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Senate Bill 584
Civil Actions – Noneconomic Damages – Personal Injury and Wrongful Death
Sponsors: Senators Waldstricher and Smith
Judicial Proceedings Committee

POSITION: SUPPORT (FAVORABLE)

February 7, 2025

Dear Chairman Smith and Members of the Senate Judicial Proceedings Committee,

As a trial lawyer, small business owner, mother of 3 young children and Maryland citizen, I am writing in support of SB584 and respectfully asking for a favorable report for the following reasons.

As a trial lawyer, I have seen firsthand the absolute injustice that the arbitrary cap on non-economic damages has on the rights of Marylanders that are severely injured at the hand of a negligent actor and by no fault of their own. It is so difficult to explain to clients that the Maryland legislature has limited their ability to be fully and completely compensated for their lifelong pain and suffering, which is often so tremendous it is difficult to even put a monetary value on it. It is also so difficult to tell clients that if a jury, who spends days listening to all of the evidence in their case, and then hours, if not days, deliberating their case, awards them a significant amount of non-economic damages, that jury award will automatically be reduced by the judge by law. Clients do not understand why this is the system that we have. Honestly, neither do I. We are one of only nine states that still puts an arbitrary cap on our citizens' quality of life and Maryland citizens deserve better.

As a small business owner, I am fully aware of the concerns that small business owners face in obtaining insurance and facing potential liability, but this bill would not increase either of those concerns. There has been no benefit to insurance costs or to the economy from this arbitrary cap; it is those that are injured that are forced to suffer even more.

As a mother of 3 young children and a Maryland citizen, it terrifies me that if someone significantly injures me or my children, we would not be able to be fully compensated for our injuries. My children, and any Maryland citizen, would not be able to be made whole when injured due to no fault of their own.

I am so proud to live and work in Maryland, especially in 2025. I know that we care deeply about our citizens. We should trust our juries as much as 41 other states in our nation do. Thank you for all of your work and for your consideration of this important bill and I urge a **FAVORABLE** report.

Respectfully,
Cara O'Brien (District 31)

2025 MAJ Position Paper HB113 SB584 Non Econ Damag

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2025 POSITION PAPER
HB113 / SB584 - FAVORABLE

CIVIL ACTIONS - NONECONOMIC DAMAGES PERSONAL INJURY AND WRONGFUL DEATH
FAVORABLE

A Maryland law enacted in 1986 arbitrarily restricts the ability of Maryland juries to decide the full and fair outcome in court cases when unreasonably unsafe conduct causes injury or death. This law caps and limits the recovery of "noneconomic damages" (including every kind of loss of quality of life, other than wages or medical expenses). **Let Maryland Citizen Juries Decide**.

Maryland is an Outlier

Enacted nearly 40 years ago, this cap was the first of its kind in the nation and today only nine other states have adopted similar restrictions. No neighboring state, nor any state on the Eastern Seaboard, places the same limitations on citizens' rights to fair compensation. For over four decades, § 11-108 has failed to lower insurance costs or improve the economic well-being of Marylanders—therefore, it is time to repeal this outdated law and allow juries to decide fair outcomes.

Caps Hurt All Marylanders, Including Women, Children, and the Elderly

Under §11-108, Maryland's civil justice system disproportionately favors high-wage earners and forces a cap on physical and psychological injuries, such as reproductive harm, pregnancy loss, infertility, deformity, disfigurement, impaired physical capacities, sexual assault injuries, grief, or altered sense of self.[1]

- In Maryland, a 24-year-old woman suffered severe shoulder injuries after a tractor-trailer rear-ended her car. As a result of the crash, she had to undergo a painful and disfiguring breast reduction surgery. The jury, recognizing the immense physical and emotional toll on her life, awarded a total verdict of $3,156,000, including $2,367,000 in non-economic damages, reflecting the jury's understanding of the magnitude of the young woman's lifetime of pain and impaired self-esteem. However, due to the limitations set by § 11-108, the verdict was reduced by nearly two-thirds.[2]

- In Maryland, a 25-year-old woman was kidnapped from her building's lobby by a felon who, despite assurances to tenants that only carefully-screened tenants could access common areas, received a set of keys from the landlord. Beaten and sexually assaulted, the young woman's traumatic experience did not stop her from working, so she had no significant wage loss. The jury's verdict was composed nearly entirely of non-economic damages; however unbeknownst to the jury, due to the limitations set by § 11-108, the verdict was reduced by more than half.[3]

2025 POSITION PAPER
HB113 / SB584 - FAVORABLE

Let Maryland Citizen Juries Decide

In similar fashion, § 11-108 impacts jury verdicts where unreasonably unsafe conduct injures or kills very young or very old Marylanders, because such cases have a very low lost wages/earning component.

- When a five-year old child drowned in a negligently-managed pool at an Anne Arundel County country club, § 11-108 slashed the jury's verdict for his parents' grief and anguish by almost 75%.[4]

Repealing § 11-108 would empower juries to determine fair compensation, ensuring justice for all Marylanders, especially those who experience non-financial harm.

MARYLAND ASSOCIATION FOR JUSTICE URGES A FAVORABLE REPORTER ON HB113/ SB584

[1] HB113 / SB 584 would repeal this "general" noneconomic damages cap. HB113/SBXXX has no effect on caps applicable to health care providers, local or State government, boards of education, or the cap enacted pertaining to claims of sexual assault against a child.

[2] Wertz v. Wakefoose, Case No. 71695V (Cir. Ct. Montgomery County, Md. Dec. 2, 1993). Because the cap was $350,000 in 1993, 11-108 took away nearly two-thirds of the jury's verdict.

[3] Solder v. Queen-Anne Belvedere Assocs., Ltd., Case No. 24-L-90002826 (Cir. Ct. Baltimore County, Md. Jul 23, 1993).

[4] Freed v. DRD Pool Serv., Inc., 416 Md. 46, 5 A.3d 45 (2010). In this reported appellate decision, the Maryland Supreme Court refused to find § 11-108 unconstitutional. Accordingly, the only way Marylanders can get relief from § 11-108 is for the General Assembly to repeal it.

About Maryland Association for Justice

The Maryland Association for Justice (MAJ) represents over 1,250 trial attorneys throughout the state of Maryland. MAJ advocates for the preservation of the civil justice system, the protection of the rights of consumers and the education and professional development of its members.

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Written Testimony Caps, JPR, CSN.pdf
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Members of the Maryland Senate,
Judicial Proceedings Committee

RE: Favorable Support of SB584
Repeal of the 11-108 Cap

Dear Chairman Smith and Members of the Senate Judicial Proceedings Committee:

I am a registered Republican. I am also a husband, father, lifelong Marylander, and third-generation small business owner. I am writing to strongly urge a favorable report on SB584, which would repeal an ill-conceived, antiquated (passed nearly four decades ago, in 1986), fear-driven piece of legislation which serves only to deprive injured Marylanders of just compensation when they are severely injured as a result of proven negligence.

Just as the 2nd Amendment to the United States Constitution protects the rights of Americans to bear arms, the 8th Amendment to the Constitution protects the rights of Americans to the right to a trial by jury in a civil case. The 2nd Amendment is not limited to the liability phase of a civil claim, but encompasses all aspects of those claims, including negligence, causation, and damages. **Both of these rights (the 2nd and 8th Amendment), which stand on equal constitutional footing, *shall not be infringed***. Similarly, Article 23 of the Maryland Constitution guarantees Marylanders the same right to a trial by jury in a civil case. As conservatives, we must not pick and choose which constitutional rights we decide to fight to uphold, or the proverbial slope will become progressively more slippery, undermining the foundational rights that fortify our democracy.

As a third-generation small business owner, I am understanding of other small business owners who fear that repealing this "cap" may have an adverse effect on their businesses. Simply put, those fears are unfounded, **unsubstantiated by data**, and are nothing more than the product of fearmongering by those who stand to gain by limiting Marylanders' Constitutional rights to a full measure of justice. The rare instances where unreasonably unsafe conduct severely injures innocent Maryland citizens do not drive the cost of doing business in our State. Rather, the biggest dangers to business owners in Maryland are suffocating taxes and regulations which have made it progressively more difficult to run a viable small business in our State. Only nine other states in the Country have such caps, and the vast majority of the most business-friendly, conservative states in the union have no such caps (ex: Texas, Florida, etc.).

Not only is this "cap" unnecessary to protect small businesses, but it is un-American and is inconsistent with true conservative values. I strongly urge a favorable vote on SB584.

Sincerely,

Christopher S. Norman

Christopher S. Norman

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Testimony of George S. Tolley III

SB 584 Civil Actions – Noneconomic Damages
– Personal Injury and Wrongful Death

FAVORABLE

Dear Chairman Smith, Vice Chair Waldstreicher, and Distinguished Members of the Senate Judicial Proceedings Committee:

I write to urge a **FAVORABLE** report on SB 584, which repeals Maryland's cap on non-economic damages in Md. Cts. & Jud. Procs. § 11-108.

First, ***§ 11-108 does not apply to medical malpractice claims***. Accordingly, repealing § 11-108 will have no effect on medical malpractice claims, which are governed by a separate damages cap (found in Md. Cts. & Jud. Procs. § 3-2A-09). Medical malpractice has a different cap because the reasons for a cap in that area of the law are completely different.

There is no dispute as to this fact. In written testimony last year, Medical Mutual admitted that "***the physician groups joining in this letter would not be directly affected by [ ]repeal"*** of § 11-108. Further, the plaintiff's bar is working with the Maryland Hospital Association on language to insulate hospitals in Maryland from any negative effects from repealing § 11-108. *See* SB 681 / HB 926.

Repealing § 11-108 will not change the cap in medical malpractice claims. However, repealing the ***general*** cap that applies to every other kind of personal injury and wrongful death action (§ 11-108) will correct an historical injustice.

Second, forty (40) states in this country have no cap statute like § 11-108. Over 85% of the U.S. population reside in those 40 states. If § 11-108 were a magical law that somehow stabilizes unsustainable insurance markets, all of those other states would have been suffering

When the opponents of SB 584 talk about why they believe § 11-108 should be preserved, they point to events that happened four decades ago. Those events are irrelevant because the market conditions that allowed insurers to cancel policies for no reason or justification no longer exist in Maryland or anywhere else. Moreover, the insurance industry is earning profits globally at a record pace – billions of dollars in profits per month. The global market for insurance coverage no longer requires Marylanders to sacrifice their right to fair compensation determined by citizen juries to keep it afloat.

Third, there is nothing mysterious about non-economic damages. As noted, almost every state has no law like § 11-108. Non-economic damages in those states are not difficult for juries to calculate. In courtrooms across the United States, juries reach unanimous verdicts every day, including with respect to the valuation of non-economic damages.

In a personal injury case, the plaintiff must present evidence to prove that the unreasonably unsafe (*i.e.*, "negligent") conduct of the defendant caused the plaintiff's injuries. At a fair and impartial trial, the jury decides from the evidence whether the defendant is legally responsible and, if so, how much money will fairly compensate the plaintiff.

Even when injuries are ***catastrophic***, juries routinely deliberate and reach unanimous verdicts to compensate plaintiffs fairly for their non-economic damages.

The insurance industry claims that § 11-108 must be preserved ***or else***.

Or else . . . inconsistent and unfair judgments will cause Maryland's insurance market to collapse. But most of the country has no cap like § 11-108, and their insurance markets manage to work well, with available and affordable liability insurance.

Or else . . . juries will struggle to calculate fair and rational awards. Of course, juries are not told about § 11-108 but they still return unanimous verdicts without much struggle.

Or else . . . personal injury lawsuits will be easier to resolve through negotiation and settlement. That's actually a good thing; more settlements would allow courts to do their work more efficiently and with less cost to taxpayers.

Or else . . . juries might return "nuclear verdicts" of more than a million dollars. Under Maryland law, I the jury's verdict indicates that it was based on passion or other inappropriate factors, the trial judge (who heard the same evidence the jury heard) has authority to reduce the verdict and require the plaintiff to accept the reduction or choose to try the case with a new jury (this is called *remittitur*). Even with a cap, nuclear verdicts are possible because the jury isn't told about § 11-108.

Or else . . . the sky will fall. *Balderdash*. With four decades of experience, we now can see clearly that § 11-108 provides no benefit to Maryland or its citizens. Our insurance is not measurably cheaper, our business environment is not measurably stronger, our economy is not measurably more prosperous, and businesses are not flocking to relocate to Maryland despite having enacted back in 1986 what the insurance industry and tort reform zealots claim is a virtually magical statute.

None of Maryland's neighboring states – not Pennsylvania, nor Delaware, nor the District of Columbia, nor Virginia, nor West Virginia – indeed, no other State on the East Coast – has a law like § 11-108 that limits recoverable non-economic damages in personal injury cases. Section 11-108 puts "equal justice" beyond the reach of catastrophically injured Marylanders.

Maryland law should provide equal justice for all. Please enact HB 83 and repeal § 11-108.

I respectfully ask for a **FAVORABLE** report on **Senate Bill 584**.

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Democratic Renewal and the Civil Jury

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Democratic Renewal and the Civil Jury

Cover Page Footnote

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DEMOCRATIC RENEWAL AND THE CIVIL JURY

Richard L. Jolly, Valerie P. Hans,† & Robert S. Peck‡*

The United States is in a period of democratic decline. Waning commitment to principles of self-governance throughout the polity necessitates urgent action to revitalize the Republic. The civil jury offers an often-overlooked avenue for such democratic renewal. Welcoming laypeople into the courthouse and deputizing them as constitutional actors demonstrates a profound faith in representative governance and results in wide-reaching and pronounced sociopolitical and administrative benefits. The Seventh Amendment of the U.S. Constitution and similar state provisions protect the rights of litigants to jury trials in most circumstances. But these promises have been hollowed over time through legal, political, and practical challenges. The result is that civil juries play a more minor role in resolving civil disputes today than at any other point in American history. If the civil jury is to serve as a locus of democratic power and as an emboldening civic experience for those who serve, it too must be renewed. To this end, this Article offers six research-based recommendations, informed by the distinctive approach that jurors bring to decision-making as well as the sociopolitical benefits that undergird the institution. Adopting these strategies can help reintroduce democracy into the civil justice system, and in doing so, can help direct America back toward the nation's democratic aspirations.

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I. INTRODUCTION

The United States is in a period of crisis. At the time of this writing, COVID-19 has claimed the lives of over a million people and hospitalized over four million.[1] The sickness has upended every aspect of the nation's social, economic, and government institutions, and, with new variants regularly emerging, there seems to be little sign of abatement.[2] The dominant political parties, which were deeply polarized even before the pandemic, have grown only more so.[3] And opportunistic public figures have used the emergency to foment a loss of faith in the nation's institutions with shocking effectiveness.[4] A Harvard study found that a plurality of young Americans today believe that American democracy is "in trouble" or "failing," with a third believing that the country is on a path to civil war.[5] But perhaps the darkest indicator of democratic malaise occurred on January 6, 2021, when a violent mob stormed the Capitol in an attempt to prevent the peaceful transfer of political

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[1] These figures were cited by the Supreme Court on January 13, 2022. Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, OSHA, 142 S. Ct. 661, 670 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting); *see also Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (Aug. 5, 2022), https://www.nytimes.com/interactive/2021/us/covid-cases.html (reporting 1,029,108 total deaths due to COVID-19).

[2] *See* Kathy Katella, *Omicron, Delta, Alpha, and More: What to Know About the Coronavirus Variants*, YALE MED. (Aug. 31, 2022), https://www.yalemedicine.org/news/covid-19-variants-of-concern-omicron ("One thing we know for sure about SARS-CoV-2, the virus that causes COVID-19, is that it is changing constantly.").

[3] *See, e.g.*, *Political Polarization in the American Public*, PEW RSCH. CTR. (June 12, 2014), https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/ (offering empirical evidence of increasing partisan polarization in the United States from 1994 through 2014); *see also, e.g.*, Michael Dimock & Richard Wike, *America is Exceptional in the Nature of its Political Divide*, PEW RSCH. CTR. (Nov. 13, 2020), https://www.pewresearch.org/fact-tank/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide/ (noting that "the 2020 pandemic has revealed how pervasive the divide in American politics is relative to other nations" and claiming that "Americans have rarely been as polarized as they are today").

[4] *Cf. Toplines and Crosstabs December 2021 National Poll: Presidential Election & Jan 6th Insurrection at the US Capitol*, U. MASS. AMHERST (Dec. 28, 2021), https://polsci.umass.edu/toplines-and-crosstabs-december-2021-national-poll-presidential-election-jan-6th-insurrection-us (finding that a substantial number of Republicans doubt the legitimacy of the 2020 presidential election).

[5] *See* HARVARD KENNEDY SCH. INST. POL., HARVARD YOUTH POLL FALL 2021: TOP TRENDS AND TAKEAWAYS (42d ed. 2021) (concluding that "[a] majority (52%) of young Americans believe that our democracy is either 'in trouble' or 'failing'" and that "[y]oung Americans place the chances that they will see a second civil war in their lifetime at 35%").

power at the federal level for the first time in the nation's history.[6] It is said without hyperbole that the flame of American democracy is rapidly extinguishing.[7]

Given the depth and severity of the Republic's current crisis, the civil jury might not be the first solution to come to mind as a potential democratic corrective. The institution is regularly relegated in popular and constitutional discussions to being little more than an optional dispute resolution tool, with some disparaging it as a poor one at that.[8] It is rarely spoken about broadly in terms of its sociopolitical significance and the role it plays in enabling democratic participation and a commitment to representative governance. But what critics of the civil jury fail to appreciate is that the institution is an integral piece of the constitutional puzzle that, along with other reforms, may help America forge a path toward democratic renewal.[9] As political and social leaders search for institutional and legislative reforms to address the nation's current legitimacy crisis, the civil jury should be high on their shortlist.

It is easy to forget that in early American history the right to trial by civil jury was widely celebrated as among the most cherished constitutional protections. Indeed, commitment to the institution served as a chief motivator in prompting the American Revolution and in debating and achieving the Constitution's ratification. Recall that British efforts to restrain colonial civil juries through enacted legislation motivated not only the First Congress of the American Colonies in 1765,[10] but was also explicitly listed in the Declaration

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[6] *See* Kat Lonsdorf, Courtney Dorning, Amy Isackson, Mary Louise Kelly & Ailsa Change, *A Timeline of How the Jan. 6 Attack Unfolded—Including Who Said What and When*, NPR, (June 9, 2022, 9:11 AM) https://www.npr.org/2022/01/05/1069977469/a-timeline-of-how-the-jan-6-attack-unfolded-including-who-said-what-and-when (documenting the January 6, 2021, Capitol riots' timeline).

[7] *See* SARAH REPUCCI, FROM CRISIS TO REFORM: A CALL TO STRENGTHEN AMERICA'S BATTERED DEMOCRACY (Freedom House 2022), https://freedomhouse.org/report/special-report/2021/crisis-reform-call-strengthen-americas-battered-democracy (noting the United States' rapid democratic decline in relation to established democracies around the world).

[8] *See infra* Section III.B.

[9] *See infra* Part II.

[10] *See* RESOLUTION VII OF THE STAMP ACT CONGRESS (1765) (listing among grievances "[t]hat trial by jury is the inherent and invaluable right of every British subject in these colonies" and "[t]hat the late Act of Parliament, . . . by extending the jurisdiction of the courts of Admiralty beyond its ancient limits, have a manifest tendency to subvert the rights and liberties of the colonists").

of Independence as a grievance justifying the Revolution.[11] And roughly a decade later, ratification of the United States Constitution was in no small part secured by a promise to guarantee civil jury protections as part of a subsequent Bill of Rights,[12] which was realized in 1791 with the Seventh Amendment.[13]

Furthermore, the civil jury has never been merely a feature of the federal government. The constitutions of all thirteen original states secured the institution—in fact, the civil jury was likely the only right so universally protected at the Founding.[14] When the Fourteenth Amendment was ratified roughly a century later, the constitutions of thirty-six out of thirty-seven states guaranteed the right to a jury trial.[15] And today, Colorado, Louisiana, and Wyoming are the only states without civil jury guarantees in their constitutions, though all three protect the right by legislation in certain contexts.[16] Furthermore, this broad protection is in some sense uniquely American. Though England was the progenitor of common law civil juries, the country abandoned their widespread use after the First World War.[17] And while lay participation in resolving disputes has recently expanded in some countries—

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[11] *See* THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776) ("For depriving us in many cases, of the benefits of Trial by Jury").

[12] *See* Stanton D. Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICH. L. REV. 407, 411–13 (1999) (outlining how one of the most potent arguments against the ratification of the Constitution was "[t]he absence of a guarantee that litigants would have a right to jury trial in civil cases in any new federal courts" and "[o]nly by promising amendments did the Federalists prevail").

[13] *See* U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

[14] *See* LEONARD LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 281 (1960) ("The right to trial by jury was probably the only one universally secured by the first American state Constitutions . . . .").

[15] *See* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868*, 87 TEX. L. REV. 7, 115 (2008) (surveying the adoption of jury trial rights in state constitutions at the time of the Fourteenth Amendment's ratification).

[16] *See* Eric J. Hamilton, Note, *Federalism and the State Civil Jury Rights*, 65 STAN. L. REV. 851, 858–59 (2013) (reviewing state practices and protections as to civil jury rights).

[17] *See* William V. Dorsaneo, III, *The Decline of Anglo-American Civil Jury Trial Practice*, 71 SMU L. REV. 353, 355–56 (2018) (noting that the civil jury began in England around the end of the 1100s before it all but disappeared in the 1900s).

perhaps most successfully in Argentina[18]—no other countries protect the right to trial by civil jury as widely and as foundationally as the United States does.

Strong political, social, and administrative motivations compel America's commitment to civil juries and provide guidance for addressing the nation's current democratic decline. By nature of its institutional characteristics, the jury is positioned to check the application and development of law as enacted and enforced by the government, and to serve as a bulwark against powerful social and economic actors.[19] It is a democratic part of the Constitution's complex system of checks and balances, ensuring that few acts of government affecting core private rights can be brought to bear without passing through a body of local laypeople.[20] For this reason, jury service and voting have long been conceptually linked as forms of meaningful political participation; in fact, as Professor Andrew Ferguson notes, "In the hierarchy of political rights, the jury trumped voting in importance [at the Founding]."[21] And as French thinker Alexis de Tocqueville recognized after closely studying the early American body, "The jury is . . . above all a political institution."[22] Even today, to serve as a juror is a political designation: It is to be deputized as a constitutional officer worthy of resolving private disputes.[23] The civil jury is enshrined in the Constitution specifically because of—not despite—it being a locus of democratic power.

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[18] *See* Vanina G. Almeida, Denise C. Bakrokar, Mariana Bilinski, Natali D. Chizik, Andrés Harfuch, Lilián Andrea Ortiz, Maria Sidonie Porterie, Aldana Romano & Shari Seidman Diamond, *The Rise of the Jury in Argentina: Evolution in Real Time*, *in* JURIES, LAY JUDGES, AND MIXED COURTS 25, 26, 31, 41–42 (Sanja Kutnjak Ivković, Shari Diamond, Valerie P. Hans & Nancy S. Marder, eds., Cambridge U. Press, 2021) (discussing the recent adoption and expansion of juries in Argentina and prospects for its implementation elsewhere in Latin America).

[19] *See* NANCY S. MARDER, THE JURY PROCESS 10–14 (2005) (discussing the jury's political role); SUJA A. THOMAS, THE MISSING AMERICAN JURY 58–62 (2016) (articulating the relationship between the jury and the traditional branches of government).

[20] *See* THOMAS, *supra* note 19, at 92 (describing the jury's position in relation to the traditionally recognized branches of government).

[21] Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1119 (2014).

[22] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 272 (J. P. Mayer ed., George Lawrence trans., 1969) (1835).

[23] *See* Ferguson, *supra* note 21, at 1115–34 (discussing the relationship between jury service and constitutional identity).

But it is not just the inherent political power that makes the institution of interest in this time of American crisis; perhaps more important is that through exercising this power, the jury serves as a venue for fostering a commitment to democratic governance. Again, looking to the early body, Tocqueville described jury service as a virtue-enhancing exercise that impresses upon those who serve the skills required for self-governance, noting: "[Juries] make all men feel that they have duties toward society and that they take a share in its government. By making men pay attention to things other than their own affairs, they combat that individual selfishness which is like rust in society."[24] These observations are not anachronistic. Recent empirical studies show that individuals who serve on civil juries to the point of issuing a final verdict tend to view their service favorably and as a form of significant civic engagement.[25] Studies also show that civil jurors who served on larger juries that were required to reach a unanimous decision are significantly more likely to vote in elections after jury service than they were before serving.[26]

The civil jury further provides jurors, and society more broadly, with valuable information. Bringing the public into the courthouse to hear a controversy and to serve as an integral part of its resolution provides transparency that is necessarily lacking from common forms of private dispute resolution, such as mandatory mediation and arbitration.[27] Resolving disputes publicly shines light on social ills and provides information that voters and policymakers may draw upon in addressing common harms.[28] For a

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[24] TOCQUEVILLE, *supra* note 22, at 274.

[25] *See, e.g.*, Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 282, 298–300 (Robert E. Litan ed., 1993) [hereinafter Diamond, *What Jurors Think*] (discussing studies on the impact on individuals of civil jury participation).

[26] *See* Valerie P. Hans, John Gastil & Traci Feller, *Deliberative Democracy and the American Civil Jury*, 11 J. EMPIRICAL LEGAL STUD. 697, 710–12 (2014) (presenting empirical data indicating that individuals were more likely to vote after serving on a jury that required them to reach a unanimous verdict; jurors who served in twelve-person as opposed to smaller juries, and who sat in cases with organizational as opposed to individual defendants, also showed a boost in subsequent voting).

[27] *See infra* Section II.B.*1*.

[28] *See* CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA 3–5 (2001) (discussing the impact of lawsuits in prompting societal or legislative changes); ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 1–2 (2017) (concluding that "litigation is a social good" and justifies the

recent example of this process, consider how the #MeToo movement gained visibility and strength by publicity surrounding high-profile instances of sexual harassment and sexual assault.[29] The litigation and attendant publicity encouraged other victims to come forward, which provided society a better idea of the frequency and impact of this widespread problem.[30] In this way, the public resolution of private disputes provides a public good that benefits society as a whole.

Emphasizing these political and social benefits is not to ignore the direct advantages that jurors offer in the administration of civil justice. Laypeople drawn from the community for one-off trials enhance fact-finding by bringing their diverse viewpoints to bear on a given dispute.[31] For this reason, the jury has at times been referred to as "the lower judicial bench" in a bicameral judiciary, and as "the democratic branch of the judiciary power."[32] This structural power arrangement—built into the very architecture of American courtrooms[33]—has advantages over deferring to professional judges. As repeat players, judges are likely to approach cases in a routinized fashion and fall victim to confirmation biases.[34]

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costs of litigation because "it enables people to promote the rule of law and affirms our citizen-centered political system").

[29] *See* Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where to, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155, 156–57 (2019) (arguing that binding arbitration clauses have halted the social movement's progress by denying victims access to public courts).

[30] *See* Mary Graw Leary, *Is the #MeToo Movement for Real? Implications for Jurors' Biases in Sexual Assault Cases*, 81 LA. L. REV. 81, 83 (2020) (reviewing how the social movement "gained staggering momentum from a tweet and evolved into a worldwide acknowledgment of the sexual harassment and violence that many women experience").

[31] *See* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1275 (2000) (explaining that "[b]ecause the jury's work largely depends on subjective interpretations of evidence, a variety of perspectives will enrich jury discussions" and that interaction among jurors from various experience levels, both limited and expansive, "will expand the range of issues to be discussed" among jurors).

[32] *See* Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1189 (1991) (collecting early American sources).

[33] *See* Jonathan D. Rosenbloom, *Social Ideology as Seen Through Courtroom and Courthouse Architecture*, 22 COLUM.-VLA J.L. & ARTS 463, 487 (1998) (discussing how the physical division between the judge and jurors reflects social ideology).

[34] English writer G.K. Chesterton captures this well: "[T]he horrible thing about all legal officials . . . is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it. Strictly they

And jurors possess attributes that judges do not. As community representatives, jurors are informed of societal norms from which the unrepresentative judicial class is often detached. What is more, unlike individual trial judges, jurors must deliberate to reach a decision, thus allowing for robust and multifaceted consideration of a dispute.[35] These jury characteristics ensure that the law is applied and develops in a way that is grounded in community norms.

However, while the civil jury has the potential to offer these many sociopolitical and administrative benefits that can be of service toward the ends of democratic renewal, they are not currently sufficiently realized. To the contrary, over the course of the twentieth century, the civil jury as an institution has languished under sustained attacks from the state and powerful private actors. The judiciary adopted procedures deliberately designed to limit the use of and role for the civil jury by transferring power into the hands of unrepresentative judges and private arbitrators.[36] Legislatures, too, enacted laws restricting access to the jury by allowing for mandatory arbitration agreements, as well as limiting the jury's fact-finding role by restricting their authority to assess and award civil damages in certain contexts.[37] And businesses, particularly those in the insurance industry, have engaged in a decades-long political campaign to convince the public, practitioners, and the judiciary that these restrictions on the civil jury are not only warranted but also should be expanded.[38] The jury, they say, is unqualified to decide complex disputes, and that twelve laypeople routinely bring not wisdom but prejudice against certain litigants—specifically those with business interests.[39]

These attacks, fundamentally unfounded or subject to built-in correctives, have been so effective that they have come close to nearly eradicating the jury as a meaningful component of the

do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop." G. K. Chesterton, *The Twelve Men*, *in* TREMENDOUS TRIFLES 80, 85–86 (1909).

[35] *See infra* Section II.B.

[36] *See infra* Section III.A.

[37] *See infra* Section IV.B.

[38] *See infra* Section III.C.

[39] *See infra* Section III.C.

American civil justice system.[40] Although at common law the civil jury was the primary means by which legal disputes were resolved,[41] the jury today is but an afterthought. In 2019—the last complete pre-pandemic fiscal year—juries disposed of just 0.53% of filed federal civil disputes.[42] The trend is mirrored in state courts. Although figures are incomplete (in part because the federal government no longer collects them), data from the Court Statistics Project shows that in 2019, juries disposed of a median of only 0.09% of state civil disputes.[43] Hawaii reported just a single civil jury trial that year; Alaska reported zero.[44] So while ostensibly the civil jury is secured for use in all legal disputes to ensure the democratic application and development of law, the reality is that the institution's use has been drastically reduced.

The COVID-19 pandemic poses a new threat to the civil jury, with the potential to topple the institution entirely. From the beginning of the outbreak, it was clear that the airborne spread of the disease posed unique challenges to the jury, which, as a deliberative body, traditionally requires some degree of interpersonal interaction. As a result, in the spring of 2020, many courts around the country responded by completely suspending civil

[40] While our analysis focuses on the civil jury, it must be noted that the criminal jury, too, has been diminished as a locus of democratic power. *See* THOMAS, *supra* note 19, at 79 (noting that plea bargaining is one of the primary reasons "for the decline of criminal jury trials"). As the Supreme Court has recognized, American criminal justice today is for the most part "a system of pleas, not a system of trials." Lafler v. Cooper, 566 U.S. 156, 169–70 (2012). Like the civil jury, this displacement of the criminal jury has had deleterious effects on the democratic health of the Republic. *See* CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 1, 19–26, 221–22 (2021) (documenting the decline of jury trials and the rise of guilty pleas and describing the negative consequences). We emphasize the civil jury here, however, because its near collapse offers substantial upside from revival, and it is most often overlooked in the conversation.

[41] *See* Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 419 (1999) (explaining how juries "retained the ultimate power to decide the great majority of cases" in colonial American courts).

[42] Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (2019).

[43] *See* Sarah Gibson, Bree Harris, Nicole Waters, Kathryn Genthon, Amanda Fisher-Boyd & Diane Robinson, *Trial Court Caseload Overview*, CT. STAT. PROJECT, https://www.courtstatistics.org/csp-stat-nav-cards-first-row/csp-stat-civil (last updated July 8, 2022) (compiling disposition data from selected state courts).

[44] *Id.*

jury trials.[45] In Los Angeles Superior Court, for instance, all non-preference civil trials were postponed for all of 2020.[46] And some state and federal courts took the same approach in response to the highly-contagious Omicron variant in late 2021 and early 2022.[47] Such postponements produce backlogs that will likely plague a court system's docket long after normal operations resume. For some civil litigants—such as those who are elderly, injured, or ill—this delay will operate as a complete denial of justice.[48] And for others, the lengthy delays raise the prospect of stale or faulty evidence when their case eventually is tried.[49]

This near complete lack of civil trials has been a boon for the private arbitration industry. As the American Arbitration Association advertises on their website: "With court delays caused by the COVID-19 pandemic, a jury trial is unlikely in the near

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[45] *See Courts Suspending Jury Trials as COVID-19 Cases Surge*, U.S. CTS. (Nov. 20, 2020), https://www.uscourts.gov/news/2020/11/20/courts-suspending-jury-trials-covid-19-cases-surge ("About two dozen U.S. district courts have posted orders that suspend jury trials or grand jury proceedings, and scale back other courthouse activities in response to a sharp nationwide rise in coronavirus (COVID-19) cases.").

[46] *See* Administrative Order of the Presiding Judge Re: COVID-19 Pandemic, Gen. Order No. 2020-GEN-023-00 at 10 (Super. Ct. L.A. Cnty. Oct. 9, 2020) ("All non-preference civil jury trials may commence on or after January 4, 2021."); *see also* CA.CIV. PROC. CODE § 36 (giving preference to those civil actions involving, inter alia, a party "who is over 70 years of age" or concerning "wrongful death or personal injury").

[47] *See* Christine Schiffner, *Omicron Spike Forces Plaintiffs Firms to Reassess Trial and Case Strategy*, NAT'L L.J. (Jan. 14, 2022), https://www.law.com/nationallawjournal/2022/01/14/omicron-spike-forces-plaintiffs-firms-to-reassess-trial-and-case-strategy/ (noting that the spike in COVID-19 cases due to the Omicron variant caused litigants to continue to face delays, "especially when it c[ame] to jury trials"); Michael Finnegan, *Federal Jury Trials Suspended in L.A. Amid Rapid COVID Spread*, L.A. TIMES (Jan. 4, 2022), https://www.latimes.com/california/story/2022-01-04/federal-jury-trials-suspended-omicron-coronavirus-covid (stating that the rapid spread of COVID-19's Omicron variant caused "[f]ederal jury trials in Los Angeles, Santa Ana[,] and Riverside" to be suspended for a few weeks in January of 2022).

[48] While many jurisdictions have procedures to give certain litigants scheduling preference—which are meant to recognize that some elderly and very ill plaintiffs will not survive substantial trial delays—these procedures are neither automatic nor preferred. *See, e.g.*, Jay P. Barron, Fox*ing Your Way to Trial with Statutory Preference*, 61 ORANGE CNTY. LAW. 1, 43 (2019) (reviewing the process by which parties request scheduling preference).

[49] *Cf.* Irving R. Kaufman, *Judicial Reform in the Next Century*, 29 STAN. L. REV. 1, 2 (1976) (noting the "pervasive extent of cost and delay, and their corrosive impact upon our judicial system").

future."[50] They are not wrong. Courts are reporting that the backlog just in criminal cases could take years to work through, let alone the pile of hundreds of thousands of actively pending civil cases.[51] Moreover, there are an unknown number of civil cases that were not filed in 2020 because parties chose instead to wait out the pandemic.[52] The Court Statistics Project estimates this number of "shadow cases" to be over 1.1 million for just the twelve states that reported their 2020 caseloads, and it warns that these cases "have the potential to overwhelm the civil justice system."[53] Factor in the continued underfunding of the judicial branch[54] and it is not alarmist to recognize that the already rare civil jury trial is likely to lay dormant for the foreseeable future, despite some admirable experiments in virtual jury trials.[55]

Accordingly, if the sociopolitical benefits inherent in the use of civil juries are to be realized in this time of American democratic decline, it is necessary that the institution itself be restored. Strategies for doing so should be motivated by the animating principles of lay participation in resolving civil disputes—including the democratic representation of the community and the emboldening role of jury decision-making. Efforts must be made to remove barriers to jury trials so that they can occur more frequently

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[50] *The Arbitration Solution to COVID-19-Stalled Court Litigation*, AM. ARB. ASS'N, https://www.adr.org/litigation-to-arbitration (last visited Nov. 10, 2022).

[51] *See* DIANE ROBINSON & SARAH GIBSON, PANDEMIC CASELOAD HIGHLIGHTS, CT. STAT. PROJECT, (Mar. 22, 2021), https://www.courtstatistics.org/__data/assets/pdf_file/0022/61519/2020_4Q_pandemic.pdf (citing data showing the staggering amount of pending criminal and civil cases in 2020).

[52] *See id.* ("Although courts remained open for filing throughout the pandemic, litigants . . . may simply have chosen to wait to file civil or domestic relations cases.").

[53] *Id.*

[54] *See* Mandi Hunter, *Who Pays if Kansas Doesn't Fund Its Court System Adequately? You, Eventually*, THE KAN. CITY STAR (Apr. 30, 2021), https://www.kansascity.com/opinion/readersopinion/guestcommentary/article251037774.html (noting that Kansas state courts "have not been adequately funded for years"); Tom Coulter, *Officials: Budget Cuts Likely to Have Effects on Court System,* RAWLINS TIMES (Oct. 13, 2020), wyomingnews.com/rawlinstimes/news/officials-budget-cuts-likely-to-have-effects-on-court-system/article_924174e7-4a35-521c-89f6-36da8f278fef.html (explaining that the cuts in funding will result in a decrease in trials).

[55] *See Coronavirus and the Courts*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/newsroom/public-health-emergency (last visited Aug. 7, 2022) (providing links to state court experiments with virtual jury trials); *see generally* ONLINE COURTROOM PROJECT, https://www.onlinecourtroom.org/ (last visited Aug. 7, 2022) (describing efforts by trial consultants and others to study and improve online trials).

and to improve the fairness and accuracy of jury fact-finding so that more litigants view jury trials as a desirable mode of dispute resolution. We offer here six research-based strategies aimed at making these changes. Adopting these strategies can help rebuild the civil jury so that it is once again a key component of our democracy.

This Article recognizes that the jury represents a profound commitment to the principles of democratic self-governance and contends that looking to the institution can help guide the nation back toward those principles. To this end, it is divided into three main parts. Part II recounts the history and the anticipated role of the civil jury within the constitutional structure. It emphasizes that bringing the community into the application and development of the law has pronounced administrative and sociopolitical benefits. Part III presents the history of the institution's decline in use and esteem over the twentieth century. It recounts how critiques and successful attacks on jury authority have created a culture that views the institution as expendable. Part IV contends that if the democracy-enhancing benefits associated with the civil jury are to be once again realized, strategies must be taken to restore the institution to its position as a core part of the constitutional body. It offers strategies empirically shown to remove barriers to, and to improve the fairness and accuracy of, civil jury trials. The Article concludes that while the civil jury is unlikely to alone renew American democracy, it must be part of the conversation.

II. THE FOUNDATIONAL BENEFITS OF TRIAL BY CIVIL JURY

To understand the sociopolitical benefits that restoring the civil jury can bring in this time of democratic crisis, it is helpful to examine the role the institution played at the time of the Founding. The civil jury was cemented in the U.S. Constitution and widely protected in the states as a core institution designed to check abuses of power by the government and powerful actors.[56] It was a democratic body, bringing laypeople into the administration of

[56] *See* Eric Fleisig-Greene, *Why Contempt Is Different: Agency Costs and Petty Crime in Summary Contempt Proceedings*, 112 YALE L.J. 1223, 1229 (2003) (suggesting that the Founders included the right to a jury trial, at least in part, because of "the functional role of the jury as a way to assure that the judiciary remained accountable to, and aligned with, the interests of the citizenry it purported to serve").

justice and allowing them to exercise meaningfully the practice of self-governance. These are not theoretical benefits. Modern empirical research shows that jury service supports these foundational interests.[57] The jury enhances the administration of justice by democratizing the process of fact-finding and ensuring that outcomes conform with communitarian notions of justice. And through that civic engagement and transparency, laypeople are imbued with a deeper commitment to the legitimacy of government institutions.

A. THE CONSTITUTIONAL ROLE OF THE CIVIL JURY

It is difficult to overstate the role that the civil jury played in the run-up to the American Revolutionary War and the founding of the United States. The jury at the time was a core channel through which the colonists challenged the distant and unrepresentative monarchy.[58] In establishing their new system of government, many former colonists insisted that these jury protections be preserved in writing to act as a similar bulwark against the proposed American federal government.[59] To this end, the civil jury was constitutionalized not merely as a dispute resolution tool but also as a democratic body meant to bind the hands of powerful actors to the mast of the community.[60] It was an integral, structural component of the constitutional system itself.

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[57] *See, e.g.*, Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1278–94 (2009) (describing one of the jury's roles as a "deliberative accountability paradigm").

[58] In fact, colonial America was familiar with the resistance that criminal juries showed to the Crown not only in criminal prosecutions like Zenger's trial or the trial of William Penn, but also in civil cases that held British officials accountable for overstepping their authority and restricting civil liberties through damage verdicts, as in Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765) and Wilkes v. Wood, 98 Eng. Rep. 489 (K.B. 1763).

[59] *See, e.g.*, United States v. Gaudin, 515 U.S. 506, 510–11 (1995) (recognizing that juries were "designed 'to guard against a spirit of oppression and tyranny on the part of rulers,' and were 'from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.'" (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (4th ed. 1873))).

[60] *See* J. H. Michael Jr., *Right to Trial by Jury: How Important?*, U.S. DEP'T OF JUST. OFF., OF JUST. PROGRAMS (Oct. 1991), https://www.ojp.gov/ncjrs/virtual-library/abstracts/right-trial-jury-how-important (listing "the vindication of interests of private citizens in litigation with the government" and "protection of litigants against overbearing and oppressive judges" as arguments in favor of civil jury trials that were advanced during the Constitution's ratification process).

It is unsurprising that the Founders so entrusted the jury. Eighteenth-century jurists and scholars revered the jury for its sociopolitical significance. Perhaps most famous among these champions was English jurist William Blackstone. In his widely circulated *Commentaries*,[61] Blackstone celebrated the jury with an almost religious zeal. He called it "the glory of English law," "a privilege of the highest and most beneficial nature," and "the principal bulwark of [every Englishman's] liberties."[62] It was, he said, a "strong and two-fold barrier . . . between the liberties of the people[] and the prerogative of the crown" because "the truth of every accusation . . . [s]hould afterwards be confirmed by the unanimous suffrage of twelve of [a defendant's] equals and neighbours, indifferently chosen, and superior to all suspicion."[63]

It was this politically active jury that the American colonists weaponized in the decades leading up to the Revolution. Relying not just on colonial assemblies that opposed British tyranny, juries served "to protect the rights of the people from being violated by the Crown and its dependents," as a representative institution.[64] One of the early and most famous examples of the colonists exerting such political power is the seditious libel case of John Peter Zenger in 1735. Zenger was accused of printing allegations of corruption against the New York Governor, including the governor's attempt to recover a debt in an equity court to evade the debtor's right to a jury trial.[65] At the trial, because it was agreed that Zenger had published the material, his attorney Andrew Hamilton argued in support of the jury's power to determine both law and fact and to acquit Zenger on the basis that the corruption allegations were truthful, despite the fact that truth was not a defense for libel under

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[61] The Supreme Court has recognized that "[a]t the time of the adoption of the Federal Constitution, [Blackstone's Commentaries] had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England; so that undoubtedly, the framers of the Constitution were familiar with it." Schick v. United States, 195 U.S. 65, 69 (1904).

[62] 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *350, *379 (1765).

[63] *Id.* at *349–50.

[64] Jack N. Rakove, *The Original Justifications for Judicial Independence*, 95 GEO. L.J. 1061, 1074 (2007).

[65] *See* CLARK GAVIN, FAMOUS LIBEL AND SLANDER CASES OF HISTORY: FOUL, FALSE AND INFAMOUS 45–46 (Collier Books 1962) ("Zenger was arrested . . . on a Council warrant charging seditious libel.").

the law.[66] Although the judge threatened Hamilton with disbarment for making the argument and the jurors with perjury if they returned a not guilty verdict, the jury acquitted Zenger.[67] The outcome was celebrated throughout the colonies.[68]

The Zenger case proved to be no outlier. By the mid-eighteenth century, colonists were regularly employing the jury to nullify the excesses of the Crown. They did so both offensively—for instance, by refusing to enforce civil penalties against smugglers—and defensively—by awarding smugglers damages for harms resulting from the trespass of officers' searches.[69] In doing this, colonial jurors essentially rendered British law unenforceable, so much so that one governor complained, "[A] trial by jury here is only trying one illicit trader by his fellows, or at least by his well-wishers."[70] Another governor warned in 1761: "A custom house officer has no chance with a jury, let his cause be what it will. And it will depend upon the vigorous measures that shall be taken [in London] for the defense of the officers, whether there be any Custom house here at all."[71]

The Crown soon took vigorous measures against the jury, specifically by expanding the jurisdiction of juryless tribunals. This began with the Stamp Act of 1765, which required that all printed documents used or created in the colonies bear an embossed revenue stamp, with violations to be tried in juryless vice-admiralty courts.[72]

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[66] *See id.* at 52–53 (reciting the hearing transcript when Hamilton stressed that a jury may "determine both the law and the fact, and where they do not doubt of the law . . . they ought to do so").

[67] *See* Arthur E. Sutherland, *A Brief Narrative of the Case and Trial of John Peter Zenger*, 77 HARV. L. REV. 787, 788 (1964) (noting that the jury acquitted Zenger while spectators cheered).

[68] For a review of the Zenger trial and its significance in the colonies, see generally JAMES ALEXANDER, PRINTER OF THE NEW YORK WEEKLY JOURNAL, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER (Stanley Nider Katz ed., 1963).

[69] *See, e.g.*, Erving v. Cradock, 1 Geo. 3 (1761), *in* JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772 app. II at 555 (1865) (returning a verdict for a ship owner in breach of revenue law and against a customs collector for trespass when the collector held the plaintiff's ship and cargo pending payment of a civil fine).

[70] STEPHEN BOTEIN, EARLY AMERICAN LAW AND SOCIETY 57 (1983) (quoting Governor William Shirley).

[71] Letter from Governor Francis Bernard to Lords of Trade (Aug. 2, 1761), *in* QUINCY, JR., *supra* note 69, app. II at 557.

[72] Duties in America (Stamp) Act 1765, 5 Geo. 3, c. 12.

Over the next three years, the British passed a series of taxes known as the Townshend Acts,[73] which also placed jurisdiction beyond juries in vice-admiralty courts.[74] Since the Crown could not directly control the obstinate colonial jurors, it took steps so that juries would simply be avoided.

The colonists met these several Acts with fierce objections.[75] The Stamp Act, for instance, triggered the First Congress of the American Colonies in October of 1765, where the body declared that "trial by jury is the inherent and invaluable right of every British subject in these colonies" and that "[the Stamp Act], and several other acts, by extending the jurisdiction of the courts of admiralty beyond its ancient limits, have a manifest tendency to subvert the rights and liberties of the colonists."[76] A similar claim was made soon thereafter in the Declaration of Independence, which proclaimed that independence was justified in part because the Crown had "depriv[ed] [the colonists] in many cases, of the benefits of Trial by Jury."[77]

Americans' reverence for the jury did not diminish after the war. Under the short-lived Articles of Confederation, Congress required civil juries to resolve certain disputes and all thirteen states broadly secured the institution.[78] Likewise, the institution was secured in the Northwest Territory.[79] Thus, it is somewhat surprising that the Constitution as originally drafted in 1787 only secured the right to trial by jury for all crimes, except those of impeachment; it did not secure civil jury protections. This absence was not because the drafters found the civil jury an unworthy institution of such protection or because they intended to destroy it. Instead, the

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[73] *See* Catherine S. Menand, *The Revolutionary Moment and the Supreme Judicial Court*, 77 MASS. L. REV. 22, 23 (1992) (explaining that these "acts provided for certain import taxes and tightened existing customs regulations").

[74] Vice Admiralty Court Act 1767, 8 Geo. 3., c. 22.

[75] For a review of American colonial vice-admiralty courts in the American colonies and how changes in their jurisdiction helped spark the Revolution, see generally CARL UBBELOHDE, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION (1960).

[76] RESOLUTIONS VII, VIII OF THE STAMP ACT CONGRESS (1765).

[77] THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

[78] *See* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 655 (1972) (discussing the broad protection the civil jury enjoyed).

[79] *See* NORTHWEST ORDINANCE OF 1787 art. II ("The inhabitants of the said territory shall always be entitled to the benefits of . . . the trial by jury"); *see also* SOURCES OF OUR LIBERTIES 387 (Richard L. Perry ed., 1978) (noting that "the Northwest Ordinance contains the first federally enacted bill of rights").

drafters found it difficult to find language that would correspond with the different civil jury practices in the states and believed the right to be so ingrained that those in power would have no incentive to restrict it.[80]

Nevertheless, the initial lack of civil jury protections in the Constitution was met with great skepticism throughout the states. As Alexander Hamilton acknowledged, "The objection to the [Constitution], which has met with most success[,] . . . is that relative to the want of a constitutional provision for the trial by jury in civil cases."[81] Anti-Federalists persuasively charged that the original Constitution's grant of the Supreme Court appellate jurisdiction both "as to law and fact" effectively abolished civil juries altogether.[82] They wrote passionately on the horrors that would result if civil jury protections were not constitutionalized: "[W]hat satisfaction can we expect from a lordly court of justice, always ready to protect the officers of government against the weak and helpless citizen, and who will perhaps sit at the distance of many hundred miles from the place where the outrage was committed?"[83]

The civil jury, then, provided protection not only against executive abuses of power, but also against those judges who might bless such abuses. As the Federal Farmer, a prolific Anti-Federalist, expounded: "[F]requently drawn from the body of the people . . . we secure to the people at large, their just and rightful control in the judicial department."[84] And Thomas Jefferson, a reluctant supporter of the Constitution, went so far as to answer: "Were I

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[80] *See* THE FEDERALIST NO. 83 (Alexander Hamilton) ("From this sketch it appears that there is a material diversity, as well in the modification as in the extent of the institution of trial by jury in civil cases, in the several States; and from this fact these obvious reflections flow: first, that no general rule could have been fixed upon by the convention which would have corresponded with the circumstances of all the States; and secondly, that more or at least as much might have been hazarded by taking the system of any one State for a standard, as by omitting a provision altogether and leaving the matter, as has been done, to legislative regulation.").

[81] *Id.*

[82] *See, e.g.*, ESSAY OF A DEMOCRATIC FEDERALIST (1787), *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 58, 60 (Herbert J. Storing ed., 1981) (discussing that appellate jurisdiction of the supreme court "precludes every idea of a trial by jury").

[83] *Id.*; *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 87 (1998) [hereinafter AMAR, THE BILL OF RIGHTS] (providing "graphic[] illustrat[ions]" of cases where English "judges had at times abetted government tyranny").

[84] LETTERS FROM THE FEDERAL FARMER XV (1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, 315, 320 (Herbert J. Storing ed., 1981).

called upon to decide, whether the people had best be omitted in the legislative or judiciary department, I would say it is better to leave them out of the legislative. The execution of the laws is more important than the making [of] them."[85] He continued, highlighting distrust of a permanent judiciary, noting that such "judges acquire an *Esprit de corps*," and are liable to be misled "by a spirit of party" or "by a devotion to the executive or legislative power."[86] "It is in the power, therefore, of the juries, if they think permanent judges are under any bias whatever, in any cause," Jefferson said, "to take on themselves to judge the law as well as the fact."[87]

Finally, the civil jury—and particularly the importance of constitutionalizing it—was thought to be necessary to guard against the national legislature, which might pass obnoxious and unpopular legislation, or even worse, seek to restrict the use of juries in cases arising under such legislation.[88] So celebrated was the right to a civil jury that some Federalists' response to this argument was that reasonable legislators would dare not restrict the right out of their own self-interest.[89] Prior to serving as one of the nation's first Supreme Court Justices, James Iredell earnestly contended that if jury protections were stripped, "[Congress's] authority would be instantly resisted," drawing upon the legislators "the resentment and detestation of the people" such that "[t]hey and their families . . . would be held in eternal infamy."[90] But it was precisely because legislators could not be trusted to draw the contours of significant

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[85] Letter from Thomas Jefferson to M. L'Abbe Arnond (July 19, 1789), *in* 3 THE WRITINGS OF THOMAS JEFFERSON: BEING HIS AUTOBIOGRAPHY, CORRESPONDENCE, REPORTS, MESSAGES, ADDRESSES, AND OTHER WRITINGS, OFFICIAL AND PRIVATE 82 (H. A. Washington, ed., 1853).

[86] *Id.* at 81.

[87] *Id.* at 82.

[88] *See* Wolfram, *supra* note 78, at 654 ("A deeply divisive issue in the years just preceding the outbreak of hostilities between the colonies and England in 1774–1776 had been the extent to which colonial administrators were making use of judge-tried cases to circumvent the right of civil jury trial.").

[89] *See id.* at 664–65 (discussing the Federalists' position that the right to a jury trial was better left to Congress based on the assumption that "decent men would be elected").

[90] James Iredell in the North Carolina Ratifying Convention (July 28, 1788), *in* 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 120, 148 (Jonathan Elliot ed., 1891).

rights that amendments were thought necessary to the proposed Constitution—the civil jury being chief among them.[91]

The Anti-Federalists' arguments "struck a very responsive chord" among the American populace, who had in no small part just fought a bloody revolution over the importance of civil jury protections.[92] As part of the ratification process, eight of the nine states that submitted amendment proposals offered specific language for securing a civil jury right.[93] Massachusetts explicitly conditioned its ratification on the addition of such a clause.[94] Accordingly, it was the promise of what would come to be the Seventh Amendment that convinced many skeptics to sign on to the American experiment. Without such an implicit agreement on civil jury protections, the U.S. Constitution may very well never have been ratified.[95]

As this historical account demonstrates, the civil jury at the Founding was anticipated to be more than just one adjudicative body among many for resolving private disputes. It was instead established as a necessary institution within the constitutionally established balance of power, responsible for integrating laypeople into the administration of justice and for checking abuses of power at various levels. Constitutional scholar Professor Akhil Amar goes so far as to suggest: "If we seek a paradigmatic image underlying the original Bill of Rights, we cannot go far wrong in picking the jury."[96] The jury was the lynchpin tying the experiment together; empowering laypeople to serve as the nation's true sovereigns in the administration of law.

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[91] *Cf.* Blakely v. Washington, 542 U.S. 296, 308 (2004) (noting that, in the criminal context, "the Framers put a jury-trial guarantee in the Constitution [because] they were unwilling to trust government to mark out the role of the jury").

[92] Wolfram, *supra* note 78, at 668.

[93] *See* Lochlan F. Shelfer, *How the Constitution Shall Not Be Construed,* 2017 B.Y.U. L. REV. 331, 353 (2017) (noting that the civil jury proposal was the second most popular proposal behind the reservation of power to the states).

[94] *See* Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 298 (1966) (explaining that it was necessary for Massachusetts to "recommend certain 'conciliatory propositions'" to achieve a majority, which included civil jury trials).

[95] *See* Parsons v. Bedford, 28 U.S. 433, 446 (1830) ("One of the strongest objections originally taken against the [C]onstitution of the United States[] was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the [S]eventh [A]mendment . . . [that] received an assent of the people so general[] as to establish its importance as a fundamental guarantee of the rights and liberties of the people.").

[96] AMAR, THE BILL OF RIGHTS, *supra* note 83, at 96.

B. THE SOCIOPOLITICAL BENEFITS OF THE JURY IN PRACTICE

Our overview of the jury's beginnings identifies important systemic justifications for the civil jury. But it is important to note that these benefits are not merely theoretical. Over the last sixty years, researchers have examined how the civil jury operates in practice. We summarize the empirical evidence on two main dimensions: (1) the civil jury's competence in fact-finding as compared to that of a professional judge, and (2) the civil jury's impact on civic engagement of the citizenry and its contributions to the transparency and legitimacy of the legal system. This contemporary empirical evidence about the operation and the impact of civil juries confirms many of the Founders' assumptions and experiences.

1. The Civil Jury's Fact-Finding Advantages over Judges. Civil juries add to the quality of fact-finding in civil trials. This assertion might surprise some readers. After all, judges are elite, legally trained, and experienced in adjudication, whereas jurors are drawn from all walks of life and usually have no special legal training or experience.[97] Expertise in a particular subject matter can be very helpful in aiding decision-making, especially in complex trials.[98] Jurors' diverse backgrounds and perspectives, and even their lack of experience, however, offer numerous benefits in terms of quality fact-finding—particularly in comparison to that of a professional judge.[99] By bringing their democratic insights to bear, the civil jury enhances the work of the judicial department.

A lay citizen's lack of specialized knowledge and experience confers some benefits even over an experienced and expert judge.

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[97] Special juries, in which individuals are selected for specific education, training, or experience to serve as civil jurors, remain an option in the United States, but their usage has declined dramatically in recent years. *See generally* JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 174–212 (2006) (reviewing the history of special juries in the United States).

[98] *See* Valerie P. Hans, David H. Kaye, B. Michael Dann, Erin J. Farley & Stephanie Albertson, *Science in the Jury Box: Jurors' Comprehension of Mitochondrial DNA Evidence*, 35 LAW & HUM. BEHAV. 60, 69 (2011) (showing that jurors with more education and more science courses do better on DNA quizzes).

[99] *See* Taylor-Thompson, *supra* note 31, at 1275 (explaining that "[b]ecause the jury's work largely depends on subjective interpretations of evidence, a variety of perspectives will enrich jury discussions"' and that interaction among jurors from various experience levels, both limited and expansive, "will expand the range of issues to be discussed" among jurors).

Judges are repeat players; a jury decides one case at a time. As judges sit in case after case over the years, judicial fact-finding becomes routinized.[100] Judges may jump to premature conclusions because of similar fact patterns in prior cases, might regularly favor one party over the other, or might even become jaded about the process of civil litigation.[101] Judges may be affected by confirmation bias, the unconscious psychological process in which people look for evidence that confirms their previous views and experiences and interpret evidence in ways that are consistent with their existing views.[102] This is especially so when prior cases are presented by the same legal counsel. Despite differences in facts and even trial strategy, the presence of the same advocate or even the same opponents can cause the judge to view the case with expectations based on prior experience.[103] Because lawyers often regularly appear in a single jurisdiction, this can occur with surprising frequency, particularly when both lawyers practice in a specialized field. Jurors deciding a single case come with a fresh perspective.

Relatedly, judges' personal characteristics and their prior legal work experiences correlate with their decisions.[104] For example, studies show that judges who worked in corporate law or as

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[100] *See* Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L & SOC. SCI. 203, 216 (2017) ("[E]xperience might induce judges to adopt mental shortcuts that they did not use when they were new judges.").

[101] *Id.*; *see also supra* note 34 and accompanying text.

[102] JENNIFER K. ROBBENNOLT & VALERIE P. HANS, THE PSYCHOLOGY OF TORT LAW 80–81, 212 (2016).

[103] *See* Melissa L. Breger, *Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity and the Bench Trial*, 53 U. RICH. L. REV. 1039, 1041–42 (2019) ("[E]ven if judges attempt to shield their decisions from their explicit biases, implicit biases may seep into judicial decision making . . . [, which] could be particularly consequential in trial courts when juries are not utilized, or when the same litigants appear before the same judges repeatedly."); Jordan M. Singer, *Gossiping About Judges*, 42 FLA. ST. U. L. REV. 427, 435, 468 (2015) (finding repeated appearances create an overall advantage for lawyers but that judges often recall conduct of attorneys from previous interactions in future interactions); Bahaar Hamzehzadeh, *Repeat Player v. One-Shotter: Is Victory All that Obvious*, 6 HASTINGS BUS. L.J. 239, 243–44 (2010) (analyzing the impact on success caused by repeated appearances before the same judge).

[104] *See* JOANNA SHEPHERD, JOBS, JUDGES, AND JUSTICE: THE RELATIONSHIP BETWEEN PROFESSIONAL DIVERSITY AND JUDICIAL DECISIONS 12–16 (2021), https://demandjustice.org/wp-content/uploads/2021/03/Jobs-Judges-and-Justice-Shepherd-3-08-21.pdf (presenting data showing that "certain types of career experiences are associated with judges favoring individuals over corporations, or vice versa").

prosecutors before becoming judges are less likely to favor employees in employment discrimination cases.[105] There is also a link between campaign contributions and judges' decisions.[106] The same is true for a judge's race and political affiliation.[107] Senator Sheldon Whitehouse points to the increasing politicization of judicial appointments and special interest funding in judicial elections as causes for concern, both of which underscore the value of having an effective and efficient civil jury trial option.[108]

True, judges operate within a laudable system of accountability. Their judgments and written opinions are part of the public record, are reviewed by appellate courts, and may be considered in retention and promotion. But some studies of judicial decision-making have found a downside to these consequences. Judges in state courts facing reappointment or retention elections impose more severe sentences or show less favorability toward capital defendants' appeals, according to research.[109] This should not be

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[105] *See id.* at 13 ("[F]ormer prosecutors and lawyers with a corporate background are less likely to rule in favor of claimants—individual employees or the EEOC or Department of Labor on behalf of employees—than are judges without these backgrounds.").

[106] *See* Rachlinski & Wistrich, *supra* note 100, at 211 (collecting studies that show that "donations from a political party correlate with judicial decision making" (first citing Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decisionmaking*, 7 STATE POL. & POL'Y Q. 281, 281–97 (2007); and then citing Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 69–130 (2011))).

[107] *See, e.g.*, *id.* at 216–22 ("[P]ersonal characteristics of judges—their political ideology, gender, race, and experience—affect their decisions in cases that reflect those characteristics."). For examples of relevant research, see generally JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002) (documenting decision-making differences in judgments by judges appointed by Republican and Democratic presidents); Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 399–406 (2010) (finding that a judge's gender affects decisions in sex discrimination cases).

[108] *See* Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of Our Government*, 55 WM. & MARY L. REV. 1241, 1266–67 (2014) ("Concerns over corrupt influence may not be relevant as often in our contemporary civil justice system, but as judicial appointment becomes more politicized, and as special interest funding becomes more influential in judicial elections, corruption, particularly in the sense meant by the Founders, is a consideration not to be overlooked." (footnote omitted)).

[109] *See, e.g.*, Rachlinski & Wistrich, *supra* note 100, at 210 (indicating that "judges facing retention elections are less favorable to capital defendants' efforts to overturn their sentences" and that the effect on judge behavior extends to reappointment (first citing Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind when*

surprising. As former California Supreme Court Justice Otto Kaus colorfully explained: "There's no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them near election time. That would be like ignoring a crocodile in your bathtub."[110] Jurors, as temporary agents of the state, generally face no such professional peril from their one-off decisions.

The jury's beneficial fact-finding flows from its comparative advantage over judges in community representativeness. A group of jurors is more likely than an elite judge to represent the range of backgrounds, experiences, views, and attitudes of the community at large.[111] A substantial body of theory and research on juror decision-making confirms that jurors draw on their life experiences, attitudes, and perspectives as they assess and weigh evidence in the trial.[112] The story model of juror decision-making posits that jurors rely on their world knowledge to interpret evidence in the case and to develop a narrative account of what happened in the events that led to the trial.[113] Knowledge of the world varies with life experiences. As such, demographic and attitudinal characteristics such as gender, race, and political affiliations are associated with distinctive decisions by jurors[114] and by judges as well.[115] A group of laypeople drawn from a cross-section of the community is better able to reflect a community's social and political characteristics, and to

it Runs for Office? 48 AM. J. POL. SCI. 247, 247–63 (2004); then citing John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 465–503 (1999); and then citing Joanna M. Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. LEGAL STUD. 169, 169–203 (2009))).

[110] Paul Reidinger, *The Politics of Judging*, A.B.A. J., Apr. 1, 1987, at 52, 58.

[111] *See* Meghan J. Ryan, *Juries and the Criminal Constitution*, 65 ALA. L REV. 849, 874–77 (2014) (discussing why judges are not representative of societal standards).

[112] *See* Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 520–29 (1991) (contending that the "central cognitive process in juror decision making is *story construction*"); *see generally* NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS (2000) (exploring how jurors attribute blame for accidental injury or death).

[113] Pennington & Hastie, *supra* note 112, at 521–23.

[114] *See, e.g.*, EDIE GREENE & BRIAN H. BORNSTEIN, DETERMINING DAMAGES: THE PSYCHOLOGY OF JURY AWARDS 79–94 (2003) (describing research showing demographic effects on damage award decision-making).

[115] *See supra* notes 106–107 and accompanying text.

be better informed about community norms.[116] In sum, the civil jury is in an ideal position to incorporate the community's views and attitudes about responsibility and the valuation of injuries in its legal judgments.

Research on public reactions to a police car chase video footage that was integral to the Supreme Court's decision in *Scott v. Harris*[117] offers a vivid illustration of the superior ability of a representative community group to reflect the diverse range of citizens' opinions. The majority of the justices in that case asserted after viewing the footage that "no reasonable jury" could conclude that the car's driver did not pose a substantial risk.[118] But when researchers surveyed the public on their perception of the footage, their "subjects didn't see eye to eye."[119] Specifically, "African Americans, low-income workers, and residents of the Northeast," as well as "individuals who characterized themselves as liberals and Democrats," were all more likely to disagree with the Supreme Court's conclusion as to the risk posed by the driver.[120] When people assess the reasonableness of others' actions, research confirms that even if they are instructed to use an objective standard, they rely on their own values.[121] And when judges are asked to anticipate the collective mind of the jury, they are likely to be influenced by their own experiences and perspectives.[122]

Other benefits accrue from the group nature of jury decision-making. Juries engage in the process of deliberation, which offers the opportunity to compare, contrast, and test differing evaluations of the trial evidence. Deliberation and group decision-making are especially robust when the jury is composed of individuals with

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[116] *See* Ryan, *supra* note 111, at 878–80 (discussing how juries are necessarily more representative of their communities than are judges).

[117] 550 U.S. 372 (2007).

[118] *Id.* at 380.

[119] Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?:* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841 (2009).

[120] *Id.*

[121] *See* Mark D. Alicke & Stephanie H. Weigel, *The Reasonable Person Standard: Psychological and Legal Perspectives*, 17 ANN. REV. L. & SOC. SCI. 123, 123 (2021) (noting that there is a tendency to "rely on the self" when following a reasonable person standard).

[122] *See, e.g.*, Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759, 760 (2009) ("[J]udges decide dispositive motions based on their own views of the evidence, as opposed to what a reasonable jury could find.").

diverse backgrounds and experiences.[123] Furthermore, studies have shown that jury deliberation is more robust when juries are required to reach unanimous as opposed to majority decisions.[124] Through the diversity of individuals and their viewpoints, a more thorough and searching decision-making process results.

