

THE MARKET FOR JUSTICE, THE “LITIGATION EXPLOSION,” AND THE “VERDICT BUBBLE”: A CLOSER LOOK AT VANISHING TRIALS

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“A jury consists of twelve persons chosen to decide who has the better lawyer.” – Robert Frost

Abstract

[a.1] Recently, a respected jurist has lamented the declining number of federal jury trials. Chief Judge William Young of the United States District Court for the District of Massachusetts, writing in the *Federal Lawyer*,¹ pointed out that jury trials in federal civil cases declined 26% in the decade between 1989 and 1999, which he attributed to four factors: the district court judiciary’s “loss of focus” on the core function of trying jury cases; the business community’s loss of interest in jury adjudication (“opting out of the legal system altogether” in favor of arbitration); Congress’s “marginalizing the district court judiciary”; and the “Europeanization of American Law,” which seems to refer to the expanding role of administrative adjudication in American law.²

[a.2] In our view, although Judge Young has correctly observed that the data show a decline in the number of completed federal civil jury trials,³ and has also given some explanations for the numbers, he did not give sufficient credit to a major, underlying issue, which involves the economics of adjudication, beyond the business community’s “loss of interest” in jury trials. We shall demonstrate that there is a marked increase in the use of alternative fora, especially arbitration, which is inevitably drawing down the number of cases that would otherwise be filed, as well as those eventually reaching trial. Although the decline in trials has come both in trials concluded before judges and juries, arbitration, as Young recognizes, has a special role in displacing jury trials, as it offers a more predictable and far less expensive dispute resolution mechanism than is provided by trial of facts to a randomly selected, broadly representative jury panel.

[a.3] We shall also demonstrate that legal history teaches that there has long been market competition among alternative fora; that fora, as well as litigants, are themselves motivated by economic considerations that make them more (or less) willing to exercise jurisdiction; and that dispute resolution will tend, over time, to move toward the most economically efficient forum. Although increased judicial “activism,” e.g., increased enthusiasm for resolving cases by summary judgment, has been identified as a major culprit in the diversion of cases from trial,⁴ rather little attention seems to have been paid to the role of jury verdicts – especially high-end “outliers” – as a factor in the shrinking numbers of trials.

Table of Contents

[The Numbers](#)

[A Lesson from Legal History](#)

[The Jury’s In](#)

[Judicial Economics](#)

[The Jury’s Out](#)

[The Verdict](#)

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¹ William G. Young, *An Open Letter to U.S. District Judges*, FED. LAW., July 2003, at 30.

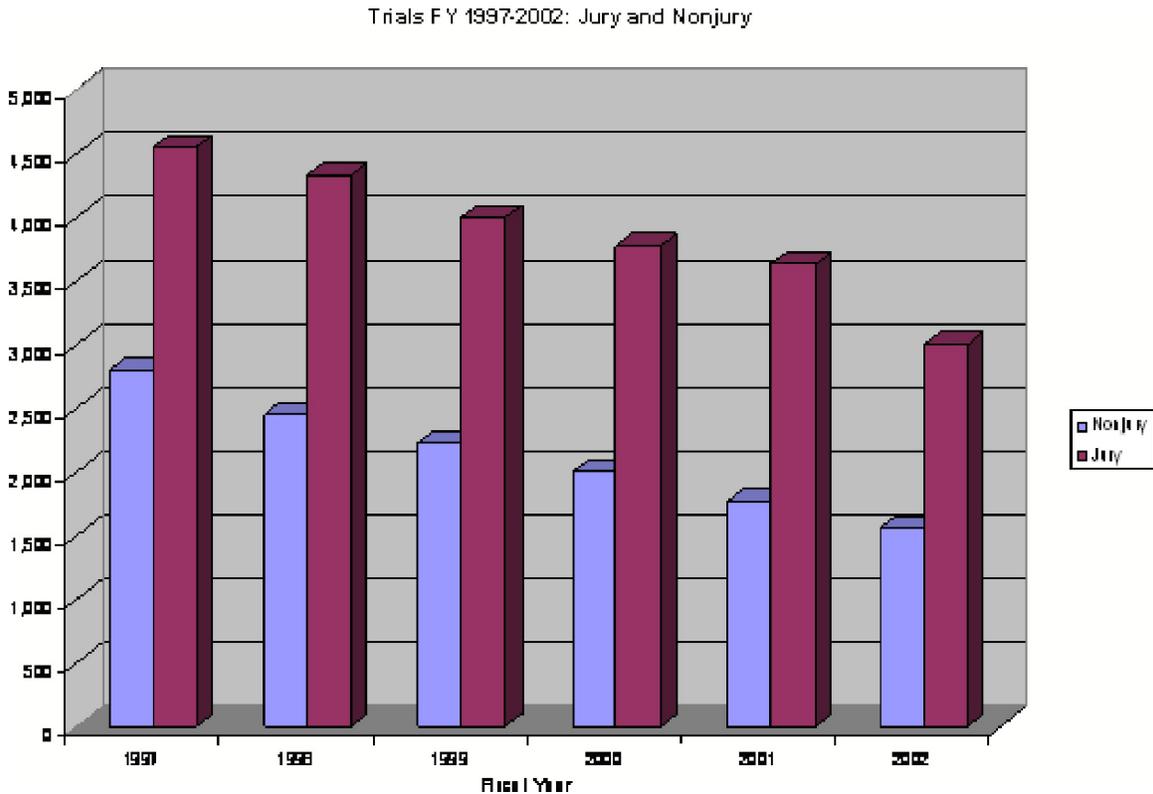
² *Id.* at 32-34.

