discovery and to give confidence to decisions to not chase every rabbit.[77]

c. Another Answer: Cooperate with Each Other

In addition to Judge Higginbotham's prescription for discovery control, it is well to consider the suggestions found in Stephen Susman and Barry Barnett's *Techniques for Expediting and Streamlining Litigation.*[78] To begin with, they emphasize that Rule 1 of the Federal Rules of Civil Procedure expresses that the

76. Hope Viner Samborn, *The Vanishing Trial*, A.B.A. J., Oct. 2002, at 24, 26.

77. E-mail from Patrick E. Higginbotham, Judge, U.S. Court of Appeals, Fifth Circuit, to Royal Furgeson, Judge, U.S. Dist. Court, W. Dist. of Tex. (May 16, 2008, 12:23 CST) (on file with author).

78. Stephen D. Susman & Barry C. Barnett, *Techniques for Expediting and Streamlining Litigation*, *in* 5 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS 397, 406 (2d ed. 2005).

goal of the civil justice system is "the just, speedy, and inexpensive determination of every action."[79] Lawyers are officers of the court, and this seminal rule must be their watchword.

The central theme of the Susman-Barnett approach to discovery is that, from the outset of the case, lawyers *must work* together to expedite and streamline litigation:

> You also should immediately make friends with opposing counsel and coax him to accept efficiency-enhancing procedures. Devote yourself to helping the court solve problems, to proposing solutions that will save the court time and effort, and to imposing on the court to decide only those issues determinative of the outcome.[80]

Most discovery problems arise and then get worse because lawyers do not talk and work together collaboratively to find reasonable solutions. It should always be remembered that a certificate of conference means more than a quick phone message or e-mail stating: "I just filed a motion to compel and for sanctions." On the other hand, when lawyers take the time to talk and work together, discovery problems by and large get resolved.

Here are some additional words of wisdom from the Susman-Barnett article:

1. "First, less is best."[81]
2. "It is better to produce too much than too little."[82]
3. "Don't take many depositions, and keep the ones you do take short. You don't need to look under every stone."[83]
4. "Try to conduct all discovery by agreement. It is expensive to do otherwise."[84]

Following these guidelines will do much to take the concerns of the United States Supreme Court in *Twombly* off the table and bring civil jury trials back to the courts.

I do have one small disagreement with Mr. Susman and Mr.

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79. FED. R. CIV. P. 1.

80. Stephen D. Susman & Barry C. Barnett, *Techniques for Expediting and Streamlining Litigation*, *in* 5 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS 397, 406 (2d ed. 2005).

81. *Id.* at 409.

82. *Id.* at 411. These first two points are not contradictory. "Less is best" means seeking less discovery. *Id.* "Producing too much" means to err on the side of production. *Id.*

83. Stephen D. Susman & Barry C. Barnett, *Techniques for Expediting and Streamlining Litigation*, *in* 5 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS 397, 412 (2d ed. 2005).

84. *Id.* at 413.

Barnett. Their view is that judges "are seldom the problem."[85] The fact is that judges are often the problem. In fact, I myself plead guilty. May I share another personal experience? At the beginning of my judgeship, I resolved to handle all discovery disputes in my own cases because it was clear to me, after twenty-four years of trial practice, that discovery was where the system broke down. So far, so good. But then, I went astray. Every time lawyers came before me with a discovery dispute, no matter how legitimate and no matter how hard they had worked to resolve it, I barked at them for bothering me. I treated each and every disagreement as a big pain in my backside. I was not helpful at all. Finally, some years into my judgeship, it occurred to me that I was the problem. If the lawyers were working diligently to find ways to remove discovery roadblocks, I needed to do likewise. Even if they were not, I needed to do better. So I changed. Now I no longer complain to lawyers about discovery disputes. I earnestly try to work with them to find solutions. It is the least that I can do. As Justice Gina M. Benavides of the Thirteenth Court of Appeals of Texas once told me: when discovery stalls, it is the trial judge's duty to "re-start the engine."

But my experience explains the Susman-Barnett view that judges hate discovery disputes "because they consume so much time and do so little to advance the case to resolution. Partly as a result, judges seldom handle fights over discovery quickly or effectively and usually give both sides less than they could get by agreement. The lack of attention bogs down the discovery process and hinders trial preparation."[86]

Quite frankly, this is unacceptable. Trial judges should handle the discovery in their own cases expeditiously, helpfully, and with good cheer. Given the view from *Twombly*, it is more important than ever to do so. It is time for trial lawyers and trial judges to come together to do the heavy lifting and to make discovery work. If we do not, appellate judges may be prone to limit access to the courts as a way of dealing with discovery. Limiting access also, of course, limits trials and juries. To have such a result on our watch would be an indictment too severe to contemplate.

85. *Id.* at 401.
86. *Id.* at 414.

d. Electronic Discovery: What a Mess

Electronic discovery is bedeviling the civil justice system. American companies, large and small, are heavily committed to electronic mail and a paperless environment with all that such a commitment entails. Under such circumstances, document production in complex cases is weighted toward electronic discovery and has now become overwhelmingly difficult and complicated. The recent changes to the Federal Rules of Civil Procedure signal one heroic effort to deal with the problem, but it is clear that satisfactory solutions to electronic discovery are still beyond reach. Either this matter is resolved in short order, or the civil justice system will collapse in complex cases, eliminating jury trials, verdicts and precedents.

Rather than look for a radical solution, at least for the present, there is a possible middle path that could be taken to ameliorate the excesses of today's electronic discovery and, at the same time, give the parties an opportunity for meaningful discovery. In complex cases, the court should consider the appointment of a special master,[87] with the cost divided among the parties. The special master would by necessity have special expertise in the field of information technology. The special master's assignment would be to understand what electronic discovery is needed and then decide how that discovery can be accomplished in a realistic and economical way. To achieve this, the special master normally would meet with the IT representatives of the various parties to determine how their IT systems work and how discovery can be focused to obtain the needed information without excessive expense. In this way, neither plaintiffs nor defendants could force settlements by shifting significant costs to the other, and all parties could avoid the stress that comes with the very real concern that arises when trying to comply with discovery requests. If matters need to be resolved by the court, the special master could be available to give the court the perspective and expertise needed to correctly decide the issue. As things presently stand, a court has no proper way of resolving electronic discovery disputes, because one side argues the discovery is essential for the case, while the

87. *See* FED. R. CIV. P. 53(a)(1)(C) ("[A] court may appoint a master only to ... address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.").

other side argues the cost to retrieve the discovery is prohibitive.

Whether this middle-of-the-road solution would work remains to be seen. It is worth the effort, however. Failing here means either that complex cases will not be the proper subject of lawsuits or that radical surgery will be required to severely limit electronic discovery. In fact, in a recent survey of the members of the American College of Trial Lawyers, a clear majority eschew the "tinkering around the edges" approach to the discovery rules, which is considered to be a failure, in favor of more radical changes. A super majority (87%) "agree that electronic discovery, in particular, is too costly."[88] Time is clearly of the essence here.

Regardless, litigants and their attorneys must come to the realization that the scorched-earth approach to discovery to find "the smoking gun" does not work any longer. A better way must be found or else the traditional roles of trials and juries in the civil justice system will end at a cost to America that is too great to contemplate. The need for discovery must not be elevated to the point that it exceeds the value of the trial.

3. The Cost of Litigation

It is an unfortunate fact that litigation in America is too expensive. The bench and the bar need to come together, as with discovery, to address the issue. Discovery adds much to the cost of litigation,[89] but it is not the only culprit. Trials themselves can be hugely expensive. In the not too distant future, we may actually see a time when trials simply cannot happen because they are unaffordable. This is not surmise.

Very serious attention needs to be given to this problem of costs. We cannot do justice with juries if only the most affluent can pay the freight and access the court system. Yet, the problem of costs should not descend into a complaint against contingent fees. Contingent fees are a good method for keeping costs down. They provide those who cannot afford a lawyer with a way to hire

88. AM. COLL. OF TRIAL LAWYERS, INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 5 (2008).

89. Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1416–17 (2002). Judge Higginbotham observed that the most costly feature of federal practice is discovery. *Id.* He also noted that we would profit from empirical studies to better quantify these costs, although quantification would face challenges. *Id.*

a lawyer. They provide those who can afford a lawyer with a way to better manage costs.[90] I agree with a recent *Blawgletter*[91] written by Barry Barnett on April 30, 2008:

> Our Alerts include items that mention "contingent fee" (or its yokely doppelganger, "contingency fee"). Most reference ads for personal injury lawyers, especially ones handling (still!) "mesothelioma" cases.
>
> A claim of sameness. A more interesting one caught our eye yesterday. The item appeared on David Giacalone's f/k/a blog under the lower-case title obama's tort reform creds? On the way to finding Barack Obama neither fish nor fowl in tort reform terms, the post notes (with emphasis ours) that f/k/a has "written extensively on the topic of the standard contingency fee (charging virtually every personal injury client the *same percentage fee* regardless of how risky or easy the case might be), which we believe consistently extracts *excessive fees* from clients." And it refers the reader to "our four-part essay on the ethics and economics of contingency fees."
>
> The "same percentage fee" and "excessive fees" got our attention. Specifically they provoked, how you say, dubiositousness. While we don't practice in the p.i. arena, we do recall that in January we saw a study that attributed the uniformity of contingent fee percentages in personal injury matters to some kind of "sorting" process. Cases sort themselves into a rough order of strength: The strongest cases go to the best lawyers, middling ones attract the not-so-greats, and the weakest end up with the pikers. The clients don't mind paying one-third because a 33.3 percentage assures that each gets the highest quality his or her individual case can attract.
>
> . . . Say you have a great case—hard damages of $10 million, a solvent defendant, and good liability facts. A hack lawyer would positively salivate at landing you as a client. He might even discount the usual one-third to keep you from going elsewhere. But will you hire him? Or will you go with the best personal injury trial lawyer in the state? You know—the courtroom dynamo who doesn't need your case because she has so many other terrific ones to work on?
>
> Commercial angle. We must say that we find the "sorting" conclusion appealing. We also expect that, if accurate, it applies with even greater force in the context of commercial—business v.

90. HUGH STRETTON, ECONOMICS: A NEW INTRODUCTION 530 (1999).

91. Uniform Rates—Bah!, http://blawgletter.typepad.com/bbarnett/other_blawgs/ (Apr. 30, 2008, 05:25 EST).

business—litigation.

Why? In the first place, commercial litigants know more. They may not have served as president of the Harvard Law Review, but they do have contacts in the business and legal communities as well as the resources and savvy to evaluate credentials, look at success rates, and judge other signs of competence. So you'd expect business people to do an even better job of finding the best contingent fee lawyer for their cases.

You'd also anticipate that companies and business owners grasp how to turn competition to their advantage. They know to shop their cases to compare offers. They understand that a "standard" contingent fee represents a starting point for negotiation. They or their regular counsel can haggle over terms—not only the contingent percentage but also who pays expenses, whether expenses come out before computing the fee, and under what circumstances the lawyer can withdraw. Fee terms thus vary widely in commercial contingent fee litigation.

Businesses with money also enjoy more options. Law firms that will work on a contingent fee basis usually will offer also to take cases on an hourly basis, for a periodic flat fee, or under an arrangement that blends hourly with contingent. The business client chooses.

Bottom line. We favor contingent fees because they shift downside risk to the lawyer, better aligning the interests of client and lawyer. Clients appreciate them too. The study concluded, in fact, that clients so like the idea of shedding some of the risk of loss that they'll gladly agree to pay a contingent fee 2.5 times as big as the fees they'd expect to pay to an hourly lawyer. What does that tell you?[92]

As a general matter, contingent fees are not the problem with costs. But, attorneys' fees are a problem and moderating costs is essential. It is therefore time for innovative ideas to make lawsuits affordable. Between corporate counsel and the private bar, much is being done to innovate in this area. The effort must continue. Of course, the answer is not to chisel hard-working lawyers out of a reasonable and fair fee. Lawyers deserve to be adequately compensated. The trend, however, is more than worrisome and needs thoughtful attention. If not arrested, it will impinge on the

92. *Id.*

ability of parties to get to a trial and to a jury.

4. Expert Witnesses and *Daubert*

There is much to commend in the United States Supreme Court decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[93] *General Electric Co. v. Joiner*,[94] and *Kumho Tire Co. v. Carmichael*,[95] which established the gatekeeper's role for the trial judge in regard to expert witness testimony. As much as it labored, however, the Supreme Court could not anticipate all the twists and turns that accompany experts and their testimony. Indeed, the FJC, in an effort to assist trial judges in their roles as gatekeepers, has published a 624-page manual on the subject.[96] Perhaps more than anything, this illustrates the difficulties inherent in the Supreme Court's formulation on experts.

It would not serve the purpose of this essay to critique *Daubert*, *General Electric*, or *Kumho Tire*. But, this trial judge's anecdotal experiences have revealed that these cases have spawned a substantial number of challenges to experts in a vast number of cases. Experts who are reliable and able to provide relevant testimony are routinely challenged. As one of the authors in the FJC *Manual* noted, "The enormous scope and open-ended nature of *Kumho Tire* guarantee that battles over the admissibility of expert testimony will continue."[97]

It is a proper concern that these cases have encouraged too many motions to exclude. Trial lawyers should be judicious in filing such motions. In addition, trial judges should be careful not to let such challenges take over a case. Not every motion needs to be heard with testimony. Those that need to be heard can often be heard during trial after the jury goes home, especially when it is clear that the challenge, even if successful, will not exclude all of the expert's testimony. No matter how they are handled, motions need to be filed early, be to the point, and be clear so that the judge can make the proper assessment.

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93. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

94. Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997).

95. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

96. FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (2d ed. 2000).

97. Margaret A. Berger, *The Supreme Court's Trilogy on the Admissibility of Expert Testimony*, *in* FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 9, 38 (2d ed. 2000).

Again, finding the right balance is important. Lawsuits should never reach the point, for example, where some lawyer believes that it is proper to challenge a Nobel scientist whose work involves the very subject matter in controversy. While this illustration takes the proposition to the extreme, motions have been filed that approach such an extreme. The profession can and must do better.

It is essential to find reasonable, efficient ways to deal with expert witnesses. Otherwise, everyone is exhausted long before a jury enters the box. Certainly, that does not make sense. The virtues of good judgment and prudence advise against blanket challenges to experts. It is hoped that these virtues will always be in ample supply in every lawsuit; but, if not, judges should be quick to demand their presence.

5. Lawsuit Abuse

While it is not the trial courts that cause "lawsuit abuse," there is a perception that "lawsuit abuse" is not addressed by trial courts and is thus enabled by trial courts. Such is not the case, but perceptions persist. The truth is, however, that "lawsuit abuse" criticisms are seldom on target. Here is a response to those concerns by Randy Howry, president of the Austin Bar Association, involving, of all things, baseball. Since Mr. Howry's piece cannot be improved upon, I will cite it in its entirety:

> In his March 21[, 2006] op-ed piece, "Striking out lawsuit abuse," Jay Miller, the president of the Round Rock Express baseball team, claims that many lawsuits are filed by spectators injured at ballparks every year resulting in large payouts by team owners. He maintains that baseball fans are "looking for every opportunity to hit a grand slam jackpot at the expense of the team or even its players."
>
> Those of us interested in addressing the myths of tort reform have one question, "Where in the world are you being sued?"
>
> Although we apologize for striking out a good fantasy with the truth, a decent respect for the dignity of the rule of law requires that your readers know the following: a search of the district clerk's records in Williamson County reflects that neither the Round Rock Express nor its owners have ever been sued for any reason, certainly not for spectator injury, in the five years the team has called Round Rock home. Not once. Ever.
>
> But let's go further: try "Googling" for baseball-related

lawsuits. You'll get about a dozen across the country covering decades, almost all related to contract disputes or other business-related matters. Miller himself could only cite three examples from across the nation, years removed, and more importantly, he did not reveal outcomes. Most states even have laws that protect teams from lawsuits related to known consequences of attending sporting events.

So why would Miller profess such fear? Why insult his good and generous fans? The answer to that question is found in the small print at the very end of his op-ed piece. Miller is a member of the board of directors of Citizens Against Lawsuit Abuse of Central Texas.

Over the past few years, it has become real sport for organizations such as this to demonize lawyers and lawsuits. Blaming lawyers and lawsuits for all of society's ills is fun and comfortable for folks, like Miller, who do not feel the need to research the facts. These so-called "tort reformers" are quick to throw out phrases such as, "Frivolous lawsuits are clogging the courthouse" or, "Out-of-control jurors award too much money."

The truth is that over the past decade, there has been a 50 percent reduction in the number of non-family-law cases filed, and the monetary awards, reflected in jury verdicts, have steadily decreased during that same period. This downward trend began well before the "tort reformers" began their reforms.

No doubt, there are occasions when juries make bad decisions. Those are the ones you read about in newspapers and magazines. But it does not happen nearly as often as some would have you believe. And, the anti-lawsuit crowd never wants to discuss the checks and balances built into the legal system to protect against run-away jury verdicts: motions to sanction frivolous filings, the ability of trial judges to enter judgments regardless of jury verdicts and the right of appellate courts to review jury verdicts and overturn them and reduce jury awards if justified.

Miller writes, ". . . the game of baseball is played with bats and balls. The rules of the game have been in place for more than 100 years." True, and it is the longevity of the game of baseball that makes it so special. And Miller knows that, for more than 100 years, the legal rule has been that being hit by a foul ball or home run in the ball park is expected and foreseeable and not the proper subject of a lawsuit.

