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THE AMERICAN CIVIL JURY TODAY

Richard A. Michael[*]

The Seventh Amendment of the United States Constitution requires that "[i]n Suits at common law where the value in controversy shall exceed twenty dollars," the right to trial by jury "shall be preserved." In essence, this provision requires that civil cases in the federal courts seeking monetary damages be tried by a jury. While this provision is not applicable in state courts,[1] most states have their own constitutional provisions which require a civil jury in similar types of cases.[2]

The American civil jury is, nevertheless, quite controversial today. Although the non-legally trained citizen typically views juries as an important bulwark of American civil liberties, the image they often conjure of a jury is that of a criminal jury, where the jury stands as a significant barrier between

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[1] *See* Minneapolis & St Louis R.R. Co. v. Bombolis, 241 U.S. 211, 217 (1916); *See also* Gasperini v. Ctr. For Humanities, 518 U.S. 415, 423 (1996); YEAZELL, CIVIL PROCEDURE 613 (8th ed. 2012).

[2] *See Principles for Juries & Jury Trials,* AM. BAR ASS'N (American Jury Project), (2005), at 2, https://www.americanbar.org/content/dam/aba/administrative/american_jury/principles.authcheckdam.pdf. Accordingly, the practical significance of the inapplicability of the Seventh Amendment in the state courts is that the United States Supreme Court decisions interpreting the right to civil jury trials are not binding on the states.

the state, the prosecuting agency, and the individual charged with a crime. No need for such a barrier exists in civil litigation, where disputes are mostly between two private individuals or entities.[3]

England, where the civil jury originated, has abandoned civil juries except in an extremely small percentage of its civil cases.[4] The United States is now one of the very few jurisdictions in the world that regularly employs civil juries.[5] When the American Law Institute attempted to adopt a proposed procedure to be employed in transnational litigation, it quickly learned not only that the rest of the world would not accept civil jury trials, but also that the American bar would not abandon them. This created a need for the American Law Institute to limit its proposed procedural plan to commercial litigation where, apparently, the American bar was willing to forgo jury trials and to exclude tort litigation from the proposed plan.[6]

As one authority reported, "In most of the world, the idea of having untrained lay people decide legal disputes is nonsensical and irrational."[7] Another states: "[I]n most respects the civil jury was relatively uncontroversial through the nineteenth and the first half of the twentieth century. But by the middle of the twentieth century, changes in legal doctrines about personal injury put civil jury verdicts in the eye of a storm."[8]

Ever since Kalven and Zeisel's groundbreaking work, *The American Jury*, was published in 1966, there has been a substantial increase in the empirical studies attempting to evaluate how well juries perform their intended functions. Unfortunately, most of these studies were primarily focused on American criminal juries. Nonetheless, these studies made many important findings applicable to civil juries although many conclusions remain uncertain.

This Article will attempt to identify and isolate the various functions

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[3] The most common civil jury cases in the state courts where the state is a litigant are eminent domain cases.

[4] Administration of Justice (Miscellaneous Provisions) Act 1933, ch. 23–24, Geo. 5; *See also* Jackson, *The Incidence of Jury Trial During the Past Century,* 1 MODERN L. REV. 132, 141 (1937). A right to jury trial was preserved in cases alleging fraud, defamation, false imprisonment, malicious prosecution, seduction, and breach of promise of marriage unless the trial will require a lengthy examination. *Id.* In the King's Bench division of the High Court of Justice 96% of the cases were tried to a jury in 1876, 40% in 1932, and 12% in 1935. *Id.* at 134–35.

[5] *See* OSCAR G. CHASE, LAW, CULTURE AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT 55 (2005) ("While the jury retains a lively role in criminal cases in most English-speaking nations (but not in the rest of the world), it is striking that in no other nation does the jury play the role in civil litigation that it does in the United States.").

[6] *See* ALI/UNIDROIT, PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE. Discussion Draft No.3, 56 com. R-2A (Apr. 8, 2002) states that the "Rules apply to contract disputes and disputes arising from contractual relations; injuries to property, including immovable (real property), movable property (personal property), and to intangible property such as copyright, trademark, patent rights; and injuries resulting from breach of obligations and commercial torts in business transactions. They do not apply to claims for personal injury or wrongful death."

[7] SUZANNA SHERRY & JAY TIDMARSH, CIVIL PROCEDURE: ESSENTIALS 96 (2007).

[8] NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES 61 (2007).

of the American civil jury and, utilizing the empirical studies to the extent they exist and apply, to analyze comparatively how well civil juries perform each of these functions. Next, this Article will weigh the value of the American civil jury against its costs in terms of effectiveness, time, and judicial efficiency. Finally, this Article will consider those factors that weigh in favor of the American civil jury trial.

I. THE FUNCTIONS OF THE AMERICAN CIVIL JURY

Any analysis of how successfully the American civil jury accomplishes its assigned functions must begin with a consideration of what functions it performs. It is common to superficially state that, in the normal civil trial, the jury's function is to determine the historical facts while the judge's function is to determine the law. The jury, of course, performs many functions other than the determination of the historical facts. Many attempts to evaluate the civil jury fail because they do not recognize and consider its many functions. Many of these studies compare the final determination of the jury with the determination that a judge would have made, and in doing so, fail to consider the jury's performance in each of their functions.

