Nebraska Association of Trial Attorneys

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Trial: The *Real* Alternative Dispute Resolution Method

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Trial: The *Real* Alternative Dispute Resolution Method

Introduction

I. Trial by Jury: The Only Twice Mentioned Right in The Bill of Rights![1]

Trial, and particularly trial by jury, is the least used dispute resolution methodology in America. Informal discussions, formal business meetings, use of consultants, and in recent years, use of mandatory and commonplace mediation techniques to resolve civil disputes, have become commonplace.

The method of dispute resolution that is *uncommon* is trial. ***Trial is the real alternate dispute resolution procedure!***

The United States judiciary compiles statistics of its judicial business and publishes the data annually.[2] The results of the publication may be surprising. In 2009, during the entire year, this was the incidents of civil jury trials:

Eighth Circuit Civil Trial, December 30, 2009

Judicial District	Total All Trials	Civil Trial						
		Total	1 Day	2 Days	3 Days	4 to 9 Days	10 to 19 Days	20 Days or More
Eighth Circuit	468	217	67	41	33	72	4	0
AR, E	66	49	14	12	7	16	0	0
AR, W	26	19	5	4	4	6	0	0
IA N	26	7	1	2	1	1	2	0
IA S	71	17	3	4	2	8	0	0
MN	50	28	6	2	6	13	1	0
MO E	74	42	17	8	6	11	0	0
MO W	48	23	14	3	3	3	0	0
NE	46	17	6	2	4	5	0	0
ND	17	1	0	0	0	1	0	0
SD	44	14	1	4	0	8	1	0

How unique are these rights? *Human Rights Watch* estimates more than 98% of all civil jury trials, and over 90% of all criminal jury trials, occur in the United States of America.[3]

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[1] ©2010 David A Domina & Brian E Jorde, Domina Law Group pc llo, Omaha NE.

[2] www.uscourts.gov/statistics/judicialbusiness

[3] HON. WILLIAM L. DWYER, IN THE HANDS OF THE PEOPLE: THE TRIAL JURY'S ORIGINS, TRIUMPHS, TROUBLES, AND FUTURE IN AMERICAN DEMOCRACY 153 (2002).

Judge Young observed in an extended article[4] 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."[5] 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. "[T]he greatest value of the jury is its ability to decide cases correctly."[6] We place upon juries no less a task than discovering and declaring the truth in each case. In virtually every instance, these twelve men and women, good and true, rise to the task, finding the facts and applying the law as they, in their collective vision, see fit.

In a very real sense, therefore, a jury verdict actually embodies our concept of "justice." Jurors bring their good sense and practical knowledge into our courts. Reciprocally, judicial standards and a respect for justice flow out to the community.[7] The acceptability and moral authority of the justice provided in our courts rest in large part on the presence of the jury. It is through this process, in which the jury applies rules formulated in light of common experience to the facts of each case, we deliver the best justice our society knows how to provide.

II. How Important is Trial by Jury—The Only Right Mentioned Twice in the Bill of Rights

Two separate provisions of the *Bill of Rights*, Amendments I through X to the *Constitution of the United States*, mention the right to trial by jury. The jury is also mentioned in Article III, Sec. 2. History's simple lesson is that the 13 Colonies could not agree upon the Constitution's text. Only the addition of the *Bill of Rights* led to the Constitution's ratification, and the formation of our current form of government. It is worthwhile to recall what the Constitution says:

US Const Amend VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury… and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor;, and to have the Assistance of Counsel for his defense.

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[4] Hon. Wm. Young, *Vanishing Trials, Vanishing Jury, Vanishing Constitution*, Suffolk Law Rev (2007).
[5] Harry Kalven, Jr., & Hans Zeisel, *The American Jury* 499 (1966).
[6] Charles W. Joiner, *From the Bench, in* The Jury System in America 146 (Rita James Simon ed., 1975).
[7] See Patrick E. Higginbotham, Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power, 56 Tex L Rev 47, 59 (1977).

US Const Amend VII

> In suits at common law, where the value and controversy shall exceed 20 dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

But, the *Bill of Rights* is not the only place where the jury is mentioned. It also appears in *US Const* Art III, § 2, which contains these clauses:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made….
>
> The trial of all crimes, except in cases of impeachment, shall be by jury….

Three of the *Federalist Papers* mention trial by jury.[8] Alexander Hamilton's comments in *The Federalist No. 65*, make these insightful points about why impeachments of officials should not be tried to juries, while other cases should:

> The loss of life and estate would often be virtually included in a sentence which, in its terms, imported nothing more than dismission (*in original*) from a present, and disqualification for a future, office. It may be said, that the intervention of a jury, in the second instance, would obviate the danger. But juries are frequently influenced by the opinions of judges. They are sometimes induced to find special verdicts, which refer the main question to the decision of the court. Who would be willing to stake his life and his estate upon the verdict of a jury acting under the auspices of judges who had predetermined his guilt?[9]

Hamilton, again, in a subsequent paper, made it clear that the jury's decision on the facts was to be inviolate, i.e., not disturbed by appellate review for legal errors committed by a judge while presiding over a jury:

> But it does not follow that the re-examination of a fact once ascertained by a jury, will be permitted in the Supreme Court. Why may not it be said, with the strictest propriety, when a writ of error is brought from an inferior to a superior court of law in this State, that the latter has jurisdiction of the fact as well as the law? It is true it cannot institute a new inquiry concerning

[8] *The Federalist Papers No.* 65, 81, 83.
[9] Hamilton, *The Federalist Papers* No. 65.

> the fact, but it takes cognizance of it as it appears upon the record, and pronounces the law arising upon it.[10]

III. The State Department's Explanation of Trial by Jury.[11]

What did the Bush Administration say to our neighbors about the right to trial by jury?[12] These comments, posted on the U S Department of State's website during the presidency of George W Bush remain descriptive of the jury's role in dispute resolution and its uniqueness in this nation. They remain the official description under the Obama administration, now:

> It has been said that a society can be judged by how it treats its least favored citizens, and people accused of crimes, by definition, fall into this category. They have allegedly broken the social compact by depriving other people of life, limb, or property, and if in fact the charges are true, they have placed themselves outside the bonds of society; they are, literally "outlaws." But before we consign people to prison, purge them from the community, or even deprive them of life, we want to be exceptionally sure that in fact they are guilty of the crimes with which they are charged – guilty, that is, "beyond a reasonable doubt."
>
> There are two reasons for this cautious approach. The first, and most obvious, is to avoid lasting harm to the individual. If the accused did not commit a crime, then that must be determined through the rule of law, so that the innocent shall not be punished. Another, and equally important reason, is to prevent both harm to society and the erosion of the people's liberties. A system of justice that is corrupt, that is used by authorities to punish political opponents, or that lets the guilty go free, erodes the trust in government and society that is essential in a democratic society. Just as one cannot have a free society without liberty of speech or press, neither can democracy exist without a justice system that treats people accused of crimes fairly and ensures them their rights.
>
> This is not to say that the criminal justice system in the United States is perfect; there are often gaps between the real and the ideal, as there are in any society. But the constitutional requirements found in the Fifth and Sixth Amendments serve as constant reminders of what the ideal is, and provide

[10] Hamilton, *The Federalist Papers* No. 81.