Likewise, the jury system has been part of the American

> democratic process for more than 200 years. Properly constrained by rules of evidence and procedure, it has served us very well.
>
> There never seems to be public outcry when ordinary citizens, who serve as jurors, are asked to determine whether a criminal defendant should live or die. But when asked to determine the culpability of a defendant in a civil case involving monetary damages, these same ordinary citizens are suddenly rendered incapable of making such a decision.
>
> Can our system of justice be improved? Certainly, but there can be no dispute that lawyers and lawsuits have made significant contributions to society during that period. Dangerous products have been improved or eliminated, civil rights have been established, and polluters have been punished. Creating false impressions about frivolous lawsuits does every citizen a disservice.
>
> So, Mr. Miller, with all due respect, don't pitch that stuff unless you have all the facts. With daily news reports about gambling by players and coaches, exorbitant players' salaries and performance-enhancing drugs, it's hard to believe that "frivolous lawsuits" are baseball's biggest problem.[98]

Mr. Howry's op-ed piece about the lack of frivolous lawsuits in Texas has additional support in a recent survey conducted for the *Baylor Law Review*, where Texas state judges were asked about frivolous lawsuits. Over 86% of the responding judges believed that there was no need to address frivolous lawsuits legislatively.[99] Almost half—44%—had not observed a single frivolous lawsuit during the previous four years.[100] Over 65% of Texas judges had not imposed a single sanction under Rule 13 of the Texas Rules of Civil Procedure or chapters 9, 10, or 11 of the Texas Civil Practice and Remedies Code for bringing frivolous claims; another roughly 20% had imposed only a single sanction.[101] This shows that frivolous lawsuits are not a frequent problem, and when they are filed, adequate tools already exist to deal with them short of curtailing jury access.

And finally, the President's Opinion Column, written by Guy

98. Randy Howry, *"Tort Reform" Backers Make Foul Assertion* (Mar. 28, 2006), http://www.hermanhowry.com/randyhowrytortfoul.htm.

99. Larry Lyon et al., *Straight from the Horse's Mouth: Judicial Observations of Jury Behavior and the Need for Tort Reform*, 59 BAYLOR L. REV. 419, 433 (2007).

100. *Id.* at 432.

101. *Id.*

Harrison in February 2003 for the *Texas Bar Journal* when he was president of the State Bar of Texas, is certainly on point:

> The e-mail was from a non-lawyer friend of mine, whose habit it is to remind me of his, if not the public's, perception of my chosen profession. The subject line declared, "The Stella Awards."
>
> "The Stella Awards" is a reference to Stella Liebeck, the woman awarded damages against McDonalds for burns suffered from scalding coffee. The principal case reported this year was a man who set his Winnebago on cruise control, got up to get a cup of coffee, and crashed because there was no warning that a driver should stay in control of the vehicle. Reportedly, he was to receive $1.75 million. Other mentions were given to an Austin woman, who tripped over her misbehaving toddler in a furniture store and received $780,000, and a man in Los Angeles who was awarded money when a car he was stealing ran over his hand.
>
> Deleting the [e-mail] without responding, in retrospect, may have given credence to the stories or belied a careless attitude toward my perception of my chosen profession. Were any of the stories true, as reported, there indeed was a need for reform. Were they false, allowing the perception that they be true was a failing.
>
> . . . .
>
> What I should have done was investigate, perhaps visit Snopes.com, which, I am told, checks out "urban myths," or at least I could have called a lawyer in Austin to check out the Texas case. Had I done so, I would have learned that there was only one thing wrong with the above cited matters—*none of them ever happened.*
>
> So why report this in this space? Because we as lawyers have a duty to defend our profession when it is in need of defense and a like duty to be informed on shortcomings in an effort to help change the system for the good. If it be proven frivolous lawsuits are a problem, if there is rampant forum shopping in violation of rules of procedure, if there are changes that will improve the system, to not acknowledge them is to allow only one side to be heard in the debate. Hand in glove with our duty to be informed regarding needed changes is our duty to defend ill informed calls that change be made for change's sake.
>
> . . . .
>
> As John Adams put it so much clearer than I: "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of the facts

and evidence." Unfortunately, the silence of the profession and those of us as individual lawyers, create scenarios whereby the fancies put forth become the facts if we do not speak up. That's not an opinion, that's a fact.[102]

## B. *Problems in the Appellate Courts*

As a trial judge, I wholeheartedly subscribe to the principle of judicial review. It is essential to the proper functioning of the American judicial system. Indeed, judicial review gives me much comfort as a trial judge. I know that I am human and will make mistakes and that those mistakes should be corrected to prevent bad results. Nonetheless, judicial review should always be conducted in accordance with proper standards of review to ensure that the law stays within appropriate bounds, with due respect to be shown at all times to the findings of juries. As conscientious as appellate judges are, they too are human and should always be careful not to lose their balance.

### 1. The Supreme Court, *Balzac* and the Six-Person Jury

#### a. *Balzac*

Unfortunately, the United States Supreme Court has not always had a balanced approach to juries. A particularly unfortunate example is *Balzac v. People of Porto Rico*,[103] ably criticized by Carlos R. Soltero in *Latinos and American Law: Landmark Supreme Court Cases*.[104] In *Balzac*, the Supreme Court decided that a Puerto Rican who criticized the American governor of Puerto Rico in newspaper editorials was not entitled to a jury trial in a subsequent criminal prosecution for seditious libel.[105] While the Court, through Chief Justice Taft, gave many reasons for the denial, Mr. Soltero was able to cut through the thicket of the Court's judgment:

Chief Justice Taft's arguments on behalf of the Court in *Balzac* were simply legal rationalizations for perpetuating colonialism. If the

102. Guy Harrison, *The Duty (and Honor) of Debating the Facts*, 66 TEX. B.J. 110, 110 (2003).

103. Balzac v. People of Porto Rico, 258 U.S. 298 (1922).

104. CARLOS R. SOLTERO, LATINOS AND AMERICAN LAW: LANDMARK SUPREME COURT CASES 30–31 (2006).

105. *Balzac*, 258 U.S. at 313.

> goal of the United States was to improve the capacity for self-governance of the natives and to bring to Puerto Rico the "blessings of liberty," one could hardly imagine a more appropriate populist institution, apart from the voting booth, than the jury box. A jury trial serves not only the particular interests of the defendant in a criminal case, but also the participatory needs of citizens in self-government by dispensing justice.[106]

The Supreme Court missed an opportunity in *Balzac* to bring the supreme institution of democracy to Puerto Rico, through the supreme law of the land. The mistake continues to this very day. As Mr. Soltero has observed, the Supreme Court should reconsider *Balzac* and "close a dark chapter in American constitutional history."[107] Indeed, it should because jury trials, both criminal and civil, are one of the very best ways to secure the blessing of liberty for a free people.

b. Six-Person Juries

In *Balzac*, the Supreme Court denied the citizens of Puerto Rico the right to criminal juries.[108] In *Colgrove v. Battin*,[109] the Supreme Court denied American citizens the right to civil juries of twelve people in federal courts.[110] While the two denials are not equal in reach, the second denial was likewise a mistake, as so thoughtfully documented in the *Harvard Law Review*.[111] In deciding that six-person juries met the test of the Seventh Amendment, the Court cited four studies that provided "convincing empirical evidence" that such juries operate more efficiently than twelve-person juries without abridging litigants' substantive rights.[112] Yet, a thorough analysis of the four studies has shown that the "convincing evidence" is not convincing at all:

> At best, the studies represent marginal support for the use of six-person juries. Carefully examined, they provide a flimsy ground on which to overturn several hundred years of established jury practice.

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106. CARLOS R. SOLTERO, LATINOS AND AMERICAN LAW: LANDMARK SUPREME COURT CASES 30 (2006).

107. *Id.* at 33.

108. *Balzac*, 258 U.S. at 313.

109. Colgrove v. Battin, 413 U.S. 149 (1973).

110. *Id.* at 160.

111. *See Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1489 (1997) (calling for an end to the practice of using six-person juries in federal courts).

112. *Colgrove*, 413 U.S. at 159 n.15.

> The studies prove even less impressive when considered in light of the arguments and evidence challenging the efficacy of smaller juries.[113]

What are the problems with six-person as opposed to twelve-person juries? They do save money, but only marginally so.[114] Do they perform similarly? The answer is no.

> [S]ix-person juries are more unpredictable and are more likely to return strange verdicts than are twelve-person panels.... [Six-person juries have] a larger margin of error ... making a jury of six far more likely than a jury of twelve to return a verdict that is inconsistent with community norms.[115]

Six-person juries are also "less likely than larger ones to encourage the 'divergent perceptions and evaluations' that a true cross-section of the population would exhibit."[116] Six-person juries are much less likely to include ethnic and racial minorities.[117] The conclusion is clear:

> [S]ix person juries do little to alleviate congestion in the courts, and more importantly, ... they are substantively inferior to their twelve-person counterparts. Smaller juries increase the reluctance of those with minority viewpoints to express themselves, reach results substantially different from those of larger juries, and fail to serve as true cross-sections of the population. In short, smaller panels have a reduced capacity to fulfill the democratic role for which the civil jury was created.[118]

It is also clear what should be done:

> Although stare decisis counsels against overturning *Colgrove*, the Court must consider the differences between the deliberative abilities of six- and twelve-person juries. Stare decisis controls neither those cases that have been wrongly decided nor those cases in which the "facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification." Because *Colgrove* satisfies both of these exceptions, continued adherence to its holding amounts to little

113. *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1483–84 (1997).

114. *Id.* at 1484 n.153.

115. *Id.* at 1484–85 (citations omitted).

116. *Id.* at 1485.

117. *Id.*

118. *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1487 (1997).

more than blind acceptance of a flawed precedent.

> The cost of restoring twelve-person panels in federal civil trials is clear enough, at ten million dollars each year. The cost of continuing to use six-person panels is more difficult to quantify, however, for the value of a diluted Seventh Amendment is not measurable in dollars and cents. In the eyes of the Constitution, the smaller jury allowed in *Colgrove* is not equal to its larger counterpart. Accordingly, the Court should end the federal system's experiment with six-person civil juries and declare their use unconstitutional.[119]

The Supreme Court should end the experiment with six-person civil juries and the sooner the better.

### 2. The Embrace of Preemption

#### a. The Trend

There is a long and thoughtful history behind American product liability laws. They have been carefully crafted with the good help of the American Law Institute.[120] They have done much to enhance product safety and to protect the American people. Yet, there is now a movement in appellate courts throughout the United States, led by the United States Supreme Court, to preempt product liability laws (as well as other state tort actions) on the theory that federal regulation supersedes all state law. The broad extension of this doctrine, beyond anything contemplated by Congress, would remove vast swaths of cases from trial courts and trial juries, ending important tort litigation across America and greatly restricting jury involvement in a wide range of cases. In addition, preemption would make businesses and industries unaccountable for the harm that they cause and leave injured victims with no adequate remedy. Products liability, a particularly American advancement, which has been carefully structured over decades by courts and legislatures, which has done so much good for so many, and which has been thoughtfully and fairly administered by the civil justice system, through juries, could be

119. *Id.* at 1489 (footnotes omitted).

120. *See generally* RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY (1998) (superseding former section 402A of Restatement (Second) of Torts in the mid-1960s as the first section to be revised by the American Law Institute in its long-term undertaking to revise the entire Restatement (Second) of Torts).

subjected to significant limitation in the future because of the principle of preemption.

No less authority than the *New England Journal of Medicine* has become alarmed by this development. In anticipation of the decision in *Riegel v. Medtronic, Inc.*,[121] the editors of the journal stated the following in their January 3, 2008 editorial:

> This spring the Supreme Court of the United States will decide whether premarketing approval of a medical device by the Food and Drug Administration (FDA) immunizes the manufacturer against product-liability litigation in state courts. This decision, we believe, is a matter of particular importance to patients and the medical community.
>
> On December 4, 2007, the Supreme Court heard oral argument in *Riegel v. Medtronic.* In May 1996, Charles Riegel underwent coronary angioplasty in Albany, New York. During the procedure, the balloon ruptured, and advanced cardiac life support and emergency coronary bypass surgery were needed. Mr. Riegel and his wife subsequently sued Medtronic in a New York court, claiming that the device was defective and the labeling inadequate. Medtronic claimed, however, that any state lawsuit was preempted by a section of the Medical Device Amendments of 1976 to the Food, Drug, and Cosmetic Act.
>
> The 1976 law arose out of the Dalkon Shield disaster. Like all medical devices introduced before 1976, the Dalkon Shield intrauterine device underwent no premarketing assessment of safety or efficacy by any federal agency. In the wake of the thousands of deaths and serious injuries caused by the device, Congress took action, empowering the FDA to regulate all medical devices. To avoid conflict with state laws that, given the absence of any federal oversight, had been enacted to regulate medical devices, the 1976 law included a section that preempted certain state-law requirements that differed from federal (FDA) requirements with respect to the safety and efficacy of devices. This section, 360k(a), was used for two decades to prevent the enactment of state legislation that might conflict with FDA regulation.
>
> . . . .
>
> In *Riegel v. Medtronic* the company has resurrected the argument dismissed by the Court in *Lohr.* What, then, is the

121. Riegel v. Medtronic, Inc., 128 S. Ct. 999 (2008).

difference between the two cases? In *Lohr*, the pacemaker lead had been approved by the FDA in a "substantial equivalence" process in which, because the design of the lead was deemed to be "equivalent" to that of an existing lead, no further study of the safety and efficacy of the specific device was required. Furthermore, the existing pacemaker lead to which the new lead was judged equivalent had itself never undergone full premarketing assessment and had instead been "grandfathered." In *Riegel*, on the other hand, the angioplasty catheter had received premarketing approval from the FDA in accordance with current standards on testing for efficacy and safety. Medtronic argues that, given the rigor of the FDA approval process, any action at the state level, including tort litigation against the company, would represent a further requirement and thus be preempted under § 360k(a) of the Medical Device Amendments. Medtronic argues, in effect, that the granting of FDA approval shields any device manufacturer from state tort liability.

Congress worked long and hard last year to reform the FDA in its mission to improve the safety of drugs and medical devices. Congressional scrutiny of the FDA raised serious questions about whether the agency has the authority and resources necessary to do its job. A recent report from the Office of Inspector General of the Department of Health and Human Services reinforced this concern. Thus, a question that the justices will address in *Riegel v. Medtronic* is just how reliable the FDA premarketing approval process is and how much weight to give it. For its part, the FDA in *Lohr* interpreted the Medical Device Amendments as providing no basis for the preemption of state lawsuits. However, in *Riegel*, the FDA has reversed itself and now interprets the same statute as allowing the preemption of state lawsuits.

The decision of the justices in *Riegel v. Medtronic* will be critical for patients' rights and will have enormous impact on manufacturers' responsibilities and the safety of medical devices. Whether drug manufacturers might enjoy the same immunity that device manufacturers are claiming is a question that will also soon come before the Court. Next month the Court will hear a case (*Warner-Lambert v. Kent*) involving the diabetes drug troglitazone, which was withdrawn from the market in 2000 because of liver toxicity. The Court will be asked to decide whether FDA premarketing approval of the drug preempts liability claims in state court.

Ultimately, we believe that the pivotal question for the Justices

> in *Riegel v. Medtronic* resides in what is in the best interest of American society. Is it in the people's interest to shield medical-device companies from product-liability claims? Would such a decision benefit patients by making more lifesaving medical devices available, or would there be adverse effects on the overall safety of devices? Is the FDA premarketing approval process sufficiently rigorous and comprehensive to justify immunization of the industry against tort claims? And if medical-device manufacturers are shielded from liability, what about drug manufacturers? Or would society be better served if patients retained their right to seek legal redress when they believed they had been damaged by a faulty medical device? In the long run, would this result in safer medical devices for patients?
>
> If Congress later concludes that the Supreme Court has come to the wrong conclusion—that is, a conclusion that is too restrictive of patients' legal prerogatives and does not serve the public interest—Congress can then act to clarify the law and leave open the possibility that patients injured by devices or drugs can seek legal redress.
>
> But by rejecting Medtronic's plea for immunity, the Supreme Court can act now to protect patients. From time to time, the Court agrees to hear a case that may have major, even momentous, implications for health care. *Riegel v. Medtronic* is such a case.[122]

Despite the concern of the editors of the preeminent medical journal in the United States, the Supreme Court found preemption in the *Medtronic* case, deciding the premarket approval process of the FDA to be, as a general matter, "rigorous."[123] Yet, Justice Scalia, speaking for himself and six of his colleagues, did not address "just how reliable the FDA premarketing approval process is," as requested by the *New England Journal of Medicine*.[124] Instead, he simply explained the process.

Then, Justice Scalia considered the meaning of the Medical Device Amendments of 1976 (MDA) to the federal Food, Drug and Cosmetic Act (FDCA) that expressly preempted only state requirements "different from, or in addition to, any requirement"

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122. Gregory D. Curfman et al., Editorial, *A Pivotal Medical-Device Case*, 358 NEW ENG. J. MED. 76, 76–77 (2008) (citations omitted).

123. *Riegel*, 128 S. Ct. at 1004 (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 477 (1996)).