Accordingly, this Article identifies five critical functions performed by the American civil jury in a normal case: determining the historical facts; determining the appropriate inferences to be drawn from these facts; applying the facts, as determined by them, to the law in light of the judge's instructions; determining the amount of damages to award a successful plaintiff in a suit seeking monetary damages; and, perhaps, applying the function of "rounding off the rough edges of the law" by refusing to apply a rule of law that the jury thinks would result in an injustice on the facts of the particular case. This Article will discuss how well the American civil jury accomplishes each of these functions.

A. Determining the Proper Historical Facts Applicable to the Controversy

The function of the American civil jury, which the average American thinks of, is its obligation to determine the facts relevant to the controversy. More accurately, it has the obligation to determine those facts that are legitimately uncertain. If facts are not uncertain, they will be resolved by the judge by a motion for summary judgment, a motion for a directed verdict, or a judgment notwithstanding the verdict.[9] Accordingly, this function of a civil jury is to determine only the facts that are uncertain and in controversy.[10]

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[9] The recently renamed judgment as a matter of law in the federal courts is the equivalent of the directed verdict and the judgment notwithstanding the verdict, terms that are still employed for these motions in many state courts.

[10] The fact that the factual issues to be determined by the jury together with the generally applicable burden of proof, by a preponderance of the evidence or 51% in the vast majority of cases reflects the fact that the primary function of the jury is to decide the case rather than to determine the actual true facts; *See*

Many authors argue, non-empirically, that jurors do not competently determine the facts. Judge Jerome Frank is perhaps the most outspoken on this issue. He argues that jurors:

> [a]re hopelessly incompetent as fact-finders. It is possible, by training, to improve the ability of our judges to pass upon facts more objectively. But no one can be fatuous enough to believe that the entire community can be so educated that a crowd of twelve men chosen at random can do, even moderately well, what painstaking judges now find it difficult to do. . . . [t]he jury makes the orderly administration of justice virtually impossible.[11]

The renowned tort scholar, Leon Green, added that, "[a]s a scientific method of settling disputes the general verdict rates a little higher than the ordeal, compurgation, or trial by battle."[12] There are also a number of articles that argue, non-empirically, that judges are superior finders of historical fact. Many of these authors have ties to the civil law. These authors include Professor John Langbein, who contends that civil law judges do a better job of historical fact-finding because they must "decide the case by means of a written judgment containing findings of facts and rulings of law,"[13] and Leon Sarpy, a renowned Louisiana attorney at the time his article was written, who argued that because of their extensive training and experience, judges are far more competent to sift the facts and to apply the law to them than the average juror who is not trained in these matters, and to expect the average juror to be as competent is "unreasonable and unrealistic." He questioned many "leading citizens" about abolishing civil juries after they served as jurors and, in well over seventy-five percent of the cases, their "reply was an enthusiastic yes."[14] More moderately, Graham C. Lilly, in *The Decline of the Civil Jury*,[15] opined that, "long-term trends in the nature of litigation and the selection of juries pose serious questions about the potential of American juries to adequately perform their traditional roles."

Recently, there have been many attempts to determine through empirical research how effectively a jury performs this function. Most studies have been unable to do this directly because of uncertainty as to what the real facts were. For a jury to be included in these studies, there must have been, as previously noted, a real uncertainty as to what the true facts were, and the jury is only required, in the vast majority of cases, to base its determination on a

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generally Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53 (2001) (This is true despite the fact that the trier of fact makes every reasonable effort to determine the true facts involved in the controversy.).

[11] JEROME FRANK, LAW AND THE MODERN MIND 180–81 (1949).

[12] LEON GREEN, JUDGE AND JURY 353 (1930).

[13] John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 856 (1985).

[14] Leon Sarpy, *Civil Juries, Their Decline and Eventual Fall*, 11 LOY. REV. 243, 261 (1962).

[15] Lilly, *supra* note 10, at 53.

belief that its determination is more likely true than untrue, or, in other words, is supported by a subjective probability of no less than fifty-one percent.

Accordingly, most studies have attempted to compare the extent to which the jury verdict agrees with the verdict that the judge would have entered. These studies compare the final result reached by the jury to that which would have been reached by the judge; hence, they consider not only the determination of the facts, but also the final result reached by the jury after performing all of its relevant functions rather than just its findings of historical fact.[16]

In one such study of civil cases, Kalven reported that the judge and jury agreed seventy-nine percent of the time, and in the other twenty-one percent of the cases the disagreements in favor of the defendant were distributed equally. Accordingly, he believes no alleged bias of juries toward injured plaintiffs seemed to have existed.[17]

Neal Vidmar and Valerie Hans concluded that "studies showing sizeable agreement between jury verdicts and the decisions of judges yield support for the hypothesis that juries are competent, at least in the majority of cases." These authors add, however, that studies that used different methodologies, like case studies and mock jury projects, "indicate that juries fall short on occasion." They point out that one particular challenge is the "jury's ability to comprehend and follow particular legal instructions."18 Another related problem area is the ability of juries to properly resolve complex cases. Former Chief Justice Warren Burger expressed his concern about the use of civil juries in complex cases, writing, "changes in litigation patterns in recent years boggle the mind, and numerous cases document that reality. Even Jefferson would be appalled at the prospect of a dozen of his stout yeomen and artisans trying to cope with some of today's complex litigation."[19]

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[16] It would, however, include any difficulty the jury might encounter in applying the facts to the instructions.