[11] (This Section II of this paper is taken from U.S. Department of State publication, *Rights of the People: Individual Freedom and the Bill of Rights*. http://www.america.gov/st/democracyhr-english/2008/June/20080630224303eaifas0.7254129.html.)

[12] www.america.gov/st/democracyhr-english/2008/june/20080630224303eaifas0.7254129.htm

those who believe they have been unfairly treated the right to appeal adverse judgments to higher courts.

Because the workings of the criminal justice system are very important in a democracy, the right to a speedy and public trial refers not just to those accused of crimes; it is also a right of the public, one that suggests people may examine how the system is working and determine whether there are significant problems. Moreover, jury duty is an essential responsibility of citizenship, second only, perhaps, to voting itself. In no other governmental function is the average citizen asked to shoulder the task of determining whether someone is innocent or guilty of a crime, or bears the responsibility for civil damages. Jury duty is an education, in which people are asked to apply the law, and so they must learn to understand what the law is, and how it affects the case in front of them.

Alexis de Tocqueville, Democracy in America (1835)

The jury, which is the most energetic means of making the people rule, is also the most efficacious means of teaching it to rule well.

There are many aspects of the right to a fair trial, and while in certain instances one aspect may be of more importance than another, they are all part of that "bundle of rights" to which we have referred over and over again. At a trial, for example, the type of evidence that may be introduced is governed by the rules of the Fourth Amendment, which requires the police to have probable cause for searching a person's home, and then to secure a warrant in order to actually do so. Should the police fail to obey these constitutional commands, the evidence they seize may not be used at trial. Should the police fail to warn a suspect of his or her constitutional rights, then confessions made are considered invalid in a courtroom. When charged with a crime, if a person is denied access to an attorney, then it is clear that justice cannot be done in a fair trial.

To some people, all of these safeguards appear to be too favorable to the criminal, and they argue that a smart lawyer can ensure that a client, even a guilty one, will not be punished. Although there are occasionally high-profile cases where apparently guilty defendants have been freed, in fact if we look at the system overall it works remarkably well. The safeguards involving pre-trial investigations and arrest guarantee better, more professional police work, so that when an arrest is made, the chances are that sufficient evidence has been legitimately collected, proof of guilt is high, and the criminal is punished. But all of this takes place within a

constitutional framework carefully designed to limit the arbitrary power of the state.

* * * * *

A jury trial is essentially an effort to determine the truth. Did a person actually do what the state says he or she has done? In the past, efforts to determine truths took many different forms, and often included terrible physical ordeals. Hundreds of years ago, for example, the accused might suffer through a physical ordeal, in which he called upon God to prove his innocence. A person might be tossed into a pool to see if he would sink (innocent) or float (guilty); and if innocent, be retrieved, hopefully while still alive. In Europe, for the knightly classes, the ordeal often took the form of trial by combat, in which it was believed that God would strengthen the arm of the innocent who would then prevail over a false accuser or a true felon.

When the jury system that Americans have come to prize so highly first developed is not known. Before the Norman conquest of England, Saxon law required a definite and known accuser to publicly confront the accused; proceedings were open, and the presence of the community ensured fairness. The Norman Conquest introduced the grand jury, which derived from the Norman institution of "recognition by sworn inquest," whereby 12 knights, chosen to serve as "recognitors," inquired publicly into various matters of interest to the new rulers of England. These matters might include issues such as the rate of taxation or the feudal duties owed by a vassal to his lord.

As early as the 12th century, those bringing suit in certain cases relating to land ownership applied to the King's Court for the summoning of recognitors to ascertain the fact, either from their own knowledge or on inquiry of others; the verdict of the court, if unanimous, was accepted as conclusive. Eventually other questions of fact arising in the King's Court were handled in a similar manner, and a panel of knight recognitors became the jury. Originally, the jury members not only judged fact, but might also serve as witnesses because of their knowledge of the customs and the people of the locality. By the early 15th century, however, the judges of the common law courts restricted the jury to the single function of determining fact based on the evidence submitted in an action.

By the era of the American Revolution, trial by jury was an accepted right in every colony. The colonists saw it as a basic protection of individual freedoms, and Edmund Burke, the British statesman, warned Parliament

that the American colonies would rebel if the mother country attempted to restrict trial by jury. But that is exactly what Parliament did in the Stamp Act of 1765, when it transferred the trial of persons accused of smuggling to admiralty courts, where naval officials sat in judgment without a civilian jury.

John Adams, on the Stamp Act (1765)

But the most grievous innovation of all, is the alarming extension of the power of the courts of admiralty. In these courts, one judge presides alone! No juries have any concern there! The law and the fact are both to be decided by the same single judge.

Over time, two kinds of juries evolved, grand and petit, serving two different functions. The *grand jury* determines whether there is sufficient evidence to bring an indictment (official accusation) against a person for a particular crime, while the *petit jury* hears the actual case. The two juries are different in size, method of operation, and standards of evidence.

Currently, in the United States, a grand jury may have as many as 24 members. It may be called to investigate a complex issue or merely to determine whether to hand up an indictment to a court. If the former, the prosecuting attorneys will bring in witnesses, and the jury may return a report detailing its conclusions or it may indict persons whom they believe might be guilty of crimes. The procedures in a grand jury are quite flexible; it may hear evidence not permitted in regular trials, such as hearsay evidence, and its standard for returning an indictment is one of possibility rather than certainty. If there is sufficient evidence to make the members of a grand jury believe that a person may have committed the crime, they can return an indictment. A much higher standard prevails in the petit jury, when the case finally goes to trial.

Sir William Blackstone, Commentaries on the Laws of England (1765)

But in settling and adjusting a question of fact, when entrusted to any single magistrate, partiality and injustice had an ample field to range in; either by asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and varying others, and distinguishing away the remainder. Here, therefore, a competent number of sensible and upright jurymen, chosen by lot from among those of middle rank, will be found the best investigators of truth, and the surest guardians of public justice. For the most powerful individuals in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the

fact of his oppression may be examined and decided by twelve indifferent men, not appointed until the hour of the 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 general justice, and prevents the encroachment of the powerful and wealthy citizens.

The institution of the grand jury has often been seen as an important bulwark against tyranny. Despite the existence of the grand jury in England as far back as the 12th century, the Crown could also initiate criminal prosecutions on its own. The abuse of this prerogative led to popular uprisings against the Stuart monarchs Charles I and James II in England in the 17th century and by the American colonists against George III in the 18th century. In the Declaration of Independence, the colonists listed those rights that they claimed the King had transgressed, and prominent among them were rights of the accused. The leaders of the American Revolution pointed out that judges served at the King's pleasure, trials were rigged, jury trials had been denied, and trials had been moved to faraway venues – all of which mocked the ideal of due process of law that had been handed down from the Magna Carta. The principle that only the people as a whole through their representatives should have the power to institute criminal prosecutions is embodied in the Fifth Amendment of the Constitution, which guarantees the institution of the grand jury. Most state constitutions have similar provisions. Although the use of the grand jury was abolished in England in 1933 and replaced with the court clerk's preparing the indictment, it continues as an active although not universal feature of the American criminal justice system.