In short, a jury trial—with a professional judge presiding—combines the multiple benefits of both lay and legally-trained decision-makers. Professional judges possess advantages of legal expertise and experience. And juries bring diverse perspectives, life experiences, and a strong grounding in community norms to the fact-finding task. Deliberation aids jurors in testing their interpretations of evidence and in developing a sound common account of the events leading to the lawsuit. A representative jury is thus able to fulfill one of the major purposes of trial by jury envisioned by the Founders—to stand in for the community in legal fact-finding to enhance the democratic legitimacy of the judicial department and its decisions.

Extensive research on civil jury decision-making supports the strength of the jury not only as a democratic institution but also as a fair and accurate fact-finder.[125] Interviews and post-trial questionnaire research confirm that the vast majority of jurors take

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[123] *See* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 606 (2006) (reporting research that found differences in decision-making between racially diverse and non-racially diverse groups).

[124] *See* Shari Seidman Diamond, Mary R. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Nonunanimous Civil Jury*, 100 NW. U. L. REV. 201, 230 (2006) ("[T]he deliberations demonstrate that thoughtful minorities are sometimes marginalized when the majority has the power to ignore them in reaching a verdict. Although juries generally engage in serious and intense deliberations, jurors themselves report more thorough and open-minded debate when they reach unanimity."); *see also* Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making,* 4 DEL. L. REV. 1, 23–24 (2001) [hereinafter Hans, *The Power of Twelve*] (summarizing empirical evidence of the benefits of a unanimity decision rule and a larger jury size).

[125] *See, e.g.*, HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 63–65 (1966) (presenting research on judge-jury agreement rates); Valerie P. Hans, *What's it Worth? Jury Damage Awards as Community Judgments*, 55 WM. & MARY L. REV. 935, 937 (2014) [hereinafter Hans, *What's it Worth?*] ("Civil jury damage awards serve to check or endorse private power"); *see also* Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1148–55 (1992) (contrasting perceptions of civil juries with the realities of their decision-making).

their jury duty seriously.[126] Researchers have compared the verdicts reached by juries to judicial decisions or judicial evaluations of the same or similar types of cases; they have also used experimental methods to examine the decision processes in civil disputes.[127]

It is difficult to directly compare the outcomes of jury trials and bench trials because litigants select which cases go to the jury and which go to the judge.[128] In judge-jury agreement studies, judges presiding over jury trials are asked to record the jury's verdict and to indicate what verdict they themselves would have reached had they been trying the case as a bench trial. Therefore, the judge and jury assess the same case, and a comparison of the actual jury verdict and the judge's hypothetical verdict is more readily attributable to the distinctive qualities of the fact-finder.[129] The first judge-jury agreement study occurred in the 1950s and revealed that the judge agreed with the jury's verdict in civil trials seventy-eight percent of the time.[130] Interestingly, in that study, the disagreements between the judge and jury were symmetrical; judges would have found for the plaintiff when the jury reached a defense verdict in ten percent of the trials, and judges would have found for the defendant when the jury decided the case for the plaintiff in twelve percent of the trials.[131] Subsequent studies using a similar methodology have found comparable overall agreement

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[126] *See* Diamond, *What Jurors Think*, *supra* note 25, at 288 (asserting that "the vast majority of jurors are motivated to do a good job").

[127] NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 19 (2007) (describing the multiple methods used to evaluate the jury system, including "interviewing and surveying jurors, analyzing jury verdicts, and conducting experiments to test hypotheses about jury decision processes"); *see also id.* at 267–79 (presenting research findings about juror judgments of civil liability).

[128] For a thoughtful discussion of the impact of these "selection effects" (that different streams of cases are heard by judges versus juries), see Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1961–64 (2009). Differences in outcomes could thus be attributable to case differences or to differences between judge and jury decision-making. *See id.* at 1963 (concluding, in part, that "small differences between judges' and juries' treatment of cases and . . . the parties' varying the case selection that reaches the judge and jury" contribute to differences in outcomes).

[129] Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 144 (2002) (discussing the data collection methodology for judge-jury agreement studies).

[130] KALVEN & ZEISEL, *supra* note 125, at 63.

[131] *Id.* at 64. For a comparison of judge and jury verdicts, see Clermont & Eisenberg, *supra* note 129, 1442–47 (analyzing data on the rate of agreement between judge and jury on liability) and Clermont, *supra* note 128, at 1961–64.

rates.[132] Importantly, several judge-jury agreement studies have found that the complexity of evidence in the case is unrelated to the agreement rates between juries and legal experts; a relationship would have been expected if jury incompetence led juries to choose a different verdict.[133]

Studies of money damage awards in civil cases, too, offer some reassurance.[134] The civil jury is in an ideal position to determine damage awards, which is a fact-finding function constitutionally assigned to the jury.[135] Jury damage awards reflect the community's assessment of the value of an injury by considering the context and circumstances of the injury and the identities and behavior of the parties.[136] The need to examine each case's specific facts, and the ability to handle both the uncertainty and the intangibility of some injuries, make the representative jury a societally appropriate decision-maker on damages. As the Virginia Supreme Court once noted, "[T]he law wisely leaves the assessment of damages, as a rule, to juries, with the concession that there are no scales in which to weigh human suffering, and no measure by which pecuniary compensation for personal injuries can be accurately

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[132] Shari Seidman Diamond, Neil Vidmar, Mary Rose, Leslie Ellis & Beth Murphy, *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1, 67 n.108 (2003) [hereinafter Diamond et al., *Juror Discussions*] (finding a seventy-seven percent agreement rate between judges and juries); Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of its Meaning and its Effects,* 18 LAW & HUM. BEHAV. 29, 48 (1994) (finding a sixty-three percent agreement).

[133] *See*, Theodore Eisenberg, Paula L. Hannaford-Agor, Valerie P. Hans & Nicole L. Waters, *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's The American Jury*, 2 J. EMPIRICAL LEGAL STUD. 171, 191–92 (2005) (presenting research detailing similar judge-jury agreement across different evidentiary complexities).

[134] *See, e.g.*, VIDMAR & HANS, *supra* note 127, 281–320 (presenting research on compensatory and punitive damage award decision-making by juries); Hans, *What's it Worth?, supra* note 125, at 939–41 (discussing how jury-determined damage awards for intangible injuries display the community's value assessment of those injuries).

[135] *See* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432 (2002) ("A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination."); Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353 (1998) ("The jury are the judges of damages." (quoting Lord Townshend v. Hughes (1677) 86 Eng. Rep. 994, 995 (C.P.)); *see also* BLACKSTONE, *supra* note 62, at *324 ("[T]he quantum of damages . . . is a matter that cannot be done without the intervention of the jury.").

[136] *See* Hans, *What's it Worth?*, *supra* note 125, at 939 (discussing how damage awards are often closely associated with a community's value of the injury); Harry Kalven, Jr., *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158, 160 (1958) (explaining that a foundational premise of a jury is to evaluate the damage award on a case-by-case basis).

ascertained."[137] The jury can draw on its collective experiences with injuries and the resulting financial consequences as they engage in the necessary fact-finding.[138]

Empirical studies show that the concrete factual details and injuries at issue in a case regularly explain a jury's damage award. First, the overall severity of plaintiffs' injuries is strongly related to jury damage awards.[139] In states that separate out economic and noneconomic damages, the amount of economic damages is a powerful predictor of the amount of noneconomic damages.[140] Second, empirical research on jury decision-making with respect to punitive damages reassures that the civil jury acquits itself fairly; punitive damages are generally proportionate to compensatory damages, suggesting that the jury often is not unduly harsh.[141] Instead, as with all of the jury's decisions, the community's consciousness is channeled through the institution, enhancing the accuracy and democratic legitimacy of the judgment.

2. The Civil Jury Promotes Civic Engagement and Systemic Legitimacy. Beyond the benefits that jurors bring in fact-finding and the administration of civil justice, the civil jury institution and juror experience itself promote civic engagement and broader systemic

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[137] Chesapeake & Ohio Ry. Co. v. Arrington, 101 S.E. 415, 423 (Va. 1919), *abrogated by* John Crane, Inc. v. Jones, 650 S.E.2d 851 (Va. 2007).

[138] *See* Hans, *What's it Worth?*, *supra* note 125, at 939, 941 (explaining how jurors' independent evaluations combined to establish a damage award rooted in community values).

[139] *See* Randall R. Bovbjerg, Frank A. Sloan & James F. Blumstein, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908, 941 (1989) (summarizing evidence showing the strong relationship between injury severity and damage awards; those who are more severely injured generally receive higher damage awards).

[140] *See* Herbert Kritzer, Guangya Liu & Neil Vidmar, *An Exploration of "Noneconomic" Damages in Civil Jury Awards*, 55 WM. & MARY L. REV. 971, 1010–13 (2014) (presenting research examining possible predictive relationships between noneconomic and economic damages based on conditional variables).

[141] *See* Theodore Eisenberg, Valerie P. Hans & Martin T. Wells, *The Relation Between Punitive and Compensatory Awards: Combining Extreme Data with the Mass of Awards*, *in* CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL AND LEGAL PERSPECTIVES 105, 106–07 (Brian H. Bornstein, Richard L. Wiener, Robert F. Schopp & Steven L. Willborn eds., 2008) (finding a strong correlation between compensatory and punitive damage awards); *see also* Valerie P. Hans & Valerie F. Reyna, *To Dollars from Sense: Qualitative to Quantitative Translation in Jury Damage Awards*, 8 J. EMPIRICAL LEGAL STUD. 120, 142, 144 (2011) (same). After reviewing the empirical literature, the Supreme Court found that jury "discretion to award punitive damages has not mass-produced runaway awards," but, instead, "show[s] an overall restraint." Exxon Shipping Co. v. Baker, 554 U.S. 471, 497, 499 (2008).

legitimacy. The French political thinker Alexis de Tocqueville trenchantly observed that the civil jury operates as an ever-open "public school" that educates American citizens about the law through their participation.[142] He added:

> The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. . . . It invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge toward society; and the part which they take in the Government.[143]

Studies bolster this observation. One phenomenon that has been widely documented is the largely favorable reaction that citizens have to the experience of jury service.[144] Although many citizens express concern about receiving a jury summons, once they participate as jurors, they generally recognize their experience as a positive form of civic engagement.[145] In one of the largest studies, over 8,000 jurors from sixteen federal and state courts completed questionnaires following their jury service; sixty-three percent reported that their view of jury service became more favorable after serving.[146] In other research, after they have served, jurors are more apt to say that they see the courts as fair and to have more favorable views about the justice and equity of the legal system.[147]

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[142] *See* TOCQUEVILLE, *supra* note 22, at 274 (noting how the civil jury system educates the public on the law and instills a shared responsibility to achieve justice).

[143] *Id.*

[144] *See* Diamond, *What Jurors Think*, *supra* note 25, at 298–300 (summarizing the research documenting jurors' favorable responses to serving and finding that "willingness to serve again was high").

[145] *See* James B. Binnall, *A "Meaningful" Seat at the Table: Contemplating Our Ongoing Struggle to Access Democracy*, 73 SMU L. REV. F. 35, 46 (2020) ("[J]ury service fosters a general sense of empowerment that frequently leads to other forms of civic engagement.").

[146] JANET T. MUNSTERMAN, G. THOMAS MUNSTERMAN, BRIAN LYNCH & STEVEN D. PENROD, NAT'L CTR. FOR STATE CTS., THE RELATIONSHIP OF JUROR FEES AND TERMS OF SERVICE TO JURY SYSTEM PERFORMANCE 6 (1991).

[147] *See* Diamond, *What Jurors Think*, *supra* note 25, at 286 ("The jurors [that were] studied became more positive in their assessments of the justice and equity of the legal system following jury service.").

Jury service is a form of civic participation, and, in this way, the jury is a responsibility-taking institution.[148] It pulls individuals from their daily lives and assigns them the task of implementing society's judgments, forcing them both to express and to create community identity through group deliberation.[149] Given this substantial task and the transformative role required of laypeople to perform it, perhaps it should not surprise us that participating as a juror—in either a criminal or a civil trial—boosts other forms of citizen engagement. Professor John Gastil and his colleagues put Tocqueville's observation to an empirical test in a set of studies that examined the links between jury service and voting.[150] In one such study, they obtained jury service data from seven U.S. states and linked these records with jurors' voting history before and after jury service.[151] Citizens who served in criminal cases and who were infrequent voters boosted their voting after completing jury service.[152] Another study found that jurors who served on twelve-person civil juries or juries that were required to reach a unanimous

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[148] *See* Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381, 2382 (1999) (articulating the virtues reflected in the jury system and in jury service); *see also* Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 192 (1990) (describing a theory of jury responsibility in which "the jury is conceptualized as a democratic representative of the community" that should "convey the moral condemnation of the community in a criminal case and the range of viewpoints of the community in a civil case").

[149] Note, too, that the jury system may relieve judges of responsibility, allowing them to take cover behind the work of jurors. *See, e.g.*, KALVEN & ZEISEL, *supra* note 125, at 7 (noting that one of the "collateral advantages" of the jury system is that jurors may serve as a "lightning rod for animosity and suspicion which otherwise might center on the more permanent judge").

[150] *See* JOHN GASTIL, E. PIERRE DEESS, PHILIP J. WEISER & CINDY SIMMONS, THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION 45–47 (2010) [hereinafter GASTIL ET AL., THE JURY AND DEMOCRACY] (finding that low-frequency voters who served as jurors in a criminal case were more likely to vote in later elections); *see also* John Gastil, E. Pierre Deess, Philip J. Weiser & Jordan Meade, *Jury Service and Electoral Participation: A Test of the Participation Hypothesis*, 70 J. POLS. 351, 358–60 (2008) (analyzing the effect of deliberation on jurors' likelihood to vote); John Gastil, E. Pierre Deess & Philip J. Weiser, *Civic Awakening in the Jury Room: A Test of the Connection Between Jury Deliberation and Political Participation*, 64 J. POLS. 585, 586 (2002) (examining "the link between political participation and an institutionalized form of citizen deliberation," specifically inquiring into the effect of deliberation and reaching a verdict on a jury on the likelihood of voting in subsequent elections).

[151] GASTIL ET AL., THE JURY AND DEMOCRACY, *supra* note 150, at 45–47.

[152] *See id.* at 45–47 (finding that for low frequency voters, "[c]riminal jurors reaching a verdict" were 4.3% more likely to vote in a future election).

decision—in other words, the traditional form of trial by jury—were significantly more likely to vote following their service, controlling for their pre-service voting history.[153] Civil jurors who decided cases with organizational (as opposed to individual) defendants also showed increased voting behavior.[154]

What is more, the civil jury enhances systemic legitimacy more broadly. Disputants who can discuss their differences and reach fair and equitable resolutions through mediation or other private settlement mechanisms may not need to resort to the courts. Surveys have found that people often are satisfied with these private remedies.[155] But for other litigants, and for the rest of society, the public trial—and in particular the civil jury trial—offers several advantages. In her book, *In Praise of Litigation*, Professor Alexandra Lahav identifies the multiple ways in which litigation protects important democratic values:

> Litigation helps democracy function in a number of ways: it helps to *enforce* the law; it fosters *transparency* by revealing information crucial to individual and public decision-making; it promotes *participation* in self-government; and it offers a form of *social equality* by giving litigants equal opportunities to speak and be heard.[156]

With respect to enforcement and transparency, jury trials, and public litigation more generally, add value because they produce information about what otherwise might be unfairly hidden practices and procedures.[157] The trial is a transparent and public

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[153] *See* Hans et al., *supra* note 26, at 710–12 (finding that jurors on twelve-person juries had the "highest increase in voting" participation after service).

[154] *See id.* ("When jurors served on cases with organizational defendants, they had an experience that resulted in a more positive change in their voting rates . . . than did those jurors whose cases featured only individual defendants.").

[155] *See* Shari Seidman Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 LA. L. REV. 120, 132 (2020) (finding that respondents "preferred [mediation] significantly to arbitration and bench trials").

[156] LAHAV, *supra* note 28, at 1–2.

[157] *See id.* at 56–57 (offering a real-world example of how adversarial litigation can increase transparency and bring vital information to light); *see also* Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1683 (2016) (reviewing the externalities associated with public dispute resolution, including the production of information).

event. Citizens observe the evidence and arguments presented by each side. Others, potentially liable under the same circumstances, also see the results and can take additional safety measures as a form of self-regulation, improving their products or services and filling gaps in our system of formal regulation.[158]

Litigants have their day in court; their arguments and evidence are given in public to their peers and the state. The opportunity to present one's views and the chance to be heard are key elements contributing to procedural justice, a sense that fair processes are used to resolve a dispute.[159] In turn, a sense that one has been heard and treated fairly in a dispute resolution procedure increases the perceived legitimacy of the procedure.[160] Because it takes place in a public forum and because there is a framework for appealing the results, there are possibilities for error correction. Private adjudication lacks not only the transparency of inviting the public to decide cases and check the work of arbiters but also does not have the same corrective potential in the form of appellate review.[161]

In sum, the transparent and public nature of civil jury trials, allowing the presentation of evidence on both sides, providing litigants the opportunity to be heard, and giving citizens the right to decide the outcomes, operates to reinforce democratic self-governance. Combined with the other benefits we discuss, this positions the civil jury as an institution of great significance during this time of American democratic decline. The jury is poised to play the role anticipated by the Founders—bringing laypeople into the administration of justice, investing them in the fair and democratic

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[158] *See, e.g.*, BOGUS, *supra* note 28, at 169 (offering examples from the automobile industry); *see also* Stephan Landsman, *Juries as Regulators of Last Resort*, 55 WM. & MARY L. REV. 1061, 1067 (2014) (discussing the civil jury's role in filling in gaps in the regulatory regime).

[159] *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 19–68 (1990) (examining the positive effect of procedural justice in legal experiences on legitimacy and compliance with the law).

[160] *See id*. at 20 (concluding that satisfaction with court performance increases the perception of legitimacy). From the earliest days of the Republic, the Supreme Court has recognized the importance of that perception, opining that a legitimate system of justice "recognizes and [s]trongly [r]ests on this great moral truth, that justice is the [s]ame whether due from one man or a million, or from a million to one man" and enables every person "to obtain justice without any danger of being overborne by the weight and number of their opponents." Chisholm v. Georgia, 2 U.S. 419, 479 (1793).

[161] *See, e.g.*, Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 704–12, 754 (1999) (describing how "[a]rbitration privatizes the creation of law").

application of laws, and ensuring their power to push back against state and other powerful actors. However, as will be discussed next, the civil jury has been under sustained attack for nearly a century, greatly inhibiting its ability to serve its emboldening role. If the civil jury is to help redirect America toward democratic principles, it is necessary to understand what has caused the decline of the civil jury and to make urgent efforts to preserve and strengthen the institution.

III. THE PRECIPITOUS DECLINE OF THE CIVIL JURY

Despite this foundational commitment to, and the sociopolitical and administrative benefits of, the civil jury, the institution has fallen precipitously in use and esteem. The factors contributing to the civil jury's decades-long decline are numerous and interrelated. The adoption of new procedures in the twentieth century altered the institutional relationship between the judge and the jury, empowering the former and divesting the latter of the authority that existed at common law. Judges hurried this transformation through their decisions denigrating jurors as incapable of deciding complex disputes or too impassioned to decide them impartially.[162] Similarly, powerful economic actors have engaged in a lengthy campaign to convince the public and policy makers that jurors should not be trusted.[163] The result is a popular and judicial culture that does not value lay participation and views it as an expendable part of the civil justice system. Thus, when budgetary or, most recently, public health crises arise, the civil jury is easily sidelined.[164] And as a result, the many potential sociopolitical benefits of this institution are squandered.

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[162] *See* Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 389, 485–91 (1996) (outlining common criticisms of juries and how judges quickly exercised greater control over civil juries under the new Rules through mechanisms such as "special verdicts and special interrogatories, summary judgment, the directed verdict, and the judgment notwithstanding the verdict").

[163] *See* Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?*, 101 JUDICATURE 26, 34, (2017) (discussing corporate defendants' "longstanding distrust of juries").

[164] *See supra* notes 45–48 and accompanying text.

A. PROCEDURAL DIVESTING OF THE CIVIL JURY'S AUTHORITY

Despite its lofty beginnings, the civil jury has long faced a steady drumbeat of criticism from state and economic actors, leading to decline of both its use and constitutional esteem. To be sure, for much of American history, the jury fell short of including all segments of the community, and its verdicts have not been immune to racism, sexism, and other forms of bigotry.[165] But whereas the jury at the founding was seen as a great well of community knowledge that injected laypeople into the administration of justice, only decades into our history jurors had become—as one judge put it—"mere *assistants* of the courts, whose province it is to aid them in the decision of disputed questions of fact."[166] This new conception, matched with substantial changes in civil procedure in the past 100 years, has made civil jury trials exceptionally rare.[167] So uncommon are they today that at least one leading scholar has proclaimed: "The civil jury is dead."[168]

This decline is not new. Scholars have voiced concerns about the decline of the civil jury going back at least to the late 1920s.[169] Their concerns were borne out. Starting in 1962, the year when federal judicial statistics become most reliable, a consistent decline has been readily apparent in the percent of civil cases disposed of by

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[165] For an overview of the history of jury exclusion, see Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCH. PUB. POL'Y & L. 201, 204–08 (2001); *see also* Donald G. Gifford & Brian Jones, *Keeping Cases from Black Juries: An Empirical Analysis of How Race, Income Inequality, and Regional History Affect Tort Law*, 73 WASH. & LEE L. REV. 557, 560 (2016) (discussing the roles that race and racism have played, historically and through to today, in debates and actions taken to control civil jury power around the country).

[166] Ernst v. Hudson River R.R. Co., 24 How. Pr. 97, 105 (N.Y. 1862).

[167] Renée Lettow Lerner, *The Uncivil Jury, Part 4: The Collapse of the Civil Jury*, WASH. POST: DEMOCRACY DIES IN DARKNESS (May 28, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/28/the-uncivil-jury-part-4-the-collapse-of-the-civil-jury/ (explaining how civil procedure has "expanded the scope of discovery" which leads to fewer parties seeking to fight until trial).

[168] *Id.*

[169] *See* Herbert M. Kritzer, *The Trials and Tribulations of Counting "Trials,"* 62 DEPAUL L. REV. 415, 416 (2013) (identifying scholarship concerning the decline of the jury trial to date back to the 1920s).

jury trial.[170] That rate was 5.5% in 1962; 3.7% in 1972; 2.6% in 1982; 1.9% in 1992; 1.2% in 2002; 0.81% in 2012; and just 0.31% in 2021 (the most recent year on file at time of writing).[171] A similar pattern has been experienced in state courts. In those states that kept accurate statistics, between 1976 and 2002, civil jury trials fell threefold from 1.8% to 0.6% in courts of general jurisdiction.[172] And the most recent data from the Court Statistics Project shows that the COVID-19 pandemic has driven these numbers to their lowest point ever. In 2020, for those states reporting, juries disposed of a median of only 0.06% of filed civil disputes—with Alaska reporting zero civil jury trials for the second year in a row.[173] Simply put, civil jury trials are today the very rare exception and not the rule.

Critically, bench trials have also been falling during this time. At the federal level, 6% of civil cases were resolved by bench trial in 1962, versus just 0.21% in 2021.[174] Indeed, since 1987 there have been fewer bench trials than jury trials at the federal level.[175] Figure 1 depicts the decline in federal bench and jury trials since 1962.

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[170] *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461 (2004) (showing that the rate of civil trials by jury in 2002 "was less than one-sixth of what it was in 1962"); *see also* Kritzer, *supra* note 169, at 438 ("It is clear that the number of jury trials declined in many, perhaps most, jurisdictions in the United States over the last fifty years.").

[171] Galanter, *supra* note 170, at 461; Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962–2021) (offering the total number of cases filed and disposed of by civil jury trial).

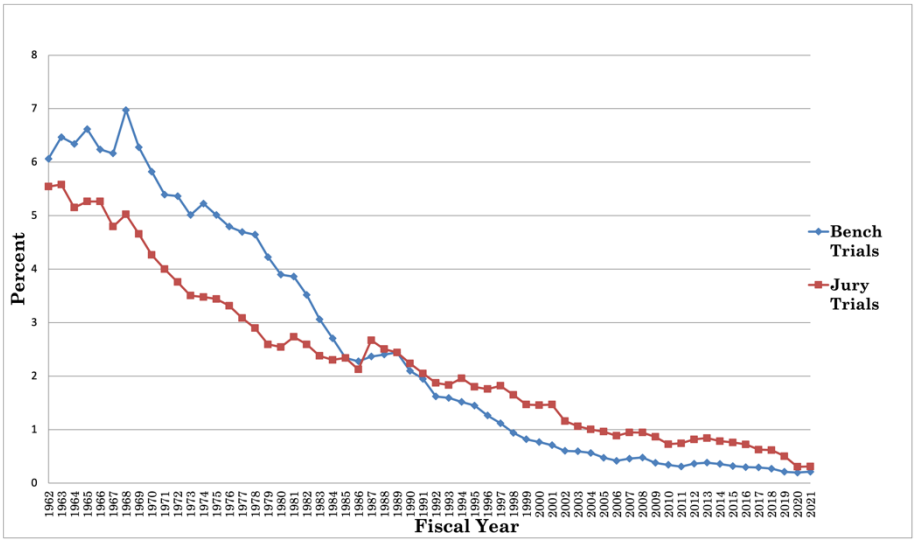
[172] Brian J. Ostrom, Shauna Strickland & Paula Hannaford, *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 768 (2004).

[173] According to the National Center for State Courts, seventeen states reported publishable data for total civil dispositions and jury trials in 2020: Alaska (0.0 percent), California (0.15 percent), Florida (0.07 percent), Georgia (0.05 percent), Hawai'i (0.06 percent), Indiana (0.02 percent), Michigan (0.01 percent), Minnesota (0.06 percent), Missouri (0.03 percent), Nevada (0.06 percent), New Jersey (0.03 percent), North Carolina (0.02 percent), Ohio (0.06 percent), Rhode Island (0.02 percent), Texas (0.08 percent), Vermont (0.09 percent) and Wisconsin (0.05 percent). *CSP STAT Civil,* NAT'L CTR. FOR STATE CTS., (Jan. 6, 2022), https://www.courtstatistics.org/csp-stat-nav-cards-first-row/csp-stat-civil.

[174] *See* Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962–2021) (presenting the total number of civil cases filed and disposed of by judge and jury); *see also* Marc Galanter & Angela M. Frozena, *A Grin Without a Cat: The Continuing Decline & Displacement of Trials in American Courts*, 143 DÆDALUS, J. OF THE AM. ACAD. OF ARTS & SCI. 115, 116–18 (2014) (charting and discussing this trend).

[175] Galanter, *supra* note 170, at 461

Figure 1: Percent of Civil Cases Resolved by Bench and Jury Trials, U.S. District Courts, 1962–2021[176]

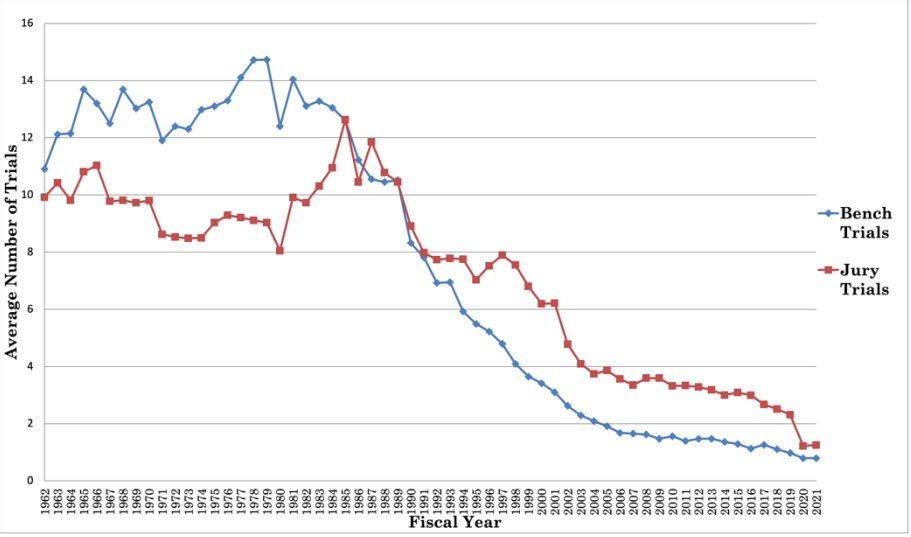


Perhaps unsurprisingly, this steady historical decline in bench and jury trials has been associated with a modified role of trial judges. Despite a fourfold increase in the number of civil case filings since the 1960s, judges are conducting increasingly fewer civil trials than ever before.[177] As Figure 2 illustrates, until the mid-1980s, on average, federal judges conducted a few dozen bench and jury trials each year. However, the number of trials began a precipitous decline in the mid-1980s and has not recovered. The most recent data show an average of fewer than two jury trials and one bench trial per judge per year.

[176] Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962–2021); *see also* Galanter & Frozena, *supra* note 174, at 125–26 (charting and discussing this trend). To demonstrate the clear trend, Figure 1 controls for the mass disposition of oil refinery explosion cases in the Middle District of Louisiana in 2007 and 2008, which added over 6,300 jury trials in 2007 and over 1,400 bench trials in 2008 that had been pending in that district for over a decade. If these refinery cases had been included in the figure, jury trials would have accounted for 3.8% of all federal civil cases disposed of in 2007, and bench trials would have accounted for 1.1% of such cases in 2008. *See* Administrative Office of the U.S. Courts, Annual Report of the Director, Table 6.3 (2007), Table 4.1 (2008).

[177] *See* Galanter, *supra* note 170, at 474 (discussing this inverse relationship).

Figure 2: Civil Trials per Article III Judgeship, U.S. District Courts, 1962–2021[178]



As Figures 1 and 2 make clear, jury trials are not being "replaced" with bench trials. Instead, the civil trial itself is disappearing. The system of civil justice itself is more broadly under assault.

The reasons for the civil jury's decline are many and interrelated. Perhaps most significantly, civil procedures adopted over the course of the twentieth century have played a central role. Many point to the adoption of the Federal Rules of Civil Procedure in 1938 as a pivotal moment of transformation.[179] The original drafters of the rules were radically anti-jury; as one scholar recognized, "[V]irtually everyone connected with urging uniform procedural

[178] Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962–2021); *see also* Galanter & Frozena, *supra* note 174, at 125–26 (charting and discussing this trend). For the reasons given in *supra* note 176, Figure 2 controls for cases brought in the Middle District of Louisiana in 2007 and 2008. If those cases had been included in the figure, the average district court judge would have conducted 12.9 jury trials in 2007 and 3.7 bench trials in 2008. *See* Administrative Office of the U.S. Courts, Annual Report of the Director, Table 6.3 (2007), Table 4.1 (2008).

[179] *See, e.g.*, Rex R. Perschbacher & Debra Lyn Bassett, *The Revolution of 1938 and Its Discontents*, 61 OKLA. L. REV. 275, 275–76 (2008) (calling the Rules an "innovative set of procedural rules for a court system that was just coming into its own"); John F. Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 WM. & MARY BILL RTS. J. 1, 44 (2013) (describing them as one of the "major legislative event[s] of the twentieth century").

rules denigrated juries."[180] Charles E. Clark (the principal architect of the Federal Rules)[181] disparaged the civil jury, claiming that it "injected an element of rigidity—of arbitrary right—into a system wherein general rules of convenience should prevail."[182] When Fleming James, one of the rule committee's assistants, whittled the core objectives of united procedure down to just three, number two read: "The right of jury trial should not be expanded. This method of settling disputes is expensive, dilatory—perhaps anachronistic. Indeed, the number of jury trials should be cut down if this can be done so as to not jeopardize the attainment of other objectives."[183]

One way the drafters accomplished this was by including a jury-waiver default rule,[184] which was meant to discourage the number of jury trials. Whereas historically a litigant would need to affirmatively request a bench trial, the new rule required a litigant to affirmatively request a jury trial; failure to do so defaulted to a trial by judge.[185] Clark was explicit in noting that under a jury-waiver default regime, judges were more likely to sit without juries since inertia leads to waiver and not to jury trial like under the old system.[186] And as a practitioner noted just four years after the adoption of the federal default rule, "The most effective device yet evolved for effectuating a more limited use of the jury and yet which preserves the constitutional right is that of requiring a party to

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[180] Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 968 (1987).

[181] *See generally* Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914 (1976) (outlining Clark's integral role).

[182] CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 53 (1928).

[183] Fleming James, Jr., *Trial by Jury and the New Federal Rules of Procedure*, 45 YALE L.J. 1022, 1025–26 (1936).

[184] *See* FED. R. CIV. P. 38(d) ("A party waives a jury trial unless its demand is properly served and filed.").

[185] *See* Deborah J. Matties, *A Case for Judicial Self-Restraint in Interpreting Contractual Jury Trial Waivers in Federal Court*, 65 GEO. WASH. L. REV. 431, 442 (1997) (reviewing the history of the jury trial waiver).

[186] *See* Charles E. Clark, *The New Illinois Civil Practice Act*, 1 U. CHI. L. REV. 209, 213 (1933) ("Moreover where a judge is sitting without a jury, as he does more and more when dockets become crowded and jury waiver automatic . . . ."). Clark had studied this and, in other writings, compared empirical data on the number of jury trials in New York and Connecticut, attributing Connecticut's lower rate of jury trials to its automatic waiver rule. *See* Charles E. Clark, *Fact Research in Law Administrations*, 2 CONN. B.J. 211, 226–27 (1928) (noting that "[t]he small number of jury trials and the large number of jury-waived cases is remarkable" when comparing a state like New York to one like Connecticut that implements a jury-waiver rule).

make a timely demand or be deemed to have waived his rights."[187] Automatic waiver allowed the drafters to limit jury trials under the guise of litigant preferences.

Beyond introducing inertia against lay participation, the drafters also limited jury trials by rendering them, essentially, unnecessary through the adoption of procedures previously employed in juryless courts of equity—namely, liberal discovery.[188] Whereas at common law trial was the premier opportunity for the competing sides to share evidence, pretrial discovery practices required by the Federal Rules allowed each side to assess the strength of their case in advance.[189] Under the new discovery rules, litigants could therefore more accurately gauge the value of the case and, as they deemed desirable, enter settlement agreements.[190] The expected and realized result is that most cases settle.[191] As United States Supreme Court Justice Neil Gorsuch pithily acknowledged: "Not long ago, we used to have trials without discovery. Now we have discovery without trials."[192]

The Federal Rules also led to fewer trials by permitting liberal joinder of parties and claims.[193] To make sense of these more complicated proceedings, judges took on a more managerial role.[194]

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[187] Harry W. Henry, Jr., *The Proposed Code of Civil Procedure for Missouri—Parties and Pleadings*, 7 MO. L. REV. 1, 6 (1942).

[188] *See* Alan K. Goldstein, *A Short History of Discovery*, 10 ANGLO-AM. L. REV. 257, 266 (1981) (discussing rule reforms intended to "facilitate wider availability of discovery").

[189] *See* Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—"Much Ado About Nothing?,"* 46 HASTINGS L.J. 679, 690–91 (1995) (describing how the Federal Rules of Civil Procedure caused a shift from "a system in which lawyers were . . . largely unrestrained in their efforts to prevail through surprise at trial" as most evidence was presented for the first time at time to a system of "economy, efficiency, and justice" where "discovery was intended to narrow issues that remained in dispute, equalize knowledge among the parties about the evidence, [and] eliminate trickery or surprise at trial").

[190] *See id.* at 719 ("[D]isclosure [as encouraged by the Rules] would accelerate disposition (including settlement) of cases by getting facts out early and facilitate planning when discovery is necessary by focusing the courts and parties on areas where factual gaps exist.").

[191] Even though many think settlement is a welcome outcome, it is not an unalloyed good. For a discussion of that problem, see generally Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994).

[192] Tony Mauro, *In Speech Notes, Neil Gorsuch Painted a Dark Picture of Litigation*, NAT'L L.J. (Mar. 14, 2017), http://www.nationallawjournal.com/id=1202781242573/.

[193] *See* FED. R. CIV. P. 18–20 (outlining the rules for joinder of parties and claims).

[194] *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 443 (1982) ("[T]he structure of the Federal Rules, with provisions permitting liberal joinder of parties and issues, encourages the problems that in turn invite management.").

In the 1960s, to facilitate case management, the judiciary abandoned master calendars and adopted an individual assignment system such that a single judge handled a case from filing to finish.[195] At the same time, courts issued a handbook instructing judges to adopt a process of extensive pretrial conferencing, which was designed to help judges address discovery disputes and to identify and refine the issues in dispute.[196] And by 1983, the Rules listed "facilitating settlement" as a core objective of pretrial conferencing.[197] Trials were no longer the process of resolving disputes, but rather the result of a breakdown in the settlement process.

Legislation and further rule changes exacerbated these trends in subsequent decades. Enacted in 1996, the Civil Justice Reform Act required all federal district courts to implement "expense and delay reduction plan[s]" to "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes."[198] It promoted case management principles, guidelines, and techniques for courts to adopt, and created a race among judges to dispose of cases as quickly as possible.[199] Anything that short-circuited trial became preferable. Moreover, the 2015 changes to Rule 26 of the Federal Rules of Civil Procedure regarding discovery emphasized the need for discovery to be reasonable and proportionate.[200] These changes were designed, as the Advisory

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[195] *See id.* at 377–78 (discussing the effects of the individual assignment system).

[196] *See Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351, 355 (1960) (setting forth judges' pretrial investigative duties).

[197] *See* Fed. R. Civ. P. 16(a)(5) ("In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as . . . facilitating settlement.").

[198] 28 U.S.C. § 471.

[199] *See generally* JAMES S. KAKALIK, TERENCE DUNWORTH, LAURAL A. HILL, DANIEL F. MCCARRREY, MARIAN OSHIRO, NICHOLAS M. PACE & MARY E. VAIANA, THE INST. FOR CIV. JUST., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996) (analyzing the widespread effects of the Civil Justice Reform Act).

[200] *See* FED. R. CIV. P. 26(b) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.").

Committee Notes to the new rule explain, to place even greater emphasis on taking a managerial approach to judging.[201]

Other explanations for the decline of civil trials focus on more recent interpretations of the Federal Rules, particularly on those Rules governing dispositive motions. The Supreme Court's 1986 trilogy of cases concerning Rule 56 summary judgment, for instance, empowered judges to dismiss cases in which they concluded that no genuine dispute of material fact existed so as to necessitate a trial.[202] The result is that a once rarely used procedure—indeed, once earnestly referred to by a leading scholar as a "toothless tiger"[203]—has had a major impact on the disposition of federal cases. Approximately nineteen percent of federal cases are now resolved by summary judgment.[204] That figure is higher in certain types of cases; for instance, a 2006 study found that courts granted in whole or in part eighty percent of defendants' summary judgment motions in employment discrimination cases.[205]

Roughly twenty years after the Supreme Court judicially-transformed the summary judgment standard, the Court took a similar approach with respect to Rule 12(b)(6)'s motion to dismiss for failure to state a claim. In dual cases, the Court reformed the traditional standard—one that for most of the twentieth century required a plaintiff to provide only "a short and plain statement of

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[201] *See* FED. R. CIV. P. 26 advisory committee notes to 2015 amendment (noting, *inter alia*, that "[t]he parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes").

[202] *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 598–99 (1986) (finding no genuine dispute of material fact because the factual context rendered the claims of the plaintiffs implausible); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986) ("[A] court ruling on a motion for summary judgment must be guided by the . . . clear and convincing evidentiary standard in determining whether a genuine issue of actual malice exists." (internal quotation marks omitted)); Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" (quoting FED. R. CIV. P. 1)).

[203] Arthur R. Miller, *The Pretrial Rush to Judgment*, 78 N.Y.U. L. REV. 982, 1056 (2003).

[204] Joe S. Cecil, Rebecca N. Eyre, Dean Miletich & David Rindskopf, *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 861 (2007).

[205] Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1033.

the claim" showing that the pleader is entitled to relief[206]—to the far more restrictive requirement that plaintiffs plead "enough facts to raise a reasonable expectation that discovery will reveal evidence of [the claim]."[207] The Court tasked trial judges with drawing upon their "judicial experience and common sense" in making that determination.[208] While judges still must accept all well-pleaded allegations as true and credit all logical inferences, they may reject conclusory allegations.[209] Of course, what is conclusory is often in the eye of the beholder. Judges thus now have license to decide for themselves if a plaintiff's claims are sufficiently plausible to allow for further proceedings.[210]

Another explanation for the decline in trials emphasizes the rise of mandatory arbitration. Although the 1925 precursor to what would come to be the Federal Arbitration Act anticipated only agreements between sophisticated actors—such as distant merchants who were increasingly reliant on the nation's railroad networks and desired enforceable private dispute resolution agreements[211]—by the second half of the century, the Supreme Court had dramatically expanded its application to nearly all agreements.[212] Chasing what they hoped to be favorable treatment, powerful economic actors began including binding arbitration

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[206] FED. R. CIV. P. 8(a)(2); *see* Conley v. Gibson, 355 U.S. 41, 47 (1957*)* (reinforcing a literal interpretation of Rule 8(a)(2) as "not requir[ing] a claimant to set out in detail the facts upon which he bases his claim" and that "to the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests"); Lucas F. Tesoriero, *Pre-*Twombly *Precedent: Have* Leatherman *and* Swierkiewicz *Earned Retirement Too?*, 65 DUKE L.J. 1521, 1527 (2016) ("For nearly fifty years after *Conley*, notice pleading was the dominant standard employed by lower courts when assessing a complaint's sufficiency.").

[207] Bell Atl. Corp. v. Twombly*,* 550 U.S. 544, 556 (2007).

[208] Ashcroft v. Iqbal*,* 556 U.S. 662, 679 (2009).

[209] *Twombly*, 550 U.S. at 561.

[210] Some authors have noted how similar the standard for motion to dismiss and summary judgment have become under the Court's *Iqbal-Twombly* standard. *See, e.g.*, Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly*,* 14 LEWIS & CLARK L. REV. 15, 18–38 (2010) (making this comparison and asserting that the "*Iqbal/Twombly* standard is unconstitutional").

[211] *See* Sam Cleveland, Note, *A Blueprint for States to Solve the Mandatory Arbitration Problem While Avoiding FAA Preemption*, 104 MINN. L. REV. 2515, 2520–21 (2020) (explaining how the major supporters of the Federal Arbitration Act in the early 1920s were business groups and commercial organizations and that "[m]uch of the [Act]'s legislative history shows that Congress only contemplated arbitration between businesses").

[212] *See infra* notes 214–216.

clauses in a wide variety of employment and consumer contracts.[213] Much of the case law, especially at the federal level, has developed such that these agreements between actors of disparate sophistication are enforceable even against typical contract defenses such as fraud,[214] illegality,[215] and unconscionability.[216] So widespread has this system of jury-less private adjudication grown that some have called it the "new litigation."[217]

Finally, observers point to tort reform efforts to explain the decline in jury trials in state courts.[218] Specifically, the use of damage caps—both for economic and noneconomic damages[219]—has had a deleterious effect on the rate of public adjudication. Funded

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[213] *See* David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 366–68 (2018) (discussing the effect of widespread arbitration clauses in employment and consumer contracts).

[214] *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–04 (1967) (holding that under the Federal Arbitration Act a court may only consider a claim of "fraud in the inducement of the arbitration clause itself" and not "fraud in the inducement of the contract generally").

[215] *See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006) ("[A] challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.").

[216] *See* Rent-A-Center, West, Inc. v. Jackson, 531 U.S. 63, 71 (2010) ("[T]he basis of [the] challenge [must] be directed specifically to the agreement to arbitrate before the [C]ourt will intervene.").

[217] Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 8.

[218] *See generally* Ronen Avraham, *Database of State Tort Law Reforms* (7.1) (U. Tex. L., L. & Econ. Rsch. Paper No. e555, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=902711 (collecting and sorting the many tort reform measures from around the country); *see also* Joanne Doroshow, *Tort Reform: Blocking the Courthouse Door and Denying Access to Justice*, *in* 2 COLLECTED ESSAYS ON EXPANDING ACCESS TO JUSTICE 57 (2016) (arguing that tort reforms have limited access to justice and reduced jury trials).

[219] The distinction between economic and noneconomic damages is often overstated in the policy and popular discourse. Both forms of damages aim to compensate the victims of private harm by making them whole, rather than to punish tortfeasors for their wrongdoing. Economic damages compensate a victim for more easily calculable losses, such as medical bills, lost income, or property loss. Noneconomic damages compensate a victim for harms that are not readily translated into monetary terms, such as disfigurement or loss of reproductive capacity. For a fuller discussion, see generally Kritzer et al., *supra* note 140. Still, the "calculation of lost wages and future medical care can be hotly contested trial issues." Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391, 439 (2005). As a result, assessing economic damages may oftentimes be just as challenging as determining noneconomic damages.

largely by pro-business interest groups,[220] these tort reform efforts set a maximum value for certain types of injury claims within causes of action for medical malpractice, products liability, and premises liability.[221] These reforms not only arbitrarily supplant the jury as fact-finder of the value of a given dispute, but they also limit litigant's and their attorney's incentive to bring such claims because the costs of litigating certain cases are prohibitive when compared to the chance of receiving artificially limited compensation well below what a judge or jury would find appropriate.[222] As such, these caps simultaneously decrease the number of trials and render jury service less democratically meaningful. Where artificial damage caps are in place, they also destroy the transparency of the jury trial

[220] The insurance industry in particular lobbies vigorously for damage caps or immunity based on false claims of increased claiming, rising jury verdicts, and skyrocketing tort system costs in general, when their proposed solutions have no impact on the problems they identify. *See* Geoff Boehm, *Debunking Medical Malpractice Myths: Unraveling the False Premises Behind "Tort Reform*,*"* 5 YALE J. HEALTH POL'Y, L., & ETHICS 357, 363 (2005) ("The insurance industry, the U.S. Chamber of Commerce, and corporate front groups such as the American Tort Reform Association have spent many tens of millions of dollars in pursuit of immunity or limitations on liability from wrongdoing." (footnote omitted)). In striking down Florida's noneconomic damage caps, the state supreme court observed that, while doctors received no relief from high medical-malpractice insurance premiums, the purported purpose of the cap, insurance companies enjoyed "an increase in their net income *of more than 4300 percent*." Estate of McCall v. United States, 134 So. 3d 894, 914 (Fla. 2014). The caps, then, serve as little more than increased profitability when insurance companies' investments slide downward. *See* Robert B. McKay*, Rethinking the Tort Liability System: A Report from the ABA Action Commission*, 32 VILL. L. REV. 1219, 1219–21 (1987) (discussing how the insurance industry faired from the 1960s through the 1980s).

[221] *See, e.g.*, S.D. CODIFIED LAWS § 21-3-11 (2022) (limiting damages in medical malpractice actions); MICH. COMP. LAWS ANN. § 600.2946a (products liability actions); TEX. CIV. PRAC. & REM. CODE ANN. § 75.004 (West 2021) (certain premises liability suits).

[222] *See* Stephen Daniels & Joanne Martin, *Damage Caps and Access to Justice: Lessons from Texas*, 96 OR. L. REV. 635, 660–71 (2018) ("Ultimately, damage caps will not allow for adequate compensation—enough to compensate the client, cover the lawyer's costs, perhaps a referral fee, and the lawyer's fee."); *see also* Mohammad Rahmati, David A. Hyman, Bernard Black & Charles Silver, *Insurance Crisis or Liability Crisis? Medical Malpractice Claiming in Illinois, 1980–2010*, 13 J. EMPIRICAL LEGAL STUD. 183, 202 (2016) (examining Illinois data and concluding that, with caps, smaller damage cases "all but disappeared" and led to an "increase in mean and median payouts [that] led many to conclude that the med mal system has become more generous to plaintiffs [when] [t]he opposite [was] closer to reality").

because jurors are not informed that their verdicts will be subsequently reduced.[223]

The impact of these explanations on the jury's decline is difficult to measure, both due to their overlapping nature but also due to the lack of data. A 2020 study conducted by Professors Shari Seidman Diamond and Jessica Salerno, and sponsored by the American Bar Association, sought to make sense of these explanations by conducting a national survey of legal professionals on their understanding of why cases no longer proceed to jury trial.[224] They solicited participation from legal professionals across the country by inviting them to complete the online survey anonymously.[225] In total, the study involved 1,460 respondents: "173 judges, 70% state and 30% federal, and 1,282 attorneys, 63% who handle primarily civil cases, 33% who handle primarily criminal cases, and 4% who did not indicate whether they primarily handle civil or criminal cases."[226]

The results of the study are illuminating. They show that among the most commonly accepted reasons among legal professionals for the decline in trials was that "litigants would rather settle than go to trial."[227] Judges particularly felt this way, with 89% of them agreeing or strongly agreeing with that statement; attorneys indicated their agreement, with 63.6% of attorneys agreeing or strongly agreeing that preference for settlement resulted in fewer trials.[228] As Professors Diamond and Salerno note, "[W]hether or not the perception is accurate in describing what most litigants want, it

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[223] *See* Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 355 (1998) (rejecting an argument that the jury's job was completed once it assessed damages, so that the law could then be applied as failing "to preserve 'the substance of the common-law right of trial by jury,'" as required by the Seventh Amendment); Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 223 (Ga. 2010) (holding that a cap that applies once damages are assessed "clearly nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function").

[224] *See* Diamond & Salerno, *supra* note 155, at 120–21 ("The survey was designed to investigate how legal professionals who have firsthand experience with the decisions that lead to or away from jury trials explain the reduction in jury trials in recent years. This Article describes the results from this national survey of 1,460 legal professionals, both attorneys and judges.").

[225] *Id.* at 120–21.

[226] *Id.* at 127.

[227] *Id.* at 128.

[228] *Id.* at 128, 131.

may explain why judges and attorneys encourage—or pressure—litigants to waive trial and accept a settlement . . . ."[229]

The study also measured systemic effects as sources of the reduction in civil jury trials. Respondents were asked to evaluate the effects of five systemic changes: damage caps, mandatory binding arbitration, increases in successful summary judgment motions, increases in successful *Daubert* motions, and increases in successful motions to dismiss.[230] Damage caps and mandatory binding arbitration were identified by respondents as having the greatest influence on reducing trial rates.[231] More than half of all respondents perceived these two features as causing medium or large reductions in the rate of jury trials—61.6% for damage caps and 52.1% for mandatory binding arbitration.[232] A significant proportion of respondents (39.9%) perceived the increased use of successful summary judgment motions as causing a moderate or large reduction in jury trials.[233] In contrast, most respondents saw increases in successful *Daubert* motions and motions to dismiss as having little to no effect in reducing jury trials.[234]

Also of interest, the study assessed how respondents compared jury trials to other modes of dispute resolution, such as bench trials, mediation, and binding arbitration.[235] Respondents viewed jury trials as among the fairest procedures (second only to nonbinding mediation), and the procedure they preferred most.[236] Attorneys who regularly represented either plaintiffs or defendants saw jury trials as fairer overall than bench trials; whereas, perhaps understandably, civil judges saw themselves as fairer than juries.[237]

With that said, respondents also acknowledged that jury trials had certain notable detriments, including that they were perceived as "less predictable, slower, and less cost-effective than alternative

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[229] *Id.* at 131.

[230] *Id.* at 143.

[231] *Id.* at 121.

[232] *Id.* at 144.

[233] *Id.* at 144–45

[234] *Id.* at 145.

[235] *See id.* at 131–39 ("The survey asked civil attorneys and judges to rank four procedures used to resolve civil cases—arbitration, mediation, jury trials, and bench trials—based on their predictability, speed, cost effectiveness, fairness, and the respondent's overall preference for the procedure.").

[236] *Id.* at 121.

[237] *Id.* at 137 fig. 5.

procedures."[238] The authors note that "[t]his pattern suggests that perceived risk, costs, and delay deter the use of jury trials despite their attractiveness on other important dimensions."[239] These perceived detriments are not new and have been seized on to justify critiques and attacks on the institution by powerful economic and political actors with dramatic effectiveness.

B. LEGAL CRITIQUES AND ATTACKS ON THE CIVIL JURY

Judicial and economic elites have hurried the decline of the civil jury brought on by the practices just discussed by sustaining critiques and attacks on the institution. Although civil juries were celebrated in colonial America as well as during the nation's first century as a check on the exercise of arbitrary authority,[240] it inevitably followed that those with influence and clout resented the loss of their natural institutional advantages when decision-making is placed in the hands of more common folk. In fact, "[e]ver since there have been juries or jurylike tribunals . . . there have been attacks on their competence and even calls for their abolition."[241]

The critiques have hardly varied over time. At a time when the public clamor for civil jury trials in the Constitution should not yet have faded, Georgia Chief Justice Joseph Lumpkin observed that, while in "*criminal* proceedings, trial by jury cannot be too highly appreciated or guarded with too much vigilance," "[w]e may, however, after all, *doubt* the *essentiality* of trial by jury in *civil cases*."[242] Among the problems that existed when civil juries were de rigueur, Lumpkin said, was the "time, trouble, and expense" involved.[243] Nearly a century later, particularly around the 1930s, a number of judges, academics, and bar associations soured on civil juries, questioning both their expense and their competence.[244] For

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[238] *Id.* at 121.

[239] *Id.*

[240] *See supra* Section II.A.

[241] Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCH. PUB. POL'Y & L. 788, 789 (2000).

[242] Flint River Steamboat Co. v. Foster, 5 Ga. 194, 206 (1848).

[243] *Id.* at 207.

[244] *See* Stanley E. Sacks, *Preservation of the Civil Jury System*, 22 WASH. & LEE L. REV. 76, 79 (1965) (outlining the history of jury treatment at that time and how authors of "anti-jury ferment" concluded that the "jury system deserved condemnation" due to delay and "incompetence to perform the function assigned to it").

instance, Chief Justice Charles Evans Hughes in 1928 did not mince words in a speech to the Federal Bar Association in New York: "Get rid of jury trials as much as possible. . . . The ideal of justice is incarnated in the judge."[245] Three decades later, many critics continued to express that view, as Harvard Law School Dean Erwin Griswold asked in 1962, "Why should anyone think that twelve persons brought in from the street, selected in various ways, for their lack of general ability, have any special capacity for deciding controversies between persons?"[246]

These various critiques gained a modern-day foothold when the Supreme Court was called upon to decide whether the Seventh Amendment mandated trial by jury in stockholder derivative actions. In *Ross v. Bernhard*, the Court held that the "right to jury trial attaches to those issues in derivative actions as to which the corporation, if it had been suing in its own right, would have been entitled to a jury."[247] The decision relied on the traditional dividing line of which aspects of a case sounded in equity as opposed to those sounding in law.[248] The Court's opinion divided the claims within the lawsuit to reach its conclusion and stated that the answer to the question of when a jury is required "depends on the nature of the issue to be tried rather than the character of the overall action."[249] A footnote attached to that statement explained that one of the three factors that must be taken into consideration to determine the applicability of the jury-trial right was "*the practical abilities and limitations of juries*."[250]

That phrase has only appeared in one other Supreme Court opinion, also in a footnote, where the Court limited its meaning and application to instances where "Congress has permissibly entrusted the resolution of certain disputes to an administrative agency or

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[245] Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL RTS. J. 811, 873–74 (2014) (quoting *Fewer Jury Trials Urged by Hughes: More Power for the Federal Judges Would Improve System, He Says*, N.Y. TIMES, Dec. 7, 1928, at 3).

[246] Hans Zeisel, *The Debate over the Civil Jury in Historical Perspective*, 1990 U. CHI. LEGAL F. 25, 26 (quoting 1962–63 HARVARD LAW SCHOOL DEAN'S REP. 5–6).

[247] 396 U.S. 531, 532–33 (1970).

[248] *See id.* at 533 (discussing case law defining "the line between actions at law with legal rights and suits in equity dealing with equitable matters" (first citing Parsons v. Bedford, 3 Pet. 433, 447 (1830); then *citing* Whitehead v. Shattuck, 138 U.S. 146, 151 (1891))).

[249] *Id.* at 538.

[250] *Id.* at 538 n.10 (emphasis added).

specialized court of equity, and . . . jury trials would impair the functioning of the legislative scheme."[251] Still, the Court's earlier acknowledgement that a practical assessment of a generic jury's capabilities is relevant to determining if the jury right applies to particular issues became a talisman for those who continued to advance the criticism that lay jurors were ill-equipped to make factual findings when the issues were outside the average person's experience.

Even though the Supreme Court itself ascribed little meaning to the footnote's suggestion that the Seventh Amendment was cabined by jurors' presumptively limited abilities, the phrase "practical abilities and limitations of juries" gained wider purchase among other federal courts, appearing in thirty-four federal appellate decisions and 114 district court opinions (yet only a mere fifteen state court opinions).[252] The phrase signaled to those who were dissatisfied with jury verdicts that critiques of civil juries might obtain traction with the courts sufficient to avoid jury trials. Perhaps it is only coincidence, then, that shortly thereafter a corporate public relations campaign took off, telling the public that jurors were unqualified to decide complex and sophisticated issues and tended to let sympathies override reason to reach supposedly unfathomably high verdicts.[253]

As discussed in the previous section, the jury in actuality tends to perform its fact-finding role fairly and admirably.[254] High damage awards in civil jury trials make the news because of their unusual

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[251] Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 n.4 (1989).

[252] *See* Westlaw, https://www.westlaw.com (last visited Sept. 15, 2022) (search "492 U.S. 33"; then navigate to the menu titled "Citing References" and select "Cases"); *see also* Arthur R. Miller, *The Pretrial Rush To Judgment: Are The "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day In Court And Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1104–09 (1997) (discussing the impact of "the Supreme Court's footnote in *Ross v. Bernhard* announcing a three-prong jury-triability test" and providing examples of courts' applications and interpretations of this test).

[253] *See* Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building*, 52 L. & CONTEMP. PROBS. 269, 292 (1989) (outlining how the insurance industry led an effort in the mid-1970s "through advocacy advertising to influence and shape public opinion in cause of civil justice reform" to prevent what it characterized as "ridiculously high jury awards").

[254] *See supra* notes 134–141 and accompanying text (providing evidence that juries and judges tend to award damages at similar amounts and that punitive damages are generally proportional to compensatory damages among other findings which indicate that juries tend to perform their role in regards to damages appropriately).

man-bites-dog quality, but their appearance may lead audience members to overestimate their frequency and in turn causes risk managers to overestimate liability exposure.[255] Looking to tamp down verdicts against their sponsors, corporate groups seized upon these news reports and circulated skewed and fictionalized stories about runaway juries giving large verdicts to undeserving plaintiffs.[256] This skewed rendition of what juries did helped to create a political environment primed for jury-restrictive legislation while blaming plaintiffs' lawyers and juries for a broken civil justice system.[257]

Attacks on civil juries not only encouraged legislation designed to take constitutionally secured prerogatives away from the jury, such as through damage-cap laws, but also influenced judicial thinking and legal doctrine.[258] It caused judges even in some jurisdictions thought to be "plaintiff-friendly" to opine about the problems with juries. For example, the Alabama Supreme Court has noted three frequent criticisms of jurors: "the helplessness and lack of sophistication of jurors obligated to resolve issues in complex

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[255] *See* Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 LAW & HUM. BEHAV. 419, 426, 427 (1996) (presenting findings that media portrayals of damages depict higher awards of damages than actually occur in most cases and indicating that such portrayals "provide[] a dubious basis for sound decision making"); Steven Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes*, 1998 WIS. L. REV. 237, 250 ("The availability heuristic also suggests that when decisionmakers consider liability risk they often substantially overestimate it. Contributing to this are high-visibility liability episodes such as unusually large awards, punitive damages, and liability when injury causation is disputed by respected authorities.").

[256] For a comprehensive debunking of the tall tales that were circulated, see generally Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System,* 40 ARIZ. L. REV. 717 (1998) (providing empirical data and detailing the facts of lawsuits in which large damages were awarded and those same facts as portrayed by corporate groups).

[257] *See, e.g.*, THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 26 (2002) ("The notoriety of tort litigation, combined with the powers of persuasion of corporate and professional interests, has put personal injury lawsuit reform at the top of the antilitigation agenda."); STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 20–21 (1995) (describing the political clout, resources, and propaganda utilized to sell the ideas of runaway juries and a system out of whack).

[258] *See* Shaakirrah R. Sanders, *Deconstructing Juryless Fact-Finding in Civil Cases*, 25 WM. & MARY BILL RTS. J. 235, 257 n.160 (2016) (explaining how a "core dispute among states is the scope of state legislative power to alter or replace the jury's determination of the value of an injury" using damage-cap laws and citing several state court decisions evaluating such laws).

litigation;" jurors' overcompensation of "injured tort victims for noneconomic damages;" and the "'unbridled' discretion jurors enjoy in imposing massive punitive damage awards."[259] The West Virginia Supreme Court of Appeals expressed a similar sentiment when it asserted that "[c]ourts understand that juries operate on largely emotive principles and that jury awards can be substantially in excess of what judges, educated in law as a science, would award in similar circumstances."[260] Yet empirical research establishes that judges and jurors tend to reach similar conclusions about liability,[261] compensatory damages,[262] and punitive damages.[263]

Perhaps there is no better example of how this campaign influenced judicial doctrine than in the area of punitive damages. To understand, it is important to stress that the Seventh Amendment both preserves civil trial by jury as it was practiced under the English common law at the time when the Bill of Rights was added to the Constitution and also prohibits reexamination of facts determined by a jury.[264] The English common law recognized that "the jury are judges of the damages."[265] Thus, if damage assessment was committed to the jury's determination, judges have no authority to substitute their own numbers for the jury's.[266] Nor do legislatures in common-law causes of action.[267] Since at least

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[259] Cent. Ala. Elec. Coop. v. Tapley, 546 So. 2d 371, 376 (Ala. 1989).

[260] Roberts v. Stevens Clinic Hosp., Inc., 345 S.E.2d 791, 803 (W. Va. 1986).

[261] *See* VIDMAR & HANS, *supra* note 127, at 148–52 (2007) (presenting research findings that judges and juries agreed on liability "in about four out of five cases").

[262] *See id.* at 299–302 (presenting findings that jurors and judges "thought about the relative severity of the injuries in remarkably similar ways" and generally awarded approximately the same amount of compensatory damages).

[263] *See* Theodore Eisenberg, Neil LaFountain, Brian Ostrom, David Rottman & Martin T. Wells, *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 779 (2002) ("Juries and judges award punitive damages at about the same rate, and their punitive awards bear about the same relation to their compensatory awards.").

[264] U.S. CONST. amend. VII.

[265] Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353 (1998) (quoting Lord Townsend v. Hughes (1677) 86 Eng. Rep. 994, 994–95 (C.P.)).

[266] *See* Hetzel v. Prince William Cnty., 523 U.S. 208, 211 (1998) (per curiam) (stating that the Seventh Amendment's "prohibition on the reexamination of facts determined by a jury" bars a court from substituting its own "estimate of the amount of damages" for the damages as determined by the jury).

[267] *See, e.g.*, Hilburn v. Enerpipe Ltd., 442 P.3d 509, 524 (Kan. 2019) (holding that the Kansas Constitution Bill of Rights disallows statutory noneconomic damage caps); Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 636 (Mo. 2012) (en banc) (deciding that statutory

1851, the Supreme Court has recognized that the jury's preeminent role in assessing punitive damages was so well established that "the question will not admit of argument."[268]

Despite this constitutional history, and the infrequency with which punitive damages were awarded,[269] a campaign developed in the 1980s that caught the Supreme Court justices' eyes.[270] Businesses used a comprehensive array of press releases to highlight outlier punitive damage verdicts, portraying them as typical.[271] These tall tales, such as the highly publicized McDonald's "hot coffee" case, were further circulated by politicians hoping to score points with a well-heeled constituency.[272] Insurers and business groups bemoaned the bet-the-company consequences of an

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noneconomic damage caps infringes on the right to trial by jury guaranteed by the Missouri Constitution); Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 220 (Ga. 2010) (finding that noneconomic damage caps violate the Georgia Constitution); Moore v. Mobile Infirmary Ass'n., 592 So. 2d 156, 164 (Ala. 1991) (holding that statutorily limiting noneconomic damages violates the Alabama Constitution); Sofie v. Fibreboard Corp., 771 P.2d 711, 712 (Wash. 1989) (en banc) (deciding that noneconomic damage caps violate the Washington Constitution). Oddly, while not overruling *Watts*, the Missouri Supreme Court subsequently held that when the legislature codifies the common law and adds a damage cap, it removes the issue from the purview of the state constitution's "inviolate" right to trial by jury. Ordinola v. Univ. Physician Assocs., 625 S.W.3d 445, 449–51 (Mo. 2021) (en banc). The decision, thus, permits the legislature to restrict the authority of a civil jury even if such a ploy would not be valid under the Seventh Amendment. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 (1989) (relying on the legal-equity dichotomy to determine if the issue was committed to a jury's determination).

[268] Day v. Woodworth, 54 U.S. 363, 371 (1851).

[269] *See* THOMAS H. COHEN & KYLE HARBACEK, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STATS., PUNITIVE DAMAGE AWARDS IN STATE COURTS, 2005, at 1 (2011), https://www.bjs.gov/content/pub/pdf/pdasc05.pdf (reporting that "[p]unitive damages were awarded in 700 (5%) of the 14,359 trials where the plaintiff prevailed" and that the "median punitive damage award for the 700 trials with punitive damages was $64,000 in 2005").

[270] *See* PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 3–10 (1988) (describing a supposedly rampant increase in tort suits and damage awards). *But see* Mark M. Hager, *Civil Compensation and Its Discontents: A Response to Huber*, 42 STAN. L. REV. 539, 547, 579 (1990) (pointing out fallacies in figures used by Huber).

[271] *See* Stephen Daniels & Joanne Martin, *Jury Verdicts and the Crisis in Civil Justice*, 11 JUST. SYS. J. 321, 325 (1986) (describing the "horror story" public relations campaigns that big businesses ran).

[272] *See* Deborah Jones Merritt & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315, 316 (1999) ("Politicians exchange tales of the psychic who recovered a million dollars from her doctor, claiming that a CAT scan destroyed her psychic powers, and stories of the woman who won several million dollars from McDonald's after spilling a cup of coffee on herself.").

adverse punitive damages verdict, paid for studies that often utilized problematic methodologies to support the campaign's viewpoint,[273] and cited these studies and unfiltered examples from news reports in Supreme Court certiorari petitions and briefs[274] with a plea that unrestricted punitive damages constituted a form of excessive fines or violated due process.[275]

The Supreme Court initially resisted entreaties to apply a constitutionally based limit on punitive damages.[276] However, usual swing-Justice Sandra Day O'Connor bemoaned "skyrocketing" punitive damage awards and their supposed adverse effect on product innovation,[277] apparently accepting the false portrayal of out-of-control juries. It was not long before a majority of the Court shared Justice O'Connor's sentiment; it held that due process placed a constitutional limit on "grossly excessive" punitive damages, relying on vague and subjective guideposts[278] and whether the size of the punitive damages "raise[s] a suspicious judicial eyebrow."[279]

After subjecting punitive damage verdicts to a due-process override, the natural next question was what to do when punitive damages were unconstitutionally excessive. Should the question be resubmitted to the jury, or should a judge choose the amount? The answer depends on whether the Seventh Amendment applies. The constitutional history was clear; juries are "judges of the

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[273] *See* Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 14 (1990) (describing press kits and publicity tactics highlighting tales and anecdotes about punitive-damage verdicts,); *see also* Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1298 (2005) ("Much of what is asserted about the nature of punitive damages is untrue, unknown, or stitched together from questionable sources.").