124. Gregory D. Curfman et al., Editorial, *A Pivotal Medical-Device Case*, 358 NEW ENG. J. MED. 76, 76–77 (2008).

applicable to medical devices.[125] In this design defect case, not manufacturing defect case,[126] the Supreme Court decided that common law actions for negligence and strict liability do impose "requirements" and would therefore be preempted by federal requirements specific to a medical device.[127] In doing so, it noted similar interpretations of the Federal Insecticide, Fungicide, and Rodenticide Act and the Public Health Cigarette Smoking Act of 1969.[128] Speaking for the majority, Justice Scalia opined that, by the terms of the MDA, "reference to a State's 'requirements' includes its common-law duties," so preemption was required.[129] He followed with this observation:

> In the present case, there is nothing to contradict this normal meaning. To the contrary, in the context of this legislation excluding common-law duties from the scope of pre-emption would make little sense. State tort law that requires a manufacturer's catheters to be safer, but hence less effective, than the model the FDA has approved disrupts the federal scheme no less than state regulatory law to the same effect. Indeed, one would think that tort law, applied by juries under a negligence or strict-liability standard, is less deserving of preservation. A state statute, or a regulation adopted by a state agency, could at least be expected to apply cost-benefit analysis similar to that applied by the experts at the FDA: How many more lives will be saved by a device which, along with its greater effectiveness, brings a greater risk of harm? A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court. As Justice [Breyer] explained in *Lohr*, it is implausible that the MDA was meant to "grant greater power (to set state standards 'different from, or in addition to' federal standards) to a single state jury than to state officials acting through state administrative or legislative lawmaking processes." That perverse distinction is not required or even suggested by the broad language Congress chose in the MDA, and we will not turn somersaults to create it.[130]

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125. *Riegel*, 128 S. Ct. at 1006.

126. *Id.* at 1006 n.2. The dismissal of the manufacturing defect issue was not appealed. *Id.*

127. *Id.* at 1008.

128. *Id.* at 1007–08.

129. *Riegel*, 128 S. Ct. at 1008.

130. *Id.* (internal citations omitted).

Seven other Justices (including a reluctant Justice Stephens in concurrence) joined Justice Scalia in the *Medtronic* decision. Despite such near unanimity, it is fair to inquire whether there was a different way to frame this decision in order to give balance to court access and congressional regulation. Was there another reasonable approach that the Court could have taken in order both to allow compensation for tort victims and to enhance the regulatory process?[131]

### b. The Tension Between Federal Preemption Law and State Lawsuits

Justice Scalia's opinion highlights the tension between what states do with their courts and juries, and what Congress does. "[F]ederal law is the supreme law of the land," and Congress has the authority, within constitutional bounds, to limit the justice systems of the states.[132] The courts should always show great deference to Congress in this regard, but they also should be very cautious in finding such a limitation, unless explicitly stated, given the central role that the states and their justice systems play in the scheme of American justice.[133] Should it be enough that some general statement of preemption is in a congressional enactment?

In addition, to a trial lawyer or a trial judge, Justice Scalia's two quotes about juries raise interesting questions. Why is not tort law, applied by juries under a negligence or strict liability standard, less deserving of preservation in the face of a federal statute that would deny damages to innocent victims for their injuries, without a very clear statement of preemption?[134] Why must this be an either/or approach when negligence and strict liability actions could be seen to supplement, rather than be different from or in addition to, regulation requirements?[135] Then, the terms of the

131. *See* DAVID VLADECK, THE EMERGING THREAT OF REGULATORY PREEMPTION 81, 85 (2008), http://www.acslaw.org/files/Vladeck%20Issue%20Brief.pdf ("The case for preemption of medical device claims is extremely weak.").

132. Levine v. Wyeth, 944 A.2d 179, 184 (Vt. 2006), *aff'd*, 129 S. Ct. 1187 (2009).

133. *See id.* (quoting Cipollone v. Ligett Group, Inc., 505 U.S. 504, 516 (1992)) (limiting the preemption of state law by federal statute when there is an express congressional command, the state law conflicts with federal law, or there is no room for states to supplement federal law).

134. *See id.* at 187 (citing Horn v. Thoratec Corp., 376 F.3d 163, 176 (3d Cir. 2004)) (noting preemption is appropriate based on the express preemption clause in the Food, Drug and Cosmetic Act).

135. *See id.* at 187–88 (citing Geier v. Am. Honda Motor Co., 529 U.S. 861, 870, 880–

MDA would not require preemption. This would seem a more proper result in light of Justice Ginsberg's dissent that the construction given by the majority "is at odds with the MDA's central purpose: to protect consumer safety."[136] While no Justice disagreed with her as to purpose, the point of the majority was, regardless of the purpose and intent behind the MDA, the terms of the MDA control. In addition, impliedly using this formulation, Justice Ginsberg correctly observed that "a medical device manufacturer may have a dispositive defense if it can identify an actual conflict between the plaintiff's theory of the case and the FDA's premarket approval of the device in question."[137]

The second comment about juries in the majority opinion is difficult to square with what actually happens in products cases. The Restatement and almost all state liability laws require proof that the alternative design proposed by the plaintiff is indeed a "safer alternative design." Juries not only see the cost of a more dangerous design, they are also presented and concerned with the benefits of the product at issue before them. Any defense lawyer worth her salt will present evidence to a jury of the benefit of her defendant's product, normally without objection. It is a part of the issue before the jury, which must consider utility in conjunction with the efficacy of the product design.

In her dissent, Justice Ginsberg also answered this concern. "[A] medical device manufacturer may be entitled to interpose a regulatory compliance defense based on the FDA's approval of the premarket application."[138] Certainly, such a rule would make sense. In addition, by placing compliance at issue, the plaintiff arguably also would be allowed to investigate the reliability of the approval process, which certainly would be justified in the regulatory environment of today.

As this essay was headed to the printer, the Supreme Court announced its decision in *Wyeth v. Levine*[139] and clarified the extent of the reach of the preemption doctrine in the federal system. For those concerned about the adverse impact of

81 (2000)) (finding no preemption by federal safety regulations when the intent of the regulations is to provide a range of options).

136. Riegel v. Medtronic, Inc., 128 S. Ct. 999, 1020 (2008) (Ginsberg, J., dissenting).

137. *Id.* at 1019–20.

138. *Id.* at 1020.

139. Wyeth v. Levine, 129 S. Ct. 1187 (2009).

preemption on the right to a jury trial, the opinion was a welcomed relief because the Court held that federal labeling requirements, by themselves, would not immunize companies from state court action.[140] The argument in *Wyeth* sought to take preemption to a more expansive level than that approved in *Riegel v. Medtronic, Inc.*, where the Court found express preemption in the statutory language.[141] Eschewing such an aggressive approach to preemption and embracing a more balanced view, the Supreme Court in *Wyeth* ruled that unless Congress said that preemption was required or unless common law claims stood as an obstacle to congressional purposes—making it impossible to comply with both state and federal obligations—federal regulations would not be preemptive.[142] The Court accepted *Wyeth* for deliberation only after a jury trial on the merits had been completed, providing a fully developed record for consideration—not necessarily a usual occurrence on the Supreme Court's civil docket. By doing so, the Court was not only able to benefit from the thoughtful opinions of the New Hampshire trial and appellate courts, but also from the testimony of a five-day trial. The result speaks for itself.

Strangely enough, the preemption doctrine has recently been given a warm embrace from an unlikely source—a state court. In *Bic Pen Corp. v. Carter*,[143] the Texas Supreme Court held unanimously that the federal Consumer Product Safety Act impliedly preempted design defect claims against defendant Bic by the plaintiff, whose six-year-old daughter suffered severe burns from a defective lighter.[144] While overturning a jury award totaling $5 million, the court found implied preemption in the face of what Justice Ginsberg labeled the "presumption against preemption"[145] that has always prevailed in American courts.[146] Not only did the Texas Supreme Court find implied preemption, but it also determined that the Act's savings clause, which specifically retained common law and statutory law claims, was

140. *Id.* at 1191.

141. *Riegel*, 128 S. Ct. at 1008.

142. *Wyeth*, 129 S. Ct. at 1196.

143. Bic Pen Corp. v. Carter, 251 S.W.3d 500 (Tex. 2008). Justice Green did not participate in the decision. *Id.* at 500.

144. *Id.* at 508–09.

145. *Riegel*, 128 S. Ct. at 1014.

146. *Bic Pen Corp.*, 251 S.W.3d at 503. The portion of the award attributed to exemplary damages was reduced to $750,000 by statute. *Id.* at 503 n.1.

inoperable.[147] A more enthusiastic adoption of the doctrine of preemption is difficult to imagine, and by a state court no less. On remand, the court of appeals held the jury had no basis to award exemplary damages, reversed the jury verdict in that regard, and rendered a decision eliminating those damages for the plaintiff.[148]

c. Another Approach

Critics of the preemption movement have aptly noted that it ignores the important role that the tort system serves in information gathering and in compensation schemes. America's federal regulatory systems are far from perfect. Approved products continuously go to market with significant defects. Preemption leaves those injured by such defects with no remedy whatsoever. This is an unacceptable result. A better approach is needed.

The good news is that a better approach has been suggested by Professor William Childs in a recent law review article.[149] It has strong merit, and it or its variation should be considered, either by the courts or Congress or both. Before outlining his formulation in his article, Professor Childs sought to compare "the two main approaches to a 'regulatory defense' in the FDA context," as demonstrated by Professors Robert Rabin and Richard Stewart.[150] Professor Stewart has written in favor of preemption, so long as the regulatory agency can be shown to have done its job. If a product has been approved for the market, immunity should attach with few exceptions. On the other hand, Professor Rabin has seen value in finding some compromise with preemption to

147. *Id.* at 506–07.

148. Bic Pen Corp. v. Carter, No. 13-03-00560-CV, 2008 WL 5090757, at *10 (Tex. App.—Corpus Christi Dec. 4, 2008, pet. filed) (mem. op.).

149. *See generally* William Childs, *The Implementation of FDA Determinations in Litigation: Why Do We Defer to the PTO but Not to the FDA?*, 5 MINN. INTELL. PROP. REV. 155 (2004) (asserting the value of agency decisions should be determined using several factors, including the risk of an incorrect agency decision, the strength of the agency process, the interest in litigating the issue, and the interests of the parties involved).

150. *Id.* at 183. *Compare* Robert Rabin, *Reassessing Regulatory Compliance*, 88 GEO. L.J. 2049, 2084 (2000) (arguing the regulatory compliance defense approach to tort law is the right approach), *with* Richard Stewart, *Regulatory Compliance Preclusion of Tort Liability: Limiting the Dual-Track System*, 88 GEO. L.J. 2167, 2167 (2000) (presenting state autonomy, nonefficiency goals, social utility goals, and unanticipated circumstances as counterweights to a strict regulatory compliance defense approach to tort law).

allow the tort system to work.

After assessing the debate between Professors Stewart and Rabin, Professor Childs suggested yet another way to strike a balance in this difficult area. He has called it "[a] middle ground: learning from the patent context,"[151] by comparing FDA regulation with the system in place in the United States Patent and Trademark Office (USPTO), as follows:

> A presumption of safety and efficacy for FDA-approved pharmaceuticals is supported by comparing the FDA's system to the USPTO's system. It maintains the basic outlines of the current tort system, but requires additional evidence to obtain a recovery. Moreover, it expressly tells the jury that the FDA decision is to be presumed correct. It provides judges with additional power to determine liability before trial and put expert testimony to the test. It maintains the accepted role of the tort system as a public safeguard in the development and marketing of drugs. Finally, it treats determinations of two agencies, the USPTO and FDA, consistently. A presumption of safety and efficacy would allow pharmaceutical regulation and pharmaceutical litigation to work in harmony to promote the safe and efficient development and marketing of pharmaceuticals.[152]

This middle ground proposal of Professor Childs balances the need for regulatory action for public safety with the need for fair compensation for individual victims of defective products. It probably would take a congressional fix to redefine how preemption was to work, with a judiciary fix to develop *Markman*-like[153] hearings to give judges more power to determine liability before trial. A fix that finds the middle ground is a fix to be admired and to be sought after. The fact is that regulation and tort liability should be seen as complementary, not mutually exclusive, methods to address a very important societal issue. Professor Childs's idea preserves both.

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151. William Childs, *The Implementation of FDA Determinations in Litigation: Why Do We Defer to the PTO but Not to the FDA?*, 5 MINN. INTELL. PROP. REV. 155, 188 (2004).

152. *Id.* at 192.

153. *See* Markman v. Westview Instruments, Inc., 517 U.S. 370, 390 (1996) (holding judges, not juries, determine the meaning of words of art in patent cases).

d. The Assumption of Regulatory Efficacy

The preemption movement appears to assume that regulatory agencies are properly funded, staffed and managed. It further appears to assume that a system of strict regulation is in place, thereby making it unnecessary to require regulated industries to be accountable for the harm they cause because strict regulation will minimize such harm. However, evidence of strict, efficient, and competent regulation of federal agencies is not generally forthcoming.

Of course, a reasonable argument can be made that the issue of regulatory effectiveness is one for Congress, not the courts. Yet, if Congress does not support an efficient and effective regulatory system, can the courts ever take notice? How deficient must a system be before the courts examine not only the language and intent of Congress, but also the means and methods of Congress in achieving its goals, especially if the separation of powers between the states and the federal government, as well as the constitutional right to civil juries, are at stake? If Congress were to continue to insist upon and expand preemption but not support effective regulation, would an examination be in order?

Across the board, there are credible reports that our regulatory agencies, such as the Federal Trade Commission, the Food and Drug Administration, and the Consumer Protection Agency, struggle to perform the tasks at hand adequately.[154] Staffing shortages, funding deficiencies, and increasing responsibility are a challenge to regulatory effectiveness.[155]

For example, the number of FTC employees is down about 40% from 1,746 employees in 1979 to 1,007 in 2006.[156] This staffing cutback has occurred while the FTC has picked up more duties,

154. Within the federal government, this is reported as a widespread problem. Three former heads of the Securities and Exchange Commission have written that the "problem with the S.E.C. today is that it lacks the money, manpower and tools it needs to do its job." William Donaldson, Arthur Levitt & David Ruder, *Muzzling the Watchdog*, N.Y. TIMES, Apr. 29, 2008, at A19.

155. *See* Greg Anrig, *Who Strangled the FDA?*, AM. PROSPECT, Dec. 12, 2007, http://www.prospect.org/cs/articles?article=who_strangled_the_fda ("[I]n the 1970s, the FDA ranked among the most respected public agencies, with a public confidence rating of 80 percent. By 2000, that level had dropped to 61 percent; [and in 2006], it was just 36 percent.").

156. Bob Sullivan, *Consumer Protection Agencies Failing America*, RED TAPE CHRON., Nov. 2, 2007, http://www.redtape.msnbc.com/2007/11/consumers-agenc.html.

such as "Internet fraud, identity theft and the Do Not Call list," to name a few.[157]

Another important example is the FDA, the federal agency involved in the *Medtronic* and *Wyeth* cases. In another context, it has been subjected to recent scrutiny for failure to protect consumers in the wake of melamine-tainted pet food.[158] Similar to the FTC, the FDA has reduced food inspections by 78% over the last thirty-five years, inspecting "food manufacturers once every [ten] years."[159] Former FDA chief and professor at the University of California, San Francisco, David A. Kessler even admits that the FDA does not have the ability "to oversee in a comprehensive fashion everything it regulates."[160] The current FDA commissioner, Andrew C. von Eschenbach, has echoed this sentiment, stating that the agency needs a systemic overhaul, which could take years.[161]

"For years, Congress has pointed out that the FDA is understaffed and under funded," said Senator Durbin at a press conference in the U.S. Capitol in December of 2007.[162] A report by a subcommittee of the FDA's Science Board revealed that under-funding is jeopardizing the agency's ability to protect the food supply and prompted the press conference.[163] Furthermore, the FDA continues to receive fewer resources while simultaneously obtaining more and more responsibility.[164] "Even

157. *Id.*

158. Greg Anrig, *Who Strangled the FDA?*, AM. PROSPECT, Dec. 12, 2007, http://www.prospect.org/cs/articles?article=who_strangled_the_fda. "Recent fiascoes like the Melamine-tainted pet food and lead-laced Mattel toys, both imported from China, are sure to continue in the absence of meaningful accountability." *Id.* (discussing a 2007 report from an FDA subcommittee that described "the agency's slow asphyxiation by prolonged budgetary constraints").

159. *Id.*

160. Daniel Costello, *Patient's Ability to Sue at Risk*, L.A. TIMES, Mar. 3, 2008, at C1.

161. *Id.*

162. Press Release, Consumer Fed'n of Am., Senate Democrats & Republicans, Food Industry and Consumer Groups to White House: Under Funded FDA Jeopardizes Food Safety (Dec. 6, 2007), *available at* http://www.consumerfed.org/pdfs/Durbin_FDA_Coalition_press_release_12_06_07.pdf.

163. *See id.* (summarizing the FDA's Science Board findings that "the agency's ability to protect the food supply" is in jeopardy); *see also* FDA SUBCOMM. ON SCI. & TECH., FDA SCIENCE AND MISSION AT RISK REPORT (Nov. 2007), http://www.fda.gov/ohrms/dockets/AC/07/briefing/2007-4329b_02_01_FDA%20Report%20on%20Science%20and%20Technology.pdf (finding the FDA's ability to timely respond to problems and provide basic food inspection has eroded).

164. Press Release, Consumer Fed'n of Am., Senate Democrats & Republicans,

as the number of 'adverse events' from prescription drugs has increased by 146% from 1996 to 2006—to 471,679 last year—there has been no increase in FDA personnel to review those reports."[165]

Finally, a third agency with significant responsibilities is the Consumer Protection Agency (the Agency). Yet, two years of significant staffing cuts have raised concerns about the Consumer Product Safety Commission's ability to carry out its mission.[166] The Agency has only half as many employees as it had in 1980.[167] Similar to the FDA, the Agency is also struggling to carry out its very important tasks, tasks that may now hold unfortunate consequences for consumers injured by a product.[168] In a recent letter, Commissioner Thomas H. Moore noted that "[t]he clear signal from the [Bush] administration is that consumer protection is just not that important."[169] "[S]taffing cuts and other resource reductions have limited the Commission's ability to carry out its mission and have left the agency at a point where it is now doing only what is absolutely necessary for it to do and little else."[170]

The challenges of regulation mandate a more balanced approach in this arena, such as that suggested by Professor Childs.[171] We need the best of both worlds, not the worst of either. However, if we only get regulation, and if regulation does not work, then the worst of both worlds is what we will get,

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Food Industry and Consumer Groups to White House: Under Funded FDA Jeopardizes Food Safety (Dec. 6, 2007), *available at* http://www.consumerfed.org/pdfs/Durbin_FDA_Coalition_press_release_12_06_07.pdf.