The petit jury normally has 12 members, but some states have smaller jury panels. They are chosen, like the members of the grand jury, from a pool of registered voters. The procedural requirements of a jury trial are quite precise, and rest upon the assumption that the accused is innocent until proven guilty. It is not the defendant's task to prove that he or she is innocent of the crime; rather, the burden is on the state to prove the guilt of the accused, and for felonies, the most serious crimes, the standard is "beyond a reasonable doubt." In federal courts and in most state courts, unanimous agreement is required for a guilty verdict. Should a majority of the jury vote for innocence, the defendant is discharged. Should a majority vote for guilt, however, this may result in what is known as a "hung jury," and lead to a new trial with a different panel.

The phrase "innocent until proven guilty" is not empty rhetoric. Constitutional provisions and the procedural rules that have flowed from them are designed to redress the clear advantage that the state has when confronting a single citizen. At the grand jury stage, the prosecution must prove, by a preponderance of the evidence, that the accused might have committed the crime. This standard is similar to the "probable cause" standard that police must meet in securing a search warrant. The grand jury need not know absolutely that the accused is in fact guilty, only that there is a reasonable possibility; actual guilt is determined by the petit jury.

In that trial, the prosecution lays out its case first, and each witness for the prosecution may be cross-examined (subject to questioning) by the defendant's attorney. The state must present evidence that has been lawfully secured, and it cannot introduce certain types of evidence, such as hearsay, that is, assertions based entirely on things a witness has heard from other people. Moreover, it cannot refer to matters that are beyond the scope of the current trial, such as the defendant's problems with the law at other times. If there are witnesses with evidence against the defendant, they must be presented in court, since under the Constitution the accused is entitled to confront those giving testimony against him. At the end of the prosecution's presentation, if the defense believes that the state has failed to make its case, it may request that the court summarily dismiss the charges. This rarely happens, but occasionally it does, and serves to remind the state that bringing ill-founded charges does not sit well with the judiciary.

The defense then presents its case, and its witnesses may also be cross-examined by the prosecutor. The defense has the power, under the Constitution, to compel the appearance of witnesses who can testify to the defendant's innocence. The defense need not prove the innocence of the defendant, only that there is a *reasonable doubt* regarding guilt.

This outline is, by its nature, merely an overview, and the actual procedural rules governing a trial are quite complex. That is one reason why the Constitution guarantees that a person accused of a crime is entitled to counsel to aid in his or her defense.

* * * * *

Justice Byron White, in Duncan v. Louisiana (1967)[13]

[13] 391 U.S. 145 (1968).

The question has been asked whether [trial by jury] is among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . . We believe that trial by jury is fundamental to the American scheme of justice. . . . The jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.

Regrettably, the reality of the American criminal justice system often falls short of the ideal. Harried and overworked prosecutors, public defenders [lawyers provided for free to indigent defendants] and judges often engage in "plea bargaining," in which the defendant agrees to plead guilty in return for a reduced sentence, thus saving the state the time and expense of a trial. And, despite the rules, trials are rarely the neat affairs one sees on television or in the movies. There is confusion and delay, lawyers are not always eloquent, nor are judges always paragons of judicial wisdom. Yet even with all its problems, the American judicial system both in its ideal theory and its sometimes flawed practice offers persons accused of crimes more protection than any other system in the world. Like all liberties, the right of fair trial is a work in progress, changing and improving to match similar transformations in society.

Indeed, if we look at how the jury system has changed over the years, we see that change within the Constitutional framework has always been the rule rather than the exception. Thomas Jefferson in the late 18th century noted that "the common sense of twelve honest men" (jurors) enhanced the chances of a just decision. He might well have added, at that time, "twelve honest, white, property-owning men," since jury rolls in the United States have always been taken from voter registration lists. Just as the right to vote has expanded over history (see Chapter 12), so have the rights and responsibilities of people heretofore excluded from full participation in the workings of government and law. As the Supreme Court noted in 1940, "Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government. It is part of the established tradition . . . that the jury be a body truly representative of the community."

Property requirements for civic participation fell into disrepute early on in American history, so that by the 1830s no state imposed the ownership of property as a precondition for either voting or for jury service. However, though the Civil War ended slavery, some southern states attempted to keep blacks off juries simply because of their race. In 1879, the Supreme Court

struck down a West Virginia statute that excluded blacks from grand and petit jury service. But since voting qualifications were then considered a matter of state law, once southern states devised various stratagems to deprive blacks from voting, they also managed to keep them off juries. If the voting lists did not include blacks, then neither did the jury pools.

But as the civil rights movement began to take shape in the 1940s, challenges to keeping blacks off juries found a sympathetic ear in the federal courts. In part, the country's ideas and ideals regarding race were changing, and they would come to fruition in the great upheavals of the 1950s and 1960s which finally won black Americans full legal rights in the country. As the courts have emphasized time and again, barring particular groups from jury service not only discriminated against those groups and prevented them from partaking fully in their responsibilities as citizens, it also deprived persons accused of crimes from one of the basic attributes of a free trial – a jury of one's peers.

Over the years, court cases have arisen not only from those who have, for one reason or another, been kept off jury rolls, but also from defendants who have claimed that barring certain groups from jury service denied them due process of law.

Justice Thurgood Marshall, in Peters v. Kiff (1972)

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude . . . that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

The largest group of people to be kept off jury lists consisted of women. Even after they received the vote in 1920, women were still excluded from jury service on the grounds that their primary duty was to take care of their homes and families. Even if women could vote, strong male prejudices continued to dictate that the "raw" material women might hear in the course of a criminal trial would shock their "delicate sensibilities."

Justice William O. Douglas, in Ballard v. United States (1946)

If the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and

systematically excluded from the panel? The truth is that the two sexes are not fungible: a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence of one on the other is among imponderables . . . . A flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community.

Eventually women won the right to full participation in the jury system, and there is no evidence that it has done anything to harm them. To the contrary, it has – as is the case with all groups whose rights have expanded – given them a better sense of the responsibilities that accompany citizenship.

* * * * *

The jury system, as we have seen, is designed to protect first and foremost the rights of persons accused of crimes. The theory is that a panel of one's fellow citizens – one's peers – are best qualified to judge guilt or innocence. Second, the jury system is essential to democracy in that it imposes a serious responsibility upon individuals who, as in perhaps no other setting, can learn how democracy works. But there is still a third aspect to the jury trial, the assurance to the community at large that the legal system is functioning properly.

Chief Justice Warren E. Burger, in Richmond Newspapers, Inc. v. Virginia (1980)

The origins of the proceeding which has become the modern criminal trial in Anglo-American justice can be traced back beyond reliable historical records. . . . What is significant for present purposes is that throughout its evolution, the trial has been open to all who care to observe. . . . From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice.

The First Amendment, in conjunction with the Fourteenth, prohibits governments from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted.

The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. Public access to trials was then regarded as an important aspect of the process itself; the conduct of trials "before as many of the people as chose to attend" was regarded as one of "the inestimable advantages of a free English constitution of government." In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees. . . . What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted. "For the First Amendment does not speak equivocally. . . . It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and "of the press could be eviscerated."