[274] *See, e.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471, 501 n.17 (2008) (declining to rely upon Exxon-funded studies that used "mock juries" to demonstrate the unpredictability of punitive damage awards and describing the studies as part of "a body of literature running parallel to anecdotal reports").

[275] *See* Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 276–78 (1989) (finding that the due-process argument was not preserved and rejecting the applicability of the Excessive Fines Clause).

[276] *Id.* at 280.

[277] *Id*. at 282 (O'Connor, J., concurring in part and dissenting in part) (citing HUBER, *supra* note 270, at 152–71).

[278] *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–75 (1996) (holding that the degree of reprehensibility, the disparity of harm and award, and sanctions in comparable cases are the controlling factors).

[279] *Id*. at 583 (quoting TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 481 (1993) (O'Connor, J., dissenting)).

damages."[280] But the Supreme Court adopted a fiction to conclude that judges could replace the jury's determination with their own. It declared that compensation was the type of fact reserved for a jury's determination and that, although punitive damages previously served a compensatory purpose, they no longer did.[281] Instead, the Court said that punitive damages were the jury's "expression of its moral condemnation" of egregious misconduct and not a factual determination.[282] By reclassifying the jury's role with respect to punitive damages, the Court opened the door to revision of the verdict by both trial and appellate judges. Without any change in constitutional language and disregarding the longstanding regard of punitive damages as separate and above compensation,[283] the Court limited the jury's role in determining punitive damages and increased the role of judges.[284]

Years later, the Court considered newly collected data and concluded that the empirical assumptions underlying this jurisprudential change were not well grounded. As the Court recognized, "[T]he most recent studies tend to undercut much of [the criticism of punitive damages]."[285] Moreover, research "reveals that discretion to award punitive damages has not mass-produced runaway awards."[286] Rather than the bill of goods they had been sold, the Justices conceded that the data revealed "an overall restraint" on the part of juries.[287] The die, however, had been cast.

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[280] Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353 (1998) (quoting Lord Townshend v. Hughes (1677) 86 Eng. Rep. 994, 995 (C.P.)).

[281] *See* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432, 437, 437–38 n.11 (2001) ("Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries . . . .").

[282] *Id.* at 432.

[283] *See* Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101, 107 (1893) (recognizing that punitive damages are awarded "not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others"); *see also* Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 164 (2003) ("[I]t would be at best anachronistic (and at worst misleading) to say that punitive damages served primarily a compensatory function in the early years of American tort law . . . .").

[284] *See Cooper Indus.*, 532 U.S. at 431 (holding that appellate courts must review the constitutionality of punitive damages awards under a de novo standard, rather than the less intensive "abuse of discretion" standard).

[285] Exxon Shipping Co. v. Baker, 554 U.S. 471, 497 (2008).

[286] *Id.*

[287] *Id.* at 498–99.

Judges would scrutinize and adjust punitive damage verdicts after the fact, rendering the jury's determination more advisory.

The transformation of the jury's role with respect to punitive damages followed a strategic blueprint that has successfully transformed the law in other areas where juries have historically played a constitutionally consecrated role as well. Step one is to appeal to the idea that jurors lack the sophistication necessary to assess complex information and give in too easily to emotion. Then, having established a level of agreement with that proposition, step two is to advocate for changes that limit the jury's scope.

For instance, another area where this blueprint succeeded is the increased authority of judges over expert evidence. First, the critics argued that juries could not be expected to understand complex scientific or other technical evidence from experts.[288] Second, giving examples of juries siding with seemingly incredulous expert testimony that was purposely presented in a damning light as "junk science,"[289] a call was made to rethink the rules that would admit such evidence.[290] And, as with punitive damages, the Court

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[288] *See, e.g.*, Daniels, *supra* note 253, at 280 ("[J]uries are not competent to decide issues in complex, lengthy trials . . . [as] jury attention span decreases in long trials, especially antitrust, products liability, or medical malpractice cases, which entail complicated evidence . . . [and] [j]uries are likely to be misled, or confused in such cases by . . . technical evidence, thereby eliminating any chance for a fair, rational decision. . . . Uninformed, gullible lay jurors may accept expert testimony uncritically, ignore it, or just not understand it at all."); Edward J. Imwinkelried, *Judge Versus Jury: Who Should Decide Questions of Preliminary Facts Conditioning the Admissibility of Scientific Evidence?*, 25 WM. & MARY L. REV. 577, 580 (1984) (contending that jurors are "incompetent to evaluate scientific proof critically"); Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 505 (1975) (questioning ability of jurors in complex antitrust or shareholder suits).

[289] PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 1–6 (1991). The basis for the claim that junk science was overrunning the courts was authoritatively refuted by other writers. *See* Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 AM. U. L. REV. 1637, 1642 (1993) ("*Galileo's Revenge* and its author have received heavy publicity and have been treated by lawyers as well as laypeople as if they *were* part of legitimate scholarship on these issues . . . .").

[290] *See, e.g.*, Peter Huber, *Junk Science and the Jury,* 1990 U. CHI. LEGAL F. 273, 278, 302 (1990) (calling for a change to "reduce the amount of science that juries must decide for themselves" because of the continuing problems of "junk science" as "juries sometimes accept factual claims that mainstream scientists categorically reject"). *But see* Robert Blomquist, *Science, Toxic Tort Law, and Expert Evidence: A Reaction to Peter Huber,* 44 ARK. L. REV. 629, 652 (1991) (finding Huber's arguments to limit scientific evidence admitted to juries

succumbed to the criticism and created a gatekeeper role so that judges would prevent juries from hearing certain expert testimony previously deemed admissible.[291] To accomplish that result, the Court read the existing rule in a new way. The relevant rule on expert evidence states that such testimony is admissible if its probative value helps the jury understand a fact at issue,[292] such as whether exposure to a toxic chemical caused the plaintiff's injury.

For years, under the previous standard, courts had admitted expert testimony to help the jury connect the dots when the evidence provided was "generally accepted" within the expert's field.[293] However, because of how quickly science advances, this general-acceptance standard was presented as failing to keep up with new research.[294] To address that concern, the Court reinterpreted the expert evidence rule to permit the admission of novel scientific evidence so long as it was based on scientifically acceptable methodologies.[295] On its face, the change appeared to liberalize the admissibility of expert evidence. Yet, at the same time, in adopting the new standard, the Court also enhanced the gatekeeper role that judges play in deciding the expert-evidence admissibility question.

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unpersuasive because his "vision expects too much of mainstream scientific testimony in an area where too little expert consensus exists" and "expects too little of our common law heritage" including judge and jury prerogatives in furthering equity and social justice).

[291] *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592 (1993) ("Faced with a proffer of expert scientific testimony, then, *the trial judge must determine* at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." (emphasis added) (footnote omitted)).

[292] *See* FED. R. EVID. 702(a) ("A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if . . . the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue . . . .").

[293] *See* Frye v. United States, 193 F. 1013, 1014 (D.C. Cir. 1923) ("[W]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.").

[294] *See* Frederick B. Lacey, *Scientific Evidence*, 24 JURIMETRICS J. 254, 265 (1984) ("[T]he *Frye* jurisdictions will always lag behind the advances of science while they wait for novel scientific techniques to gain 'general acceptance.'").

[295] *See Daubert*, 509 U.S. at 588 (discarding the traditional "general acceptance" test for admissibility of expert opinion evidence).

The corporate public-relations machine then again moved into high gear, proclaiming a great victory against "junk science."[296] Conferences, articles, and continuing legal education programs emphasized the judges' gatekeeper role in keeping expert evidence from coming before a jury, rather than the broader admissibility of new or novel science.[297] Judges' understanding of the new precedent aligned with that publicity.[298] The result was a more restrictive approach to expert evidence that ended up frequently constricting juries in the discharge of their constitutionally assigned role as fact-finders. As with punitive damages, the empirical evidence did not catch up in time. Studies do not bear out the inaccurate caricature of juries completely befuddled by scientific evidence.[299]

C. A CULTURE DISCOURAGING OF CIVIL JURY TRIALS

The artificial barriers constructed through legislation, rules, and judicial doctrine have significantly diminished the uses and prevalence of jury trials. Meanwhile, other developments, such as budgetary crises, have compounded the problem and further diminished juries.[300] If not for a cultural predilection that believes juries are not a core component of our democratic structure and instead are luxuries that are expensive, antiquated, and unnecessary, years-long postponements of civil jury trials would not be seen as a solution to nearly every subsequent crisis faced by society.

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[296] For a description of these efforts, see Allan Kanner & M. Ryan Casey, Daubert *and the Disappearing Jury Trial*, 69 U. PITT. L. REV. 281, 296–97 (2007).

[297] *See* Robert S. Peck & Erwin Chemerinsky, *The Right to Trial by Jury as A Fundamental and Substantive Right and Other Civil-Trial Constitutional Protections*, 96 OR. L. REV. 489, 508–09 (2018) (describing how the *Daubert* Test has increased pretrial attacks on experts).

[298] *See* Kanner & Casey, *supra* note 296, at 283 (recognizing that, rather than liberalize admission of scientific evidence, *Daubert* accomplished "the exact opposite").

[299] *See, e.g.*, Richard Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 235 (Robert E. Litan ed., 1993) ("[T]he weight of the evidence indicates that juries can reach rationally defensible verdicts in complex cases.").

[300] *See* RICHARD Y. SCHAUFFLER & MATTHEW KLEIMAN, THE BOOK OF THE STATES, STATE COURTS AND THE BUDGET CRISIS: RETHINKING COURT SERVICES 2010, at 289 ("Like other public institutions, courts in many states are thrust into crisis mode, and forced to respond by creating immediate savings through reducing services, closing courthouses, [and] suspending jury trials in civil cases.").

Examples abound. Tightened state budgets have resulted in court systems deferring civil jury trials despite state constitutional promises against "unnecessary delay" and an "inviolate" right to a jury trial.[301] For more than a decade, states have cut overall budgets, resulting in reductions of money allocated to state courts by as much as twenty percent.[302] New Hampshire started this money-crunching trend by suspending civil jury trials.[303] In California, where the courts have been hit hard by budget cuts, the 2021 budget contained an increase in court funding, but was insufficiently large such that the legislature's budgetary analysis arm projected that they would still need to reduce expenditures by a minimum of fifty million dollars in 2021–22.[304] As an expensive item for trial courts, civil jury trials may well be suspended—again. Similarly, Florida faced an overall budget deficit of $5.4 billion in 2020, while its courts estimated that nearly one million more cases would be added to trial courts' dockets by mid-2021.[305] All that is to say, funding courts is a choice. And the policy of cutting budgets and insufficiently funding courts is part of a broader, growing notion that civil trials can be easily discarded if done in furtherance of some vague notion of efficiency.[306]

The COVID-19 pandemic has further exposed this cultural disposition to devalue the jury and exacerbated the effects. Health concerns have required courts to adjust their approaches to conducting jury trials to ensure public safety, but courts around the country largely took the approach of simply refusing to hold civil

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[301] *See, e.g.*, WASH. CONST. art. I, §§ 10, 21 (respectively).

[302] *See* SCHAUFFLER & KLEIMAN, *supra* note 300, at 289 ("In the 2010 fiscal year, 40 state court budgets were cut . . . . The cumulative cuts have reached as high as 20 percent of the court budget . . . .").

[303] *Id*. at 290; *see also* Abby Goodnough, *Jury Trials to Be Halted in One State Feeling Pinch*, N.Y. TIMES (Dec. 8, 2008), https://www.nytimes.com/2008/12/09/us/09court.html ("The Superior Court . . . in New Hampshire will take the unusual step of halting jury trials . . . because of a widening state budget crisis.").

[304] *See* THE 2021–22 BUDGET: TRIAL COURT OPERATIONS PROPOSALS, CAL. LEGIS. ANALYST'S OFF. (Feb. 11, 2021), https://lao.ca.gov/Publications/Report/4362 ("[T]he expiration of $50 million in one-time funding provided in the current year means that trial courts could need to reduce expenditures by at least a further $50 million in 2021–22.").

[305] Andrew Strickler, *State Court Budget Forecast: Stormy, with Rising Case Backlogs*, LAW360 (Nov. 23, 2020), https://www.law360.com/articles/1331216/state-court-budget-forecast-stormy-with-rising-backlogs.

[306] *See* Peck & Chemerinsky, *supra* note 297, at 493 (recognizing that "[t]hese movements away from jury trials [are] often in the name of efficiency").

jury trials rather than find ways to make it work.[307] Like many states, New Mexico instituted a suspension of jury trials in response to surging COVID-19 cases at the end of 2020 and only began those trials again on February 1, 2021.[308] The federal court system acted similarly, with the Administrative Office of U.S. Courts reporting in November 2020 that "[a]bout two dozen U.S. district courts have posted orders that suspend jury trials."[309] The result left hundreds of thousands civil cases languishing in a standstill and has discouraged litigants from bringing new cases, leading to a looming backlog of cases some estimate to number in the millions.[310]

Though as of this writing, many state and federal courts have reopened, the more than a year of courts treating civil jury trials as expendable has had both short-term and long-term effects. Among the federal appellate courts, only the Ninth Circuit held that the suspension of jury trials for lack of funds violated the Seventh Amendment's guarantee.[311] And the COVID-19 Omicron variant's emergence in the winter of 2021 again caused many courts to shutter their doors to civil jury trials, demonstrating the unpredictability of a pandemic.[312]

In the short term, the decision to forgo civil jury trials creates significant backlogs, which further causes court systems to look for ways to cut corners to reduce the number of cases requiring juries because of the time and resources needed. The public loses its

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[307] *See, e.g.*, Ed Spillane, *The End of Jury Trials: Covid-19 and the Courts: The Implications and Challenges of Holding Hearings Virtually and in Person During a Pandemic from a Judge's Perspective*, 18 OHIO ST. J. CRIM. L. 537, 538 (2021) ("[T]he ability to hold jury trials has almost completely grounded to a halt since March 2020.").

[308] Order in the Matter of the Amendment of the New Mexico Judiciary Public Health Emergency Protocols for the Safe and Effective Administration of the New Mexico Judiciary During the COVID-19 Public Health Emergency, No. 20-8500-042, at 17 (N.M. Dec. 14, 2020).

[309] *Courts Suspending Jury Trials as COVID-19 Cases Surge*, U.S. CTS. (Nov. 20, 2020), https://www.uscourts.gov/news/2020/11/20/courts-suspending-jury-trials-covid-19-cases-surge.

[310] *See* ROBINSON & GIBSON, *supra* note 51 ("[O]ver a million cases that were not filed in 2020 could make their way into the courts . . . . [T]his speaks to the need to address growing backlogs in civil courts . . . .").

[311] *See* Armster v. U.S. Dist. Ct. for the Cent. Dist. of Cal., 792 F.2d 1423, 1430 (9th Cir. 1986) ("[W]e conclude that the Seventh Amendment right to a civil jury trial is violated when, because of [budgetary] suspensions, an individual is not afforded, for any significant period of time, a jury trial he would otherwise receive.").

[312] *See supra* note 47 and accompanying text (detailing the effect of the Omicron variant on state and federal courtroom closures in California).

opportunity to be involved in resolving disputes during a time when it is perhaps most necessary that it be involved. And in the long-term, lay participation atrophy sets in, leading litigants and jurists to believe that their business does not require the public's scrutiny.[313] Even more people will be driven to private adjudication services,[314] further diminishing the number of jury trials. With jury trials now a rarity, few new lawyers will learn the art of trying a case before a jury, thereby creating a persistent cycle of lawyers opting not to go the jury route because they lack the skillset and familiarity needed for success before a panel.[315]

The cost to society if this culture and decline are not reversed will be substantial. Recall an observation Alexis de Tocqueville made in a preface to his book, *Democracy in America*:

> If the lights that guide us ever go out, they will fade little by little, as if of their own accord. Confining ourselves to practice, we may lose sight of basic principles, and when these have been entirely forgotten, we may apply the methods derived from them badly; we might be left without the capacity to invent new methods and only able to make a clumsy and an unintelligent use of wise procedures no longer understood.[316]

It is critical that the benefits of the civil jury and jury service be fully appreciated, and that we take appropriate action to revive it, less the institution's light be fully extinguished. American

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[313] *See* James M. Chadwick & Gary L. Bostwick, *Images of Fair Use: A Fair Use of Jury Trial*, 24 COMMC'NS L. 11, 18 (2006) (explaining public scrutiny's role in the court system).

[314] *See* Smith & MacQueen, *supra* note 163, at 33 (noting that even prior to the pandemic an increasing number of cases were being resolved through private adjudication).

[315] Some judges have grown particularly concerned with this phenomenon and have adopted "Junior Attorney Rules" encouraging litigants to give standup roles to attorneys with less than five years' experience. *See, e.g.*, CHIP'S NEXT GEN COMM., JUDICIAL ORDERS PROVIDING/ENCOURAGING OPPORTUNITIES FOR JUNIOR LAWYERS (2016), https://nextgenlawyers.com/wp-content/uploads/2013/04/Judicial-Orders-re-Next-Gen-6-13-16.pdf (noting that Judge Lucy Koh, Northern District of California, "strongly encourages parties to permit less experienced lawyers to examine witnesses at trial and to have an important role at trial").

[316] TOCQUEVILLE, *supra* note 22, at 464.

democratic renewal might lie through restoring the promises of the civil jury.

IV. RESTORING THE DEMOCRATIC PROMISE OF THE CIVIL JURY

Given the centrality of the civil jury in the United States' constitutional structure,[317] as well as the benefits the jury offers for the administration of civil justice and society more broadly,[318] the severe decline and disuse of the institution should give us pause. Exalting the role of judges in resolving disputes at the cost of excluding people from meaningful civic participation has rippling consequences. It disinvests the public in the success of the Republic, suggesting to individuals that the state operates without them. As Plato warned over a two millennia ago, "[I]n private suits, too, as far as is possible, all should have a share; for he who has no share in the administration of justice, is apt to imagine that he has no share in the state at all."[319] America's recent turn toward abandoning its democratic principles might be course-corrected by reinvesting the public in civil dispute resolution.

To do so, it is imperative that active measures be taken to revive the institution to its once premier role. Critically, these strategies should not be based on speculation or misrepresentation of the jury or jurors, but instead on empirical support and research to ensure that the benefits of lay judicial participation are more fully realized. Drawing on such research, we offer here the following six recommendations designed to (A) remove barriers to civil jury trials to make them more likely to occur when parties so desire, and (B) promote better civil jury fact-finding to ensure more accurate dispute resolution. Strengthening the institution so as to encourage inviting the public back into the courthouse can help loosen that coddling mindset that a private dispute and its just resolution belongs solely to the litigants.

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[317] *See supra* Section II.A.

[318] *See supra* Section II.B.

[319] Plato, *Laws IV 768*, *in* 2 THE DIALOGUES OF PLATO 529 (B. Jowett trans., Random House ed., 1937).

A. REMOVING BARRIERS TO CIVIL JURY TRIALS

The first step for reviving the civil jury as an institution so that it might again contribute to renewing America's commitment to democratic self-governance is ensuring that all litigants who desire a jury trial are able to receive one. The sociopolitical benefits of jury service can only result if trials actually occur and if jurors are called upon to determine the outcome. The following three research-based recommendations are designed to remove barriers to civil jury trials and thereby lower costs associated with employing juries. These include (1) returning to a civil jury-trial default rule; (2) repealing statutory restrictions on jurors calculating damages; and (3) experimenting with procedural arrangements to lower the costs to litigants and society associated with employing civil juries.

1. Adopt a Jury-Trial Default Rule. One of the easiest ways to restore the civil jury as a meaningful component of the judiciary is for courts to readopt a jury-trial default rule. This means that litigants would receive a civil jury trial unless they affirmatively waived their right to one, as opposed to the current approach taken in federal and most state jurisdictions in which litigants must affirmatively demand a civil jury trial.[320] As noted above, the current waiver default was adopted purposefully by drafters motivated by anti-jury animus in order to limit the number of jury trials.[321] Now-Supreme Court Justice Neil Gorsuch and U.S. Court of Appeals for the Ninth Circuit Judge Susan Graber have argued in support of the proposal because reverting back to a jury-default approach would accomplish three main goals: (1) "encourage jury trials;" (2) increase "simplicity;" (3) result in "greater certainty," particularly for pro se litigants and in cases removed from state courts; and (4) "honor[] the Seventh Amendment more fully."[322]

The automatic waiver rule was adopted at the federal level in 1938 concomitantly with the merger of courts of law and equity, and it has remained largely unchanged since then.[323] But it is important

[320] *See supra* notes 187–188.

[321] *See supra* notes 180–187 and accompanying text.

[322] HON. NEIL GORSUCH & HON. SUSAN GRABER, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, MEMORANDUM: 16-CV-F (June 13, 2016), https://www.uscourts.gov/sites/default/files/16-cv-f-suggestion_gorsuch_0.pdf.

[323] The only changes have concerned at what time the litigant need to make the demand. *See* FED. R. CIV. P. 38 advisory committee notes ("The times set in the former rule at 10 days have been revised to 14 days.").

to note that nothing about merged courts necessitates this approach to the jury. A number of state judiciaries merged their courts in the mid-nineteenth century without requiring litigants to affirmatively demand a jury trial.[324] But as the trend toward merged courts spread in late nineteenth century, so too did broad antipathy toward the jury.[325] Following the Civil War, the jury-waiver rule grew as a popular tool for limiting the frequency of jury trials while, at least formally, securing the institution's position within the new courts.[326] It was this trend that the drafters of the Federal Rules latched onto as a mechanism to sideline the jury in 1938.[327] So common did this approach become over the twentieth century that today only Georgia, Minnesota, Mississippi, Missouri, and Oregon broadly maintain jury-trial default rules in most of their civil courts.[328]

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[324] New York, after merging their courts in 1846, was the first state by statute to allow litigants to waive their right to a civil jury trial, but such waiver could only occur in three ways: "(1) by failing to appear at the trial; (2) by written consent, in person or by attorney, filed with the clerk; or (3) by oral consent in open court, entered in the minutes." Act of Apr. 12, 1848, ch. 379, § 221, 1848 N.Y. Laws 497, 538. It did not require an affirmative jury demand. *Id.*

[325] As Justice Lumpkin of the Supreme Court of Georgia noted in 1848: "[I]t is notorious, that modern law reform, both in England, and in this country, seeks . . . to dispense, as much as possible with juries. A jury is never to be invoked, unless specially demanded by one of the parties." Flint River Steamboat Co. v. Foster, 5 Ga. 194, 207 (1848). He added further that this approach "is a vast saving of time, trouble, and expense, to suitors and the country," though recognized that there might be broader detriments. *See id.* ("Whether these considerations should outweigh the advantages resulting from a personal participation, by every citizen, in the practical administration of public justice, it does not become me to say.").

[326] For an excellent review of the migration of the Field Code across the country in the nineteenth century, which served as a model for many states, see Kellen Funk & Lincoln A. Mullen, *The Spine of American Law: Digital Text Analysis and U.S. Legal Practice*, 123 AM. HIST. REV. 132, 132–33 (2018).

[327] *See supra* notes 186–187 and accompanying text.

[328] *See* O.C.G.A. §§ 9-11-38 to -39 (2007) ("The right of trial by jury as declared by the Constitution of the state or as given by a statute of the state shall be preserved to the parties inviolate."); MINN. R. CIV. P. 38.01 ("[T[he issues of fact shall be tried by a jury, unless a jury trial is waived or a reference is ordered."); MISS. R. CIV. P. 38(a)) ("The right of trial by jury as declared by the Constitution or any statute of the State of Mississippi shall be preserved to the parties inviolate."); MO. SUP. CT. R. 69.01 01 ("The right of trial by jury as declared by the Constitution or as given by a statute shall be preserved to the parties inviolate."); OR. R. CIV. P. 51(c) ("The trial of all issues of fact shall be by jury unless . . . ."). Some states, such as Nebraska, have different default rules for different types of courts. *See, e.g.*, Jacobson v. Shresta, 849 N.W.2d 515, 519 (Neb. 2014) (noting that the Nebraska constitution "provides

Restoring the jury-trial default rule could have a number of positive consequences for the jury and the administration of civil justice. For one, it could increase the number of civil jury trials conducted. As legal scholars James Pike and Henry Fisher succinctly noted in 1940, "[Under the waiver rule] the formula has been changed from inertia = jury trial, to inertia = no jury trial."[329] Flipping that equation back could have the opposite effect. There is robust economic literature on the power of default rules to nudge actors toward preferred outcomes while preserving their freedom to choose alternative options.[330] That is, the default rule would not inhibit those litigants who wish to have a bench trial, but it would instead impose a small cost (in the form of an affirmative action) for them to do so.

Moreover, adopting the rule would prevent the inadvertent waiver of a significant constitutional right. This is particularly true for low-information litigants, who are most likely to be affected by default rules.[331] But it would also be implicated in cases removed to federal court under Federal Rule of Civil Procedure 81(c)(3).[332] That rule and its dizzying exceptions have been criticized as "poorly crafted" with "needless complexity," and has been called a "trap for the unwary."[333] A jury-default rule could greatly simplify this

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the constitutional right to a jury trial" in that "[t]he right of trial by jury shall remain inviolate, but the Legislature may authorize trial by a jury of a less number than twelve in courts inferior to the District Court, and may by general law authorize a verdict in civil cases in any court by not less than five-sixths of the jury" (quoting NEB. CONST. art. 1, § 6)).

[329] James A. Pike & Henry G. Fisher, *Pleadings and the Jury Rights in the New Federal Procedure*, 88 U. PA. L. REV. 645, 647 (1940).

[330] *See* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 10 (2008) (arguing that in formulating default rules, "[t]here is . . . no way of avoiding nudging in some direction, and whether intended or not, these nudges will affect what people choose.").

[331] *See* CASS R. SUNSTEIN, CHOOSING NOT TO CHOOSE: UNDERSTANDING THE VALUE OF CHOICE 7 (2015) (discussing that effect of default rules on low information actors).

[332] *See* FED. R. CIV. P. 81(c)(3) (requiring that, in removed actions, "[a] party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal," but "[i]f the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so"; and going on to require that "[i]f all necessary pleadings have been served at the time of removal," a party must demand a jury trial "within 14 days after it files a notice of removal" or "it is served with a notice of removal," with failure to do so resulting in waiver).

[333] 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2334 (4th ed. 2022) (collecting judicial criticisms of Rule 81(c)); *see also* Susan M. Halpern,

process, ensuring litigants that they can readily receive a federal jury trial regardless of the status of the case at the time of removal. While those scholars who have studied the jury-default proposal differ on their conclusions as to the degree that the proposal would increase the number of jury trials, basic economics suggest it would have at least some positive impact.[334]

But even if reverting to the original rule failed to substantially increase the number of jury trials, it is still a worthwhile proposal for its symbolic significance. Procedural rules reflect the virtues of the societies that adopt them.[335] The current jury-waiver rule reflects the erroneous notion that common law courts can largely operate at their full potential without the democratic insights of the governed. It suggests to litigants and the society more generally that the civil jury is but one of many options for dispute resolution, rather than a central and favored component of the constitutional structure. Justice Gorsuch and Judge Graber are correct in suggesting that readopting a jury-default rule "honors the Seventh Amendment more fully."[336] The rule would better reflect the systemic value and virtue of the jury as a nonexpendable part of the American system of government, and it would nudge litigants toward that socially desirable outcome.

2. Remove Damage Caps. Another tool to lower barriers to the use of civil juries, so that they may once again serve their emboldening sociopolitical role, is to remove statutorily imposed restrictions on their fact-finding—specifically, damage caps. The Supreme Court has made it clear that a damage calculation is a fact reserved for

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Federal Rule 81(c) and Jury Demand in a Removed Action: A Procedural Trap for the Unwary, 47 ALA. L. REV. 623, 638 (1983) (discussing how the result of this rule is "widespread judicial inconsistency" and that litigants unaware of the rule "unintentionally waive[] their right to a jury"); *see also* Richard Lorren Jolly, *Toward A Civil Jury-Trial Default Rule*, 67 DEPAUL L. REV. 685, 695 (2018) (discussing the complexity of Rule 81(c)(3) and the different approaches taken by circuit courts in addressing it).

[334] *Compare* Jolly, *supra* note 333, at 694 (arguing that a jury-trial default is unlikely to result in substantially more jury trials), *with* David Crump, *A Response to the Jury Default Proposal: Court Dockets, Jury Trials, and Finding the Best Solution*, 38 REV. LITIG. 239, 241–43 (2019) (arguing that the change is likely to substantially increase the number of jury trials).

[335] *See, e.g.*, JOHN P. DAWSON, A HISTORY OF LAY JUDGES 1 (1960) (arguing that the structure and organization of courts are influenced by, among other things, "the alternative or competing means by which group decisions could be made," and that these "are a product and a reflection of many forces in society").

[336] GORSUCH & GRABER, *supra* note 322, at 73.

the jury's determination.[337] Allowing legislatures and judges to displace jurors in that fact-finding role has dramatic consequences as to the practicable ability for some litigants to bring certain causes of action.

As the Diamond-Salerno study previously cited shows, artificial caps on damages undermine the availability of jury trials by changing the "practical and economic realities of mounting a jury trial."[338] When a plaintiff's attorney must finance the costs of the litigation and take into account the uncertainty of a return on the investment for both the client and counsel's time,[339] as one Texas lawyer colorfully put it: "You're talking about a lot of money, and—in other words—it makes the juice not worth the squeeze."[340] Restricting the authority of civil jurors effectively restricts entire causes of action.

Noneconomic damage caps make it particularly problematic to move forward in a legitimate case for those who are unlikely to have significant lost wages or income that might ameliorate a cap's effect.[341] As a result, retirees, children, full-time caregivers, and those living in poverty may be unable to seek compensation in states with capped damages because the litigation's costs will often exceed

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[337] *See* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc. 532 U.S. 424, 437 (2001) (noting that "the measure of actual damages suffered . . . presents a question of historical or predictive fact" within the province of the jury)*; see also* St. Louis, Iron Mountain & S. Ry. Co. v. Craft, 237 U.S. 648, 661 (1915) (holding that the amount of damages to be awarded is "only a question of fact" and is within the power, duty, and responsibility of the lower court).

[338] Diamond & Salerno, *supra* note 155, at 144.

[339] The contingency fee embodies this approach to financing litigation, in which the lawyers' services and expenses will only be collected if the client prevails. *See* City of Burlington v. Dague, 505 U.S. 557, 561 (1992) ("Under the most common contingent-fee contract for litigation, the attorney receives no payment for his services if his client loses."). For most potential plaintiffs who lack the means to self-finance litigation, the contingency fee is their "key to the courthouse." *See, e.g.*, Sneed v. Sneed, 681 P.2d 754, 756 (Okla. 1984) ("[C]ontingent fees are still the poor man's key to the courthouse door [and] allows persons who could not otherwise afford to assert their claims to have their day in [c]ourt." (footnote omitted)); Philip H. Corboy, *Contingency Fees: The Individual's Key to the Courthouse Door*, 2 LITIG. 27, 28 (1976) ("[The plaintiff] must obtain representation without a requirement that he pay for it out of already depleted recourses.").

[340] Daniels & Martin, *supra* note 222, at 660.

[341] In some states, however, damage caps limit total damages—economic and noneconomic—and may not even compensate fully for medical expenses caused by the tortious conduct. *See, e.g.*, COLO. REV. STAT. § 13-64-302 (2005); IND. CODE § 34-18-14-3 (2017); LA. REV. STAT. ANN. § 40:1231.2 (2015); NEB. REV. STAT. § 44-2825 (2014); VA. CODE ANN. § 8.01-581.15 (2011).

the potential recovery.[342] The cap also discriminates against groups that have historically received lesser wages because of their gender or minority status, rendering their noneconomic damages a larger proportion of their compensatory damages.[343] As Professor Lucinda Finley contends in discussing those she calls "the hidden victims of tort reform": "[W]omen, minorities, and the poor receive lesser amounts of economic loss compensation than more economically well off white men," and "wage projection data . . . are explicitly race and gender based, building on the assumption that past race and gender wage disparities will remain ensconced in the future."[344] Damage caps exacerbate social inequality in the courthouse.

The simple solution to these problems is to repeal the caps[345] and thereby restore the civil jury's constitutional authority over fact-finding. This would not destroy the economy as some pro-business interests have argued.[346] Damage caps have not been shown to have any positive effect on, for instance, the availability or affordability of health care—the most frequent justification offered by their proponents.[347] Instead, damage caps create significant obstacles to jury trials and access to the courts. Their removal could thus increase the number of jury trials and, what is more, reflect a trust

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[342] *See* Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1265, 1305 (2004) (discussing disparate impacts resulting from damages caps).

[343] *Id.* at 1280.

[344] *Id.*

[345] Courts are split on whether damage caps in common-law causes of action violate constitutional jury trial guarantees. *Compare* Hilburn v. Enerpipe Ltd., 442 P.3d 509, 524 (Kan. 2019) ("Regardless of whether an existing damages cap is technically or theoretically applied as a matter of law, the cap's effect is to disturb the jury's finding of fact on the amount of the award. Allowing this substitutes the Legislature's nonspecific judgment for the jury's specific judgment."), *with* Siebert v. Okun, 485 P.3d 1265, 1277 (N.M 2021) (holding that, once a jury "returns a verdict based on its factual findings," the "legal consequence of that verdict is a matter of law, which the Legislature has the authority to shape [by reducing damages to a statutory limit]").

[346] *See supra* note 38 and accompanying text.

[347] *See, e.g.*, BERNARD S. BLACK, DAVID A. HYMAN, MYUNGHO PAIK, WILLIAM M. SAGE & CHARLES SILVER, MEDICAL MALPRACTICE LITIGATION 211–23 (2021) (finding no evidence that damage caps positively affect physician supply); Myungho Paik, Bernard Black & David A. Hyman, *Damage Caps and the Labor Supply of Physicians: Evidence from the Third Reform Wave,* 18 AM. L. & ECON. REV. 463, 463 (2016) (same); David A. Hyman, Charles M. Silver, & Bernard S. Black & Myungho Paik, *Does Tort Reform Affect Physician Supply? Evidence from Texas*, 42 INT'L REV. L. & ECON. 203, 217 (2015) (same).

in Americans to govern themselves fairly, while keeping with constitutional principles.

3. Expand Procedural Experimentation. Restoring the jury to its position within the constitutional structure does not require pretending that nothing has changed since 1791. Another way to revive civil jury trials is to expand the use of alternative procedural tracks, such as expedited jury trials, which allow speedy access to community input, as well as remote or virtual jury trials, as solutions to the current public health crisis.[348] Such experimentation, however, should only be widely adopted if it can maintain the key benefits of lay judicial participation. As the Supreme Court has recognized, "[N]otions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government."[349] Any experimentation must live up to those motivating concepts.

Consider first expedited jury trial projects, which offer an alluring solution for bringing the public back into the jury box. Courts have recognized that for some litigants, the time and cost of a full civil jury trial can be prohibitive, deterring them from exercising their right to seek community judgment of their disputes.[350] In the 1990s, states around the country began to address the problem by experimenting with expedited jury trials.[351] These alternative trial procedures offer abbreviated jury trials designed to resolve factually and legally straightforward cases with lower-value damages quickly, often in a single day.[352] The specifics of these procedures differ meaningfully among jurisdictions, though they often involve a trial before fewer than twelve jurors, mandatory

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[348] *See, e.g.*, Robert A. Patterson, *Reviving the Civil Jury Trial: Implementing Short, Summary, and Expedited Trial Programs*, 2014 BYU L. REV. 951, 951 (discussing how expedited jury trials can be a means of reviving civil jury trials).

[349] Glasser v. United States, 315 U.S. 60, 85 (1942).

[350] *See* Patterson, *supra* note 348, at 960 (stating that expedited jury trials are attempts at making the process speedier and less expensive).

[351] *See* PAULA L. HANNAFORD-AGOR, NAT'L CTR. FOR STATE CTS., SHORT, SUMMARY & EXPEDITED: THE EVOLUTION OF CIVIL JURY TRIALS 23 (2012) ("The short trial program in the Maricopa County Superior Court allows civil litigants to opt for a streamlined jury trial as an alternative to mandatory arbitration or as an appeal from an unfavorable arbitration decision.").

[352] *See id.* at 24 ("Most short trial cases are lower-value personal-injury cases, especially automobile torts involving soft-tissue injuries.").

damage caps or high-low agreements, and the jury's verdict may or may not be binding on the parties.[353]

Make no mistake, as currently designed, these projects are not an ideal solution to America's democratic woes. They cut against the full benefits of lay judicial participation by limiting the responsibility of jurors to resolve whole factual disputes, at times operate with as few as four jurors, and do not require unanimity.[354] However, there are certain benefits. By ensuring court access and limiting incentives to overinvest in litigation, litigants and the judiciary receive many of the benefits of jury trials while avoiding some of the commonly observed detriments.[355] Moreover, shorter trials may prove less of a hardship, financial and otherwise, on the people serving as jurors, thereby allowing for a greater diversity of voices to be represented.[356] And if the programs were modified to require full juries of twelve—which better represent the community and are more reliable fact-finders compared to smaller bodies—expedited trials could prove significantly valuable in jumpstarting the institution while not discarding the democratic and administrative benefits of lay judicial participation.[357]

Another option is to explore the potential benefits of remote or virtual civil jury trials.[358] In the spring of 2020, the COVID-19 pandemic led many courts to shift to online proceedings.[359] For

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[353] *See generally id.* (comparing expedited and summary jury trial projects around the country).

[354] *See id.* at 6 (citing the Maricopa County, Arizona Superior Court Short Trial Program, which involved a four-person jury selected from a ten-person panel with a verdict requiring only three votes).

[355] *See id.* at 4 (noting that the short-trial programs were designed to address concerns about "uncertainty, delay, and expense" of a typical jury trial).

[356] For a discussion on how these burdens limit juror diversity, see generally Anna Offit, *Benevolent Exclusion*, 96 WASH. L. REV. 613 (2021) ("[T]he routine dismissal of citizens who face economic hardship excludes not only people but also the diversity of ideas, experiences, and frames of interpretation that characterize the American population.").

[357] *See supra* Section II.B.

[358] *See* Valerie P. Hans, *Virtual Juries*, 71 DEPAUL L. REV. 301, 301 (2022) [hereinafter Hans, *Virtual Juries*] (examining how virtual jury trials may affect "the issues of jury representativeness, the adequacy of virtual jury selection, the quality of decision making, and the public's access to jury trial proceedings").

[359] For state court perspectives on online proceedings, see NATIONAL CTR. FOR STATE CTS., JUDICIAL PERSPECTIVES ON ODR AND OTHER VIRTUAL COURT PROCESSES, https://www.ncsc.org/__data/assets/pdf_file/0018/42912/2020-07-27-Judicial-Perspectives-002.pdf. For current federal court procedures, see *Court Orders and Updates During COVID-*

many courts and lawyers, a virtual jury trial, in which jury selection, trial proceedings, and jury deliberation are all conducted online, was a bridge too far.[360] Commentators analyzing the prospect of virtual jury trials expressed concerns about whether the quality of justice would be compromised.[361] A small number of courts, however, embarked on virtual jury trials, primarily in civil cases.[362] For example, as of March 2021, the Superior Court in King County, Washington, had conducted more than 300 virtual civil trials, including a significant number of civil jury trials.[363] Courts in Arizona, California, Florida, and Texas also have undertaken virtual civil jury trials, with generally positive evaluations.[364] As courts reopened their buildings for business, many began to schedule in-person jury trials (with masks and social distancing) rather than experiment with the novel option of virtual jury trial proceedings.[365] But as we noted earlier, a substantial backlog and continuing health issues related to COVID-19 have led to substantial delays in scheduling civil jury trials and fraught

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19 Pandemic, U.S. CTS, https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic; *see also* Herbert B. Dixon, Jr., *Pandemic Potpourri: The Legal Profession's Rediscovery of Teleconferencing*, 59 ABA JUDGES' J. 37 (2020) (discussing the switch to virtual court proceedings).

[360] *See, e.g.*, TAYLOR BENNINGER, COURTNEY COLWELL, DEBBIE MUKAMAL & LEAH PLACHINSKI, STANFORD CRIM. JUST. CTR., VIRTUAL JUSTICE? A NATIONAL STUDY ANALYZING THE TRANSITION TO REMOTE CRIMINAL COURT 5–12 (2021) (expressing access to justice concerns about remote criminal case proceedings).

[361] *See* Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFFALO L. REV. 1275, 1280 (2020) (analyzing the potential risks to justice created by the use of virtual jury trials).

[362] *See* Sozi Tulante, Kimberly Branscome & Emily Van Tuyl, *Demystifying the Virtual Civil Jury Trial Experience*, LAW360 (Apr. 29, 2021) https://www.law360.com/articles/1379757/demystifying-the-virtual-civil-jury-trial-experience ("During the pandemic, formats of civil jury trials have varied widely, and have included fully in-person trials—with participants maintaining social distance and wearing personal protective equipment—as well as fully virtual trials and hybrid approaches.").

[363] *See* Matt Markovich, *King County Court Shifts to Virtual Trials, Potentially Changing Future of Courtrooms*, KOMO NEWS (Mar. 4, 2021), https://komonews.com/news/local/king-county-superior-court-shifts-to-virtual-trials-chips-away-at-massive-case-backlog ("[T]he court has done over 300 virtual civil trials and at least eight criminal trials, all over Zoom.").

[364] *See* Hans, *Virtual Juries*, *supra* note 358, at 310–13 (summarizing virtual jury trial experimentation in these courts and noting that beyond some technical issues, the cases "proceeded well").

[365] *See, e.g.*, Bill Rankin, *Ga. Courts Try to Keep Jury Trials Going Despite COVID-19 Delta Surge*, THE ATLANTA-J. CONST. (Aug. 18, 2021) (explaining how some judges require masks and distancing in returning to the courtroom).

experiences when jurors, witnesses, or litigants become sick during their trials.[366]

Virtual civil jury proceedings—for part or all of the trial—could help reduce the backlog and avoid the negative health consequences of assembling with large numbers of others during the pandemic. Several judges who participated in virtual jury trials observed that when jury selection was conducted virtually, and with assistance and alternatives for those who had limited or no access to the required technology, it appeared that the panels were as diverse or more diverse than in-person jury selection panels.[367] The prospective jurors who participated in virtual jury selection expressed overall favorable reactions to the experience as well.[368] Of course, we still need to know more about how the virtual character of the trial affects the jury's evaluation of evidence and witnesses, participation by jurors who lack their own remote access, and the robustness of the jury deliberation.

If we take care to implement these procedural innovations in a way that ensures representative and high-quality citizen participation, the benefits may outweigh the detriments. Put simply, having some jury trials is better than having no jury trials. And given the ongoing impact of COVID-19, expedited or virtual jury trials could provide methods for managing the backlog of civil cases in a way that provides some, albeit a more limited, space for community involvement. Expedited jury trials provide a way to address the concerns of those litigants who, correctly or incorrectly, believe that even during non-pandemic times that jury trials are too slow, risky, and expensive.[369] And virtual jury trials offer a safer way to give voice to the community in the resolution of societal disputes during a pandemic. Critically, in our view, until we are assured that these alternative procedures do not compromise justice, they should be optional and not forced on those litigants who desire traditional jury trial procedures.

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[366] *See supra* notes 46–49 and accompanying text.

[367] *See* Hans, *Virtual Juries*, *supra* note 358, at 310–13 (reporting judges' favorable observations about jury panel diversity in virtual proceedings).

[368] *See id*. at 311 (concluding that "[o]n the whole, participants gave positive feedback about the experience").

[369] Diamond & Salerno, *supra* note 155, at 121 (discussing the "risk, costs, and delay" associated with jury trials).

B. PROMOTING FAIR AND ACCURATE JURY FACT-FINDING

To better realize the democratic promise of the civil jury, the institution itself must be a desirable form of dispute resolution. If litigants do not trust jurors, they will avoid them in favor of alternative arbiters and venues. As such, in order to revitalize the jury, strategies for increasing the already strong fairness and accuracy of jury fact-finding should be adopted. The following research-based recommendations can help make litigants more confident in the outcomes of their disputes while also ensuring that the jury as an institution continues to fulfill its constitutionally anticipated sociopolitical role.

1. Ensure Representative Juries. The jury that decides a civil trial is drawn from a jury venire, ideally one that constitutes a representative cross-section of the community. Earlier we discussed the multiple benefits of representative juries.[370] Our laws do not guarantee a representative trial jury, but they do require courts to assemble representative venires from which those juries are picked.[371] Even so, in many jurisdictions, jury venires still fall short of fully reflecting the community.[372] And the COVID-19 pandemic has made summoning a representative cross-section of the population even more challenging. This is disturbing considering that diverse juries engage in more robust and thorough fact-finding.[373] Vigorous deliberation can give voice to people with differing perspectives to debate their views and arrive at a verdict that incorporates multiple perspectives in the community. Perhaps

[370] *See supra* Section II.B.

[371] *See* NANCY GERTNER, JUDITH H. MIZNER & JOSHUA DUBIN, THE LAW OF JURIES 34–35 (11th ed. 2020) ("First, litigants have the right to grand and petit juries selected at random from a fair cross-section of the community in the district or division where the court sits. Second, all citizens have the opportunity to be considered for service on grand and petit juries and have the obligation to serve as jurors when summoned.").

[372] *See, e.g.*, VALERIE P. HANS, POUND CIV. JUST. INST., CHALLENGES TO ACHIEVING FAIRNESS IN CIVIL JURY SELECTION 7–12 (2021) [hereinafter HANS, CHALLENGES TO ACHIEVING FAIRNESS], https://www.poundinstitute.org/wp-content/uploads/2021/06/2021-Pound-Forum-Paper-Valerie-Hans.pdf. (summarizing evidence of failures to achieve jury representativeness in civil jury trial); Shari Seidman Diamond & Valerie P. Hans, *Fair Juries*, U. ILL. L. REV. (forthcoming) (examining causes of the lack of representativeness in jury trials).

[373] *See supra* note 123 and accompanying text.

for that reason, diverse juries are seen as more legitimate.[374] Therefore, we urge courts to take multiple steps to modify jury selection procedures to ensure the fullest possible community representation.

Multiple reasons for underrepresentation call for multiple remedies.[375] The first place to begin is the sources of the names of community residents that courts use to generate master jury lists. Information collected by the National Center for State Courts (NCSC) shows that states use diverse sources to populate their master jury lists.[376] Even today, some jurisdictions rely upon a single source list such as the voters list, or combine multiple lists that still fall short of fully including the jury-eligible population.[377] The results are jury pools that are less than fully reflective of the community.[378] One of the most important ways to promote fuller representation is to use multiple source lists. Doing so has been identified as "perhaps the most significant step" that courts can use to maximize the representativeness of the master jury list.[379] But

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[374] *See* Leslie Ellis & Shari Siedman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1039 (2003) (discussing the costs of unrepresentative juries).

[375] *See* SHARI SEIDMAN DIAMOND, POUND CIV. JUST. INST., JUDICIAL RULEMAKING FOR JURY TRIAL FAIRNESS 5–12 (2021), https://www.poundinstitute.org/wp-content/uploads/2021/06/2021-Pound-Forum-Paper-Shari-Seidman-Diamond.pdf (recommending actions to promote jury pool representativeness); *see also* Ellis & Diamond, *supra* note 374 (recommending a two-pronged approach to developing impartial juries).

[376] GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, NAT'L CTR. FOR STATE CTS., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT (2007), https://www.ncscjurystudies.org/__data/assets/pdf_file/0016/5623/soscompendiumfinal.pdf. NCSC resources on fair cross-section law and summoning practices may be found at https://www.ncsc-jurystudies.org/what-we-do/fair-cross-section.

[377] *See* William Caprathe, Paula Hannaford-Agor, Stephanie McCoy Loquvam & Shari Seidman Diamond, *Assessing and Achieving Jury Pool Representativeness*, 55 ABA JUDGES' J. 16 (2016) (describing how to assess and improve representativeness of master jury lists); *see also id.* at 18 (recommending that the master jury list should include at least eighty-five percent of the jury-eligible population).

[378] *See* VIDMAR & HANS, *supra* note 127, at 76–79 (2007) (describing points in the jury selection process that contribute to decreases in jury representativeness); HANS, CHALLENGES TO ACHIEVING FAIRNESS, *supra* note 372, at 11–12 (describing a study that found how nonresponses to jury qualification questionaries and summonses threatened representative jury venires).

[379] Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 780 (2011).

the efforts should not stop there. Courts need to continually update their master lists, at least annually, recognizing that a significant number of residents regularly move into and out of the jurisdiction.[380]

Representativeness is also affected by nonresponse to the jury summons.[381] Perhaps the most common reason for this is that the jury summons was never received in the mail.[382] However, at least some of the nonresponse is likely due to people's reluctance to participate as jurors. And the COVID-19 pandemic has introduced new challenges to courts that attempt to seat fully representative juries, whether they are traditional in-person jury trials or remote virtual jury trials.[383] Multiple follow-ups to jury summonses have been shown to reduce the nonresponse rate.[384] Something as simple as a follow-up postcard sent within a few weeks of the initial nonresponse significantly increases the likelihood of the citizen responding.[385] Some reformers have also proposed redesigning the jury summons with messaging that stresses the positive and emboldening aspects of jury service, rather than the punitive results that may flow from a failure to respond, as a way to increase yield rates.[386] A jury will only be as diverse as the venire from which it is chosen.

As for in-court jury selection, the voir dire process in which prospective jurors are questioned about whether they can be fair and impartial jurors also affects jury representativeness. Evidence that attorneys in both civil and criminal cases exercise their peremptory challenges along racial lines has led some states to take

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[380] *See* Caprathe et al., *supra* note 377, at 18 ("The master jury list should be updated at least annually").

[381] *See id.* at 19 ("Nonresponse and FTA [(Failure to Appear)] rates contribute to underrepresentation of minorities in the jury pool.").

[382] *See id.* at 18 (noting that "12 percent of jury-related mailings are returned by [the United States Postal Service] as undeliverable").

[383] *See* HANS, CHALLENGES TO ACHIEVING FAIRNESS, *supra* note 372, at 13 (describing how health problems and access to technology may undermine jury pool representativeness).

[384] *See* Caprathe et al., *supra* note 377, at 19 ("[T]he most effective post-hoc strategy for minimizing nonresponse/FTA rates is a second notice/second summons program.").

[385] *See id.* ("The most effective follow-up programs are those that follow up within three weeks after the person's nonresponse/FTA and that are consistently administered.").

[386] *See* D.C. JURY PROJECT COMM., JURY SERVICE REVISITED: UPGRADES FOR THE 21ST CENTURY, COUNCIL FOR CT. EXCELLENCE 9 (2015) ("The DC Jury Project believes that if positive reinforcement is provided[,] . . . a greater percentage of jurors will be eager to serve in the future . . . .").

innovative approaches, ranging from California's[387] and Washington State's[388] new strategies for handling potentially race-based peremptory challenges, to Arizona's elimination of peremptory challenges entirely.[389] These states will serve as laboratories, allowing scholars and policy makers to examine the extent to which such innovations affect justice and fairness in jury trials and to propose further strategies accordingly.

In a very real sense, although jury duty is technically obligatory, it is more accurately seen as a voluntary activity in the court's work. Failing to respond to a jury summons, developing good-enough excuses for excusal, answering questions during voir dire in such as a way as to suggest bias—there are multiple ways that one can avoid serving.[390] So, we also need to consider developing effective community outreach efforts that explain not only the nuts and bolts of jury duty and what to expect, but also that emphasize the central importance of jury service to our democracy through outreach into the community. Some jurisdictions have begun celebrating the first week of May as Juror Appreciation Week, with programs and advertisements to "educat[e] the public about the judicial system, enhance public awareness of the importance of jury service, and appreciation to citizens who perform their civic duty"—with

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[387] *See* CA. CODE OF CIV. P. § 231.7 (2021) (establishing a procedure for reviewing exercises of peremptory challenges requiring the party to show "by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's [membership in a protected class]" and defining "objectively reasonable person" as someone that is "aware that unconscious bias, in addition to purposeful discrimination, have resulted in unfair exclusion of potential jurors in the State of California").

[388] *See* WASH. R. GEN. 37 (2018) (establishing a procedure for reviewing exercises of peremptory challenges requiring the court to determine whether "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge," and defines an "objective observer" as someone who is aware of "implicit, institutional, and unconscious biases").

[389] Order Amending Rules 18.4 and 18.5 of The Rules of Criminal Procedure, and Rule 47(E) of The Rules of Civil Procedure, No. R-21-0020 (Ariz. Aug. 30, 2021). For a discussion on the potential benefits associated with abolishing peremptory challenges, see generally Hon. Morris B. Hoffman, *Peremptory Challenges Should be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809 (1997).

[390] Step-by-step instructions for "getting out of" jury service are readily available online. *See, e.g.*, Jacob Maslow, *How to Legally Get Out of Jury Selection in 2022?*, LEGAL SCOOPS (Jan. 27, 2022), https://www.legalscoops.com/how-to-legally-get-out-of-jury-selection-in-2022/.

promising results.[391] Adopting and expanding such efforts can help increase the diversity of the summons's yield and boost the institution's reputation as a democratic body.[392]

2. Return to Twelve-Person Civil Juries. Related to the above, the jury's size coincides with its ability to represent the community. Larger juries are much better able to reflect the range of diverse backgrounds, experiences, and viewpoints in a community.[393] The decisions that many jurisdictions have made to reduce the civil jury's size from the traditional number of twelve have also reduced the ability of today's civil juries to fully represent the local community.[394] Judge Patrick Higginbotham, Judge Lee Rosenthal, and Professor Steven Gensler surveyed the frequency of different jury sizes in federal district courts, discovering that in recent years the most common size was an eight-person civil jury.[395] Research on jury size shows that there are strong reasons to recommend twelve-person juries: the decisions of larger juries are more representative, more reliable, and less influenced by outlier juror preferences.[396]

An interesting study by Professor Shari Diamond and her colleagues shows the crucial way in which the jury's size directly

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[391] Taylor Simpson-Wood, *The Rise and Fall of Bad Judge: Lady Justice Is No Tramp*, 17 TEX. REV. ENT. & SPORTS L. 1, 29 (2015) (internal quotation marks omitted); *see also* ABA COMM'N ON THE CIV. JURY, JUROR APPRECIATION KIT https://www.americanbar.org/content/dam/aba/administrative/american_jury/juror_kit_part_1.pdf (contending that implementing Juror Appreciation Week can help to "[r]einforce public confidence in the justice system, [i]mprove communication with jurors and employers, [and] [d]isseminate an important and positive message to the public about jury service").

[392] *See, e.g.*, Caprathe et al., *supra* note 377, at 19 (contending that "educat[ing] the public about the consequences of failing to appear" may improve appearance rates, and higher appearance rates "will improve the inclusiveness and representativeness" the jury pool).

[393] *See Jury Size: Does It Matter?*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/newsroom/at-the-center/2022/jury-size-does-it-matter (last visited Sept. 14 (2022) ("Smaller juries are often less diverse and less likely to accurately represent their communities.").

[394] *See* Shari S. Diamond, Destiny Peery, Francis J. Dolan & Emily Dolan, *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. EMPIRICAL LEGAL STUD. 425, 425 (2009) [hereinafter Diamond et al., *Achieving Diversity*] ("[J]ury size had a substantial effect on minority representation.").

[395] *See* Patrick E. Higginbotham, Lee H. Rosenthal & Steven S. Gensler, *Better by the Dozen: Bringing Back the Twelve-Person Civil Jury*, 104 JUDICATURE 46, 49–50 (2020) (studying jury size in fifteen district courts during 2016–18 and finding that 61.4% of civil juries in these district courts were eight-person juries).

[396] *See id.* at 51–53 (summarizing the empirical research).

affects its ability to fully represent the community.[397] Observing the use of peremptory challenges and jury composition in 277 Chicago-area civil juries of different sizes, Professor Diamond and her collaborators found that peremptory challenges by both sides were associated with prospective jurors' race. Defense attorneys challenged more black prospective jurors, whereas plaintiffs' attorneys challenged fewer black jurors.[398] The patterns of their challenges offset, so that the overall jury pool's composition were not significantly affected by the race-based peremptory challenges.[399] However, the jury's size was significantly related to its representativeness.[400] Just two percent of the twelve-person juries had no black members, while twenty-eight percent of the six-person juries had no black members.[401] The authors concluded that the "change most likely to promote diversity on the jury is a return to the jury of 12."[402]

In addition to its positive effect on jury representativeness, research also documents the superior fact-finding ability of larger juries. It is said that "[t]welve heads are better than one"; and empirical jury research confirms that insight.[403] So too does ancient wisdom. As Aristotle explained:

> Taken individually, any one of these people is presumably inferior to the best person. But a city consists of many people, just like a feast to which many contribute, and is better than one that is one and simple. This is why a mob can also judge many things better than any single individual.[404]

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[397] *See* Diamond et al., *Achieving Diversity*, *supra* note 394, at 449 (showing that jury size is more significant than exercises of peremptory challenges in jury diversity).

[398] *See id.* at 440 ("Plaintiffs removed fewer blacks, fewer females, and wealthier jurors; in stark contrast, defense attorneys removed more blacks and poorer jurors.").

[399] *See id.* at 436 (describing a "tiny" effect).

[400] *See id.* at 443 (noting the "precipitous drop" in representation when jury size decreases).

[401] *Id.* at 442 tbl.6.

[402] *Id.* at 426.

[403] Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205 (1989). For empirical research on jury size, see Hans, *The Power of Twelve*, *supra* note 124, at 8 (summarizing research); Higginbotham et al., *supra* note 395, at 51–54 (summarizing arguments and evidence in favor of larger jury size).

[404] ARISTOTLE, POLITICS bk. III § 1286(a) at 77 (C.D.C. Reeve trans., Hackett Publ'g Co. 2017) (c. 384 B.C.E.)).

In short, jurors are clearly "better by the dozen."[405]

A final point in favor of larger juries is that jury service encourages civic engagement and the legal system's legitimacy.[406] As Judge Higginbotham and his colleagues note: "In this era of declining jury-trial rates, we should fill every jury chair we can, every chance we get. Every empty jury chair is a missed opportunity to strengthen the bonds between the people and the courts."[407] Yet many jurisdictions use juries of six or eight persons, even for high profile and significant civil cases.[408] The original motivation was undoubtedly one of efficiency, coupled with the belief that smaller juries were likely to be quite similar to larger juries in their fact-finding.[409] Smaller juries cost somewhat less to manage; fewer community members need to be summoned; and the total amounts paid out in juror fees are lower.[410] But the modest time savings and logistical benefits that might accrue from smaller juries are outweighed by the increased representativeness and the superior fact-finding of twelve-person juries, which has now been well-documented.[411] The dramatic declines that we have noted in civil jury trials suggest that whatever savings might have accrued previously from the use of smaller juries is likely even more modest today.[412]

Judge Higginbotham and his colleagues propose one immediate solution for the federal courts. They suggest that federal judges use

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[405] There is some judicial appetite at the Supreme Court for returning to twelve-person juries, at least in the criminal context. *See* Khorrami v. Arizona, No. 21-1553, 2022 WL 16726030, at *1 (Nov. 7, 2022) (Gorsuch, J. dissenting from the denial of certiorari) ("[*Williams v. Florida*, 399 U.S. 78 (1970), upholding the use of six-person criminal juries,] was wrong the day it was decided, it remains wrong today, and it impairs both the integrity of the American criminal justice system and the liberties of those who come before our Nation's Courts.").

[406] See *supra* Section II.B.*2*.

[407] Higginbotham et al., *supra* note 395, at 53.

[408] *See id.* at 47, 50 (recounting the small jury size in the cases with the largest damage awards in federal courts in 2019 and identifying that "four out of every five civil juries begin[s] with nine or fewer members").

[409] *See, e.g.*, ERICA J. BOYCE, NAT'L CTR. FOR STATE CTS., TIME TO REFLECT: HAS THE RESEARCH CHANGED REGARDING THE IMPORTANCE OF JURY SIZE? 3 (2021) (discussing the arguments and evidence about the cost effectiveness of smaller juries).

[410] *See id*. (examining and challenging arguments on cost effectiveness of smaller juries).

[411] Higginbotham et al., *supra* note 395, at 53 ("Larger juries are better than smaller juries in ways important to the process and the product.").

[412] *See* BOYCE, *supra* note 409, at 3 (examining and then challenging prior research on cost effectiveness of smaller juries).

their discretion to seat twelve-person juries, pointing out that Rule 48 of the Federal Rules of Civil Procedure allows judges latitude in the size of the civil jury that will hear the case: "A jury must begin with at least 6 and no more than 12 members . . . ."[413] Judges need not obtain agreement from the parties to seat larger juries.[414] The preferences of litigants, while certainly important, should not be given automatic priority over the systemic interests of the court's legitimacy.[415] In some state courts, judges may have no discretion if state court rules specify civil juries of a particular size.[416] We urge the legal community and lawmakers to act now to change laws, rules, and practices to once again mandate twelve-person civil juries. A change to larger juries is a straightforward and effective way to underscore a commitment to the importance of diversity and inclusion in the legal system.

3. Adopt Active Jury Reforms. Civil jury trial procedures currently seem to be based on an image of the jury as a quiescent, passive group of citizens. Jurors are instructed to refrain from talking to one another about the case and from reaching premature conclusions until all the evidence is presented.[417] At the end of evidence presentation, the judge then instructs the jury, and the members adjourn to the deliberation room, relying on one another's memories to assess the evidence and reach a decision.[418] The assumption seems to be that a passive role is essential to

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[413] *See id.* at 47–48 (quoting FED. R. CIV. P. 48(a)).

[414] See *id.* at 49 ("Whether to empanel six or 12 or some number in between is a choice for the judge to make.").

[415] *See, e.g.*, *id.* at 55 (indicating that jurors "consistently say that the experience makes them more appreciative and more trustful of the court system")

[416] *See, e.g.*, VA. CODE ANN. § 8.01-359(A) (2022) (establishing five-person juries as the default and only allowing twelve-person juries in special circumstances).

[417] *See, e.g.*, MASS. SUPERIOR CT. MODEL JURY INSTRUCTION COMM., MODEL CIVIL JURY PRECHARGE 5, 8 (Oct. 1, 2021) [hereinafter MODEL CIVIL JURY PRECHARGE], https://www.mass.gov/doc/superior-court-model-civil-jury-instructions-precharge-script-pdf (exhorting jurors to "[a]void drawing conclusions until the end of the case" and "not discuss the evidence . . . until you start your formal deliberations").

[418] *See, e.g.*, MASS. SUPERIOR CT. MODEL JURY INSTRUCTION COMM., CIVIL JURY INSTRUCTION TEMPLATE 10 (Oct. 1, 2021), https://www.mass.gov/doc/superior-court-model-civil-jury-instructions-final-charge-script-master-template-pdf (instructing jurors to "rely on their own memory" during deliberation).

impartiality in the adversary system.[419] Therefore, jurors asking questions and talking to one another as the case proceeds are discouraged or outright forbidden.[420]

This approach is badly mistaken. Research on jury decision-making confirms that although jurors may be sitting quietly, they are actively interpreting evidence as it is presented and integrating it into a coherent narrative of what happened in the case.[421] When we consider ways to promote high quality jury decision-making, we need to take into account the active approach of the jury to its decision-making task.[422] By giving substantive preliminary legal instructions at the start of the trial, jurors will know in advance the law that they will need to apply and can help guide them to attend to the most relevant evidence.[423] Allowing jurors to take notes, pose questions, and engage with one another in discussing the case as it is proceeding can help jurors avoid misunderstandings and mistakes in interpreting the evidence.[424]

A substantial body of research has tested these "active jury" reforms, finding some positive effects and little-to-no negative consequences when they are implemented.[425] For instance, in a Seventh Circuit research project examining the impact of preliminary substantive legal instructions in jury trials, more than eighty percent of the jurors said that hearing these instructions

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[419] *See, e.g.*, B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1235 (1993) (summarizing the historical development of juries through the achievement of "almost total jury passivity" in seventeenth-century America).

[420] *See, e.g.*, MODEL CIVIL JURY PRECHARGE., *supra* note 417, at 8 (limiting discussion among jurors).

[421] *See* Dann, *supra* note 419, at 1242 (showing that jurors "mold information into a plausible 'story' or 'schema'" during the trial).

[422] *See id.* ("The rate of predeliberation judgments or decisions by jurors is high.").

[423] *See id.* at 1249 (bemoaning the lack of preliminary instructions, which "wastes a real opportunity to better inform the jury and improve the quality of the trial and verdict").

[424] *See id.* at 1265 (promoting "limited discussions of the evidence among jurors" to enhance the quality of jury decision-making).

[425] For summaries of active jury reforms and related research on their effectiveness, see JURY TRIAL INNOVATIONS 113–37 (G. Thomas Munsterman, Paula L. Hannaford-Agor & G. Marc Whitehead eds., 2d ed. 2006); B. Michael Dann & Valerie P. Hans, *Recent Evaluative Research on Jury Trial Innovations*, 41 CT. REV. 12, 12–18 (2004); Valerie P. Hans, *Empowering the Active Jury: A Genuine Tort Reform*, 13 ROGER WILLIAMS U. L. REV. 39, 55–70 (2008); Valerie P. Hans & Michael J. Saks, *Improving Judge & Jury Evaluation of Scientific Evidence*, 147 DAEDALUS 164, 164–75 (2018).

helped them better understand the case.[426] Most judges and lawyers agreed that these instructions increased the jurors' comprehension of the law.[427] As then-Chief Judge James Holderman stated, "I have found that preliminary instructions helped to orient the jurors to the case and allowed the jurors to start making connections between the evidence and the disputed issues in the case more quickly."[428] With respect to notetaking, jurors express greater satisfaction when they are permitted to take notes; and some studies show that notetaking leads to significant improvements in evidence comprehension, memory, and decision-making.[429] Similarly, jurors who are permitted to ask questions of the witnesses under carefully controlled circumstances "report feeling significantly better informed" and say their questions clarified the evidence.[430] Allowing jurors to discuss the case throughout the trial, rather than waiting until the deliberation, is more controversial, as some fear that jurors might prematurely judge the case.[431] Field experiments with real jury trials in which civil juries were randomly assigned to either allow or not allow trial discussions, however, showed no evidence of prejudgment.[432] In fact, jurors in one study noted that trial

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[426] SEVENTH CIRCUIT AMERICAN JURY PROJECT, FINAL REPORT 28 (2008), https://www.uscourts.gov/sites/default/files/seventh_circuit_american_jury_project_final_report_0.pdf ("Over eighty percent (80%) of the jurors reported that interim statements of counsel were helpful.").

[427] *See id.* at 27–28 ("Over eighty-five percent (85%) of the participating judges thought the use of interim statements increased the jurors' understanding and said they would permit interim statements during trials in the future.").

[428] *Id.* at 28.

