

# University of Michigan Journal of Law Reform

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Volume 20

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1987

## The Civil Jury--An Endangered Species

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### Recommended Citation

John Feikens, *The Civil Jury--An Endangered Species*, 20 U. MICH. J. L. REFORM 789 (1987).

Available at: <https://repository.law.umich.edu/mjlr/vol20/iss3/4>

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## THE CIVIL JURY—AN ENDANGERED SPECIES†

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The Honorable John Feikens\*

George Bernard Shaw, the Irish dramatist and arch gadfly, once said, "The reasonable man adapts himself to the world: the unreasonable one persists in trying to adapt the world to himself. Therefore all progress depends on the unreasonable man."<sup>1</sup>

With this tantalizing opener, let me say that I will attempt to point out to you my deep concern about the gradual elimination of jury trials in civil cases in our country.

To paraphrase Shaw, I contend that what accounts for my concern as to the elimination of jury trials is that a significant group of apparently reasonable people in the judicial system—judges, professors, and lawyers—are attempting to adapt *themselves* to the world. That world, as they see it, is a world in which cases are disposed of in the shortest possible time, with a minimum of effort, and at the lowest possible cost. I call this the Federal Judicial Center syndrome.<sup>2</sup>

What is this syndrome?

In the last two decades, Americans have had a love affair with the courts, and I am sure you are aware of the avalanche of cases that has resulted. One result is the bureaucratization of the judicial system: more judges, more magistrates, more staff attorneys, and a massive effort to find ways to dispose of cases in the shortest possible time, with a minimum of effort, and at the lowest possible cost.

Our former Chief Justice, Warren Burger, with his avowed goal of streamlining the judicial system, has led this crusade. Coupled with an unusual amour for the British judiciary, which

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† Adapted from an address before the Annual Banquet of the *University of Michigan Journal of Law Reform*.

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1. OXFORD DICTIONARY OF QUOTATIONS 498:1 (3d ed. 1979).

2. See, e.g., J. CECIL, ADMINISTRATION OF JUSTICE IN A LARGE APPELLATE COURT (1984); M. JACUBOVITCH & C. MOORE, SUMMARY JURY TRIALS IN THE NORTHERN DISTRICT OF OHIO (1982); J. SHEPARD, APPEALS WITHOUT BRIEFS (1984). The influence of the Federal Judicial Center can also be seen in opinions of the Supreme Court. See, for example, Chief Justice Burger's response to Justice White's dissent from denial of certiorari in *Brown Transport Corp. v. Atcon, Inc.*, 439 U.S. 1014, 1025-32 (1978).

has done away with the jury trial in civil cases, he has encouraged the Federal Judicial Center to emphasize these goals for federal judges.<sup>3</sup> It is this that I call the syndrome.

I suppose you detect a note of criticism here. Criticism, by the way, is what we say about other people who do not have the same faults we have.

In order to discuss the need for the jury trial in civil cases and its gradual elimination, we must start with a discussion of the purpose of our adversary system.

If I were to ask you what the goal of a court trial is, I daresay that you would respond that it attempts to ascertain truth. You might say that through this confrontation in court the truth of what occurred is determined and a judicial decision follows. You would be somewhat correct in saying it in that way. Our adversary system has evolved from earlier methods of making decisions—trial by fire, trial by battle—to the current trial in court.

I suggest to you that this is not the goal of a trial. I suggest that the goal is not truth finding. Rather, I say, the goal is justice; that is to say, the achievement of a just result. And speaking about truth, let me tell you what Mark Twain said: "When in doubt, tell the truth."<sup>4</sup> When he was introduced as the man who said that, he replied he had invented that maxim for others, but that when in doubt himself, he used more sagacity.

Some thirty years ago, Justice Roger Traynor, a highly regarded associate justice of the Supreme Court of California, noted that: "The judicial process deals with probabilities, not facts."<sup>5</sup> Let me restate that, for it is my subject this evening: the judicial process deals with probabilities, not facts.

Borrowing this phrase, Wright and Graham, in their treatise on federal practice and procedure, write:

To avoid giving these values [truth and justice] exaggerated importance it should be kept in mind that the "truth" with which the law is content is something less than the cosmic variety. "The judicial process, . . . deals with probabilities, not facts . . . ." If we knew the "truth"—where the plaintiff was going when the accident happened, how the defendant treats his family, what the

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3. See, e.g., Burger, *The Time is Now for the Intercircuit Panel*, A.B.A. J., Apr. 1985, at 86.