165. Greg Anrig, *Who Strangled the FDA?*, AM. PROSPECT, Dec. 12, 2007, http://www.prospect.org/cs/articles?article=who_strangled_the_fda.

166. Joseph S. Enoch, *Bush "Slowly Killing" Consumer Safety Agency*, CONSUMERAFFAIRS.COM, July 29, 2007, http://www.consumeraffairs.com/news04/2007/07/cpsc_moore.html.

167. James Surowiecki, *Parsing Paulson*, NEW YORKER, Apr. 28, 2008, at 26.

168. *See* James S. Enoch, *Bush "Slowly Killing" Consumer Safety Agency*, CONSUMERAFFAIRS.COM, July 29, 2007, http://www.consumeraffairs.com/news04/2007/07 cpsc_moore.html (reporting the Consumer Product Safety Commission is "powerless to invoke mandatory recalls, create new legislation and levy fines").

169. Letter from Thomas H. Moore, Consumer Prod. Safety Comm'r (July 2007), http://cpsc.gov/pr/moore_proposals.pdf.

170. *Id.*

171. *See* William G. Childs, *The Implementation of FDA Determinations in Litigation: Why Do We Defer to the PTO but Not to the FDA?*, 5 MINN. INTELL. PROP. REV. 155, 192 (2004) (encouraging "pharmaceutical regulation and pharmaceutical litigation to work in harmony").

including the elimination of the civil jury from a vast area of the substantive law. There must be a better way.

3. Appellate Disregard for Jury Verdicts

While trial judges on the whole respect juries, verdicts get a much more mixed reception from appellate judges. This may come from a tendency of us all to be a "Monday morning quarterback." For whatever reason, however, appellate courts must always be mindful of the need to respect jury verdicts.

A case on point is *Brown v. Parker Drilling Offshore Corp.*,[172] where a seaman injured his back while working for his employer, Parker.[173] Upon investigation of the back injury, Parker discovered that the plaintiff had a history of prior back injuries, and that the plaintiff made false representations on the medical questionnaire form he completed when he applied for the job.[174] As a result of these discoveries, "Parker withheld payment of [the plaintiff's] maintenance and cure benefits."[175] The plaintiff then sued Parker under various theories, seeking recovery of these benefits.[176] The jury returned a verdict partially in favor of the plaintiff and partially in favor of the defendant.[177] Specifically, the jury returned a verdict that the plaintiff was injured due to Parker's negligence, and that the plaintiff was entitled to his maintenance and cure benefits.[178]

The *Brown* case has somewhat of a tortured history. In its first opinion, the Fifth Circuit reversed the entire jury award for the plaintiff.[179] Then, on rehearing, part of the award was reinstated, but the rest was overturned.[180] Finally, the petition for panel

172. Brown v. Parker Drilling Offshore Corp. (*Brown I*), 396 F.3d 619 (5th Cir.), *vacated*, 410 F.3d 166 (5th Cir. 2005).

173. *Id.* at 621.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Brown I*, 396 F.3d at 621.

178. *Id.* The jury found in favor of the defendant "on the claims of unseaworthiness and retaliatory discharge." *Id.* at 621 n.3.

179. *Id.* at 620.

180. Brown v. Parker Drilling Offshore Corp. (*Brown II*), 410 F.3d 166, 181 (5th Cir. 2005). On rehearing, the Fifth Circuit found that the "[trial] judge's denial of the motion for [judgment as a matter of law] regarding the maintenance and cure claims was erroneous," and it therefore "vacat[ed] the jury verdict as to the maintenance and cure award." *Id.* Also, the Fifth Circuit on rehearing found the original majority opinion

rehearing was treated as the petition for rehearing en banc and denied, with Judges Stewart, King, Higginbotham, Wiener, Benavides, and Dennis dissenting from the denial of rehearing en banc.[181]

In his dissent, Judge Carl Stewart reiterated: "[M]y primary disagreement with the panel majority rests on my understanding of the jury's role as fact-finder and of our limited role as appellate court judges."[182] Judge Stewart observed:

> The panel majority, under the guise of correcting errors of law, usurped the jury's Seventh Amendment function, replacing the jury's verdict with a verdict of its own. Brown's petition for rehearing en banc was not an invitation for the full court to re-try this case for a third time, but an opportunity to correct the lamentable message that the panel majority's decision sent to the bench and bar throughout the Fifth Circuit—no jury verdict is invulnerable before this court. The panel majority's decision commandeered the jury's role as fact-finder and it is principally for this reason that I vehemently dissent from the full court's refusal to rehear this case en banc.[183]

Judge Jacques Wiener concurred in whole with Judge Stewart's dissent, writing to express his opinion that, in failing to vote to rehear the case en banc, the circuit had unintentionally done "damage to the federal courts' civil jury system and thus to the Seventh Amendment to the United States Constitution."[184] Judge Wiener concluded:

> This is precisely the kind of civil *jury* case in which the verdict (and the refusal of the district court to supplant it) should not have been overturned on appeal. Otherwise, as Judge Stewart pointed out in his panel dissents and again in his dissent from denial of rehearing en banc, we do irreparable harm to the civil jury system in this circuit when we allow the panel majority's jury reversal to stand.[185]

Judges Stewart and Wiener clearly make the point that no

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dismissing the plaintiff's Jones Act negligence claim to be erroneous and reinstated that award. *Id.*

181. Brown v. Parker Drilling Offshore Corp. (*Brown III*), 444 F.3d 457, 457 (5th Cir. 2006) (Stewart, J., dissenting from denial of rehearing).

182. *Id.* at 458.

183. *Id.* at 458–59.

184. *Id.* at 459 (Wiener, J., dissenting from denial of rehearing).

185. *Id.* at 462.

matter how well-intentioned and thoughtful appellate judges are, no matter how tempting it is to re-try a case, usurpation of a jury's function is not appropriate on appeal.[186] After all, the Seventh Amendment does state that "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."[187]

One of the problems highlighted by the dissenting judges in the *Brown* case is that if the plaintiffs' bar comes to understand that plaintiffs' verdicts no longer have sanctity because of appellate interference, then cases will be forced into settlement, regardless of merit, and the role of juries in our system will be lost.[188]

This is not only a problem in the federal appellate courts. It is also a problem in the Texas appellate courts:

> About ten years ago, a veteran observer of the Texas judiciary observed that "[f]ew issues of Texas procedural law have drawn more attention than the respective roles of judge and jury on questions of fact. Few states define these roles with as much

186. *Brown III*, 444 F.3d at 458 (Stewart, J., dissenting from denial of rehearing) (characterizing the majority as "commandeer[ing] the jury's role" because it was improper "for the full court to re-try this case"); *see also id.* at 459 (Wiener, J., dissenting from denial of rehearing) (stating his belief that the majority harmed the civil jury system, although "unintentionally, I am sure").

187. U.S. CONST. amend. VII. Circuit judges also find it difficult to determine when best to intervene with a jury's verdict about whether damages are excessive. The Fifth Circuit is no exception, especially in light of its maximum recovery rule. As Judge James Dennis observed in his special concurrence in *Thomas v. Texas Department of Criminal Justice*, the practice of comparing a present award with past awards does not give proper deference to the jury decision. Thomas v. Tex. Dep't of Criminal Justice, 297 F.3d 361, 373–74 (5th Cir. 2002) (Dennis, J., concurring). "The proper focus of our inquiry is whether, based on the facts in the record, the award is entirely disproportionate to the injury sustained, not whether the award is greater or smaller than awards granted by previous juries." *Id.* Judge Dennis found the standard stated by Judge Alvin B. Rubin in *Caldarera v. Eastern Airlines, Inc.* to be the correct one. *Id.* at 373.

> We do not reverse a jury verdict for excessiveness except on "the strongest of showings." The jury's award is not to be disturbed unless it is entirely disproportionate to the injury sustained. We have expressed the extent of distortion that warrants intervention by requiring such awards to be so large as to "shock the judicial conscience," "so gross or inordinately large as to be contrary to right reason," so exaggerated as to indicate "bias, passion, prejudice, corruption, or other improper motive," or as "clearly exceed[ing] that amount that *any* reasonable man could feel the claimant is entitled to."

Caldarera v. E. Airlines, Inc., 705 F.2d 778, 784 (5th Cir. 1983) (footnotes omitted).

188. *See, e.g.*, *Brown III*, 444 F.3d at 458 (Stewart, J., dissenting from denial of rehearing) (casting the majority as sending a "lamentable message" that "no jury verdict is invulnerable before" the Fifth Circuit).

> deference to the jury." While the roles of judge and jury still rightly receive much attention, such "deference" is a moving target these days. For a variety of reasons, not all related to the judicial review of verdicts (tort reform has also been a major factor), there is a sense that juries have been marginalized and judges correspondingly empowered on questions of fact. It is important to ask whether the current balance brokered by the standards of review is optimal to ensure justice for those who seek to exercise their fundamental right to trial by jury in Texas.[189]

Another "breathtaking" assault on juries by the Texas appellate courts relates to the shift in the treatment of causation evidence:

> The Texas Supreme Court in recent years has not hesitated to reverse jury verdicts based on its view of the "causation" evidence; according to Professor Dorsaneo it has not appeared constrained or even much bothered by limitations in the Texas Constitution on the permissible scope of its evidentiary review, or by decades of tort formulations calculated to make "causation" findings largely the province of the jury. This trend occurred while the court was rewriting the evidentiary review rules, culminating in *City of Keller.* The court's recent willingness to take and decide causation cases is breathtaking, even when compared to the Court's most activist "plaintiffs-oriented" period (in the mid- and late 80's). What this means for *stare decisis* in this state is anybody's guess. How much future courts will perceive themselves constrained by the court's recent decisions is also anybody's guess. The danger, of course, is that what Judge Andrews called "practical politics" may mean future courts take away from the recent causation decisions the lesson that *every* aspect of a jury's decision in tort cases, and not just the "duty" issue, is really a question of public-policy for the court (and perhaps in a few years "practical politics" could mean those courts have less obeisance to the defense side of the docket and less deference to jury findings of no causation). They may infer that it is permissible to weigh the sufficiency of the evidence, as long as that function is disguised as something else, like "legal cause," or a "reasonable juror" test. One thing is certain: the recent Texas Supreme Court's approach to causation provides ample precedent for a later activist Court to second-guess juries and courts of appeals based on a different view of the weight of the causation evidence.[190]

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189. W. Wendell Hall & Mark Emery, *The Texas Hold Out: Trends in the Review of Civil and Criminal Jury Verdicts*, 49 S. TEX. L. REV. 539, 540–41 (2008) (footnotes omitted).

190. George Parker Young, Layne Keele & Josh Borsellino, *"A Rough Sense of*

There is, in fact, a sense that juries are being marginalized, not only by federal appellate courts and Texas appellate courts,[191] but by appellate courts across America. When this happens, the justice system becomes skewed, and normative standards, to use Judge Higginbotham's postulation,[192] go missing. When a justice system sets up an un-level playing field, bad things happen.

4. Summary Dispositions

a. From Disfavored to Favored

In the last forty years, over my lifetime as a lawyer and a judge, there has been a seismic shift in the attitude of all courts toward dispositive motions, starting with the United States Supreme Court. When I began my practice in 1970, judges were cautious in their consideration of such motions. Yet now, thanks to what I consider too much encouragement from appellate courts and too much embrace by trial courts, caution has been thrown to the wind. Since both appellate and trial courts have contributed to the problem, both can be a part of the solution.

As to summary judgments under Rule 56 of the Federal Rules of Civil Procedure, Professor Charles Alan Wright explained why caution should always be preferred:

> It should be remembered that Rule 56 is not merely a dilatory or technical procedure; it affects the substantive rights of the litigants. A summary-judgment motion goes to the merits of the case and, because it does not simply raise a matter in abatement, a granted motion operates to merge or bar the cause of action for purposes of claim and issue preclusion. Similarly, the ability to continue to pursue a particular issue will be impaired if a partial summary judgment has been entered under Rule 56(d). A litigant cannot amend as a matter of right under Rule 15(a) after a summary judgment has been rendered and a court ordinarily will be reluctant to allow leave to amend to a party against whom summary judgment has been entered, especially in the absence of a showing that the

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*Justice" or "Practical Politics?": Recent Texas Supreme Court Opinions on Causation, in* TEX. BAR CLE 25TH ANNUAL LITIG. UPDATE INST., ch. 3 at 69–70 (2009).

191. David A. Anderson, *Judicial Tort Reform in Texas*, 26 REV. LITIG. 1, 5–6 (2007).

192. Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1419 (2002).

> defect that gave rise to the grant of the motion will not affect the new pleading.
>
> On the other hand, the denial of summary judgment does not preclude either party from raising at trial any of the issues dealt with on the motion. This is because a denial of summary judgment is not a decision on the merits; it simply is a decision that there is a material factual issue to be tried. Thus, for example, renewal of a summary-judgment motion after substantial discovery may be particularly appropriate in light of the revelation of facts that were not available at the time of the first motion.
>
> Since the impact of a successful Rule 56 motion is rather drastic, summary judgment must be used with a due regard for its purposes and should be cautiously invoked so that no person will be improperly deprived a trial of disputed factual issues.[193]

As to motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, Wright and Miller also explained why caution should be preferable:

> As a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted by the district court only in the relatively unusual case in which the plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to securing relief.... In other words, dismissal is justified only when the allegations of the complaint itself clearly demonstrate that whatever interpretation is given to the facts the plaintiff does not have a claim that is legally redressible; in a real sense, the plaintiff has pleaded himself or herself out of federal court.[194]

### b. Summary Judgment Motions Under Rule 56

Given Professor Wright's (and Professor Miller's and Professor Kane's) preeminent standing in both the academy and with the bench and the bar, one might have expected their words on Rule 56 to be the last words on the subject. But that is not the case. First came the Supreme Court decisions in *Celotex Corp. v. Catrett*,[195] *Anderson v. Liberty Lobby, Inc.*,[196] and *Matsushita*

193. 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2712 (3d ed. 1998).

194. 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (3d ed. 2004).

195. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

196. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

*Electric Industrial Co. v. Zenith Radio Corp.*,[197] where the Court essentially held that Rule 56 of the Federal Rules of Civil Procedure should be viewed with favor and applied according to its terms.[198] As Professor Wright observed, perhaps wistfully, "these Supreme Court cases [signaled] to the lower courts that summary judgment should be relied upon to weed out frivolous lawsuits and avoid wasteful trials."[199] However, because of these cases, we have gone overboard.

Since *Celotex*, *Anderson*, and *Matsushita Electric*, trial judges, especially federal trial judges, grant too many summary judgment motions, and appellate judges, especially federal appellate judges, affirm too many summary judgment motion grants. A thoughtful exposition of this trend has been noted by Judge Patricia Wald:

> Federal jurisprudence is largely the product of summary judgment in civil cases. This probably comes as no surprise to most practitioners and judges, but in truth this state of affairs has crept up on us. As originally envisioned by its drafters in 1937, the purpose of Rule 56 was to weed out frivolous and sham cases, and cases for which the law had a quick and definitive answer. . . . It is 1-L stuff that a motion for summary judgment lies only when there is no genuine issue of material fact, and that Rule 56 is not designed to foreclose trial when material facts are in issue. But research and observations in my own D.C. Circuit suggest that summary judgment has assumed a much larger role in civil case dispositions than its traditional image portrays or even than the text of Rule 56 would indicate, to the point where fundamental judgments about the value of trials and especially trials by jury may be at stake. A reassessment of Rule 56 and its erratic history may be in order, lest it develop too casually into a stealth weapon for clearing calendars.[200]

May I share yet another personal experience? Although I grant relatively few summary judgments, I am still surprised that I grant as many as I do. When I began my judgeship, I expected that I would hardly grant any. But what surprises me even more is the

197. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

198. *Celotex Corp.*, 477 U.S. at 322; *Anderson*, 477 U.S. at 247–48; *Matsushita Elec.*, 475 U.S. at 586–87.

199. 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2712 (3d ed. 1998).

200. Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1897–98 (1998).

propensity of lawyers to file summary judgment motions as a matter of course in all of their cases. I do not exaggerate by observing that almost all of the civil cases in my court generate at least one motion for summary judgment. My experience is shared by other federal trial judges. In May 2008, in a district judges meeting at the Fifth Circuit Judicial Conference, I asked my colleagues by a show of hands whether they observed the same phenomenon and, to a judge, they responded in the affirmative.[201]

Further consultation with Professor Charles Alan Wright is constructive here. He and his colleagues have observed that the courts should "take great care not to deny the nonmoving party a full trial once it is shown that a genuine issue of fact exists or that the judgment ultimately might depend on the credibility of witnesses; the courts do not attempt to try fact issues when ruling on the motion."[202] They have also observed "in most situations in which the moving party seems to have discharged his burden of demonstrating that no genuine issue of fact exists, the court has discretion to deny a Rule 56 motion. . . . [T]he court should have the freedom to allow the case to continue when it has any doubt as to the wisdom of terminating the action prior to a full trial."[203]

c. Motions to Dismiss Under Rule 12(b)(6)

It is not enough that the floodgates have been opened for summary judgments. Now they have been opened for Rule 12(b)(6) dismissals. In *Bell Atlantic Corp. v. Twombly*, the

201. While it is the experience of the trial judges of the Fifth Circuit that summary judgment motions are filed in practically all of their cases, a recent study by the FJC has questioned the far-reaching nature of that experience. *See* Memorandum from Joe Cecil and George Cort to Judge Michael Baylson 1 (Nov. 2, 2007), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/insumjre.pdf/$file/insumjre.pdf (finding, among other results, that most cases see no motions for summary judgment filed by any party). The purpose of the FJC memorandum was to assess

> the potential impact of the proposed amendments to Rule 56 [that would] require the movant to "state in separately numbered paragraphs only those material facts that the movant asserts are not genuinely in dispute and entitle the movant to judgment as a matter of law," and require the respondent to address each one of those facts in similarly numbered paragraphs.