[17] Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1065–66 (1964). This is approximately the same percentage of agreement found in Kalven and Zeisel's *The American Jury*. *See generally* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966). This is remarkable because that book studied criminal juries and intuitively one would reason that there would be a substantially greater probability of disagreement where the burden of proof is a preponderance of the evidence rather than "beyond a reasonable doubt." *See also* Clermont and Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124 (1992) contending that such statistics do not fully explain the difference in outcomes between judge trials and jury trials but suggest a more meaningful statistic is the a comparison of the win rates of plaintiffs before judges and juries for cases based on the same cause of action and contains such a study. This Article concludes that there is a high positive correlation between rates of success in judge trials and in rates of success in jury trials; that plaintiffs do well before judges in the same case categories in which they tend to do well before juries.

[18] Vidmar & Hans, *supra* note 8, at 168. This, of course, relates, not to the jury's function of fact-finding, but to its function of applying the facts to the law. *Id.*

[19] Warren E. Burger, remarks, *Thinking the Unthinkable*, 31 LOY. L. REV. 205, 210 (1985); *See generally* NANCY S. MARDER, THE JURY PROCESS (2005), discussing jury incompetence in technical and complex cases. Many have contended that some of this difficulty could be alleviated by preparing better

In *Ross v. Bernhard*,[20] the Supreme Court stated, "the 'legal' nature of an issue is determined by considering, first, the pre-merger custom[21] with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries."[22] While the inclusion of this third factor led to a supposition that the right to jury trials might be limited in complex cases,[23] the Court rejected this conclusion in footnotes in two cases.[24] In *Granfinanciera*, the Court explained that *Ross* applies to cases that consider whether Congress has permissibly "entrusted the resolution of certain disputes to an administrative agency or specialized court of equity, and whether jury trials would impair the functioning of the legislative scheme[.]"[25]

The only argument for a complex case exception to the right to a jury trial is based on the view of English scholar Lord Patrick Devlin to the effect that "the practical abilities and limitations of jurors" would have a factor, in 1791, in determining the existence of the jurisdiction of the Court of Chancery.[26] A number of law review articles have debated the validity of this position.[27]

Other scholars conclude that judges and juries agree on historical facts in a high percentage of cases, ranging from eighty percent in more routine matters to sixty-three percent in some complex cases. They add that when judges and juries disagree, judges tend to be more sympathetic to plaintiffs. When both judges and juries find for the plaintiff, juries tend to award higher damages.[28]

From these empirical studies, one may conclude that the premise that jurors are as reliable finders of historical fact as judges has not been disproven, but the studies did not conclude that a jury is better or as good at this function than judges would be. Furthermore, it appears that the jury's reliability in this area decreases when the case is unusually complicated.

B. Drawing Conclusions from the Historical Facts: Acting as "The

instructions or giving them at different times. But little has yet to be accomplished in this area. Furthermore, it appears that the United States Supreme Court has not looked favorably on specialized or "blue ribbon" juries. *See, e.g.*, Thiel v. S. Pac. Co., 328 U.S. 217 (1946).

[20] 396 U.S. 531 (1970).

[21] The procedure preceding the merger of law and equity was first adopted in New York in 1848.

[22] Ross, 396 U.S. at 539.

[23] *See, e.g.*, In re Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980); In re U.S. Fin. Sec. Litig., 609 F.2d 411 (9th Cir. 1979).

[24] *See* Tull v. United States, 481 U.S. 412, 418 n.4 (1987); Granfinanciera v. Nordberg, 492 U.S. 33, 43 n.4.

[25] Granfinanciera v. Nordberg, 492 U.S. 33, 43 n.4.

[26] PATRICK DEVLIN, *Jury Trial of Complex Cases: English Practices at the time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 44 (1980).

[27] *See e.g.* MORRIS S. ARNOLD, *A Historical Inquiry into the Right of Trial by Jury in Complex Civil Litigation*, 128 U.PA.L. REV. 829 (1980); JAMES CAMPBELL & NICHOLAS LE POIDEVIN, *Complex Cases and Jury Trials: A Reply to Professor Arnold*, U.PA. L. REV. 965 (1980).

[28] Sherry & Tidmarsh, *supra* note 7, at 95.

Conscience of the Community"

Consideration of this second jury function requires that an important distinction be drawn between conclusions of law and conclusions of fact. While the function of drawing conclusions of fact may properly be considered as part of the jury's role in determining the historical facts,[29] the making of conclusions of law frequently goes far beyond that.

An important distinction separates conclusions of law into two distinct types. Many conclusions of law are for the court to draw (e.g., whether a duty of care existed in a negligence case), but many are for the jury to draw (e.g., whether the defendant breached an existing duty of care in a negligence case or whether a product was unreasonably dangerous when it left the manufacturer's control). [30] When a jury draws these conclusions of law left to it to determine, it serves as the conscience of the community.[31]

No study has contended that a judge can serve as the conscience of the community as well as a panel of citizens can. The only issue here is whether or not a jury can draw these conclusions of law as accurately as a trained judge can. There is little empirical evidence on this issue.

C. Applying the Facts to the Law to Reach the Verdict

A third function performed by a civil jury is to apply the historical facts, as they are determined to be, to the instructions given to them to render the general verdict. Exceptions to this function occur in those rare cases where, in the exercise of judicial discretion, a judge decides to employ a special verdict and to a lesser extent when a judge gives a special question to the jury to answer along with its general verdict.