³ The data actually show a steady decline in both jury and nonjury federal civil trials. See Table I and note 5, *infra*.

⁴ See, e.g., 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 (2003).

The Numbers

[1] As observed by Judge Young, the number of federal civil jury trials⁵ showed a remarkable decline of more than one-fourth in the decade 1989-99.⁶ The authors have brought the numbers up to date, through fiscal year 2002. The decline has continued, as Table I below clearly demonstrates:



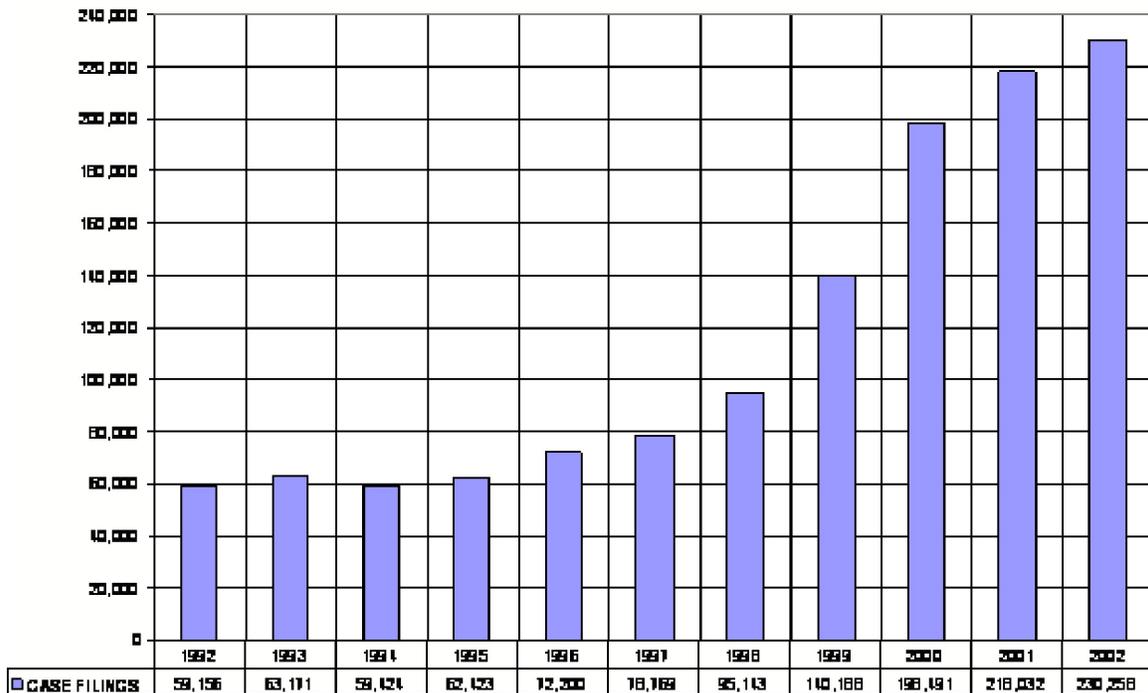
⁵ As reported on a fiscal-year basis by the ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, [FEDERAL COURT MANAGEMENT STATISTICS](#), Appendix: Detailed Statistical Tables, tbls. C-4, C-4a, and C-7 for fiscal years 1997-2002.