Although many people will never attend a trial in their entire life, they have a right to do so. Some would say that they even have an obligation to do so, because if eternal vigilance is the price of liberty, then there should be constant oversight of what many people consider a key element of democratic society.

* * * * *

Unlike nearly all the other liberties of the people, trial by jury has been the subject of serious criticism, and of the sort that requires extensive examination. Nowadays, people do not claim that the right of trial by jury should be replaced with ordeals by combat, or closed courtrooms where a single judge hands down unreviewable decisions. The ideal of a free and fair trial is that justice be done, and critics claim that the current system is so overloaded that truly free and fair trials cannot take place.

The current system, it is claimed, works poorly. There are too many trials, many of them for petty offenses that could and should be handled in a more efficient manner. Court calendars are overcrowded, so that oftentimes there may be delays of months or perhaps even years before an accused person is brought to trial, and, as the saying goes, justice delayed is justice denied. Public defenders are overworked, and cannot give truly effective assistance

to the poor people whom they serve. Public prosecutors, faced with too many trials and insufficient staff, are willing to enter into plea bargains that often penalize those accused of relatively minor crimes while letting those accused of more serious felonies off with minimal penalties.

Even when a case goes to trial, are juries actually the best means of determining truth? In former times, part of the rationale for a jury was that the panel members would know the neighborhood, know both the victim and the defendant, know the facts, and thus be able to reach a fair and just decision. Today, juror panels are taken from voting lists of jurisdictions that cover hundreds of square miles and contain hundreds of thousands of people. Jurors rarely know the accused, and if they do may be excused because of it, under the assumption personal acquaintance might unduly influence their judgment. In antitrust cases and in charges of stock manipulation and fraud, can the average citizen really understand the economic and accounting issues involved?

Are there more efficient means of managing the criminal justice system? After all, in Great Britain, the birthplace of trial by jury, only one percent of civil trials and five percent of criminal trials are decided by juries. "Bench trials," in which a single judge or a panel of judges hears the case without a jury, take less time, cost less money, and since they are open to the public and may be reviewed by appellate courts, are considered by many to be fair and efficient. Moreover, in cases involving difficult questions of law, judges rather than laypersons are better equipped to make a determination.

Prompted by such considerations, in the United States, in the area of civil law, there has been a growing movement toward impartial arbitration, where both parties agree to be bound by the ruling of an impartial outsider. Arbitration, it is claimed, is faster since there is no delay caused by overcrowded court calendars; it is fair; and when businesses are involved, it allows the parties to have the decision made based on the rules of the marketplace in which they operate.

Finally, it is charged, juries are notoriously fickle, and can ignore the law when they decide that a defendant had good reason to do whatever was done, or they can be manipulated by crafty attorneys.

All of these criticisms are partially true, and, in fact, the American systems of criminal and civil justice today rely on a variety of forms. There are bench trials, and there is arbitration. Moreover, good police work often yields such a convincing amount of evidence that accused criminals will plead guilty without a jury trial. As for so-called renegade juries that ignore

the law to vote their emotions, this is an occasional weakness of a system that relies heavily on the decisions of ordinary citizens. In addition, there have also been times in American history when "jury nullification" has taken place because juries have believed the laws to be unjust. Prior to the American Revolution, local juries refused to convict their neighbors accused of smuggling, believing the English trade and navigation acts to be unjust.

But to eliminate trial by jury because of perceived defects in the system would be to strike a blow against democratic government itself. For those who believe they will do better by bench trial or (in civil matters) through arbitration, that option is there. But for many, their only hope of establishing their innocence is to go before a jury of their peers, where the state must establish the issue of guilt "beyond a reasonable doubt."

Critics who look at the jury system simply in terms of its efficiency or inefficiency also fail to recognize the importance the jury has beyond the question of determining guilt or innocence. As society grows more complex, many people worry that the average citizen is growing disconnected from the government, that he or she is losing a sense of participation in the daily processes of democracy. Jury service, almost alone of everything a person does as a citizen, continues to provide that sense of both responsibility and participation.

A free and fair trial by a jury of one's peers remains a critical right of the people, both of those who may be accused of a crime, as well as those called upon to establish that fact.

IV. Why Is Trial Disappearing?

The data seems incontrovertible. The American jury system is dying—faster on the federal side—but also on the state side. This is true even though the jury is, perhaps, the only exceptional thing about *American* jurisprudence.[14] Without question, several reasons are principal among those causing the decline in jury trials at a significant, indeed alarming rate. The attitude of the public and legislators is part of the problem. But, not all of it.

[14] Some scholars say a second exceptional aspect of American jurisprudence is first-line judicial review of legislative enactments on constitutional grounds. In the United States, trial judges have the right, duty, and power to interpret the organic law, i.e., the Constitution and Statutes. Trial judges, including state trial judges, also interpret state organic law for its compliance, or violation, of the United States Constitution's supremacy clause. Placing this responsibility in first line jurists, instead of a specialized constitutional court, is a second distinguishing hallmark of American jurisprudence.

Judges, now, do not merely manage cases. Often, they shape litigation by deciding issues in cases as they arise, directing the evidence gathering process, ordering mediation, delaying scheduling to force parties to reconsider matters, and using technique upon technique to avoid trial. Summary judgment has explored as a dispute resolution device. It has lead to the regrettable process, accepted and bought into by judges, of deciding matters on an issue-by-issue basis when doing so clearly involves increased judicial energy and often delays resolution while enhancing cost. The only thing saved is time with a jury. This "savings" deprives the litigants of their original reason for going to court and prevents citizens in investing in their nation and state through mandatory government service.

The out-of-control use and enforcement of arbitration is a second problem. Arbitration clauses are ubiquitous. They appear in car rental contracts, credit card company contracts, bank loan agreements, landlord-tenant leases, office equipment leases, and perhaps even in the contract signed by lawyers for their online computer assistance services. Lawyers are altogether too reluctant to strike them out and insist they be removed.

Mediation, in some states called facilitation, is now mandatory in most places. In Nebraska, judges can now order it.[15] For some cases, mediation is fine. For others, it thwarts the very essence of the dispute resolution process so vital to permit people the catharsis of trial and a mechanism whereby they can cope with losing. Settlement is not always a dispute resolution surrogate for trial.[16] The outcome in many cases, i.e., the motive that drives people is not recovering money, or even deciding child custody or visitation matters. Instead, people want to tell their story. In mediation, they get no chance to do so.[17] In some states, legislation governing the use of ombudsmen and the regulation of certain professionals, including matters involving fee disputes, keep things from court.[18]

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[15] *Neb Rev Stat* §§ 25-2932 *et seq., Nebraska Mediation Act. Neb Rev Stat* § 25-2934 provides, "A court may refer a civil case to mediation or another form of alternative dispute resolution and, unless otherwise ordered following a hearing upon a motion to object to such referral, may state a date for the case to return to court." Under the Parenting Act, mediation can be ordered. *Neb Rev Stat* § 43-2937. In civil cases, generally, mediation is now a tool available to the court.