[429] Research studies on notetaking include Lynne ForsterLee, Irwin A. Horowitz & Martin Bourgeois, *Effects of Notetaking on Verdicts and Evidence Processing in a Civil Trial*, 18 L. & HUM. BEHAV. 567, 574–75 (1994); Larry Heuer & Steven D. Penrod, *Juror Notetaking and Question Asking During Trials: A National Field Experiment*, 18 L. & HUM. BEHAV. 121, 135–40 (1994); David L. Rosenhan, S. L. Eisner & R. J. Robinson, *Notetaking Can Aid Juror Recall*, 18 L. & HUM. BEHAV. 53, 59–60 (1994) (identifying benefits of note taking).

[430] Heuer & Penrod, *supra* note 429, at 142.

[431] *See* Diamond et al., *Juror Discussions*, *supra* note 132, at 74 (noting concerns that "jurors permitted to discuss the evidence would use the breaks during trial to arrive at premature group decisions on verdicts before hearing all of the evidence and the instructions").

[432] *Id.* at 74–76; *see also* Paula L. Hannaford, Valerie P. Hans & G. Thomas Munsterman, *Permitting Jury Discussions During Trial: Impact of the Arizona Reform*, 24 LAW & HUM. BEHAV. 359, 378 (2000) (noting that allowing earlier discussion reduces the degree of uncertainty jurors feel at the start of deliberation).

discussions with other jurors helped to correct misunderstandings of the evidence.[433]

We recommend specific reforms that have been tested and vetted in real-world cases: (1) preliminary substantive legal instructions; (2) notetaking; (3) question asking; and (4) engaging in trial discussions. Research with preliminary instructions in the law that applies to the case at hand helps jurors know what legal requirements apply as they hear trial evidence. Allowing jurors to take notes, ask questions of witnesses under controlled circumstances, and permitting jurors to discuss the case during trial breaks have all proved their worth in the jurisdictions and courts that use them. These research-based reforms can further strengthen jury decision-making in civil cases as well as help the civil jury cope in cases with extremely complex evidence. In doing so, they may make the jury a more desirable form of dispute resolution and so increase the number of jury trials.

V. CONCLUSION

The twenty-first century finds America at a dangerous crossroad. Commitment to democratic principles is waning, and in its place is extreme partisanship—a shift that has already resulted in multiple instances of violence and death across the country. The future of American democracy is in greater peril than we have ever experienced in our lifetimes, and it is coinciding with the nation's slow emergence from the ravages of a life-changing and deadly pandemic. As strategies are adopted and efforts are made to redirect the Republic back toward its liberal commitments, the civil jury should not be overlooked as a meaningful locus of democratic action and power.

While the institution has been subject to criticism and successful attacks over the last hundred years, which have driven it to a minor role in the judiciary today, the institution's sociopolitical importance and potential have not dissipated. Jury service still provides a forum for public participation and grassroots governance, which since the Founding has been recognized as just as important as voting, if not more so, in maintaining the Republic. The history of and current procedures designed to exclude the populace from this meaningful form of public participation must be scrutinized and, as

[433] Diamond et al., *Juror Discussions*, *supra* note 132, at 74–75.

necessary, removed to restore the institution. William Blackstone warned nearly two and a half centuries ago of "secret machinations, which may sap and undermine [the jury]" and cautioned that no matter how "convenient these may appear at first . . . delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty."[434] Americans should heed these words now more than ever.

The six jury recommendations offered here can help America back on the path toward democratic renewal. Simple changes can be adopted to remove barriers to jury trials, making them more likely to occur when the parties desire them. And efforts can be made to ensure that jurors are given the tools necessary to reach more often fair and accurate resolutions of those disputes with which they are presented. Creative thinking and other strategies, too, might be motivated toward these ends.[435] Deliberate action must be taken to ensure that the promise of the Seventh Amendment is maintained, and that lay judicial participation is restored to its central role in our judiciary, our democratic spirit, and our governance structure.

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[434] BLACKSTONE, *supra* note 62, at *349.

[435] *See e.g.*, Christopher T. Robertson & Michael Shammas, *The Jury Trial Reinvented*, 9 TEX. A&M L. REV. 109, 110, 146–48 (2021) (proposing a number of radical recommendations such as a national jury pool for national civil cases and vote-aggregation without deliberation); Andrew S. Pollis, *Busting Up the Pretrial Industry*, 85 FORDHAM L. REV. 2097, 2098–99 (2017) (arguing that a legal practice model of "extracting settlement and maximizing billable hours" have given rise to a pretrial industry, and urging a return to a "trial model" of the judiciary); Dmitry Bam, *Restoring the Civil Jury in a World Without Trials*, 94 NEB. L. REV. 862, 908 (2016) (proposing "hybrid judicial panels" in which jurors would deliberate alongside judges); Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L.J. 1579, 1625–26 (2006) (arguing in favor of a more empowered and active decision-making role for the jury); Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1178, 1186–87 (1995) (offering a number of reforms including limiting the opportunities for individuals to be excused from service and increasing social education about the institution).

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DEMOCRATIC RENEWAL AND THE CIVIL JURY

Richard L. Jolly, Valerie P. Hans,† & Robert S. Peck‡*

The United States is in a period of democratic decline. Waning commitment to principles of self-governance throughout the polity necessitates urgent action to revitalize the Republic. The civil jury offers an often-overlooked avenue for such democratic renewal. Welcoming laypeople into the courthouse and deputizing them as constitutional actors demonstrates a profound faith in representative governance and results in wide-reaching and pronounced sociopolitical and administrative benefits. The Seventh Amendment of the U.S. Constitution and similar state provisions protect the rights of litigants to jury trials in most circumstances. But these promises have been hollowed over time through legal, political, and practical challenges. The result is that civil juries play a more minor role in resolving civil disputes today than at any other point in American history. If the civil jury is to serve as a locus of democratic power and as an emboldening civic experience for those who serve, it too must be renewed. To this end, this Article offers six research-based recommendations, informed by the distinctive approach that jurors bring to decision-making as well as the sociopolitical benefits that undergird the institution. Adopting these strategies can help reintroduce democracy into the civil justice system, and in doing so, can help direct America back toward the nation's democratic aspirations.

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I. INTRODUCTION

The United States is in a period of crisis. At the time of this writing, COVID-19 has claimed the lives of over a million people and hospitalized over four million.[1] The sickness has upended every aspect of the nation's social, economic, and government institutions, and, with new variants regularly emerging, there seems to be little sign of abatement.[2] The dominant political parties, which were deeply polarized even before the pandemic, have grown only more so.[3] And opportunistic public figures have used the emergency to foment a loss of faith in the nation's institutions with shocking effectiveness.[4] A Harvard study found that a plurality of young Americans today believe that American democracy is "in trouble" or "failing," with a third believing that the country is on a path to civil war.[5] But perhaps the darkest indicator of democratic malaise occurred on January 6, 2021, when a violent mob stormed the Capitol in an attempt to prevent the peaceful transfer of political

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[1] These figures were cited by the Supreme Court on January 13, 2022. Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, OSHA, 142 S. Ct. 661, 670 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting); *see also Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (Aug. 5, 2022), https://www.nytimes.com/interactive/2021/us/covid-cases.html (reporting 1,029,108 total deaths due to COVID-19).

[2] *See* Kathy Katella, *Omicron, Delta, Alpha, and More: What to Know About the Coronavirus Variants*, YALE MED. (Aug. 31, 2022), https://www.yalemedicine.org/news/covid-19-variants-of-concern-omicron ("One thing we know for sure about SARS-CoV-2, the virus that causes COVID-19, is that it is changing constantly.").

[3] *See, e.g.*, *Political Polarization in the American Public*, PEW RSCH. CTR. (June 12, 2014), https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/ (offering empirical evidence of increasing partisan polarization in the United States from 1994 through 2014); *see also, e.g.*, Michael Dimock & Richard Wike, *America is Exceptional in the Nature of its Political Divide*, PEW RSCH. CTR. (Nov. 13, 2020), https://www.pewresearch.org/fact-tank/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide/ (noting that "the 2020 pandemic has revealed how pervasive the divide in American politics is relative to other nations" and claiming that "Americans have rarely been as polarized as they are today").

[4] *Cf. Toplines and Crosstabs December 2021 National Poll: Presidential Election & Jan 6th Insurrection at the US Capitol*, U. MASS. AMHERST (Dec. 28, 2021), https://polsci.umass.edu/toplines-and-crosstabs-december-2021-national-poll-presidential-election-jan-6th-insurrection-us (finding that a substantial number of Republicans doubt the legitimacy of the 2020 presidential election).

[5] *See* HARVARD KENNEDY SCH. INST. POL., HARVARD YOUTH POLL FALL 2021: TOP TRENDS AND TAKEAWAYS (42d ed. 2021) (concluding that "[a] majority (52%) of young Americans believe that our democracy is either 'in trouble' or 'failing'" and that "[y]oung Americans place the chances that they will see a second civil war in their lifetime at 35%").

power at the federal level for the first time in the nation's history.[6] It is said without hyperbole that the flame of American democracy is rapidly extinguishing.[7]

Given the depth and severity of the Republic's current crisis, the civil jury might not be the first solution to come to mind as a potential democratic corrective. The institution is regularly relegated in popular and constitutional discussions to being little more than an optional dispute resolution tool, with some disparaging it as a poor one at that.[8] It is rarely spoken about broadly in terms of its sociopolitical significance and the role it plays in enabling democratic participation and a commitment to representative governance. But what critics of the civil jury fail to appreciate is that the institution is an integral piece of the constitutional puzzle that, along with other reforms, may help America forge a path toward democratic renewal.[9] As political and social leaders search for institutional and legislative reforms to address the nation's current legitimacy crisis, the civil jury should be high on their shortlist.

It is easy to forget that in early American history the right to trial by civil jury was widely celebrated as among the most cherished constitutional protections. Indeed, commitment to the institution served as a chief motivator in prompting the American Revolution and in debating and achieving the Constitution's ratification. Recall that British efforts to restrain colonial civil juries through enacted legislation motivated not only the First Congress of the American Colonies in 1765,[10] but was also explicitly listed in the Declaration

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[6] *See* Kat Lonsdorf, Courtney Dorning, Amy Isackson, Mary Louise Kelly & Ailsa Change, *A Timeline of How the Jan. 6 Attack Unfolded—Including Who Said What and When*, NPR, (June 9, 2022, 9:11 AM) https://www.npr.org/2022/01/05/1069977469/a-timeline-of-how-the-jan-6-attack-unfolded-including-who-said-what-and-when (documenting the January 6, 2021, Capitol riots' timeline).

[7] *See* SARAH REPUCCI, FROM CRISIS TO REFORM: A CALL TO STRENGTHEN AMERICA'S BATTERED DEMOCRACY (Freedom House 2022), https://freedomhouse.org/report/special-report/2021/crisis-reform-call-strengthen-americas-battered-democracy (noting the United States' rapid democratic decline in relation to established democracies around the world).

[8] *See infra* Section III.B.

[9] *See infra* Part II.

[10] *See* RESOLUTION VII OF THE STAMP ACT CONGRESS (1765) (listing among grievances "[t]hat trial by jury is the inherent and invaluable right of every British subject in these colonies" and "[t]hat the late Act of Parliament, . . . by extending the jurisdiction of the courts of Admiralty beyond its ancient limits, have a manifest tendency to subvert the rights and liberties of the colonists").

of Independence as a grievance justifying the Revolution.[11] And roughly a decade later, ratification of the United States Constitution was in no small part secured by a promise to guarantee civil jury protections as part of a subsequent Bill of Rights,[12] which was realized in 1791 with the Seventh Amendment.[13]

Furthermore, the civil jury has never been merely a feature of the federal government. The constitutions of all thirteen original states secured the institution—in fact, the civil jury was likely the only right so universally protected at the Founding.[14] When the Fourteenth Amendment was ratified roughly a century later, the constitutions of thirty-six out of thirty-seven states guaranteed the right to a jury trial.[15] And today, Colorado, Louisiana, and Wyoming are the only states without civil jury guarantees in their constitutions, though all three protect the right by legislation in certain contexts.[16] Furthermore, this broad protection is in some sense uniquely American. Though England was the progenitor of common law civil juries, the country abandoned their widespread use after the First World War.[17] And while lay participation in resolving disputes has recently expanded in some countries—

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[11] *See* THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776) ("For depriving us in many cases, of the benefits of Trial by Jury").

[12] *See* Stanton D. Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICH. L. REV. 407, 411–13 (1999) (outlining how one of the most potent arguments against the ratification of the Constitution was "[t]he absence of a guarantee that litigants would have a right to jury trial in civil cases in any new federal courts" and "[o]nly by promising amendments did the Federalists prevail").

[13] *See* U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

[14] *See* LEONARD LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 281 (1960) ("The right to trial by jury was probably the only one universally secured by the first American state Constitutions . . . .").

[15] *See* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868*, 87 TEX. L. REV. 7, 115 (2008) (surveying the adoption of jury trial rights in state constitutions at the time of the Fourteenth Amendment's ratification).

[16] *See* Eric J. Hamilton, Note, *Federalism and the State Civil Jury Rights*, 65 STAN. L. REV. 851, 858–59 (2013) (reviewing state practices and protections as to civil jury rights).

[17] *See* William V. Dorsaneo, III, *The Decline of Anglo-American Civil Jury Trial Practice*, 71 SMU L. REV. 353, 355–56 (2018) (noting that the civil jury began in England around the end of the 1100s before it all but disappeared in the 1900s).

perhaps most successfully in Argentina[18]—no other countries protect the right to trial by civil jury as widely and as foundationally as the United States does.

Strong political, social, and administrative motivations compel America's commitment to civil juries and provide guidance for addressing the nation's current democratic decline. By nature of its institutional characteristics, the jury is positioned to check the application and development of law as enacted and enforced by the government, and to serve as a bulwark against powerful social and economic actors.[19] It is a democratic part of the Constitution's complex system of checks and balances, ensuring that few acts of government affecting core private rights can be brought to bear without passing through a body of local laypeople.[20] For this reason, jury service and voting have long been conceptually linked as forms of meaningful political participation; in fact, as Professor Andrew Ferguson notes, "In the hierarchy of political rights, the jury trumped voting in importance [at the Founding]."[21] And as French thinker Alexis de Tocqueville recognized after closely studying the early American body, "The jury is . . . above all a political institution."[22] Even today, to serve as a juror is a political designation: It is to be deputized as a constitutional officer worthy of resolving private disputes.[23] The civil jury is enshrined in the Constitution specifically because of—not despite—it being a locus of democratic power.

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[18] *See* Vanina G. Almeida, Denise C. Bakrokar, Mariana Bilinski, Natali D. Chizik, Andrés Harfuch, Lilián Andrea Ortiz, Maria Sidonie Porterie, Aldana Romano & Shari Seidman Diamond, *The Rise of the Jury in Argentina: Evolution in Real Time*, *in* JURIES, LAY JUDGES, AND MIXED COURTS 25, 26, 31, 41–42 (Sanja Kutnjak Ivković, Shari Diamond, Valerie P. Hans & Nancy S. Marder, eds., Cambridge U. Press, 2021) (discussing the recent adoption and expansion of juries in Argentina and prospects for its implementation elsewhere in Latin America).

[19] *See* NANCY S. MARDER, THE JURY PROCESS 10–14 (2005) (discussing the jury's political role); SUJA A. THOMAS, THE MISSING AMERICAN JURY 58–62 (2016) (articulating the relationship between the jury and the traditional branches of government).

[20] *See* THOMAS, *supra* note 19, at 92 (describing the jury's position in relation to the traditionally recognized branches of government).

[21] Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1119 (2014).

[22] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 272 (J. P. Mayer ed., George Lawrence trans., 1969) (1835).

[23] *See* Ferguson, *supra* note 21, at 1115–34 (discussing the relationship between jury service and constitutional identity).

But it is not just the inherent political power that makes the institution of interest in this time of American crisis; perhaps more important is that through exercising this power, the jury serves as a venue for fostering a commitment to democratic governance. Again, looking to the early body, Tocqueville described jury service as a virtue-enhancing exercise that impresses upon those who serve the skills required for self-governance, noting: "[Juries] make all men feel that they have duties toward society and that they take a share in its government. By making men pay attention to things other than their own affairs, they combat that individual selfishness which is like rust in society."[24] These observations are not anachronistic. Recent empirical studies show that individuals who serve on civil juries to the point of issuing a final verdict tend to view their service favorably and as a form of significant civic engagement.[25] Studies also show that civil jurors who served on larger juries that were required to reach a unanimous decision are significantly more likely to vote in elections after jury service than they were before serving.[26]

The civil jury further provides jurors, and society more broadly, with valuable information. Bringing the public into the courthouse to hear a controversy and to serve as an integral part of its resolution provides transparency that is necessarily lacking from common forms of private dispute resolution, such as mandatory mediation and arbitration.[27] Resolving disputes publicly shines light on social ills and provides information that voters and policymakers may draw upon in addressing common harms.[28] For a

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[24] TOCQUEVILLE, *supra* note 22, at 274.

[25] *See, e.g.*, Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 282, 298–300 (Robert E. Litan ed., 1993) [hereinafter Diamond, *What Jurors Think*] (discussing studies on the impact on individuals of civil jury participation).

[26] *See* Valerie P. Hans, John Gastil & Traci Feller, *Deliberative Democracy and the American Civil Jury*, 11 J. EMPIRICAL LEGAL STUD. 697, 710–12 (2014) (presenting empirical data indicating that individuals were more likely to vote after serving on a jury that required them to reach a unanimous verdict; jurors who served in twelve-person as opposed to smaller juries, and who sat in cases with organizational as opposed to individual defendants, also showed a boost in subsequent voting).

[27] *See infra* Section II.B.*1*.

[28] *See* CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA 3–5 (2001) (discussing the impact of lawsuits in prompting societal or legislative changes); ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 1–2 (2017) (concluding that "litigation is a social good" and justifies the

recent example of this process, consider how the #MeToo movement gained visibility and strength by publicity surrounding high-profile instances of sexual harassment and sexual assault.[29] The litigation and attendant publicity encouraged other victims to come forward, which provided society a better idea of the frequency and impact of this widespread problem.[30] In this way, the public resolution of private disputes provides a public good that benefits society as a whole.

Emphasizing these political and social benefits is not to ignore the direct advantages that jurors offer in the administration of civil justice. Laypeople drawn from the community for one-off trials enhance fact-finding by bringing their diverse viewpoints to bear on a given dispute.[31] For this reason, the jury has at times been referred to as "the lower judicial bench" in a bicameral judiciary, and as "the democratic branch of the judiciary power."[32] This structural power arrangement—built into the very architecture of American courtrooms[33]—has advantages over deferring to professional judges. As repeat players, judges are likely to approach cases in a routinized fashion and fall victim to confirmation biases.[34]

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costs of litigation because "it enables people to promote the rule of law and affirms our citizen-centered political system").

[29] *See* Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where to, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155, 156–57 (2019) (arguing that binding arbitration clauses have halted the social movement's progress by denying victims access to public courts).

[30] *See* Mary Graw Leary, *Is the #MeToo Movement for Real? Implications for Jurors' Biases in Sexual Assault Cases*, 81 LA. L. REV. 81, 83 (2020) (reviewing how the social movement "gained staggering momentum from a tweet and evolved into a worldwide acknowledgment of the sexual harassment and violence that many women experience").

[31] *See* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1275 (2000) (explaining that "[b]ecause the jury's work largely depends on subjective interpretations of evidence, a variety of perspectives will enrich jury discussions" and that interaction among jurors from various experience levels, both limited and expansive, "will expand the range of issues to be discussed" among jurors).

[32] *See* Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1189 (1991) (collecting early American sources).

[33] *See* Jonathan D. Rosenbloom, *Social Ideology as Seen Through Courtroom and Courthouse Architecture*, 22 COLUM.-VLA J.L. & ARTS 463, 487 (1998) (discussing how the physical division between the judge and jurors reflects social ideology).

[34] English writer G.K. Chesterton captures this well: "[T]he horrible thing about all legal officials . . . is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it. Strictly they

And jurors possess attributes that judges do not. As community representatives, jurors are informed of societal norms from which the unrepresentative judicial class is often detached. What is more, unlike individual trial judges, jurors must deliberate to reach a decision, thus allowing for robust and multifaceted consideration of a dispute.[35] These jury characteristics ensure that the law is applied and develops in a way that is grounded in community norms.

However, while the civil jury has the potential to offer these many sociopolitical and administrative benefits that can be of service toward the ends of democratic renewal, they are not currently sufficiently realized. To the contrary, over the course of the twentieth century, the civil jury as an institution has languished under sustained attacks from the state and powerful private actors. The judiciary adopted procedures deliberately designed to limit the use of and role for the civil jury by transferring power into the hands of unrepresentative judges and private arbitrators.[36] Legislatures, too, enacted laws restricting access to the jury by allowing for mandatory arbitration agreements, as well as limiting the jury's fact-finding role by restricting their authority to assess and award civil damages in certain contexts.[37] And businesses, particularly those in the insurance industry, have engaged in a decades-long political campaign to convince the public, practitioners, and the judiciary that these restrictions on the civil jury are not only warranted but also should be expanded.[38] The jury, they say, is unqualified to decide complex disputes, and that twelve laypeople routinely bring not wisdom but prejudice against certain litigants—specifically those with business interests.[39]

These attacks, fundamentally unfounded or subject to built-in correctives, have been so effective that they have come close to nearly eradicating the jury as a meaningful component of the

do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop." G. K. Chesterton, *The Twelve Men*, *in* TREMENDOUS TRIFLES 80, 85–86 (1909).

[35] *See infra* Section II.B.

[36] *See infra* Section III.A.

[37] *See infra* Section IV.B.

[38] *See infra* Section III.C.

[39] *See infra* Section III.C.

American civil justice system.[40] Although at common law the civil jury was the primary means by which legal disputes were resolved,[41] the jury today is but an afterthought. In 2019—the last complete pre-pandemic fiscal year—juries disposed of just 0.53% of filed federal civil disputes.[42] The trend is mirrored in state courts. Although figures are incomplete (in part because the federal government no longer collects them), data from the Court Statistics Project shows that in 2019, juries disposed of a median of only 0.09% of state civil disputes.[43] Hawaii reported just a single civil jury trial that year; Alaska reported zero.[44] So while ostensibly the civil jury is secured for use in all legal disputes to ensure the democratic application and development of law, the reality is that the institution's use has been drastically reduced.

The COVID-19 pandemic poses a new threat to the civil jury, with the potential to topple the institution entirely. From the beginning of the outbreak, it was clear that the airborne spread of the disease posed unique challenges to the jury, which, as a deliberative body, traditionally requires some degree of interpersonal interaction. As a result, in the spring of 2020, many courts around the country responded by completely suspending civil

[40] While our analysis focuses on the civil jury, it must be noted that the criminal jury, too, has been diminished as a locus of democratic power. *See* THOMAS, *supra* note 19, at 79 (noting that plea bargaining is one of the primary reasons "for the decline of criminal jury trials"). As the Supreme Court has recognized, American criminal justice today is for the most part "a system of pleas, not a system of trials." Lafler v. Cooper, 566 U.S. 156, 169–70 (2012). Like the civil jury, this displacement of the criminal jury has had deleterious effects on the democratic health of the Republic. *See* CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 1, 19–26, 221–22 (2021) (documenting the decline of jury trials and the rise of guilty pleas and describing the negative consequences). We emphasize the civil jury here, however, because its near collapse offers substantial upside from revival, and it is most often overlooked in the conversation.

[41] *See* Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 419 (1999) (explaining how juries "retained the ultimate power to decide the great majority of cases" in colonial American courts).

[42] Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (2019).

[43] *See* Sarah Gibson, Bree Harris, Nicole Waters, Kathryn Genthon, Amanda Fisher-Boyd & Diane Robinson, *Trial Court Caseload Overview*, CT. STAT. PROJECT, https://www.courtstatistics.org/csp-stat-nav-cards-first-row/csp-stat-civil (last updated July 8, 2022) (compiling disposition data from selected state courts).

[44] *Id.*

jury trials.[45] In Los Angeles Superior Court, for instance, all non-preference civil trials were postponed for all of 2020.[46] And some state and federal courts took the same approach in response to the highly-contagious Omicron variant in late 2021 and early 2022.[47] Such postponements produce backlogs that will likely plague a court system's docket long after normal operations resume. For some civil litigants—such as those who are elderly, injured, or ill—this delay will operate as a complete denial of justice.[48] And for others, the lengthy delays raise the prospect of stale or faulty evidence when their case eventually is tried.[49]

This near complete lack of civil trials has been a boon for the private arbitration industry. As the American Arbitration Association advertises on their website: "With court delays caused by the COVID-19 pandemic, a jury trial is unlikely in the near

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[45] *See Courts Suspending Jury Trials as COVID-19 Cases Surge*, U.S. CTS. (Nov. 20, 2020), https://www.uscourts.gov/news/2020/11/20/courts-suspending-jury-trials-covid-19-cases-surge ("About two dozen U.S. district courts have posted orders that suspend jury trials or grand jury proceedings, and scale back other courthouse activities in response to a sharp nationwide rise in coronavirus (COVID-19) cases.").

[46] *See* Administrative Order of the Presiding Judge Re: COVID-19 Pandemic, Gen. Order No. 2020-GEN-023-00 at 10 (Super. Ct. L.A. Cnty. Oct. 9, 2020) ("All non-preference civil jury trials may commence on or after January 4, 2021."); *see also* CA.CIV. PROC. CODE § 36 (giving preference to those civil actions involving, inter alia, a party "who is over 70 years of age" or concerning "wrongful death or personal injury").

[47] *See* Christine Schiffner, *Omicron Spike Forces Plaintiffs Firms to Reassess Trial and Case Strategy*, NAT'L L.J. (Jan. 14, 2022), https://www.law.com/nationallawjournal/2022/01/14/omicron-spike-forces-plaintiffs-firms-to-reassess-trial-and-case-strategy/ (noting that the spike in COVID-19 cases due to the Omicron variant caused litigants to continue to face delays, "especially when it c[ame] to jury trials"); Michael Finnegan, *Federal Jury Trials Suspended in L.A. Amid Rapid COVID Spread*, L.A. TIMES (Jan. 4, 2022), https://www.latimes.com/california/story/2022-01-04/federal-jury-trials-suspended-omicron-coronavirus-covid (stating that the rapid spread of COVID-19's Omicron variant caused "[f]ederal jury trials in Los Angeles, Santa Ana[,] and Riverside" to be suspended for a few weeks in January of 2022).

[48] While many jurisdictions have procedures to give certain litigants scheduling preference—which are meant to recognize that some elderly and very ill plaintiffs will not survive substantial trial delays—these procedures are neither automatic nor preferred. *See, e.g.*, Jay P. Barron, Fox*ing Your Way to Trial with Statutory Preference*, 61 ORANGE CNTY. LAW. 1, 43 (2019) (reviewing the process by which parties request scheduling preference).

[49] *Cf.* Irving R. Kaufman, *Judicial Reform in the Next Century*, 29 STAN. L. REV. 1, 2 (1976) (noting the "pervasive extent of cost and delay, and their corrosive impact upon our judicial system").

future."[50] They are not wrong. Courts are reporting that the backlog just in criminal cases could take years to work through, let alone the pile of hundreds of thousands of actively pending civil cases.[51] Moreover, there are an unknown number of civil cases that were not filed in 2020 because parties chose instead to wait out the pandemic.[52] The Court Statistics Project estimates this number of "shadow cases" to be over 1.1 million for just the twelve states that reported their 2020 caseloads, and it warns that these cases "have the potential to overwhelm the civil justice system."[53] Factor in the continued underfunding of the judicial branch[54] and it is not alarmist to recognize that the already rare civil jury trial is likely to lay dormant for the foreseeable future, despite some admirable experiments in virtual jury trials.[55]

Accordingly, if the sociopolitical benefits inherent in the use of civil juries are to be realized in this time of American democratic decline, it is necessary that the institution itself be restored. Strategies for doing so should be motivated by the animating principles of lay participation in resolving civil disputes—including the democratic representation of the community and the emboldening role of jury decision-making. Efforts must be made to remove barriers to jury trials so that they can occur more frequently

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[50] *The Arbitration Solution to COVID-19-Stalled Court Litigation*, AM. ARB. ASS'N, https://www.adr.org/litigation-to-arbitration (last visited Nov. 10, 2022).

[51] *See* DIANE ROBINSON & SARAH GIBSON, PANDEMIC CASELOAD HIGHLIGHTS, CT. STAT. PROJECT, (Mar. 22, 2021), https://www.courtstatistics.org/__data/assets/pdf_file/0022/61519/2020_4Q_pandemic.pdf (citing data showing the staggering amount of pending criminal and civil cases in 2020).

[52] *See id.* ("Although courts remained open for filing throughout the pandemic, litigants . . . may simply have chosen to wait to file civil or domestic relations cases.").

[53] *Id.*

[54] *See* Mandi Hunter, *Who Pays if Kansas Doesn't Fund Its Court System Adequately? You, Eventually*, THE KAN. CITY STAR (Apr. 30, 2021), https://www.kansascity.com/opinion/readersopinion/guestcommentary/article251037774.html (noting that Kansas state courts "have not been adequately funded for years"); Tom Coulter, *Officials: Budget Cuts Likely to Have Effects on Court System,* RAWLINS TIMES (Oct. 13, 2020), wyomingnews.com/rawlinstimes/news/officials-budget-cuts-likely-to-have-effects-on-court-system/article_924174e7-4a35-521c-89f6-36da8f278fef.html (explaining that the cuts in funding will result in a decrease in trials).

[55] *See Coronavirus and the Courts*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/newsroom/public-health-emergency (last visited Aug. 7, 2022) (providing links to state court experiments with virtual jury trials); *see generally* ONLINE COURTROOM PROJECT, https://www.onlinecourtroom.org/ (last visited Aug. 7, 2022) (describing efforts by trial consultants and others to study and improve online trials).

and to improve the fairness and accuracy of jury fact-finding so that more litigants view jury trials as a desirable mode of dispute resolution. We offer here six research-based strategies aimed at making these changes. Adopting these strategies can help rebuild the civil jury so that it is once again a key component of our democracy.

This Article recognizes that the jury represents a profound commitment to the principles of democratic self-governance and contends that looking to the institution can help guide the nation back toward those principles. To this end, it is divided into three main parts. Part II recounts the history and the anticipated role of the civil jury within the constitutional structure. It emphasizes that bringing the community into the application and development of the law has pronounced administrative and sociopolitical benefits. Part III presents the history of the institution's decline in use and esteem over the twentieth century. It recounts how critiques and successful attacks on jury authority have created a culture that views the institution as expendable. Part IV contends that if the democracy-enhancing benefits associated with the civil jury are to be once again realized, strategies must be taken to restore the institution to its position as a core part of the constitutional body. It offers strategies empirically shown to remove barriers to, and to improve the fairness and accuracy of, civil jury trials. The Article concludes that while the civil jury is unlikely to alone renew American democracy, it must be part of the conversation.

II. THE FOUNDATIONAL BENEFITS OF TRIAL BY CIVIL JURY

To understand the sociopolitical benefits that restoring the civil jury can bring in this time of democratic crisis, it is helpful to examine the role the institution played at the time of the Founding. The civil jury was cemented in the U.S. Constitution and widely protected in the states as a core institution designed to check abuses of power by the government and powerful actors.[56] It was a democratic body, bringing laypeople into the administration of

[56] *See* Eric Fleisig-Greene, *Why Contempt Is Different: Agency Costs and Petty Crime in Summary Contempt Proceedings*, 112 YALE L.J. 1223, 1229 (2003) (suggesting that the Founders included the right to a jury trial, at least in part, because of "the functional role of the jury as a way to assure that the judiciary remained accountable to, and aligned with, the interests of the citizenry it purported to serve").

justice and allowing them to exercise meaningfully the practice of self-governance. These are not theoretical benefits. Modern empirical research shows that jury service supports these foundational interests.[57] The jury enhances the administration of justice by democratizing the process of fact-finding and ensuring that outcomes conform with communitarian notions of justice. And through that civic engagement and transparency, laypeople are imbued with a deeper commitment to the legitimacy of government institutions.

A. THE CONSTITUTIONAL ROLE OF THE CIVIL JURY

It is difficult to overstate the role that the civil jury played in the run-up to the American Revolutionary War and the founding of the United States. The jury at the time was a core channel through which the colonists challenged the distant and unrepresentative monarchy.[58] In establishing their new system of government, many former colonists insisted that these jury protections be preserved in writing to act as a similar bulwark against the proposed American federal government.[59] To this end, the civil jury was constitutionalized not merely as a dispute resolution tool but also as a democratic body meant to bind the hands of powerful actors to the mast of the community.[60] It was an integral, structural component of the constitutional system itself.

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[57] *See, e.g.*, Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1278–94 (2009) (describing one of the jury's roles as a "deliberative accountability paradigm").

[58] In fact, colonial America was familiar with the resistance that criminal juries showed to the Crown not only in criminal prosecutions like Zenger's trial or the trial of William Penn, but also in civil cases that held British officials accountable for overstepping their authority and restricting civil liberties through damage verdicts, as in Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765) and Wilkes v. Wood, 98 Eng. Rep. 489 (K.B. 1763).

[59] *See, e.g.*, United States v. Gaudin, 515 U.S. 506, 510–11 (1995) (recognizing that juries were "designed 'to guard against a spirit of oppression and tyranny on the part of rulers,' and were 'from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.'" (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (4th ed. 1873))).

[60] *See* J. H. Michael Jr., *Right to Trial by Jury: How Important?*, U.S. DEP'T OF JUST. OFF., OF JUST. PROGRAMS (Oct. 1991), https://www.ojp.gov/ncjrs/virtual-library/abstracts/right-trial-jury-how-important (listing "the vindication of interests of private citizens in litigation with the government" and "protection of litigants against overbearing and oppressive judges" as arguments in favor of civil jury trials that were advanced during the Constitution's ratification process).

It is unsurprising that the Founders so entrusted the jury. Eighteenth-century jurists and scholars revered the jury for its sociopolitical significance. Perhaps most famous among these champions was English jurist William Blackstone. In his widely circulated *Commentaries*,[61] Blackstone celebrated the jury with an almost religious zeal. He called it "the glory of English law," "a privilege of the highest and most beneficial nature," and "the principal bulwark of [every Englishman's] liberties."[62] It was, he said, a "strong and two-fold barrier . . . between the liberties of the people[] and the prerogative of the crown" because "the truth of every accusation . . . [s]hould afterwards be confirmed by the unanimous suffrage of twelve of [a defendant's] equals and neighbours, indifferently chosen, and superior to all suspicion."[63]

It was this politically active jury that the American colonists weaponized in the decades leading up to the Revolution. Relying not just on colonial assemblies that opposed British tyranny, juries served "to protect the rights of the people from being violated by the Crown and its dependents," as a representative institution.[64] One of the early and most famous examples of the colonists exerting such political power is the seditious libel case of John Peter Zenger in 1735. Zenger was accused of printing allegations of corruption against the New York Governor, including the governor's attempt to recover a debt in an equity court to evade the debtor's right to a jury trial.[65] At the trial, because it was agreed that Zenger had published the material, his attorney Andrew Hamilton argued in support of the jury's power to determine both law and fact and to acquit Zenger on the basis that the corruption allegations were truthful, despite the fact that truth was not a defense for libel under

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[61] The Supreme Court has recognized that "[a]t the time of the adoption of the Federal Constitution, [Blackstone's Commentaries] had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England; so that undoubtedly, the framers of the Constitution were familiar with it." Schick v. United States, 195 U.S. 65, 69 (1904).

[62] 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *350, *379 (1765).

[63] *Id.* at *349–50.

[64] Jack N. Rakove, *The Original Justifications for Judicial Independence*, 95 GEO. L.J. 1061, 1074 (2007).

[65] *See* CLARK GAVIN, FAMOUS LIBEL AND SLANDER CASES OF HISTORY: FOUL, FALSE AND INFAMOUS 45–46 (Collier Books 1962) ("Zenger was arrested . . . on a Council warrant charging seditious libel.").

the law.[66] Although the judge threatened Hamilton with disbarment for making the argument and the jurors with perjury if they returned a not guilty verdict, the jury acquitted Zenger.[67] The outcome was celebrated throughout the colonies.[68]

The Zenger case proved to be no outlier. By the mid-eighteenth century, colonists were regularly employing the jury to nullify the excesses of the Crown. They did so both offensively—for instance, by refusing to enforce civil penalties against smugglers—and defensively—by awarding smugglers damages for harms resulting from the trespass of officers' searches.[69] In doing this, colonial jurors essentially rendered British law unenforceable, so much so that one governor complained, "[A] trial by jury here is only trying one illicit trader by his fellows, or at least by his well-wishers."[70] Another governor warned in 1761: "A custom house officer has no chance with a jury, let his cause be what it will. And it will depend upon the vigorous measures that shall be taken [in London] for the defense of the officers, whether there be any Custom house here at all."[71]

The Crown soon took vigorous measures against the jury, specifically by expanding the jurisdiction of juryless tribunals. This began with the Stamp Act of 1765, which required that all printed documents used or created in the colonies bear an embossed revenue stamp, with violations to be tried in juryless vice-admiralty courts.[72]

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[66] *See id.* at 52–53 (reciting the hearing transcript when Hamilton stressed that a jury may "determine both the law and the fact, and where they do not doubt of the law . . . they ought to do so").

[67] *See* Arthur E. Sutherland, *A Brief Narrative of the Case and Trial of John Peter Zenger*, 77 HARV. L. REV. 787, 788 (1964) (noting that the jury acquitted Zenger while spectators cheered).

[68] For a review of the Zenger trial and its significance in the colonies, see generally JAMES ALEXANDER, PRINTER OF THE NEW YORK WEEKLY JOURNAL, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER (Stanley Nider Katz ed., 1963).

[69] *See, e.g.*, Erving v. Cradock, 1 Geo. 3 (1761), *in* JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772 app. II at 555 (1865) (returning a verdict for a ship owner in breach of revenue law and against a customs collector for trespass when the collector held the plaintiff's ship and cargo pending payment of a civil fine).

[70] STEPHEN BOTEIN, EARLY AMERICAN LAW AND SOCIETY 57 (1983) (quoting Governor William Shirley).

[71] Letter from Governor Francis Bernard to Lords of Trade (Aug. 2, 1761), *in* QUINCY, JR., *supra* note 69, app. II at 557.

[72] Duties in America (Stamp) Act 1765, 5 Geo. 3, c. 12.

Over the next three years, the British passed a series of taxes known as the Townshend Acts,[73] which also placed jurisdiction beyond juries in vice-admiralty courts.[74] Since the Crown could not directly control the obstinate colonial jurors, it took steps so that juries would simply be avoided.

The colonists met these several Acts with fierce objections.[75] The Stamp Act, for instance, triggered the First Congress of the American Colonies in October of 1765, where the body declared that "trial by jury is the inherent and invaluable right of every British subject in these colonies" and that "[the Stamp Act], and several other acts, by extending the jurisdiction of the courts of admiralty beyond its ancient limits, have a manifest tendency to subvert the rights and liberties of the colonists."[76] A similar claim was made soon thereafter in the Declaration of Independence, which proclaimed that independence was justified in part because the Crown had "depriv[ed] [the colonists] in many cases, of the benefits of Trial by Jury."[77]

Americans' reverence for the jury did not diminish after the war. Under the short-lived Articles of Confederation, Congress required civil juries to resolve certain disputes and all thirteen states broadly secured the institution.[78] Likewise, the institution was secured in the Northwest Territory.[79] Thus, it is somewhat surprising that the Constitution as originally drafted in 1787 only secured the right to trial by jury for all crimes, except those of impeachment; it did not secure civil jury protections. This absence was not because the drafters found the civil jury an unworthy institution of such protection or because they intended to destroy it. Instead, the

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[73] *See* Catherine S. Menand, *The Revolutionary Moment and the Supreme Judicial Court*, 77 MASS. L. REV. 22, 23 (1992) (explaining that these "acts provided for certain import taxes and tightened existing customs regulations").

[74] Vice Admiralty Court Act 1767, 8 Geo. 3., c. 22.

[75] For a review of American colonial vice-admiralty courts in the American colonies and how changes in their jurisdiction helped spark the Revolution, see generally CARL UBBELOHDE, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION (1960).

[76] RESOLUTIONS VII, VIII OF THE STAMP ACT CONGRESS (1765).

[77] THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

[78] *See* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 655 (1972) (discussing the broad protection the civil jury enjoyed).

[79] *See* NORTHWEST ORDINANCE OF 1787 art. II ("The inhabitants of the said territory shall always be entitled to the benefits of . . . the trial by jury"); *see also* SOURCES OF OUR LIBERTIES 387 (Richard L. Perry ed., 1978) (noting that "the Northwest Ordinance contains the first federally enacted bill of rights").

drafters found it difficult to find language that would correspond with the different civil jury practices in the states and believed the right to be so ingrained that those in power would have no incentive to restrict it.[80]

Nevertheless, the initial lack of civil jury protections in the Constitution was met with great skepticism throughout the states. As Alexander Hamilton acknowledged, "The objection to the [Constitution], which has met with most success[,] . . . is that relative to the want of a constitutional provision for the trial by jury in civil cases."[81] Anti-Federalists persuasively charged that the original Constitution's grant of the Supreme Court appellate jurisdiction both "as to law and fact" effectively abolished civil juries altogether.[82] They wrote passionately on the horrors that would result if civil jury protections were not constitutionalized: "[W]hat satisfaction can we expect from a lordly court of justice, always ready to protect the officers of government against the weak and helpless citizen, and who will perhaps sit at the distance of many hundred miles from the place where the outrage was committed?"[83]

The civil jury, then, provided protection not only against executive abuses of power, but also against those judges who might bless such abuses. As the Federal Farmer, a prolific Anti-Federalist, expounded: "[F]requently drawn from the body of the people . . . we secure to the people at large, their just and rightful control in the judicial department."[84] And Thomas Jefferson, a reluctant supporter of the Constitution, went so far as to answer: "Were I

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[80] *See* THE FEDERALIST NO. 83 (Alexander Hamilton) ("From this sketch it appears that there is a material diversity, as well in the modification as in the extent of the institution of trial by jury in civil cases, in the several States; and from this fact these obvious reflections flow: first, that no general rule could have been fixed upon by the convention which would have corresponded with the circumstances of all the States; and secondly, that more or at least as much might have been hazarded by taking the system of any one State for a standard, as by omitting a provision altogether and leaving the matter, as has been done, to legislative regulation.").

[81] *Id.*

[82] *See, e.g.*, ESSAY OF A DEMOCRATIC FEDERALIST (1787), *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 58, 60 (Herbert J. Storing ed., 1981) (discussing that appellate jurisdiction of the supreme court "precludes every idea of a trial by jury").

[83] *Id.*; *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 87 (1998) [hereinafter AMAR, THE BILL OF RIGHTS] (providing "graphic[] illustrat[ions]" of cases where English "judges had at times abetted government tyranny").

[84] LETTERS FROM THE FEDERAL FARMER XV (1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, 315, 320 (Herbert J. Storing ed., 1981).

called upon to decide, whether the people had best be omitted in the legislative or judiciary department, I would say it is better to leave them out of the legislative. The execution of the laws is more important than the making [of] them."[85] He continued, highlighting distrust of a permanent judiciary, noting that such "judges acquire an *Esprit de corps*," and are liable to be misled "by a spirit of party" or "by a devotion to the executive or legislative power."[86] "It is in the power, therefore, of the juries, if they think permanent judges are under any bias whatever, in any cause," Jefferson said, "to take on themselves to judge the law as well as the fact."[87]

Finally, the civil jury—and particularly the importance of constitutionalizing it—was thought to be necessary to guard against the national legislature, which might pass obnoxious and unpopular legislation, or even worse, seek to restrict the use of juries in cases arising under such legislation.[88] So celebrated was the right to a civil jury that some Federalists' response to this argument was that reasonable legislators would dare not restrict the right out of their own self-interest.[89] Prior to serving as one of the nation's first Supreme Court Justices, James Iredell earnestly contended that if jury protections were stripped, "[Congress's] authority would be instantly resisted," drawing upon the legislators "the resentment and detestation of the people" such that "[t]hey and their families . . . would be held in eternal infamy."[90] But it was precisely because legislators could not be trusted to draw the contours of significant

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[85] Letter from Thomas Jefferson to M. L'Abbe Arnond (July 19, 1789), *in* 3 THE WRITINGS OF THOMAS JEFFERSON: BEING HIS AUTOBIOGRAPHY, CORRESPONDENCE, REPORTS, MESSAGES, ADDRESSES, AND OTHER WRITINGS, OFFICIAL AND PRIVATE 82 (H. A. Washington, ed., 1853).

[86] *Id.* at 81.

[87] *Id.* at 82.

[88] *See* Wolfram, *supra* note 78, at 654 ("A deeply divisive issue in the years just preceding the outbreak of hostilities between the colonies and England in 1774–1776 had been the extent to which colonial administrators were making use of judge-tried cases to circumvent the right of civil jury trial.").

[89] *See id.* at 664–65 (discussing the Federalists' position that the right to a jury trial was better left to Congress based on the assumption that "decent men would be elected").

[90] James Iredell in the North Carolina Ratifying Convention (July 28, 1788), *in* 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 120, 148 (Jonathan Elliot ed., 1891).

rights that amendments were thought necessary to the proposed Constitution—the civil jury being chief among them.[91]

The Anti-Federalists' arguments "struck a very responsive chord" among the American populace, who had in no small part just fought a bloody revolution over the importance of civil jury protections.[92] As part of the ratification process, eight of the nine states that submitted amendment proposals offered specific language for securing a civil jury right.[93] Massachusetts explicitly conditioned its ratification on the addition of such a clause.[94] Accordingly, it was the promise of what would come to be the Seventh Amendment that convinced many skeptics to sign on to the American experiment. Without such an implicit agreement on civil jury protections, the U.S. Constitution may very well never have been ratified.[95]

As this historical account demonstrates, the civil jury at the Founding was anticipated to be more than just one adjudicative body among many for resolving private disputes. It was instead established as a necessary institution within the constitutionally established balance of power, responsible for integrating laypeople into the administration of justice and for checking abuses of power at various levels. Constitutional scholar Professor Akhil Amar goes so far as to suggest: "If we seek a paradigmatic image underlying the original Bill of Rights, we cannot go far wrong in picking the jury."[96] The jury was the lynchpin tying the experiment together; empowering laypeople to serve as the nation's true sovereigns in the administration of law.

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[91] *Cf.* Blakely v. Washington, 542 U.S. 296, 308 (2004) (noting that, in the criminal context, "the Framers put a jury-trial guarantee in the Constitution [because] they were unwilling to trust government to mark out the role of the jury").

[92] Wolfram, *supra* note 78, at 668.

[93] *See* Lochlan F. Shelfer, *How the Constitution Shall Not Be Construed,* 2017 B.Y.U. L. REV. 331, 353 (2017) (noting that the civil jury proposal was the second most popular proposal behind the reservation of power to the states).

[94] *See* Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 298 (1966) (explaining that it was necessary for Massachusetts to "recommend certain 'conciliatory propositions'" to achieve a majority, which included civil jury trials).

[95] *See* Parsons v. Bedford, 28 U.S. 433, 446 (1830) ("One of the strongest objections originally taken against the [C]onstitution of the United States[] was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the [S]eventh [A]mendment . . . [that] received an assent of the people so general[] as to establish its importance as a fundamental guarantee of the rights and liberties of the people.").

[96] AMAR, THE BILL OF RIGHTS, *supra* note 83, at 96.

B. THE SOCIOPOLITICAL BENEFITS OF THE JURY IN PRACTICE

Our overview of the jury's beginnings identifies important systemic justifications for the civil jury. But it is important to note that these benefits are not merely theoretical. Over the last sixty years, researchers have examined how the civil jury operates in practice. We summarize the empirical evidence on two main dimensions: (1) the civil jury's competence in fact-finding as compared to that of a professional judge, and (2) the civil jury's impact on civic engagement of the citizenry and its contributions to the transparency and legitimacy of the legal system. This contemporary empirical evidence about the operation and the impact of civil juries confirms many of the Founders' assumptions and experiences.

1. The Civil Jury's Fact-Finding Advantages over Judges. Civil juries add to the quality of fact-finding in civil trials. This assertion might surprise some readers. After all, judges are elite, legally trained, and experienced in adjudication, whereas jurors are drawn from all walks of life and usually have no special legal training or experience.[97] Expertise in a particular subject matter can be very helpful in aiding decision-making, especially in complex trials.[98] Jurors' diverse backgrounds and perspectives, and even their lack of experience, however, offer numerous benefits in terms of quality fact-finding—particularly in comparison to that of a professional judge.[99] By bringing their democratic insights to bear, the civil jury enhances the work of the judicial department.

A lay citizen's lack of specialized knowledge and experience confers some benefits even over an experienced and expert judge.

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[97] Special juries, in which individuals are selected for specific education, training, or experience to serve as civil jurors, remain an option in the United States, but their usage has declined dramatically in recent years. *See generally* JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 174–212 (2006) (reviewing the history of special juries in the United States).

[98] *See* Valerie P. Hans, David H. Kaye, B. Michael Dann, Erin J. Farley & Stephanie Albertson, *Science in the Jury Box: Jurors' Comprehension of Mitochondrial DNA Evidence*, 35 LAW & HUM. BEHAV. 60, 69 (2011) (showing that jurors with more education and more science courses do better on DNA quizzes).

[99] *See* Taylor-Thompson, *supra* note 31, at 1275 (explaining that "[b]ecause the jury's work largely depends on subjective interpretations of evidence, a variety of perspectives will enrich jury discussions"' and that interaction among jurors from various experience levels, both limited and expansive, "will expand the range of issues to be discussed" among jurors).

Judges are repeat players; a jury decides one case at a time. As judges sit in case after case over the years, judicial fact-finding becomes routinized.[100] Judges may jump to premature conclusions because of similar fact patterns in prior cases, might regularly favor one party over the other, or might even become jaded about the process of civil litigation.[101] Judges may be affected by confirmation bias, the unconscious psychological process in which people look for evidence that confirms their previous views and experiences and interpret evidence in ways that are consistent with their existing views.[102] This is especially so when prior cases are presented by the same legal counsel. Despite differences in facts and even trial strategy, the presence of the same advocate or even the same opponents can cause the judge to view the case with expectations based on prior experience.[103] Because lawyers often regularly appear in a single jurisdiction, this can occur with surprising frequency, particularly when both lawyers practice in a specialized field. Jurors deciding a single case come with a fresh perspective.

Relatedly, judges' personal characteristics and their prior legal work experiences correlate with their decisions.[104] For example, studies show that judges who worked in corporate law or as

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[100] *See* Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L & SOC. SCI. 203, 216 (2017) ("[E]xperience might induce judges to adopt mental shortcuts that they did not use when they were new judges.").

[101] *Id.*; *see also supra* note 34 and accompanying text.

[102] JENNIFER K. ROBBENNOLT & VALERIE P. HANS, THE PSYCHOLOGY OF TORT LAW 80–81, 212 (2016).

[103] *See* Melissa L. Breger, *Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity and the Bench Trial*, 53 U. RICH. L. REV. 1039, 1041–42 (2019) ("[E]ven if judges attempt to shield their decisions from their explicit biases, implicit biases may seep into judicial decision making . . . [, which] could be particularly consequential in trial courts when juries are not utilized, or when the same litigants appear before the same judges repeatedly."); Jordan M. Singer, *Gossiping About Judges*, 42 FLA. ST. U. L. REV. 427, 435, 468 (2015) (finding repeated appearances create an overall advantage for lawyers but that judges often recall conduct of attorneys from previous interactions in future interactions); Bahaar Hamzehzadeh, *Repeat Player v. One-Shotter: Is Victory All that Obvious*, 6 HASTINGS BUS. L.J. 239, 243–44 (2010) (analyzing the impact on success caused by repeated appearances before the same judge).

[104] *See* JOANNA SHEPHERD, JOBS, JUDGES, AND JUSTICE: THE RELATIONSHIP BETWEEN PROFESSIONAL DIVERSITY AND JUDICIAL DECISIONS 12–16 (2021), https://demandjustice.org/wp-content/uploads/2021/03/Jobs-Judges-and-Justice-Shepherd-3-08-21.pdf (presenting data showing that "certain types of career experiences are associated with judges favoring individuals over corporations, or vice versa").

prosecutors before becoming judges are less likely to favor employees in employment discrimination cases.[105] There is also a link between campaign contributions and judges' decisions.[106] The same is true for a judge's race and political affiliation.[107] Senator Sheldon Whitehouse points to the increasing politicization of judicial appointments and special interest funding in judicial elections as causes for concern, both of which underscore the value of having an effective and efficient civil jury trial option.[108]

True, judges operate within a laudable system of accountability. Their judgments and written opinions are part of the public record, are reviewed by appellate courts, and may be considered in retention and promotion. But some studies of judicial decision-making have found a downside to these consequences. Judges in state courts facing reappointment or retention elections impose more severe sentences or show less favorability toward capital defendants' appeals, according to research.[109] This should not be

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[105] *See id.* at 13 ("[F]ormer prosecutors and lawyers with a corporate background are less likely to rule in favor of claimants—individual employees or the EEOC or Department of Labor on behalf of employees—than are judges without these backgrounds.").

[106] *See* Rachlinski & Wistrich, *supra* note 100, at 211 (collecting studies that show that "donations from a political party correlate with judicial decision making" (first citing Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decisionmaking*, 7 STATE POL. & POL'Y Q. 281, 281–97 (2007); and then citing Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 69–130 (2011))).

[107] *See, e.g.*, *id.* at 216–22 ("[P]ersonal characteristics of judges—their political ideology, gender, race, and experience—affect their decisions in cases that reflect those characteristics."). For examples of relevant research, see generally JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002) (documenting decision-making differences in judgments by judges appointed by Republican and Democratic presidents); Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 399–406 (2010) (finding that a judge's gender affects decisions in sex discrimination cases).

[108] *See* Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of Our Government*, 55 WM. & MARY L. REV. 1241, 1266–67 (2014) ("Concerns over corrupt influence may not be relevant as often in our contemporary civil justice system, but as judicial appointment becomes more politicized, and as special interest funding becomes more influential in judicial elections, corruption, particularly in the sense meant by the Founders, is a consideration not to be overlooked." (footnote omitted)).

[109] *See, e.g.*, Rachlinski & Wistrich, *supra* note 100, at 210 (indicating that "judges facing retention elections are less favorable to capital defendants' efforts to overturn their sentences" and that the effect on judge behavior extends to reappointment (first citing Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind when*

surprising. As former California Supreme Court Justice Otto Kaus colorfully explained: "There's no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them near election time. That would be like ignoring a crocodile in your bathtub."[110] Jurors, as temporary agents of the state, generally face no such professional peril from their one-off decisions.

The jury's beneficial fact-finding flows from its comparative advantage over judges in community representativeness. A group of jurors is more likely than an elite judge to represent the range of backgrounds, experiences, views, and attitudes of the community at large.[111] A substantial body of theory and research on juror decision-making confirms that jurors draw on their life experiences, attitudes, and perspectives as they assess and weigh evidence in the trial.[112] The story model of juror decision-making posits that jurors rely on their world knowledge to interpret evidence in the case and to develop a narrative account of what happened in the events that led to the trial.[113] Knowledge of the world varies with life experiences. As such, demographic and attitudinal characteristics such as gender, race, and political affiliations are associated with distinctive decisions by jurors[114] and by judges as well.[115] A group of laypeople drawn from a cross-section of the community is better able to reflect a community's social and political characteristics, and to

it Runs for Office? 48 AM. J. POL. SCI. 247, 247–63 (2004); then citing John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 465–503 (1999); and then citing Joanna M. Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. LEGAL STUD. 169, 169–203 (2009))).

[110] Paul Reidinger, *The Politics of Judging*, A.B.A. J., Apr. 1, 1987, at 52, 58.

[111] *See* Meghan J. Ryan, *Juries and the Criminal Constitution*, 65 ALA. L REV. 849, 874–77 (2014) (discussing why judges are not representative of societal standards).

[112] *See* Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 520–29 (1991) (contending that the "central cognitive process in juror decision making is *story construction*"); *see generally* NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS (2000) (exploring how jurors attribute blame for accidental injury or death).

[113] Pennington & Hastie, *supra* note 112, at 521–23.

[114] *See, e.g.*, EDIE GREENE & BRIAN H. BORNSTEIN, DETERMINING DAMAGES: THE PSYCHOLOGY OF JURY AWARDS 79–94 (2003) (describing research showing demographic effects on damage award decision-making).

[115] *See supra* notes 106–107 and accompanying text.

be better informed about community norms.[116] In sum, the civil jury is in an ideal position to incorporate the community's views and attitudes about responsibility and the valuation of injuries in its legal judgments.

Research on public reactions to a police car chase video footage that was integral to the Supreme Court's decision in *Scott v. Harris*[117] offers a vivid illustration of the superior ability of a representative community group to reflect the diverse range of citizens' opinions. The majority of the justices in that case asserted after viewing the footage that "no reasonable jury" could conclude that the car's driver did not pose a substantial risk.[118] But when researchers surveyed the public on their perception of the footage, their "subjects didn't see eye to eye."[119] Specifically, "African Americans, low-income workers, and residents of the Northeast," as well as "individuals who characterized themselves as liberals and Democrats," were all more likely to disagree with the Supreme Court's conclusion as to the risk posed by the driver.[120] When people assess the reasonableness of others' actions, research confirms that even if they are instructed to use an objective standard, they rely on their own values.[121] And when judges are asked to anticipate the collective mind of the jury, they are likely to be influenced by their own experiences and perspectives.[122]

Other benefits accrue from the group nature of jury decision-making. Juries engage in the process of deliberation, which offers the opportunity to compare, contrast, and test differing evaluations of the trial evidence. Deliberation and group decision-making are especially robust when the jury is composed of individuals with

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[116] *See* Ryan, *supra* note 111, at 878–80 (discussing how juries are necessarily more representative of their communities than are judges).

[117] 550 U.S. 372 (2007).

[118] *Id.* at 380.

[119] Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?:* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841 (2009).

[120] *Id.*

[121] *See* Mark D. Alicke & Stephanie H. Weigel, *The Reasonable Person Standard: Psychological and Legal Perspectives*, 17 ANN. REV. L. & SOC. SCI. 123, 123 (2021) (noting that there is a tendency to "rely on the self" when following a reasonable person standard).

[122] *See, e.g.*, Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759, 760 (2009) ("[J]udges decide dispositive motions based on their own views of the evidence, as opposed to what a reasonable jury could find.").

diverse backgrounds and experiences.[123] Furthermore, studies have shown that jury deliberation is more robust when juries are required to reach unanimous as opposed to majority decisions.[124] Through the diversity of individuals and their viewpoints, a more thorough and searching decision-making process results.

In short, a jury trial—with a professional judge presiding—combines the multiple benefits of both lay and legally-trained decision-makers. Professional judges possess advantages of legal expertise and experience. And juries bring diverse perspectives, life experiences, and a strong grounding in community norms to the fact-finding task. Deliberation aids jurors in testing their interpretations of evidence and in developing a sound common account of the events leading to the lawsuit. A representative jury is thus able to fulfill one of the major purposes of trial by jury envisioned by the Founders—to stand in for the community in legal fact-finding to enhance the democratic legitimacy of the judicial department and its decisions.

Extensive research on civil jury decision-making supports the strength of the jury not only as a democratic institution but also as a fair and accurate fact-finder.[125] Interviews and post-trial questionnaire research confirm that the vast majority of jurors take

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[123] *See* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 606 (2006) (reporting research that found differences in decision-making between racially diverse and non-racially diverse groups).

[124] *See* Shari Seidman Diamond, Mary R. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Nonunanimous Civil Jury*, 100 NW. U. L. REV. 201, 230 (2006) ("[T]he deliberations demonstrate that thoughtful minorities are sometimes marginalized when the majority has the power to ignore them in reaching a verdict. Although juries generally engage in serious and intense deliberations, jurors themselves report more thorough and open-minded debate when they reach unanimity."); *see also* Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making,* 4 DEL. L. REV. 1, 23–24 (2001) [hereinafter Hans, *The Power of Twelve*] (summarizing empirical evidence of the benefits of a unanimity decision rule and a larger jury size).

[125] *See, e.g.*, HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 63–65 (1966) (presenting research on judge-jury agreement rates); Valerie P. Hans, *What's it Worth? Jury Damage Awards as Community Judgments*, 55 WM. & MARY L. REV. 935, 937 (2014) [hereinafter Hans, *What's it Worth?*] ("Civil jury damage awards serve to check or endorse private power"); *see also* Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1148–55 (1992) (contrasting perceptions of civil juries with the realities of their decision-making).

their jury duty seriously.[126] Researchers have compared the verdicts reached by juries to judicial decisions or judicial evaluations of the same or similar types of cases; they have also used experimental methods to examine the decision processes in civil disputes.[127]

It is difficult to directly compare the outcomes of jury trials and bench trials because litigants select which cases go to the jury and which go to the judge.[128] In judge-jury agreement studies, judges presiding over jury trials are asked to record the jury's verdict and to indicate what verdict they themselves would have reached had they been trying the case as a bench trial. Therefore, the judge and jury assess the same case, and a comparison of the actual jury verdict and the judge's hypothetical verdict is more readily attributable to the distinctive qualities of the fact-finder.[129] The first judge-jury agreement study occurred in the 1950s and revealed that the judge agreed with the jury's verdict in civil trials seventy-eight percent of the time.[130] Interestingly, in that study, the disagreements between the judge and jury were symmetrical; judges would have found for the plaintiff when the jury reached a defense verdict in ten percent of the trials, and judges would have found for the defendant when the jury decided the case for the plaintiff in twelve percent of the trials.[131] Subsequent studies using a similar methodology have found comparable overall agreement

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[126] *See* Diamond, *What Jurors Think*, *supra* note 25, at 288 (asserting that "the vast majority of jurors are motivated to do a good job").

[127] NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 19 (2007) (describing the multiple methods used to evaluate the jury system, including "interviewing and surveying jurors, analyzing jury verdicts, and conducting experiments to test hypotheses about jury decision processes"); *see also id.* at 267–79 (presenting research findings about juror judgments of civil liability).

[128] For a thoughtful discussion of the impact of these "selection effects" (that different streams of cases are heard by judges versus juries), see Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1961–64 (2009). Differences in outcomes could thus be attributable to case differences or to differences between judge and jury decision-making. *See id.* at 1963 (concluding, in part, that "small differences between judges' and juries' treatment of cases and . . . the parties' varying the case selection that reaches the judge and jury" contribute to differences in outcomes).

[129] Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 144 (2002) (discussing the data collection methodology for judge-jury agreement studies).

[130] KALVEN & ZEISEL, *supra* note 125, at 63.

[131] *Id.* at 64. For a comparison of judge and jury verdicts, see Clermont & Eisenberg, *supra* note 129, 1442–47 (analyzing data on the rate of agreement between judge and jury on liability) and Clermont, *supra* note 128, at 1961–64.

rates.[132] Importantly, several judge-jury agreement studies have found that the complexity of evidence in the case is unrelated to the agreement rates between juries and legal experts; a relationship would have been expected if jury incompetence led juries to choose a different verdict.[133]

Studies of money damage awards in civil cases, too, offer some reassurance.[134] The civil jury is in an ideal position to determine damage awards, which is a fact-finding function constitutionally assigned to the jury.[135] Jury damage awards reflect the community's assessment of the value of an injury by considering the context and circumstances of the injury and the identities and behavior of the parties.[136] The need to examine each case's specific facts, and the ability to handle both the uncertainty and the intangibility of some injuries, make the representative jury a societally appropriate decision-maker on damages. As the Virginia Supreme Court once noted, "[T]he law wisely leaves the assessment of damages, as a rule, to juries, with the concession that there are no scales in which to weigh human suffering, and no measure by which pecuniary compensation for personal injuries can be accurately

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[132] Shari Seidman Diamond, Neil Vidmar, Mary Rose, Leslie Ellis & Beth Murphy, *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1, 67 n.108 (2003) [hereinafter Diamond et al., *Juror Discussions*] (finding a seventy-seven percent agreement rate between judges and juries); Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of its Meaning and its Effects,* 18 LAW & HUM. BEHAV. 29, 48 (1994) (finding a sixty-three percent agreement).

[133] *See*, Theodore Eisenberg, Paula L. Hannaford-Agor, Valerie P. Hans & Nicole L. Waters, *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's The American Jury*, 2 J. EMPIRICAL LEGAL STUD. 171, 191–92 (2005) (presenting research detailing similar judge-jury agreement across different evidentiary complexities).

[134] *See, e.g.*, VIDMAR & HANS, *supra* note 127, 281–320 (presenting research on compensatory and punitive damage award decision-making by juries); Hans, *What's it Worth?, supra* note 125, at 939–41 (discussing how jury-determined damage awards for intangible injuries display the community's value assessment of those injuries).

[135] *See* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432 (2002) ("A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination."); Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353 (1998) ("The jury are the judges of damages." (quoting Lord Townshend v. Hughes (1677) 86 Eng. Rep. 994, 995 (C.P.)); *see also* BLACKSTONE, *supra* note 62, at *324 ("[T]he quantum of damages . . . is a matter that cannot be done without the intervention of the jury.").

[136] *See* Hans, *What's it Worth?*, *supra* note 125, at 939 (discussing how damage awards are often closely associated with a community's value of the injury); Harry Kalven, Jr., *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158, 160 (1958) (explaining that a foundational premise of a jury is to evaluate the damage award on a case-by-case basis).

ascertained."[137] The jury can draw on its collective experiences with injuries and the resulting financial consequences as they engage in the necessary fact-finding.[138]

Empirical studies show that the concrete factual details and injuries at issue in a case regularly explain a jury's damage award. First, the overall severity of plaintiffs' injuries is strongly related to jury damage awards.[139] In states that separate out economic and noneconomic damages, the amount of economic damages is a powerful predictor of the amount of noneconomic damages.[140] Second, empirical research on jury decision-making with respect to punitive damages reassures that the civil jury acquits itself fairly; punitive damages are generally proportionate to compensatory damages, suggesting that the jury often is not unduly harsh.[141] Instead, as with all of the jury's decisions, the community's consciousness is channeled through the institution, enhancing the accuracy and democratic legitimacy of the judgment.

2. The Civil Jury Promotes Civic Engagement and Systemic Legitimacy. Beyond the benefits that jurors bring in fact-finding and the administration of civil justice, the civil jury institution and juror experience itself promote civic engagement and broader systemic

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[137] Chesapeake & Ohio Ry. Co. v. Arrington, 101 S.E. 415, 423 (Va. 1919), *abrogated by* John Crane, Inc. v. Jones, 650 S.E.2d 851 (Va. 2007).

[138] *See* Hans, *What's it Worth?*, *supra* note 125, at 939, 941 (explaining how jurors' independent evaluations combined to establish a damage award rooted in community values).

[139] *See* Randall R. Bovbjerg, Frank A. Sloan & James F. Blumstein, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908, 941 (1989) (summarizing evidence showing the strong relationship between injury severity and damage awards; those who are more severely injured generally receive higher damage awards).