⁶ The number of civil filings has, in contrast, showed remarkably little fluctuation from 1993 through 2002. The figures are: 1993-226,165; 1994-236,391; 1995-248,335; 1996-269,132; 1997-272,027; 1998-256,787; 1999-260,271; 2000-259,517; 2001-250,907; 2002-274,841. *See id.* at [tbls. C](#). These figures readily lend themselves to a conclusion that many cases are simply not filed in the Article III forum in the first place, because, given a growing population (both in the general population and in the ranks of lawyers) and significant yearly increases in statutory civil remedies from new legislation without offsetting repeal of older remedies, one would expect a substantial increase in the number of filings over the years rather than a plateau.

[2] It is interesting to note from Table I that the decline in completed trials is not confined to jury trials, but extends to completed trials, both jury and nonjury, which correlate with an r^2 of 0.99.⁷ This decline in total trials of both sorts is addressed neither by Young nor by much recent literature disparaging what is seen as judicial aversion to the jury; this is omitted for an important reason, explained below.

[3] It is illuminating to look to at least one major alternative to the federal trial – jury or nonjury – and that is the number of arbitrations instituted with the American Arbitration Association, set forth below in Table II:

Table II
American Arbitration Association
Total Cases Filed 1992 - 2002



[4] A simple comparison shows that while the number of federal trials has been decreasing markedly, the number of arbitrations has been increasing markedly. Unfortunately, the limited nature of the data precludes a more statistically robust analysis of the correlation between jury trials and ADR. Nevertheless, these obvious trends beget the questions: Where has the litigation gone,

⁷ The Administrative Office reports from which Table I is compiled do not separately report trials conducted by Magistrate Judges. Interestingly, the numbers of jury and non-jury trials conducted by Magistrate Judges, with consent of the litigants, *see* 28 U.S.C. § 636(c), show a decline from highs of 892 and 656, respectively, in 1998 to 472 and 487, respectively, in 2002, as reported in JUDICIAL BUSINESS OF THE U.S. COURTS, *supra* note 5, at Table S-17.

and is there good reason to suspect migration out of the judicial forum in favor of others, like arbitration, rather than simply natural growth in the number of arbitrations.

[5] Four possible answers suggest themselves, but can be dispatched without lengthy discussion. The first is that people are becoming generally less litigious. However, the number of federal civil filings has seen no significant decline over the relevant time period.⁸ One might next assume that the number of trials completed has declined simply because federal civil trials are getting postponed more often than in the past and untried civil cases are simply accumulating, while judges do other things, like deal with a burgeoning criminal caseload. This was also investigated by the authors, but was found not to be the case, as the reported statistics show only a 2.8% increase in median time from filing to trial in civil cases between 1997 and 2002.⁹ A third possible answer is that cases filed recently are somehow systematically less “deserving” of trial, in some objective sense. However, there is little reason to believe that this is the case, even if such an assessment of relative merit could be made. Lastly, one might assume that these cases are being litigated in other judicial *fora*, but there is mounting evidence that jury trials in state court are systematically decreasing as well.¹⁰

[6] Some would argue that a shift to arbitration is primarily or entirely the product of increased disparate bargaining power at the forum choice point, which is often at the time of contracting.¹¹ But a few observations contraindicate unilateral imposition as the most likely explanation of these trends. First, arbitration clauses are not universal enough to have the kind of impact seen in these figures. Second, while there has been much argument in favor of enforcing such forum choice

⁸ See note 6, *supra*.