*Id.* In my opinion, this merely complicates the process further and would not be a helpful development.

202. 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2714 (3d ed. 1998).

203. *Id.* § 2728.

Supreme Court retired the "no set of facts" language regarding dismissal motions, as set forth in *Conley v. Gibson*,[204] and ruled that a complaint must be plausible on its face or suffer dismissal.[205] This was a surprise to Justice Stevens, who wrote in his dissent:

> If *Conley*'s "no set of facts" language is to be interred, let it not be without a eulogy. That exact language, which the majority says has "puzzl[ed] the profession for 50 years," has been cited as authority in a dozen opinions of this Court and four separate writings. In not one of those 16 opinions was the language "questioned," "criticized," or "explained away." Indeed, today's opinion is the first by any Member of this Court to express *any* doubt as to the adequacy of the *Conley* formulation.[206]

In analyzing *Twombly*, Professor Lonny S. Hoffman noted:

> As long as there have been courts to resolve disputes, there has been tension between principles of access and efficiency.
>
> . . . .
>
> The Court's recent decisions, and *Twombly* in particular, may or may not mark a fundamental change in where courts strike the balance between access and efficiency. It is still too early to say. What is certain, even at this early date, is that these cases are receiving a great deal of attention in the lower courts. Consider, as one important barometer, that in its first nine months on the job courts cited *Twombly* more than 4000 times. This astonishing figure can be contrasted with the number of times courts cited *Celotex Corp. v. Catrett*, the second most cited case of all time, in its first nine months (roughly 400 times).[207]

Professor Hoffman may be correct. While it may be too early to say whether *Twombly* will mark a fundamental change in dismissal practice, it is likely that it will do so, just as *Celotex Corp. v. Catrett* marked a fundamental change in summary judgment practice. The motions will soon cascade into the federal district courts, giving yet one more reason to limit jury trials. While this is just a prediction,

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204. Conley v. Gibson, 355 U.S. 41 (1957).

205. *See* Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1967–70 (2007) (revising the *Conley* "no set of facts" standard in deciding whether to dismiss a complaint).

206. *Id.* at 1978 (Stevens, J., dissenting).

207. Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1218, 1222 (2008) (footnote omitted).

of course, the best predictor of future behavior is past behavior.

d. When in Doubt, Don't

As Charles Alan Wright has noted, where there is *any* doubt about the efficacy of a dispositive motion, a full trial is in order.[208] This same caution has been urged by Professor Wright's esteemed colleague Arthur Miller.[209] Professors Wright and Miller are right that the pendulum has swung too far away from jury trials and towards a preference for the summary disposition of cases. This is more of a problem for the judiciary than the bar, but none can escape responsibility for this unfortunate trend. The growing tendency to resolve cases by summary judgment and Rule 12 dismissals infringes on the traditional role of the jury in our civil justice system and must be vigorously re-examined.[210] It is time to seek a better balance.

e. The "Europeanization" of American Justice

United States District Judge Lee Yeakel has been outspoken about the dangers of deciding cases at the trial level on the record alone, as with dispositive motions. In his view, it amounts to the "Europeanization" of American justice, where controversies are resolved on the record, often by affidavits, and not on the testimony of live witnesses. He is right. Now is not the time to abandon one of America's great legal traditions in the service of false expediency or for any other reason.

Ironically, while many commentators decry any tendency to cite European or international law as authority in American

208. 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2728 (3d ed. 1998).

209. *See* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1067–68 (2003) (discussing a case in which the Supreme Court weighed the evidence, going "well beyond the limited Rule 56 inquiry as to the existence of a genuine issue of material fact").

210. Professor Arthur Miller and I are not the only persons concerned with this trend. Professor Suja Thomas has written stimulating articles on these topics. *See generally* Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007) (describing summary judgment as depriving a civil litigant of the Seventh Amendment right to a jury trial); Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008) (discussing the constitutional implications of recent Supreme Court decisions on the motion to dismiss).

decisions,[211] there has not been a similar concern expressed about Judge Yeakel's "Europeanization" of America's trial process. There should be. Indeed, citation by American courts to European law or authority should be far less disturbing than the wholesale adoption by American courts of European trial systems. Yet while the former gets loud disapprobation, the latter is hardly mentioned. It is perplexing that this drift to European-style justice is accelerating, especially since the American trial traditions have been particularly well-suited to America's unique cultural and political identity.

f. In a Box

During one particularly difficult week not too long ago, my court was inundated with dispositive motions. The thought occurred to me at the time, based upon the pending dispositive motions in almost all of my cases, that I was apparently presiding over a civil docket of more than one hundred cases, almost none of which contained a material issue of genuine fact. Could it be, I asked myself, that the dozens of plaintiffs' lawyers practicing in my court were filing lawsuits devoid of fact issues? Many of these lawyers had been in practice for a generation and were well-regarded by the bench and the bar. How was it that they were so experienced yet somehow had become so incompetent?

Around the same week that the large number of dispositive motions were filed, I attended a meeting of the William S. Sessions Inn of Court in San Antonio. May I share the story of what happened there? At an opportune moment, in frustration, I asked the assembled membership why defendants were filing so many dispositive motions in federal court. The defense lawyers in the Inn responded that they believed they were compelled to do so to avoid the very real possibility that their clients would accuse them of falling below the appropriate standard of care in defending their cases. For the first time, I understood that we had put ourselves in

211. *See generally* David C. Gray, *Why Justice Scalia Should Be a Constitutional Comparativist . . . Sometimes*, 59 STAN. L. REV. 1249 (2007) (discussing "[t]he proper role of international law in domestic constitutional adjudication"); Melissa A. Waters, *Justice Scalia on the Use of Foreign Law in Constitutional Interpretation: Unidirectional Monologue or Co-Constitutive Dialogue?*, 12 TULSA J. COMP. & INT'L L. 149 (2007) (analyzing the Supreme Court's debates about "the appropriateness of foreign precedent in constitutional analysis").

a box. Attorneys for defendants believe that it is in essence malpractice not to file dispositive motions; trial judges believe that they must take the motions seriously because appellate judges say so, and trials keep going away. It is time to break out of the box. I reiterate Judge Patricia Wald's admonition: "A reassessment of Rule 56 . . . may be in order."[212]

g. One Last Point

There is one other problem with the proliferation of dispositive motions in the federal courts: the process has the practical effect of limiting access. Plaintiffs who contemplate filing their actions in federal courts now realize that there will be substantial procedural hurdles to leap before they can get to a jury. These hurdles produce a disincentive to filing in federal court. As Professor Samuel Issacharoff and Professor of Economics George Loewenstein have noted:

> [S]ummary judgment fundamentally alters the balance of power between plaintiffs and defendants by raising both the costs and risks to plaintiffs in the pretrial phases of litigation while diminishing both for defendants. Even where summary judgment motions are not filed, the potential use of liberalized summary judgment procedures is sufficient to lower the expected value to plaintiffs of settled claims. Therefore, liberalized summary judgment inhibits the filing of otherwise meritorious suits and results in a wealth transfer from plaintiffs as a class to defendants as a class.[213]

Artificially limiting access to the courts should be a cause for concern to us all. Moreover, given how state courts so often follow federal court trends, if state courts begin to encourage the substantial filing of dispositive motions, the problem of access will be exacerbated. The fact is that practical issues often underlie decisions to go to court, and if motion practice becomes too intense, access will be restricted.

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212. Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1898 (1998).

213. Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 75 (1990).

5. Mandamus: Extraordinary or Not?

"The hard thing about granting mandamus relief is knowing when to stop."[214] More and more often, appellate courts do not seem to know when to stop granting mandamus relief, doing so far more regularly than is otherwise appropriate.[215] This is despite the fact that the writ of mandamus is an extraordinary remedy, justified in "[o]nly exceptional circumstances, amounting to a judicial usurpation of power."[216] As the United States Supreme Court has written:

> Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy.... As extraordinary remedies, they are reserved for really extraordinary causes.[217]

An excellent, yet unfortunate, example of the disruptive and dilatory nature of mandamus is *In re Volkswagen*,[218] where the Fifth Circuit reviewed a denial of a § 1404(a)[219] motion to transfer by defendant Volkswagen.[220] The Fifth Circuit, sitting en banc, granted the writ, despite a strong dissent by Judge Carolyn Dineen King.[221] From the perspective of a trial judge, Judge King encapsulated the problems with writs of mandamus:

> The Court's prohibition on the use of mandamus as a substitute for appeal is based not only on the violation of 28 U.S.C. §§ 1291–1292 that it would entail but also on the resulting delay that those statutes

214. *In re* Poly-America, L.P., 262 S.W.3d 337, 361 (Tex. 2008) (Brister, J., dissenting).

215. *See, e.g.*, *In re* Citigroup Global Mkts., Inc., 258 S.W.3d 623, 625 (Tex. 2008) (granting mandamus relief and reversing the lower court's determination that the parties had waived their right to arbitration).

216. Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980); CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 102 (6th ed. 2002).

217. *Ex parte* Fahey, 332 U.S. 258, 259–60 (1947).

218. *In re* Volkswagen, 545 F.3d 304 (5th Cir. 2008).

219. 28 U.S.C. § 1404(a) (2006). "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." *Id.*

220. *See Volkswagen*, 545 F.3d at 307 (considering Volkswagen's appeal of the district court's refusal to grant its § 1404(a) motion to transfer).

221. *See id.* (granting a petition for mandamus).

> were intended to avoid. This case is a painful and ironic example of that delay. Volkswagen's petition for mandamus was filed in this court on January 23, 2007, and this court will finally dispose of it during October 2008. Discovery continued in the district court until this court—apparently in order to prevent the case from becoming moot—stayed the trial proceedings on September 18, 2007, one day before the scheduled close of discovery. The second panel's opinion was issued one day after jury selection was slated to begin. In all probability, this case would have been concluded on its merits long before our court finishes with it, likely, not long after the second panel's opinion issued. The delay here (even without taking the en banc process into account) perfectly exemplifies the harm caused by conducting an interlocutory review under the aegis of mandamus.[222]

As Judge King pointed out, despite the opinion of the majority, an abuse of discretion standard, needed to justify the grant of the writ, is not met merely because the appellate court disagrees with the trial court. It is "a mistake to equate the kind of ordinary error that might be labeled an 'abuse of discretion' on appeal with the kind of error that justifies mandamus."[223] Her concluding paragraph bears repeating:

> Despite the Supreme Court's crystal clear guidance that mandamus is unavailable in these circumstances, conflicts among the circuits and within individual circuits have proliferated on the question whether the writ may be used as a tool to review a district court's § 1404(a) transfer decision. As the late Judge Friendly recognized more than 40 years ago, "[a]ppellate courts die hard in relinquishing powers stoutly asserted but never truly possessed. . . . [W]e should . . . end this sorry business of invoking a prerogative writ to permit appeals, which Congress withheld from us, from discretionary orders fixing the place of trial."[224]

Trial judges can make mistakes, but they should be entitled to manage their dockets with discretion and flexibility, to the best of their ability, case by case, to the conclusion of each case, when appeal becomes ripe. Otherwise, docket control is mangled, cases become disjointed, opportunities for the trial court to correct mistakes during litigation are lost, and trials go on the back burner.

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222. *Id.* at 324 (King, J., dissenting).
223. *Id.* at 325–26.
224. *Id.* at 327 (citations omitted).

In the end, writs of mandamus almost always adversely impact the right to a trial by a jury—if only by delay—which is always the enemy of jury trials. Mandamus is an extraordinary remedy and should be granted only in extraordinary situations. When there is any doubt, let the case proceed to the jury. More often than not, that will cure all errors and correct all mistakes.

### C. *Problems in the Legislature*

Legislative bodies are one of America's two great institutions of democracy, the other being juries. Strong deference should always be accorded to legislatures by courts. Nonetheless, legislatures should, in turn, always be mindful of the essential work of juries and courts. As Judge Higginbotham has noted:

> While there have been changes over the past 213 years in the way civil and criminal trials are conducted, their large trappings have changed little.... [T]his stability is the more impressive because it has been achieved in the face of significant changes in the ethnic and cultural make up of this country.... True enough, changing values and changing attitudes have changed laws .... Yet the dispute system that channeled these changes into forms for resolution has stayed in place as a conservatory for settled expectations and as a facilitator of progressive activity.[225]

Legislatures, courts and juries are partners in bringing "liberty and justice for all" to our great nation. It is well that legislatures remember that and act with balance to preserve that.

#### 1. The Risk of Punitive Damages

##### a. An Empirical Examination

One of the major criticisms of juries is the unpredictability of their decisions on punitive damages. In their book *Punitive Damages: How Juries Decide*,[226] Professors Cass R. Sunstein, Reid Hastie, John W. Payne, David A. Schkade, and W. Kip Viscusi have provided a thorough and helpful look at juries. Their observations and conclusions are worth noting.

Consistent with the views of most trial judges and trial lawyers,

225. Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1407 (2002).

226. CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE (2002).

the professors acknowledge "the serious and energetic manner in which citizens performed the difficult legal judgment tasks that are demanded by the punitive damages decision."[227] The professors then conclude as follows:

> The experimental methods employed by these studies have shed new light on the decision processes of jurors and juries. This detailed account has enabled us to identify orderly elements of jury decision making and to distinguish them from those elements that are erratic and unpredictable. Our findings can be separated into three conceptual categories derived from the judgmental functions of the jury. First, there are the reliable and coherent aspects of the judgment process. For example, the lay jury performs the task of assessing the *relative* moral offensiveness of the defendant's conduct reliably. Second, there are systematic biases, some due to fundamental properties of the human mind, others due to culturally based, learned habits. For example, we believe the hindsight effect that makes past events seem more inevitable, and foreseeable, is a universal habit of the healthy, adult human mind. Third, there are aspects of human behavior that seem to be erratic and unpredictable in terms of commonsense intuitions and behavioral science principles. For example, the great variability in dollar awards, for identical descriptions of a defendant's conduct, appears to derive from idiosyncratic and largely unknown differences in jurors' and juries' backgrounds and reactions to the evidence and instructions.[228]

b. The Jury's Role in Punitive Damages

Since the justice system is a search for the truth, and since these careful scholars now present the truth to us, as best as can be done in social science, we need to receive their work and adjust our system accordingly. Juries assess the "*relative* moral offensiveness of the defendant's conduct reliably."[229] Therefore, on the question of whether punitive damages are proper, the jury should make the decision. As to the amount to award, however, the decision is better placed elsewhere.

The Supreme Court has already weighed into the debate

227. Reid Hastie, *Putting It All Together*, *in* CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 211, 241 (2002).

228. *Id.* at 211.

229. *Id.*

somewhat in *BMW of North America, Inc. v. Gore*,[230] where it struck down an award of punitive damages because it had no relationship to actual damages and to other penalties for acts of this sort.[231] Although Justice Breyer, in his concurrence, saw the issue as a problem relating to jury instructions,[232] our good professors believe instructions are not the answer. They have suggested solutions such as punitive damage schedules, caps, and multipliers, all of which have merit.[233]

The professors are right: juries still should have a role to play in the punitive damages equation. They are also right: juries are well-equipped to decide whether punitive damages should be assigned. Accordingly, because of the merit of their scholarship, it makes sense that lawyers and judges might consider working with the legislators to effect this bifurcated system. In doing so, the centrality of the jury's role in our system would be affirmed. At the same time, a willingness should be shown to make thoughtful modifications to the punitive damage system based on empiricism. It is well worth considering such a plan.

One last word, however. The potential award of punitive damages has driven a great deal of the criticism against juries. While this seems overblown, in light of the minuscule number of awards actually made, punitive damages continue to be the poster child for attacks on juries. Under the circumstances, if I were ever put to a choice, I would forgo punitive damages in civil suits rather than allow attacks on juries to gain a stranglehold on the issue.

### 2. Arbitration

#### a. Full Force and Effect Under the FAA

The Federal Arbitration Act (FAA)[234] became law in 1925. It provides that arbitration agreements "shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in

230. BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).

231. *See id.* at 582–83 ("When the ratio is a breathtaking 500 to 1, however, the award must surely 'raise a suspicious judicial eyebrow.'" (quoting TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 481 (1993) (O'Connor, J., dissenting))).

232. *See id.* at 596 (Souter, J., concurring) (describing the difficulty of issuing proper jury instructions in cases calling for punitive damages).

233. *See generally* CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE (2002) (discussing alternatives for jury instructions).

234. 9 U.S.C. §§ 1–16 (2000).

equity for the revocation of any contract."[235] According to the United States Supreme Court, the FAA sets forth a national policy favoring arbitration.[236] In addition, "as with any other contract, the parties' intentions control, but those intentions are [to be] generously construed as to the issues of arbitrability."[237] In the view of the Supreme Court, the FAA was intended to end judicial hostility regarding arbitration agreements.[238] It was further "designed to allow parties to avoid 'the costliness and delays of litigation,' and to place arbitration agreements 'upon the same footing as other contracts.'"[239]

The United States Supreme Court has given full effect to the FAA, but something important has been lost in the process: the use of jury trials to resolve conflicts large and small. Parties are now entitled to agree to arbitrate disputes under the Securities Exchange Act of 1934,[240] state statutes,[241] antitrust laws,[242] the Racketeer Influenced and Corrupt Organizations Act,[243] the

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235. *Id.* § 2.

236. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006).

237. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985).

238. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219–20 (1985).

239. Scherk v. Alberto-Culver Co., 417 U.S. 506, 510–11 (1974) (internal citations omitted).

240. *See id.* at 516 (holding that arbitration clauses in commercial transactions are essential to foster predictability and order in complex multinational cases arising under the Securities Exchange Act of 1934).

241. *See, e.g.*, Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686–89 (1996) (reversing the Montana Supreme Court's ruling that the FAA preempts the state arbitration statute); Southland Corp. v. Keating, 465 U.S. 1, 11 (1984) (examining the interaction between the FAA and a California arbitration statute).

242. *See Mitsubishi*, 473 U.S. at 640 (explaining that the unique issues and complexities common to antitrust cases are insufficient justifications not to enforce a valid arbitration clause). *But see id.* at 666 (Stevens, J., dissenting) ("Consideration of a fully developed record by a jury, instructed in the law by a federal judge, and subject to appellate review, is a surer guide to the competitive character of a commercial practice than the practically unreviewable judgment of a private arbitrator.").

243. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 239 (1987).

> Unlike the Exchange Act, there is nothing in the text of the RICO statute that even arguably evinces congressional intent to exclude civil RICO claims from the dictates of the Arbitration Act. This silence in the text is matched by silence in the statute's legislative history. The private treble-damages provision . . . was added to the House version of the bill after the bill had been passed by the Senate, and it received only abbreviated discussion in either House. There is no hint in these legislative debates that Congress intended for RICO treble-damages claims to be excluded from the ambit of the Arbitration Act.

Securities Act of 1933,[244] the Age Discrimination in Employment Act (ADEA),[245] the Truth in Lending Act and Equal Credit Opportunity Act,[246] all employment laws,[247] and all consumer laws.[248] Given the Supreme Court's green light, it is now a widespread practice throughout the United States to place arbitration agreements in contracts that are executed by the parties at the beginning of the contractual relationship, before any dispute has arisen between the parties. Further, many such pre-dispute agreements are found in "form contracts" between companies and consumers, such as credit card contracts, where the consumer has little or no understanding of the arbitration requirement being agreed upon. Although at first glance one might consider such arbitration agreements to be contracts of adhesion and therefore unenforceable because of the disparate bargaining power, the Supreme Court has held otherwise.[249] They are fully enforceable unless they are unconscionable.[250]

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*Id.* (citations omitted).

244. *Accord* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 479–83 (1989) (affirming, over the dissent of Justices Stevens, Brennan, Marshall, and Blackmun, the enforcement of an arbitration clause in a case arising under the Securities Exchange Acts of 1933 and 1934). The *Rodriguez de Quijas* Court expressly overruled *Wilko v. Swan*, 436 U.S. 427 (1953). Explaining its decision to overrule *Wilko*, the Court pointed to a shift in judicial attitudes tending to favor arbitration clauses as a necessary and beneficial alternative to litigation. *Rodriguez de Quijas*, 490 U.S. at 480.

245. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (holding that statutory claims of right, such as age discrimination cases under the ADEA, are subject to the requirements of the FAA).

246. Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 90–91 (2000) (allowing enforcement of arbitration clauses in "claims arising under a statute designed to further important social policies," such as the Truth in Lending Act, so long as the plaintiff's right to state her claim can be adequately accommodated by the arbitration process).

247. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 121–24 (2001) (applying the preemptive power of the FAA to a California employment statute). In *Circuit City*, the attorneys general from twenty-one states submitted amicus briefs to the Court complaining that allowing such encroachment by the FAA into state employment law would upset the balance of the federal-state system. *Id.* at 121. The Court was not convinced. *Id.* at 124.

248. *See* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452–53 (2003) (articulating that the FAA applied in the face of a South Carolina consumer protection law where the arbitration clause at issue did not expressly prohibit the use of class-action arbitration).

249. *See* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 683–85 (1996) (reversing the ruling of the Montana Supreme Court, which held that an arbitration clause was not in the proper typeface under Montana law and therefore was unenforceable as a form contract).

250. *Id.* at 687.

In *Circuit City v. Adams*,[251] Justice Stevens cautioned that the courts may have pushed the FAA too far when he wrote:

> Times have changed. Judges in the 19th century disfavored private arbitration . . . but a number of this Court's cases decided in the last several decades have pushed the pendulum far beyond a neutral attitude and endorsed a policy that strongly favors private arbitration.[252]

Justice Stevens is correct that judges once disfavored arbitration. He is also correct that his Court has endorsed a very expansive view favoring arbitration. Whether his Court should have done so is now beside the point. The jurisprudence is in place and, without congressional action, will stay in place. Still, an appropriate balance has been lost, as Justice Stevens has suggested.

b. Amend the FAA?

There is a proposed bill in the Senate to amend the FAA.[253] It would provide that some mandatory arbitration agreements are not enforceable if entered into before the actual dispute arises.[254] The unenforceable agreements include those involving employment, consumers, franchises, civil rights and parties in unequal bargaining positions.[255] The bill would allow mandatory arbitration agreements in collective bargaining agreements and business-to-business disputes.[256] While this is, in my opinion, a step in the right direction, I would recommend a similar but broader approach to the issue.

Why not amend the FAA so that all mandatory arbitration agreements are unenforceable if entered into before the actual dispute arises, except for those in collective bargaining agreements[257] and international contracts? There is a long history behind the development of collective bargaining agreements in

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251. Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

252. *Id.* at 131–32.

253. The Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007).

254. *Id.*

255. *Id.*

256. *Id.*

257. *See generally* United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960) (upholding challenges to collective bargaining agreements that contained provisions requiring arbitration); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) (same); United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960) (same).

labor contracts and both labor and management have put processes in place that facilitate in special ways the objectives of both parties.[258] Such arrangements should be honored. Likewise, the globalization of the marketplace has created demands for dispute resolution in the international arena that are best served by mandatory arbitration agreements. To not support such agreements would place American companies at a disadvantage and would be a mistake.[259] For all other dealings between parties in the United States, parties should be allowed to agree to arbitration only after the dispute arises.

Another amendment would also be in order. The parties to arbitration should be able to agree that their arbitrator's decision can be reviewed for legal error. The present state of the law forecloses such an agreement, as the Supreme Court has recently announced,[260] but such a review would be a positive development and should be considered by amendment to the FAA.

By so amending the FAA, several advantages would be achieved, the first and foremost being the preservation of the right to trial by jury. How can a waiver of the Seventh Amendment right to a jury trial be acceptable without a clear showing of knowing consent? The effect of a mandatory arbitration clause is to require a person to waive the right to a jury trial before any issue is at hand, hardly a condition indicating knowing consent. The courts apply the contract-law consent standard to arbitration clauses, not a knowing-waiver standard.[261] The contract law

258. *Accord Enter. Wheel*, 363 U.S. at 597–99 (illustrating the special requirements associated with workers employed at manufacturing plants and the necessity that arbitration opinions remain faithful to the drafters of collective bargaining agreements).

259. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), June 10, 1958, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf. The Convention was adopted by the United Nations and entered into force in 1959. United Nations Commission on International Trade Law, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (last visited Mar. 2, 2009). It is widely considered the "foundation instrument of international arbitration." *Id.* ("The Convention . . . requires courts of contracting States to give effect to an agreement to arbitrate when seized of an action in a matter covered by an arbitration agreement . . . .").

260. Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1403 n.5 (2008).

261. *See* Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 167, 170 (explaining that the standard of consent required to enforce an arbitration clause is less rigorous than the standard of consent required to waive one's right to a jury trial). Ware describes the impact of consent on legal analysis of form

standard merely requires a mutual manifestation of assent, which disregards whether a person actually read or understood a contract as long as it looks like he agreed to it, for instance, by signing it.[262] This should not be a sufficiently strict standard when the result is to waive a fundamental right. The change to the FAA proposed here would solve this problem.

Second, matters of public interest are now being resolved outside the public domain and away from public scrutiny. Shouldn't society know how employers are dealing with their employees? How investment brokers are dealing with their clients? How credit card companies are dealing with their customers?[263]

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contracts, particularly those with arbitration clauses. To wit:

> As with contracts generally, courts find consent to arbitration in the vast majority of form contracts containing arbitration clauses. The nondrafting party (a consumer, for example) consents to arbitration by signing the form or by manifesting assent in another way, such as by performance of the contract. That the consumer did not read or understand the arbitration clause does not prevent the consumer from consenting to it. Nor does the consumer's ignorance that an arbitration clause is included on the form. These are statements of ordinary, plain-vanilla contract law. They are not statements of law peculiar to arbitration clauses. They are the way contract law treats form contract terms generally. The norm in contract law is consent to the unknown.

*Id.* at 171–72.

262. *Id.* at 171 (quoting Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 113 (1996)).

263. *But see* Ross v. Bank of Am., N.A., 524 F.3d 217, 221–24 (2d Cir. 2008). The *Ross* plaintiffs, representing a putative class of credit cardholders, sued twenty of the largest issuing banks under section 1 of the Sherman Act for conspiring to use arbitration clauses that prohibit class actions:

> After preliminary meetings and communications, the banks formed an "Arbitration Coalition" to recruit other credit card issuers into using mandatory arbitration clauses. Over the next four years, the Arbitration Coalition held more meetings, shared plans for the adoption of arbitration clauses, and spun off additional working groups. Ultimately, "Defendants jointly forced unwilling and unaware cardholders to accept arbitration clauses and class action prohibitions on a 'take-it-or-leave-it basis' through the joint exercise of immense market power."

*Id.* at 221. Interestingly enough, the Second Circuit decided to let the action go forward:

> [B]ecause the banks conspired not to offer cards permitting class actions, the cardholders will be forced to expend time and legal fees to monitor the legality of the banks' behavior, whereas if the cardholders had access to a card that permitted class actions, they would have the option of relying on motivated class action attorneys to perform this function. If the cardholders chose not to monitor the banks—which would perhaps be more likely because, as the Complaint observes, actions that result in significant aggregate revenue to the banks (concerning, e.g., late fees, overlimit fees, foreign transaction fees, APR, etc.) generally harm individual consumers in only small amounts—they would still lose the services of class action attorneys. Either

How lawyers are dealing with their clients?[264] We no longer know. Yet, by amending the FAA, it is very likely that such disputes would be resolved in an open way and sometimes before a jury. In this regard, arbitration does not have the benefits of an open court system, outlined in 1982 by the Third Circuit in *United States v. Criden*,[265] as:

- [P]romot[ing] informed discussion of governmental affairs by providing the public with a more complete understanding of the judicial system;
- "[A]ssur[ing] that the proceedings [are] conducted fairly" ... and promot[ing] the public's "perception of fairness";
- [P]rovid[ing] an "outlet for community concern, hostility, and emotion";
- [S]erv[ing] as a check on corrupt [judicial] practices;
- [E]nhanc[ing] the performance of all involved; and
- [D]iscourag[ing] perjury.[266]

Third, judicial review of arbitration decisions is now extremely limited. This is another important principle of our justice system—that decisions are subject to full review—because justice is a human endeavor subject to error. The principle of review is practically foreclosed in our present system of arbitration.[267] Judicial

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way, the cardholders would have been forced to accept a less valuable card as a result of the banks' alleged collusion.

*Id.* at 224.

264. *See* ABA Formal Ethics Op. 02-425 (2002) (permitting lawyers to include arbitration of fee and malpractice disputes in a retainer agreement, so long as there is informed consent); Op. Tex. Ethics Comm'n No. 586 (2008) (same).

265. United States v. Criden, 675 F.2d 550 (3d Cir. 1982).

266. *Id.* at 556 (citations omitted) (reformatted for clarity).

267. A few arbitration firms provide at least some workable solutions. For example, it should be noted, with approval, that the alternative dispute resolution firm JAMS has a review process, called Optional Arbitration Appeal Procedure, which can be selected by the parties and which reads as follows:

> (D) The Appeal Panel will apply the same standards of review that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision. The Appeal Panel will respect the evidentiary standard set forth in Rule 22(d) of the JAMS Comprehensive Arbitration Rules. The Panel may affirm, reverse or modify an Award.

JAMS Optional Arbitration Review Procedure (2003), http://www.jamsadr.com/rules/optional.asp. If the parties arbitrate with JAMS and select the appeal procedure, then they are at least able to achieve some level of review.

review of arbitration awards is essentially limited to review for extreme arbitrator misconduct such as fraud or corruption.[268] Several arbitrators conducted a study on all state and federal cases filed between January 1, 2004, and October 31, 2004, in which parties sought to vacate an arbitration award.[269] The results of this study show the remote likelihood of having an arbitration award vacated under this system of limited review. These results serve only to confirm concerns about the increasing trend toward mandatory arbitration. For instance, the judges whose cases were surveyed believed their role in the review process was to be merely "policing . . . procedural propriety . . . rather than correcting the substantive merits of the awards."[270] While this is an accurate view of the present state of the law, it emphasizes the problem of review presented by arbitration agreements.[271] An amendment to the FAA would make a difference here.

Fourth, arbitration creates no precedent, and thus, there are no benchmarks to guide us as attorneys and judges in assessing future cases.[272] Remember what United States District Judge Sarah Vance said about arbitration: "'It doesn't produce any publicly made law . . . . There is no verdict, no appeal, no precedent.'"[273]

Fifth, although there is a consensus in the literature and in court opinions that arbitration is quicker and cheaper than trials, that consensus is breaking down, and the gap in this regard between arbitration and trials seems to have narrowed considerably.

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268. *See* 9 U.S.C. § 10(a)(1)–(4) (2006) (stating that a court may vacate an arbitration award when the award involves corruption or arbitrator misconduct, or when an arbitrator exceeds his or her power); *see also* Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1399 (2008) (noting that an arbitrator's ruling can be vacated upon showing that the arbitrator is guilty of misconduct or that the arbitrator exceeded his or her powers).

269. Lawrence R. Mills et al., *Vacating Arbitration Awards*, DISP. RESOL. MAG., Summer 2005, at 23, 23.

270. *Id.* at 26.

271. *See Hall St. Assocs.*, 128 S. Ct. at 1404–05 (interpreting 9 U.S.C. §§ 10–11 as an exclusive catalog of reasons reviewing judges may consider in determining whether to vacate an arbitration award); *see also* Roger Haydock & Jennifer Henderson, *Arbitration and Judicial Civil Justice: An American Historical Review and a Proposal for Private/Arbitral and Public/Judicial Partnership*, 2 PEPP. DISP. RESOL. L.J. 141, 193 (2002) (describing the standard of review for arbitration awards as "whether the arbitrators ha[ve] exceeded their power or authority").

272. *See* Hope Viner Samborn, *The Vanishing Trial*, 88 A.B.A. J., Oct. 2002, at 24, 26 (suggesting that arbitration jeopardizes the notion of stare decisis because it does not produce any judicial precedent in the form of case law).

273. *Id.*

Indeed, in many instances, it may now be non-existent. While the cost of dispute resolution, whether by arbitration or trial, should be a large concern to both the bench and the bar, much is lost when parties arbitrate and cost alone cannot justify what is lost.

This is not to say that binding arbitration per se is bad. If parties with equal bargaining power wish to exit the justice system and agree to arbitration when the controversy is in place, they certainly should be free to do so. However, they should be required to wait until the actual dispute arises, with the full understanding of what they are giving up.

It also should be noted that non-binding mediation is an entirely different kind of animal and is a wonderful addendum to our justice system. Even in yesteryear when juries flourished, over 90% of cases settled. Before mediation, they settled without the parties having any forum to tell their story. Mediation facilitates this important principle of due process, where everyone gets to tell their story before an impartial and fair decision maker. Such mediation, however, does not have the defects of binding arbitration outlined above. If the matter is not resolved in mediation, the right to jury is preserved. And judicial review is also preserved. Now, because of mediation, settlements have the added benefit of giving people their day to be heard. This makes settlements more meaningful and more helpful in resolving disputes.

### 3. Tort Reform

#### a. The Attack on Lawyers and Juries

The tort reform movement in America and in Texas has not been all bad—some has actually been good—but the bad parts have been bad indeed.[274] This is especially true of the effort to drastically reduce the impact of lawyers and juries upon the civil justice system. The goal has not been to actually eliminate lawsuits; rather, it has been to create procedural barriers to court access, through the use of ceilings or caps on damages and other devices. For example, if damages are capped low enough, such as

274. The inventiveness of "tort reform" advocates should be applauded because they chose a name that belies their goal. It is not to reform the tort laws; it is to emasculate them.

at $250,000 for non-economic damages in medical malpractice cases, lawsuits on behalf of blue collar workers, the young, the elderly, and others will often not be viable enough to file, given the cost of experts needed to prosecute such actions. Fewer lawsuits will translate into fewer juries, which has indeed been the result.[275] Fewer lawsuits will also translate, eventually, into fewer lawyers.