[140] *See* Herbert Kritzer, Guangya Liu & Neil Vidmar, *An Exploration of "Noneconomic" Damages in Civil Jury Awards*, 55 WM. & MARY L. REV. 971, 1010–13 (2014) (presenting research examining possible predictive relationships between noneconomic and economic damages based on conditional variables).

[141] *See* Theodore Eisenberg, Valerie P. Hans & Martin T. Wells, *The Relation Between Punitive and Compensatory Awards: Combining Extreme Data with the Mass of Awards*, *in* CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL AND LEGAL PERSPECTIVES 105, 106–07 (Brian H. Bornstein, Richard L. Wiener, Robert F. Schopp & Steven L. Willborn eds., 2008) (finding a strong correlation between compensatory and punitive damage awards); *see also* Valerie P. Hans & Valerie F. Reyna, *To Dollars from Sense: Qualitative to Quantitative Translation in Jury Damage Awards*, 8 J. EMPIRICAL LEGAL STUD. 120, 142, 144 (2011) (same). After reviewing the empirical literature, the Supreme Court found that jury "discretion to award punitive damages has not mass-produced runaway awards," but, instead, "show[s] an overall restraint." Exxon Shipping Co. v. Baker, 554 U.S. 471, 497, 499 (2008).

legitimacy. The French political thinker Alexis de Tocqueville trenchantly observed that the civil jury operates as an ever-open "public school" that educates American citizens about the law through their participation.[142] He added:

> The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. . . . It invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge toward society; and the part which they take in the Government.[143]

Studies bolster this observation. One phenomenon that has been widely documented is the largely favorable reaction that citizens have to the experience of jury service.[144] Although many citizens express concern about receiving a jury summons, once they participate as jurors, they generally recognize their experience as a positive form of civic engagement.[145] In one of the largest studies, over 8,000 jurors from sixteen federal and state courts completed questionnaires following their jury service; sixty-three percent reported that their view of jury service became more favorable after serving.[146] In other research, after they have served, jurors are more apt to say that they see the courts as fair and to have more favorable views about the justice and equity of the legal system.[147]

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[142] *See* TOCQUEVILLE, *supra* note 22, at 274 (noting how the civil jury system educates the public on the law and instills a shared responsibility to achieve justice).

[143] *Id.*

[144] *See* Diamond, *What Jurors Think*, *supra* note 25, at 298–300 (summarizing the research documenting jurors' favorable responses to serving and finding that "willingness to serve again was high").

[145] *See* James B. Binnall, *A "Meaningful" Seat at the Table: Contemplating Our Ongoing Struggle to Access Democracy*, 73 SMU L. REV. F. 35, 46 (2020) ("[J]ury service fosters a general sense of empowerment that frequently leads to other forms of civic engagement.").

[146] JANET T. MUNSTERMAN, G. THOMAS MUNSTERMAN, BRIAN LYNCH & STEVEN D. PENROD, NAT'L CTR. FOR STATE CTS., THE RELATIONSHIP OF JUROR FEES AND TERMS OF SERVICE TO JURY SYSTEM PERFORMANCE 6 (1991).

[147] *See* Diamond, *What Jurors Think*, *supra* note 25, at 286 ("The jurors [that were] studied became more positive in their assessments of the justice and equity of the legal system following jury service.").

Jury service is a form of civic participation, and, in this way, the jury is a responsibility-taking institution.[148] It pulls individuals from their daily lives and assigns them the task of implementing society's judgments, forcing them both to express and to create community identity through group deliberation.[149] Given this substantial task and the transformative role required of laypeople to perform it, perhaps it should not surprise us that participating as a juror—in either a criminal or a civil trial—boosts other forms of citizen engagement. Professor John Gastil and his colleagues put Tocqueville's observation to an empirical test in a set of studies that examined the links between jury service and voting.[150] In one such study, they obtained jury service data from seven U.S. states and linked these records with jurors' voting history before and after jury service.[151] Citizens who served in criminal cases and who were infrequent voters boosted their voting after completing jury service.[152] Another study found that jurors who served on twelve-person civil juries or juries that were required to reach a unanimous

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[148] *See* Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381, 2382 (1999) (articulating the virtues reflected in the jury system and in jury service); *see also* Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 192 (1990) (describing a theory of jury responsibility in which "the jury is conceptualized as a democratic representative of the community" that should "convey the moral condemnation of the community in a criminal case and the range of viewpoints of the community in a civil case").

[149] Note, too, that the jury system may relieve judges of responsibility, allowing them to take cover behind the work of jurors. *See, e.g.*, KALVEN & ZEISEL, *supra* note 125, at 7 (noting that one of the "collateral advantages" of the jury system is that jurors may serve as a "lightning rod for animosity and suspicion which otherwise might center on the more permanent judge").

[150] *See* JOHN GASTIL, E. PIERRE DEESS, PHILIP J. WEISER & CINDY SIMMONS, THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION 45–47 (2010) [hereinafter GASTIL ET AL., THE JURY AND DEMOCRACY] (finding that low-frequency voters who served as jurors in a criminal case were more likely to vote in later elections); *see also* John Gastil, E. Pierre Deess, Philip J. Weiser & Jordan Meade, *Jury Service and Electoral Participation: A Test of the Participation Hypothesis*, 70 J. POLS. 351, 358–60 (2008) (analyzing the effect of deliberation on jurors' likelihood to vote); John Gastil, E. Pierre Deess & Philip J. Weiser, *Civic Awakening in the Jury Room: A Test of the Connection Between Jury Deliberation and Political Participation*, 64 J. POLS. 585, 586 (2002) (examining "the link between political participation and an institutionalized form of citizen deliberation," specifically inquiring into the effect of deliberation and reaching a verdict on a jury on the likelihood of voting in subsequent elections).

[151] GASTIL ET AL., THE JURY AND DEMOCRACY, *supra* note 150, at 45–47.

[152] *See id.* at 45–47 (finding that for low frequency voters, "[c]riminal jurors reaching a verdict" were 4.3% more likely to vote in a future election).

decision—in other words, the traditional form of trial by jury—were significantly more likely to vote following their service, controlling for their pre-service voting history.[153] Civil jurors who decided cases with organizational (as opposed to individual) defendants also showed increased voting behavior.[154]

What is more, the civil jury enhances systemic legitimacy more broadly. Disputants who can discuss their differences and reach fair and equitable resolutions through mediation or other private settlement mechanisms may not need to resort to the courts. Surveys have found that people often are satisfied with these private remedies.[155] But for other litigants, and for the rest of society, the public trial—and in particular the civil jury trial—offers several advantages. In her book, *In Praise of Litigation*, Professor Alexandra Lahav identifies the multiple ways in which litigation protects important democratic values:

> Litigation helps democracy function in a number of ways: it helps to *enforce* the law; it fosters *transparency* by revealing information crucial to individual and public decision-making; it promotes *participation* in self-government; and it offers a form of *social equality* by giving litigants equal opportunities to speak and be heard.[156]

With respect to enforcement and transparency, jury trials, and public litigation more generally, add value because they produce information about what otherwise might be unfairly hidden practices and procedures.[157] The trial is a transparent and public

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[153] *See* Hans et al., *supra* note 26, at 710–12 (finding that jurors on twelve-person juries had the "highest increase in voting" participation after service).

[154] *See id.* ("When jurors served on cases with organizational defendants, they had an experience that resulted in a more positive change in their voting rates . . . than did those jurors whose cases featured only individual defendants.").

[155] *See* Shari Seidman Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 LA. L. REV. 120, 132 (2020) (finding that respondents "preferred [mediation] significantly to arbitration and bench trials").

[156] LAHAV, *supra* note 28, at 1–2.

[157] *See id.* at 56–57 (offering a real-world example of how adversarial litigation can increase transparency and bring vital information to light); *see also* Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1683 (2016) (reviewing the externalities associated with public dispute resolution, including the production of information).

event. Citizens observe the evidence and arguments presented by each side. Others, potentially liable under the same circumstances, also see the results and can take additional safety measures as a form of self-regulation, improving their products or services and filling gaps in our system of formal regulation.[158]

Litigants have their day in court; their arguments and evidence are given in public to their peers and the state. The opportunity to present one's views and the chance to be heard are key elements contributing to procedural justice, a sense that fair processes are used to resolve a dispute.[159] In turn, a sense that one has been heard and treated fairly in a dispute resolution procedure increases the perceived legitimacy of the procedure.[160] Because it takes place in a public forum and because there is a framework for appealing the results, there are possibilities for error correction. Private adjudication lacks not only the transparency of inviting the public to decide cases and check the work of arbiters but also does not have the same corrective potential in the form of appellate review.[161]

In sum, the transparent and public nature of civil jury trials, allowing the presentation of evidence on both sides, providing litigants the opportunity to be heard, and giving citizens the right to decide the outcomes, operates to reinforce democratic self-governance. Combined with the other benefits we discuss, this positions the civil jury as an institution of great significance during this time of American democratic decline. The jury is poised to play the role anticipated by the Founders—bringing laypeople into the administration of justice, investing them in the fair and democratic

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[158] *See, e.g.*, BOGUS, *supra* note 28, at 169 (offering examples from the automobile industry); *see also* Stephan Landsman, *Juries as Regulators of Last Resort*, 55 WM. & MARY L. REV. 1061, 1067 (2014) (discussing the civil jury's role in filling in gaps in the regulatory regime).

[159] *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 19–68 (1990) (examining the positive effect of procedural justice in legal experiences on legitimacy and compliance with the law).

[160] *See id*. at 20 (concluding that satisfaction with court performance increases the perception of legitimacy). From the earliest days of the Republic, the Supreme Court has recognized the importance of that perception, opining that a legitimate system of justice "recognizes and [s]trongly [r]ests on this great moral truth, that justice is the [s]ame whether due from one man or a million, or from a million to one man" and enables every person "to obtain justice without any danger of being overborne by the weight and number of their opponents." Chisholm v. Georgia, 2 U.S. 419, 479 (1793).

[161] *See, e.g.*, Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 704–12, 754 (1999) (describing how "[a]rbitration privatizes the creation of law").

application of laws, and ensuring their power to push back against state and other powerful actors. However, as will be discussed next, the civil jury has been under sustained attack for nearly a century, greatly inhibiting its ability to serve its emboldening role. If the civil jury is to help redirect America toward democratic principles, it is necessary to understand what has caused the decline of the civil jury and to make urgent efforts to preserve and strengthen the institution.

III. THE PRECIPITOUS DECLINE OF THE CIVIL JURY

Despite this foundational commitment to, and the sociopolitical and administrative benefits of, the civil jury, the institution has fallen precipitously in use and esteem. The factors contributing to the civil jury's decades-long decline are numerous and interrelated. The adoption of new procedures in the twentieth century altered the institutional relationship between the judge and the jury, empowering the former and divesting the latter of the authority that existed at common law. Judges hurried this transformation through their decisions denigrating jurors as incapable of deciding complex disputes or too impassioned to decide them impartially.[162] Similarly, powerful economic actors have engaged in a lengthy campaign to convince the public and policy makers that jurors should not be trusted.[163] The result is a popular and judicial culture that does not value lay participation and views it as an expendable part of the civil justice system. Thus, when budgetary or, most recently, public health crises arise, the civil jury is easily sidelined.[164] And as a result, the many potential sociopolitical benefits of this institution are squandered.

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[162] *See* Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 389, 485–91 (1996) (outlining common criticisms of juries and how judges quickly exercised greater control over civil juries under the new Rules through mechanisms such as "special verdicts and special interrogatories, summary judgment, the directed verdict, and the judgment notwithstanding the verdict").

[163] *See* Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?*, 101 JUDICATURE 26, 34, (2017) (discussing corporate defendants' "longstanding distrust of juries").

[164] *See supra* notes 45–48 and accompanying text.

A. PROCEDURAL DIVESTING OF THE CIVIL JURY'S AUTHORITY

Despite its lofty beginnings, the civil jury has long faced a steady drumbeat of criticism from state and economic actors, leading to decline of both its use and constitutional esteem. To be sure, for much of American history, the jury fell short of including all segments of the community, and its verdicts have not been immune to racism, sexism, and other forms of bigotry.[165] But whereas the jury at the founding was seen as a great well of community knowledge that injected laypeople into the administration of justice, only decades into our history jurors had become—as one judge put it—"mere *assistants* of the courts, whose province it is to aid them in the decision of disputed questions of fact."[166] This new conception, matched with substantial changes in civil procedure in the past 100 years, has made civil jury trials exceptionally rare.[167] So uncommon are they today that at least one leading scholar has proclaimed: "The civil jury is dead."[168]

This decline is not new. Scholars have voiced concerns about the decline of the civil jury going back at least to the late 1920s.[169] Their concerns were borne out. Starting in 1962, the year when federal judicial statistics become most reliable, a consistent decline has been readily apparent in the percent of civil cases disposed of by

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[165] For an overview of the history of jury exclusion, see Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCH. PUB. POL'Y & L. 201, 204–08 (2001); *see also* Donald G. Gifford & Brian Jones, *Keeping Cases from Black Juries: An Empirical Analysis of How Race, Income Inequality, and Regional History Affect Tort Law*, 73 WASH. & LEE L. REV. 557, 560 (2016) (discussing the roles that race and racism have played, historically and through to today, in debates and actions taken to control civil jury power around the country).

[166] Ernst v. Hudson River R.R. Co., 24 How. Pr. 97, 105 (N.Y. 1862).

[167] Renée Lettow Lerner, *The Uncivil Jury, Part 4: The Collapse of the Civil Jury*, WASH. POST: DEMOCRACY DIES IN DARKNESS (May 28, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/28/the-uncivil-jury-part-4-the-collapse-of-the-civil-jury/ (explaining how civil procedure has "expanded the scope of discovery" which leads to fewer parties seeking to fight until trial).

[168] *Id.*

[169] *See* Herbert M. Kritzer, *The Trials and Tribulations of Counting "Trials,"* 62 DEPAUL L. REV. 415, 416 (2013) (identifying scholarship concerning the decline of the jury trial to date back to the 1920s).

jury trial.[170] That rate was 5.5% in 1962; 3.7% in 1972; 2.6% in 1982; 1.9% in 1992; 1.2% in 2002; 0.81% in 2012; and just 0.31% in 2021 (the most recent year on file at time of writing).[171] A similar pattern has been experienced in state courts. In those states that kept accurate statistics, between 1976 and 2002, civil jury trials fell threefold from 1.8% to 0.6% in courts of general jurisdiction.[172] And the most recent data from the Court Statistics Project shows that the COVID-19 pandemic has driven these numbers to their lowest point ever. In 2020, for those states reporting, juries disposed of a median of only 0.06% of filed civil disputes—with Alaska reporting zero civil jury trials for the second year in a row.[173] Simply put, civil jury trials are today the very rare exception and not the rule.

Critically, bench trials have also been falling during this time. At the federal level, 6% of civil cases were resolved by bench trial in 1962, versus just 0.21% in 2021.[174] Indeed, since 1987 there have been fewer bench trials than jury trials at the federal level.[175] Figure 1 depicts the decline in federal bench and jury trials since 1962.

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[170] *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461 (2004) (showing that the rate of civil trials by jury in 2002 "was less than one-sixth of what it was in 1962"); *see also* Kritzer, *supra* note 169, at 438 ("It is clear that the number of jury trials declined in many, perhaps most, jurisdictions in the United States over the last fifty years.").

[171] Galanter, *supra* note 170, at 461; Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962–2021) (offering the total number of cases filed and disposed of by civil jury trial).

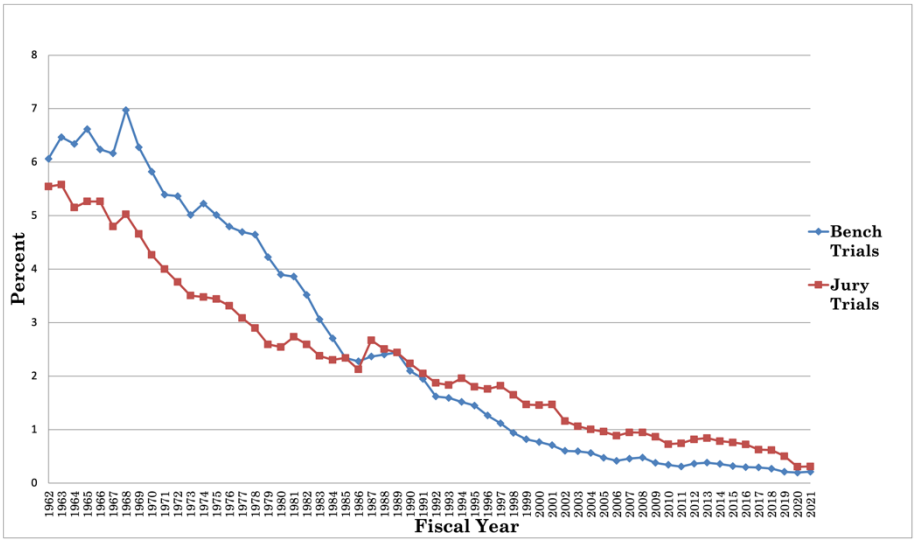
[172] Brian J. Ostrom, Shauna Strickland & Paula Hannaford, *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 768 (2004).

[173] According to the National Center for State Courts, seventeen states reported publishable data for total civil dispositions and jury trials in 2020: Alaska (0.0 percent), California (0.15 percent), Florida (0.07 percent), Georgia (0.05 percent), Hawai'i (0.06 percent), Indiana (0.02 percent), Michigan (0.01 percent), Minnesota (0.06 percent), Missouri (0.03 percent), Nevada (0.06 percent), New Jersey (0.03 percent), North Carolina (0.02 percent), Ohio (0.06 percent), Rhode Island (0.02 percent), Texas (0.08 percent), Vermont (0.09 percent) and Wisconsin (0.05 percent). *CSP STAT Civil,* NAT'L CTR. FOR STATE CTS., (Jan. 6, 2022), https://www.courtstatistics.org/csp-stat-nav-cards-first-row/csp-stat-civil.

[174] *See* Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962–2021) (presenting the total number of civil cases filed and disposed of by judge and jury); *see also* Marc Galanter & Angela M. Frozena, *A Grin Without a Cat: The Continuing Decline & Displacement of Trials in American Courts*, 143 DÆDALUS, J. OF THE AM. ACAD. OF ARTS & SCI. 115, 116–18 (2014) (charting and discussing this trend).

[175] Galanter, *supra* note 170, at 461

Figure 1: Percent of Civil Cases Resolved by Bench and Jury Trials, U.S. District Courts, 1962–2021[176]

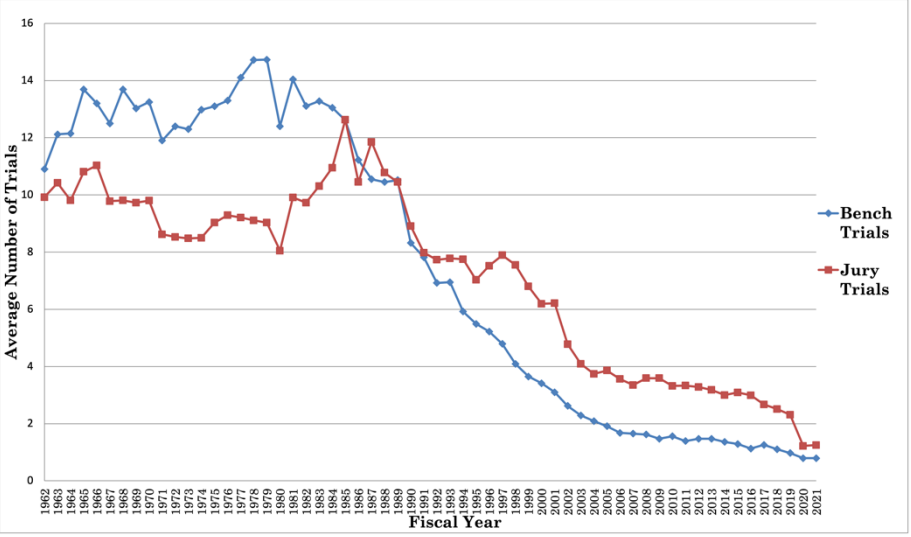


Perhaps unsurprisingly, this steady historical decline in bench and jury trials has been associated with a modified role of trial judges. Despite a fourfold increase in the number of civil case filings since the 1960s, judges are conducting increasingly fewer civil trials than ever before.[177] As Figure 2 illustrates, until the mid-1980s, on average, federal judges conducted a few dozen bench and jury trials each year. However, the number of trials began a precipitous decline in the mid-1980s and has not recovered. The most recent data show an average of fewer than two jury trials and one bench trial per judge per year.

[176] Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962–2021); *see also* Galanter & Frozena, *supra* note 174, at 125–26 (charting and discussing this trend). To demonstrate the clear trend, Figure 1 controls for the mass disposition of oil refinery explosion cases in the Middle District of Louisiana in 2007 and 2008, which added over 6,300 jury trials in 2007 and over 1,400 bench trials in 2008 that had been pending in that district for over a decade. If these refinery cases had been included in the figure, jury trials would have accounted for 3.8% of all federal civil cases disposed of in 2007, and bench trials would have accounted for 1.1% of such cases in 2008. *See* Administrative Office of the U.S. Courts, Annual Report of the Director, Table 6.3 (2007), Table 4.1 (2008).

[177] *See* Galanter, *supra* note 170, at 474 (discussing this inverse relationship).

Figure 2: Civil Trials per Article III Judgeship, U.S. District Courts, 1962–2021[178]



As Figures 1 and 2 make clear, jury trials are not being "replaced" with bench trials. Instead, the civil trial itself is disappearing. The system of civil justice itself is more broadly under assault.

The reasons for the civil jury's decline are many and interrelated. Perhaps most significantly, civil procedures adopted over the course of the twentieth century have played a central role. Many point to the adoption of the Federal Rules of Civil Procedure in 1938 as a pivotal moment of transformation.[179] The original drafters of the rules were radically anti-jury; as one scholar recognized, "[V]irtually everyone connected with urging uniform procedural

[178] Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962–2021); *see also* Galanter & Frozena, *supra* note 174, at 125–26 (charting and discussing this trend). For the reasons given in *supra* note 176, Figure 2 controls for cases brought in the Middle District of Louisiana in 2007 and 2008. If those cases had been included in the figure, the average district court judge would have conducted 12.9 jury trials in 2007 and 3.7 bench trials in 2008. *See* Administrative Office of the U.S. Courts, Annual Report of the Director, Table 6.3 (2007), Table 4.1 (2008).

[179] *See, e.g.*, Rex R. Perschbacher & Debra Lyn Bassett, *The Revolution of 1938 and Its Discontents*, 61 OKLA. L. REV. 275, 275–76 (2008) (calling the Rules an "innovative set of procedural rules for a court system that was just coming into its own"); John F. Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 WM. & MARY BILL RTS. J. 1, 44 (2013) (describing them as one of the "major legislative event[s] of the twentieth century").

rules denigrated juries."[180] Charles E. Clark (the principal architect of the Federal Rules)[181] disparaged the civil jury, claiming that it "injected an element of rigidity—of arbitrary right—into a system wherein general rules of convenience should prevail."[182] When Fleming James, one of the rule committee's assistants, whittled the core objectives of united procedure down to just three, number two read: "The right of jury trial should not be expanded. This method of settling disputes is expensive, dilatory—perhaps anachronistic. Indeed, the number of jury trials should be cut down if this can be done so as to not jeopardize the attainment of other objectives."[183]

One way the drafters accomplished this was by including a jury-waiver default rule,[184] which was meant to discourage the number of jury trials. Whereas historically a litigant would need to affirmatively request a bench trial, the new rule required a litigant to affirmatively request a jury trial; failure to do so defaulted to a trial by judge.[185] Clark was explicit in noting that under a jury-waiver default regime, judges were more likely to sit without juries since inertia leads to waiver and not to jury trial like under the old system.[186] And as a practitioner noted just four years after the adoption of the federal default rule, "The most effective device yet evolved for effectuating a more limited use of the jury and yet which preserves the constitutional right is that of requiring a party to

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[180] Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 968 (1987).

[181] *See generally* Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914 (1976) (outlining Clark's integral role).

[182] CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 53 (1928).

[183] Fleming James, Jr., *Trial by Jury and the New Federal Rules of Procedure*, 45 YALE L.J. 1022, 1025–26 (1936).

[184] *See* FED. R. CIV. P. 38(d) ("A party waives a jury trial unless its demand is properly served and filed.").

[185] *See* Deborah J. Matties, *A Case for Judicial Self-Restraint in Interpreting Contractual Jury Trial Waivers in Federal Court*, 65 GEO. WASH. L. REV. 431, 442 (1997) (reviewing the history of the jury trial waiver).

[186] *See* Charles E. Clark, *The New Illinois Civil Practice Act*, 1 U. CHI. L. REV. 209, 213 (1933) ("Moreover where a judge is sitting without a jury, as he does more and more when dockets become crowded and jury waiver automatic . . . ."). Clark had studied this and, in other writings, compared empirical data on the number of jury trials in New York and Connecticut, attributing Connecticut's lower rate of jury trials to its automatic waiver rule. *See* Charles E. Clark, *Fact Research in Law Administrations*, 2 CONN. B.J. 211, 226–27 (1928) (noting that "[t]he small number of jury trials and the large number of jury-waived cases is remarkable" when comparing a state like New York to one like Connecticut that implements a jury-waiver rule).

make a timely demand or be deemed to have waived his rights."[187] Automatic waiver allowed the drafters to limit jury trials under the guise of litigant preferences.

Beyond introducing inertia against lay participation, the drafters also limited jury trials by rendering them, essentially, unnecessary through the adoption of procedures previously employed in juryless courts of equity—namely, liberal discovery.[188] Whereas at common law trial was the premier opportunity for the competing sides to share evidence, pretrial discovery practices required by the Federal Rules allowed each side to assess the strength of their case in advance.[189] Under the new discovery rules, litigants could therefore more accurately gauge the value of the case and, as they deemed desirable, enter settlement agreements.[190] The expected and realized result is that most cases settle.[191] As United States Supreme Court Justice Neil Gorsuch pithily acknowledged: "Not long ago, we used to have trials without discovery. Now we have discovery without trials."[192]

The Federal Rules also led to fewer trials by permitting liberal joinder of parties and claims.[193] To make sense of these more complicated proceedings, judges took on a more managerial role.[194]

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[187] Harry W. Henry, Jr., *The Proposed Code of Civil Procedure for Missouri—Parties and Pleadings*, 7 MO. L. REV. 1, 6 (1942).

[188] *See* Alan K. Goldstein, *A Short History of Discovery*, 10 ANGLO-AM. L. REV. 257, 266 (1981) (discussing rule reforms intended to "facilitate wider availability of discovery").

[189] *See* Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—"Much Ado About Nothing?,"* 46 HASTINGS L.J. 679, 690–91 (1995) (describing how the Federal Rules of Civil Procedure caused a shift from "a system in which lawyers were . . . largely unrestrained in their efforts to prevail through surprise at trial" as most evidence was presented for the first time at time to a system of "economy, efficiency, and justice" where "discovery was intended to narrow issues that remained in dispute, equalize knowledge among the parties about the evidence, [and] eliminate trickery or surprise at trial").

[190] *See id.* at 719 ("[D]isclosure [as encouraged by the Rules] would accelerate disposition (including settlement) of cases by getting facts out early and facilitate planning when discovery is necessary by focusing the courts and parties on areas where factual gaps exist.").

[191] Even though many think settlement is a welcome outcome, it is not an unalloyed good. For a discussion of that problem, see generally Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994).

[192] Tony Mauro, *In Speech Notes, Neil Gorsuch Painted a Dark Picture of Litigation*, NAT'L L.J. (Mar. 14, 2017), http://www.nationallawjournal.com/id=1202781242573/.

[193] *See* FED. R. CIV. P. 18–20 (outlining the rules for joinder of parties and claims).

[194] *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 443 (1982) ("[T]he structure of the Federal Rules, with provisions permitting liberal joinder of parties and issues, encourages the problems that in turn invite management.").

In the 1960s, to facilitate case management, the judiciary abandoned master calendars and adopted an individual assignment system such that a single judge handled a case from filing to finish.[195] At the same time, courts issued a handbook instructing judges to adopt a process of extensive pretrial conferencing, which was designed to help judges address discovery disputes and to identify and refine the issues in dispute.[196] And by 1983, the Rules listed "facilitating settlement" as a core objective of pretrial conferencing.[197] Trials were no longer the process of resolving disputes, but rather the result of a breakdown in the settlement process.

Legislation and further rule changes exacerbated these trends in subsequent decades. Enacted in 1996, the Civil Justice Reform Act required all federal district courts to implement "expense and delay reduction plan[s]" to "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes."[198] It promoted case management principles, guidelines, and techniques for courts to adopt, and created a race among judges to dispose of cases as quickly as possible.[199] Anything that short-circuited trial became preferable. Moreover, the 2015 changes to Rule 26 of the Federal Rules of Civil Procedure regarding discovery emphasized the need for discovery to be reasonable and proportionate.[200] These changes were designed, as the Advisory

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[195] *See id.* at 377–78 (discussing the effects of the individual assignment system).

[196] *See Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351, 355 (1960) (setting forth judges' pretrial investigative duties).

[197] *See* Fed. R. Civ. P. 16(a)(5) ("In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as . . . facilitating settlement.").

[198] 28 U.S.C. § 471.

[199] *See generally* JAMES S. KAKALIK, TERENCE DUNWORTH, LAURAL A. HILL, DANIEL F. MCCARRREY, MARIAN OSHIRO, NICHOLAS M. PACE & MARY E. VAIANA, THE INST. FOR CIV. JUST., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996) (analyzing the widespread effects of the Civil Justice Reform Act).

[200] *See* FED. R. CIV. P. 26(b) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.").

Committee Notes to the new rule explain, to place even greater emphasis on taking a managerial approach to judging.[201]

Other explanations for the decline of civil trials focus on more recent interpretations of the Federal Rules, particularly on those Rules governing dispositive motions. The Supreme Court's 1986 trilogy of cases concerning Rule 56 summary judgment, for instance, empowered judges to dismiss cases in which they concluded that no genuine dispute of material fact existed so as to necessitate a trial.[202] The result is that a once rarely used procedure—indeed, once earnestly referred to by a leading scholar as a "toothless tiger"[203]—has had a major impact on the disposition of federal cases. Approximately nineteen percent of federal cases are now resolved by summary judgment.[204] That figure is higher in certain types of cases; for instance, a 2006 study found that courts granted in whole or in part eighty percent of defendants' summary judgment motions in employment discrimination cases.[205]

Roughly twenty years after the Supreme Court judicially-transformed the summary judgment standard, the Court took a similar approach with respect to Rule 12(b)(6)'s motion to dismiss for failure to state a claim. In dual cases, the Court reformed the traditional standard—one that for most of the twentieth century required a plaintiff to provide only "a short and plain statement of

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[201] *See* FED. R. CIV. P. 26 advisory committee notes to 2015 amendment (noting, *inter alia*, that "[t]he parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes").

[202] *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 598–99 (1986) (finding no genuine dispute of material fact because the factual context rendered the claims of the plaintiffs implausible); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986) ("[A] court ruling on a motion for summary judgment must be guided by the . . . clear and convincing evidentiary standard in determining whether a genuine issue of actual malice exists." (internal quotation marks omitted)); Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" (quoting FED. R. CIV. P. 1)).

[203] Arthur R. Miller, *The Pretrial Rush to Judgment*, 78 N.Y.U. L. REV. 982, 1056 (2003).

[204] Joe S. Cecil, Rebecca N. Eyre, Dean Miletich & David Rindskopf, *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 861 (2007).

[205] Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1033.

the claim" showing that the pleader is entitled to relief[206]—to the far more restrictive requirement that plaintiffs plead "enough facts to raise a reasonable expectation that discovery will reveal evidence of [the claim]."[207] The Court tasked trial judges with drawing upon their "judicial experience and common sense" in making that determination.[208] While judges still must accept all well-pleaded allegations as true and credit all logical inferences, they may reject conclusory allegations.[209] Of course, what is conclusory is often in the eye of the beholder. Judges thus now have license to decide for themselves if a plaintiff's claims are sufficiently plausible to allow for further proceedings.[210]

Another explanation for the decline in trials emphasizes the rise of mandatory arbitration. Although the 1925 precursor to what would come to be the Federal Arbitration Act anticipated only agreements between sophisticated actors—such as distant merchants who were increasingly reliant on the nation's railroad networks and desired enforceable private dispute resolution agreements[211]—by the second half of the century, the Supreme Court had dramatically expanded its application to nearly all agreements.[212] Chasing what they hoped to be favorable treatment, powerful economic actors began including binding arbitration

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[206] FED. R. CIV. P. 8(a)(2); *see* Conley v. Gibson, 355 U.S. 41, 47 (1957*)* (reinforcing a literal interpretation of Rule 8(a)(2) as "not requir[ing] a claimant to set out in detail the facts upon which he bases his claim" and that "to the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests"); Lucas F. Tesoriero, *Pre-*Twombly *Precedent: Have* Leatherman *and* Swierkiewicz *Earned Retirement Too?*, 65 DUKE L.J. 1521, 1527 (2016) ("For nearly fifty years after *Conley*, notice pleading was the dominant standard employed by lower courts when assessing a complaint's sufficiency.").

[207] Bell Atl. Corp. v. Twombly*,* 550 U.S. 544, 556 (2007).

[208] Ashcroft v. Iqbal*,* 556 U.S. 662, 679 (2009).

[209] *Twombly*, 550 U.S. at 561.

[210] Some authors have noted how similar the standard for motion to dismiss and summary judgment have become under the Court's *Iqbal-Twombly* standard. *See, e.g.*, Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly*,* 14 LEWIS & CLARK L. REV. 15, 18–38 (2010) (making this comparison and asserting that the "*Iqbal/Twombly* standard is unconstitutional").

[211] *See* Sam Cleveland, Note, *A Blueprint for States to Solve the Mandatory Arbitration Problem While Avoiding FAA Preemption*, 104 MINN. L. REV. 2515, 2520–21 (2020) (explaining how the major supporters of the Federal Arbitration Act in the early 1920s were business groups and commercial organizations and that "[m]uch of the [Act]'s legislative history shows that Congress only contemplated arbitration between businesses").

[212] *See infra* notes 214–216.

clauses in a wide variety of employment and consumer contracts.[213] Much of the case law, especially at the federal level, has developed such that these agreements between actors of disparate sophistication are enforceable even against typical contract defenses such as fraud,[214] illegality,[215] and unconscionability.[216] So widespread has this system of jury-less private adjudication grown that some have called it the "new litigation."[217]

Finally, observers point to tort reform efforts to explain the decline in jury trials in state courts.[218] Specifically, the use of damage caps—both for economic and noneconomic damages[219]—has had a deleterious effect on the rate of public adjudication. Funded

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[213] *See* David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 366–68 (2018) (discussing the effect of widespread arbitration clauses in employment and consumer contracts).

[214] *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–04 (1967) (holding that under the Federal Arbitration Act a court may only consider a claim of "fraud in the inducement of the arbitration clause itself" and not "fraud in the inducement of the contract generally").

[215] *See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006) ("[A] challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.").

[216] *See* Rent-A-Center, West, Inc. v. Jackson, 531 U.S. 63, 71 (2010) ("[T]he basis of [the] challenge [must] be directed specifically to the agreement to arbitrate before the [C]ourt will intervene.").

[217] Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 8.

[218] *See generally* Ronen Avraham, *Database of State Tort Law Reforms* (7.1) (U. Tex. L., L. & Econ. Rsch. Paper No. e555, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=902711 (collecting and sorting the many tort reform measures from around the country); *see also* Joanne Doroshow, *Tort Reform: Blocking the Courthouse Door and Denying Access to Justice*, *in* 2 COLLECTED ESSAYS ON EXPANDING ACCESS TO JUSTICE 57 (2016) (arguing that tort reforms have limited access to justice and reduced jury trials).

[219] The distinction between economic and noneconomic damages is often overstated in the policy and popular discourse. Both forms of damages aim to compensate the victims of private harm by making them whole, rather than to punish tortfeasors for their wrongdoing. Economic damages compensate a victim for more easily calculable losses, such as medical bills, lost income, or property loss. Noneconomic damages compensate a victim for harms that are not readily translated into monetary terms, such as disfigurement or loss of reproductive capacity. For a fuller discussion, see generally Kritzer et al., *supra* note 140. Still, the "calculation of lost wages and future medical care can be hotly contested trial issues." Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391, 439 (2005). As a result, assessing economic damages may oftentimes be just as challenging as determining noneconomic damages.

largely by pro-business interest groups,[220] these tort reform efforts set a maximum value for certain types of injury claims within causes of action for medical malpractice, products liability, and premises liability.[221] These reforms not only arbitrarily supplant the jury as fact-finder of the value of a given dispute, but they also limit litigant's and their attorney's incentive to bring such claims because the costs of litigating certain cases are prohibitive when compared to the chance of receiving artificially limited compensation well below what a judge or jury would find appropriate.[222] As such, these caps simultaneously decrease the number of trials and render jury service less democratically meaningful. Where artificial damage caps are in place, they also destroy the transparency of the jury trial

[220] The insurance industry in particular lobbies vigorously for damage caps or immunity based on false claims of increased claiming, rising jury verdicts, and skyrocketing tort system costs in general, when their proposed solutions have no impact on the problems they identify. *See* Geoff Boehm, *Debunking Medical Malpractice Myths: Unraveling the False Premises Behind "Tort Reform*,*"* 5 YALE J. HEALTH POL'Y, L., & ETHICS 357, 363 (2005) ("The insurance industry, the U.S. Chamber of Commerce, and corporate front groups such as the American Tort Reform Association have spent many tens of millions of dollars in pursuit of immunity or limitations on liability from wrongdoing." (footnote omitted)). In striking down Florida's noneconomic damage caps, the state supreme court observed that, while doctors received no relief from high medical-malpractice insurance premiums, the purported purpose of the cap, insurance companies enjoyed "an increase in their net income *of more than 4300 percent*." Estate of McCall v. United States, 134 So. 3d 894, 914 (Fla. 2014). The caps, then, serve as little more than increased profitability when insurance companies' investments slide downward. *See* Robert B. McKay*, Rethinking the Tort Liability System: A Report from the ABA Action Commission*, 32 VILL. L. REV. 1219, 1219–21 (1987) (discussing how the insurance industry faired from the 1960s through the 1980s).

[221] *See, e.g.*, S.D. CODIFIED LAWS § 21-3-11 (2022) (limiting damages in medical malpractice actions); MICH. COMP. LAWS ANN. § 600.2946a (products liability actions); TEX. CIV. PRAC. & REM. CODE ANN. § 75.004 (West 2021) (certain premises liability suits).

[222] *See* Stephen Daniels & Joanne Martin, *Damage Caps and Access to Justice: Lessons from Texas*, 96 OR. L. REV. 635, 660–71 (2018) ("Ultimately, damage caps will not allow for adequate compensation—enough to compensate the client, cover the lawyer's costs, perhaps a referral fee, and the lawyer's fee."); *see also* Mohammad Rahmati, David A. Hyman, Bernard Black & Charles Silver, *Insurance Crisis or Liability Crisis? Medical Malpractice Claiming in Illinois, 1980–2010*, 13 J. EMPIRICAL LEGAL STUD. 183, 202 (2016) (examining Illinois data and concluding that, with caps, smaller damage cases "all but disappeared" and led to an "increase in mean and median payouts [that] led many to conclude that the med mal system has become more generous to plaintiffs [when] [t]he opposite [was] closer to reality").

because jurors are not informed that their verdicts will be subsequently reduced.[223]

The impact of these explanations on the jury's decline is difficult to measure, both due to their overlapping nature but also due to the lack of data. A 2020 study conducted by Professors Shari Seidman Diamond and Jessica Salerno, and sponsored by the American Bar Association, sought to make sense of these explanations by conducting a national survey of legal professionals on their understanding of why cases no longer proceed to jury trial.[224] They solicited participation from legal professionals across the country by inviting them to complete the online survey anonymously.[225] In total, the study involved 1,460 respondents: "173 judges, 70% state and 30% federal, and 1,282 attorneys, 63% who handle primarily civil cases, 33% who handle primarily criminal cases, and 4% who did not indicate whether they primarily handle civil or criminal cases."[226]

The results of the study are illuminating. They show that among the most commonly accepted reasons among legal professionals for the decline in trials was that "litigants would rather settle than go to trial."[227] Judges particularly felt this way, with 89% of them agreeing or strongly agreeing with that statement; attorneys indicated their agreement, with 63.6% of attorneys agreeing or strongly agreeing that preference for settlement resulted in fewer trials.[228] As Professors Diamond and Salerno note, "[W]hether or not the perception is accurate in describing what most litigants want, it

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[223] *See* Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 355 (1998) (rejecting an argument that the jury's job was completed once it assessed damages, so that the law could then be applied as failing "to preserve 'the substance of the common-law right of trial by jury,'" as required by the Seventh Amendment); Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 223 (Ga. 2010) (holding that a cap that applies once damages are assessed "clearly nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function").

[224] *See* Diamond & Salerno, *supra* note 155, at 120–21 ("The survey was designed to investigate how legal professionals who have firsthand experience with the decisions that lead to or away from jury trials explain the reduction in jury trials in recent years. This Article describes the results from this national survey of 1,460 legal professionals, both attorneys and judges.").

[225] *Id.* at 120–21.

[226] *Id.* at 127.

[227] *Id.* at 128.

[228] *Id.* at 128, 131.

may explain why judges and attorneys encourage—or pressure—litigants to waive trial and accept a settlement . . . ."[229]

The study also measured systemic effects as sources of the reduction in civil jury trials. Respondents were asked to evaluate the effects of five systemic changes: damage caps, mandatory binding arbitration, increases in successful summary judgment motions, increases in successful *Daubert* motions, and increases in successful motions to dismiss.[230] Damage caps and mandatory binding arbitration were identified by respondents as having the greatest influence on reducing trial rates.[231] More than half of all respondents perceived these two features as causing medium or large reductions in the rate of jury trials—61.6% for damage caps and 52.1% for mandatory binding arbitration.[232] A significant proportion of respondents (39.9%) perceived the increased use of successful summary judgment motions as causing a moderate or large reduction in jury trials.[233] In contrast, most respondents saw increases in successful *Daubert* motions and motions to dismiss as having little to no effect in reducing jury trials.[234]

Also of interest, the study assessed how respondents compared jury trials to other modes of dispute resolution, such as bench trials, mediation, and binding arbitration.[235] Respondents viewed jury trials as among the fairest procedures (second only to nonbinding mediation), and the procedure they preferred most.[236] Attorneys who regularly represented either plaintiffs or defendants saw jury trials as fairer overall than bench trials; whereas, perhaps understandably, civil judges saw themselves as fairer than juries.[237]

With that said, respondents also acknowledged that jury trials had certain notable detriments, including that they were perceived as "less predictable, slower, and less cost-effective than alternative

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[229] *Id.* at 131.

[230] *Id.* at 143.

[231] *Id.* at 121.

[232] *Id.* at 144.

[233] *Id.* at 144–45

[234] *Id.* at 145.

[235] *See id.* at 131–39 ("The survey asked civil attorneys and judges to rank four procedures used to resolve civil cases—arbitration, mediation, jury trials, and bench trials—based on their predictability, speed, cost effectiveness, fairness, and the respondent's overall preference for the procedure.").

[236] *Id.* at 121.

[237] *Id.* at 137 fig. 5.

procedures."[238] The authors note that "[t]his pattern suggests that perceived risk, costs, and delay deter the use of jury trials despite their attractiveness on other important dimensions."[239] These perceived detriments are not new and have been seized on to justify critiques and attacks on the institution by powerful economic and political actors with dramatic effectiveness.

B. LEGAL CRITIQUES AND ATTACKS ON THE CIVIL JURY

Judicial and economic elites have hurried the decline of the civil jury brought on by the practices just discussed by sustaining critiques and attacks on the institution. Although civil juries were celebrated in colonial America as well as during the nation's first century as a check on the exercise of arbitrary authority,[240] it inevitably followed that those with influence and clout resented the loss of their natural institutional advantages when decision-making is placed in the hands of more common folk. In fact, "[e]ver since there have been juries or jurylike tribunals . . . there have been attacks on their competence and even calls for their abolition."[241]

The critiques have hardly varied over time. At a time when the public clamor for civil jury trials in the Constitution should not yet have faded, Georgia Chief Justice Joseph Lumpkin observed that, while in "*criminal* proceedings, trial by jury cannot be too highly appreciated or guarded with too much vigilance," "[w]e may, however, after all, *doubt* the *essentiality* of trial by jury in *civil cases*."[242] Among the problems that existed when civil juries were de rigueur, Lumpkin said, was the "time, trouble, and expense" involved.[243] Nearly a century later, particularly around the 1930s, a number of judges, academics, and bar associations soured on civil juries, questioning both their expense and their competence.[244] For

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[238] *Id.* at 121.

[239] *Id.*

[240] *See supra* Section II.A.

[241] Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCH. PUB. POL'Y & L. 788, 789 (2000).

[242] Flint River Steamboat Co. v. Foster, 5 Ga. 194, 206 (1848).

[243] *Id.* at 207.

[244] *See* Stanley E. Sacks, *Preservation of the Civil Jury System*, 22 WASH. & LEE L. REV. 76, 79 (1965) (outlining the history of jury treatment at that time and how authors of "anti-jury ferment" concluded that the "jury system deserved condemnation" due to delay and "incompetence to perform the function assigned to it").

instance, Chief Justice Charles Evans Hughes in 1928 did not mince words in a speech to the Federal Bar Association in New York: "Get rid of jury trials as much as possible. . . . The ideal of justice is incarnated in the judge."[245] Three decades later, many critics continued to express that view, as Harvard Law School Dean Erwin Griswold asked in 1962, "Why should anyone think that twelve persons brought in from the street, selected in various ways, for their lack of general ability, have any special capacity for deciding controversies between persons?"[246]

These various critiques gained a modern-day foothold when the Supreme Court was called upon to decide whether the Seventh Amendment mandated trial by jury in stockholder derivative actions. In *Ross v. Bernhard*, the Court held that the "right to jury trial attaches to those issues in derivative actions as to which the corporation, if it had been suing in its own right, would have been entitled to a jury."[247] The decision relied on the traditional dividing line of which aspects of a case sounded in equity as opposed to those sounding in law.[248] The Court's opinion divided the claims within the lawsuit to reach its conclusion and stated that the answer to the question of when a jury is required "depends on the nature of the issue to be tried rather than the character of the overall action."[249] A footnote attached to that statement explained that one of the three factors that must be taken into consideration to determine the applicability of the jury-trial right was "*the practical abilities and limitations of juries*."[250]

That phrase has only appeared in one other Supreme Court opinion, also in a footnote, where the Court limited its meaning and application to instances where "Congress has permissibly entrusted the resolution of certain disputes to an administrative agency or

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[245] Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL RTS. J. 811, 873–74 (2014) (quoting *Fewer Jury Trials Urged by Hughes: More Power for the Federal Judges Would Improve System, He Says*, N.Y. TIMES, Dec. 7, 1928, at 3).

[246] Hans Zeisel, *The Debate over the Civil Jury in Historical Perspective*, 1990 U. CHI. LEGAL F. 25, 26 (quoting 1962–63 HARVARD LAW SCHOOL DEAN'S REP. 5–6).

[247] 396 U.S. 531, 532–33 (1970).

[248] *See id.* at 533 (discussing case law defining "the line between actions at law with legal rights and suits in equity dealing with equitable matters" (first citing Parsons v. Bedford, 3 Pet. 433, 447 (1830); then *citing* Whitehead v. Shattuck, 138 U.S. 146, 151 (1891))).

[249] *Id.* at 538.

[250] *Id.* at 538 n.10 (emphasis added).

specialized court of equity, and . . . jury trials would impair the functioning of the legislative scheme."[251] Still, the Court's earlier acknowledgement that a practical assessment of a generic jury's capabilities is relevant to determining if the jury right applies to particular issues became a talisman for those who continued to advance the criticism that lay jurors were ill-equipped to make factual findings when the issues were outside the average person's experience.

Even though the Supreme Court itself ascribed little meaning to the footnote's suggestion that the Seventh Amendment was cabined by jurors' presumptively limited abilities, the phrase "practical abilities and limitations of juries" gained wider purchase among other federal courts, appearing in thirty-four federal appellate decisions and 114 district court opinions (yet only a mere fifteen state court opinions).[252] The phrase signaled to those who were dissatisfied with jury verdicts that critiques of civil juries might obtain traction with the courts sufficient to avoid jury trials. Perhaps it is only coincidence, then, that shortly thereafter a corporate public relations campaign took off, telling the public that jurors were unqualified to decide complex and sophisticated issues and tended to let sympathies override reason to reach supposedly unfathomably high verdicts.[253]

As discussed in the previous section, the jury in actuality tends to perform its fact-finding role fairly and admirably.[254] High damage awards in civil jury trials make the news because of their unusual

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[251] Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 n.4 (1989).

[252] *See* Westlaw, https://www.westlaw.com (last visited Sept. 15, 2022) (search "492 U.S. 33"; then navigate to the menu titled "Citing References" and select "Cases"); *see also* Arthur R. Miller, *The Pretrial Rush To Judgment: Are The "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day In Court And Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1104–09 (1997) (discussing the impact of "the Supreme Court's footnote in *Ross v. Bernhard* announcing a three-prong jury-triability test" and providing examples of courts' applications and interpretations of this test).

[253] *See* Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building*, 52 L. & CONTEMP. PROBS. 269, 292 (1989) (outlining how the insurance industry led an effort in the mid-1970s "through advocacy advertising to influence and shape public opinion in cause of civil justice reform" to prevent what it characterized as "ridiculously high jury awards").

[254] *See supra* notes 134–141 and accompanying text (providing evidence that juries and judges tend to award damages at similar amounts and that punitive damages are generally proportional to compensatory damages among other findings which indicate that juries tend to perform their role in regards to damages appropriately).

man-bites-dog quality, but their appearance may lead audience members to overestimate their frequency and in turn causes risk managers to overestimate liability exposure.[255] Looking to tamp down verdicts against their sponsors, corporate groups seized upon these news reports and circulated skewed and fictionalized stories about runaway juries giving large verdicts to undeserving plaintiffs.[256] This skewed rendition of what juries did helped to create a political environment primed for jury-restrictive legislation while blaming plaintiffs' lawyers and juries for a broken civil justice system.[257]

Attacks on civil juries not only encouraged legislation designed to take constitutionally secured prerogatives away from the jury, such as through damage-cap laws, but also influenced judicial thinking and legal doctrine.[258] It caused judges even in some jurisdictions thought to be "plaintiff-friendly" to opine about the problems with juries. For example, the Alabama Supreme Court has noted three frequent criticisms of jurors: "the helplessness and lack of sophistication of jurors obligated to resolve issues in complex

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[255] *See* Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 LAW & HUM. BEHAV. 419, 426, 427 (1996) (presenting findings that media portrayals of damages depict higher awards of damages than actually occur in most cases and indicating that such portrayals "provide[] a dubious basis for sound decision making"); Steven Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes*, 1998 WIS. L. REV. 237, 250 ("The availability heuristic also suggests that when decisionmakers consider liability risk they often substantially overestimate it. Contributing to this are high-visibility liability episodes such as unusually large awards, punitive damages, and liability when injury causation is disputed by respected authorities.").

[256] For a comprehensive debunking of the tall tales that were circulated, see generally Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System,* 40 ARIZ. L. REV. 717 (1998) (providing empirical data and detailing the facts of lawsuits in which large damages were awarded and those same facts as portrayed by corporate groups).

[257] *See, e.g.*, THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 26 (2002) ("The notoriety of tort litigation, combined with the powers of persuasion of corporate and professional interests, has put personal injury lawsuit reform at the top of the antilitigation agenda."); STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 20–21 (1995) (describing the political clout, resources, and propaganda utilized to sell the ideas of runaway juries and a system out of whack).

[258] *See* Shaakirrah R. Sanders, *Deconstructing Juryless Fact-Finding in Civil Cases*, 25 WM. & MARY BILL RTS. J. 235, 257 n.160 (2016) (explaining how a "core dispute among states is the scope of state legislative power to alter or replace the jury's determination of the value of an injury" using damage-cap laws and citing several state court decisions evaluating such laws).

litigation;" jurors' overcompensation of "injured tort victims for noneconomic damages;" and the "'unbridled' discretion jurors enjoy in imposing massive punitive damage awards."[259] The West Virginia Supreme Court of Appeals expressed a similar sentiment when it asserted that "[c]ourts understand that juries operate on largely emotive principles and that jury awards can be substantially in excess of what judges, educated in law as a science, would award in similar circumstances."[260] Yet empirical research establishes that judges and jurors tend to reach similar conclusions about liability,[261] compensatory damages,[262] and punitive damages.[263]

Perhaps there is no better example of how this campaign influenced judicial doctrine than in the area of punitive damages. To understand, it is important to stress that the Seventh Amendment both preserves civil trial by jury as it was practiced under the English common law at the time when the Bill of Rights was added to the Constitution and also prohibits reexamination of facts determined by a jury.[264] The English common law recognized that "the jury are judges of the damages."[265] Thus, if damage assessment was committed to the jury's determination, judges have no authority to substitute their own numbers for the jury's.[266] Nor do legislatures in common-law causes of action.[267] Since at least

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[259] Cent. Ala. Elec. Coop. v. Tapley, 546 So. 2d 371, 376 (Ala. 1989).

[260] Roberts v. Stevens Clinic Hosp., Inc., 345 S.E.2d 791, 803 (W. Va. 1986).

[261] *See* VIDMAR & HANS, *supra* note 127, at 148–52 (2007) (presenting research findings that judges and juries agreed on liability "in about four out of five cases").

[262] *See id.* at 299–302 (presenting findings that jurors and judges "thought about the relative severity of the injuries in remarkably similar ways" and generally awarded approximately the same amount of compensatory damages).

[263] *See* Theodore Eisenberg, Neil LaFountain, Brian Ostrom, David Rottman & Martin T. Wells, *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 779 (2002) ("Juries and judges award punitive damages at about the same rate, and their punitive awards bear about the same relation to their compensatory awards.").

[264] U.S. CONST. amend. VII.

[265] Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353 (1998) (quoting Lord Townsend v. Hughes (1677) 86 Eng. Rep. 994, 994–95 (C.P.)).

[266] *See* Hetzel v. Prince William Cnty., 523 U.S. 208, 211 (1998) (per curiam) (stating that the Seventh Amendment's "prohibition on the reexamination of facts determined by a jury" bars a court from substituting its own "estimate of the amount of damages" for the damages as determined by the jury).

[267] *See, e.g.*, Hilburn v. Enerpipe Ltd., 442 P.3d 509, 524 (Kan. 2019) (holding that the Kansas Constitution Bill of Rights disallows statutory noneconomic damage caps); Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 636 (Mo. 2012) (en banc) (deciding that statutory

1851, the Supreme Court has recognized that the jury's preeminent role in assessing punitive damages was so well established that "the question will not admit of argument."[268]

Despite this constitutional history, and the infrequency with which punitive damages were awarded,[269] a campaign developed in the 1980s that caught the Supreme Court justices' eyes.[270] Businesses used a comprehensive array of press releases to highlight outlier punitive damage verdicts, portraying them as typical.[271] These tall tales, such as the highly publicized McDonald's "hot coffee" case, were further circulated by politicians hoping to score points with a well-heeled constituency.[272] Insurers and business groups bemoaned the bet-the-company consequences of an

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noneconomic damage caps infringes on the right to trial by jury guaranteed by the Missouri Constitution); Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 220 (Ga. 2010) (finding that noneconomic damage caps violate the Georgia Constitution); Moore v. Mobile Infirmary Ass'n., 592 So. 2d 156, 164 (Ala. 1991) (holding that statutorily limiting noneconomic damages violates the Alabama Constitution); Sofie v. Fibreboard Corp., 771 P.2d 711, 712 (Wash. 1989) (en banc) (deciding that noneconomic damage caps violate the Washington Constitution). Oddly, while not overruling *Watts*, the Missouri Supreme Court subsequently held that when the legislature codifies the common law and adds a damage cap, it removes the issue from the purview of the state constitution's "inviolate" right to trial by jury. Ordinola v. Univ. Physician Assocs., 625 S.W.3d 445, 449–51 (Mo. 2021) (en banc). The decision, thus, permits the legislature to restrict the authority of a civil jury even if such a ploy would not be valid under the Seventh Amendment. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 (1989) (relying on the legal-equity dichotomy to determine if the issue was committed to a jury's determination).

[268] Day v. Woodworth, 54 U.S. 363, 371 (1851).

[269] *See* THOMAS H. COHEN & KYLE HARBACEK, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STATS., PUNITIVE DAMAGE AWARDS IN STATE COURTS, 2005, at 1 (2011), https://www.bjs.gov/content/pub/pdf/pdasc05.pdf (reporting that "[p]unitive damages were awarded in 700 (5%) of the 14,359 trials where the plaintiff prevailed" and that the "median punitive damage award for the 700 trials with punitive damages was $64,000 in 2005").

[270] *See* PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 3–10 (1988) (describing a supposedly rampant increase in tort suits and damage awards). *But see* Mark M. Hager, *Civil Compensation and Its Discontents: A Response to Huber*, 42 STAN. L. REV. 539, 547, 579 (1990) (pointing out fallacies in figures used by Huber).

[271] *See* Stephen Daniels & Joanne Martin, *Jury Verdicts and the Crisis in Civil Justice*, 11 JUST. SYS. J. 321, 325 (1986) (describing the "horror story" public relations campaigns that big businesses ran).

[272] *See* Deborah Jones Merritt & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315, 316 (1999) ("Politicians exchange tales of the psychic who recovered a million dollars from her doctor, claiming that a CAT scan destroyed her psychic powers, and stories of the woman who won several million dollars from McDonald's after spilling a cup of coffee on herself.").

adverse punitive damages verdict, paid for studies that often utilized problematic methodologies to support the campaign's viewpoint,[273] and cited these studies and unfiltered examples from news reports in Supreme Court certiorari petitions and briefs[274] with a plea that unrestricted punitive damages constituted a form of excessive fines or violated due process.[275]

The Supreme Court initially resisted entreaties to apply a constitutionally based limit on punitive damages.[276] However, usual swing-Justice Sandra Day O'Connor bemoaned "skyrocketing" punitive damage awards and their supposed adverse effect on product innovation,[277] apparently accepting the false portrayal of out-of-control juries. It was not long before a majority of the Court shared Justice O'Connor's sentiment; it held that due process placed a constitutional limit on "grossly excessive" punitive damages, relying on vague and subjective guideposts[278] and whether the size of the punitive damages "raise[s] a suspicious judicial eyebrow."[279]

After subjecting punitive damage verdicts to a due-process override, the natural next question was what to do when punitive damages were unconstitutionally excessive. Should the question be resubmitted to the jury, or should a judge choose the amount? The answer depends on whether the Seventh Amendment applies. The constitutional history was clear; juries are "judges of the

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[273] *See* Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 14 (1990) (describing press kits and publicity tactics highlighting tales and anecdotes about punitive-damage verdicts,); *see also* Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1298 (2005) ("Much of what is asserted about the nature of punitive damages is untrue, unknown, or stitched together from questionable sources.").

[274] *See, e.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471, 501 n.17 (2008) (declining to rely upon Exxon-funded studies that used "mock juries" to demonstrate the unpredictability of punitive damage awards and describing the studies as part of "a body of literature running parallel to anecdotal reports").

[275] *See* Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 276–78 (1989) (finding that the due-process argument was not preserved and rejecting the applicability of the Excessive Fines Clause).

[276] *Id.* at 280.

[277] *Id*. at 282 (O'Connor, J., concurring in part and dissenting in part) (citing HUBER, *supra* note 270, at 152–71).

[278] *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–75 (1996) (holding that the degree of reprehensibility, the disparity of harm and award, and sanctions in comparable cases are the controlling factors).

[279] *Id*. at 583 (quoting TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 481 (1993) (O'Connor, J., dissenting)).

damages."[280] But the Supreme Court adopted a fiction to conclude that judges could replace the jury's determination with their own. It declared that compensation was the type of fact reserved for a jury's determination and that, although punitive damages previously served a compensatory purpose, they no longer did.[281] Instead, the Court said that punitive damages were the jury's "expression of its moral condemnation" of egregious misconduct and not a factual determination.[282] By reclassifying the jury's role with respect to punitive damages, the Court opened the door to revision of the verdict by both trial and appellate judges. Without any change in constitutional language and disregarding the longstanding regard of punitive damages as separate and above compensation,[283] the Court limited the jury's role in determining punitive damages and increased the role of judges.[284]

Years later, the Court considered newly collected data and concluded that the empirical assumptions underlying this jurisprudential change were not well grounded. As the Court recognized, "[T]he most recent studies tend to undercut much of [the criticism of punitive damages]."[285] Moreover, research "reveals that discretion to award punitive damages has not mass-produced runaway awards."[286] Rather than the bill of goods they had been sold, the Justices conceded that the data revealed "an overall restraint" on the part of juries.[287] The die, however, had been cast.

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[280] Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353 (1998) (quoting Lord Townshend v. Hughes (1677) 86 Eng. Rep. 994, 995 (C.P.)).

[281] *See* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432, 437, 437–38 n.11 (2001) ("Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries . . . .").

[282] *Id.* at 432.

[283] *See* Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101, 107 (1893) (recognizing that punitive damages are awarded "not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others"); *see also* Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 164 (2003) ("[I]t would be at best anachronistic (and at worst misleading) to say that punitive damages served primarily a compensatory function in the early years of American tort law . . . .").

[284] *See Cooper Indus.*, 532 U.S. at 431 (holding that appellate courts must review the constitutionality of punitive damages awards under a de novo standard, rather than the less intensive "abuse of discretion" standard).

[285] Exxon Shipping Co. v. Baker, 554 U.S. 471, 497 (2008).

[286] *Id.*

[287] *Id.* at 498–99.

Judges would scrutinize and adjust punitive damage verdicts after the fact, rendering the jury's determination more advisory.

The transformation of the jury's role with respect to punitive damages followed a strategic blueprint that has successfully transformed the law in other areas where juries have historically played a constitutionally consecrated role as well. Step one is to appeal to the idea that jurors lack the sophistication necessary to assess complex information and give in too easily to emotion. Then, having established a level of agreement with that proposition, step two is to advocate for changes that limit the jury's scope.

For instance, another area where this blueprint succeeded is the increased authority of judges over expert evidence. First, the critics argued that juries could not be expected to understand complex scientific or other technical evidence from experts.[288] Second, giving examples of juries siding with seemingly incredulous expert testimony that was purposely presented in a damning light as "junk science,"[289] a call was made to rethink the rules that would admit such evidence.[290] And, as with punitive damages, the Court

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[288] *See, e.g.*, Daniels, *supra* note 253, at 280 ("[J]uries are not competent to decide issues in complex, lengthy trials . . . [as] jury attention span decreases in long trials, especially antitrust, products liability, or medical malpractice cases, which entail complicated evidence . . . [and] [j]uries are likely to be misled, or confused in such cases by . . . technical evidence, thereby eliminating any chance for a fair, rational decision. . . . Uninformed, gullible lay jurors may accept expert testimony uncritically, ignore it, or just not understand it at all."); Edward J. Imwinkelried, *Judge Versus Jury: Who Should Decide Questions of Preliminary Facts Conditioning the Admissibility of Scientific Evidence?*, 25 WM. & MARY L. REV. 577, 580 (1984) (contending that jurors are "incompetent to evaluate scientific proof critically"); Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 505 (1975) (questioning ability of jurors in complex antitrust or shareholder suits).

[289] PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 1–6 (1991). The basis for the claim that junk science was overrunning the courts was authoritatively refuted by other writers. *See* Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 AM. U. L. REV. 1637, 1642 (1993) ("*Galileo's Revenge* and its author have received heavy publicity and have been treated by lawyers as well as laypeople as if they *were* part of legitimate scholarship on these issues . . . .").

[290] *See, e.g.*, Peter Huber, *Junk Science and the Jury,* 1990 U. CHI. LEGAL F. 273, 278, 302 (1990) (calling for a change to "reduce the amount of science that juries must decide for themselves" because of the continuing problems of "junk science" as "juries sometimes accept factual claims that mainstream scientists categorically reject"). *But see* Robert Blomquist, *Science, Toxic Tort Law, and Expert Evidence: A Reaction to Peter Huber,* 44 ARK. L. REV. 629, 652 (1991) (finding Huber's arguments to limit scientific evidence admitted to juries

succumbed to the criticism and created a gatekeeper role so that judges would prevent juries from hearing certain expert testimony previously deemed admissible.[291] To accomplish that result, the Court read the existing rule in a new way. The relevant rule on expert evidence states that such testimony is admissible if its probative value helps the jury understand a fact at issue,[292] such as whether exposure to a toxic chemical caused the plaintiff's injury.

For years, under the previous standard, courts had admitted expert testimony to help the jury connect the dots when the evidence provided was "generally accepted" within the expert's field.[293] However, because of how quickly science advances, this general-acceptance standard was presented as failing to keep up with new research.[294] To address that concern, the Court reinterpreted the expert evidence rule to permit the admission of novel scientific evidence so long as it was based on scientifically acceptable methodologies.[295] On its face, the change appeared to liberalize the admissibility of expert evidence. Yet, at the same time, in adopting the new standard, the Court also enhanced the gatekeeper role that judges play in deciding the expert-evidence admissibility question.

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unpersuasive because his "vision expects too much of mainstream scientific testimony in an area where too little expert consensus exists" and "expects too little of our common law heritage" including judge and jury prerogatives in furthering equity and social justice).

[291] *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592 (1993) ("Faced with a proffer of expert scientific testimony, then, *the trial judge must determine* at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." (emphasis added) (footnote omitted)).

[292] *See* FED. R. EVID. 702(a) ("A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if . . . the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue . . . .").

[293] *See* Frye v. United States, 193 F. 1013, 1014 (D.C. Cir. 1923) ("[W]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.").

[294] *See* Frederick B. Lacey, *Scientific Evidence*, 24 JURIMETRICS J. 254, 265 (1984) ("[T]he *Frye* jurisdictions will always lag behind the advances of science while they wait for novel scientific techniques to gain 'general acceptance.'").

[295] *See Daubert*, 509 U.S. at 588 (discarding the traditional "general acceptance" test for admissibility of expert opinion evidence).

The corporate public-relations machine then again moved into high gear, proclaiming a great victory against "junk science."[296] Conferences, articles, and continuing legal education programs emphasized the judges' gatekeeper role in keeping expert evidence from coming before a jury, rather than the broader admissibility of new or novel science.[297] Judges' understanding of the new precedent aligned with that publicity.[298] The result was a more restrictive approach to expert evidence that ended up frequently constricting juries in the discharge of their constitutionally assigned role as fact-finders. As with punitive damages, the empirical evidence did not catch up in time. Studies do not bear out the inaccurate caricature of juries completely befuddled by scientific evidence.[299]

C. A CULTURE DISCOURAGING OF CIVIL JURY TRIALS

The artificial barriers constructed through legislation, rules, and judicial doctrine have significantly diminished the uses and prevalence of jury trials. Meanwhile, other developments, such as budgetary crises, have compounded the problem and further diminished juries.[300] If not for a cultural predilection that believes juries are not a core component of our democratic structure and instead are luxuries that are expensive, antiquated, and unnecessary, years-long postponements of civil jury trials would not be seen as a solution to nearly every subsequent crisis faced by society.