Most commentators and analysts agree that one of the weakest functions of the American civil jury is their observed difficulty in applying the historical facts, as its members find them, to the law as given to them in the instructions. Sherry and Tidmarsh conclude that in some cases, juries understand only about half of the instructions and that the most likely error that a jury will make is misunderstanding the instructions.[32] As previously

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[29] An example of a conclusion of fact arose in Welch v. Chi. Tribune Co., 34 Ill.App.3d 1046, 340 N.E.2d 539 (1st Dist. 1975), where the plaintiff sued for libel because the defendant had called him an "alcoholic." It was agreed as to how much he drank daily and how well he performed the obligations of his employment and the trial court granted summary judgment for the defendant. *Id.* The reviewing court reversed holding that whether a person was an alcoholic as that term is meant in common usage was a question of fact for the jury. *Id.* at 545–46.

[30] *See* JACK H. FRIEDENTHAL ET AL., Civil Procedure, §11.2 (1985); *See also* Nunez v. Superior Oil Co., 572 F.2d 1119, 1126 (5th Cir. 1978) (holding the issues delegated to the jury, absent extreme facts, include negligence, foreseeability, whether "just cause" exists, whether a product is "unreasonably dangerous," whether a fiduciary duty was breached, and questions involving motive, purpose, or intent.

[31] *See generally* GEORGE L. PRIEST, JUSTIFYING THE CIVIL JURY, VERDICT: ASSESSING THE CIVIL JURY SYSTEM (Robert E. Litan ed., 1993).

[32] Sherry & Tidmarsh, *supra* note 7, at 95.

indicated, Vidmar and Hans' studies indicate that a "particular challenge is the jury's ability to comprehend and follow particular legal instructions."[33] This weakness is particularly troublesome in complex cases.[34]

D. Determining the Proper Award of Damages in Tort Cases

A fourth civil jury function is determining the amount of damages to be awarded. Almost every civil jury that finds for the plaintiff performs this function because most cases currently heard by juries were historically heard by the common law courts before the merger of law and equity. The right to a jury trial does not extend to actions for specific relief today because at common law, they were heard in the Court of Chancery. Cases derived from the common law writs of replevin and ejectment are exceptions to this generality, because at law, those writs required a specific relief rather than damages.

The law distinguishes between special damages and general damages. Special damages are basically a plaintiff's economic losses, such as one's medical expenses and loss of earning and the repair or replacement of damaged property. Usually, these economic losses are easily proven and their limits are clear. There can, however, be highly contested issues concerning some future projected losses, such as the loss of earning over the plaintiff's lifetime caused by the tort in question and the cost of future medical treatment of the plaintiff's injuries caused by the accident. These issues are part of the determination of the facts and part of the problem juries face with scientific and opinion evidence.

General damages, on the other hand, involve compensation for pain and suffering and loss of body parts. Unlike the determination of special damages, general damages have no provable economic losses to serve as a basis for the jury's assessment of damages. Pain and suffering and the non-economic loss resulting from the loss of a limb or other loss of bodily integrity have no real monetary equivalents. The amount of money that should be awarded for such losses is strictly a matter of subjective evaluation and different juries can vary widely in their determination of what is fair compensation.

There can then be no fair determination of how well juries perform this particular task. Nevertheless, there appears to be a general consensus that these jury awards are inconsistent and often too high. Sherry and Tidmarsh report that when both the judge and the jury find for a plaintiff, juries tend to

[33] Vidmar & Hans, *supra* note 8.

[34] Marder, *supra* note 19, at 238–44; *See also* Vidmar & Hans, *supra* note 8, at 188 (concluding "[T]here can be little doubt that expert evidence, especially in cases with complex statistical evidence, poses difficulties for jurors").

award the higher damages figure.[35]

The authors of *American Juries* state that the statistical studies "show considerable variability" in people "with the same level of injury," and conclude that "[c]ivil juries are undoubtedly most controversial because of their role in arriving at damage awards."[36] Nancy Marder concludes:

> In the civil context, the most resounding criticism is that jury damage awards are excessively high. . . . In some states, legislatures have passed statutes limiting jury damage awards for noneconomic injury, such as pain and suffering. . . . In other states, legislatures have passed statutes limiting the types of cases that can be heard by a jury.[37]

The difficulty a civil jury has in achieving uniform assessments of compensatory damages for the same level of injury is the reason that England has substantially abandoned civil juries. In England, civil juries are only normally available in the six types of cases where they are required by statute[38] and, accordingly, only two percent of their civil cases are tried by a jury today. The Court of Appeal, in *Ward v. James*, explained its practical abolishment of jury trials as follows:

> It is an essential attribute of justice that similar decisions should be granted in similar cases and this requires that the considerations which guide judges in this determination should be set out. When a man's honour or integrity is at stake or when one of the parties must be deliberately lying, trial by jury has no equal. But in personal injury cases trial by jury has given way to trial by judge alone because if a judge is in error one may appeal but one never knows what a jury will do and if they go wrong the Court of Appeals hardly ever interferes with the verdict of a jury. In a trial by judge they apply the same standard for negligence and set the standard for awards. Hence uniformity of decision. Those that want juries often do so because they have a weak case or desire to appeal to sympathy.
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> It begins to look like a jury is an unsuitable tribunal to assess injuries in grave cases at least where a man is greatly reduced in his activities. No money can compensate for the loss yet compensation has to be given in money. This

[35] *Supra* note 1, at 95.