Why is it that lawyers are such a target of tort reformers? Certainly, lawyers are not perfect. Not even close. But that is not the complaint. Tort reformers view lawyers as pushing the envelope too hard, as interfering too much with capitalism and the

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275. The blog *Blawgletter* has addressed this very issue in its May 23, 2008 publication entitled "Banishing Jury Trial—Update" as follows:

> Last February, Blawgletter reported a steep decline in Texas state court jury trials in civil cases. In 1996, district court juries rendered 2,971 verdicts but only 1,428 during 2006—a drop of 52 percent. District judges also directed verdicts 253 times in 1996 but 473 times in 2006—an increase of 87 percent.
>
> We wondered whether the trend continued into 2007. Today we disclose the results.
>
> According to [t]he Texas Office of Court Administration, juries decided 1,643 district court cases in 2007, and district judges directed verdicts in 384. The performance improved the decline in jury verdicts to less than 45 percent from 1996 and the jump in directed verdicts to below 52 percent.
>
> Will the trends towards more jury trials and fewer directed verdicts continue in 2008? The statistics through April 2008 give good news and bad. The 459 jury verdicts in the first four months translate into 1,377 for the full year—raising the drop-off from 1996 to 53.6 percent—but the directed verdicts so far (103) equal 309 for all of 2008—a rise of only 22 percent versus 1996.
>
> Note that a fall-off in caseloads cannot account for the trend. In 1996, pending district court cases (including criminal matters) totaled a bit more than 700,000. By 2006, the number had grown to more than 900,000 and in 2007 to about 950,000. We should have more jury trials now rather than fewer.
>
> The overall results suggest that trial by jury in civil cases remains under pressure if not in danger of extinction.
>
> Section 12 of the Texas Constitution provides that "[t]he right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency."

Banishing Jury Trial—Update, http://blawgletter.typepad.com/bbarnett/2008/05/ (May 23, 2008, 05:25 EST). For an Inn of Court presentation in March 2007, Larry York examined this issue in Travis County. From 1986 to 2005, total civil filings dropped "from over 12,000 . . . to under 10,000. From 1997 to present, automobile injury cases . . . dropped by 75% [and] [o]ther types of injury cases dropped by 25%. The number of jury trials of all kinds . . . went from 74 in 1996 to 14 in 2006." Larry York, Skit for Robert Calvert Inn of Court Presentation (Mar. 13, 2007).

social order. Yet, this has been the job assigned to lawyers by our traditions and by our history: to bring accountability to all segments of American society so that those wrongfully harmed or damaged receive justice.

While lawyers are not perfect, an American justice system without lawyers would be too imperfect to contemplate. America was conceived in liberty and dedicated to the proposition that all persons are created equal. Mr. Lincoln understood that America's grand experiment has been to embrace these two competing ideals—liberty and equality—and then to find a way for them to co-exist. America's answer has been, by and large, through the law. Liberty and justice for all. Equal justice under the law. To achieve this difficult balance, America has needed lots of lawyers. Liberty and equality are not static ideals, frozen in place. They constantly evolve, and it is the lawyers who press forward to challenge the status quo. *Brown v. Board of Education*[276] is the most dramatic example of such challenges, but less notable ones take place every day throughout the courtrooms of this country.

Every time a lawyer challenges the status quo, another lawyer stands ready to defend the status quo, which is as it should be. Lawyers on each side of a controversy do their best for their clients so that, in the end, the best justice can be achieved. This is particularly true of America's tort system, which is well-suited to the free-wheeling, individualistic nature of our society. It is the lawyers who are charged with the duty to make certain that those injured by negligence are rightfully compensated and, concomitantly, to make certain that actual injuries and actual negligence have indeed occurred. Lawyers promote a robust, diverse, free and equal America, in accord with the rule of law.

Unlike other industrialized nations, which depend on heavy regulation and high taxes to negotiate and ameliorate the tensions inherent in a modern, civil society, America has assigned much of the task to lawyers. Yet, those who argue that it should be otherwise also argue that heavy regulation and high taxes are not the American way. They assert that America needs to drastically reduce the number of lawyers and lawsuits, but they offer nothing in return. No lawsuits and no safety nets, either. As imperfect as a lawyer-based society may be, it is better than no alternative.

276. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

While tort reform advocates will not dispute that much of their effort is directed at lawyers, they will dispute that juries are a target. Their protestations are not persuasive. Time and again, procedural barriers to jury trials are ensconced in legislative enactments.

The most egregious of these is found in the Residential Construction Liability Act, a Texas statute that protects homebuilders from suit until after a very burdensome administrative process is initiated through a state agency called the Texas Residential Construction Commission.[277] One would be hard-pressed to imagine a more byzantine process to engineer before pursuing litigation. One would also be hard-pressed to imagine a more transparent effort to shield homebuilders from juries. The statute is clearly not designed to regulate home-builders; rather, it is designed to protect homebuilders from their customers and from the scrutiny of juries.

In November 2008, validation of the above conclusion came from a forceful recommendation of the Texas Sunset Advisory Commission, as follows:

> The Texas Residential Construction Commission was never meant to be a true regulatory agency with a clear mission of protecting the public. It has elements of a regulatory agency in its registration of homebuilders, but this program is not designed to ensure that only qualified persons can enter the field—the way true regulatory agencies work—and so does not work to prevent problems from occurring. The Commission also has tools for taking enforcement action, but the ease of satisfying the registration requirements and significant gaps in who must be registered make it easy for even problem builders to stay in business.
>
> The Commission also administers the State Inspection Process, designed to resolve disputes between homeowners and builders before either party may pursue legal action. This lengthy and sometimes difficult process has been a source of frustration for homeowners trying to address defects with their homes. Despite changes last Session ostensibly to strengthen the process by making builders subject to new penalties if they refuse to offer repair of a confirmed defect, the Commission still has no real power to require

277. *See generally* Residential Construction Liability Act, TEX. PROP. CODE ANN. §§ 27.001–.007 (Vernon 2007) (detailing the procedure a claimant must follow to obtain relief from a homebuilder).

builders to make needed repairs. Because homeowners must submit to this process before they may seek remedies in court, those who fail to satisfy its requirements either out of confusion or frustration lose their access to court. No other regulatory agency has a program with such a potentially devastating effect on consumers' ability to seek their own remedies.

The cumulative impact of these programs is a greater lack of trust than is seen with other regulatory agencies. People do not trust the regulatory processes to protect them from unqualified builders who should not be in business. Homeowners do not trust the State Inspection Process to help fix defects in their houses. When confronted with the daunting issues involved in controlling such a large, important, and complex field as residential construction, Sunset staff did not trust that the commitment exists to establish the true regulation needed for the protection of the public.

In its review of the Texas Residential Construction Commission, Sunset staff concluded that anything short of a true regulatory program does more harm than good, and should be abolished. Despite recent improvements in the State Inspection Process regarding satisfactory offers of repair, the process is still ineffective and likewise needs to be abolished. The Commission cannot require needed repairs, and the Process potentially threatens the Commission's ability to objectively enforce regulations. Although agency staff work diligently to implement regulations and help consumers navigate the various processes for redressing complaints, good intentions are not a substitute for having adequate statutory tools.[278]

Will the Texas legislature follow the recommendations of the Sunset Commission? By the time this essay is published, the verdict will be in, since the legislative session ends in May 2009. However, given the strength of the tort reform movement in Texas, no one should hold their breath that the recommendation of the Sunset Commission will be accepted.

b. The View from *BusinessWeek*

*How to Fix the Tort System*, an article from the March 14, 2005 issue of *BusinessWeek*, presents a factual, balanced analysis of our

278. Tex. Sunset Advisory Comm'n Decision Material on Tex. Residential Constr. Comm'n (Nov. 2008), *available at* http://www.sunset.state.tx.us/81streports/trcc/trcc_dec.pdf.

tort system and of the tort reform movement.[279] It is a thoughtful commentary on the subject of tort reform and from a source that is business-oriented with a business perspective:

> [The] [p]roblem is, much of the discussion has been distorted by hyperbole from both sides. Despite the alarmism from Corporate America, most of the big verdicts that become urban legends are reduced on appeal. Nor is there authoritative evidence that plaintiffs' lawyers are weighing down the economy. This is, in part, because there are no reliable aggregate data about the system. America's network of federal, state, and local tribunals is sprawling and undigitized. Nobody knows how many cases are filed each year or how they turn out—especially since the vast majority are settled out of court. So any macroeconomic conclusions are speculative. When Bush claims that the annual "litigation tax" in America is $246 billion, it's a guess.
>
> To the extent that reliable data do exist, they show no signs of broad systemic breakdown. The latest statistics from the Bureau of Economic Analysis indicate that legal services accounted for less than 1.5% of gross domestic product in 2003—a slightly lower share than in 1990. That means the legal industry has lagged the overall economy. Such slow growth suggests that lawyers are not reaping a bonanza from winning—and defending—big corporate cases. Moreover, the strong productivity gains in recent years undercut the argument that rapacious plaintiff lawyers are strangling growth.
>
> Does this mean there's no case against the tort system? Not at all. Just that the strongest evidence of plaintiffs' lawyer misconduct doesn't rest on broad economic data. Rather, the real crisis lies in the proliferation of specific types of bogus cases—ones in which nobody has been injured, no malfeasance has occurred, or regulators have already taken care of the problem. Despite their claims of being selfless safety advocates, plaintiffs' attorneys in 2005 are analogous to chief executives in 1999: Most of the players are making an honest living. But an unacceptably high percentage of them are stretching the rules.
>
> *BusinessWeek*'s four-part solution to the problem is based on a set of pragmatic principles, with some parallels to those being used to clean up Corporate America. Like CEOs, lawyers should, first of all, be paid for performance. They shouldn't be allowed to take home multimillion-dollar paychecks if clients get pennies. Second,

279. Mike France, *How to Fix the Tort System*, BUS. WK., Mar. 14, 2005, at 70, 72–73.

they shouldn't be able to cash in when they're merely piling on to government crackdowns. Third: When attorneys break the rules, the punishment should sting. These days, lawyers who file frivolous suits barely get their wrists slapped. These simple reforms would eliminate the most abusive cases while preserving the rights of victims. In the rare cases where they did not go far enough, such as asbestos, a far more radical change—exiting the courts altogether—may work better.[280]

Interestingly enough, *BusinessWeek* also noted:

After World War II, tort law received a boost from economists—something that would probably come as a surprise to many business people today.... [Economic scholars] argued that the tort system should be more than simply a method of compensating the victims of misfortune. [The tort system] *should be a free-market tool for preventing accidents in the first place.* In the real world, this usually meant hiking the liability on manufacturers, giving them a financial incentive to improve the safety of their products. The economic theory essentially held that the most socially efficient outcome would be achieved when the cost of the safety improvements matched the cost of being sued.

The result is one of those exceptional American institutions that sometimes causes the rest of the industrialized world to rub its eyes in wonder: A tort system that functions as both an insurance mechanism and as a form of decentralized regulation. Loud-mouthed, Lear-jetting, billboard-advertising plaintiffs' attorneys have been officially deputized to serve as private-sector adjuncts to the Securities & Exchange Commission ("SEC"), the Food & Drug Administration ("FDA"), the National Highway Traffic Safety Administration ("NHTSA"), and a wealth of other federal and state agencies. "Europeans would be extremely nervous with this kind of arrangement," observes Michael Greve, a German-born tort reform expert at the conservative American Enterprise Institute in Washington.

What do they do in Germany, Belgium, or France when sport-utility vehicles roll over? For starters, the victim's medical expenses are covered by nationalized health care. And lost wages are largely picked up by employers or the government. So nobody needs to go to court to be made whole—and punitive damages aren't allowed. It's basically a no-fault system that renders plaintiffs' lawyers irrelevant, eliminating most of the expensive features of the U.S.

280. *Id.* at 74.

adversarial system, such as pretrial discovery.

That probably sounds great to many in Corporate America. But built into the Western European system is an even greater degree of regulation. Instead of offloading responsibilities to plaintiffs' lawyers, bureaucrats and administrative judges do all the work. "You can substitute for tort law by having more extensive social insurance and relying on regulators to a greater extent," says Mark Geistfeld, an expert in comparative jurisprudence at New York University School of Law. "But it's not like the cost disappears; it just becomes part of the tax base."

That's why comparisons between the U.S. and other countries are misleading. Britain, Germany, and Japan all have fewer lawyers per capita than America—a fact critics of the U.S. love to cite. But these countries don't ask their attorneys to engage in business regulation, and they have more restricted notions of individual rights. As a result, tort changes that call for importing a big idea from overseas miss the larger context. Making courtroom losers pay their opponents' legal expenses only works in Britain because it is part of a larger whole that also includes nationalized health insurance.

Throwing out big chunks of the U.S. system, therefore, isn't a grand solution. Sure, it's theoretically possible to eliminate punitive damages or adopt other European-style reforms without bringing aboard their entire social safety net. But it almost certainly wouldn't end there. One way or another, the American public will demand that the Firestones and Enrons of the world be held accountable for tire blow-outs and financial blowups. Radical reductions in corporate liability would undercut the accountability of genuinely bad actors. It wouldn't take long before the public would cry out for more regulation. This is one reason why the AEI's Greve thinks it could be foolhardy for medical-device makers to lobby for broad legal immunity for products approved by the FDA. "As soon as the agency made a mistake and 14 people died, there would be hysteria, and the whole approval process would be shut down," he predicts. "You need a sensible mix of public and private enforcement."

The right way to reform the U.S. tort system is not to put most plaintiffs' lawyers on the streets but to ensure that they do a better job at their two key roles: compensating victims and deterring corporate wrongdoing. The crisis is not that ambulance chasers are wrecking the economy, but that too many entrepreneurial personal-injury attorneys have found illegitimate ways to earn money. Tort reformers aren't directly attacking this problem. Instead of cracking

> down on exploitative lawyers, the critics often try to solve the problem by punishing their clients. *For instance,* the White House's main idea for reducing the cost of medical malpractice litigation is to place an arbitrary $250,000 ceiling on pain-and-suffering recoveries, which would hurt the most severely injured malpractice victims, such as those blinded or paralyzed. That would also shortchange blue-collar workers, the elderly, and others who couldn't receive big compensation for lost earnings.
>
> This is the wrong approach. The big mistake of the last century was not excessive compassion. The fact that America offers the most compensation worldwide for intangible emotional injuries is a tribute to the country's best humanitarian impulses. In retrospect, the thing that the legal theorists overlooked was that tort law would become a big business. Invited to become private corporate cops, way too many plaintiffs' attorneys crashed the party. The challenge now is to weed out the parasites without compromising fundamental values.[281]

*BusinessWeek* is right. Certainly there are lawyers who cross the line of propriety and they should be dealt with harshly. They have no excuse. Yet, most lawyers stay within proper boundaries, ably representing their clients and making the system work in a just and fair way. Can lawyers do better? Of course. Every American lawyer needs to commit to do better every day. Where there are structural changes to facilitate better conduct, those changes should be made.[282] Whatever can improve lawyer conduct should be done. The stakes are too high not to seek every avenue. But the problem should not be over-exaggerated.

Here are *BusinessWeek*'s recommendations for reform of the tort system, some of which are better than others, but none of which involve doing away with civil juries: (1) pay lawyers based on performance; (2) create penalties that sting; (3) curb duplication; and (4) exit the tort system.[283] The first proposal is not necessarily as reasonable as it sounds because sometimes businesses with vast numbers of consumers are able to reap large profits by wrongfully taking small amounts from those individual consumers who, in the aggregate, make up a massive class. In such

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281. *Id.*

282. *See* Craig Enoch, *Incivility in the Legal System? Maybe It's the Rules*, 47 SMU L. REV. 199, 200 (1994) (suggesting rule changing as a possible solution to improving the conduct of lawyers).

283. Mike France, *How to Fix the Tort System*, BUS. WK., Mar. 14, 2005, at 70, 70.

instances, a significant societal benefit accrues from an action that effectively and efficiently prevents the wrongful practice, even though the results might mean only nickel-and-dime recoveries for any one consumer. A single action by a lone consumer would have no similar benefit and would allow the wrongdoing to continue. The most recent work of the American Law Institute on aggregate litigation seeks to address ways of governing aggregate lawsuits "that promote their efficiency and efficacy as tools for enforcing valid laws. Often, this means avoiding under-enforcement stemming from deficient incentives, but it may also mean avoiding over-enforcement brought on by aggregating remedies.... Without aggregation, justice under law may be unaffordable. With it, the stakes of litigation may change significantly."[284]

As to the second recommendation, when lawyers act inappropriately, judges should be quicker to intervene. It is questionable, however, that judges need more tools to deal with the problem; the arsenal is adequate already. The third point needs more consideration because it suggests that punitive damages would be eliminated for products approved by regulators. This issue has already been discussed elsewhere in this essay. Suffice it to say, America's regulatory effort needs to improve substantially before this idea is adopted. Finally, it is true that some mass tort issues may not be suited to America's civil justice system because of the sheer size of the problem.[285] It would be

284. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION intro. at 2 (Tentative Draft No. 1, 2008).

285. For a discussion of non-jury suggestions in mass tort cases, see *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408 (1997), which presents concerns about the ability of a jury to deal with highly complex civil cases, and Joan Steinman, *Managing Punitive Damages: A Role for Mandatory "Limited Generosity" Classes and Anti-Suit Injunctions?*, 36 WAKE FOREST L. REV. 1043 (2001), which suggests that many feel jury damages can be excessive. *See also* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967) ("[There is grave] difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation [could] be so administered as to avoid overkill [in a mass tort case]."). However, "if there were [a] way in which all cases could be assembled before a single court, ... it might be possible for a jury to make one award ... for appropriate distribution among all successful plaintiffs." *Roginsky*, 378 F.2d at 839 n.11; *see also* Campbell v. ACandS, Inc., 704 F. Supp. 1020, 1022–23 (D. Mont. 1989) (stating that although they had failed to persuade the court that liability for punitive damages should not go to the jury, the defendants had argued for a holding "as a matter of law, that the further imposition of punitive damages upon them in" asbestos litigation in Montana "would be unreasonable and excessive" because, on the facts, deterrence would not be fostered and the defendants had been adequately punished); *In re* N. Dist. of Cal.

appropriate to consider alternatives in areas such as this.