4. Notebook of Samuel Langhorne Clemens (Feb. 2, 1894), quoted in *THE HOME BOOK OF PROVERBS, MAXIMS, AND FAMILIAR PHRASES* 2391:18 (B. Stevenson ed. 1948).

5. Traynor, *Fact Skepticism and the Judicial Process*, 106 U. PA. L. REV. 635, 636 (1958).

money will be spent for, how the lawyer happened to take the case, what his father did to the witness—we would be faced with an almost insoluble problem in deciding what justice requires. The law avoids that by making this part of the “truth” irrelevant to our decision. Rather than the real dispute, the jurors are given an artificial controversy to be resolved by a consideration of much less than half-truths.<sup>6</sup>

To buttress this point, consider the decisions of the Supreme Court holding that involuntary confessions cannot be admitted as evidence.<sup>7</sup> This is so not because such confessions are not true (in most cases they are), but because the method used to extract them offends an underlying principle in the enforcement of our criminal law—that the government must establish guilt by evidence independently and freely secured.<sup>8</sup>

I suggest a just result that considers the values of our society is the goal of court trials, that the strictures of truth may conflict with a just result, and that the ultimate way of finding justice is through the use of the jury system in trials.

In 1873, the Supreme Court said in *Railroad Co. v. Stout*:<sup>9</sup>

Twelve men [and they did not say twelve men and women] of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man,

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6. 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5026, at 152 (1977) (quoting Traynor, *supra* note 5, at 638).

7. See *Mincey v. Arizona*, 437 U.S. 385 (1978) (confession will not be used even though ample evidence supports conviction); see also *Greenwald v. Wisconsin*, 390 U.S. 519 (1968) (confessions given under coercive circumstances are inadmissible); *Beecher v. Alabama*, 389 U.S. 35 (1967) (confessions resulting from coercion should not be admitted into evidence); *Davis v. North Carolina*, 384 U.S. 737 (1966) (confessions involuntarily given under coercive circumstances are inadmissible); *Brown v. Mississippi*, 297 U.S. 278 (1936) (confessions obtained by torture of accused are inadmissible). See generally *United States v. Leon*, 468 U.S. 897, 906-13 (1984) (exclusionary rule).

8. *Rogers v. Richmond*, 365 U.S. 534, 543-45 (1960).

9. 84 U.S. (17 Wall.) 657, 664 (1873).

*that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.*<sup>10</sup>

Judge Learned Hand had a good definition of justice. He said: "Justice . . . is the tolerable accommodation of the conflicting interests of society."<sup>11</sup>

Professor Jack Weinstein, now a federal judge, commented on justice in the *Columbia Law Review* in 1966.<sup>12</sup> He said:

Even were it theoretically possible to ascertain truth with a fair degree of certainty, it is doubtful whether the judicial system and rules of evidence would be designed to do so. Trials in our judicial system are intended to do more than merely determine what happened. Adjudication is a practical enterprise serving a variety of functions. Among the goals—in addition to truth finding—which the rules of procedure and evidence in this country have sought to satisfy are economizing of resources, inspiring confidence, supporting independent social policies, permitting ease in prediction and application, adding to the efficiency of the entire legal system, and tranquilizing disputants.<sup>13</sup>

The great value of the jury trial lies in its ability to reach a decision in tune with community values. This process constantly reinforces our democratic ideals. It is our way of avoiding elitism in decisionmaking. To paraphrase Traynor, this is the way in which the discrepancies between law in dogmatic theory and law in action are melded.

In *Stout*, the Court taught us again that twelve people know more of the common affairs of life than does one person; that they can draw wiser and safer conclusions from admitted facts than can a single judge.

Today, as we face the gradual elimination of civil jury trials, the argument is being made that there are some cases that are too complex for the jury to handle. The Third and the Ninth Circuits are on opposite sides of this question.<sup>14</sup> Apart from the

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10. *Id.* at 664 (emphasis added).

11. Hamburger, *The Great Judge*, LIFE, Nov. 4, 1946, at 119, 122-23 (quoting Judge Learned Hand).

12. Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 COLUM. L. REV. 223 (1966).

13. *Id.* at 241.

14. The question originally arose in *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970). The Third Circuit suggested that juries may be incapable of handling complex litigation

mandate of the Constitution, which requires jury trials in civil cases where damages of more than twenty dollars are sought, the contention is that the fifth amendment (due process and a fair trial) is more important than the sixth amendment.