[16] Perhaps it is valuable to recall the day of admission to the Bar and the thrill of taking the oath that makes one a lawyer. Lawyers are sworn in by a court to practice law before courts. Mediation is a subordinate, and junior dispute resolution method. No license is required to appear before a mediator. And, the advocate at mediation is not required to swear an oath of allegiance to the law.

[17] Like nearly all trial lawyers, our experience is our clients do not complain about losing, and return for our services after losing, if they feel like they have been effectively represented and have their day in court. Trial lawyers are seldom blamed for losing if they try their cases well.

[18] See 4 *Civil Action 1*, Spring 2005 (publication of the National Center for State Courts). This issue highlighted aspects of the Center's Civil Justice Reform Initiative.

The scope and breathe of trial's vanishing has been cataloged by several authors and commanded the attention of a few.[19] Entire systems have been created to handle issues related to Social Security benefits, black lung, employment issues, workers compensation, and other kinds of claims. Administrative law judges, who function without the *possibility* of trial by jury, exist and are expanding in numbers at both state and federal levels. Mark S. Galanter of the University of Wisconsin College of Law suggests that "vanishing trials" might be relabeled as "displaced" trials. Instead of saying trials are vanishing, perhaps it is more accurate to say that what was originally a citizen-driven and a citizen-based decisional process has now passed to the hands of a new cadre of judges who, at both the state and federal levels, have formed new, or massively expanded hierarchs, and seem to view the jury as a treat to their empowerment.

Surely, it is fair to say that for several decades, business and insurance interests have disparaged civil juries while courts have failed to defend the institution upon which judicial moral authority ultimately depends.[20]

Perhaps an institutional mistake of constitutional and substantial dimension has also contributed to the decline in trial by jury. *F R Civ P* 50(a)(1) contains this language which is starkly inconsistent with the Seventh Amendment:

> (1) ***In General,*** if a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:
>
> (A) resolve the issue against the party; and
> (B) grant a motion for judgment as a matter of law….

This procedure is nothing more than a delayed summary judgment in some settings. But, Rule 50 has been used altogether too frequently to ignore jury verdicts, cast them aside, and enter judgment on the judge's view of the facts. Rule 50(b) provides:

> If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. Not later than 28 days after entry of the judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days

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[19] See Ostrom, et al., *Examining Trial Trends in State Courts: 1976-2002*, I Journal of Empirical Legal Studies, Issue 3, November 2004. See also Galanter, *The Vanishing Trial: An Examination of Trial and Related Matters in Federal and State Courts*, 1 Journal of Empirical Legal Studies 3, November 2004.

[20] Young, XL Suffolk L Rev 67 at 76, *supra.* See, for example, the website of the *Institute for Legal Reform*, an affiliate of the U S Chamber of Commerce, http://www.instituteforlegalreform.com/.

> after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial…. In ruling on the renewed motion, the court may:
>
> (1) allow judgment on the verdict, if the jury returned a verdict; or
> (2) order a new trial; or
> (3) direct the entry of judgment as a matter of law.

The official comments to the Rule include a reference to the Seventh Amendment, and suggest the Rule was drafted in an effort to circumvent the Amendment's mandate:

> Rule 50(b) is amended to permit renewal of any Rule 50(a) motion for judgment as a matter of law, deleting the requirement that a motion be made at the close of all the evidence. Because the Rule 50 motion is only a renewal of the pre-verdict motion, it can be granted only on grounds advanced in the pre-verdict motion. The earlier motion informs the opposing party of the challenge to the sufficiency of the evidence and affords a clear opportunity to provide additional evidence that may be available. The earlier motion also alerts the court to the opportunity to simplify the trial by resolving some, or even all, issues, without submission to the jury. *This fulfillment of the functional needs that underlie present Rule 50(b) also satisfies the Seventh Amendment*. Automatic reservation of the legal questions raised by the motion conforms to the decision in *Baltimore & Carolina Line v. Redman*, 297 US 654 (1935). (emphasis added)

But, courts, and commentators, are not perfectly uniform in their view that the Seventh Amendment is so easily placated.

In 1913, *Solcum v. New York Life Ins. Co.*,[21] held a federal Court of Appeals lacked authority to order entry of a judgment contrary to a verdict. The case was one in which the Court of Appeals found a directed verdict should have been granted, but the jury found for the other party. The Supreme Court held the only course open to either court was to order a new trial. The five-four decision was viewed as consistent with the common law. Yet, it was heavily criticized based on convenience. Subsequent cases dramatically impaired the *Solcum* holding.[22]

First, the court held a trial court has a right to enter judgment on a verdict of the jury after reserving that decision on a motion by the defendant for dismissal on grounds of insufficient evidence. *Baltimore & Carolina Line v. Redman*, 295 US 654 (1935).

[21] 228 US 364 (1913).
[22] This history is recounted *at F. James Civil Procedure*, 332-33 (1965).

The Supreme Court's decision, in *Baltimore & Carolina Line*, distinguished *Solcum*. The *Baltimore* court noted its ruling qualified some of the positions taken in *Solcum*.

Later, the Supreme Court dealt with the issue further in *Lyon v. Mutual Benefit Ass'n*, 305 US 484 (1939). There, the court sustained a district court's rejection of a defendant's motion for dismissal and peremptorily directed a verdict for the plaintiff. The Supreme Court held there was ample evidence to support the verdict and the federal court acted appropriately.

A third case, *Galloway v. United States*, 319 US 372, 398 (1943) led to the Supreme Court's observation that "the practice has been approved explicitly in the promulgation of the *Federal Rules of Civil Procedure*." The court cited *Berry v. United States*, 312 US 450 (1941) where the court remarked the new rule of civil procedure had given "district judges, under certain circumstances… the right (but not the mandatory duty) to enter a judgment contrary to the jury's verdict without granting a new trial." But, that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact—a jury being the constitutional tribunal provided for trying facts in courts of law."[23]

Justice Black, speaking for a three-judge dissenting group in *Galloway*, lamented in dissent that, "Today's decision marks a continuation of the gradual process of judicial erosion which in 150 years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment."[24]

Even the Supreme Court has had serious trouble harmonizing attempts to preserve the historic common law covering the relations of judge and jury with the clear and compelling language of the Seventh Amendment.[25]

V. Why Is Such An Important Right so Marginalized?

> "Yet the American jury system is dying. It is dying faster in the federal courts than in the state courts. It is dying faster on the civil side than that on the criminal side, but it is dying. It will never go entirely, but it is already marginalized."[26]

[23] *Berry v. United States*, 312 US 450, 452-53 (1941).
[24] *Galloway v. United States*, 319 US 372, 379 (Brennan, J. dissenting).
[25] See *Neely v. Martin K. Eby Sons T Co.*, 386 US 317 (1967) (interpreting *F R Civ P* 50 and the Seventh Amendment)
[26] Hon Wm Young, U S District Judge, Dist of Massachusetts, speech to Florida Bar July, 2007.