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[296] For a description of these efforts, see Allan Kanner & M. Ryan Casey, Daubert *and the Disappearing Jury Trial*, 69 U. PITT. L. REV. 281, 296–97 (2007).

[297] *See* Robert S. Peck & Erwin Chemerinsky, *The Right to Trial by Jury as A Fundamental and Substantive Right and Other Civil-Trial Constitutional Protections*, 96 OR. L. REV. 489, 508–09 (2018) (describing how the *Daubert* Test has increased pretrial attacks on experts).

[298] *See* Kanner & Casey, *supra* note 296, at 283 (recognizing that, rather than liberalize admission of scientific evidence, *Daubert* accomplished "the exact opposite").

[299] *See, e.g.*, Richard Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 235 (Robert E. Litan ed., 1993) ("[T]he weight of the evidence indicates that juries can reach rationally defensible verdicts in complex cases.").

[300] *See* RICHARD Y. SCHAUFFLER & MATTHEW KLEIMAN, THE BOOK OF THE STATES, STATE COURTS AND THE BUDGET CRISIS: RETHINKING COURT SERVICES 2010, at 289 ("Like other public institutions, courts in many states are thrust into crisis mode, and forced to respond by creating immediate savings through reducing services, closing courthouses, [and] suspending jury trials in civil cases.").

Examples abound. Tightened state budgets have resulted in court systems deferring civil jury trials despite state constitutional promises against "unnecessary delay" and an "inviolate" right to a jury trial.[301] For more than a decade, states have cut overall budgets, resulting in reductions of money allocated to state courts by as much as twenty percent.[302] New Hampshire started this money-crunching trend by suspending civil jury trials.[303] In California, where the courts have been hit hard by budget cuts, the 2021 budget contained an increase in court funding, but was insufficiently large such that the legislature's budgetary analysis arm projected that they would still need to reduce expenditures by a minimum of fifty million dollars in 2021–22.[304] As an expensive item for trial courts, civil jury trials may well be suspended—again. Similarly, Florida faced an overall budget deficit of $5.4 billion in 2020, while its courts estimated that nearly one million more cases would be added to trial courts' dockets by mid-2021.[305] All that is to say, funding courts is a choice. And the policy of cutting budgets and insufficiently funding courts is part of a broader, growing notion that civil trials can be easily discarded if done in furtherance of some vague notion of efficiency.[306]

The COVID-19 pandemic has further exposed this cultural disposition to devalue the jury and exacerbated the effects. Health concerns have required courts to adjust their approaches to conducting jury trials to ensure public safety, but courts around the country largely took the approach of simply refusing to hold civil

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[301] *See, e.g.*, WASH. CONST. art. I, §§ 10, 21 (respectively).

[302] *See* SCHAUFFLER & KLEIMAN, *supra* note 300, at 289 ("In the 2010 fiscal year, 40 state court budgets were cut . . . . The cumulative cuts have reached as high as 20 percent of the court budget . . . .").

[303] *Id*. at 290; *see also* Abby Goodnough, *Jury Trials to Be Halted in One State Feeling Pinch*, N.Y. TIMES (Dec. 8, 2008), https://www.nytimes.com/2008/12/09/us/09court.html ("The Superior Court . . . in New Hampshire will take the unusual step of halting jury trials . . . because of a widening state budget crisis.").

[304] *See* THE 2021–22 BUDGET: TRIAL COURT OPERATIONS PROPOSALS, CAL. LEGIS. ANALYST'S OFF. (Feb. 11, 2021), https://lao.ca.gov/Publications/Report/4362 ("[T]he expiration of $50 million in one-time funding provided in the current year means that trial courts could need to reduce expenditures by at least a further $50 million in 2021–22.").

[305] Andrew Strickler, *State Court Budget Forecast: Stormy, with Rising Case Backlogs*, LAW360 (Nov. 23, 2020), https://www.law360.com/articles/1331216/state-court-budget-forecast-stormy-with-rising-backlogs.

[306] *See* Peck & Chemerinsky, *supra* note 297, at 493 (recognizing that "[t]hese movements away from jury trials [are] often in the name of efficiency").

jury trials rather than find ways to make it work.[307] Like many states, New Mexico instituted a suspension of jury trials in response to surging COVID-19 cases at the end of 2020 and only began those trials again on February 1, 2021.[308] The federal court system acted similarly, with the Administrative Office of U.S. Courts reporting in November 2020 that "[a]bout two dozen U.S. district courts have posted orders that suspend jury trials."[309] The result left hundreds of thousands civil cases languishing in a standstill and has discouraged litigants from bringing new cases, leading to a looming backlog of cases some estimate to number in the millions.[310]

Though as of this writing, many state and federal courts have reopened, the more than a year of courts treating civil jury trials as expendable has had both short-term and long-term effects. Among the federal appellate courts, only the Ninth Circuit held that the suspension of jury trials for lack of funds violated the Seventh Amendment's guarantee.[311] And the COVID-19 Omicron variant's emergence in the winter of 2021 again caused many courts to shutter their doors to civil jury trials, demonstrating the unpredictability of a pandemic.[312]

In the short term, the decision to forgo civil jury trials creates significant backlogs, which further causes court systems to look for ways to cut corners to reduce the number of cases requiring juries because of the time and resources needed. The public loses its

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[307] *See, e.g.*, Ed Spillane, *The End of Jury Trials: Covid-19 and the Courts: The Implications and Challenges of Holding Hearings Virtually and in Person During a Pandemic from a Judge's Perspective*, 18 OHIO ST. J. CRIM. L. 537, 538 (2021) ("[T]he ability to hold jury trials has almost completely grounded to a halt since March 2020.").

[308] Order in the Matter of the Amendment of the New Mexico Judiciary Public Health Emergency Protocols for the Safe and Effective Administration of the New Mexico Judiciary During the COVID-19 Public Health Emergency, No. 20-8500-042, at 17 (N.M. Dec. 14, 2020).

[309] *Courts Suspending Jury Trials as COVID-19 Cases Surge*, U.S. CTS. (Nov. 20, 2020), https://www.uscourts.gov/news/2020/11/20/courts-suspending-jury-trials-covid-19-cases-surge.

[310] *See* ROBINSON & GIBSON, *supra* note 51 ("[O]ver a million cases that were not filed in 2020 could make their way into the courts . . . . [T]his speaks to the need to address growing backlogs in civil courts . . . .").

[311] *See* Armster v. U.S. Dist. Ct. for the Cent. Dist. of Cal., 792 F.2d 1423, 1430 (9th Cir. 1986) ("[W]e conclude that the Seventh Amendment right to a civil jury trial is violated when, because of [budgetary] suspensions, an individual is not afforded, for any significant period of time, a jury trial he would otherwise receive.").

[312] *See supra* note 47 and accompanying text (detailing the effect of the Omicron variant on state and federal courtroom closures in California).

opportunity to be involved in resolving disputes during a time when it is perhaps most necessary that it be involved. And in the long-term, lay participation atrophy sets in, leading litigants and jurists to believe that their business does not require the public's scrutiny.[313] Even more people will be driven to private adjudication services,[314] further diminishing the number of jury trials. With jury trials now a rarity, few new lawyers will learn the art of trying a case before a jury, thereby creating a persistent cycle of lawyers opting not to go the jury route because they lack the skillset and familiarity needed for success before a panel.[315]

The cost to society if this culture and decline are not reversed will be substantial. Recall an observation Alexis de Tocqueville made in a preface to his book, *Democracy in America*:

> If the lights that guide us ever go out, they will fade little by little, as if of their own accord. Confining ourselves to practice, we may lose sight of basic principles, and when these have been entirely forgotten, we may apply the methods derived from them badly; we might be left without the capacity to invent new methods and only able to make a clumsy and an unintelligent use of wise procedures no longer understood.[316]

It is critical that the benefits of the civil jury and jury service be fully appreciated, and that we take appropriate action to revive it, less the institution's light be fully extinguished. American

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[313] *See* James M. Chadwick & Gary L. Bostwick, *Images of Fair Use: A Fair Use of Jury Trial*, 24 COMMC'NS L. 11, 18 (2006) (explaining public scrutiny's role in the court system).

[314] *See* Smith & MacQueen, *supra* note 163, at 33 (noting that even prior to the pandemic an increasing number of cases were being resolved through private adjudication).

[315] Some judges have grown particularly concerned with this phenomenon and have adopted "Junior Attorney Rules" encouraging litigants to give standup roles to attorneys with less than five years' experience. *See, e.g.*, CHIP'S NEXT GEN COMM., JUDICIAL ORDERS PROVIDING/ENCOURAGING OPPORTUNITIES FOR JUNIOR LAWYERS (2016), https://nextgenlawyers.com/wp-content/uploads/2013/04/Judicial-Orders-re-Next-Gen-6-13-16.pdf (noting that Judge Lucy Koh, Northern District of California, "strongly encourages parties to permit less experienced lawyers to examine witnesses at trial and to have an important role at trial").

[316] TOCQUEVILLE, *supra* note 22, at 464.

democratic renewal might lie through restoring the promises of the civil jury.

IV. RESTORING THE DEMOCRATIC PROMISE OF THE CIVIL JURY

Given the centrality of the civil jury in the United States' constitutional structure,[317] as well as the benefits the jury offers for the administration of civil justice and society more broadly,[318] the severe decline and disuse of the institution should give us pause. Exalting the role of judges in resolving disputes at the cost of excluding people from meaningful civic participation has rippling consequences. It disinvests the public in the success of the Republic, suggesting to individuals that the state operates without them. As Plato warned over a two millennia ago, "[I]n private suits, too, as far as is possible, all should have a share; for he who has no share in the administration of justice, is apt to imagine that he has no share in the state at all."[319] America's recent turn toward abandoning its democratic principles might be course-corrected by reinvesting the public in civil dispute resolution.

To do so, it is imperative that active measures be taken to revive the institution to its once premier role. Critically, these strategies should not be based on speculation or misrepresentation of the jury or jurors, but instead on empirical support and research to ensure that the benefits of lay judicial participation are more fully realized. Drawing on such research, we offer here the following six recommendations designed to (A) remove barriers to civil jury trials to make them more likely to occur when parties so desire, and (B) promote better civil jury fact-finding to ensure more accurate dispute resolution. Strengthening the institution so as to encourage inviting the public back into the courthouse can help loosen that coddling mindset that a private dispute and its just resolution belongs solely to the litigants.

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[317] *See supra* Section II.A.

[318] *See supra* Section II.B.

[319] Plato, *Laws IV 768*, *in* 2 THE DIALOGUES OF PLATO 529 (B. Jowett trans., Random House ed., 1937).

A. REMOVING BARRIERS TO CIVIL JURY TRIALS

The first step for reviving the civil jury as an institution so that it might again contribute to renewing America's commitment to democratic self-governance is ensuring that all litigants who desire a jury trial are able to receive one. The sociopolitical benefits of jury service can only result if trials actually occur and if jurors are called upon to determine the outcome. The following three research-based recommendations are designed to remove barriers to civil jury trials and thereby lower costs associated with employing juries. These include (1) returning to a civil jury-trial default rule; (2) repealing statutory restrictions on jurors calculating damages; and (3) experimenting with procedural arrangements to lower the costs to litigants and society associated with employing civil juries.

1. Adopt a Jury-Trial Default Rule. One of the easiest ways to restore the civil jury as a meaningful component of the judiciary is for courts to readopt a jury-trial default rule. This means that litigants would receive a civil jury trial unless they affirmatively waived their right to one, as opposed to the current approach taken in federal and most state jurisdictions in which litigants must affirmatively demand a civil jury trial.[320] As noted above, the current waiver default was adopted purposefully by drafters motivated by anti-jury animus in order to limit the number of jury trials.[321] Now-Supreme Court Justice Neil Gorsuch and U.S. Court of Appeals for the Ninth Circuit Judge Susan Graber have argued in support of the proposal because reverting back to a jury-default approach would accomplish three main goals: (1) "encourage jury trials;" (2) increase "simplicity;" (3) result in "greater certainty," particularly for pro se litigants and in cases removed from state courts; and (4) "honor[] the Seventh Amendment more fully."[322]

The automatic waiver rule was adopted at the federal level in 1938 concomitantly with the merger of courts of law and equity, and it has remained largely unchanged since then.[323] But it is important

[320] *See supra* notes 187–188.

[321] *See supra* notes 180–187 and accompanying text.

[322] HON. NEIL GORSUCH & HON. SUSAN GRABER, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, MEMORANDUM: 16-CV-F (June 13, 2016), https://www.uscourts.gov/sites/default/files/16-cv-f-suggestion_gorsuch_0.pdf.

[323] The only changes have concerned at what time the litigant need to make the demand. *See* FED. R. CIV. P. 38 advisory committee notes ("The times set in the former rule at 10 days have been revised to 14 days.").

to note that nothing about merged courts necessitates this approach to the jury. A number of state judiciaries merged their courts in the mid-nineteenth century without requiring litigants to affirmatively demand a jury trial.[324] But as the trend toward merged courts spread in late nineteenth century, so too did broad antipathy toward the jury.[325] Following the Civil War, the jury-waiver rule grew as a popular tool for limiting the frequency of jury trials while, at least formally, securing the institution's position within the new courts.[326] It was this trend that the drafters of the Federal Rules latched onto as a mechanism to sideline the jury in 1938.[327] So common did this approach become over the twentieth century that today only Georgia, Minnesota, Mississippi, Missouri, and Oregon broadly maintain jury-trial default rules in most of their civil courts.[328]

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[324] New York, after merging their courts in 1846, was the first state by statute to allow litigants to waive their right to a civil jury trial, but such waiver could only occur in three ways: "(1) by failing to appear at the trial; (2) by written consent, in person or by attorney, filed with the clerk; or (3) by oral consent in open court, entered in the minutes." Act of Apr. 12, 1848, ch. 379, § 221, 1848 N.Y. Laws 497, 538. It did not require an affirmative jury demand. *Id.*

[325] As Justice Lumpkin of the Supreme Court of Georgia noted in 1848: "[I]t is notorious, that modern law reform, both in England, and in this country, seeks . . . to dispense, as much as possible with juries. A jury is never to be invoked, unless specially demanded by one of the parties." Flint River Steamboat Co. v. Foster, 5 Ga. 194, 207 (1848). He added further that this approach "is a vast saving of time, trouble, and expense, to suitors and the country," though recognized that there might be broader detriments. *See id.* ("Whether these considerations should outweigh the advantages resulting from a personal participation, by every citizen, in the practical administration of public justice, it does not become me to say.").

[326] For an excellent review of the migration of the Field Code across the country in the nineteenth century, which served as a model for many states, see Kellen Funk & Lincoln A. Mullen, *The Spine of American Law: Digital Text Analysis and U.S. Legal Practice*, 123 AM. HIST. REV. 132, 132–33 (2018).

[327] *See supra* notes 186–187 and accompanying text.

[328] *See* O.C.G.A. §§ 9-11-38 to -39 (2007) ("The right of trial by jury as declared by the Constitution of the state or as given by a statute of the state shall be preserved to the parties inviolate."); MINN. R. CIV. P. 38.01 ("[T[he issues of fact shall be tried by a jury, unless a jury trial is waived or a reference is ordered."); MISS. R. CIV. P. 38(a)) ("The right of trial by jury as declared by the Constitution or any statute of the State of Mississippi shall be preserved to the parties inviolate."); MO. SUP. CT. R. 69.01 01 ("The right of trial by jury as declared by the Constitution or as given by a statute shall be preserved to the parties inviolate."); OR. R. CIV. P. 51(c) ("The trial of all issues of fact shall be by jury unless . . . ."). Some states, such as Nebraska, have different default rules for different types of courts. *See, e.g.*, Jacobson v. Shresta, 849 N.W.2d 515, 519 (Neb. 2014) (noting that the Nebraska constitution "provides

Restoring the jury-trial default rule could have a number of positive consequences for the jury and the administration of civil justice. For one, it could increase the number of civil jury trials conducted. As legal scholars James Pike and Henry Fisher succinctly noted in 1940, "[Under the waiver rule] the formula has been changed from inertia = jury trial, to inertia = no jury trial."[329] Flipping that equation back could have the opposite effect. There is robust economic literature on the power of default rules to nudge actors toward preferred outcomes while preserving their freedom to choose alternative options.[330] That is, the default rule would not inhibit those litigants who wish to have a bench trial, but it would instead impose a small cost (in the form of an affirmative action) for them to do so.

Moreover, adopting the rule would prevent the inadvertent waiver of a significant constitutional right. This is particularly true for low-information litigants, who are most likely to be affected by default rules.[331] But it would also be implicated in cases removed to federal court under Federal Rule of Civil Procedure 81(c)(3).[332] That rule and its dizzying exceptions have been criticized as "poorly crafted" with "needless complexity," and has been called a "trap for the unwary."[333] A jury-default rule could greatly simplify this

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the constitutional right to a jury trial" in that "[t]he right of trial by jury shall remain inviolate, but the Legislature may authorize trial by a jury of a less number than twelve in courts inferior to the District Court, and may by general law authorize a verdict in civil cases in any court by not less than five-sixths of the jury" (quoting NEB. CONST. art. 1, § 6)).

[329] James A. Pike & Henry G. Fisher, *Pleadings and the Jury Rights in the New Federal Procedure*, 88 U. PA. L. REV. 645, 647 (1940).

[330] *See* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 10 (2008) (arguing that in formulating default rules, "[t]here is . . . no way of avoiding nudging in some direction, and whether intended or not, these nudges will affect what people choose.").

[331] *See* CASS R. SUNSTEIN, CHOOSING NOT TO CHOOSE: UNDERSTANDING THE VALUE OF CHOICE 7 (2015) (discussing that effect of default rules on low information actors).

[332] *See* FED. R. CIV. P. 81(c)(3) (requiring that, in removed actions, "[a] party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal," but "[i]f the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so"; and going on to require that "[i]f all necessary pleadings have been served at the time of removal," a party must demand a jury trial "within 14 days after it files a notice of removal" or "it is served with a notice of removal," with failure to do so resulting in waiver).

[333] 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2334 (4th ed. 2022) (collecting judicial criticisms of Rule 81(c)); *see also* Susan M. Halpern,

process, ensuring litigants that they can readily receive a federal jury trial regardless of the status of the case at the time of removal. While those scholars who have studied the jury-default proposal differ on their conclusions as to the degree that the proposal would increase the number of jury trials, basic economics suggest it would have at least some positive impact.[334]

But even if reverting to the original rule failed to substantially increase the number of jury trials, it is still a worthwhile proposal for its symbolic significance. Procedural rules reflect the virtues of the societies that adopt them.[335] The current jury-waiver rule reflects the erroneous notion that common law courts can largely operate at their full potential without the democratic insights of the governed. It suggests to litigants and the society more generally that the civil jury is but one of many options for dispute resolution, rather than a central and favored component of the constitutional structure. Justice Gorsuch and Judge Graber are correct in suggesting that readopting a jury-default rule "honors the Seventh Amendment more fully."[336] The rule would better reflect the systemic value and virtue of the jury as a nonexpendable part of the American system of government, and it would nudge litigants toward that socially desirable outcome.

2. Remove Damage Caps. Another tool to lower barriers to the use of civil juries, so that they may once again serve their emboldening sociopolitical role, is to remove statutorily imposed restrictions on their fact-finding—specifically, damage caps. The Supreme Court has made it clear that a damage calculation is a fact reserved for

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Federal Rule 81(c) and Jury Demand in a Removed Action: A Procedural Trap for the Unwary, 47 ALA. L. REV. 623, 638 (1983) (discussing how the result of this rule is "widespread judicial inconsistency" and that litigants unaware of the rule "unintentionally waive[] their right to a jury"); *see also* Richard Lorren Jolly, *Toward A Civil Jury-Trial Default Rule*, 67 DEPAUL L. REV. 685, 695 (2018) (discussing the complexity of Rule 81(c)(3) and the different approaches taken by circuit courts in addressing it).

[334] *Compare* Jolly, *supra* note 333, at 694 (arguing that a jury-trial default is unlikely to result in substantially more jury trials), *with* David Crump, *A Response to the Jury Default Proposal: Court Dockets, Jury Trials, and Finding the Best Solution*, 38 REV. LITIG. 239, 241–43 (2019) (arguing that the change is likely to substantially increase the number of jury trials).

[335] *See, e.g.*, JOHN P. DAWSON, A HISTORY OF LAY JUDGES 1 (1960) (arguing that the structure and organization of courts are influenced by, among other things, "the alternative or competing means by which group decisions could be made," and that these "are a product and a reflection of many forces in society").

[336] GORSUCH & GRABER, *supra* note 322, at 73.

the jury's determination.[337] Allowing legislatures and judges to displace jurors in that fact-finding role has dramatic consequences as to the practicable ability for some litigants to bring certain causes of action.

As the Diamond-Salerno study previously cited shows, artificial caps on damages undermine the availability of jury trials by changing the "practical and economic realities of mounting a jury trial."[338] When a plaintiff's attorney must finance the costs of the litigation and take into account the uncertainty of a return on the investment for both the client and counsel's time,[339] as one Texas lawyer colorfully put it: "You're talking about a lot of money, and—in other words—it makes the juice not worth the squeeze."[340] Restricting the authority of civil jurors effectively restricts entire causes of action.

Noneconomic damage caps make it particularly problematic to move forward in a legitimate case for those who are unlikely to have significant lost wages or income that might ameliorate a cap's effect.[341] As a result, retirees, children, full-time caregivers, and those living in poverty may be unable to seek compensation in states with capped damages because the litigation's costs will often exceed

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[337] *See* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc. 532 U.S. 424, 437 (2001) (noting that "the measure of actual damages suffered . . . presents a question of historical or predictive fact" within the province of the jury)*; see also* St. Louis, Iron Mountain & S. Ry. Co. v. Craft, 237 U.S. 648, 661 (1915) (holding that the amount of damages to be awarded is "only a question of fact" and is within the power, duty, and responsibility of the lower court).

[338] Diamond & Salerno, *supra* note 155, at 144.

[339] The contingency fee embodies this approach to financing litigation, in which the lawyers' services and expenses will only be collected if the client prevails. *See* City of Burlington v. Dague, 505 U.S. 557, 561 (1992) ("Under the most common contingent-fee contract for litigation, the attorney receives no payment for his services if his client loses."). For most potential plaintiffs who lack the means to self-finance litigation, the contingency fee is their "key to the courthouse." *See, e.g.*, Sneed v. Sneed, 681 P.2d 754, 756 (Okla. 1984) ("[C]ontingent fees are still the poor man's key to the courthouse door [and] allows persons who could not otherwise afford to assert their claims to have their day in [c]ourt." (footnote omitted)); Philip H. Corboy, *Contingency Fees: The Individual's Key to the Courthouse Door*, 2 LITIG. 27, 28 (1976) ("[The plaintiff] must obtain representation without a requirement that he pay for it out of already depleted recourses.").

[340] Daniels & Martin, *supra* note 222, at 660.

[341] In some states, however, damage caps limit total damages—economic and noneconomic—and may not even compensate fully for medical expenses caused by the tortious conduct. *See, e.g.*, COLO. REV. STAT. § 13-64-302 (2005); IND. CODE § 34-18-14-3 (2017); LA. REV. STAT. ANN. § 40:1231.2 (2015); NEB. REV. STAT. § 44-2825 (2014); VA. CODE ANN. § 8.01-581.15 (2011).

the potential recovery.[342] The cap also discriminates against groups that have historically received lesser wages because of their gender or minority status, rendering their noneconomic damages a larger proportion of their compensatory damages.[343] As Professor Lucinda Finley contends in discussing those she calls "the hidden victims of tort reform": "[W]omen, minorities, and the poor receive lesser amounts of economic loss compensation than more economically well off white men," and "wage projection data . . . are explicitly race and gender based, building on the assumption that past race and gender wage disparities will remain ensconced in the future."[344] Damage caps exacerbate social inequality in the courthouse.

The simple solution to these problems is to repeal the caps[345] and thereby restore the civil jury's constitutional authority over fact-finding. This would not destroy the economy as some pro-business interests have argued.[346] Damage caps have not been shown to have any positive effect on, for instance, the availability or affordability of health care—the most frequent justification offered by their proponents.[347] Instead, damage caps create significant obstacles to jury trials and access to the courts. Their removal could thus increase the number of jury trials and, what is more, reflect a trust

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[342] *See* Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1265, 1305 (2004) (discussing disparate impacts resulting from damages caps).

[343] *Id.* at 1280.

[344] *Id.*

[345] Courts are split on whether damage caps in common-law causes of action violate constitutional jury trial guarantees. *Compare* Hilburn v. Enerpipe Ltd., 442 P.3d 509, 524 (Kan. 2019) ("Regardless of whether an existing damages cap is technically or theoretically applied as a matter of law, the cap's effect is to disturb the jury's finding of fact on the amount of the award. Allowing this substitutes the Legislature's nonspecific judgment for the jury's specific judgment."), *with* Siebert v. Okun, 485 P.3d 1265, 1277 (N.M 2021) (holding that, once a jury "returns a verdict based on its factual findings," the "legal consequence of that verdict is a matter of law, which the Legislature has the authority to shape [by reducing damages to a statutory limit]").

[346] *See supra* note 38 and accompanying text.

[347] *See, e.g.*, BERNARD S. BLACK, DAVID A. HYMAN, MYUNGHO PAIK, WILLIAM M. SAGE & CHARLES SILVER, MEDICAL MALPRACTICE LITIGATION 211–23 (2021) (finding no evidence that damage caps positively affect physician supply); Myungho Paik, Bernard Black & David A. Hyman, *Damage Caps and the Labor Supply of Physicians: Evidence from the Third Reform Wave,* 18 AM. L. & ECON. REV. 463, 463 (2016) (same); David A. Hyman, Charles M. Silver, & Bernard S. Black & Myungho Paik, *Does Tort Reform Affect Physician Supply? Evidence from Texas*, 42 INT'L REV. L. & ECON. 203, 217 (2015) (same).

in Americans to govern themselves fairly, while keeping with constitutional principles.

3. Expand Procedural Experimentation. Restoring the jury to its position within the constitutional structure does not require pretending that nothing has changed since 1791. Another way to revive civil jury trials is to expand the use of alternative procedural tracks, such as expedited jury trials, which allow speedy access to community input, as well as remote or virtual jury trials, as solutions to the current public health crisis.[348] Such experimentation, however, should only be widely adopted if it can maintain the key benefits of lay judicial participation. As the Supreme Court has recognized, "[N]otions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government."[349] Any experimentation must live up to those motivating concepts.

Consider first expedited jury trial projects, which offer an alluring solution for bringing the public back into the jury box. Courts have recognized that for some litigants, the time and cost of a full civil jury trial can be prohibitive, deterring them from exercising their right to seek community judgment of their disputes.[350] In the 1990s, states around the country began to address the problem by experimenting with expedited jury trials.[351] These alternative trial procedures offer abbreviated jury trials designed to resolve factually and legally straightforward cases with lower-value damages quickly, often in a single day.[352] The specifics of these procedures differ meaningfully among jurisdictions, though they often involve a trial before fewer than twelve jurors, mandatory

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[348] *See, e.g.*, Robert A. Patterson, *Reviving the Civil Jury Trial: Implementing Short, Summary, and Expedited Trial Programs*, 2014 BYU L. REV. 951, 951 (discussing how expedited jury trials can be a means of reviving civil jury trials).

[349] Glasser v. United States, 315 U.S. 60, 85 (1942).

[350] *See* Patterson, *supra* note 348, at 960 (stating that expedited jury trials are attempts at making the process speedier and less expensive).

[351] *See* PAULA L. HANNAFORD-AGOR, NAT'L CTR. FOR STATE CTS., SHORT, SUMMARY & EXPEDITED: THE EVOLUTION OF CIVIL JURY TRIALS 23 (2012) ("The short trial program in the Maricopa County Superior Court allows civil litigants to opt for a streamlined jury trial as an alternative to mandatory arbitration or as an appeal from an unfavorable arbitration decision.").

[352] *See id.* at 24 ("Most short trial cases are lower-value personal-injury cases, especially automobile torts involving soft-tissue injuries.").

damage caps or high-low agreements, and the jury's verdict may or may not be binding on the parties.[353]

Make no mistake, as currently designed, these projects are not an ideal solution to America's democratic woes. They cut against the full benefits of lay judicial participation by limiting the responsibility of jurors to resolve whole factual disputes, at times operate with as few as four jurors, and do not require unanimity.[354] However, there are certain benefits. By ensuring court access and limiting incentives to overinvest in litigation, litigants and the judiciary receive many of the benefits of jury trials while avoiding some of the commonly observed detriments.[355] Moreover, shorter trials may prove less of a hardship, financial and otherwise, on the people serving as jurors, thereby allowing for a greater diversity of voices to be represented.[356] And if the programs were modified to require full juries of twelve—which better represent the community and are more reliable fact-finders compared to smaller bodies—expedited trials could prove significantly valuable in jumpstarting the institution while not discarding the democratic and administrative benefits of lay judicial participation.[357]

Another option is to explore the potential benefits of remote or virtual civil jury trials.[358] In the spring of 2020, the COVID-19 pandemic led many courts to shift to online proceedings.[359] For

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[353] *See generally id.* (comparing expedited and summary jury trial projects around the country).

[354] *See id.* at 6 (citing the Maricopa County, Arizona Superior Court Short Trial Program, which involved a four-person jury selected from a ten-person panel with a verdict requiring only three votes).

[355] *See id.* at 4 (noting that the short-trial programs were designed to address concerns about "uncertainty, delay, and expense" of a typical jury trial).

[356] For a discussion on how these burdens limit juror diversity, see generally Anna Offit, *Benevolent Exclusion*, 96 WASH. L. REV. 613 (2021) ("[T]he routine dismissal of citizens who face economic hardship excludes not only people but also the diversity of ideas, experiences, and frames of interpretation that characterize the American population.").

[357] *See supra* Section II.B.

[358] *See* Valerie P. Hans, *Virtual Juries*, 71 DEPAUL L. REV. 301, 301 (2022) [hereinafter Hans, *Virtual Juries*] (examining how virtual jury trials may affect "the issues of jury representativeness, the adequacy of virtual jury selection, the quality of decision making, and the public's access to jury trial proceedings").

[359] For state court perspectives on online proceedings, see NATIONAL CTR. FOR STATE CTS., JUDICIAL PERSPECTIVES ON ODR AND OTHER VIRTUAL COURT PROCESSES, https://www.ncsc.org/__data/assets/pdf_file/0018/42912/2020-07-27-Judicial-Perspectives-002.pdf. For current federal court procedures, see *Court Orders and Updates During COVID-*

many courts and lawyers, a virtual jury trial, in which jury selection, trial proceedings, and jury deliberation are all conducted online, was a bridge too far.[360] Commentators analyzing the prospect of virtual jury trials expressed concerns about whether the quality of justice would be compromised.[361] A small number of courts, however, embarked on virtual jury trials, primarily in civil cases.[362] For example, as of March 2021, the Superior Court in King County, Washington, had conducted more than 300 virtual civil trials, including a significant number of civil jury trials.[363] Courts in Arizona, California, Florida, and Texas also have undertaken virtual civil jury trials, with generally positive evaluations.[364] As courts reopened their buildings for business, many began to schedule in-person jury trials (with masks and social distancing) rather than experiment with the novel option of virtual jury trial proceedings.[365] But as we noted earlier, a substantial backlog and continuing health issues related to COVID-19 have led to substantial delays in scheduling civil jury trials and fraught

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19 Pandemic, U.S. CTS, https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic; *see also* Herbert B. Dixon, Jr., *Pandemic Potpourri: The Legal Profession's Rediscovery of Teleconferencing*, 59 ABA JUDGES' J. 37 (2020) (discussing the switch to virtual court proceedings).

[360] *See, e.g.*, TAYLOR BENNINGER, COURTNEY COLWELL, DEBBIE MUKAMAL & LEAH PLACHINSKI, STANFORD CRIM. JUST. CTR., VIRTUAL JUSTICE? A NATIONAL STUDY ANALYZING THE TRANSITION TO REMOTE CRIMINAL COURT 5–12 (2021) (expressing access to justice concerns about remote criminal case proceedings).

[361] *See* Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFFALO L. REV. 1275, 1280 (2020) (analyzing the potential risks to justice created by the use of virtual jury trials).

[362] *See* Sozi Tulante, Kimberly Branscome & Emily Van Tuyl, *Demystifying the Virtual Civil Jury Trial Experience*, LAW360 (Apr. 29, 2021) https://www.law360.com/articles/1379757/demystifying-the-virtual-civil-jury-trial-experience ("During the pandemic, formats of civil jury trials have varied widely, and have included fully in-person trials—with participants maintaining social distance and wearing personal protective equipment—as well as fully virtual trials and hybrid approaches.").

[363] *See* Matt Markovich, *King County Court Shifts to Virtual Trials, Potentially Changing Future of Courtrooms*, KOMO NEWS (Mar. 4, 2021), https://komonews.com/news/local/king-county-superior-court-shifts-to-virtual-trials-chips-away-at-massive-case-backlog ("[T]he court has done over 300 virtual civil trials and at least eight criminal trials, all over Zoom.").

[364] *See* Hans, *Virtual Juries*, *supra* note 358, at 310–13 (summarizing virtual jury trial experimentation in these courts and noting that beyond some technical issues, the cases "proceeded well").

[365] *See, e.g.*, Bill Rankin, *Ga. Courts Try to Keep Jury Trials Going Despite COVID-19 Delta Surge*, THE ATLANTA-J. CONST. (Aug. 18, 2021) (explaining how some judges require masks and distancing in returning to the courtroom).

experiences when jurors, witnesses, or litigants become sick during their trials.[366]

Virtual civil jury proceedings—for part or all of the trial—could help reduce the backlog and avoid the negative health consequences of assembling with large numbers of others during the pandemic. Several judges who participated in virtual jury trials observed that when jury selection was conducted virtually, and with assistance and alternatives for those who had limited or no access to the required technology, it appeared that the panels were as diverse or more diverse than in-person jury selection panels.[367] The prospective jurors who participated in virtual jury selection expressed overall favorable reactions to the experience as well.[368] Of course, we still need to know more about how the virtual character of the trial affects the jury's evaluation of evidence and witnesses, participation by jurors who lack their own remote access, and the robustness of the jury deliberation.

If we take care to implement these procedural innovations in a way that ensures representative and high-quality citizen participation, the benefits may outweigh the detriments. Put simply, having some jury trials is better than having no jury trials. And given the ongoing impact of COVID-19, expedited or virtual jury trials could provide methods for managing the backlog of civil cases in a way that provides some, albeit a more limited, space for community involvement. Expedited jury trials provide a way to address the concerns of those litigants who, correctly or incorrectly, believe that even during non-pandemic times that jury trials are too slow, risky, and expensive.[369] And virtual jury trials offer a safer way to give voice to the community in the resolution of societal disputes during a pandemic. Critically, in our view, until we are assured that these alternative procedures do not compromise justice, they should be optional and not forced on those litigants who desire traditional jury trial procedures.

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[366] *See supra* notes 46–49 and accompanying text.

[367] *See* Hans, *Virtual Juries*, *supra* note 358, at 310–13 (reporting judges' favorable observations about jury panel diversity in virtual proceedings).

[368] *See id*. at 311 (concluding that "[o]n the whole, participants gave positive feedback about the experience").

[369] Diamond & Salerno, *supra* note 155, at 121 (discussing the "risk, costs, and delay" associated with jury trials).

B. PROMOTING FAIR AND ACCURATE JURY FACT-FINDING

To better realize the democratic promise of the civil jury, the institution itself must be a desirable form of dispute resolution. If litigants do not trust jurors, they will avoid them in favor of alternative arbiters and venues. As such, in order to revitalize the jury, strategies for increasing the already strong fairness and accuracy of jury fact-finding should be adopted. The following research-based recommendations can help make litigants more confident in the outcomes of their disputes while also ensuring that the jury as an institution continues to fulfill its constitutionally anticipated sociopolitical role.

1. Ensure Representative Juries. The jury that decides a civil trial is drawn from a jury venire, ideally one that constitutes a representative cross-section of the community. Earlier we discussed the multiple benefits of representative juries.[370] Our laws do not guarantee a representative trial jury, but they do require courts to assemble representative venires from which those juries are picked.[371] Even so, in many jurisdictions, jury venires still fall short of fully reflecting the community.[372] And the COVID-19 pandemic has made summoning a representative cross-section of the population even more challenging. This is disturbing considering that diverse juries engage in more robust and thorough fact-finding.[373] Vigorous deliberation can give voice to people with differing perspectives to debate their views and arrive at a verdict that incorporates multiple perspectives in the community. Perhaps

[370] *See supra* Section II.B.

[371] *See* NANCY GERTNER, JUDITH H. MIZNER & JOSHUA DUBIN, THE LAW OF JURIES 34–35 (11th ed. 2020) ("First, litigants have the right to grand and petit juries selected at random from a fair cross-section of the community in the district or division where the court sits. Second, all citizens have the opportunity to be considered for service on grand and petit juries and have the obligation to serve as jurors when summoned.").

[372] *See, e.g.*, VALERIE P. HANS, POUND CIV. JUST. INST., CHALLENGES TO ACHIEVING FAIRNESS IN CIVIL JURY SELECTION 7–12 (2021) [hereinafter HANS, CHALLENGES TO ACHIEVING FAIRNESS], https://www.poundinstitute.org/wp-content/uploads/2021/06/2021-Pound-Forum-Paper-Valerie-Hans.pdf. (summarizing evidence of failures to achieve jury representativeness in civil jury trial); Shari Seidman Diamond & Valerie P. Hans, *Fair Juries*, U. ILL. L. REV. (forthcoming) (examining causes of the lack of representativeness in jury trials).

[373] *See supra* note 123 and accompanying text.

for that reason, diverse juries are seen as more legitimate.[374] Therefore, we urge courts to take multiple steps to modify jury selection procedures to ensure the fullest possible community representation.

Multiple reasons for underrepresentation call for multiple remedies.[375] The first place to begin is the sources of the names of community residents that courts use to generate master jury lists. Information collected by the National Center for State Courts (NCSC) shows that states use diverse sources to populate their master jury lists.[376] Even today, some jurisdictions rely upon a single source list such as the voters list, or combine multiple lists that still fall short of fully including the jury-eligible population.[377] The results are jury pools that are less than fully reflective of the community.[378] One of the most important ways to promote fuller representation is to use multiple source lists. Doing so has been identified as "perhaps the most significant step" that courts can use to maximize the representativeness of the master jury list.[379] But

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[374] *See* Leslie Ellis & Shari Siedman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1039 (2003) (discussing the costs of unrepresentative juries).

[375] *See* SHARI SEIDMAN DIAMOND, POUND CIV. JUST. INST., JUDICIAL RULEMAKING FOR JURY TRIAL FAIRNESS 5–12 (2021), https://www.poundinstitute.org/wp-content/uploads/2021/06/2021-Pound-Forum-Paper-Shari-Seidman-Diamond.pdf (recommending actions to promote jury pool representativeness); *see also* Ellis & Diamond, *supra* note 374 (recommending a two-pronged approach to developing impartial juries).

[376] GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, NAT'L CTR. FOR STATE CTS., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT (2007), https://www.ncscjurystudies.org/__data/assets/pdf_file/0016/5623/soscompendiumfinal.pdf. NCSC resources on fair cross-section law and summoning practices may be found at https://www.ncsc-jurystudies.org/what-we-do/fair-cross-section.

[377] *See* William Caprathe, Paula Hannaford-Agor, Stephanie McCoy Loquvam & Shari Seidman Diamond, *Assessing and Achieving Jury Pool Representativeness*, 55 ABA JUDGES' J. 16 (2016) (describing how to assess and improve representativeness of master jury lists); *see also id.* at 18 (recommending that the master jury list should include at least eighty-five percent of the jury-eligible population).

[378] *See* VIDMAR & HANS, *supra* note 127, at 76–79 (2007) (describing points in the jury selection process that contribute to decreases in jury representativeness); HANS, CHALLENGES TO ACHIEVING FAIRNESS, *supra* note 372, at 11–12 (describing a study that found how nonresponses to jury qualification questionaries and summonses threatened representative jury venires).

[379] Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 780 (2011).

the efforts should not stop there. Courts need to continually update their master lists, at least annually, recognizing that a significant number of residents regularly move into and out of the jurisdiction.[380]

Representativeness is also affected by nonresponse to the jury summons.[381] Perhaps the most common reason for this is that the jury summons was never received in the mail.[382] However, at least some of the nonresponse is likely due to people's reluctance to participate as jurors. And the COVID-19 pandemic has introduced new challenges to courts that attempt to seat fully representative juries, whether they are traditional in-person jury trials or remote virtual jury trials.[383] Multiple follow-ups to jury summonses have been shown to reduce the nonresponse rate.[384] Something as simple as a follow-up postcard sent within a few weeks of the initial nonresponse significantly increases the likelihood of the citizen responding.[385] Some reformers have also proposed redesigning the jury summons with messaging that stresses the positive and emboldening aspects of jury service, rather than the punitive results that may flow from a failure to respond, as a way to increase yield rates.[386] A jury will only be as diverse as the venire from which it is chosen.

As for in-court jury selection, the voir dire process in which prospective jurors are questioned about whether they can be fair and impartial jurors also affects jury representativeness. Evidence that attorneys in both civil and criminal cases exercise their peremptory challenges along racial lines has led some states to take

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[380] *See* Caprathe et al., *supra* note 377, at 18 ("The master jury list should be updated at least annually").

[381] *See id.* at 19 ("Nonresponse and FTA [(Failure to Appear)] rates contribute to underrepresentation of minorities in the jury pool.").

[382] *See id.* at 18 (noting that "12 percent of jury-related mailings are returned by [the United States Postal Service] as undeliverable").

[383] *See* HANS, CHALLENGES TO ACHIEVING FAIRNESS, *supra* note 372, at 13 (describing how health problems and access to technology may undermine jury pool representativeness).

[384] *See* Caprathe et al., *supra* note 377, at 19 ("[T]he most effective post-hoc strategy for minimizing nonresponse/FTA rates is a second notice/second summons program.").

[385] *See id.* ("The most effective follow-up programs are those that follow up within three weeks after the person's nonresponse/FTA and that are consistently administered.").

[386] *See* D.C. JURY PROJECT COMM., JURY SERVICE REVISITED: UPGRADES FOR THE 21ST CENTURY, COUNCIL FOR CT. EXCELLENCE 9 (2015) ("The DC Jury Project believes that if positive reinforcement is provided[,] . . . a greater percentage of jurors will be eager to serve in the future . . . .").

innovative approaches, ranging from California's[387] and Washington State's[388] new strategies for handling potentially race-based peremptory challenges, to Arizona's elimination of peremptory challenges entirely.[389] These states will serve as laboratories, allowing scholars and policy makers to examine the extent to which such innovations affect justice and fairness in jury trials and to propose further strategies accordingly.

In a very real sense, although jury duty is technically obligatory, it is more accurately seen as a voluntary activity in the court's work. Failing to respond to a jury summons, developing good-enough excuses for excusal, answering questions during voir dire in such as a way as to suggest bias—there are multiple ways that one can avoid serving.[390] So, we also need to consider developing effective community outreach efforts that explain not only the nuts and bolts of jury duty and what to expect, but also that emphasize the central importance of jury service to our democracy through outreach into the community. Some jurisdictions have begun celebrating the first week of May as Juror Appreciation Week, with programs and advertisements to "educat[e] the public about the judicial system, enhance public awareness of the importance of jury service, and appreciation to citizens who perform their civic duty"—with

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[387] *See* CA. CODE OF CIV. P. § 231.7 (2021) (establishing a procedure for reviewing exercises of peremptory challenges requiring the party to show "by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's [membership in a protected class]" and defining "objectively reasonable person" as someone that is "aware that unconscious bias, in addition to purposeful discrimination, have resulted in unfair exclusion of potential jurors in the State of California").

[388] *See* WASH. R. GEN. 37 (2018) (establishing a procedure for reviewing exercises of peremptory challenges requiring the court to determine whether "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge," and defines an "objective observer" as someone who is aware of "implicit, institutional, and unconscious biases").

[389] Order Amending Rules 18.4 and 18.5 of The Rules of Criminal Procedure, and Rule 47(E) of The Rules of Civil Procedure, No. R-21-0020 (Ariz. Aug. 30, 2021). For a discussion on the potential benefits associated with abolishing peremptory challenges, see generally Hon. Morris B. Hoffman, *Peremptory Challenges Should be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809 (1997).

[390] Step-by-step instructions for "getting out of" jury service are readily available online. *See, e.g.*, Jacob Maslow, *How to Legally Get Out of Jury Selection in 2022?*, LEGAL SCOOPS (Jan. 27, 2022), https://www.legalscoops.com/how-to-legally-get-out-of-jury-selection-in-2022/.

promising results.[391] Adopting and expanding such efforts can help increase the diversity of the summons's yield and boost the institution's reputation as a democratic body.[392]

2. Return to Twelve-Person Civil Juries. Related to the above, the jury's size coincides with its ability to represent the community. Larger juries are much better able to reflect the range of diverse backgrounds, experiences, and viewpoints in a community.[393] The decisions that many jurisdictions have made to reduce the civil jury's size from the traditional number of twelve have also reduced the ability of today's civil juries to fully represent the local community.[394] Judge Patrick Higginbotham, Judge Lee Rosenthal, and Professor Steven Gensler surveyed the frequency of different jury sizes in federal district courts, discovering that in recent years the most common size was an eight-person civil jury.[395] Research on jury size shows that there are strong reasons to recommend twelve-person juries: the decisions of larger juries are more representative, more reliable, and less influenced by outlier juror preferences.[396]

An interesting study by Professor Shari Diamond and her colleagues shows the crucial way in which the jury's size directly

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[391] Taylor Simpson-Wood, *The Rise and Fall of Bad Judge: Lady Justice Is No Tramp*, 17 TEX. REV. ENT. & SPORTS L. 1, 29 (2015) (internal quotation marks omitted); *see also* ABA COMM'N ON THE CIV. JURY, JUROR APPRECIATION KIT https://www.americanbar.org/content/dam/aba/administrative/american_jury/juror_kit_part_1.pdf (contending that implementing Juror Appreciation Week can help to "[r]einforce public confidence in the justice system, [i]mprove communication with jurors and employers, [and] [d]isseminate an important and positive message to the public about jury service").

[392] *See, e.g.*, Caprathe et al., *supra* note 377, at 19 (contending that "educat[ing] the public about the consequences of failing to appear" may improve appearance rates, and higher appearance rates "will improve the inclusiveness and representativeness" the jury pool).

[393] *See Jury Size: Does It Matter?*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/newsroom/at-the-center/2022/jury-size-does-it-matter (last visited Sept. 14 (2022) ("Smaller juries are often less diverse and less likely to accurately represent their communities.").

[394] *See* Shari S. Diamond, Destiny Peery, Francis J. Dolan & Emily Dolan, *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. EMPIRICAL LEGAL STUD. 425, 425 (2009) [hereinafter Diamond et al., *Achieving Diversity*] ("[J]ury size had a substantial effect on minority representation.").

[395] *See* Patrick E. Higginbotham, Lee H. Rosenthal & Steven S. Gensler, *Better by the Dozen: Bringing Back the Twelve-Person Civil Jury*, 104 JUDICATURE 46, 49–50 (2020) (studying jury size in fifteen district courts during 2016–18 and finding that 61.4% of civil juries in these district courts were eight-person juries).

[396] *See id.* at 51–53 (summarizing the empirical research).

affects its ability to fully represent the community.[397] Observing the use of peremptory challenges and jury composition in 277 Chicago-area civil juries of different sizes, Professor Diamond and her collaborators found that peremptory challenges by both sides were associated with prospective jurors' race. Defense attorneys challenged more black prospective jurors, whereas plaintiffs' attorneys challenged fewer black jurors.[398] The patterns of their challenges offset, so that the overall jury pool's composition were not significantly affected by the race-based peremptory challenges.[399] However, the jury's size was significantly related to its representativeness.[400] Just two percent of the twelve-person juries had no black members, while twenty-eight percent of the six-person juries had no black members.[401] The authors concluded that the "change most likely to promote diversity on the jury is a return to the jury of 12."[402]

In addition to its positive effect on jury representativeness, research also documents the superior fact-finding ability of larger juries. It is said that "[t]welve heads are better than one"; and empirical jury research confirms that insight.[403] So too does ancient wisdom. As Aristotle explained:

> Taken individually, any one of these people is presumably inferior to the best person. But a city consists of many people, just like a feast to which many contribute, and is better than one that is one and simple. This is why a mob can also judge many things better than any single individual.[404]

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[397] *See* Diamond et al., *Achieving Diversity*, *supra* note 394, at 449 (showing that jury size is more significant than exercises of peremptory challenges in jury diversity).

[398] *See id.* at 440 ("Plaintiffs removed fewer blacks, fewer females, and wealthier jurors; in stark contrast, defense attorneys removed more blacks and poorer jurors.").

[399] *See id.* at 436 (describing a "tiny" effect).

[400] *See id.* at 443 (noting the "precipitous drop" in representation when jury size decreases).

[401] *Id.* at 442 tbl.6.

[402] *Id.* at 426.

[403] Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205 (1989). For empirical research on jury size, see Hans, *The Power of Twelve*, *supra* note 124, at 8 (summarizing research); Higginbotham et al., *supra* note 395, at 51–54 (summarizing arguments and evidence in favor of larger jury size).

[404] ARISTOTLE, POLITICS bk. III § 1286(a) at 77 (C.D.C. Reeve trans., Hackett Publ'g Co. 2017) (c. 384 B.C.E.)).

In short, jurors are clearly "better by the dozen."[405]

A final point in favor of larger juries is that jury service encourages civic engagement and the legal system's legitimacy.[406] As Judge Higginbotham and his colleagues note: "In this era of declining jury-trial rates, we should fill every jury chair we can, every chance we get. Every empty jury chair is a missed opportunity to strengthen the bonds between the people and the courts."[407] Yet many jurisdictions use juries of six or eight persons, even for high profile and significant civil cases.[408] The original motivation was undoubtedly one of efficiency, coupled with the belief that smaller juries were likely to be quite similar to larger juries in their fact-finding.[409] Smaller juries cost somewhat less to manage; fewer community members need to be summoned; and the total amounts paid out in juror fees are lower.[410] But the modest time savings and logistical benefits that might accrue from smaller juries are outweighed by the increased representativeness and the superior fact-finding of twelve-person juries, which has now been well-documented.[411] The dramatic declines that we have noted in civil jury trials suggest that whatever savings might have accrued previously from the use of smaller juries is likely even more modest today.[412]

Judge Higginbotham and his colleagues propose one immediate solution for the federal courts. They suggest that federal judges use

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[405] There is some judicial appetite at the Supreme Court for returning to twelve-person juries, at least in the criminal context. *See* Khorrami v. Arizona, No. 21-1553, 2022 WL 16726030, at *1 (Nov. 7, 2022) (Gorsuch, J. dissenting from the denial of certiorari) ("[*Williams v. Florida*, 399 U.S. 78 (1970), upholding the use of six-person criminal juries,] was wrong the day it was decided, it remains wrong today, and it impairs both the integrity of the American criminal justice system and the liberties of those who come before our Nation's Courts.").

[406] See *supra* Section II.B.*2*.

[407] Higginbotham et al., *supra* note 395, at 53.

[408] *See id.* at 47, 50 (recounting the small jury size in the cases with the largest damage awards in federal courts in 2019 and identifying that "four out of every five civil juries begin[s] with nine or fewer members").

[409] *See, e.g.*, ERICA J. BOYCE, NAT'L CTR. FOR STATE CTS., TIME TO REFLECT: HAS THE RESEARCH CHANGED REGARDING THE IMPORTANCE OF JURY SIZE? 3 (2021) (discussing the arguments and evidence about the cost effectiveness of smaller juries).

[410] *See id*. (examining and challenging arguments on cost effectiveness of smaller juries).

[411] Higginbotham et al., *supra* note 395, at 53 ("Larger juries are better than smaller juries in ways important to the process and the product.").

[412] *See* BOYCE, *supra* note 409, at 3 (examining and then challenging prior research on cost effectiveness of smaller juries).

their discretion to seat twelve-person juries, pointing out that Rule 48 of the Federal Rules of Civil Procedure allows judges latitude in the size of the civil jury that will hear the case: "A jury must begin with at least 6 and no more than 12 members . . . ."[413] Judges need not obtain agreement from the parties to seat larger juries.[414] The preferences of litigants, while certainly important, should not be given automatic priority over the systemic interests of the court's legitimacy.[415] In some state courts, judges may have no discretion if state court rules specify civil juries of a particular size.[416] We urge the legal community and lawmakers to act now to change laws, rules, and practices to once again mandate twelve-person civil juries. A change to larger juries is a straightforward and effective way to underscore a commitment to the importance of diversity and inclusion in the legal system.

3. Adopt Active Jury Reforms. Civil jury trial procedures currently seem to be based on an image of the jury as a quiescent, passive group of citizens. Jurors are instructed to refrain from talking to one another about the case and from reaching premature conclusions until all the evidence is presented.[417] At the end of evidence presentation, the judge then instructs the jury, and the members adjourn to the deliberation room, relying on one another's memories to assess the evidence and reach a decision.[418] The assumption seems to be that a passive role is essential to

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[413] *See id.* at 47–48 (quoting FED. R. CIV. P. 48(a)).

[414] See *id.* at 49 ("Whether to empanel six or 12 or some number in between is a choice for the judge to make.").

[415] *See, e.g.*, *id.* at 55 (indicating that jurors "consistently say that the experience makes them more appreciative and more trustful of the court system")

[416] *See, e.g.*, VA. CODE ANN. § 8.01-359(A) (2022) (establishing five-person juries as the default and only allowing twelve-person juries in special circumstances).

[417] *See, e.g.*, MASS. SUPERIOR CT. MODEL JURY INSTRUCTION COMM., MODEL CIVIL JURY PRECHARGE 5, 8 (Oct. 1, 2021) [hereinafter MODEL CIVIL JURY PRECHARGE], https://www.mass.gov/doc/superior-court-model-civil-jury-instructions-precharge-script-pdf (exhorting jurors to "[a]void drawing conclusions until the end of the case" and "not discuss the evidence . . . until you start your formal deliberations").

[418] *See, e.g.*, MASS. SUPERIOR CT. MODEL JURY INSTRUCTION COMM., CIVIL JURY INSTRUCTION TEMPLATE 10 (Oct. 1, 2021), https://www.mass.gov/doc/superior-court-model-civil-jury-instructions-final-charge-script-master-template-pdf (instructing jurors to "rely on their own memory" during deliberation).

impartiality in the adversary system.[419] Therefore, jurors asking questions and talking to one another as the case proceeds are discouraged or outright forbidden.[420]

This approach is badly mistaken. Research on jury decision-making confirms that although jurors may be sitting quietly, they are actively interpreting evidence as it is presented and integrating it into a coherent narrative of what happened in the case.[421] When we consider ways to promote high quality jury decision-making, we need to take into account the active approach of the jury to its decision-making task.[422] By giving substantive preliminary legal instructions at the start of the trial, jurors will know in advance the law that they will need to apply and can help guide them to attend to the most relevant evidence.[423] Allowing jurors to take notes, pose questions, and engage with one another in discussing the case as it is proceeding can help jurors avoid misunderstandings and mistakes in interpreting the evidence.[424]

A substantial body of research has tested these "active jury" reforms, finding some positive effects and little-to-no negative consequences when they are implemented.[425] For instance, in a Seventh Circuit research project examining the impact of preliminary substantive legal instructions in jury trials, more than eighty percent of the jurors said that hearing these instructions

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[419] *See, e.g.*, B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1235 (1993) (summarizing the historical development of juries through the achievement of "almost total jury passivity" in seventeenth-century America).

[420] *See, e.g.*, MODEL CIVIL JURY PRECHARGE., *supra* note 417, at 8 (limiting discussion among jurors).

[421] *See* Dann, *supra* note 419, at 1242 (showing that jurors "mold information into a plausible 'story' or 'schema'" during the trial).

[422] *See id.* ("The rate of predeliberation judgments or decisions by jurors is high.").

[423] *See id.* at 1249 (bemoaning the lack of preliminary instructions, which "wastes a real opportunity to better inform the jury and improve the quality of the trial and verdict").

[424] *See id.* at 1265 (promoting "limited discussions of the evidence among jurors" to enhance the quality of jury decision-making).

[425] For summaries of active jury reforms and related research on their effectiveness, see JURY TRIAL INNOVATIONS 113–37 (G. Thomas Munsterman, Paula L. Hannaford-Agor & G. Marc Whitehead eds., 2d ed. 2006); B. Michael Dann & Valerie P. Hans, *Recent Evaluative Research on Jury Trial Innovations*, 41 CT. REV. 12, 12–18 (2004); Valerie P. Hans, *Empowering the Active Jury: A Genuine Tort Reform*, 13 ROGER WILLIAMS U. L. REV. 39, 55–70 (2008); Valerie P. Hans & Michael J. Saks, *Improving Judge & Jury Evaluation of Scientific Evidence*, 147 DAEDALUS 164, 164–75 (2018).

helped them better understand the case.[426] Most judges and lawyers agreed that these instructions increased the jurors' comprehension of the law.[427] As then-Chief Judge James Holderman stated, "I have found that preliminary instructions helped to orient the jurors to the case and allowed the jurors to start making connections between the evidence and the disputed issues in the case more quickly."[428] With respect to notetaking, jurors express greater satisfaction when they are permitted to take notes; and some studies show that notetaking leads to significant improvements in evidence comprehension, memory, and decision-making.[429] Similarly, jurors who are permitted to ask questions of the witnesses under carefully controlled circumstances "report feeling significantly better informed" and say their questions clarified the evidence.[430] Allowing jurors to discuss the case throughout the trial, rather than waiting until the deliberation, is more controversial, as some fear that jurors might prematurely judge the case.[431] Field experiments with real jury trials in which civil juries were randomly assigned to either allow or not allow trial discussions, however, showed no evidence of prejudgment.[432] In fact, jurors in one study noted that trial

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[426] SEVENTH CIRCUIT AMERICAN JURY PROJECT, FINAL REPORT 28 (2008), https://www.uscourts.gov/sites/default/files/seventh_circuit_american_jury_project_final_report_0.pdf ("Over eighty percent (80%) of the jurors reported that interim statements of counsel were helpful.").

[427] *See id.* at 27–28 ("Over eighty-five percent (85%) of the participating judges thought the use of interim statements increased the jurors' understanding and said they would permit interim statements during trials in the future.").

[428] *Id.* at 28.

[429] Research studies on notetaking include Lynne ForsterLee, Irwin A. Horowitz & Martin Bourgeois, *Effects of Notetaking on Verdicts and Evidence Processing in a Civil Trial*, 18 L. & HUM. BEHAV. 567, 574–75 (1994); Larry Heuer & Steven D. Penrod, *Juror Notetaking and Question Asking During Trials: A National Field Experiment*, 18 L. & HUM. BEHAV. 121, 135–40 (1994); David L. Rosenhan, S. L. Eisner & R. J. Robinson, *Notetaking Can Aid Juror Recall*, 18 L. & HUM. BEHAV. 53, 59–60 (1994) (identifying benefits of note taking).

[430] Heuer & Penrod, *supra* note 429, at 142.

[431] *See* Diamond et al., *Juror Discussions*, *supra* note 132, at 74 (noting concerns that "jurors permitted to discuss the evidence would use the breaks during trial to arrive at premature group decisions on verdicts before hearing all of the evidence and the instructions").

[432] *Id.* at 74–76; *see also* Paula L. Hannaford, Valerie P. Hans & G. Thomas Munsterman, *Permitting Jury Discussions During Trial: Impact of the Arizona Reform*, 24 LAW & HUM. BEHAV. 359, 378 (2000) (noting that allowing earlier discussion reduces the degree of uncertainty jurors feel at the start of deliberation).

discussions with other jurors helped to correct misunderstandings of the evidence.[433]

We recommend specific reforms that have been tested and vetted in real-world cases: (1) preliminary substantive legal instructions; (2) notetaking; (3) question asking; and (4) engaging in trial discussions. Research with preliminary instructions in the law that applies to the case at hand helps jurors know what legal requirements apply as they hear trial evidence. Allowing jurors to take notes, ask questions of witnesses under controlled circumstances, and permitting jurors to discuss the case during trial breaks have all proved their worth in the jurisdictions and courts that use them. These research-based reforms can further strengthen jury decision-making in civil cases as well as help the civil jury cope in cases with extremely complex evidence. In doing so, they may make the jury a more desirable form of dispute resolution and so increase the number of jury trials.

V. CONCLUSION

The twenty-first century finds America at a dangerous crossroad. Commitment to democratic principles is waning, and in its place is extreme partisanship—a shift that has already resulted in multiple instances of violence and death across the country. The future of American democracy is in greater peril than we have ever experienced in our lifetimes, and it is coinciding with the nation's slow emergence from the ravages of a life-changing and deadly pandemic. As strategies are adopted and efforts are made to redirect the Republic back toward its liberal commitments, the civil jury should not be overlooked as a meaningful locus of democratic action and power.

While the institution has been subject to criticism and successful attacks over the last hundred years, which have driven it to a minor role in the judiciary today, the institution's sociopolitical importance and potential have not dissipated. Jury service still provides a forum for public participation and grassroots governance, which since the Founding has been recognized as just as important as voting, if not more so, in maintaining the Republic. The history of and current procedures designed to exclude the populace from this meaningful form of public participation must be scrutinized and, as

[433] Diamond et al., *Juror Discussions*, *supra* note 132, at 74–75.

necessary, removed to restore the institution. William Blackstone warned nearly two and a half centuries ago of "secret machinations, which may sap and undermine [the jury]" and cautioned that no matter how "convenient these may appear at first . . . delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty."[434] Americans should heed these words now more than ever.

The six jury recommendations offered here can help America back on the path toward democratic renewal. Simple changes can be adopted to remove barriers to jury trials, making them more likely to occur when the parties desire them. And efforts can be made to ensure that jurors are given the tools necessary to reach more often fair and accurate resolutions of those disputes with which they are presented. Creative thinking and other strategies, too, might be motivated toward these ends.[435] Deliberate action must be taken to ensure that the promise of the Seventh Amendment is maintained, and that lay judicial participation is restored to its central role in our judiciary, our democratic spirit, and our governance structure.

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[434] BLACKSTONE, *supra* note 62, at *349.

[435] *See e.g.*, Christopher T. Robertson & Michael Shammas, *The Jury Trial Reinvented*, 9 TEX. A&M L. REV. 109, 110, 146–48 (2021) (proposing a number of radical recommendations such as a national jury pool for national civil cases and vote-aggregation without deliberation); Andrew S. Pollis, *Busting Up the Pretrial Industry*, 85 FORDHAM L. REV. 2097, 2098–99 (2017) (arguing that a legal practice model of "extracting settlement and maximizing billable hours" have given rise to a pretrial industry, and urging a return to a "trial model" of the judiciary); Dmitry Bam, *Restoring the Civil Jury in a World Without Trials*, 94 NEB. L. REV. 862, 908 (2016) (proposing "hybrid judicial panels" in which jurors would deliberate alongside judges); Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L.J. 1579, 1625–26 (2006) (arguing in favor of a more empowered and active decision-making role for the jury); Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1178, 1186–87 (1995) (offering a number of reforms including limiting the opportunities for individuals to be excused from service and increasing social education about the institution).

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MARYLAND TORT DAMAGES: A FORM OF SEX-BASED DISCRIMINATION

By: Rebecca Korzec*

I. INTRODUCTION

Maryland law provides that "compensatory damages are not to be awarded in negligence or strict liability actions absent evidence that the plaintiff suffered a loss or detriment."[1] At the same time, Maryland imposes a statutory cap on noneconomic damages in tort claims for personal injury.[2] First enacted in 1986, the statutory cap imposed a $350,000 limit on recovery of noneconomic damages.[3] Following a Court of Appeals of Maryland decision that the cap did not apply to wrongful death actions,[4] the Maryland General Assembly explicitly modified the statute to include wrongful death actions.[5] At the same time, the cap was increased to $500,000 for causes of action arising after October 1, 1994.[6] In 1996, the Maryland General Assembly increased the cap by an additional $15,000 for causes of action arising after October 1, 1995.[7] A single cap applies to the action of an injured spouse and includes the award for loss of consortium.[8]

In this essay, I argue that the statutory cap on noneconomic damages in Maryland disproportionately disadvantages women. For this reason, the cap, although facially neutral, is in fact discriminatory

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1. Owens-Illinois v. Armstrong, 87 Md. App. 699, 735, 591 A.2d 544, 561 (1991).
2. MD. CODE ANN., CTS. & JUD. PROC. § 11-108(b) (West 1986).
3. *Id.*, *see also* Gooslin v. State, 132 Md. App. 290, 298, 752 A.2d 642, 646 (2000) (holding cap does not violate equal protection claims); Edmonds v. Murphy, 83 Md. App. 133, 573 A.2d 853 (1990), *aff'd* 325 Md. 342, 370, 601 A.2d 102, 116 (1992) (holding a cap on noneconomic damages is constitutional).
4. United States v. Streidel, 329 Md. 533, 552, 620 A.2d 905, 915 (1993).
5. MD. CODE ANN., CTS. & JUD. PROC. § 11-108(a)(1)(ii) (West Supp. 1994) [hereinafter CTS. & JUD. PROC.].
6. CTS. & JUD. PROC. § 11-108(b)(2)(i).
7. CTS. & JUD. PROC. § 11-108 (West Supp. 1995). The $15,000 increase will take effect on October 1 of each year.
8. Oaks v. Connors, 339 Md. 24, 37-38, 660 A.2d 423, 430 (1995); *see also* Klein v. Sears, Roebuck & Co., 92 Md. App. 477, 492-94, 608 A.2d 1276, 1283-84 (1992) (holding spouse entitled to damages for loss of services, affection, society and sexual relationship deceased spouse would have contributed if spouse had lived).

in its impact on female litigants.[9] In addition, the cap may have the unintended effect of limiting the quality of the legal representation available to female tort litigants in Maryland.[10] Moreover, several other issues in Maryland tort law may inadvertently contribute to discrimination against women litigants. These include the Maryland adherence to contributory negligence as a complete bar to negligence claims and the Maryland approach to punitive damages. Ultimately, Maryland tort law, although facially neutral, disadvantages women.