[36] Vidmar & Hans, *supra* note 8, at 281.

[37] Marder, *supra* note 19, at. 232–34; *See also* Joni Hersch and W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1, 2–3 (2004) (concluding from their studies that juries are significantly more likely to award higher punitive and compensatory damages than judges).

[38] These are defamation cases, fraud cases, malicious prosecution cases, and cases based on false imprisonment, seduction, and breach of promise of marriage.

> problem is insoluble. To meet it judges have evolved a conventional measure. They go by their experience in comparable cases, but juries have nothing to go on.
>
> In cases of grave injury, it is very difficult to assess a fair compensation in money so that damages awarded must be a conventional figure derived from experience or from awards in comparable cases. Secondly, there should be measure of uniformity in awards so that similar decisions are given in similar cases. Thirdly, parties should be able to predict the sum that is likely to be awarded so cases may be settled. Awarding damages is almost as difficult as sentencing offenders. Some degree of uniformity is obtained by always leaving the sentence to the judge with a right of appeal. But damage awards by juries are not as easily appealed because a reviewing court cannot interfere with a jury as readily as with a judge, their verdict is inscrutable.[39]

Accordingly, the same problem that led many American jurisdictions to attempt to put caps on general damages led England to take the ability to determine damages from the jury and give it to the judge. In a similar manner, our criminal law system assigned the function of imposing sentences to the judge.[40] Consideration of this second jury function requires that an important distinction be drawn between conclusions of law and conclusions of fact. While the function of drawing conclusions of fact may properly be considered as part of the jury's role in determining the facts,[41] the determination of any conclusions of law frequently goes far beyond that.

Leading Continental European legal scholars reached similar conclusions. While discussing the assessment of damages in personal injury cases, a noted German and comparative law scholar, Hein Kotz, noted that legal doctrine relating to the assessment of damages in Germany and America does not differ greatly in this type of case but "far more significant are the differences in the mode of trial."[42] Professor Kotz explained:

> Because these cases are tried by a judge alone in Germany, and damages are assessed by judges, who give full and detailed reasons, [for the damages awarded,] the

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[39] Ward v. James, No.2, [1966] 1QB 273,, 295 (Eng.).

[40] An exception exists in death penalty cases.

[41] An example of a conclusion of fact arose in Welch v. Chi. Tribune Co., 34 Ill.App.3d 1046, 340 N.E.2d 539 (1st Dist. 1975), where the plaintiff sued for libel because the defendant had called him an "alcoholic." It was agreed as to how much he drank daily and how well he performed the obligations of his employment and the trial court granted summary judgment for the defendant. The reviewing court reversed holding that whether a person was an alcoholic as that term is meant in common usage was a question of fact for the jury.

[42] Hein Kotz, *Civil Justice Systems in Europe and the United States*, 13 DUKE J. COMP. & INT'L L. at 61.

> calculation of damages has become much more regularized, systematic and uniform in Germany while the range of awards in similar cases is very much larger in the American system of trial, almost entirely as a result of the use of juries.[43]

From another standpoint, this aspect of the civil jury's functions explains the willingness of the American bar to agree to surrender their right to a jury trial in commercial cases, but not in tort cases. In the recent American Law Institute project to establish a proposed procedure for the conduct of transnational litigation, the Institute expressed their desire to retain jury determination of general damages in personal injury cases.[44]

E. The Jury and "Rounding the Rough Edges of the Law"

A fifth, and somewhat more controversial function, is the de facto power of the jury to ameliorate harsh areas of the law. Jury nullification in its pure form only applies to criminal cases because the judge has a right to grant a judgment notwithstanding the verdict or a new trial in a civil case when the judge determines that the jury verdict was manifestly erroneous. Nevertheless, in a weaker form, it allows juries in civil cases to "smooth out the rough edges of the law." The most typical example of the power existed in cases tried under the doctrine of contributory negligence before the widespread adoption of comparative negligence. Under contributory negligence, if the jury found that the plaintiff was negligent, no matter how minor a factor it was in the causation of an accident, as long as it was a proximate cause of the accident, the law required that such a finding deprive the plaintiff of any recovery. The jury, however, would often refuse to deny the plaintiff a recovery where his negligence was a small factor in the proximate causation of the accident. Although such jury nullification was the primary factor urged for the adoption of a right to a civil jury trial in the Bill of Rights, it exists today only de facto and not de jure because the jury is instructed today that they are required to follow and apply the law as the court instructs them.[45] It is a ground to dismiss a juror for cause if that juror expresses an unwillingness to do so.[46]

The jury's ability to round off the loose edges of the law appears not to be a desired ability today in light of the law's refusal to inform them of that power. The law instead informs the jury that they must follow the judge's instructions of law. Thus the jury's de facto ability to disregard the judge's instructions and the lack of transparency of jury verdicts might be better

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[43] Ibid. 74.
[44] ALI/UNIDROIT, *supra* note 6.
[45] Thompson v. Altheimer & Gray, 248 F.3d 621, 624 (7th Cir. 2001).
[46] *Id.* at 626.

considered a weakness of the civil jury system.[47] To the extent that the trier of fact has the ability to adjust for a perceived inequity is a desirable attribute, no empirical evidence indicates a judge would not be willing to perform that function as efficiently as a jury would.