This essay has given an inordinate amount of space to the *BusinessWeek* article, mainly because it does an excellent job of assessing the arguments in the tort reform debate. For lawyers and judges, this is a debate that deserves special attention; *BusinessWeek* provides the right start for the dialogue. In doing so, it also makes clear that neither lawyers as a group (with a few exceptions) nor juries are the problem tort reformers claim. It also makes clear that neither is a drag or burden on America's economic system.[286]

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"Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887, 899 (N.D. Cal. 1981) (observing that a series of separate actions arising out of a mass tort may result in disproportionate punishment of the defendant), *vacated*, 693 F.2d 847 (9th Cir. 1982); AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION intro. at 1–3 (Tentative Draft No. 1, 2008) (noting that mass tort cases may require law reform to create better procedures).

286. The findings of *BusinessWeek* have been validated in LAWRENCE CHIMERINE & ROSS EISENBREY, ECON. POL'Y INST., THE FRIVOLOUS CASE FOR TORT LAW CHANGE 17–18 (2005), https://www.policyarchive.org/bitstream/handle/10207/8091/bp157.pdf?sequence=1.

> The economic case made by critics for changing the U.S. tort law system can only be called frivolous. They have claimed that there is a tort liability "crisis," when the facts show that the number of tort cases has declined steadily for years. They have grossly exaggerated the costs of the tort system, and have made unfounded claims about the tort system's impact on insurance premiums, corporate research and development funding, product innovation, productivity, wages and employment, and business profits. And they have claimed without any evidence whatsoever that changing the tort system will stimulate economic growth and produce jobs.
>
> These economic claims have gone largely unchallenged despite the failure of the tort system's critics to substantiate them with credible evidence. With respect to job creation in particular, significant tort law change would be more likely to slow employment growth than to promote it. Endlessly repeating that so-called "tort reform" will create jobs does not make it true.

*Id.* A one-sided focus on the costs of the tort system that excludes an examination of the potential effects of changes on the system's benefits is inherently dangerous. Professor Marc Galanter of the University of Wisconsin, a leading nonpartisan academic observer of the U.S. tort system, points out that changes to the U.S. tort liability system—even if undertaken for legitimate reasons—have the potential to reduce the rights of tort victims, leaving injured individuals, their families, and, ultimately, the taxpayers to cover losses that should be compensated by those who cause them. Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1152–53 (1996). Galanter writes:

> That it costs so much to effectuate these transfers [of compensation from tortfeasor to victim] calls for remedy, but controlling these transaction costs should not be confounded with reducing the rights of claimants. Indeed, the potential exists to have the worst of both worlds by reducing the rights of the injured without significantly reducing the transaction costs of the system.

It should also be observed that there is another, more recent effort assessing the need for tort reform specifically addressed to Texas. A graduate dean, law school dean, university president, and two law school professors have conducted research into the "tort crisis" in Texas and have reported their findings in the *Baylor Law Review*.[287] By their observation, much of the basis for establishing a need for tort reform has rested on "anecdotal horror stories, surveys of public opinion or analysis of jury verdicts that employs qualitative second-guessing of jury verdicts by someone who was not present at trial to actually see and assess the evidence first-hand."[288] As the authors have observed, each of these sources suffers serious flaws.

Their project was to obtain direct, firsthand information from Texas state court trial judges, "the only one[s] in a position to have both seen the same evidence as the jury and yet to be completely non-partisan about the proceedings."[289] After ensuring that a survey of state court trial judges created no ethical dilemmas if properly structured and ensuring an objectively verifiable level of anonymity, the authors then conducted a survey in which 303 of 389 Texas district court judges participated—"a return rate of 78%—a percentage that compares favorably with any prior published survey of this type."[290]

The results of this survey provide the best empirical evidence available on Texas courts and juries. Here is what the evidence finally showed: over 83% of Texas judges had not seen a single case in the previous forty-eight months in which a "jury's verdict on compensatory damages was *disproportionately high*;"[291] over 83% of Texas judges had not seen a single case in which a "jury's exemplary damage award was *disproportionately high* given the evidence [produced at] trial;"[292] about 58% of Texas judges witnessed "juries being too stingy with awards of compensatory

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*Id.* at 1142.

287. *See generally* Larry Lyon et al., *Straight from the Horse's Mouth: Judicial Observations of Jury Behavior and the Need for Tort Reform*, 59 BAYLOR L. REV. 419 (2007) (reporting findings on the need for tort reform in Texas).

288. *Id.* at 420.

289. *Id.* at 424.

290. *Id.* at 427.

291. *Id.*

292. Larry Lyon et al., *Straight from the Horse's Mouth: Judicial Observations of Jury Behavior and the Need for Tort Reform*, 59 BAYLOR L. REV. 419, 427 (2007).

damages;"[293] and about 15% observed juries "refuse to make any award of punitive damages when the judge believed such an award was warranted by the evidence."[294] The authors, reviewing the results of these survey areas, concluded:

> [I]f one were to base possible additional legislation solely on the reported observations of the Texas judiciary, one might have to consider a statutory *floor* on damages rather than a ceiling since Texas juries appear to have more of a problem with giving too little than too much in damages.[295]

### c. The Problem with Tort Reform

What was said in *BusinessWeek* about medical malpractice litigation is worth repeating, because it highlights the worst of the tort reform movement:

> For instance, the White House's main idea for reducing the cost of medical malpractice litigation is to place an arbitrary $250,000 ceiling on pain-and-suffering recoveries, which would hurt the most severely injured malpractice victims, such as those blinded or paralyzed. That would also shortchange blue-collar workers, the elderly and others who couldn't receive big compensation for lost earnings.
>
> This is the wrong approach. The big mistake of the last century was not excessive compassion. The fact that America offers the most compensation world-wide for intangible emotional injuries is a tribute to the country's best humanitarian impulses.[296]

Yet, the very White House idea so criticized by *BusinessWeek* is now law in Texas.[297]

The drumbeat for damage ceilings or caps in Texas began with the introduction of a ballot initiative in 2003, known as Proposition 12, to amend the Texas constitution to give the legislature the right to restrict damages in medical malpractice cases.[298] After a

293. *Id.* at 430.

294. *Id.*

295. *Id.* at 431.

296. Mike France, *How to Fix the Tort System*, BUS. WK., Mar. 14, 2005, at 70, 70.

297. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (Vernon 2003) (setting a $250,000 limit on noneconomic damages in medical malpractice suits).

298. Suzanne Batchelor, *Baby, I Lied. Rural Texas Is Still Waiting for the Doctors Tort Reform Was Supposed to Deliver*, TEX. OBSERVER, Oct. 19, 2007, at 9, 9.

heated campaign, Proposition 12 passed.[299] Shortly thereafter, the legislature enacted section 74.301 of the Texas Civil Practice and Remedies Code, limiting judgments rendered against doctors "to an amount not to exceed $250,000 for each claimant."[300]

Tort reform advocates knew that such a low cap would effectively and significantly reduce medical malpractice claims over a period of time. The cap would serve as a procedural bar to court access and eventually as a bar to jury trials. But to what end? One of the repeated arguments in favor of Proposition 12 was that caps would solve the problem of doctor shortages in rural Texas. During the debate, Governor Rick Perry observed that in 2003, "[w]omen in three out of five Texas counties d[id] not have access to obstetricians.... The problem has not been a lack of compassion among our medical community, but a lack of protection from abusive lawsuits."[301] The Governor was right about one thing: 152 Texas counties were without an obstetrician in 2003.[302] However, his prediction that Proposition 12 would solve the problem has not come to pass. As of 2007, there were still 152 Texas counties without an obstetrician.[303]

Caps, or at least unreasonable caps, are the wrong approach because caps shortchange so many who are injured by doctor malpractice. At the same time, the promise of caps, such as bringing physicians to rural Texas, has thus far proved to be illusive. Indeed, studies have shown that the claimed benefits of caps are "at best overly simple and at worst specious."[304] Yet, for the tort reformers, the institution of caps on damages is one of the blueprints for their movement. If they were to succeed in instituting caps across the spectrum of tort actions, sooner or later everyone would lose because further bars to court access, further limits on juries, and larger numbers of unaccountable people

299. *Id.*

300. TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (Vernon 2003); *see also Five Years Retrospective on House Bill 4*, ST. B. TEX. LITIG. SEC. REP. ADVOC., Fall 2008 (offering a review on varying assessments of Proposition 12), *available at* http://www.litigationsection.com/downloads/44_AfterHB4_Fall08.pdf.

301. Suzanne Batchelor, *Baby, I Lied. Rural Texas Is Still Waiting for the Doctors Tort Reform Was Supposed to Deliver*, TEX. OBSERVER, Oct. 19, 2007, at 9, 9.

302. *Id.* at 10.

303. *Id.*

304. Greg Pogarsky & Linda Babcock, *Damage Caps, Motivated Anchoring, and Bargaining Impasse*, 30 J. LEGAL STUD. 143, 158–59 (2001).

would be erected in Texas. As the American Bar Association so aptly noted, without accountability there can be no rule of law.[305] Unless caution is exercised here, there will be difficult days ahead for justice in Texas.

d. A Final Note

As a final note, I fully understand that the American tort system is not perfect. It has, in fact, been treated to much critical examination by thoughtful scholars, such as Professor Robert Kagan, who has provided one example in his book *Adversarial Legalism: The American Way of Law*.[306] He has observed, for instance, that a body of academic analysis and cross-national comparisons "suggest that a tort law system shaped by adversarial legalism [such as the American civil justice system] is a very inefficient and inconsistent means of compensating accident victims and that its contribution to deterrence and safety are erratic."[307]

Although Professor Kagan has concluded that much of the American tort system is in need of repair, he does find both sides of the tort reform debate to be unhelpful:

> European comparativists often observe that surprisingly few American judges, lawyers, legislators, and law professors have even a rudimentary knowledge of the systems of injury compensation and adjudication in other economically advanced democracies. Journalists who write about the "tort crisis" in the United States almost never discuss the injury compensation and regulatory systems of other economically advanced democracies or discuss alternatives to the tort system. By and large, therefore, American legal elites wholeheartedly endorse the fundamental rules and institutions of the American civil liability system: the primacy of tort law as a mode of recourse against injustice; the desirability of broad access to courts, juries, and adversarial lawyers to resolve disputes and enforce safety standards; and a familiar panoply of litigation-encouraging practices—contingency fees, punitive damages and awards for pain and suffering, class actions, and so on. With their

305. *See generally* William H. Neukom, *Finding Our Collective Strength Through the Rule of Law*, 46 JUDGES' J. 1, 1 (2007) (stating that the rule of law includes accountability).

306. ROBERT KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001).

307. *Id.* at 135.

> vision restricted by these distinctive American legal traditions, legal elites in the United States generally are resistant to "replacement"-type reforms.
>
> The same failure of imagination afflicts politically conservative legal critics of the tort system, who tend to blame the pathologies of the tort system on irresponsible lawyers and runaway juries rather than on the fundamental structures of adversarial legalism within which the lawyers and juries work. Hence their reform proposals tend to focus on incremental "discouragement" changes that leave the basic structures of adversarial legalism intact, diminishing injured persons' legal rights while offering nothing in return. They fight adversarial legalism in an adversarial way.[308]

To Professor Kagan, the European model has much to recommend. It is

> [a] countervailing legal idea [that] would entail greater emphasis on reliable, collectively provided social security than on individual vindication and vengeance; on legal stability, predictability, and uniformity rather than ad hoc legal responsiveness; and on the notion that professional administration of democratically endorsed regulatory rules usually will be better than litigation in guaranteeing safety and protecting the public interest.[309]

While he certainly has an argument to make in this regard, Professor Kagan has also acknowledged that "Americans' mistrust of governmental professionalism, competence, and neutrality—and their corresponding reluctance to abandon adversarial legalism as a tool of accountability—is based on hard experience."[310] Reforms in America have often been under-funded,[311] and then subjected to political bias and influence.[312]

Of course, America's tort system has flaws. It is also true that other systems have answers to some of those flaws. But Americans should not be asked to cast aside the present system without an adequate substitute, and tort reformers generally offer no adequate substitute, because truly adequate substitutes would require a strong, lasting commitment to more taxes, more

308. *Id.* at 152–53.

309. *Id.* at 153.

310. *Id.* at 247.

311. ROBERT KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 248–49 (2001).

312. *Id.* at 249–50.

regulation and more bureaucracy. Why give away something for essentially nothing? Why should Americans be convinced to do so, especially when America's system, with its shortcomings, fits the American character better than anything else yet proposed?

It is foolish to oppose in a knee-jerk way the reform of America's civil justice system. It can be made better. Everyone involved in the system must strive every day to make it better. Opposition to tort reform per se is also foolish. There have been many reforms to America's tort system that have improved it, such as comparative negligence reform. But it is not foolish to oppose efforts to use "tort reform" to cripple America's tort system to procedurally bar access to the courts and to eliminate juries from the dispute process without substituting anything in exchange.

4. Swinging the Pendulum Back

In my view, the civil jury system needs more aggressive support from the bench and the bar. This is, incidentally, a conservative view. The traditional way of resolving civil disputes in America has been by a jury trial. Justice has been well-served by this tradition for hundreds of years. It is especially disconcerting that many in America seem willing to abandon civil juries without a tried-and-true alternative to be put in its stead. Clearly, a majority of our citizens are not ready to do so. "In one recent and typical poll, three-quarters of respondents say that if they were on trial, they would prefer a jury to a judge."[313]

To me, there is another reason to do everything possible to preserve the civil jury. In America, our people see the judge and the jury as the twin pillars of our justice system. In this arrangement, the jury takes on the hardest and most visible task of making the final decision in each case. On the civil side, the jury often deals with difficult allegations of individual, corporate, and government neglect and misconduct. Since the jury comes to its work without an agenda, its verdict receives instant acceptance as a fair decision. If we did not have the jury, the decision of a single judge in any particular case, especially a controversial one, would come under much more scrutiny and skepticism. Over time, I would predict an erosion of confidence in the system. Such

313. Valerie P. Hans & Neil Vidmar, *The Verdict on Juries*, 91 JUDICATURE 226, 230 (2008).

erosion would lead to a lack of confidence in the judiciary and the law, which Balzac has recognized as "'the beginning of the end of society."'[314]

I am not proposing that the civil jury system remain fixed and unchanging. One of the strengths of American law has been to change when change was necessitated. As Roscoe Pound noted a century ago, the great challenge of the law will always be to provide stability and yet to change to meet society's needs.[315] Our goal should be to seek a proper balance for the work of the civil jury in order to enhance its viability.[316] At the very least, we should be guided in this effort by Aristotle's Golden Mean—avoid the extremes and find the middle path.[317]

There is no better way to conclude this essay than by quoting an eloquent observation by Professor Owen Fiss about the purpose of civil adjudication in America and, by extension, the benefit of trials and certainly jury trials:

> In my view, however, the purpose of adjudication should be understood in broader terms. Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring

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314. AHARON BARAK, THE JUDGE IN DEMOCRACY 109 (2006) (quoting Honoré De Balzac); *see* Robert M. Ackerman, *Vanishing Trial, Vanishing Community? The Potential Effect of the Vanishing Trial on America's Social Capital*, 2006 J. DISP. RESOL. 165, 167 (2006) ("Diminishing public participation in the justice system also allows the courts to be depicted as elitist and undemocratic."); *see also* Valerie P. Hans & Neil Vidmar, *The Verdict on Juries*, 91 JUDICATURE 226, 230 (2008) ("Jury service itself educates the public about the law and the legal system and produces more positive views of the courts.").

315. ROSCOE POUND, NEW PATHS OF THE LAW 1 (1950) ("[L]aw must be stable and yet it cannot stand still.").

316. Excellent advancements are being made in this regard. *See generally* William J. Caprathe, *A Jury Reform Pilot Project: The Michigan Experience*, 48 JUDGES' J. 27 (2009); A.B.A., *Principles for Juries and Jury Trials* (2005), *available at* http://www.abanet.org/juryprojectstandards/principles.pdf.

317. *See* ARISTOTLE, NICOMACHEAN ETHICS 27, 29 (Terence Irwin trans., 2d ed. Hackett Publ'g Co. 1999) (350 B.C.) ("Among . . . three conditions, then, two are vices—one of excess, one of deficiency—and one, the mean, is virtue."). Achieving the mean "is rare, praiseworthy, and fine." *Id.*

reality into accord with them. This duty is not discharged when the parties settle.

. . . .

Someone like Bok sees adjudication in essentially private terms: The purpose of lawsuits and the civil courts is to resolve disputes, and the amount of litigation we encounter is evidence of the needlessly combative and quarrelsome character of Americans. Or as Bok put it, using a more diplomatic idiom: "At bottom, ours is a society built on individualism, competition, and success." I, on the other hand, see adjudication in more public terms: Civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals. We turn to the courts because we need to, not because of some quirk in our personalities. We train our students in the tougher arts so that they may help secure all that the law promises, not because we want them to become gladiators or because we take a special pleasure in combat.

To conceive of the civil lawsuit in public terms as America does might be unique. I am willing to assume that no other country—including Japan, Bok's new paragon—has a case like *Brown v. Board of Education* in which the judicial power is used to eradicate the caste structure. I am willing to assume that no other country conceives of law and uses law in quite the way we do. But this should be a source of pride rather than shame. What is unique is not the problem, that we live short of our ideals, but that we alone among the nations of the world seem willing to do something about it. Adjudication American-style is not a reflection of our combativeness but rather a tribute to our inventiveness and perhaps even more to our commitment.[318]

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318. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085–90 (1984) (citations omitted).

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