II. DEVALUATION OF WOMEN'S WORK

Scholars have suggested that both the method of calculating tort damages and tort reform legislation,[11] such as statutory limits on noneconomic damages, harm women.[12] For example, Martha Chamallas argues that courts rely on gender-based generalizations in calculating damages for future earnings.[13] Employing gender-based tables founded on economic patterns for women results in lower awards for individual female plaintiffs because the tables project the fact that women earn less than men.[14] Such damage awards perpetuate inaccurate gender stereotypes of women, devalue the employment contributions of individual women and deprive those women of just compensation for their tort injuries.[15]

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9. Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access to the Civil Justice System*, 55 DEPAUL L. REV. 635, 643-47 (2006); *see generally*, Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988) [hereinafter *A Lawyer's Primer*].
10. Daniels, *supra* note 9; *see also* Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1313 (2004) [hereinafter *Hidden Victims*].
11. *See, e.g.*, Finley, *Hidden Victims*, *supra* note 10; *see generally* Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575 (1993); *see, e.g.*, Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 465, 503-04, (1998) [hereinafter *Architecture of Bias*].
12. *See* Finley, *Hidden Victims*, *supra* note 10, at 1267-80, 1313; *see generally* Michael L. Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers*, 48 RUTGERS L. REV. 673, 733, 744 (1996); Thomas Koenig & Michael Rustad, *His & Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1, 1, 5 (1995).
13. Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 75 (1994) [hereinafter *Questioning the Use*].
14. *Id.*
15. *Id.*

The devaluation of women's work results in lower tort damage awards which fail to adequately compensate them for their losses.[16] In the aggregate, women's tort damage awards are lower than their male counterparts.[17] Since the goal of tort damages is to make the tort victim whole, it is not surprising that tort damage awards reflect and reinforce gender disparities.[18] In particular, feminist scholars argue that "tort law devalues the lives, activities, and potential of women, and that one can see this at work both in substantive rules governing liability and in common methods for calculating damages."[19] Women earn less than their male counterparts in all work environments;[20] therefore, their economic damages are lower than awards for male plaintiffs.[21] Martha Chamallas has demonstrated that in a 1995 guide for personal injury lawyers, awards to male plaintiffs were twenty-seven percent higher than for women.[22] Significantly, a nationwide study of personal injury awards by juries indicated that women received lower median and mean awards for compensatory damages.[23]

These studies demonstrate that tort damages reinforce gender-based stereotypes about women. Contemporary tort law elevates some types of injuries, giving them more legal protection and awarding greater damages. Claims and injuries associated with women often receive less legal protection in the societal hierarchy which tort doctrine reflects. For example, tort doctrine places a higher value on physical injury and property loss than emotional harm. Moreover, tort reform legislation stresses the importance of economic losses, such as lost income and medical expenses over noneconomic damages, such as

16. *Id.*
17. *Id.*
18. *See generally* John C. Coughenour, *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. CAL. L. REV. 745 (1994).
19. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 198 (1999).
20. In 2005, women were paid seventy-seven cents for each dollar paid to men. *See* America's Union Movement, EQUAL PAY (Mar. 1, 2007), http://www.aflcio.org/issues/jobseconomy/women/equalpay.html. Much of the reason for this is that women perform unpaid childcare, household work and care of elderly relatives in more significant numbers than men. Scholars have argued that such unpaid work should be compensated and recognized. *See, e.g.*, JOAN WILLIAMS, UNBENDING GENDER 125-27 (2000) (proposing that the non-wage earning spouse receive a joint property right in the income of the wage earning spouse); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 3-6 (1996).
21. *See* Chamallas, *Architecture of Bias*, *supra* note 11, at 464-65.
22. CHAMALLAS, *supra* note 19.
23. *Id.*

pain and suffering, emotional distress, hedonic damages, loss of companionship and punitive damages.[24]

Maryland substantive tort law, like tort law in general, does not recognize a cause of action for caretakers of children when those children are injured. As the child's primary caretaker, women usually have greater responsibility for a child's safety and happiness. Women caretakers tend to place an extremely high value on their relational ties to their children.[25] When a child is seriously injured, the child's caretaker also suffers. For example, the caretaker must deal with the child's injury and disability. The caretaker may feel intense grief and anxiety, even guilt. The effects of an accident can be life-altering for the caretaker as well as the child.[26] Yet, tort law largely dismisses the caretaker's loss, assigning it mere derivative status. It denies a claim for "filial consortium" for the loss of the child's companionship.[27] These losses fall more heavily on women as primary caretakers of children in our society. Today, most child caretakers are women -- mothers, grandmothers, paid nannies, babysitters and day care providers.[28] Although popular culture praises "stay at home" mothers, such as the "soccer mom" who abandons the workplace to raise her children, tort law provides her no separate claim for the devastating impact of her child's injury on her daily life. The most dramatic, painful and devastating event in the mother's life, as primary caregiver of her child, is likely not compensable in tort law.

III. GENDERED TORT REFORM

Added to this problem of undercompensation is the "tort reform" [29] movement, leading to limits on damage recovery, such as statutory

24. *Id.* at 199.

25. Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 135, 153, 157-58 (1992).

26. *See, e.g.*, Regina Graycar, *Before the High Court: Women's Work: Who Cares?*, 14 SYDNEY L. REV. 86, 87 (1992) (describing hardships suffered by a mother caring for her disabled daughter).

27. Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 50 (1989) [hereinafter *A Break in the Silence*]. In 1997, Maryland changed wrongful death actions to permit parents to recover noneconomic damages for the wrongful death of an adult child. MD. CODE ANN., CTS. & JUD. PROC. § 3-904(e) (LexisNexis 2006).

28. *See, e.g.*, Becker, *supra* note 25 at 137, 213, 219. Most caretakers and maids in the United States today are immigrant women of color. BARBARA EHRENREICH & ARLIE RUSSELL HOCHSCHILD, GLOBAL WOMEN: NANNIES, MAIDS AND SEX WORKERS IN THE NEW ECONOMY 6-7 (Barbara Ehrenreich & Arlie Russell Hochschild eds., 2003).

29. *See generally supra* note 12.

caps. This reform is fueled by what business and insurance interests consider a litigation explosion, defined by excessive jury awards, increased class action litigation and frivolous suits. As in Maryland, the tort reform movement often saw the enactment of legislative limits or caps on noneconomic damages, often extending beyond medical malpractice and products liability claims, to include all personal injury claims.

As previously argued, these caps may have a negative impact on women. For example, an empirical study by Thomas Koenig and Michael Rustad indicates that women litigants are detrimentally affected when noneconomic damages are limited.[30] The study demonstrates that women comprise two-thirds of plaintiffs recovering punitive damages in medical malpractice cases, particularly in gender-linked cases involving sexual abuse, cosmetic surgery, childbirth and nursing home abuse.[31] Moreover, significant mass products liability litigation has focused on women's reproductive health and gender-linked injuries. These include the Dalkon Shield, Norplant, breast implants and super absorbent tampons. Clearly, limiting noneconomic damages in these products liability cases harms female plaintiffs. Although this gendered result may be completely inadvertent or unintended, its effect is devastating.

Koenig and Rustad demonstrate that limiting noneconomic damages disproportionately affects female litigants.[32] Women earn lower incomes, largely because they spend more time on unpaid child care, housekeeping and other relational care. As a result, female litigants tend to have lesser economic losses than their male counterparts.[33] Moreover, physical injuries to women may not result in significant damages awards since no current medical treatments may exist.[34] For example, a "soccer mom" who suffers injury by having to undergo a hysterectomy caused by a Dalkon Shield or other intrauterine device suffers little economic harm. Restricting or limiting her noneconomic damages may result in an insignificant award of damages. For those reasons, Martha Chamallas argues that: "For feminists who maintain that the market reflects and reinforces

30. Koenig & Rustad, *supra* note 12, at 85.
31. *Id.* at 61-62.
32. *Id.* at 80.
33. *Id.* at 78-79.
34. *See* Lucinda M. Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 TENN. L. REV. 847, 847-57, 861-66, 870 (1997); *see also* Koenig & Rustad, *supra* note 12, at 64-77.

cultural biases and systems of privilege, changing tort law to curtail noneconomic damages seems misguided. They argue that such reform solidifies the tendency to privilege economic losses over noneconomic ones, and intensifies implicit gender bias in tort law."[35]

Medical malpractice litigation has been a source of substantial reform efforts. Generally, advocates of caps on noneconomic damages argue for practical results rather than doctrinal purity. The argument goes that caps will lead to lower malpractice premiums for physicians preventing them from deserting certain medical specialties or geographical areas. Similarly, in the products liability arena, caps are viewed as an instrument for preventing manufacturer abandonment of significant innovation and product development or from engaging in a "race to the bottom" offering the least possible protection for the victims of defective products.

However, the nexus between damages caps and these legitimate policy issues remain attenuated. For example, in addressing the medical malpractice issue, a 2003 General Accounting Office study found:

> Interested parties debate the impact these various measures may have had on premium rates. However, a lack of comprehensive data on losses at the insurance company level makes measuring the precise impact of the measures impossible. As noted earlier, in the vast majority of cases, existing data do not categorize losses on claims as economic or noneconomic, so it is not possible to quantify the impact of a cap on noneconomic damages on insurers' losses. Similarly, it is not possible to show exactly how much a cap would affect claim frequency or claims-handling costs. In addition, while most claims are settled and caps apply only to trial verdicts, some insurers and actuaries told us that limits on damages would still have an indirect impact on settlements by limiting potential damages should the claims go to trial. But given the limitations on measuring the impact of caps on trial verdicts, an

35. CHAMALLAS, *supra* note 19, at 202.

> indirect impact would be even more difficult to measure.[36]

Moreover, Lucinda Finley's 2004 review of the efficacy of statutory limitations on noneconomic damages reached similar results.[37] She argues that women will be among the "hidden victims of tort reform" who will be less likely to obtain lawyers willing to represent them.[38] Professor Finley's empirical study included analysis of jury verdicts in Maryland, Florida and California. She concludes that women, children and the elderly will be most affected by damage caps, arguing: "[T]hese disparate negative effects will be especially pronounced for elderly women. . . . [C]ap laws will also place an effective ceiling on recovery for certain types of injuries disproportionately experienced by women, including sexual assault and gynecological injury, that impair childbearing or sexual functioning."[39]

Lucinda Finley concludes that decreasing the recovery value of these injuries for women will mean that lawyers will be unwilling to take meritorious claims which are not cost-efficient.[40] She argues that the effect of statutory damage caps will be "[T]he message that women, the elderly, and the parents of dead children should not bother to apply."[41]

IV. PUNITIVE DAMAGES

The Maryland approach to punitive damages aggravates the statutory cap problem by making it extremely difficult to recover punitive damages. For the plaintiff to recover punitive damages, the defendant must be characterized by "evil motive, intent to injure, or fraud,"[42] i.e., actual malice. Essentially a two–prong test has evolved. First, the plaintiff must demonstrate that the defendant had actual

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36. U.S. GEN. ACCOUNTING OFFICE, MEDICAL MALPRACTICE INSURANCE: MULTIPLE FACTORS HAVE CONTRIBUTED TO INCREASED PREMIUM RATES 42-43 (2003).
37. Finley, *Hidden Victims*, *supra* note 10, at 1267-80.
38. *Id.* at 1313.
39. *Id.*
40. *Id.*
41. *Id.; see generally* Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393 (1993) (arguing that tort reform makes contingency fee-based law practices less profitable, forcing plaintiff's lawyers to represent fewer litigants or abandon the market altogether).
42. Owens Corning v. Bauman, 125 Md. App. 454, 533, 726 A.2d 745, 784 (1999); Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 460, 601 A.2d 633, 652 (1992).

knowledge of the defect. Second, the plaintiff must prove that the defendant exhibited deliberate disregard of the consequences of that defect.[43] Moreover, punitive damages must be proven by clear and convincing evidence.[44]

Noneconomic damage recovery, such as the award of punitive damages, is extremely important to women litigants because they help counteract the low value placed on women's economic claims.[45] Punitive damages, pain and suffering and other noneconomic damage awards help correct the bias in tort damage awards. Preferring economic losses over noneconomic claims reinforces implicit gender bias.

V. COMPARATIVE FAULT AND CONTRIBUTORY NEGLIGENCE

Although the doctrine of comparative fault[46] is accepted in almost every jurisdiction, Maryland has not adopted it.[47] Comparative fault's widespread acceptance stems from the harshness of the contributory negligence rule which bars a plaintiff from any recovery against a tortfeasor, if the plaintiff was at fault in any respect in connection with the accident.[48] The harshness and potential unfairness of the contributory negligence approach is that it "[P]laces upon one party the entire burden of a loss for which two are, by hypothesis, responsible."[49] By contrast, the doctrine of comparative fault does not take this all-or-nothing approach to accident liability. Rather the doctrine proportionately reduces the accident victim's damages according to the victim's fault.[50] The doctrine can significantly alter the results in products liability and other litigation.[51]

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43. *Zenobia*, 325 Md. at 462, 601 A.2d at 653.
44. *Id.* at 469, 601 A.2d at 657.
45. Finley, *supra* note 34 (arguing that tort reform proposals have a "possible adverse impact on women and women's health.").
46. *See* DAVID G. OWEN, PRODUCTS LIABILITY LAW (2005) 811 n.1 [hereinafter OWEN, PRODUCTS LAW]; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 67, at 468-69 (5th ed. 1984).
47. The only other jurisdictions are Alabama, The District of Columbia, North Carolina and Virginia. *See* OWEN, PRODUCTS LAW, *supra* note 46.
48. *Id.* at 811.
49. W. PAGE KEETON ET AL., *supra* note 46.
50. OWEN, PRODUCTS LAW, *supra* note 46, at 811-12.
51. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1 cmt. a (2000); UNIF. APPORTIONMENT OF TORT RESPONSIBILITY ACT § 3 (amended 2003), 12 U.L.A. 12 (Supp. 2006).

Maryland's contributory negligence doctrine may be especially problematic for women litigants. Feminist scholars argue that negligence's "reasonable person" standard may not reflect women's experiences and sensibilities.[52] The "reasonable person" standard is a mainstay of the view that law is objective in viewpoint. The objective, "reasonable person" standard is intended to encourage the trier of fact to reach an unbiased result, which avoids the perspective of either litigant.[53] However, this "objectivity" has been criticized as an example of "point-of-viewlessness,"[54] which actually ignores women's experiences by adopting the viewpoint of the dominant, male group.[55]

Maryland's view of the sole proximate harm issue complicates the contributory negligence problem. *Anthony Pools v. Sheehan*[56] is an example of these issues in current Maryland products liability law. In Maryland, plaintiff's contributory negligence defeats a negligence claim. However, simple contributory negligence cannot bar a strict liability in tort claim.[57] To bar the strict liability claim, the plaintiff must assume the risk.[58] Nevertheless, in Maryland, the doctrine of "sole proximate cause" may bring ordinary contributory negligence back into a products liability case.[59] In a strict products liability claim, the plaintiff must still demonstrate that the product defect is the proximate cause of the plaintiff's harm.[60] In effect, the same actions which might be considered plaintiff's contributory negligence may

52. *A Lawyer's Primer*, *supra* note 9, at 31 (stating that "Negligence law could begin with . . . the feminine voice's ethic of care -- a premise that no one should be hurt. We could convert the present standard of 'care of a reasonable person under the same or similar circumstances' to a standard of 'conscious care and concern of a responsible neighbor or social acquaintance for another under the same or similar circumstances.'"). *But cf.* Richard A. Posner, *Conservative Feminism*, 1989 U. CHI. LEGAL F. 191, 214 (arguing "most neighbors are not caring, and most accident victims are not neighbors. Human nature will not be altered by holding injurers liable for having failed to take the care that a caring neighbor would have taken.").
53. CHAMALLAS, *supra* note 19, at 57.
54. CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 162 (1989).
55. *Id.*
56. 295 Md. 285, 455 A.2d 434 (1983) (holding that plaintiff's claim was not barred by his contributory negligence when he was injured as he fell off the side of the diving board of his new swimming pool onto the concrete coping at the edge of the pool).
57. Sheehan v. Anthony Pools, 50 Md. App. 614, 626, 440 A.2d 1085, 1092 (1982). The Court of Appeals of Maryland adopted Part III of the Court of Special Appeals' decision. *Anthony Pools v. Sheehan*, 295 Md. at 299, 455 A.2d at 441.
58. *See generally* Dix W. Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93 (1972).
59. *See, e.g., Anthony Pools*, 50 Md. App. at 622, 440 A.2d at 1090.
60. *See id.* at 621-23, 440 A.2d at 1090.

reappear in the defendant's argument as also constituting the sole proximate cause of the harm.[61] In other words, the plaintiff's risk-taking behavior, rather than any alleged product defect, is the "sole proximate cause" of the product user's harm.[62]

In *Anthony Pools*, in his strict liability tort action, the plaintiff asserted that the fact that non-skid material on the diving board did not extend to and over the edges of the diving board constituted a design defect.[63] Defense counsel argued the plaintiff's injury was not caused by any product defect, but rather by the way the plaintiff used the diving board. In closing argument, defense counsel argued:

> You must find that this defect proximately caused the accident. The clear testimony here from Mr. Weiner and using your common sense is that if someone steps on the board with about an inch of their foot on it, they will fall off the side. That was the proximate cause, the way the board was used, not the design of the board. I am not willing to concede for a moment that there is anything defective about the board. . . . [E]ven if you feel there was, I ask you to find that the proximate cause was the way Mr. Sheehan used it, not the way it was designed.[64]

The trial judge denied the defendant's request to instruct the jury that contributory negligence was a defense, and also denied the plaintiff's request to instruct the jury that the plaintiff's inadvertence in using the diving board was not a defense.[65] Reversing the jury verdict for the defendant, the Court of Special Appeals of Maryland held that the trial court should have granted the plaintiff's instruction on inadvertence.[66]

Anthony Pools indicates that juries can be easily confused about the role of the accident victim's conduct in establishing product defect and liability. Accident victim carelessness, inadvertence, and risk-taking activity must be considered, but should not be a complete bar to

61. *See id.* at 622, 440 A.2d at 1090.
62. OWEN, PRODUCTS LAW, *supra* note 46, at 809-10.
63. *Anthony Pools*, 50 Md. App. at 616, 440 A.2d at 1087.
64. *Id.* at 622, 440 A.2d at 1090. In this case, the defense counsel is using the rubric of "sole proximate cause" to defeat the plaintiff's strict liability claim by arguing that the way the plaintiff used the diving board rather than the design of the diving board was the proximate cause of the injury.
65. *Id.*
66. *Id.* at 626, 440 A.2d at 1092.

products liability recovery. Their effect, as doctrines limiting liability, and the effect of the doctrine of sole proximate cause, must only be applied in a manner which assures fairness in products liability litigation.

Maryland negligence law, with its emphasis on contributory negligence, adds to the problems women litigants face. In evaluating whether an individual has acted "reasonably," negligence standards, by definition, measure women's actions according to traditional male norms and viewpoints. Male norms simply may ignore the impact of female experience and conduct on notions of reasonableness. Similarly, confusing the separate products liability doctrines of defect and causation with the unhelpful rubric of "sole proximate cause" reduces the likelihood of achieving a just result.

VI. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY

The Products Liability Restatement has not been adopted in Maryland. Nevertheless, its potential impact on gender discrimination must be considered. The Restatement (Third) of Torts: Products Liability has been the subject of considerable debate[67] and criticism.[68] However, the concerns of feminist jurisprudence have been largely ignored.[69] Increasingly, feminist scholars[70] have argued that an ethic

67. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998) [hereinafter PRODUCTS LIABILITY RESTATEMENT]; *see, e.g.*, Symposium, *Restatement (Third) of Torts: Products Liability: Is the Best Defense Redefining the Offense?*, 26 N. KY. L. REV. 531, 678 (1999); *see also* James A. Henderson, Jr. & Aaron D. Twerski, *Will a New Restatement Help Settle Troubled Waters: Reflections*, 42 AM. U. L. REV. 1257 (1993).

68. *See, e.g.*, Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631 (1995); *see generally* John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns "New Cloth" for Section 402A Products Liability Design Defects: A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493 (1996).

69. For a student comment addressing feminist concerns with section 6(c), see Dolly M. Trompeter, Comment, *Sex, Drugs, and the Restatement (Third) of Torts, Section 6(c): Why Comment E is the Answer to the Woman Question*, 48 AM. U. L. REV. 1139 (1999). There is considerable feminist jurisprudence on tort law. *See, e.g.*, Bender, *A Lawyer's Primer*, *supra* note 9; Bender, *supra* note 11; Finley, *supra* note 45; Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges Are Using Their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 DEPAUL L. REV. 335 (1999).

70. There are many schools of feminist scholarship including cultural feminists, accommodation feminists, radical feminists, and critical legal studies feminists. They all share the goal of incorporating women's experiences and values into law and of employing feminist methodology. *See generally* Katharine T. Bartlett, *Feminist Legal*

of care,[71] promoting considerations of empathy and interdependence must be integrated into law. Unlike competing analyses, such as the law and economics approach,[72] which seek to achieve justice by deciding disputes with the object of promoting greater social good through wealth maximization resolutions,[73] cultural feminists find the efficiency norm unworkable. Cultural feminism regards law as just and equitable only when administered with empathy, resulting in a redistributive impact for economically and politically disadvantaged members of society.[74] At first blush, efficiency and empathy appear to be irreconcilable.[75] Nevertheless, I argue that, in the world of products liability, efficiency and wealth maximization must be reconciled with requirements of empathy and fairness. The Products Liability Restatement shift from strict liability to negligence essentially adopts the law and economics focus on efficiency and wealth maximization in derogation of empathic care as a normative principle of justice.[76] The claims of cultural feminism, emphasizing empathic care and interdependence, are essential for a valid products liability doctrine. Indeed, empathy and efficiency can and must be merged into a construct where both are achievable and viable.

Major concepts in the law of products liability, such as defectiveness, causation, and damages, reveal social policy considerations. One group of scholars emphasizes the role of products liability law in deterring product injury by providing appropriate incentives to product manufacturers. The other group focuses on products liability as an after the fact attempt to achieve corrective justice between the product producer and the product user. Often the scholarship of each group either ignores or deprecates the views of the other. I suggest that feminist jurisprudence may provide an important

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Methods, 103 HARV. L. REV. 829 (1990); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990).

71. The ethic of care or cultural feminism owes much to the work of Carol Gilligan. *See, e.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE (1982).
72. *See generally* GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970).
73. *See generally* RICHARD A. POSNER, THE ECONOMICS OF JUSTICE (1981).
74. *See* Ann C. Scales, *The Emergence of a Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); *see generally* MATTHEW H. KRAMER, CRITICAL LEGAL THEORY AND THE CHALLENGE OF FEMINISM (1995).
75. *Cf.* CALABRESI, *supra* note 72, at 24, 307-08.
76. *See, e.g.*, Mark McLaughlin Hager, *Don't Say I Didn't Warn You (Even Though I Didn't): Why the Pro-Defendant Consensus on Warning Law Is Wrong*, 61 TENN. L. REV. 1125, 1133 (1994); *see generally* William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

bridge in this products liability scholarly gap. Specifically, a cultural feminist ethic of care can provide significant new insights for products liability doctrine.

A. Products Liability Goals of Efficiency and Corrective Justice

For more than a decade, a vigorous tort reform debate has refocused examination of how legal rules promote the goals of compensation and deterrence.[77] Numerous scholars have studied the question of how to compensate tort victims for their injuries.[78] Clearly, payments to tort victims can have both compensatory and deterrent goals. Nevertheless, payments needed to promote deterrence may not be identical to payments needed to attain compensatory goals.[79]

An important tort compensation theory is the insurance theory -- the theory that tort payments should be based on the insurance choices which individuals would make in actuarially fair markets.[80] The insurance theory has significant theoretical and practical implications in that it provides a radical shift from the major compensation paradigm of tort law -- the "make the tort victim whole" theory of recovery.[81] Moreover, the insurance theory has received support from prominent scholars in the tort reform debate, including law and economics scholar Professor Steven Shavell,[82] empirical analysts Professors W. Kip Viscusi [83] and Patricia Danzon,[84] and theorists such

77. *See, e.g., Products Liability Law Symposium,* 53 S.C. L. REV. 777 (2002).
78. *See, e.g.,* Randall R. Bovbjerg, Frank A. Sloan & James F. Blumstein, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908 (1989); Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772 (1985).
79. *See generally* George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987).
80. *Id.* at 1556 (stating that when the tort victim purchases a product or service she pays in advance for insurance so that "[C]ompel[ing] insurance greater than the amount demanded by the purchaser reduces, rather than increases, his or her welfare.").
81. *See, e.g.,* FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, THE LAW OF TORTS, § 25.1 at 493 (Little, Brown, and Co. 2d ed. 1986) (1956) (examining the traditional tort damage rule).
82. *See* Steven Shavell, Economic Analysis of Accident Law 260-61 (1987).
83. *See* W. Kip Viscusi, Reforming Products Liability 89-94 (1991).
84. *See* Patricia M. Danzon, *Tort Reform and the Role of Government in Private Insurance Markets*, 13 J. Legal Stud. 517, 520-26 (1984); Patricia M. Danzon, Medical Malpractice: Theory, Evidence and Public Policy 10 (1985).

as Professor Alan Schwartz.[85] It is also supported by the American Law Institute.[86]

Some aspects of the Products Liability Restatement, no matter how well grounded in products liability policy or in theories of justice, nevertheless, will have the unintended consequences of harming women. Therefore, the Restatement doctrine must be analyzed and evaluated. In particular, the Restatement's transition from strict liability to negligence doctrine raises legitimate concerns for feminists. Negligence is generally considered more difficult to prove than strict liability in tort law.[87] Another concern is the adoption of a more stringent standard for determining medical product and prescription drug defectiveness than for other products.

An additional concern is normative, asking which values should fashion products liability doctrine. Products liability doctrine reveals societal values and priorities in valuing wealth, safety and innovation. Should products liability be premised on fault or on strict liability? Should deterrence or compensation be preferred?[88]

B. Moral and Economic Theories

1. Corrective Justice and Distributive Justice

Corrective justice seeks to right wrongs by restoring the balance of rights which have been wrongly disrupted.[89] Suppose a manufacturer's product injures a product consumer. The manufacturer's liability might depend on concepts of corrective justice -- what it takes to right the wrong done by the manufacturer. If the manufacturer is bankrupt or judgment-proof, the issue might be whether consumers and manufacturers as a group should use some of their money to help the injured consumer. This becomes a distributive

85. Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 Yale L.J. 353, 362-67 (1988).

86. *See* The Am. Law Inst. Reporters' Study on Enter. Responsibility for Pers. Injury: Volume II Approaches to Legal & Institutional Change (1991). This study, released in April 1991, discusses the insurance theory of compensation, and states that "[e]mpirical corroboration of these analytical claims" exists. *Id.* at 206 n.13; *see generally* Stephen D. Sugarman, *A Restatement of Torts*, 44 Stan. L. Rev. 1163 (1992) (book review).

87. *See, e.g.*, Page Keeton, *Product Liability and the Meaning of Defect*, 5 St. Mary's L.J. 30, 34-35 (1973).

88. *See generally* David G. Owen, *Philosophical Foundations of Fault in Tort Law*, *in* Philosophical Foundations of Tort Law 201 (1995).

89. Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 Mich. L. Rev. 2348, 2350 (1990).

justice question of how society's assets should be distributed among people.

2. *Corrective Justice v. Utilitarian Approach to Justice*

Corrective justice can be contrasted with a utilitarian approach to justice. Under a utilitarian approach, we ask what is good for society as a whole.[90] The manufacturer's fault in causing the product user's harm is a basis for deciding the case based on corrective justice.[91] We can conclude that the blameworthy manufacturer should pay compensation to the product user since it redresses a wrong when compensation is paid. As a result, fault or unreasonableness provides a legitimate moral basis for corrective justice.[92]

3. *Corrective Justice and Strict Liability*

In some situations, although neither the product manufacturer nor the product user is at fault, the user, nevertheless, is injured by the product. Unless the product manufacturer is held strictly liable, the innocent product user must bear the loss. In other words, without manufacturer strict products liability, the blameless product user must pay for his losses. Therefore, strict products liability is consistent with concepts of corrective justice.[93]

Richard Epstein is a major proponent of strict liability on the basis of corrective justice. Basically, Epstein argues that strict liability is preferable to a negligence system because negligence is not morally grounded.[94] Negligence cannot promote moral responsibility because it weighs into the balance the social utility of the defendant's conduct or product.[95] Epstein would argue that regardless of the social utility

90. Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. Rev. 257, 286-93 (1987) (stressing the importance of loss spreading, fairness and safety in strict products liability).
91. *Id.* at 286.
92. *See generally* Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 Ind. L.J. 349 (1992). Often court decisions confirm the core morality of redressing fault. *Cf.* Gary T. Schwartz, *The Beginning and Possible End of the Rise of Modern American Tort Law*, 26 Ga. L. Rev. 601 (1992) (analyzing judicial rejection of some forms of strict liability in products liability cases).
93. *See generally* Jules L. Coleman, *The Morality of Strict Tort Liability*, 18 Wm. & Mary L. Rev. 259 (1976).
94. *See generally* Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151 (1973).
95. *Id.* at 153.

of defendant's product, if it harms the plaintiff, the defendant should be liable.[96]

C. *The Products Liability Restatement Meets the Feminist Ethic of Care*

Cultural feminists argue that tort law should emphasize safety rather than profit or efficiency.[97] They view the masculine voice, with its protection of rights, autonomy, and abstraction, as a standard which promotes only efficiency and profit.[98] According to the feminist ethic of care, a much-needed feminine voice would refocus the tort system to encourage behavior which is caring about safety and responsive to victim needs, with their attendant human contexts and consequences.[99] Over the past decade, feminist scholars have provided significant critiques of tort doctrines.[100] The critiques have applied various schools of feminist theory.[101]

Feminist scholarship has demonstrated that contemporary tort law reinforces the economic subordination of women.[102] The traditional devaluation of women's work, including child rearing and homemaking, has affected the damage awards for women.[103] When the tort law determines which harms are worthy of legal protection, to what extent these harms should be compensated, and how they should be valued, it makes fundamental judgments which affect tort victims.[104] Tort settlements and damage awards represent both economic security and fundamental fairness.[105] Moreover, tort law expresses the social value placed upon certain relationships and personal interests.[106]

Given the economic position of women, it is not altogether surprising that women receive less tort compensation than men. The basic, underlying purpose of tort damages is to place the injured

96. *Id.; see generally* Richard A. Epstein, A Theory of Strict Liability: Toward a Reformation of Tort Law (1980); Jules L. Coleman, *Corrective Justice and Wrongful Gain*, 11 J. Legal Stud. 421 (1982).
97. *See, e.g.*, Bender, *A Lawyer's Primer, supra* note 9.
98. *Id.*
99. *Id.*
100. *See generally* Bender, *supra* note 11.
101. *Id.*
102. *See* Chamallas, *supra* note 19.
103. *Id.*
104. *See* Finley, *supra* note 10.
105. *Id.*
106. *Id.*

plaintiff in her pre-accident economic position.[107] Most empirical studies demonstrate that women, regardless of race, receive significantly lower tort damage awards than white men.[108] Interestingly, the efforts to study gender and race bias in the courts have provided much of the data demonstrating the higher value placed on white men's lives and injuries.[109] For example, as previously discussed, Martha Chamallas has demonstrated through empirical studies that awards for male plaintiffs were twenty-seven percent higher than those for women in a 1995 guide for personal injury lawyers.[110]

Gender-based generalizations about women lead courts to under calculate tort damages for the loss of future earning capacity.[111] Damages for the loss of future earning capacity compensates the tort victim for injuries that impair earning power.[112] When a young woman is injured, economists appearing as expert witnesses often rely on tables based on past economic patterns.[113] These tables project that women will work fewer years than men and will earn less money than their male counterparts.[114] As a result, women receive dramatically reduced awards.[115] Employing these gender-based generalizations ignores the fact that individual women may alter traditional patterns of employment participation. Applying liberal feminist principles would produce tangible gains for women because their experiences and viewpoints would be the norm rather than the exception.

General tort principles submerged into the Products Liability Restatement, as previously discussed, create problems from a feminist perspective. For example, the "reasonable person" tort law standard can be viewed as problematic. Although the standard may be perceived as objective, it may actually result in what Catherine MacKinnon has described as "point-of-viewlessness."[116] Objective

107. Fleming James, Jr., *Damages in Accident Cases*, 41 Cornell L. Q. 582, 582 (1956).
108. *See* Chamallas, *supra* note 19.
109. *See generally* Judith Resnik, *Asking About Gender in Courts*, 21 Signs: J. Women in Culture and Soc'y 952 (1996).
110. Chamallas, *supra* note 19.
111. *See generally* Chamallas, *Questioning the Use*, *supra* note 13, at 84-89; Chamallas, *Architecture of Bias*, *supra* note 11, at 465-66.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. MacKinnon, *supra* note 54, at 162 (arguing that objectivity does not exist -- rather the attempt to appear objective actually reflects the viewpoint of the dominant group).

analysis is often the viewpoint of the dominant group, accepted as valid because the dominant group's version of reality is deemed true.[117]

Leslie Bender has re-examined the tort "no duty to rescue" doctrine from a cultural feminist perspective.[118] Bender argues that liability should result when an individual refuses to save a stranger since that stranger should be viewed as a person who is interconnected with the community and whose well-being, therefore, affects others.[119] Another problematic area of the products liability arena is the "fetal protection" policies which exclude women from certain workplaces.[120]

American products liability law, as it developed for three decades, came closer to achieving these goals than the Products Liability Restatement. Under the Restatement (Second) of Torts, if a medical product harmed a patient, she could be compensated by bringing a tort claim against the manufacturer.[121] The patient could establish liability in one of two ways: (1) under a negligence theory, she could establish liability by proving that the manufacturer lacked due care in designing, manufacturing or marketing the product; (2) under the theory of strict liability in tort, she could prove that the product was in a defective condition, unreasonably dangerous to the user.[122] Under the Restatement (Second) of Torts, section 402A, a patient could find protection in a tort system concerned with care and safety rather than insulating product manufacturers from liability.[123] This focus on the product user was to be expected since strict liability in tort, as recognized by Dean Prosser, a Reporter of the Restatement (Second), is grounded in notions of fairness and product user protection.[124]

However, the "tort reform" movement may have elevated product innovation, profit maximization and efficiency above user safety.[125]

---

117. *See id.*

118. Bender, *A Lawyer's Primer, supra* note 9, at 33-36.

119. *Id.*

120. *See generally* Sally J. Kenney, For Whose Protection? Reproductive Hazards and Exclusionary Policies in the United States and Britain (1992) (arguing that "fetal protection" policies excluding women from some toxic workplaces discriminate only against mothers even though fathers can also be affected from this environment).

121. Restatement (Second) of Torts § 402A (1965).

122. *See generally* Kenney, *supra* note 120.

123. *Id.*

124. Prosser, *supra* note 76, at 1120 (quoting Escola v. Coca Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring)).

125. *See, e.g.,* Joan E. Steinman, *Women, Medical Care, and Mass Tort Litigation*, 68 Chi.-Kent L. Rev. 409 (1992).

Arguably, a prime example of this trend is section 6(c) of the Products Liability Restatement.[126] Section 6(c), which governs design defect liability for prescription drugs and medical devices, is one of the most controversial sections of the Products Liability Restatement since it requires the patient to prove that no reasonable healthcare provider would have prescribed the product for any class of patients.[127] Thus, in order for a patient to bring a successful claim for design defect, product users must demonstrate that they suffered harm and that no patient class could have derived benefit from the prescription drug or medical device. This new standard basically relieves medical product manufacturers of liability and responsibility. Since women consume more prescription drugs and products than men,[128] they are likely to be more disadvantaged by section 6(c). First, women consume a greater share of medical products than men.[129] Second, the regulatory system has not adequately tested and monitored products intended for women since men are generally the prototypes for medical studies and testing.[130]

Significantly, section 6(c) is not the only Products Liability Restatement provision which defines product design defect. Section 2 establishes a separate standard of liability for defective product design.[131] This standard of liability for general product design is separate from medical or prescription products.[132] Section 2 allows an aggrieved product user more latitude in establishing design defect

126. Products Liability Restatement, § 6(c) states:

> A prescription drug or medical device is not reasonably safe due to defective design if the foreseeable risks of harm posed by the drug or medical device are sufficiently great in relation to its foreseeable therapeutic benefits that reasonable health care providers, knowing of such foreseeable risks and therapeutic benefits, would not prescribe the drug or medical device for any class of patients.

127. *Id.*

128. L. Elizabeth Bowles, *The Disfranchisement of Fertile Women in Clinical Trials: The Legal Ramifications of and Solutions for Rectifying the Knowledge Gap*, 45 Vand. L. Rev. 877, 878 (1992) (discussing the fact that women consume more prescription drugs than men and disproportionately suffer a greater number of side effects from these drugs).

129. *See, e.g.*, Joan E. Steinman, *Women, Medical Care, and Mass Tort Litigation*, 68 Chi.-Kent L. Rev. 409 (1992).

130. *Id.*

131. *See* Products Liability Restatement, §§ 2(b), 6(c). "Because of the special nature of prescription drugs and medical devices, the determination of whether such products are not reasonably safe is to be made under Subsections (c) and (d) rather than under §§ 2(b) and 2(c)." *Id.* § 6 cmt. b.

132. Products Liability Restatement § 2 cmt. a.

liability. The Reporters of the Restatement admit that the requirements to establish general design liability are less stringent than those for medical products.[133] Rather than proving that the product was ineffective for all users, section 2 allows the product user to present a reasonable alternative design as an effective means of establishing a design defect claim for general product defectiveness.[134] The Restatement offers comment (e) as an exception to the liability standard for general product design defect claims in section 2.[135] Comment (e) provides that if the product's design renders its social utility low in relation to its potential to cause harm, liability attaches even though no reasonable alternative design exists.[136] The reasoning behind comment (e) is that rigid liability standards should not apply to products with extremely low social utility.[137] Unfortunately, section 6(c) does not have the same exception for prescription drugs and medical devices design defect claims. Simply stated, not all prescription drugs deserve special protection for public policy reasons; a cosmetic drug is not as important as life-saving chemotherapy.

The seriousness of the general product defect exception in comment (e) is most harshly felt when examining these new theories of liability from the vantage point of the injured female patient. Clearly, adopting this exception to women asserting medical product design defect claims would lighten the female patient's legal burden. In turn, this would shift the focus from maximization of product manufacturer profits to appropriate concern for patient safety.

Lucinda Finley argues that, "[T]orts suits define and signify basic social values about what human activities are worthy of protecting . . ."[138] Unfortunately, the new standard established by section 6(c) of the Products Liability Restatement does not seem to value women's health and safety over corporate profits. The tort reform achieved by

133. *See id.* § 6 cmt. f, (arguing Subsection c of section 6 imposes a more rigorous test for defect than does section 2(b) which does not apply to prescription drugs and medical devices).

134. *Id.* § 2(b). This section provides a product defect:

> [I]s defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.

135. *See id.* § 2 cmt. e.

136. *See id.*

137. *Id.*

138. Finley, *supra* note 34, at 849.

the Products Liability Restatement reduces corporate liability and responsibility, resulting in an increase in corporate profits and a decrease in patient safety. Since men and women are different biologically, women suffer injuries from defective reproductive products placed inside their bodies, while men are seldom injured by such products.[139] These injuries suffered by women are difficult to assess in traditional economic terms, since they affect reproductive loss and other noneconomic losses.[140] Often these reproductive and emotional harms are not compensated in traditional tort damages.[141] Nevertheless, they affect women's economic, educational and career choices.[142] The traditional tort approach, as exemplified by the Products Liability Restatement, tells women that their value in the labor force is not important enough to be incorporated into the market-based tort reform formula.[143] Not only is the Products Liability Restatement approach unfair to those women harmed by medical products, it also sends a message to society as a whole that women are less valuable than their male counterparts.[144]

VII. CONCLUSION

Maryland tort law discriminates against women in a number of important ways. Although facially neutral, the Maryland statutory cap on noneconomic damages and the standard for awarding punitive

139. Koenig & Rustad, *supra* note 12, at 48.

140. *See, e.g.*, Finley, *supra* note 34, at 857-58. Many of these defective, unsafe products have been intended for the use by healthy women to affect, interrupt, or enhance natural bodily processes, rather than to treat illness or disease. They include: (1) Des, a synthetic estrogen marketed to prevent miscarriage which proved ineffective for that purpose, but elevated the risk of breast cancer among the exposed mothers by forty percent, and which caused cancer, reproductive abnormalities and infertility in the exposed daughters and sons of the pregnant women who took it; (2) Early versions of birth control pills which had high hormone levels that caused strokes, heart attacks and blood clots; (3) IUDs such as the Dalkon Shield and Copper-7, which presented an elevated risk of pelvic inflammatory disease, sterility, perforated uteruses and septic abortions; and (4) Parlodel, a drug prescribed to suppress lactation, which proved ineffective and caused deaths from strokes or heart attacks. *See id.* at 869.

141. *Id.* at 857-58.

142. *Id.* at 858.

143. Finley, *A Break in the Silence, supra* note 27, at 52. The disparate impact of market-based damage measurement is derived from two principle sources: 1) the generally lower value the market assigns to women's work and 2) the market's failure to recognize or value many productive activities in which women engage, such as household management and care-taking performed within the family.

144. *Id.* As Professor Martha Chamallas has noted, earning-based damages calculations signal that white men are worth more, and reinforce beliefs that they will achieve more than white women or minority men and women. Chamallas, *supra* note 19, at 197-98.

damages disadvantage women litigants. Moreover, adoption of the Products Liability Restatement would exacerbate the situation. Adding to this problem is Maryland's failure to adopt the doctrine of comparative negligence. The current Maryland approach is confusing and unfair. Disadvantaging women may be an unintended result of the current Maryland regime. Nevertheless, it should be remedied. Maryland tort law should take women's experiences and lives seriously.

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4200 Parliament Place, Suite 510 Lanham, MD 20706

February 7, 2025

Written Testimony of Gwen-Marie Davis, Esq.
President, Maryland Association for Justice

SB 584 Civil Actions – Noneconomic Damages – Personal Injury and Wrongful Death (cross-filed with HB 113)

FAVORABLE

Dear Chairman Smith and Members of the Senate Judicial Proceedings Committee:

After nearly 40 years, the time has come to repeal Section 11-108, Maryland's cap on non-economic damages in personal injury and wrongful death cases.

I respectfully ask you for a **FAVORABLE** report on **Senate Bill 584**.

When innocent Marylanders suffer catastrophic injuries due to negligence, § 11-108 deprives them of fair compensation as determined by a jury of their peers after a fair and impartial trial. When a Maryland family loses a loved one to negligence, § 11-108 victimizes that family in the same way.

Section 11-108 should be repealed because it is arbitrary, unfair, and discriminatory.

Decades of law review articles have documented § 11-108's discriminatory effects. In the University of Baltimore Law Review, § 11-108 has been described as "a form of sex-based discrimination." In that article, Prof. Rebecca Korzec from the University of Baltimore writes:

> In this essay, I argue that the statutory cap on noneconomic damages in Maryland [§ 11-108] disproportionately disadvantages women. For this reason, the cap, although facially neutral, is in fact discriminatory in its impact on female litigants.

An award-winning article from 2022 echoes and expands Prof. Korzec's criticisms. In "**Democratic Renewal and the Civil Jury**," the authors explain that § 11-108 and similar laws disadvantage litigants on the basis of gender and minority status, and thereby "exacerbate social inequality in the courthouse."

So, it's not only me telling you that § 11-108 is a discriminatory law. The time for repeal is now.

Of course, the insurance industry, and tort reformers, and folks who want to live in a world where they can avoid accountability for the damaging consequences of their negligence – they all love § 11-108. They will try to scare you with stories, but they have no evidence. In fact, more than 85% of the people and businesses in the United States are in States without a cap like § 11-108. When courts in those States declared caps like § 11-108 unconstitutional, their markets and economies did not crash.

The reasons that justified enacting § 11-108 have vanished from memory. Insurance company profits are globally robust. Marylanders should no longer subsidize the insurance industry at the cost of their access to fair compensation, determined in our courts by fair and impartial citizen juries.

Thank you for your courtesy and indulgence, and for a FAVORABLE report on Senate Bill 584.

Sincerely,

Gwen-Marie Davis, Esq.

GMD

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Position: FAV

Gwen-Marie Davis §^*
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Gwen-Marie Davis, Esq.

GMD

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MARYLAND
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Jury awards $5.9M in cut-railing case

Caryn Tamber//**Daily Record Legal Affairs Writer**
February 28, 2010

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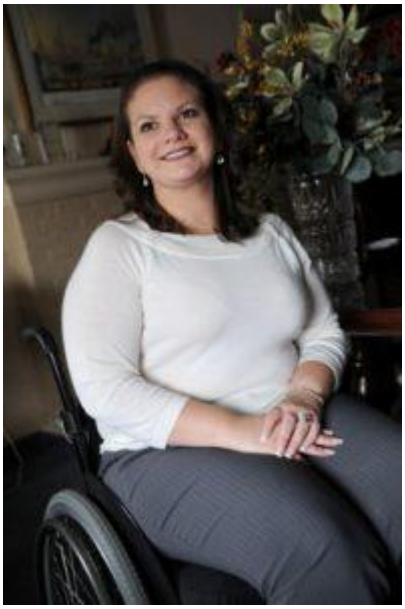

Jasmin R. Carbaugh fell through a fire-escape railing that had been cut to allow a pool table to be removed from the establishment. She says she hopes people who see her will understand what can happen with they 'mess with, alter any safety devices or emergency exits.'

A 15-foot fall from the fire escape of a Baltimore bar where Jasmin R. Carbaugh was celebrating a friend's birthday left her unable to stand or walk unassisted.

Last month, Carbaugh won a $5.9 million verdict against a vendor who, years earlier, had taken out a pool table through the fire escape, removing the railing and reattaching it with rope.

The jury verdict includes almost $3 million in non-economic damages, which is expected to be reduced to $695,000 under the statutory cap. After the reduction, the total award would stand at $3.6 million.

"I don't want people to see me and pity me or feel sorry for me, but I want them to look at me and understand that this is what happens when you mess with, alter any safety devices or emergency exits, anything like that," said Carbaugh, a 32-year-old insurance industry worker who now suffers from incomplete paraplegia.

Timothy E. Fizer of Krause, Fizer, Crogan & Lopez, who represented pool table vendor Joseph J. Balsamo's JAG Vending, declined to comment on the case because the judgment has not yet been entered.

Carbaugh went to a 30th birthday party on Feb. 29, 2008, at Mahaffey's Pub. According to Carbaugh and her attorneys, Nathaniel Fick of Fick & May P.C. and J. Mitchell Lambros of Lambros & Lambros,

the party's host had reserved the second floor of Mahaffey's, and the bar's owner said guests could use the fire escape to enter and leave the building.

A few years earlier, when Wayne Mahaffey bought the place, there had been a pool table upstairs, Carbaugh's lawyers said. Mahaffey and the vendor hired a crane operator and removed it through the fire escape, cutting the iron railing in the process. The railing was tied back into place with rope but never welded back on.

During the party, Carbaugh stepped out onto the fire escape to talk on her phone. When other guests opened the door to leave the party, Carbaugh was knocked off her feet and over the edge of the fire escape, to the street.

She suffered a burst fracture, a spinal cord contusion, a dislocated spine, eight fractured ribs and a skull fracture. She spent five weeks at the hospital and seven at a rehabilitation center, missing eight months of work.

Carbaugh suffers from incomplete paraplegia: she has some movement in her hips and knees but cannot control her feet or toes, so she cannot stand or walk without support, she said.

"This is a railing on a fire escape removed for a stupid pool table," Lambros said. "Our dear client here is a paraplegic for life over a pool table."

A Baltimore City Circuit Court jury reached a verdict in Carbaugh's case Feb. 5, just as the Super Bowl weekend blizzard was rolling into Baltimore. The jury awarded her $381,000 in past medical expenses, $2.5 million in future medical expenses, $27,000 in lost wages and more than $2.9 million in non-economic damages.

Carbaugh had originally sued just Mahaffey's, but she settled with that defendant for an undisclosed sum and added JAG Vending to the case. JAG, in turn, brought Mahaffey's back in through a third-party complaint, and the jury found Mahaffey's to be negligent as well. Mahaffey's attorney, Edward M. Buxbaum, said the settlement means the bar does not have to pay anything further to Carbaugh.

He added that Mahaffey's had been inspected several times between the pool table's removal and Carbaugh's fall, and no one raised questions about the railing.

Fick said he thinks the testimony of Carbaugh herself, her mother, her friends and her co-workers on the extent of her limitations "carried the day" with the jury in terms of determining damages.

But he criticized the statutory cap, saying that cases like Carbaugh's, where the plaintiff is seriously injured and has years of pain ahead of her, show its unfairness.

The jury is "trying to give a person both their day in court and the day that will speak for a lifetime and are never told that this is going to be stripped away, and has been stripped away, by the legislature," he said.

https://thedailyrecord.com/2010/02/28/jury-awards-59m-in-cut-railing-case/

Favorable Report on SB 584.pdf
Uploaded by: Jonathan Goldberg
Position: FAV

SCHOCHOR, STATON,
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February 7, 2025

Senator William C. Smith, Jr.
Chairman, Senate Judicial Proceedings Committee
Maryland General Assembly
2 E. Miller Senate Office Building
11 Bladen Street
Annapolis, Maryland 21401

Re: Favorable Report on Senate Bill 584

Dear Chairman Smith and Members of the Senate Judicial Proceedings Committee:

I am writing today in support of Senate Bill 584, which will eliminate the cap on non-economic damages set forth in Courts and Judicial Proceedings Article §11-108.

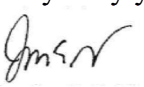
As I am sure that you and the committee know, Maryland is in the small minority of states that have a cap on non-economic damages that is similar to §11-108. The Maryland cap denies Maryland citizens the right to receive fair compensation for injuries that were caused by another person or company. The cap is arbitrary and deprives Maryland citizens of their constitutional right to a jury trial. It places a limitation on damages that has no relationship to the type of case that was brought or injuries that were incurred. It usurps the jury's function to listen to the evidence and, if it sees fit, award fair and adequate damages.

None of Maryland's surrounding states have a similar damage cap and there has been no evidence that the absence of a cap has adversely affected their economies. Additionally, because the damage cap limits an individual's or company's liability exposure, there is little incentive for wrongdoers to improve the safety of their actions or products. It may be less expensive for companies to pay settlements or judgments that are limited due to the cap then to improve their conduct or a product's safety. Therefore, the cap provides an unjust benefit that is against public policy.

The cap on non-economic damages, in many cases, benefits out-of-state individuals or corporations to the detriment of Maryland citizens. An example is a vehicle being operated by an out-of-state driver that is at fault in an accident with a Maryland citizen. The Maryland citizen's damages are limited by the damage cap. Thus, the non-Maryland citizen is protected by the cap whereas the Maryland citizen is harmed by it. This is unjust.

There is no justification for the §11-108 damage cap in this State. The abrogation of the cap will benefit Maryland citizens and will not harm any business interests. I fully support Senate Bill 584 and encourage the Senate Judicial Proceedings Committee to issue a **favorable report**.

Very truly yours,



Jonathan E. Goldberg

JEG/kc

Medical Mutual Testimony in Opposition to Senate B

Uploaded by: Alexis Braun

Position: UNF

Bill: Senate Bill 584 – Civil Actions – Noneconomic Damages – Personal Injury and Wrongful Death

Date: February 11, 2025

Position: Oppose

Medical Mutual opposes Senate Bill 584. Eliminating the cap on noneconomic damages in personal injury and wrongful death actions would expose Maryland residents and businesses to unpredictable and potentially unlimited liability that could adversely affect the availability and affordability of casualty insurance in the State.

In 1986, the General Assembly enacted a $350,000 cap on noneconomic damages for personal injury actions.[1] Effective October 1, 1994, the cap was raised to $500,000, and in an effort to address inflation, an annual escalator was enacted that increases the cap by $15,000 each year beginning on October 1, 1995.[2] Since then, the cap has steadily increased to $950,000 for causes of action arising on or after October 1, 2024.[3] This amount increases to $1,425,000 (150% of the individual cap) in wrongful death actions involving two or more claimants or beneficiaries.[4] And the cap in a combined survival and wrongful death action can be as high as $2,375,000.[5]

---

[1] 1986 Md. Laws, ch. 639. Noneconomic damages include pain and suffering and other nonpecuniary losses. Economic damages, which are not capped, include past and future loss of earnings, past and future medical expenses, and other pecuniary losses.

[2] 1994 Md. Laws, ch. 477.

[3] Md. Code, Cts. & Jud. Proc. § 11-108(b)(2).

[4] Md. Code, Cts. & Jud. Proc. § 11-108(b)(2), (3). The cap for wrongful death actions increases by $22,500 annually. *Id.*

[5] *Goss v. Estate of Jennings*, 207 Md. App. 151, 173, 51 A.3d 761, 773-74 (2012) (holding that the § 11-108 cap applies separately to damage awards in combined survival and wrongful death actions). The cap for combined survival and wrongful death actions increases by $37,500 annually. Md. Code, Cts. & Jud. Proc. § 11-108(b)(2), (3).

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The General Assembly enacted a reasonable limit on noneconomic damages. This measured response to disproportionate jury awards continues to provide predictability and stability in Maryland's civil justice system today. The noneconomic damages cap also preserves "the availability of sufficient liability insurance, at a reasonable cost, in order to cover claims for personal injuries to members of the public."[6] Eliminating the noneconomic damages cap would upend these legitimate legislative objectives and disturb the careful balance that the General Assembly struck when enacting the cap.

Medical Mutual was created in 1975 by an act of the General Assembly at a time when other medical professional liability (MPL) insurers withdrew from the State, leaving most physicians without insurance protection. Thanks to the wisdom of the General Assembly, the Governor, and others who were involved in Medical Mutual's creation, we are celebrating our 50th year as a physician-owned and directed mutual insurer, providing comprehensive MPL insurance to Maryland Physicians.

As the largest provider of MPL insurance to private practice physicians in Maryland, Medical Mutual is concerned that a repeal of the cap on noneconomic damages in civil actions for personal injury or wrongful death may lead to a proliferation of judicial challenges that seek to invalidate the cap on noneconomic damages applicable to medical liability actions. The bill file for the 1986 legislation that created the cap bears this out.[7]

The bill file includes a letter from Attorney General Sachs to Governor Hughes, approving the constitutionality and legal sufficiency of the bill.[8] In the letter, the Attorney General stated that the bill, which as introduced would only have applied to medical liability actions, was amended to apply to all personal injury actions, thus removing "an alleged constitutional objection that the legislation impermissibly treats medical liability actions differently from other types of cases." Repealing the cap on noneconomic damages in civil actions for personal injury or wrongful death could lead to the very judicial challenges the General Assembly sought to avoid. Even if those challenges ultimately fail, the mere possibility of a successful challenge could lead to costly and protracted litigation and destabilize the market for MPL insurance in Maryland.

Private practice physicians are already struggling with increasing labor and other practice costs and decreasing reimbursement rates. Adding MPL insurance premium increases to these struggles could negatively impact the availability of quality healthcare for Maryland citizens.

For these reasons, Medical Mutual respectfully requests an UNFAVORABLE report on Senate Bill 584.

For more information contact:
Alexis Braun / abraun@weinsuredocs.com
(443) 689-0208

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[6] *Murphy v. Edmonds*, 325 Md. 342, 369 (1992).

[7] Bill File, Senate Bill 558, 1986 Session, Maryland General Assembly.

[8] Letter from Stephen H. Sachs, Attorney General, Maryland, to Harry Hughes, Governor, Maryland (May 6, 1986) (included in bill file for Senate Bill 558, 1986 Session).

SB 584_noneconomic damages_oppose.pdf
Uploaded by: Allison Taylor
Position: UNF

KAISER PERMANENTE®

Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc
2101 East Jefferson Street
Rockville, Maryland 20852

February 11, 2025

The Honorable William C. Smith, Jr.
Senate Judicial Proceedings Committee
2 East, Miller Senate Office Building
11 Bladen Street
Annapolis, Maryland 21401

RE: SB 584 – Oppose

Dear Chair Smith and Members of the Committee:

Kaiser Permanente respectfully opposes SB 584, " Civil Actions - Noneconomic Damages - Personal Injury and Wrongful Death." The bill proposes to remove the existing caps on noneconomic damages in personal injury and wrongful death cases in Maryland.

Kaiser Permanente is the largest private integrated health care delivery system in the United States, delivering health care to over 12 million members in eight states and the District of Columbia.[1] Kaiser Permanente of the Mid-Atlantic States, which operates in Maryland, provides and coordinates complete health care services for over 825,000 members. In Maryland, we deliver care to approximately 475,000 members.

Kaiser Permanente opposes efforts to eliminate caps on non-economic damages awards. Caps ensure that injured patients receive fair compensation while preserving access to health care by keeping doctors, nurses, and health care providers in practice and hospitals and clinics open.

The high cost of physician liability insurance premiums influences where physicians practice and affects patients' access to care and treatment. Research has demonstrated that physician supply is higher and patients' access to care is enhanced in areas where physicians are under less pressure from the liability system. States without caps suffer from provider shortages, leading to the closing of hospitals, clinics, and trauma centers and leaving patients with no doctors in their immediate vicinity.[2]

A cap on non-economic damages reduces health care costs, thereby making health care more affordable. Caps lower loss costs by limiting the average size of liability awards and reducing the incentive for individuals and their lawyers to litigate weak or non-meritorious claims. An AMA study found that 68% of all liability claims are dropped, dismissed or withdrawn. Further, of those claims that do go to a trial verdict, physicians win 88% of the time.

---

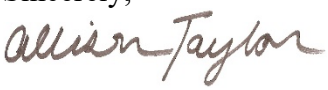
[1] Kaiser Permanente comprises Kaiser Foundation Health Plan, Inc., the nation's largest not-for-profit health plan, and its health plan subsidiaries outside California and Hawaii; the not-for-profit Kaiser Foundation Hospitals, which operates 39 hospitals and over 650 other clinical facilities; and the Permanente Medical Groups, self-governed physician group practices that exclusively contract with Kaiser Foundation Health Plan and its health plan subsidiaries to meet the health needs of Kaiser Permanente's members.

[2] See, e.g., American Medical Association, Medical Liability Reform Now! 2024.

By reducing the costs of medical liability insurance, a cap makes health care more affordable and increases the public's access to physicians and hospitals when they require care. For these reasons we urge an unfavorable report for SB 584.

Thank you for the opportunity to comment. Please feel free to contact me at Allison.W.Taylor@kp.org or (919) 818-3285 with questions.

Sincerely,



Allison Taylor
Director of Government Relations
Kaiser Permanente

AUC of Maryland_SB584_UNFAV.pdf
Uploaded by: Andrew Griffin
Position: UNF

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EXECUTIVE DIRECTOR

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AUC of MD est. 1950
Associated Utility Contractors of Maryland, Inc.

February 11, 2025

Legislative Position: Unfavorable
Senate Bill 584
Civil Actions - Noneconomic Damages - Personal Injury and Wrongful Death
Senate Judicial Proceedings Committee

Dear Chairman Smith and members of the committee:

Established in 1950, the Associated Utility Contractors of Maryland, Inc. (AUC) is dedicated to advancing the utility contracting industry across the state. Our mission is to foster strong relationships between utility contractors and their clients, uphold the highest professional standards within the industry, and elevate the reputation of utility professionals within the business community. We actively advocate for public policies that address industry challenges and contribute to improving Maryland's overall business environment.

As the statewide association for underground utility contractors, we are writing to express opposition to SB 584, which would eliminate the cap on non-economic damages. If passed, this legislation would have far-reaching, negative implications for Maryland businesses and consumers. I urge you to oppose this dangerously misguided bill.

According to studies, non-economic damages, which involve no direct economic loss and have no precise value, are one of the leading components of so-called "nuclear" verdicts, which are typically $10 million and more. Rightfully, many states have caps on non-economic damages and Maryland's cap is already one of the highest in the nation. Passing SB 584 and eliminating the non-economic damages cap could lead to more frequent and excessive nuclear verdicts, as well as potential bankruptcies, for Maryland businesses. It would also lead to a significant increase in frivolous lawsuits that drive up the costs of defense, settlement, and claims administration—contributing to increased legal system abuse that Maryland businesses will pay for via higher "tort taxes."

This misguided bill would also put upward pressure on insurance premiums for businesses across the state. In fact, when some lawmakers tried to remove Maryland's cap on non-economic damages last year, an analysis conducted by an independent actuarial firm found that it could have increased personal liability by as much as 19% and

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Associated Utility Contractors of Maryland, Inc.

commercial auto liability by up to 30%. These increases would pile new cost burdens on the backs of Maryland businesses, at a time when we can least afford it.

Please help keep insurance rates for Maryland businesses low by rejecting SB 584. **We encourage an unfavorable report.**

Sincerely,

The Associated Utility Contractors of Maryland (AUC)

HCCC_SB584_UNFAV.pdf
Uploaded by: Andrew Griffin
Position: UNF

February 11, 2025

Legislative Position: Unfavorable
Senate Bill 584
Civil Actions - Noneconomic Damages - Personal Injury and Wrongful Death
Senate Judicial Proceedings Committee

Dear Chairman Smith and members of the committee:

Founded in 1969, the Howard Chamber of Commerce is dedicated to helping businesses—from sole proprietors to large international firms—grow and succeed. With the power of 700 members that encompass more than 170,000 employees, the Howard County Chamber is an effective partner with elected officials and advocates for the interests of the county's business community.

As introduced, SB 584 would eliminate the cap on non-economic damages. If passed, this legislation would have far-reaching, negative implications for Maryland businesses and consumers. We strongly urge you to oppose this misguided bill.

According to studies, non-economic damages, which involve no direct economic loss and have no precise value, are one of the leading components of so-called "nuclear" verdicts, which are typically $10 million and more. Rightfully, many states have caps on non-economic damages and Maryland's cap is already one of the highest in the nation. Passing SB 584 and eliminating the non-economic damages cap could lead to more frequent and excessive nuclear verdicts, as well as potential bankruptcies, for Maryland businesses. It would also lead to a significant increase in frivolous lawsuits that drive up the costs of defense, settlement, and claims administration—contributing to increased legal system abuse that Maryland businesses will pay for via higher "tort taxes."

This bill would also put upward pressure on insurance premiums for businesses across the state. In fact, when this legislation was considered in the 2024 session, an analysis conducted by an independent actuarial firm found that it could have increased personal liability by as much as 19% and commercial auto liability by up to 30%. These increases would pile new cost burdens on the backs of Maryland businesses, at a time when they can least afford it.

Please help keep insurance rates for Maryland businesses low by rejecting SB 584. **We encourage an unfavorable report.**

Sincerely,

Kristi Simon
President & CEO
Howard County Chamber of Commerce

SB0584 -- Civil Actions - Noneconomic Damages - Pe

Uploaded by: Brian Levine

Position: UNF

Senate Bill 584 -- *Civil Actions - Noneconomic Damages - Personal Injury and Wrongful Death*
Senate Judicial Proceedings Committee
February 11, 2025
Oppose

The Montgomery County Chamber of Commerce (MCCC), the voice of business in Metro Maryland, opposes Senate Bill 584 -- *Civil Actions - Noneconomic Damages - Personal Injury and Wrongful Death.*

Senate Bill 584 repeals limitations on noneconomic damages in civil actions for personal injury or wrongful death. Non-economic damages compensate injuries and losses that are not easily quantified by a dollar amount while economic damages can be calculated from documents or records, such as medical expenses and earnings.

MCCC is concerned about Senate Bill 584 and its potential impact on the state's business competitiveness. Limiting noneconomic damages is generally seen as beneficial for a state's business climate, particularly for small businesses that are more vulnerable in litigation involving such damages. Increased exposure and financial burdens from this bill could harm not only small businesses but also the overall perception of Maryland's business environment.

A positive business climate in Maryland can be measured in various ways, including its legal and tort environment. When businesses consider locations for expansion, the tort environment is a significant factor. Therefore, Maryland must ensure it remains competitive with neighboring and rival states in terms of tort climate, alongside other factors like taxation, regulations, education, and transportation infrastructure.

For these reasons, the Montgomery County Chamber of Commerce opposes Senate Bill 584 and respectfully requests an unfavorable report.

The Montgomery County Chamber of Commerce (MCCC), on behalf of its members, champions the growth of business opportunities, strategic infrastructure investments, and a strong workforce to position Metro Maryland as a premier regional, national, and global business location. Established in 1959, MCCC is an independent, non-profit membership organization.

Brian Levine | Vice President of Government Affairs
Montgomery County Chamber of Commerce
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SB 584_IAB_UNF.pdf
Uploaded by: Bryson Popham
Position: UNF

Bryson F. Popham, P.A.

Bryson F. Popham, Esq.

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February 7, 2025

The Honorable Williman C. Smith Jr.
Chair, Senate Judicial Proceedings Committee
2 East Miller Senate Office Building
Annapolis, Maryland 21401

RE: Senate Bill 584 - Civil Actions - Noneconomic Damages - Personal Injury and Wrongful Death
UNFAVORABLE

On behalf of the Insurance Agents & Brokers of Maryland (IA&B) I am writing in opposition to Senate Bill 584. IA&B is a trade association comprised of nearly 200 independent agencies, employing approximately 1,800 licensed Maryland insurance producers, which are located in and doing business throughout the Maryland and the surrounding states.

The Committee is well aware of significant natural disasters, from fires in California to hurricanes in the Southeast, that have caused enormous losses to Americans and their property. Those same losses have depleted the capacity of the insurance industry to make people whole again.

This legislation presents a different hazard: by eliminating a law that has governed liability awards in Maryland for over 40 years, Senate Bill 584 introduces substantial uncertainty to the ability of insurance companies to fulfill their obligations and maintain a reasonable price for doing so. At a minimum, the General Assembly should require the Maryland Insurance Commissioner, which serves, in a very real sense, as your expert on the functioning of the insurance market, to examine the potential impact this legislation may have in Maryland.

As just one example, insurers that rely heavily on reinsurance (i.e., insurance for insurance companies), may find that reinsurance is more difficult to obtain and more expensive if this bill were to pass. That result, we submit, is unacceptable when, as now, insurance has already been subject to substantial inflationary pressure.

Although the insurance market is cyclical and expectedly fluctuates between what are known as hard and soft markets, we are currently in the midst of an insurance crisis that has been unparalleled in recent decades. These crisis conditions have been driven primarily by a corresponding increase in the frequency and severity of claims, which itself has been driven by several factors, including inflation, supply chain issues, severe weather events, litigation abuse, and counterproductive regulatory measures. Many of these factors are uncertain and uncontrollable, but the regulatory environment is not one of them.

Homeowners, auto, and commercial liability insurance have become increasingly difficult to afford. The removal of the cap on noneconomic damages, as proposed under Senate Bill 584, would only serve to further increase the severity of losses in liability claims, which will result in even higher premiums for your constituents in an already hard market.

For these reasons, IA&B urges an unfavorable vote on Senate Bill 584.