II. THE DRAWBACKS OF A CIVIL JURY SYSTEM

Whatever one's conclusions about the American civil jury's performance of functions as opposed to a judge or other trained evaluator, there are acknowledged weaknesses of a civil jury system which any perceived advantages of a civil jury system must exceed to justify its retention. As one author expressed:

> We certainly want to hold jury trials in serious criminal cases, but should we slavishly adhere to jury trials in all civil cases? We can maintain the system for civil cases, and perhaps it is worth while, but we must understand the consequences, count the costs, note the alternatives and then deliberately decide what is in the public interest.[48]

Several weaknesses of the civil jury system include delay, non-transparency, unpredictability, expense, restrictive evidentiary rules, and the burden on citizens to act as jurors.

A. *Delay*

John Cound, Jack Friedenthal and Arthur Miller assert that much of the existing delay in the courts could be avoided if trial by jury were eliminated or curtailed, arguing that in courts that have separate jury and nonjury calendars, the nonjury one may be nearly current while the jury calendar is years behind.[49] Another writer claims that "the trial process designed for and inherited from the rural society of several centuries ago is not suited to handling the enormous volume of civil litigation resulting from the high speed, complexity and congestion of modern city living and the automobile age."[50] This author adds that we have been saved from a complete breakdown of court services by the fact that ninety-five of the cases eventually get settled.[51] Estimates of the delay in the courts from civil jury trials are widely varied, with estimates running from forty percent to 300 percent.[52] If

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[47] JEROME FRANK, COURTS ON TRIAL 129–130 (Third Hardcover Printing 1973) ("[E]ach jury is a twelve-man ephemeral legislature, not elected by the voters, but empowered to destroy what the elected legislators have enacted or authorized").

[48] David W. Peck, *Do Juries Delay Justice?*, N.Y. TIMES, Dec. 25, 1955.

[49] JOHN J. COUND, JACK H. FRIEDENTHAL & ARTHUR R. MILLER, CIVIL PROCEDURE 775 (2d ed. 1974).

[50] Peck, *supra* note 47.

[51] *Id.*

[52] Hazard, *Book Review*, 48 CAL. L. REV. 360. *See also* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 130 (1985), suggesting it would half the time to try a case to a judge than to a jury.

one accepts the "twice the time" hypothesis and further assumes that civil jury trials constitutes two to four percent of a federal court's docket, total elimination of civil juries would only reduce the backlog of cases in the federal courts by four percent, but in many state courts that hear almost entirely civil jury trials, it could cut their backlogs by close to half.

The delays caused by civil juries result in part from hung juries, mistrials, and occasional instances of juror misconduct. The jury selection process also causes long delays because both sides, while purporting to assure an unbiased jury, in reality attempt to obtain one that is biased in their favor. The growth of the jury consultant profession is an example of the extremism the jury selection process engendered. The resulting delays and increase in case backlogs due to the amount of time the jury selection process takes seems a clear indicator of the disadvantages of civil juries.[53]

B. Non-Transparency

The jury's factual determinations are substantially less transparent than a judge's would be. When the judge is the trier of fact, the judge normally prepares a document entitled, "Finding of Fact and Conclusions of Law" which describes the evidence introduced, explains the factual finding made on the basis of this evidence, explains the law applied to resolve the controversy, and describes the manner in which the judge applied the factual findings to the law to determine the judgment entered. By way of contrast, a jury's general verdict is not explained in any way, nor may any member of the jury testify as to the internal means by which the verdict was reached. It is significant that this difference also makes the judge's determination much easier to review on appeal.[54]

This lack of transparency is most troubling in the cases where the jury verdict is erroneous because the jury did not understand or erroneously applied the court's instructions, an area that comprises one of the weakest functions of the American civil jury.[55] While an error of this nature may be easily noted and appealed from a reading of a judge's findings of fact and conclusions of law, they are extremely difficult to ascertain and to use as the basis of an appeal when the jury acted as the fact finder because of the non-

[53] For an extreme example consider the O.J. Simpson criminal trial; consider also England's practical abandonment of voir dire in criminal cases in favor of what is essentially a system that relies on random selection to insure fairness.

[54] *See* Rule 606(b) of the Federal Rules of Evidence. *See also,* Peterson v. Wilson, 141 F.3d 573, 579–580 (1998 5th Cir.) reversing the entry of a new trial resulting from communications from some of the jurors to the judge that the jury had completely disregarded the court's instructions. The rules have led some legal scholars to analogize a jury to a black box where the input is controlled but lack knowledge of how the result was determined. *See also* STEPHEN C. YEAZELL, CIVIL PROCEDURE 664 (Wolters Kluwer Law & Business, 8th ed. 2012). The comparison to the ancient common law ordeals where the procedure was designed to provide a single true or false answer is obvious.

[55] *See supra*, notes 18–23.

transparency of a civil jury's verdict.