I suggest to you that that argument is specious. Our citizenry is constantly called upon to decide ultimate issues affecting the existence of our society, and no issue (not even one involving IBM) is more important than these: nuclear power, disarmament, budget deficits. The problem is that in complex cases, the lawyers and the judges are not skillful enough to focus the jury's attention on the ultimate questions and to illuminate those questions artistically and competently. In a democratic society the ultimate questions cannot be dodged by saying they are too complex to decide.

But what is the suggested solution by those who want to do away with the jury trial in complex cases? Their refuge is to say that a judge trained in the law should decide them. The difficulty with this is that there is no empirical evidence showing that judges are more competent than juries to decide complex cases. I remind you again that the Supreme Court has said that twelve men know more of the common affairs of life than does one judge.

How is this erosion of the jury trial being accomplished?

1. By the studied use of alternatives to dispute resolution such as the summary jury trial and the mini jury trial;
2. By the reduction in jury size and the use of the majority verdict;
3. By disallowing the taking of notes by jurors;
4. By disallowing jurors to ask questions of witnesses;
5. By the prevention of the voir dire examination of jurors by lawyers;

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in *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980), *aff'd in part, rev'd in part following summary judgment*, 723 F.2d 238 (3d Cir. 1983) (noting that although summary judgment was improper because it was uncertain that there would be a jury trial, summary judgment might be appropriate if the evidence had the tendency to confuse or mislead the jury), *rev'd on other grounds sub nom. Matsushita Elec. Indus. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986). The Ninth Circuit decided the other way in *In re United States Fin. Sec. Litig.*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980).

The issue arises most frequently in major securities and antitrust suits because the issues are technical and esoteric and the trials take weeks or months. See Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Litigation*, 128 U. PA. L. REV. 829 (1980); Campbell, Le Poidevin & Arnold, *Discussion: Complex Cases and Jury Trials*, 128 U. PA. L. REV. 965 (1980).

6. By the significant lack of trial advocacy training in law schools; and
7. By the repeated contentions that some cases are too complex for jurors to handle.

I will discuss three of these factors.

The Federal Judicial Center is sending judges and lawyers around the country to judicial conferences to preach the use of summary jury trials as an effective way of delivering justice in the quickest possible time at the lowest possible cost. This technique, which I brand a creature of the devil, works in this way: A jury of six people is summoned, the lawyers for each side then make a fifteen minute presentation, and the jury decides the outcome. Although the result is said not to be binding, the parties are expected to see the handwriting on the wall and settle. What a travesty!

I am not opposed to the settlement of cases. I encourage that. But this technique is designed to dispose of a case quickly by the use of a jury without any of the safeguards that make for a just result.

The parties are required to submit to a procedure to which the rules of evidence and civil procedure do not apply. In the fifteen minute presentation the lawyers can say anything about their cases. Procedures designed to achieve a just result are ignored. No longer is the judicial process dealing with probabilities. There is no burden of proof. Relevancy is not a factor. Neither is credibility—the jury sees and hears no witnesses. How can the jury in this aborted procedure factor into the result the values of the community? It is the use of Russian roulette to achieve a disposition of a case. And, ultimately, as it begins to be more widely used, it will eliminate the jury trial, as we know it, in civil cases. Recently the State Bar of Michigan Assembly, by resolution, approved the concept of summary jury trial and sent it on for approval to the Michigan Supreme Court.<sup>15</sup> We will have the “*Sixty Minutes*” of television as a role model for our jury system.

What began the downfall of the jury trial in civil cases is the reduction of the size of the jury. Traditionally we had juries of twelve persons. Now we have six. And in the Michigan state

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15. *From the Michigan Supreme Court: Proposed New MCR 2.404*, 66 MICH. B.J. 1148 (1987); see also Brenneman & Wesoloski, *Blueprint for a Summary Jury Trial*, 65 MICH. B.J. 888 (1986) (discussing summary jury trial procedure on which proposed MICH. Ct. R. 2.404 is based).

courts, five out of six jurors can reach a majority verdict. What has this done to the goal of a just result?