Very truly yours,

Bryson Popham

cc: Kip White, President IA&B
John Savant, IA&B Government Relations

SB 584_MAMIC_UNF.pdf
Uploaded by: Bryson Popham
Position: UNF

MAMIC
Maryland Association of
Mutual Insurance Companies

191 Main Street, Suite 310 – Annapolis MD 21401 – 410-268-6871

February 7, 2025

The Honorable Williman C. Smith Jr.
Chair, Senate Judicial Proceedings Committee
2 East Miller Senate Office Building
Annapolis, Maryland 21401

RE: Senate Bill 584 - Civil Actions - Noneconomic Damages - Personal Injury and Wrongful Death - UNFAVORABLE

Dear Chairman Smith and Members of the Committee,

On behalf of the Maryland Association of Mutual Insurance Companies (MAMIC), we respectfully oppose Senate Bill 584.

As you may recall, MAMIC is comprised of 12 mutual insurance companies that are headquartered in Maryland and neighboring states. Approximately one-half of our members are domiciled in Maryland, and are key contributors and employers in our local communities. Together, MAMIC members offer a wide variety of insurance products and services and provide coverage for thousands of Maryland citizens.

Senate Bill 584 completely upends the system of determining noneconomic damages under Maryland's tort liability law that has been in place for many years. MAMIC is aware of no evidence that would support such a radical change. The Committee is well aware that inflation has been a major driver in the increasing cost of property and liability insurance in Maryland and across the country. As smaller insurers in the highly competitive Maryland market, MAMIC members strive to keep costs as low as possible for our policyholders.

Like all insurers, MAMIC members must purchase reinsurance – essentially, insurance for insurance companies. The cost of reinsurance has been rising rapidly as well and that places extra pressure on our members who are offering their Maryland policyholders various products and services.

We should point out that MAMIC includes the second oldest mutual insurer in the United States, located in District 46 in Baltimore City. We have other domestic insurer-members headquartered in Bel Air, Hagerstown and Frederick. Other members may be headquartered in adjoining states, but Maryland is a very important market for them. For example, one MAMIC member is a major writer of residential property (homeowners) insurance on the Lower Eastern Shore. Experienced legislators know that coastal insurance exposures are among the most difficult to insure. In short, MAMIC members offer insurance products that is vitally important to many Marylanders.

All MAMIC members depend heavily on solid, stable, reinsurance programs. Reinsurers in Maryland, by extension, depend on a solid, stable, tort liability environment in order to offer their products at affordable rates. The passage of Senate Bill 584 would completely disrupt our statutorily constructed model for assessing noneconomic damages in our State. This model has developed over decades, and it serves Maryland citizens well. To be effective, the model requires a healthy, competitive liability insurance market that can pay claims, including claims for noneconomic damages, when necessary.

For these reasons MAMIC and its members do not believe that any material change to the system of ascertaining noneconomic damages is warranted. In fact, we believe the dangers far outweigh any speculative benefit offered by the proponents of this bill. We respectfully request an unfavorable report on Senate Bill 584.

Sincerely,

Jeane A. Peters, President

55008718-v1-Opposes SB 584.pdf
Uploaded by: Carville Collins
Position: UNF

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LLP

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MARYLAND EMPLOYERS FOR CIVIL JUSTICE REFORM COALITION

OPPOSES SB 584

Civil Actions – Noneconomic Damages – Personal Injury and Wrongful Death

Maryland Employers for Civil Justice Reform Coalition, comprised of many of the largest employers, businesses, and health care providers in Maryland, opposes SB 584. The bill calls for the full repeal of Maryland's noneconomic damages caps, an unjustified public policy.

Historical Context

Caps on noneconomic damages have been an important public policy in Maryland for more than 38 years. Back in 1986, after careful study the General Assembly concluded there was a severe insurance crisis in the State, following the issuance of a 1985 report from the Governor's Task Force to Study Liability Insurance that, among other findings, concluded:

> *The current availability and affordability crisis in certain lines of insurance… is not a manufactured crisis, as some have charged… The civil justice system can no longer afford unlimited awards for pain and suffering.*
>
> *The ceiling on noneconomic damages will help contain awards within realistic limits, reduce the exposure of defendants to unlimited damages for pain and suffering, and lead to more accurate [insurance] rates because of the greater predictability of the size of the judgments. The limitation [cap] is designed to lend greater stability to the insurance market…*
>
> *A cap on allowable pain and suffering awards will help reduce the incidence of unrealistically high liability awards, yet at the same time protect the right of the injured party to recover the full amount of economic loss, including all lost wages and medical expenses.*[1]

The House Judiciary Committee helped craft the 1986 legislative solution to the crisis, noting in its Committee Report that the legislative purpose was "assuring the availability of sufficient liability insurance, at a reasonable cost, in order to cover claims for personal injury."

[1] *Franklin v. Mazda Motor Corp., 704 F. Supp. 1325, 1328 (D. Md. 1989) (quoting the Report of the Governor's Task Force to Study Liability Insurance, issued Dec. 20,1985). This issue also studied in 1985 by the Joint Executive/Legislative Task Force on Medical Insurance, resulting in a similar recommendation for statutory limits or caps.*

In light of this well studied foundation for the current caps on noneconomic damages, why *ever* would the General Assembly want to risk inviting back the insurance crisis of 1986 by removing these caps? This foundation explains why more than a dozen legislative proposals identical or similar to SB 584 have failed each and every legislative session since first introduced back in the early 2000s.

A central reason favoring the preservation of caps on noneconomic damages has always been that these damages, for pain and suffering and other nonpecuniary injuries, are difficult to quantify. Quite simply, these damages involve no direct economic loss and have no precise monetary value. Given the emotional sensitivities and differing perspectives surrounding these injuries, courts and juries often struggle to calculate fair and rational awards. Caps have proven to be the correct and best public policy to balance the need for recovery for these injuries with the avoidance of unrealistically high and excessive awards. For these reasons, more than half the states have caps currently in effect on noneconomic damages.

Maryland's Current Caps Are Reasonable

The caps were originally set at $350,000 when first enacted in 1986, and then in 1994 they were raised to $500,000 and tied to an annual escalator of $15,000 to adjust for inflation. Today, these inflation-adjusted caps in personal injury actions have risen to $950,000 for the injured party. In most other states with caps, the caps range from $250,000 to $1,000,000, placing Maryland at the top of the range among the states.

Significantly, the caps do not end at $950,000, they go higher under current law. In wrongful death cases, pain and suffering can be recovered on behalf of the person who died as a result of the negligent conduct, and in addition, two or more beneficiaries, such as immediate family members, can also recover noneconomic damages in wrongful death cases. Accordingly, in actions where a person is alleged to have died as a result of negligence, the total availability of noneconomic damages in Maryland is up to $2,375,000 ($950,000 for the decedent, plus $1,425,000 for the immediate family). Noneconomic damages are not even a sole remedy, as damages for the full and unlimited amount of *economic* losses, together with *punitive* damages, are also available to plaintiffs in these actions. Cleary, the rights of injured parties to recover for their injuries are protected under current law.

Consequences of SB 584

Each year that cap repeal legislation is introduced, the proponents contend there is no effect on insurance premiums or availability, an utterly false narrative. To the contrary, insurance costs for consumers and businesses will increase, as determined by the Maryland Insurance Administration (MIA) and the National Association of Insurance Commissioners. Last year's SB 538, which as amended would have raised the cap just to $1,750,000, would have produced insurance increases of 15.7% to 21.4% across all liability lines, according to an independent actuarial analysis.[2] SB 584's outright repeal of the cap – a more extreme measure – would produce much larger adverse impacts on insurance costs.

As identified in the Fiscal Note, SB 584 creates a *material fiscal liability* for the State of Maryland in the transportation sector. Specifically, while most state agencies are covered by the

[2] *Analysis of the Impact of Increasing $ Maryland Economic Damages Cap*, Pinnacle Actuarial Resources, Inc., April 3, 2024(actuarial analysis of Maryland insurance rates (all lines) conducted on a noneconomic damages cap of $1,750,000 and an annual escalator of $20,000)

liability limits of the Maryland Tort Claims Act, the Maryland Transit Administration (MTA) is governed by the Transportation Article which, like SB 584, does *not* include a limit on liability. According to Fiscal Services, SB 584 creates significantly greater awards and settlements against MTA, a lack of predictability in litigation and settling MTA cases, and financial liability of a magnitude of at least millions of dollars.

The real purpose of SB 584 becomes evident when understanding who the *only* proponents of the bill are – plaintiffs' lawyers. Removing the cap to make for unlimited noneconomic damages produces the same effect of unlimited attorneys' fees, which are based on a percentage of the damages recovered. While the only persons supporting this legislation are plaintiffs lawyers, bill opponents include Maryland drivers, homeowners, consumers, employers, health care providers, insurers, the hospitality and transportation sectors, and small businesses across a spectrum of industries. Such self-interested conduct by bill proponents, seeking unlimited increases in the fees they extract from their clients who are victims of negligence, has no place in the public policy of Maryland.

False Assertions

Proponents of SB 584 falsely assert that remittitur ensures that verdicts will not be excessive in personal injury cases, and therefore this readily-available safeguard obviates the need for a damages cap. What the proponents omit from this assertion is that the standard for remittitur is profoundly high, and thus the incidence of remittitur is extremely rare. The Supreme Court of Maryland established this high standard, requiring that the verdict "be grossly excessive" or "shock the conscience of the trial judge."[3] That the rarely invoked act of remittitur would serve as a readily available safeguard or cure for excessive verdicts in Maryland has no basis in fact or law.

Finally, the proponents question the constitutionality of the current caps, but unfortunately for them this issue has been reviewed on three separate occasions by the Court of Appeals (now Supreme Court) of Maryland. In every instance, the noneconomic damages caps have been upheld by the high court. [4] Allegations that caps on noneconomic damages are unconstitutional are unfounded and inconsistent with established case law.

Conclusion

For all these reasons, the Coalition respectfully urges an unfavorable report on SB 584.

Carville B. Collins
carville.collins@saul.com
410-847-5598

February 11, 2025

Counsel for Maryland Employers for
Civil Justice Reform Coalition

[3] *Rodriguez v. Cooper*, 458 Md. 425, 437 (2018).
[4] DRD Pool Service v. Freed, 416 Md. 46, 62 (2010); Oaks v. Connors, 339 Md. 24, 37 (1995); Murphy v. Edmonds, 325 Md. 342, 366 (1992). *See also*, Martinez v. Hopkins, 212 Md. App. 634, 656 (2013) (constitutionality of the caps was challenged but not struck down, finding that the constitutionality of the caps was moot).

ATRA Testimony SB 584 Noneconomic Damages.pdf
Uploaded by: Cary Silverman
Position: UNF

Testimony Before the
Maryland Senate Judicial Proceedings Committee
in Opposition to S.B. 584
A Bill That Would Allow Unlimited Noneconomic Damage Awards
in Personal Injury and Wrongful Death Cases
Cary Silverman
On Behalf of the American Tort Reform Association
February 11, 2025

On behalf of the American Tort Reform Association ("ATRA"), thank you for providing me with the opportunity to testify today. ATRA opposes S.B. 584, which would eliminate Maryland's statutory limits on noneconomic damages in personal injury cases. As a result, the bill would lead to unreasonable settlement demands and unpredictable awards in a wide range of cases, which will be felt by Maryland's drivers, homeowners, and businesses in the form of higher insurance rates.

ATRA is a broad-based coalition of businesses, municipalities, associations, and professional firms that share the goal of having a fair, balanced, and predictable civil justice system. I am a Maryland resident, a member of the Maryland Bar, and a partner in the Washington, D.C. office of Shook, Hardy & Bacon L.L.P. As part of my practice, I have studied noneconomic damage awards, authoring law review articles and research papers on the topic. I have had the privilege of testifying before this Committee when it considered legislation to raise or repeal Maryland's limits on noneconomic damages in past sessions.

There is no true way to place a monetary value on the pain and suffering associated with an injury. The instinct to permit large awards for pain and suffering to those who have suffered serious injuries, on top of what is already likely to be a large award for medical expenses, lost income, and other economic losses, must be balanced against the adverse effects that rising damage awards have on homeowners, drivers, and businesses, the economy, and the civil justice system. S.B. 584 would disturb the careful balance that the General Assembly has set, which has positively contributed to a stable civil liability environment in Maryland for decades.

Damages Available Under Maryland Law

In considering the limit on noneconomic damages, it is helpful to consider the full picture of damages in personal injury and wrongful death cases.

Economic Damages. Maryland residents who experience an injury as a result of the negligence or other wrongful conduct of others are entitled to be made whole for their losses. They can seek and recover compensation for medical expenses, lost income or earning capacity, and other expenses incurred or expected. Recoveries for these types of expenses—economic damages—are *not* limited by Maryland law. Basically, any past cost or anticipated future expense

resulting from an injury that has a measurable market value falls into this unlimited category.

For example, under Maryland law, the value household services that a person who has been injured or who has died can no longer perform is considered *economic* damages. The Maryland Supreme Court has indicated that these tasks may include "cooking, cleaning, and gardening" and can range from "polishing the family silver to pulling up weeds from the garden."[1] Hauling out the garbage, mowing the lawn, and making repairs are other examples recognized by Maryland courts as having an economic price.[2] A plaintiff can recover the cost of hiring someone to perform these services, which can add up to hundreds of thousands of dollars.

In cases of severe permanent injuries or death, economic damages can reach into the millions of dollars.

Noneconomic Damages. Plaintiffs can also recover noneconomic damages, the subject of S.B. 584. Noneconomic damages provide plaintiffs with compensation for types of harms that cannot be documented with a dollar value, such as pain, suffering, inconvenience, and loss of consortium.[3] In wrongful death cases, Maryland law allows for an especially broad range of noneconomic damages – more expansive than most other states (but which are constrained by the statutory limit).[4]

Traditionally, noneconomic damage awards were relatively small in amount and high awards were uniformly reversed.[5] For various reasons,[6] the size of pain and suffering awards increased exponentially between the 1950s and 1980s.[7] By that time, pain and suffering awards had become the largest single item of recovery in personal injury cases, exceeding medical expenses and lost wages.[8] This prompted state legislatures to enact limits on these inherently subjective damage awards.

Punitive Damages. Finally, when an injury or death is caused by malicious conduct, a plaintiff can also recover punitive damages in Maryland. About half of the states limit punitive damages to an amount set by statute or a multiple of compensatory damages. A half dozen other states generally do not authorize punitive damage awards. In Maryland, punitive damages are available and *uncapped*. Such awards are permissible so long as they are supported by the evidence of malicious conduct and are not unconstitutionally excessive.

Maryland's Limit on Noneconomic Damages

The General Assembly first limited noneconomic damages in 1985 in response to an insurance crisis and initially set the cap at $350,000. It did so after Maryland Governor Harry Hughes and the General Assembly established two task forces, the Governor's Task Force to Study Liability Insurance and the Joint Executive/Legislative Task Force on Medical Insurance, both of which, after

hearings, meetings, and substantial research, recommended statutory limits. As the Governor's Task Force concluded:

> [T]he civil justice system can no longer afford unlimited awards for pain and suffering.
>
> The ceiling on noneconomic damages will help contain awards within realistic limits, reduce the exposure of defendants to unlimited damages for pain and suffering, lead to more settlements, and enable insurance carriers to set more accurate rates because of the greater predictability of the size of judgments. The limitation is designed to lend greater stability to the insurance market and make it more attractive to underwriters.
>
> A substantial portion of the verdicts being returned in liability cases are for noneconomic loss. The translation of these losses into dollar amounts is an extremely subjective process as these claims are not easily amenable to accurate, or even approximate, monetary valuation. There is a common belief that these awards are the primary source of overly generous and arbitrary liability claim payments. They vary substantially from person to person, even when applied to similar cases or similar injuries, and can be fabricated with relative ease.
>
> A cap on allowable pain and suffering awards will help reduce the incidence of unrealistically high liability awards, yet at the same time protect the right of the injured party to recover the full amount of economic loss, including all lost wages and medical expenses.

Franklin v. Mazda Motor Corp., 704 F. Supp. 1325, 1328 (D. Md. 1989), (quoting report of the Governor's Task Force to Study Liability Insurance issued Dec. 20, 1985).

There are now separate limits applicable to general personal injury and medical malpractice cases that rise to account for inflation by $15,000 per year.[9] The Maryland Supreme Court has repeatedly upheld the limit on noneconomic damages as constitutional.[10]

Today, the inflation-adjusted limit on noneconomic damages in personal injury actions is $950,000. This amount rises to $1,425,000 (150% of the individual limit) in wrongful death actions involving two or more beneficiaries. In wrongful death cases, pain and suffering can also be recovered on behalf of the person who died as a result of negligent conduct in addition to beneficiaries, such as a spouse or children. In those actions, the limit on noneconomic damages is also $950,000. Combined, in actions alleging that a person died as a result of negligence, total noneconomic damaged can reach $2,375,000 million ($950,000

for the decedent plus $1,425,000 for his or her family). These limits will automatically increase to $965,000/$1,440,000/$2,405,000 in October 2025.

The statutory limit is accomplishing its goal. It has prevented outlier awards and provided for greater consistency and predictability in Maryland's civil justice system. It has ensured that those who are injured as a result of another party's tortious conduct can receive full compensation for economic losses plus a reasonable, though not unlimited, amount for pain and suffering. It has also provided consistency for plaintiffs by precluded widely varying noneconomic damage awards for similar injuries.

The Proposed Legislation

S.B. 584 would eliminate the limit on noneconomic damages that applies in general personal injury cases effective October 1, 2024. This bill goes even further than prior proposals that the General Assembly chose not to enact, which proposed increasing the limit or eliminating it only in certain cases.

Implications for Maryland for Eliminating the Statutory Limit

The Maryland Supreme Court has recognized that the General Assembly enacted the statutory limit to preserve "the availability of sufficient liability insurance, at a reasonable cost, in order to cover claims for personal injuries to members of the public."[11] Limiting noneconomic damages "may lead to greater ease in calculating premiums, thus making the market more attractive to insurers, and ultimately may lead to reduced premiums, making insurance more affordable for individuals and organizations performing needed services."[12]

As we see a resurgence of massive pain and suffering awards nationwide, now is certainly not the time to eliminate this limit. Awards in excess of $10 million, known as "nuclear verdicts," are rising in frequency and size in personal injury and wrongful death cases.[13] The largest component of these awards are noneconomic damages.[14] While about 20% of nuclear verdicts are reached in medical liability cases that would remain subject to Maryland's separate noneconomic damage limit, many occur in auto accident (23%), product liability cases (23%), and premises liability cases (14%) nationwide.[15] In other states, we have seen juries, prompted by plaintiffs' lawyers, award amounts for past and future pain and suffering for $12 million, $33 million, $40 million, even $85 million or more.[16] These verdicts are sometimes improperly prompted by a push by the plaintiffs' lawyer for the jury to "send a message," even if a defendant has not committed misconduct that would warrant punitive damages.

In states that lack limits on noneconomic damages, personal injury lawyers have long understood that the more you ask for, the more you get,[17] and they have become increasingly bold in their requests to juries for extraordinarily high pain and suffering awards. This tactic, known as "anchoring," implants in the minds of jurors an arbitrary sum or a mathematical formula (such as an amount per day or

hour, referred to as a "per diem" argument) designed to lead to an excessive award. An "anchor" creates a psychologically powerful baseline for jurors struggling with assigning a monetary value to pain and suffering. Once a lawyer provides an anchor, jurors accept the suggested amount or "compromise" by negotiating it upward or downward. Studies show that both use of a specific sum or mathematical formula leads juries to reach a substantially higher award—double[18] or quadruple[19] the amount they would have if left to determine a just and reasonable award on their own.

Fortunately, Maryland is not known for excessive awards. While anchoring is permissible in Maryland,[20] this type of manipulation and the potential for excessive awards has been constrained by the statutory limit on noneconomic damages. I'll give you one example that is a preview of what is to come if the statutory limit is eliminated. In a case arising from a Maryland inmate who fractured his wrist during a fight, the plaintiffs' attorney requested that the jury award his client $100 per day for pain and suffering for his remaining life expectancy of fifty years. That doesn't sound like much, but it adds up to nearly $2 million. The defendant's counsel objected to the arbitrary amount as highly prejudicial, noting that he had never seen this done before, but the trial court allowed it. Prompted by that high figure, the jury ultimately returned a $3 million verdict. The trial court reduced that $3 million award pursuant to the noneconomic damage limit in place at the time, $770,000. That judgment was affirmed on appeal.[21] Without a statutory limit, these types of arguments, and awards at significantly higher levels, will become the norm in Maryland.

How Maryland's Noneconomic Damage Limit Compares to Other States

Maryland is not alone in trying to restrain rising pain and suffering awards. When Maryland enacted its statutory limit in 1986, it was the first state to adopt a limit generally applicable to personal injury cases.[22] Now, it is among several states that have done so outside of healthcare liability. For example:

- **Alaska** limits noneconomic damages in personal injury cases to the greater of $400,000 or injured person's life expectancy in years multiplied by $8,000. In cases involving "severe physical impairment or severe disfigurement," the limit increases to the greater of $1 million or injured person's life expectancy in years multiplied by $25,000.[23]

- **Colorado** adjusted its noneconomic damage limit, effective 2025, to $1.5 million in any tort action other than medical liability actions, and to $2.125 million for surviving parties entitled to bring wrongful death actions. Includes adjustments every two years, beginning in 2028, for inflation.[24]

- **Hawaii** limits damages for pain and suffering in personal injury actions to $375,000, though the limit does not apply to auto accident, product liability, toxic tort, and other cases.[25]

- **Idaho** limits noneconomic damages in personal injury cases to $490,512, as adjusted for inflation.[26]

- **Michigan** limits noneconomic damages in product liability actions to $569,000, rising to $1,016,000 in catastrophic injury cases, as adjusted for inflation.[27]

- **Mississippi** limits noneconomic damages in personal injury cases outside of healthcare liability to $1 million.[28]

- **Ohio** limits noneconomic damages in personal injury cases (other than medical liability claims) to $250,000, or three times economic loss, up to a maximum of $350,000, which does not apply to certain permanent and substantial physical injuries, or wrongful death claims.[29]

- **Tennessee** limits noneconomic damage awards to $750,000 for each injured plaintiff, which rises to $1 million in cases involving certain catastrophic injuries or deaths. These limits do not apply if the defendant intended to harm the plaintiff, falsified or destroyed records, was impaired by alcohol or drugs, or was convicted of a related felony.[30]

In addition, some states limit noneconomic damages in their wrongful death acts, such as:

- **Indiana** limits damages for loss of an adult's love and companionship in wrongful death cases to $300,000.[31]

- **Kansas** limits nonpecuniary damages in wrongful death case to $250,000.[32]

- **New Hampshire** law, as amended in 2024, limits a surviving spouse's damages for loss of comfort, society, and companionship to no more than $500,000. A parent's damages for loss of the comfort, society, affection, guidance, and companionship of a deceased child is limited to $300,000.[33]

- **Wisconsin** limits damages for nonpecuniary injuries to $500,000 per occurrence in the case of a deceased minor, or $350,000 per occurrence in the case of a deceased adult, for loss of society and companionship.[34]

About half of states, like Maryland, limit noneconomic damages specifically in medical liability actions. Generally, theses caps are at levels similar to or lower than those above.

As these state laws show, Maryland's current limit on noneconomic damages – at nearly a million dollars in personal injury cases, significantly more in wrongful death cases, and adjusted upward each year – is well within the mainstream. Indeed, it is at the higher end of these limits.

Conclusion

The General Assembly's foresight in enacting a reasonable limit on noneconomic damages is an important, rational approach that continues to control outlier awards. It provides consistency and predictability in Maryland's civil justice system. It has avoided the rise of awards to the astounding levels that we have seen in other states.

The bill's proposal to allow unlimited pain and suffering awards outside of healthcare liability claims will have adverse effects. It will:

- Complicate the ability to reach reasonable settlements, since plaintiffs' lawyers will demand significantly higher amounts for immeasurable harm. Some may hold out for the chance of a jackpot verdict.

- Lead to more frequent excessive verdicts for a wide range of businesses and nonprofit organizations and lengthy appeals.

- Result in higher insurance costs for Maryland drivers, homeowners, and businesses.

Thank you for considering our concerns. We respectfully ask that you not favorably report this bill.

---

[1] *See Murphy v. Edmonds*, 601 A.2d 102, 118 (Md. 1992) (affirming $245,000 award for past and future loss of household services); *see also Choudhry v. Fowlkes*, 219 A.3d 107 (Md. Ct. Spec. App. 2019) (reaffirming that loss of household services are recoverable as uncapped *economic* damages so long as the plaintiff supports the request by identifying the tasks, providing their market value, and showing a reasonable expectation that a decedent would have performed those tasks).

[2] *Choudhry,* 219 A.3d at 113-14 (citing *Morvant v. Constr. Aggregates Corp.*, 570 F.2d 626, 633 (6th Cir. 1978)).

[3] Md. Cts. & Jud. Code Ann. § 11-108(a)(1).

[4] Md. Cts. & Jud. Code Ann. § 3-904(d) (providing that damages in wrongful death actions are not limited to pecuniary losses and may include "damages for mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education"). As the American Law Institute's (ALI) tentatively approved new Restatement of the Law Third Torts: Remedies recognizes in examining Wrongful Death Acts, "most states do not compensate grief or emotional distress," unlike Maryland.

[5] *See* Ronald J. Allen & Alexia Brunet, *The Judicial Treatment of Non-economic Compensatory Damages in the Nineteenth Century*, 4 J. Empirical Legal Studies 365, 396-87 (2007) (finding that prior to the Twentieth Century, there were only two reported cases affirmed on appeal involving total damages in excess of $450,000 in current dollars, each of which may have included an element of noneconomic damages); *see also* Fleming James, Jr., *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge*, 59 Colum. L. Rev. 408, 411 (1959) (observing that an award in excess of $10,000 was rare).

[6] Scholars largely attribute the initial rise in noneconomic damage awards to: (1) the availability of future pain and suffering damages; (2) the rise in automobile ownership and personal injuries resulting from automobile accidents; (3) the greater availability of insurance and willingness of plaintiffs' attorneys to take on lower value cases; (4) the rise in affluence of the public and a change in attitude that "someone should pay"; and (5) a campaign to increase such awards by the organized plaintiffs' bar. *See* Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy's First Responses*, 34 Cap. U. L. Rev. 545, 553-68 (2006); Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. Rev. 163, 170 (2004); *see also Melvin M. Belli, The Adequate Award*, 39 Cal. L. Rev. 1 (1951) (seminal article arguing for higher noneconomic damage awards).

[7] *See* David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. Rev. 256, 301 (1989).

[8] *See Nelson v. Keefer*, 451 F.2d 289, 294 (3d Cir. 1971). Judge Paul Niemeyer, a former Maryland federal judge who currently serves on the U.S. Court of Appeals for the Fourth Circuit, observed, "Money for pain and suffering . . . provides the grist for the mill of our tort industry." Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 Va. L. Rev. 1401, 1401 (2004).

[9] The noneconomic damage limit in personal injury cases increases each year on October 1. Md. Cts. & Jud. Proc. Code Ann. § 11-108(b)(2)(ii).

[10] *Martinez v. The John Hopkins Hosp.*, 70 A.3d 397, 410 n.19 (2013); *DRD Pool Serv., Inc. v. Freed*, 5 A.3d 45, 63 (Md. 2010); *Oaks v. Connors*, 660 A.2d 423, 430 (Md. 1995); *Murphy v. Edmonds*, 601 A.2d 102, 118 (Md. 1992).

[11] *DRD Pool Serv.,* 5 A.3d at 67 (Md. 2010) (quoting *Murphy,* 601 A.2d at 115).

[12] *Id.*

[13] Cary Silverman & Christopher E. Appel, Nuclear Verdicts: An Update on Trends, Causes, and Solutions, at 9-10 (U.S. Chamber Inst. for Legal Reform, May 2024) (examining 1,288 reported personal injury and wrongful death verdicts over $10 million between January 1, 2013 and December 31, 2022).

[14] *Id.* at 13.

[15] *Id.* at 8.

[16] *See* Mark A. Behrens, Cary Silverman & Christopher E. Appel, *Summation Anchoring: Is it Time to Cast Away Inflated Requests for Noneconomic Damages*, 44 Am. J. of Trial Advoc. 321, 327-29 (2021) (providing examples from several states).

[17] Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts*, 10 Applied Cognitive Psychology 519, 534 (1996).

[18] *See* Bradley D. McAuliff & Brian H. Bornstein, *All Anchors are Not Created Equal: The Effects of Per Diem Versus Lump Sum Requests on Pain and Suffering Awards*, 34 L. & Human Behavior 164, 167 (2010).

[19] *See* John Campbell, et al., *Time is Money: An Empirical Assessment of Non-Economic Damages Arguments*, 95 Wash. U. L. Rev. 1, 22 (2017).

[20] *Bauman v. Woodfield*, 223 A.2d 364, 373 (Md. 1966*); E. Shore Pub. Serv. Co. v. Corbett*, 177 A.2d 701, *adhered to sub nom.*, 180 A.2d 681 (Md. 1962); *Giant Food Inc. v. Satterfield*, 603 A.2d 877, 881 (Md. Ct. Spec. App. 1992).

[21] *Rivera-Ramirez v. Hall*, No. 756, 2023 WL 1987860, at *4 (Md. Ct. Spec. App. Feb. 14, 2023). This case was brought against a contractor that provided medical services to correction facilities, alleging that its physician provided inadequate care for the inmate's injury. The same tactics, however, can occur in any personal injury case.

[22] *See Maryland Legislature Puts Ceiling on Personal Injury Awards*, N.Y. Times, Apr. 13, 1986.

[23] Alaska Stat. § 09.17.010.

[24] Colo. Rev. Stat. §§ 13-21-102.5(3)(a), 13-21-203(1) (as amended by H.B. 24-1472 (Colo. 2024)).

[25] Haw. Rev. Stat. § 663-8.7.

[26] Idaho Code § 6-1603, as adjusted, https://iic.idaho.gov/wp-content/uploads/2024/07/Benefits-Non-economic-caps-effective-07_01_24.pdf.

[27] Mich. Comp. Laws § 600.2946a, as adjusted, https://www.michigan.gov/treasury/-/media/Project/Websites/treasury/Uncategorized/2024/Economic-Reports-and-Notices-2024/Limitation-on-NonEconomic-Damages-Jan-24-Signed.pdf.

[28] Miss. Code Ann. § 11-1-60(2)(b).

[29] Ohio Rev. Code Ann. § 2315.18.

[30] Tenn. Code § 29-39-102.

[31] Ind. Code Ann. § 34-23-1-2(e).

[32] Kan. Stat. Ann. § 60-1903(a).

[33] N.H. Rev. Stat. § 556:12 (as amended in 2024).

[34] Wis. Stat. § 895.04(4).

2025-02-07 Letter to Senate Judicial Proceedings C

Uploaded by: Chris Jeffries

Position: UNF

MARYLAND DEFENSE COUNSEL, INC.

Promoting justice. Providing solutions.

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Kramon & Graham PA

PRESIDENT-ELECT
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Wilson Elser

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EXECUTIVE DIRECTOR
Aimee Hiers

February 7, 2025

Chairman William C. Smith, Jr.
Senate Judicial Proceedings Committee
2 East Miller Senate Office Building
Annapolis, Maryland 21401

RE: SB 584 - Civil Actions - Noneconomic Damages - Personal Injury and Wrongful Death - OPPOSE

Dear Chairman Smith, Vice Chairman Waldstreicher, and Members of the Senate Judicial Proceedings Committee:

On behalf of the Maryland Defense Counsel, Inc. ("MDC") we oppose Senate Bill 584, which seeks to repeal the current cap on non-economic damages in Section 11-108 of the Courts and Judicial Proceedings Article.

Founded in 1962, MDC endeavors to attain equal justice for all, improve Maryland's courts and laws, and strengthen the defense of civil lawsuits through political activism, judicial candidate interviews, and educational conferences. With a focus on promoting the efficiency of the legal profession in dealing with common problems facing civil litigants, this statewide defense organization, among other things, funds a PAC and works with a lobbyist to promote defense interests in the state legislature on behalf of its members.

A noneconomic damages cap was first enacted in 1986. That legislation was enacted to address an insurance crisis in the State, which was studied in 1985 by a Governor's Task Force to Study Liability Insurance and a Joint Executive/Legislative Task Force on Medical Insurance. The Governor's Task Force findings included: (1) "[T]he civil justice system can no longer afford unlimited awards for pain and suffering[;]"and (2) "A cap on allowable pain and suffering awards will help reduce the incident of unrealistically high liability awards, yet at the same time protect the right of the injured party to recover the full amount of the economic loss, including all lost wages and medical expenses."[1] In 1994, the General Assembly increased the cap on noneconomic damages from $350,000 to $500,000, added an annual escalator increase to the cap of $15,000, and applied the cap to wrongful death cases.

[1] *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1328 (D. Md. 1989) (quoting the Governor's Task Force report, issued Dec. 20, 1985)).

Maryland's highest court has repeatedly upheld the constitutionality of the noneconomic damages cap.[2]

As of October 1, 2024, the cap in personal injury actions is $950,000. The maximum recovery for noneconomic damages in a wrongful death action is $2,375,000. Maryland's current noneconomic damage limits are among the highest in the country. The noneconomic damage cap does not limit the recovery of damages for economic losses.

Senate Bill 584 seeks to repeal in its entirety the noneconomic damages set forth in 11-108. MDC opposes SB 584 for three primary reasons.

First, the General Assembly enacted the noneconomic damages cap based on an in-depth study. Repealing the cap in its entirety could thrust the State into the position that necessitated the General Assembly enacting the noneconomic damages cap in the first instance.

Second, nuclear verdicts – verdicts in excess of $ $10 million – are on the rise.[3] Noneconomic damages are often a driving factor behind such verdicts. Maintaining a noneconomic damages cap is, therefore, a guardrail to protect against an increasing number of such verdicts.

Third, eliminating the cap on noneconomic damages in the context of non-medical malpractice personal injury cases will undoubtedly result in calls for eliminating the cap in medical malpractice cases. The State's hospital systems are under significant stress as it is *with* a cap on noneconomic damages and no statutory limit on future economic damages, which makes hospitals prime targets of medical malpractice lawsuits, especially hospitals that delivery babies. In the absence of such a cap, the increased stress is unfathomable and will lead to more verdicts like *Byrom*, a medical malpractice case tried in Baltimore City in 2019 in which the plaintiff claimed future economic damages of **$42,275,000**. The jury awarded, among other damages, $200,000,000 in future economic damages and $25,000,000 for non-economic damages.[4]

In conclusion, the General Assembly studied the issue and determined there was a need to enact a noneconomic damages cap. The need to retain such caps still exists. Further, the noneconomic damages cap strikes a balance by

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[2] *See DRD Pool Service v. Freed*, 416 Md. 46, 62 (2010); *Murphy v. Edmonds*, 325 Md. 342, 366 (1992).

[3] Amy Buttell, Nuclear Verdicts Escalate, Inside Medical Liability (April 2021).

[4] *Johns Hopkins Bayview Med. Ctr., Inc. v. Byrom*, No. 1585, 2021 WL 321745, at *6 n.9 (App. Feb. 1, 2021).

controlling noneconomic damages -- those that cannot be reduced to a value in any systematic way -- and allowing for the full recovery of any economic loss.

For all these reasons, MDC urges an unfavorable report on SB 584.

Sincerely,

/s/ *Christopher C. Jeffries*
(410) 347-7412
cjeffries@kg-law.com
on behalf of Maryland Defense Counsel, Inc.

MSDA Opposition to SB 584 Noneco. damages.pdf
Uploaded by: Daniel Doherty
Position: UNF

The Maryland State Dental Association and the Maryland Society of Oral & Maxillofacial Surgeons Oppose SB 584 – Civil Actions – Noneconomic Damages – Personal Injury and Wrongful Death

Submitted by Daniel T. Doherty, Jr. on Behalf of MSDA and MSOMS

The limitations on the amount of non-economic damages were enacted in 1985 in response to the serious threat that physicians, dentists and some other health care providers would cease practicing in Maryland due to the exposure to huge jury awards to noneconomic damages, and the withdrawal of many insurers from the medical malpractice market. Noneconomic damages include emotional pain and suffering, loss of society, and many other results of injury or death that cannot be quantified on a monetary basis, leaving valuation to the subjective determination of a jury. Initially the cap on these damages was set in statute as $350,000 for personal injury after July 1, 1986, and $500,000 for personal injury or wrongful death after October 1, 1994. Beginning on October 1, 1995 that cap amount increased by $15,000 each year. The enactment of this legislation in 1985 stabilized the medical insurance crisis in Maryland.

While the provisions of SB 584 do not explicitly repeal the limitations on noneconomic damages for medical malpractice cases, passage will be the first step in accomplishing that result. Today, we are in an environment where health insurance companies are consistently reducing reimbursement rates to a point that the profitability of many medical or dental practices are operating at paper thin margins. To repeal the cap on noneconomic damages likely will lead to a negative domino effect. Malpractice rates will increase significantly, narrowing even more the profitability of medical practices, driving many practitioners either into retirement or force them to move to another state with better tort protections.

For these reasons the Maryland State Dental Association and the Maryland Society of Oral & Maxillofacial Surgeons request that SB 584 receive an unfavorable report.

Submitted by
Daniel T. Doherty, Jr.
February 7, 2025

SB 584 - 2025 NAMIC Letter Opposing.pdf
Uploaded by: Gina Rotunno
Position: UNF

NAMIC®
NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES

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February 6, 2025

Members of the Senate Judicial
Proceedings Committee

Via email

Re: NAMIC opposition to SB 584 — Civil Actions - Noneconomic Damages - Personal Injury and Wrongful Death

Members of the Committee:

The National Association of Mutual Insurance Companies (NAMIC) is reaching out to express our concerns with Senate Bill 584, which repeals the existing limitations on noneconomic damages in civil actions for personal injury or wrongful death which have been in place for over 25 years.

NAMIC is the largest property and casualty insurance trade association in the country, with more than 1,300 member companies. NAMIC supports regional and local mutual insurance companies as well as some of the country's largest national insurers. NAMIC member companies write $383 billion in annual premiums nationally, and our members account for 61 percent of homeowners, 48 percent of automobile, and 25 percent of the business insurance markets.

Senate Bill 584 proposes the repeal of the long-standing limitations on noneconomic damages in civil actions for personal injury or wrongful death. These damage caps have been in place for over 25 years, and their removal would significantly disrupt the stability of the insurance marketplace. Caps on damages help create a more predictable environment for modeling insurance costs. Without these caps, inconsistent and unpredictable judgments could result in outlier verdicts, creating one of the highest cost drivers for Maryland's insurance market. This unpredictability makes it difficult for insurers to accurately model potential losses.

Inconsistent, uncapped noneconomic damages are detached from the economic realities of a potential loss and make it difficult for juries to assign damage amounts with little direction and an open-ended scope—maintaining noneconomic damages caps alleviate that burden and ultimately provide for better price stability of insurance rates for all involved

For these reasons, NAMIC strongly opposes Senate Bill 584 and respectfully requests that an unfavorable report be issued for the bill.

Sincerely,

Gina Rotunno

Gina Rotunno
Regional Vice President
Mid-Atlantic Region

SB 584_MDCC_Civil Actions - Noneconomic Damages -
Uploaded by: Grason Wiggins
Position: UNF

MARYLAND
Chamber of Commerce

LEGISLATIVE POSITION:
Unfavorable
Senate Bill 584
Civil Actions - Noneconomic Damages - Personal Injury and Wrongful Death
Judicial Proceedings Committee
Tuesday, February 11, 2025

Dear Chairman Smith and Members of the Committee:

Founded in 1968, the Maryland Chamber of Commerce is the leading voice for business in Maryland. We are a statewide coalition of more than 7,000 members and federated partners working to develop and promote strong public policy that ensures sustained economic recovery and growth for Maryland businesses, employees, and families.

As amended, Senate Bill 584 seeks to increase the current cap on noneconomic damages in civil actions in specified personal injury or wrongful death incidents by 90% - nearly doubling the current cap. This legislation also would raise the annual escalator from $15,000 to $20,000, imposing another overnight increase of 33%. The Maryland Chamber of Commerce is deeply concerned about the negative impact this bill would have on employers and their employees. **For employers, they will see their property and casualty insurance rates increase due to the greater liability exposure this higher limit on noneconomic damages will bring.** This is especially problematic for small businesses with razor-thin revenue margins. **For both employers and employees, they will see their healthcare costs rise as a product of physicians and hospitals passing along their increased premium rates to patients.** This cost will be even more burdensome with the consistently rising cost of insurance premiums.

Higher liability risks would result in spikes in insurance rates, forcing companies to raise prices, cut costs like employee wages and benefits or potentially move out of state. Higher caps on noneconomic damages also will mean larger payouts in lawsuits, which increases the risk for insurance companies, making the entire insurance pool riskier. Those companies will in turn raise premiums for liability coverage to account for their higher potential payouts, passing the additional costs onto policyholders - both businesses and individuals. The National Assocation of Insurance Commissioners found that premium rates were lower in states that regulated the amount of noneconomic damages.[1]

In the fiscal note for similar legislation introduced in the 2020 Legislative Session that would have lifted limitations on noneconomic damages, Maryland's Department of Legislative Services indicated that, "Under this bill, liability risk for small businesses, including health care providers, significantly increases." In the fiscal note for this legislation introduced in the 2023 Legislative Session, the fiscal note included that the bill would have meaningful impact on small businesses that are parties to civil actions. If passed, SB 538 could lead to more frequent excessive verdicts

for a wide range of businesses and nonprofit organizations, along with lengthy appeals. With Maryland's consumers already struggling to adjust in this historic and prolonged inflation crisis, continuing to increase the cost of doing business in Maryland will devastate our small business community and deliver worse outcomes for our most vulnerable communities.

Maryland's current limits on noneconomic damages in personal injury and wrongful death cases contribute to a predictable and stable business and healthcare environment.

For these reasons, the Maryland Chamber of Commerce respectfully requests an unfavorable report on SB 584.

[1] *NAIC, Profitability by Line by State, various reports*

SB 584_Coalition Letter_Unfavorable.pdf
Uploaded by: Hannah Allen
Position: UNF

SAY NO TO SB 584: Preserve Maryland's Noneconomic Damages Cap Levels

Why It Matters

A noneconomic damage cap was first enacted in Maryland in 1986 at $350,000. This cap has been adjusted over the years by the annual escalator. Maryland chose to cap noneconomic damages because pain and suffering are difficult to quantify, and putting a reasonable cap on damages is the best public policy to balance the need for recovery for these injuries with the avoidance of excessive awards.

The Facts

- Noneconomic damages are damages that may be awarded for pain and suffering in negligence actions. In Maryland, these damages are capped at $935,000, and they go up each year by $15,000.
- Many states have caps on noneconomic damages, and Maryland's cap is already one of the highest in the nation.
- In its current form, SB 584 would completely remove the current cap on noneconomic damages and expose small businesses across the state to untenable liability that will increase the price of goods and services for consumers.

What Would SB 584 Mean for Marylanders?

- If enacted, SB 584 would increase insurance costs for consumers and businesses, as demonstrated by data and studies compiled by the National Association of Insurance Commissioners (NAIC). Additionally, the NAIC found that premium rates were lower in states that capped the amount of non-economic damages.
- If enacted, SB 584 would lead to a significant increase in claims and lawsuit filings, driving up the costs of defense, settlement and claims administration that will ultimately be passed on to consumers.
- If enacted, SB 584 would lead to impediments in reaching reasonable settlements, since plaintiffs' lawyers will demand significantly higher amounts for immeasurable harm as they hold out for the chance of a jackpot verdict.

Bottom Line

This legislation would only benefit the plaintiffs' lawyers because elimination of the cap will result in the potential for unlimited attorney fees, which are based on a percentage of the damages recovered. **This profound increase has no basis or rationale and will make Maryland an extreme outlier among states with caps.**

What Can You Do?

Stand with hardworking Marylanders and say NO to SB 584! For the reasons stated, an overnight elimination of is excessive, unfounded, and should be rejected.

Removing the noneconomic damages cap would have a cascading effect on businesses, employment opportunities, and the price of goods. Maryland simply cannot afford to subject its businesses and residents to untenable liability that will limit economic growth and opportunity.

For these reasons, the following groups strongly oppose SB 584

Allegany County Chamber of Commerce
Associated Utility Contractors of Maryland
Calvert County Chamber of Commerce
Experience Prince George's
Howard County Chamber of Commerce
Maryland Arborist Association
Salisbury Area Chamber of Commerce
Washington County Chamber of Commerce

SB 584-Civil Actions - Noneconomic Damages - Perso

Uploaded by: Jake Whitaker

Position: UNF

Maryland
Hospital Association

Senate Bill 584- Civil Actions - Noneconomic Damages - Personal Injury and Wrongful Death
Position: *Oppose*
February 11, 2025
Senate Judicial Proceedings Committee

MHA Position

On behalf of the Maryland Hospital Association's (MHA) member hospitals and health systems, we appreciate the opportunity to comment on Senate Bill 584. Maryland hospitals oppose efforts that would make the state's highly litigious environment even more unsustainable. SB 584 would needlessly raise the cost of health care and make it difficult to attract and retain the doctors necessary to continue to provide the highest quality care.

A plaintiff in Maryland currently can seek economic and noneconomic damages for an injury. Compensation for economic damages, which are calculated to include lost wages or earning capacity and future medical care, is unlimited. These damages ensure the plaintiff will be cared for and that any income losses are adequately compensated not only to the plaintiff, but also to their family.

Noneconomic damages, on the other hand, are not established using traditional methods. These damages purport to consider the plaintiff's pain and suffering as a result of the injuries sustained. **Maryland currently has one of the highest caps in the country at $950,000, and it automatically increases each year by $15,000. For combined survival and death actions the damages can be as much as $2,375,000.**

In 1986, the General Assembly enacted reasonable limits on noneconomic damages in response to disproportionate jury awards. These limits on noneconomic damages help to ensure the stability of Maryland's liability insurance market and civil justice system, while allowing reasonable compensation for pain and suffering. Reasonable limits on jury awards for noneconomic damages help preserve "the availability of sufficient liability insurance, at reasonable cost, in order to cover claims for personal injuries to members of the public."[1] Eliminating the caps on noneconomic damages would threaten the viability of Maryland's liability insurance market, raise insurance costs, and potentially limit access to care.

For these reasons, we request an unfavorable report on SB 584.

For more information, please contact:
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[1] Murphy v. Edmonds, 325 Md. 342, 369 (1992)

SB 584 - Civil Actions - Noneconomic Damages - Per
Uploaded by: Kimberly Routson
Position: UNF

MedStar Health

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Assistant Vice President, Government Affairs - Maryland

SB 584 – Civil Actions - Noneconomic Damages - Personal Injury and Wrongful Death

Position: ***Oppose***
Senate Judicial Proceedings Committee
February 11, 2025

MedStar Health is the largest healthcare provider in Maryland and the Washington, D.C. region. MedStar Health offers a comprehensive spectrum of clinical services through over 300 care locations, including 10 hospitals, 33 urgent care clinics, ambulatory care centers and an extensive array of primary and specialty care providers.

SB 584 would remove the cap on non-economic damages, injuries that are challenging to quantify and are commonly referred to as *pain and suffering*. These are different from economic damages, which can be quantified and documented with information like a medical bill or lost wages. There is no cap on *economic damages* in Maryland, which are unlimited and fully recoverable. These damages ensure the plaintiff will be cared for and that any income losses are adequately compensated not only to the plaintiff, but also to their family.

A non-economic damage cap was first enacted in Maryland in 1986 and set at $350,000. This cap has been adjusted over the years and increases automatically at a rate of $15,000 per year. It is currently set at $950,000 and automatically increases next year.

SB 584 would negatively impact Maryland's healthcare system. Maryland's litigation and insurance environment is already one of the most troubling in the country. SB 584 would make that environment even more problematic. Many of the same insurers that provide general liability insurance provide medical liability insurance. A number of these insurers have stopped writing coverage in the state, or they have significantly reduced the amount of coverage they are willing to provide and, in addition, have raised their rates in responses to the losses they are experiencing. SB 584 would cause a self-inflicted increase in cost for all businesses, including healthcare, which in turn would raise healthcare costs. At a time where hospitals are experiencing staffing shortages, SB 584 will be one more issue that makes it difficult to attract and retain the nurses and doctors we need to continue providing Marylanders with the high quality of care they have come to expect.

These crushing expenses take resources from important needs like new clinical programs, expanded services, and public health initiatives to reduce social determinants, as well as from investments in infrastructure for new technology, modern equipment, and training and support (including compensation) for nurses and other healthcare professionals. A better balance between a desire to fairly compensate plaintiffs and these extraordinarily important needs must be struck.

For the reasons above, MedStar Health urges an ***unfavorable*** report on **SB 584**.

SB584 - Oppose - Maryland Motor Truck Association.

Uploaded by: Louis Campion

Position: UNF

Maryland Motor Truck Association

HEARING DATE: February 11, 2025

BILL NO/TITLE: SB584: Civil Actions - Noneconomic Damages - Personal Injury and Wrongful Death

COMMITTEE: Senate Judicial Proceedings

POSITION: **Oppose**

Maryland Motor Truck Association (MMTA) is extremely concerned about efforts to eliminate Maryland's noneconomic damages cap given the rise in nuclear verdicts and staged truck accidents that have plagued the trucking industry in recent years.

The American Transportation Research Institute completed a study in 2020 to better understand the impact of rising verdicts on trucking. The research evaluated 600 cases between 2006 and 2019. In the first five years of data, there were 26 cases over $1 million involving heavy-duty trucks. In the last five years, there were nearly 300 cases. The number of verdicts over $10 million nearly doubled in that time. According to CaseMetrix, the average verdict against a trucking company in 2012 was about $2.6 million. In 2017, that figure was just over $7 million. As of 2019 it exceeded $17 million. If the cap is removed it would further expose the trucking industry to nuclear verdicts exceeding $10 million. Non-economic damages make up 42% of the average nuclear verdict now. Some states without caps have seen damages exceeding $250 million! Critics say that caps are arbitrary, but the reality is that these verdicts are even more arbitrary because non-economic damages are not quantifiable, have no precise value, and can be emotionally charged for a jury.

The impacts on motor carriers of these nuclear verdicts have included bankruptcy filings, businesses closing, and unsustainable higher insurance premiums as fewer insurance companies are willing to provide insurance to the trucking industry. Over the past few years carriers such as Nationwide E&S and Zurich have exited the truck insurance market, making it more and more difficult for the trucking industry to deliver the products our businesses and citizens need.

Another outcome of these large awards is the target that has been branded on the industry in the form of staged fraudulent accidents. In these cases, cars intentionally collide with trucks or buses in the hopes of a large jury award or insurance settlement. In Louisiana at least 63 individuals have been charged or pled guilty, with the Federal government estimating they were engaged in as many as 150 staged wrecks involving commercial trucks. In January 2022, a federal indictment charged 23 defendants in Washington, California, Michigan, Nevada, and British Columbia, Canada with participating in a staged automobile accident scheme.

Data shows that in about 75% of serious injury or fatal crashes involving a car and a truck, the fault of the accident was with the car driver. Many trucking companies have now resorted to the added cost of installing dashboard cameras to their fleets to protect their drivers and businesses.

Maryland statue already allows for the noneconomic damages cap to increase annually. Removing the cap entirely will make Maryland a laboratory for similarly staged accidents and expose the trucking industry to unlimited liability, making it more difficult to obtain insurance and operate in the state. For the reasons noted above MMTA respectfully requests an unfavorable report.

About Maryland Motor Truck Association: Maryland Motor Truck Association is a non-profit trade association that has represented the trucking industry since 1935. In service to its 1,000 members, MMTA is committed to support, advocate and educate for a safe, efficient and profitable trucking industry in Maryland.

For further information, contact: Louis Campion, (c) 443-623-5663

SB584_NFIB_unfav (2025).pdf
Uploaded by: Mike O'Halloran
Position: UNF

NFIB-Maryland – 60 West St., Suite 101 – Annapolis, MD 21401 – www.NFIB.com/Maryland

TO: Senate Judicial Proceedings Committee

FROM: NFIB – Maryland

DATE: February 16, 2024

RE: **OPPOSE SENATE BILL 584** – Civil Actions – Noneconomic Damages – Personal Injury and Wrongful Death

Founded in 1943, NFIB is the voice of small business, advocating on behalf of America's small and independent business owners, both in Washington, D.C., and in all 50 state capitals. With more than 250,000 members nationwide, and nearly 4,000 here in Maryland, we work to protect and promote the ability of our members to grow and operate their business.

On behalf of Maryland's small businesses, NFIB opposes Senate Bill 584 – legislation repealing the caps on noneconomic damages in civil actions for personal injury or wrongful death.

Limitlessly raising injury awards will expose our state's small employers to increased litigation and place upward pressure on liability insurance rates. When damage awards increase, so do insurance costs. Businesses who cannot operate without liability protection, must then reallocate scarce resources to cover this subsequent increase as the "cost of doing business" in Maryland.

Too many small businesses are working off of small and diminishing profit margins and we cannot keep asking them to pass on these sorts of new or increased costs to their customers and clients.

Maryland's limits on noneconomic damages are already among the highest in the nation. We are one of the few states that statutorily increases noneconomic damages each year – currently it is $950,000 for personal injury. Maryland's small business owners fear that exorbitant damage claims and the associated costs to defend against them will easily bankrupt their business.

For these reasons, **NFIB opposes SB584** and requests an unfavorable report.

SB 584 APCIA UNF 02112025 FINAL .pdf
Uploaded by: Nancy Egan
Position: UNF

Testimony of

American Property Casualty Insurance Association (APCIA)

Senate Judicial Proceedings Committee

Senate Bill 584 Civil Actions - Noneconomic Damages - Personal Injury or Wrongful Death

February 11, 2025

Unfavorable

The American Property Casualty Insurance Association (APCIA) is the primary national trade organization representing nearly 66.9% of the personal auto market, 82.4% of commercial auto, and 75.4% of commercial general liability.in the Maryland property casualty insurance market. Senate Bill 584 would be a significant policy shift that would have a detrimental impact on Maryland civil defendants, residents, businesses and insurers due to increased claims, litigation jury verdicts and settlements. APCIA appreciates the opportunity to provide written comments in opposition to Senate Bill 584.

Repealing the non-economic damages caps for personal injury cases, which currently exceeds $950,000 and increases by $15,000 every year, will also significantly complicate the ability to settle lawsuits, since plaintiffs' lawyers will demand significantly higher amounts for immeasurable harm. The current law strikes a reasonable balance between unlimited subjective awards and the consistency and predictability that contribute to a stable civil justice system in Maryland. The escalating non-economic personal injury damage caps should be retained. The practical effect of this repeal is to provide yet another avenue for plaintiffs to seek uncapped and subjective non-economic damage awards, placing businesses, consumers and insurers at greater risk for nuclear verdicts, since non-economic damages have been shown to be the key drivers of nuclear verdicts.[1]

Non-economic damages may far exceed the amount of economic damage awards because of intangible factors such as subjective values, beliefs, emotional sensitivities and differing perspectives, and courts and juries often struggle to calculate fair and rational non-economic damage award. The repeal of the non-economic damages cap only provides incentives for plaintiff's attorneys to file litigation, which will significantly increase the number of lawsuits going forward and increase Maryland's already high tort tax of $3,694 per household and decreases the state's GDP by 1.78%.[2]

An actuarial study was conducted by Pinnacle Actuarial Resources, Inc, an independent actuarial firm in response to last year's bill SB 538 which raised the cap to $1,735,000 and the escalator to $20,000. The study found that last year's change would have raised personal auto rates by as much as 19% and commercial auto liability premiums by as much as 30%, and general liability premiums for businesses up to 14.2%.

In this time of high inflation and economic stress, this would only add to the cost of doing business in the state which would translate to higher cost to all consumers.

The broad discretion given juries in awarding damages for noneconomic loss is the single greatest contributor to the inequities and inefficiencies of the tort liability system. It is a difficult issue to address objectively because of the emotions involved in cases of serious injury and because of the financial interests of plaintiffs' lawyers.

Pain and suffering awards are typically subject to imprecise and ineffective standards of review, such as whether the amount is so high that it "shocks the conscience." Increasing the available damages in this manner will almost certainly result in an increase in claims and lawsuit filings, and will drive up the costs of defense, settlement and claims administration, including

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[1] *US Chamber of Commerce Institute for Legal Reform Nuclear Verdicts Report, November 2024*
Non-economic damages may far exceed the amount of economic damage awards because of intangible factors such as subjective values, beliefs, emotional sensitivities and differing perspectives, and courts and juries often struggle to calculate fair and rational non- economic damage award.

[2] *US Chamber of Commerce Institute for Legal Reform Tort Costs in America Empirical Analysis, November 2024.* For purposes of the study, tort costs are defined as the aggregate amount of judgments, settlements, and legal and administrative costs to adjudicate private claims and enforcement actions.

to the increased need for experts to now necessary to testify about pain and suffering on both sides given that caps would be eliminated.

- Studies have shown that caps on non-economic damages caps lead to a significant reduction in the number of court cases filed.[3]

- Caps on non-economic damages have also been found to be especially effective in controlling tort liability costs.[4]

- Studies document that non-economic damages caps are linked to lower insurance premiums. For example, using state-specific data, the National Association of Insurance Commissioners (NAIC) found that premium rates were lower in states that regulated the amount of non-economic damages. [5]

There is no need to repeal Maryland's noneconomic damage caps. When Maryland enacted its statutory limit in 1986, it was the first state to adopt a limit generally applicable to personal injury cases. Now, nearly two thirds of states have statutory limits on noneconomic damages that apply to all personal injury cases, medical malpractice cases, or both.[6] Eighteen states cap or disallow wrongful death non-economic damages. Maryland's current limits on personal injury noneconomic damages are among the highest amounts in the country.[7]

Maryland's current limits on noneconomic damages in personal injury and wrongful death cases contribute to a predictable and stable business and healthcare environment in Maryland. They are within the mainstream of how other states have treated non-economic damages and should not be altered. Repeal of the caps would disturb this careful balance that the legislature has set by exposing Maryland residents and businesses to unpredictable and potentially extraordinary liability. Eliminating the statutory limit on subjective non-economic damages will result in unpredictability and will place upwards pressure on insurance rates for Maryland consumers, businesses, and insurers as the amount of insured losses skyrockets.

The legislature's foresight in enacting a reasonable limit on noneconomic damages is an important, rational measure that continues to control outlier awards and provide predictability in Maryland's civil justice system today. A statutory limit only facilitates reasonable settlements and keeps insurance rates stable if its application is predictable and consistent. If non-economic damage caps for personal injury cases are repealed, plaintiffs will increasingly utilize such tactics as summation 'jury anchoring,' arguing for an excessive pain and suffering award, which will cause Maryland to become a nuclear verdict state, with all of the associated adverse consequences. Empirical evidence confirms that anchoring "dramatically increases" noneconomic damage awards. [8]

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[3] https://www.cbo.gov/sites/default/files/108th-congress-2003-2004/reports/report_2.pdf

[4] https://www.insurance-research.org/sites/default/files/news_releases/IRCsocinfFINAL..pdf

[5] *NAIC, Profitability by Line by State, various reports*

[6] See e..g., Alaska Stat. § 09.55.549; Cal. Civ. Code § 3333.2; Colo. Rev. Stat. § 13-64-302; Ind. Code § 34-18-14-3; La. Rev. Stat. Ann. § 40:1299.42; Md. Cts. & Jud. Proc. Code § 3-2A-09; Mass. Gen. Laws ch. 231 § 60H; Mich. Comp. Laws Ann. § 600.1483; Miss. Code Ann. § 11-1-60(2)(a); Mont. Code Ann. § 25-9- 411; Neb. Rev. Stat. § 44-2825; Nev. Rev. Stat. § 41A.035; N.M. Rev. Stat. § 41-5-6; N.C. Gen. Stat. § 90-21.19; N.D. Cent. Code § 32-42-02; Ohio Rev. Code Ann. § 2323.43; S.C. Code Ann. § 15-32- 220; S.D. Codified Laws §21-3-11; Tex. Civ. Prac. & Rem. Code Ann. § 74.301; Utah Code § 78B-3-410; Va. Code Ann. § 8.01-581.15; W. Va. Code § 55-7B-8.

[7] A few states limit noneconomic damages to $250,000. Most states with caps have limits in $350,000 to $600,000 range. Maryland is one of only seven states that automatically adjust the limit on noneconomic damages on a regular basis to account for inflation. While some states adjust or lift the cap for catastrophic injuries or wrongful death, many are still at levels that are lower than Maryland's limit.

[8] John Campbell et al., Time Is Money: An Empirical Assessment of Non-Economic Damages Arguments, 95 WASH. U. L. REV. 1, 28 (2017).

Finally, when an injury or death is caused by malicious conduct, a plaintiff can also recover punitive damages in Maryland. About half of the states limit punitive damages to an amount set by statute or a multiple of compensatory damages. A half dozen other states generally do not authorize punitive damage awards. In Maryland, punitive damages are available and uncapped.

For all these reasons, APCIA respectively requests an unfavorable report on Senate Bill 584.

Nancy J. Egan,

State Government Relations Counsel, DC, DE, MD, VA, WV Nancy.egan@APCIA.org Cell:

443-841-4174

SB584_MRA_UNF.pdf
Uploaded by: Sarah Price
Position: UNF

SB584 Civil Actions - Noneconomic Damages - Personal Injury and Wrongful Death
Judicial Proceedings Committee
February 11th, 2025

Position: Unfavorable

Background: SB584 would remove the cap on noneconomic damages in cases of personal injury and wrongful death.

Comments: The Maryland Retailers Alliance (MRA) writes in opposition to **SB584 Civil Actions - Noneconomic Damages - Personal Injury and Wrongful Death**. We have serious concerns about the impact that this proposal would have on unavoidable operational costs for businesses. Removing the existing cap on noneconomic damages could drastically affect rates for insurance policies at a time when essentially all "costs of doing business" are also increasing. This impacts not only property and casualty and umbrella policies for businesses, but also the health insurance policies that are available to employees through their workplace. As liability risk increases for healthcare professionals, so too will the cost of healthcare.

The fiscal analyses performed on previous introductions of this proposal have predicted meaningful impacts on small businesses. The previously mentioned estimated effect on the cost of insurance and the financial risks faced by businesses that find themselves as defendants against lawsuits resulting from the damages cap removal are particularly alarming. Though a fiscal analysis is not available for SB584 at the time of testimony submission, MRA expects that similar expectations would apply to this legislation.

For these reasons, we would respectfully urge an unfavorable report on SB584. Thank you for your consideration.

SB0584_UNF_MedChi, MDAFP, MDACEP, MDACOG, MDAAP, M
Uploaded by: Steve Wise
Position: UNF

Senate Judicial Proceedings Committee
February 11, 2025
Senate Bill 584 – *Civil Actions – Noneconomic Damages – Personal Injury and Wrongful Death*
POSTION: OPPOSE

On behalf of MedChi, The Maryland State Medical Society, the Maryland Academy of Family Physicians, the Maryland Chapter of the American College of Emergency Physicians, the Maryland Section of The American College of Obstetricians and Gynecologists, the Maryland Chapter of the American Academy of Pediatrics, the Maryland/District of Columbia Society of Clinical Oncology, and the Maryland Society of Eye Physicians and Surgeons, we submit this letter of opposition for Senate Bill 584.

Senate Bill 584 would repeal the State's cap on non-economic damages that applies to cases other than health care claims. While the physician groups joining in this letter would not be directly affected by its repeal, they know that the next effort by the plaintiff's bar after this one will be to seek a similar repeal of the cap which applies to health care claims, either by future legislation or through litigation. For this reason, these groups oppose Senate Bill 584.

Noneconomic damages are the damages awarded to plaintiffs for pain and suffering. One of the reasons for a cap on noneconomic damages is that pain and suffering and emotional distress are inherently subjective and there is no method to accurately calculate or measure how much money to pay someone for these items. These damage awards are the most likely to be disproportionate because by their very nature they are based on emotion. On the other hand, loss of income from employment or the cost of nursing and custodial care for a seriously injured person, and actual medical bills from hospitals, nursing homes and the like, can be calculated and determined with reasonable accuracy. These "economic damages" have always been fully compensable under Maryland law; they are not capped.

Recognizing that our insurance market could not withstand repeatedly large noneconomic damage awards, the General Assembly intervened in the 1980s and implemented a cap on them, as have many other states. Even with that cap in place, in 2004, a Special Session of the Legislature was called because of a medical liability insurance crisis, driven by excessive verdicts, which was forcing OB-GYNs to leave obstetrics practice and causing some doctors to leave Maryland or to retire early. The Legislature again stepped in and enacted a separate cap on noneconomic damages for actions in medical malpractice.

Today, Maryland has one of the highest noneconomic damage caps in the country for medical malpractice cases at over $900,000. For wrongful death medical malpractice actions involving two or more claimants or beneficiaries, the total amount awarded is limited to 125% of the cap, or over $1.1

million. These amounts automatically increase each year by $15,000.

Passage of Senate Bill 584 will undoubtedly be followed by legislation calling for a repeal of the medical malpractice cap, or by litigation seeking the same. The General Assembly should heed the lessons of past Legislatures, which recognized the need for these damage caps, and not accept this invitation from the plaintiff's bar to once again inject instability into the State's insurance market and to make even worse our current healthcare workforce shortages. We respectfully request that you oppose Senate Bill 584.

For more information call:
J. Steven Wise
Danna L. Kauffman
Andrew G. Vetter
Christine K. Krone
410-244-7000

SB0584 - MTA - LOI - Civil Actions – Noneconomic D

Uploaded by: Matt Mickler

Position: INFO

February 11, 2025

The Honorable William C. Smith, Jr.
Chair, Senate Judicial Proceedings Committee
2 East Miller Senate Office Building
Annapolis MD 21401

RE: Letter of Information – Senate Bill 584 – Civil Actions - Noneconomic Damages - Personal Injury and Wrongful Death

Dear Chair Smith and Committee Members:

The Maryland Department of Transportation (MDOT) takes no position on Senate Bill 584 but offers the following information for the Committee's consideration.

SB 584 removes the cap on noneconomic damages in civil actions for personal injury and wrongful death.

Unlike other State agencies, the Maryland Transit Administration's (MTA) tort liability is governed by the Transportation Article, not the Maryland Tort Claims Act. The Transportation Article does not include a limit on liability. Current law provides a cap on noneconomic damages, which provides plaintiffs with significant levels of recovery while protecting MTA from unlimited exposure to noneconomic damages.

Removal of the noneconomic damages cap will likely lead to significantly greater awards and settlements against MTA and could result in a lack of predictability in litigating and settling MTA cases. Senate Bill 584 may also affect MTA's access to excess insurance or deductible amounts.

The Maryland Department of Transportation requests that the Committee consider this information during its deliberations on Senate Bill 584.

Respectfully submitted,

Jalen Sanders
Director of Governmental Affairs
Maryland Transit Administration
410-491-0133

Matthew Mickler
Director of Government Affairs
Maryland Department of Transportation
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