Judge Young's comments seem dire. But the data supports his words. The National Center for State Courts[27] and the US Courts, both publish data confirming the scope of the problem.[28] This table[29] reporting results through 2008 tells the story:

Table 4.10
U.S. District Courts – Civil Cases Terminated, by Action Taken

Fiscal Year	Total	No Court Action	Total	Before Pretrial	During or After Pretrial	During or After Trial			
						Total	Nonjury	Jury	% Reaching Trial
1990 [1]	213,429	51,630	161,799	127,017	25,519	9,263	4,480	4,783	4.3%
1995	229,325	36,558	192,767	166,017	19,307	7,443	3,317	4,126	3.2%
2000	259,234	43,281	215,953	189,808	20,365	5,780	2,001	3,779	2.2%
2004	252,016	54,273	197,743	174,212	19,580	3,951	1,422	2,529	1.6%
2005	270,973	62,661	208,312	183,072	21,341	3,899	1,289	2,610	1.4%
2006	272,644	60,863	211,781	170,028	38,198	3,555	1,140	2,415	1.3%
2007	239,292	55,275	184,017	150,756	23,429	9,832 [2]	1,093	8,739 [2]	4.1%
2008	233,826	55,024	178,802	151,404	22,675	4,723 [3]	2,510 [3]	2,213	2.0%

Note: Land condemnation cases omitted.

[1] Twelve-month period ending June 30.

[2] These increases resulted from terminations of oil refinery explosion cases in the Middle District of Louisiana.

[3] More than 1,400 of the cases were related to oil refinery explosions in the Middle District of Louisiana.

Source: Table C-4, *Annual Report of the Director: Judicial Business of the United States Courts.*

Impact on State Court Functions

The National Center for State Courts has candidly said this problem with the decline in jury trials, and trials in general, has "reoriented [the court] itself to focus on resolving cases before a jury verdict. This is often accomplished by impending early case management, judicial intervention, and handling pretrial motions."[30] The Center cautioned this trend "may also mark a major shift of power from appellate judges to trial judges. With the increase in managerial judging, the trial judges have been granted a largely unreviewable discretion to encourage settlement."[31] The authors wonder whether appellate jurists, who have, in many states, encouraged alternative dispute resolution

[27] http://www.ncsconline.org/Projects_Initiatives/Images/CivilActionSpr05.pdf
[28] See, the shocking decline in trial numbers reported by the Statistical Reports on the Business of the U S Courts. The may be viewed at www.uscourts.gov/statistics/judicialbusiness.
[29] 2008 Statistical Report, Business of U S Courts, http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2008/Table410.pdf
[30] See 4 *Civil Action 1*, Spring 2005 (publication of the National Center for State Courts). This issue highlighted aspects of the Center's Civil Justice Reform Initiative.
[31] *Id.*

processes and helped make them rampant, have considered the risk to their own judicial authority.

Judge Patricia Wald, writing a tribute to Professor Charles Allen Wright, observed:

> Federal jurisprudence is largely the product of summary judgment…[32]

The summary judgment observation is not just a complaint by a lawyer whose work is predominately for plaintiffs. It has been observed that institutionally, federal courts today seem unconcerned with jury trials.[33] Judges demonstrate a willingness to "accept a diminished less representative, and thus sharply less effective, civil jury."[34]

The Courts have failed to do so despite the likely connection between a powerful jury system and a powerful independent judiciary which has been the envy of the world.[35] The attack by business on civil juries was followed by members of Congress who, dependent upon business interests for campaign contributions, took up the cause. A sophisticated analysis of the problem concludes that, "a civil justice system without a jury would evolve in a way that more reliably serves the elite business interests."[36]

The judicial role in the decline of the American jury is palpable. Regrettable and unmistakable mistakes along the way have been made, largely driven by shallow thought. In *Patton v. United States*, the Supreme Court held that "the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused."[37] Fortunately, *Patton* was eventually abrogated, but on other grounds.[38] Today the federal criminal justice system's undeniable focus is on plea bargains. Nothing gets a hearing faster than word a plea bargain has been reached. Trials—and jury trials—are altogether too often extraneous. Much lip service is made to the possibility, but few lips move during the process of trial by jury. Offenders are rewarded for waiting juries and getting it over with. They are incentified to forego a constitutional right by the criminal sentencing process. In fact, to resolve their cases, offenders are

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[32] Patricia Wald, *Summary Judgment at Sixty*, 76 Tex L Rev 1897 (1998).

[33] See *Edmond v. Ludwick, The Changing Role of the Trial Judge*, 85 Judicature 216, 216-17, 252-53 (2002).

[34] See Judith Resnik, *Changing Practices, Changing Rules, Judicial & Congressional Rule Making on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA L Rev 133, 137-52 (1977) (decrying failure of judicial conference to restore 12-person jury in civil cases). See also Development and the Law, *The Civil Jury*, 110 Havard L Rev 1408 (1466-89) (1997).

[35] See generally, Clermont & Eissenberg, *Litigation Realities*, 88 Cornell L Rev 119 (2002), and *United States v. Reed*, 214 F Supp 2d 84 (D Mass 2002).

[36] Valerie P. Hans, *Business on Trial: The Civil Jury and Corporate Responsibility*, 226-27 (2000).

[37] *Patton v. United States*, 281 US 76 (1930).

[38] *Williams v. Florida*, 399 US 78 (1970).

routinely and severely punished for crimes for which they have never been charged.[39] Even more incredibly, at times they are punished for crimes for which a jury acquitted them.[40]

The judicial system's preference for arbitration threatens the American jury, too. The Supreme Court, with its decisional framework that many commentators have criticized, interprets the federal *Arbitration Act* as supplanting jurors with arbitrators. This happens on a recurring basis.[41] Critics of this decision have been vocal.[42] So, today citizens cannot trade on stock exchanges,[43] have long distance telephone service,[44] or accept employment without surrendering statutory and procedural rights, unless they fit into specialized classes.[45]

Despite the Seventh Amendment's prohibition that decisions of juries will not be reviewed, appellate judges, and even trial judges in post-trial motions, freely and regularly examine jury verdicts. The Seventh Amendment's overt mandate is utterly ignored.[46] Some of American's preeminent scholars have commented on this topic.[47]

The disappearing jury is not simply a consequence of procedure. It is not simply the result of a change purchased by big business. And, it is not a sign of modernity. Instead, it is a product of culture—largely judicial culture. Judges do not sufficiently revere the jury system to protect it. Neither do lawyers.[48] As Judge Young wrote, "We have so deconstructed the role of trial judge that today far too many judges do not understand the concept." Judge Young cited an anecdote by a former federal law clerk, who described a clerkship for an anti-trial judge who hated trials and had the "enter my courtroom and I'll make you pay" sentiment.[49] Professor Resnik of Yale once recounted a professional meeting where she heard a federal judge remark that "he regarded the 8% trial rate as evidence of 'lawyer's failure.'" In fact, judges are rewarded for avoiding

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[39] For example, see Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 Judicature 173, 176 (1995).

[40] See *Watts v. United States*, 519 US 148, 156 (1997).

[41] *Southland Corp v. Keating*, 465 US 1, 11 (1984) (FAA applies in state courts and preempts state law).

[42] Christopher R. Drahozal, *Re-examining the Legislative History of the Federal Arbitration Act*, 78 Notre Dame L Rev 101, 103 (2002).

[43] *Finance House, Inc., v. Otten*, 369 F Supp 105 (ED Mich 1973); 15 *USC* § 780-3 *et seq.*

[44] *Boomer v. ATT Corp*, 309 F 3d 404, 423 (7th Cir 2002)

[45] *Circuit City Stores, Inc., v. Adams*, 523 US 105, 132-33 (2001).