1. It has eliminated in large measure the need for the jury to deliberate and interact to achieve a verdict. Statistics show that small juries reach verdicts more quickly and with wide aberrations in the verdicts. Such juries do not often disagree and thus a hung jury infrequently occurs.<sup>16</sup>
2. This technique has also magnified the influence of a dominant person in the jury. One such person in a small jury can have significantly more influence, and increasingly so in a jury that needs only to reach a majority verdict.<sup>17</sup>
3. The reduction in size itself reduces the all-important infusion of community values into the verdict. Thus, the most important factor in a just result is downplayed. Speed in obtaining a jury and quickness in obtaining a verdict are now more important than the deliberative process. In my view, it is a cynical view of justice. Getting the case over with—achieving a disposition in the quickest possible time at the lowest possible cost—is the goal. The cynic says most of these cases should not be in court anyway. The next steps are already being played. Send them to mediation or arbitration. Case management is now what judges are supposed to do.

Another attack on the jury trial in civil cases is being mounted. These are cases that are simply too complex for a jury to handle. In such cases, it is argued, the judge should make the decision. Cited are the lengthy antitrust or securities cases with thousands of documents, hundreds of witnesses, battalions of lawyers, and months of trial. So the facially attractive arguments are trundled out—jurors should not be tied up in trials for so lengthy a time, jurors need to be highly educated in order to

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16. Padawer-Singer, Singer & Singer, *An Experimental Study of Twelve vs. Six Member Juries under Unanimous vs. Nonunanimous Decisions*, in *PSYCHOLOGY IN THE LEGAL PROCESS* 77, 82 (B. Sales ed. 1977); see also R. SIMON, *THE JURY: ITS ROLE IN AMERICAN SOCIETY* 75 (1980); Note, *A Jury Experiment Reanalyzed*, 7 *U. MICH. J.L. REF.* 520 (1974); Note, *An Empirical Study of Six- and Twelve-Member Jury Decision-Making Processes*, 6 *U. MICH. J.L. REF.* 712 (1973); Note, *Six-Member and Twelve-Member Juries: An Empirical Study of Trial Results*, 6 *U. MICH. J.L. REF.* 671 (1973).

17. Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 *MICH. L. REV.* 644, 693 (1975). *Contra* M. SAKS, *JURY VERDICTS* 11 (1977).

understand the issues, a judge can cut through the maze more quickly, a fair trial is more important than a jury trial, etc.

I suggest that we should retain the jury in complex cases. Lawyers and judges have the responsibility for so crystallizing the issues that they can be understood. This is the artistry that is required of competent professionals. To say that there are cases in which this cannot be done begs the question.

I do believe that in such cases the full use of the device of commenting on the evidence should be used by the judge. I contend that the jury should be solely responsible for the verdict, but the judge can, by marshalling the evidence and commenting on its significance, greatly aid the jury. Commenting on the evidence requires competence and skill on the part of the judge. It requires a mastery of the body of complex evidence and an ability to present that evidence in a way in which the ultimate decisionmaking of the jury is not infringed. Appellate courts have not been helpful in this regard. Many have frowned on comments by the court, sometimes justifiably, because it appeared from the comments that the court was suggesting to the jury what it should do.

This was not always so. I remember reading a decision of the Supreme Court by Justice Oliver Wendell Holmes. In that case, Justice Holmes approved a comment by the judge in a criminal case, which went something like this:

You, ladies and gentlemen of the jury, have heard all of the evidence. It is for you to decide whether the defendant is guilty or not guilty, and you should not be influenced in any way by anything I say. But I can tell you this: If I had to make that decision, I would find the defendant guilty.<sup>18</sup>

I do not believe that such a comment would be allowed today, but the affirmance does indicate that in prior days there was a much broader latitude given to judges to comment on the evidence.

But appellate courts should support comments by thoughtful, competent judges as an aid to the jury so that the jury trial is retained. The rules governing jury trials have been crafted over many decades to ensure fair and just trials. They permit and, in my view, encourage judges and juries to act compatibly to achieve justice.

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18. See *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920).

## CONCLUSION

My central points tonight have been that the goal of our judicial system is the achievement of justice in specific cases and that the use of the jury is the best way to achieve that result. I have contended that to obtain justice in a case it is of maximum importance that a jury which is drawn from the community in which the case arises puts into the verdict the values of that community. It is in this way that the law deals with probabilities, and justice is achieved. This has high value in a democracy.

Indeed, if reasonable people in our profession are attempting to do away with the jury trial or, at the very least, to limit its effective usage in civil cases, then, in the words of Shaw, we should round up the unreasonable people in our profession and mount the counterattack.