C. Unpredictability

Many litigants believe that juries are unpredictable and often settle their case when settlement is not economically justified or employ some form of alternative dispute resolution to avoid risking the unpredictability of the jury.[56] Jury unpredictability has created the jury consultant industry, which emphasizes the ways their methodology helps predict jury trial results. Jury unpredictability also takes place not just from jury to jury, but jurisdiction to jurisdiction. Certain areas in the country are known for liberal juries who favor individual plaintiffs in suits against large companies and businesses and award large damages to them. Many entities that favor defendants, such as the United States Chamber of Commerce, the American Medical Association, and the American Tort Reform Association, claim that there are areas of the country where juries routinely render outrageous awards.[57]

Professor Hein Kotz emphasized the unpredictability of civil jury trials with the statement, "[t]he outcome of an American jury trial is less predictable than a case tried by a German judge" and illustrates this point by the previously quoted discussion of the monetary assessment of personal injuries.[58] He concludes that "the probable range of damages is less predictable in the United States than in Germany" and that "[u]npredictability leads to uncertainty, and uncertainty increases the importance of good legal representation, . . . which raises concerns about access to justice for the poor and procedural equality of litigants with disparate economic resources."[59]

D. Expense

Civil juries clearly add additional expense to litigation. The delays juries cause require more judges and more fully equipped courtrooms. Litigators frequently utilize visual aids to help the jury understand the issues. Jurors are paid for the time they serve (although not an overly generous amount), and when jurors are not allowed to return to their homes during a trial, they must be housed and fed. The list goes on. While it seems that jury fees, where they are charged, do not begin to cover these expenses, there is

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[56] Sherry & Tidmarsh, *supra*, note 7, at 76; *See also* ALAN MORRISON, FUNDAMENTALS OF AMERICAN LAW (1st ed. 1996) (stating that it is "particularly because of the wide discretion given jurors on setting the amount of damages that many cases are settled").

[57] *See* Vidmar & Hans, *supra* note 8, at 243; *See also* Adams, World-Wide Volkswagen v. Woodson—The Rest of the Story, 72 NEB. L. REV. 1122, 1128 (1993) (in which the defendants were ultimately held to be beyond the jurisdiction of the Oklahoma courts were joined to prevent removal of the case by destroying diversity because the county in Oklahoma where the case was filed was "known to personal injury lawyers throughout the state as being particularly sympathetic to personal injury plaintiffs"); *See also*, Sarpy, *supra* note 14, at 243.

[58] Kotz, *supra* note 42, at 78.

[59] One may legitimately question this inequality argument in cases where an attorney may be hired on a contingent fee basis.

very little actual data on these amounts.

E. Restrictive Evidentiary Rules

The courts adopted many of the more restrictive rules on the admissibility of evidence, including the hearsay rule and many of the rules governing relevancy, to prevent juries from misapplying the evidence, rendering erroneous verdicts, and delaying trials.[60] In many bench trials, judges are more lenient and allow evidence to be introduced for "whatever weight may be appropriate." In similar fashion, German judges allow the introduction of evidence that would have evidentiary shortcomings under American law. Under German law, those shortcomings will only affect the evidence's weight or credit.[61] Some claim that the Supreme Court's *Daubert* decisions were necessitated by the jury's inability to fully understand expert testimony in many cases.[62]

F. The Burden on Citizens to Act as Jurors

Jury service places a burden on citizens to act as jurors, sometimes for long periods. This results in an expenditure of manpower and in most citizens disliking jury service.[63]

G. Unquantifiable Considerations

The weaknesses of the jury system may often be offset by some unquantifiable considerations. These require, at the outset, a consideration of the history of the Seventh Amendment.

During the debates concerning adoption of the Constitution in 1789, several opponents of the Constitution contended that the failure to include the right to a civil jury trial was a reason to not adopt it. They argued that civil juries provide a safeguard against an unfair administration of the law.[64] One citizen argued that the jury trial was more important than adequate representation in a legislative body because "those usurpations, which silently undermine the spirit of liberty, under the sanction of law, are more dangerous than direct and open legislative attacks . . . ."[65] He believed that because a fear of a lack of impartiality in the judiciary or a belief that jury nullification would protect them from unfair legislation.[66]

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[60] Langbein, *supra* note 13.

[61] *Id.*

[62] Vidmar & Hans, *supra* note 8, at 170.

[63] Sarpy, *supra* note 14, at 243 (jury service is "unwelcome by the great majority of prospective jurors," and that he had asked leading citizens that had served on juries whether civil juries should be eliminated and that 75% answered in the affirmative).

[64] *See* Vidmar & Hans, *supra* note 8, (stating that the Federalists opposed civil juries, but the anti-federalists, state-right advocates favored them as a limitation on a strong federal government).

[65] *See* STEPHEN C. YEAZELL, CIVIL PROCEDURE 557 (7th ed. 2008).

[66] Ibid.

Neither lack of impartiality nor unfair legislation is believed to presently be a problem in the American administration of civil justice.[67] Nevertheless, a civil jury trial is part of our constitutional heritage. Furthermore, juries allow citizens to participate in the administration of civil justice. As one author stated, "the very fact that the civil jury is a democratic institution composed of laypersons fosters a sense of inclusion and participation that reflects and generates popular endorsement of the judicial system."[68]

Professor Hein Kotz noted that "if a European lawyer looks at the contemporary legal scene in the United States, he is impressed by the extent to which court litigation, rather than legislation and administrative action, is used as a means to cure defects in the structures and practises of important social institutions" and that "litigation as a means of vindicating [this] is far less significant in Europe."[69] While one can strongly argue that a civil jury is better suited to hear public interest cases than a judge, this argument is undercut by the fact that most public interest lawsuits seek an equitable decree and civil juries are not available where equitable remedies are sought.