[46] See *Pickett v. Tyson.*, 420 F 3d 1272 (11th 2005) (vacating $1.267 billion jury verdict for cattle producers for insufficient evidence of harm to market for fed cattle); see also Domina *Proving Anticompetitive Conduct in US Courtroom*, 2 Journal of Ag Food & Industrial Organization, Art 8 (2004).

[47] Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Way in Court & Jury Trial Commitments*, 78 NYU L Rev 982 (2003).

[48] Young, *Ravishing Trials, Ravishing Juries, Ravishing Constitution*, XL Suffolk L Rev 68, 79 (2007).

[49] This story is told by Paul Butler, *Case for Trials: Considering the Intangibles*, I J Empirical Legal Stud 627 (2004).

trial. "The more cases you settle, the better your statistics and better yet, no one criticizes you."[50]

These attitudes have long tails. Conferences with lawyers in chambers, instead of in the courtroom, are surely a symptom.[51] The authors have conducted trial in the United States District Court for the District of New Mexico. A new multi-story courthouse, there, is designed for courtroom sharing.

As Justice Young says, "Somehow we [judges] seem to be forgetting that the very reason for our judicial existence is to afford jury trials to our people pursuant to the United States Constitution."[52] It is also worthwhile to see *US Const* Art III, § 2.

VI. What Can Be Done To Save The Trial Process?

Lawyers must help judges and help them to regain a whetted appetite for the trial process. Our attitudes about trial and the jury must change. Efficient, thoughtful, decision-oriented trial presentations are needed. Salesmanship has been overvalued. Advocacy has been diminished. Manipulation has supplanted careful thought and tactical consideration. "Jury consultants" have developed a cottage industry in a context where the only inquiry about the jury should be one designed to assure impartiality and objectivity, but not to use the voir dire, or pre-voir dire questionnaire, process to choose predisposed jurors who are, in fact, not fair, but predisposed.

The trial need not be the object of fear for the judge or the lawyer. Solutions are available. First, judges can become very comfortable with the trial process, if they will practice at it. A few jury trials can readily make the trial process pleasant and appealing to the jurist who presides—if the case is well tried.

Chief Justice William Rehnquist long advocated a certification process to require trial lawyers be limited in number, certified separately, generally get their cases from other lawyers, and be required to demonstrate proficiency by maintaining a minimum number of trials annually. This idea has merit.

In addition, Chief Justice Rehnquist, and many others, have advocated that "trial lawyers" should be required to appear in both civil and criminal proceedings, and their practice and continuing certification criteria largely mandate they be in court regularly, in

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[50] Hon. Nancy Gertner, US District Court, D Mass, *A Quasi Independent Judiciary,* Address to the Massachusetts Bar, January 26, 2006.

[51] The Judicial Conference of the Unites States has urged courtroom sharing since a single judge does not need one on a full time basis. See, Judicial Conference of the United States, Securities and Facilities Committee, *US Courts Design Guide*, Ch 4 at 41 (4th Ed 1997).

[52] Young, XL Suffolk L Rev 67

manageable settings, and be freed from the discovery process.[53] A similar approach has been advocated by others. Surely, this approach, if implemented, would help to eliminate the frustration experienced by trial judges and jurors at dealing with incompetent presentations at trial by lawyers who are in court too seldom. The process would also largely eliminate horror stories about the uncertainties, delays, costs, etc., of trial by streamlining the process.[54]

Obviously, the discovery process is out of hand. Unless the lawyers involved are, themselves, wise enough to recognize their job is to a get a dispute to resolution on the merits, the wealthier party can win by attrition during discovery unless the trial judge is willing to step in and take control. Few Rule 37 motions to restrict discovery are made and fewer are sustained. More are needed. Lawyers should file them without fear of losing Rule 37 motions. Only by appearing in court time after time to seek constraints on the discovery process, making the amount of discovery permitted match the complexity of the case, will the corner ever be turned on the abusive and illogical system, as it exists today, permitting a meritorious claim be destroyed without ever reaching the merits by simply allowing inanities and absurdities to be plumbed in the name of efforts "reasonably calculated to lead to the discovery of admissible evidence."[55]

Streamlining trials with increased judicial management could involve other things such as:

(a) Time constraints—each party is given a specific amount of time, and when the party is on its feet in the courtroom, the clock is against it. This can include voir dire, opening statements, and the presentation of evidence. Cross-examination counts against the cross-examiner. So does disorganized or lengthy voir dire.

(b) The number of exhibits can probably be limited. Focus on key documents, advance review of documents in excess of a particular number for evaluation of their necessity under Rule 403 of the *Evidence Code*, is a possibility.[56]

(c) Summary jury trials could be used and should be encouraged.[57] The summary jury trial statute could be amended to permit a trial judge to order

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[53] Generally, reform of the American system by incorporation of some aspects of the British system was within Chief Justice Rehnquist's vision.

[54] Hon. William Rehnquist, the 1999 Year-End Report on the Federal Judiciary, the Third Branch, January 2001 at 1 (Admin Office, US Courts, DC), www.uscourts.gov/ttb/jan00ttb/jan2000.html

[55] *F R Civ P* 26.

[56] This approach has been advocated by the National Center for State Courts.

[57] Summary jury trials in Nebraska are authorized by *Neb Rev Stat* §§ 25-1154 *et seq.* Sec. 25-1155 permits the court to grant a motion for a summary jury trial and the motion may "contain a stipulation of the parties concerning

a summary jury trial. A set of statutory standards for such an order could certainly be drafted. In view of the language of Nebraska's summary jury trial statute an amendment, enacted by the Legislature, is necessary.

(d) Permitting jurors to take notes and ask questions should be encouraged. Pointed, thoughtful jury questions can often guide lawyers to get to an issue, or clean one up, and may help with expediting and effectively resolving issues during the jury trial process.[58] Where they are used, most judges require the questions be written and reviewed by the judge in advance for evidentiary concerns. In trials concluded by the authors, juror questions have ranged from "are you related to X, Mr. Witness?" to a juror question posing a piercing question about the methodologies used by a statistician to calculate the incidence and predictability of an event and secondarily to quantify damages. The same juror asked a different, equally piercing statistics question to the expert statistician on each side of the case.

There is some genuine hope the Supreme Court of the United States has understood the diminishing jury is an important institutional problem for the nation. Now "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt."[59] In *Blakely v. Washington*, Justice Scalia wrote that the court's "decision cannot turn whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice… There is not one shred of doubt… about the framer's paradigm for criminal justice: not the civil-law idea of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury."[60]

Finally, the draconian *Federal Sentencing Guidelines*, which will surely be viewed by historians as a black mark on the nation's history in the 20th Century, were invalidated by making mandatory certain sentencing features without jury fact finding.[61]

We can all hope that soon similar vibrance will be found in the obvious mandate of the Seventh Amendment prohibiting judges from meddling with jury decisions once they are rendered.

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the use or effect of the summary jury verdict." But § 25-1157 makes it clear that "summary jury trial shall not result in a final determination of the merits and shall not be appealable. Neither the fact of the holding of a summary jury nor the jurors' verdict, nor the presentations by the parties shall be admissible as evidence in any subsequent trial of the act…." To the author's knowledge no more than a handful has ever occurred. When the authored has proposed their use in select cases, judges have reacted favorably to the idea, but fearfully to engaging in much encouragement the parties consent to the approach.

[58] Juror questions after the parties have finished should be permitted.

[59] *Apprendi v. New Jersey*, 530 US 466, 490 (2000).

[60] *Blakely v. Washington*, 542 US 296, 313-14 (2004).

[61] *United States v. Booker*, 543 US 220 (2005).

The American Bar Association has emphatically urged restoration of the jury trial process, including the twelve-person jury.[62]

Several federal judges have argued vigorously for trial judges to "return to being trial judges, instead of docket managers. They should start treating jury trials as a vindication of the justice system rather than a failure to the justice system. They should revere and respect the jury trial as the centerpiece of American democracy."[63]

Interestingly, a recent study disclosed the District of Montana, the 66th largest district by total filings, ranked first among the federal districts in trials completed. Nebraska, the 40th largest district by filings, ranked 8th. The Southern District of Texas, the 5th largest by filings, tied Nebraska, as did the Eastern District of Virginia, the 21st largest. The Southern District of Iowa, the nation's 51st largest district by filings, ranked 6th in trials completed. This report is for 2003.[64]

These numbers do not hold, however. During the year ending in September 2009, ten (10) civil jury trials were conducted in the United States District Court for the District of Nebraska.[65] This is less than two (2) per Judge and Magistrate Judge per year.

VII. How Can Judges Contribute to the Solution?

Judge Harold Young's work from the District Court bench in Massachusetts has forged arguments to guide judges and encourage their role in repairing the diminishing trial problem. His suggestions are as follows:

a. Devote time to adjudication and management documents with a view toward maximizing, not diminishing, time spent on the bench trying cases.

b. Where necessary, run the trial list for specific dates, and require civil litigants to stand in line while cases before them settle or go to trial. However, allow the lawyers to choose a month in which to commence trial, knowing they will go on the running list for that month.

c. Negotiate with parties and establish reasonable time limits for civil trials.

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[62] American Bar Association, *Principles for Juries and Jury Trials: American Jury Project*, 18-19, available at www.abanet.org/juryprojectstandards/the_aba_Princples_for_Juries_and_Jury_Trials.pdf.

[63] Alexander Sanders, former Chief Justice, South Carolina Court of Appeals, *Ethics Beyond the Code: The Vanishing Jury Trial*, Address to the American Trial Lawyers Association (December 2, 2005).

[64] Administrative Office of the United States Courts, Federal Management Statistics 2003 & 2004, www.uscourts.gov/fcmstat/index.html.

[65] *Id*., 2009 statistics.

d. Grant trial continuances only if the lawyer for the party is in trial elsewhere when the case is called, or if an individual litigant has died and the case has not yet been revived, but try to get it revived.

e. Manage the work load so the trial day permits the court to do other work. This may mean quitting at 3:00 and lengthening the trial duration, but it permits the process to go forward effectively.

VIII. An Interesting Time Line of The Right to Trial by Jury.[66]

The National Center for State Courts provided this chronology of the development of the right to trial by jury. A little history is always a good thing:

Civil Justice Timeline

1215—Magna Carta
1776—Declaration of Independence
1787—U.S. Constitution
1789—Judiciary Act establishes federal court system
1906—Roscoe Pound delivers speech on "The Causes of Popular Dissatisfaction with the Administration of Justice" at the ABA annual meeting in St. Paul, Minnesota
1925—The Federal Arbitration Act (FAA), which recognized arbitration contracts as enforceable, is enacted
1934—Congress gives Supreme Court the power to promulgate federal rules
1937—Federal Rules of Civil Procedure adopted
1939—U.S. Administrative Office of the Courts established
1947—Federal Mediation and Conciliation Service (FMCS) created
1955—National Conference on Court Congestion and Delay
1958—National Conference on Court Congestion and Delay reconvened
1967—Federal Judicial Center (FJC) established
1971—National Center for State Courts conceived during the National Conference of the Judiciary
1976—National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (a.k.a. "the Pound Conference"), St. Paul, Minnesota
1978—U.S. Bankruptcy Courts established
1988—The Judicial Improvements and Access to Justice Act enacted, the first statutory provision for ADR in federal courts.
1990—Civil Justice Reform Act (CJRA) instructed federal district courts to consider using ADR; nearly half establish mediation programs
1998—Alternative Dispute Resolution Act of 1998 authorized use of ADR (including mandatory ADR) in federal district courts and required every such court to have at least one ADR process/program
2002—District of South Carolina issues local rule 5.03 prohibiting sealed settlements
2002—Federal Rule of Civil Procedure 5(d) amended, requiring that all "discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing"
2005—Class Action Fairness Act (CAFA) signed into law

A remarkable, and rare book, Wm Forsyth, *History of Trial by Jury* (1875), provides an arresting recantation of the jury's evolution.[67]

[66] 4 NCSC *Civil Action* No. 2 (Spring 2005).
[67] The book may be read at http://www.constitution.org/cmt/wf/htj.htm

Conclusion

Trial lawyers and all judges exist to try cases. We do not exist to find angles, frustrate with discovery, or learn how to manipulate in order to win. In fact, winning is not our first priority. Trial is our obligation. Lawyers are sworn in by a court to practice law before courts. Mediation is a subordinate, and junior dispute resolution method. No license is required to appear before a mediator. And, the advocate at mediation is not required to swear an oath of allegiance to the law.

A trial lawyer quoted often, and revered even more when he is quoted, said, [68]We cannot escape history…. It will light us down, in honor or dishonor, to the latest generation."

Surely, here in Nebraska, too, history will "light us down" as failed trial lawyers unless we exhort our judges, and command ourselves, to value trial, respect its process, and honor its occurrence more than we facilitate its demise by over-emphasizing client-oriented, instead of institution-oriented, success in litigation.

Parties win and lose. Their lives go on. But, if courts lose trials and juries, courts will lose the respect of the public.[69]

Good lawyers will win our share of cases, and lose cases we should lose, but need to try because the people involved need the catharsis of trial. We owe it to our fellow citizens, our clients, and ourselves to revere the trial process, respect the jury, and honor the juror.

We might also do well to consider a diminishing number of jurors means, perhaps inevitably, diminished respect for the judiciary, and the process of government itself.

Do we dare risk the loss of what we hold dear because we try too hard to manage the docket away from trial, not toward it, or because we value winning at any cost over presenting a case at trial for a decision to be made? Our founding fathers did not suffer from these failings. And, we should not.

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[68] President Abraham Lincoln, Annual Address to Congress (December 1, 1862).

[69] It may be argued, vigorously, that this is already happening. As jury trials have diminished, already massive dissatisfaction with government has sprung upward and into existence, congress has become more dysfunctional than ever, and openly disrespectful and borderline "treasonist" comments have been made by persons who ought to know better. See the comments of Texas Governor Rick Perry. http://www.wikio.com/video/texas-governor-texas-leave-union-1024162