A final unquantifiable consideration is the differences between the judicial selection process in the United States and that utilized in The United Kingdom and on the Western European Continent. On the Continent, appointments to the judiciary branch are made soon upon the entry of the candidates into the legal profession, predicated on the basis of their examinations. The new appointees could also be sent into lesser-populated areas of their jurisdiction to gain experience as a member of a three-judge panel.[70] In the United Kingdom, judicial appointments are made non-politically by a civil service body from a very select group of barristers, many of whom were formerly Queen's Counsel. Nominees are only selected after they serve anywhere from a few months to a year as a judge on a trial basis. In comparison, judges in the United States are either appointed through the political process or elected. Thus, it is possible that the U.K. and continental judges are better qualified than many American judges to make factual determinations and conclusory applications. On this basis, one scholar concluded that civil juries protect American judges by being an outlet for the criticism that the judiciary would otherwise experience.[71]

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[67] THE FEDERALIST NO. 83 (Alexander Hamilton) (Hamilton in the Federalist Papers wrote that the security of liberty is materially concerned only with trial by jury in criminal cases and predicted that ultimately questions too complicated for juries would undermine trial by civil juries. He concluded that the excellence of civil juries depends on circumstances foreign to the preservation of liberty but that they do serve as a valuable check on the corruption of judges).

[68] *Developments in the Law: II. The Civil Jury: THE VALUE OF THE CIVIL JURY*, 110 HARV. L. REV. 1421, 1433 (1997).

[69] Kotz, *supra* note 42, at 14.

[70] *See* MARY ANN GLENDON et. al., COMPARATIVE LEGAL TRADITIONS 167–79, 490–507 (3d ed. 2007).

[71] Ronald Charles Wolf, *Trial by Jury: A Sociological Analysis*, 1966 WIS. L. REV. 820, 830 (1966).

Finally, it is unquestionably true that the unpredictability of the jury has helped ameliorate the docket difficulties its unpredictability has created by inducing parties to settle cases (or to agree to arbitrate them) rather than risk that unpredictability. This argument, however, seems to be illogical, since the conclusion is that the system should be made so bad that no one would ever litigate there.

III. CONCLUSIONS

Those who assert that English and Continental judges are more accurate finders of fact than the American civil jury have not been able to prove or disprove their theory through empirical studies. Researchers only concluded that they could not say that an American judge was superior to an American civil jury in determining the facts. Additionally, the difficulty in determining an accurate test for the hypothesis leaves uncontradicted the logic that a qualified, trained observer is better able to determine the historical facts than a consensus of six or twelve citizens selected through the voir dire method presently employed in the United States. Furthermore, this logic is reinforced through the jury's difficulty in deciding complex cases and applying the legal instructions of the judge to the facts they determine. Nevertheless, the strongest case for abolishing civil juries is their inconsistency in determining general damages in personal injury cases. This also appears to be a factor that largely accounts for the civil jury's popularity with the American bar. Why else would the American bar be willing to agree that a jury trial is not necessary in international contract and commercial cases, but still require a jury determination in tort cases?

The civil jury's function in representing the conscience of the community is a desirable one. In torts cases, like those raising issues as to whether a defendant's conduct breached the standard of care or whether a product was inherently dangerous when it left the manufacturer's control, civil juries are welcomed. However, the English bar was willing to sacrifice the civil jury to correct problems relating to unpredictable awards for damages.

While the American society and bar willingly accepts the expense and delay of civil juries, little attention is given to its lack of transparency and predictability, and the difficulty this entails for appeals of highly questionable decisions.

Perhaps one's views about the desirability of a civil jury depends more on non-measurable factors, like the value of involving the citizens in administering civil justice and how well American civil juries compensate for the more rigorous judicial selection processes in England and Western Europe.

While the logical conclusion of this analysis indicates that the use of

civil juries should be limited (perhaps in conjunction with an improvement in judicial selection methods),[72] implementation of such a program would encounter significant constitutional difficulties. This reality should not prevent an analysis of the civil jury's value in comparison to the systems employed by our European friends and allies, and conclusions drawn from that comparison in order to improve our administration of civil justice. Attempts to strengthen the jury's performance of certain functions such as improving instructions with an emphasis on their application in different types of cases could be undertaken. Experiments to change the role of the civil jury in certain cases could be realistically undertaken in the state courts rather than in the federal courts because the Seventh Amendment and its interpretations are not applicable in the state courts.[73] Amendments to state constitutions are more easily enacted than federal constitutional amendments, and different interpretations of the historical tests are more readily available.[74]

[72] Popular election of judges appears to be the least desirable selection method in light of fact that judges are not expected to be a representative of the voters that elected them and that voters are quite often not aware of the judicial merit of particular judicial candidate but often cast their vote on the basis of "ballot name" or gender.

[73] Thus, for example, the "cleanup doctrine" whereby Chancery could decide issues of law if they were sufficiently related to equitable issues pending before the court has been held to be no longer applicable in the federal courts (*see* Beacon Theaters v. Westover, 359 U.S. 500 (1959)). While it is still applicable in the Illinois courts (*see* Ill. Sup. Ct. Rules 135 and 232).

[74] For example, many new causes of action have been recognized since 1791, including strict liability. The Supreme Court faced this difficulty in Chauffeurs, Teamsters & Helpers v. Terry, 494 U.S. 558, 573–74 (1990); A case involving an alleged breach of a union's duty of fair representation of its members. *Id.* The Court, after rejecting the analogy of a trustee's duty to the beneficiaries (where there would be no right to a jury trial), held that no analogy was close enough and held a jury trial was applicable on the basis of the remedy sought, a cash award. *Id.* State courts are not required to follow this approach. *Id.*