⁹ ADMIN. OFFICE OF THE U.S. COURTS, [U.S. DISTRICT COURT – JUDICIAL CASELOAD PROFILE](#) (2002). See also ERIK MOLLER, RAND INST. FOR CIVIL JUSTICE, [TRENDS IN CIVIL JURY VERDICTS SINCE 1985](#), tbl. 2 (1996) (showing declines in jury trials from 1985-94 in eleven of fifteen states studied).

¹⁰ There is some evidence that there has been a decline in cases going to trial in at least some state courts, as well. In December, 2003, the American Bar Association’s Section of Litigation’s Civil Justice Initiative sponsored a conference called “Vanishing Trials,” prompted by the observation that “[d]uring the last 15 years a federal court trend that has been mirrored in many states is the drastic decline in the number of cases tried to verdict.” [ABA Communiqué](#), October 2003. The thoughtful papers presented at the [Litigation Task Force Conference](#) by, among others, Professors Galanter and Resnik can be found collected in Symposium, *The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

¹¹ Judge Young specifically identifies the federal courts’ strong deference to arbitration as a culprit in the jury’s demise, as reflected in federal judges’ “expansive reading” of the [Federal Arbitration Act](#). He also calls for amendment of that Act to return it to what he sees as its original, limited purposes: “expansive reading of the Federal Arbitration Act allows the unilateral imposition of arbitration clauses to trump all sorts of civil rights and consumer protection legislation.” Young, *supra* note 1, at 33.

clauses, they are still subject to nullification as contracts of adhesion and may be defeated under the minimum contacts test,¹² placing their efficacy in doubt. Moreover, it is difficult to reconcile this hypothesis with the fact that federal civil filings have not been decreasing overall.¹³ This combination indicates that whatever primarily lies behind the decline in trials is a result of choices made after the events giving rise to a claim.

[7] An explanation that appears to some to be intuitive is that judges are to blame. Some would argue that judges are intentionally discriminating against juries. In that case, we should expect to see a more distinct decline in jury trials, as compared to bench trials.¹⁴ Yet, as noted above, the decline in both jury and non-jury trials correlates almost perfectly. Alternatively, the decline has been attributed to a crushing federal workload, mainly due to increased criminal prosecutions. However, new judgeships are added each year to keep up with the volume of cases (sixteen in 2003),¹⁵ and in any event, this explanation does not address the surge in ADR seen in the last few years.

[8] A reliable indicator of trends affecting litigation is the proverbial man on the street, or, in our case, the lawyer at the water-cooler. Anyone who spends more than a few minutes standing by a law firm water-cooler will conclude, based on litigators' focus on "the twin v's" venue and venire, that a major strategic concern is the composition of the jury. Pretrial rulings on these issues will have an overriding impact on parties' willingness to settle, rather than proceed to trial.

[9] Even if limitations imposed by the nature of the reported data preclude demonstrating, with robust statistical significance, a direct causal relationship between declining federal trials and increasing arbitrations, arbitration is, at the very least, perceived as an attractive alternative forum by both those with disputes, who increasingly seek it, and at least one respected and experienced member of the federal judiciary, *viz.*, Chief Judge Young.

¹² *International Shoe v. Washington*, 326 U.S. 310, 316 (1945).

¹³ In fact, since there has not been shown an overall increase in litigiousness, an increase in arbitrations without a corresponding increase in civil filings would indicate that, contrary to Professor Miller's argument, binding arbitration clauses are actually *increasing* public access to justice. This follows from potential plaintiffs' apprehension of initiating formal proceedings in Federal or State courts.

¹⁴ The implicit argument here is that the judge could affect the selection of jury vs. bench trial, and there is good reason to support this. Judges, including magistrate judges, are instrumental in structuring litigation and even the disposition of cases by settlement, and can thereby influence the parties to select one form of trial over another.

¹⁵ Twenty-First Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 312, 116 Stat. 1758, 1786 (2002) (creating eight temporary and eight permanent district judgeships).

[10] It just may be that judges are guilty of professional narrow-mindedness, but not the kind envisioned by Professor Miller and others. In other words, they are not shirking their responsibilities by denying parties their day in court, but are failing to recognize the attractiveness of alternative fora and the implications this has for the judiciary.

[11] These observations lead us to suggest that fora can and do compete in the market for litigation, and that litigation will tend to move, in obedience to ordinary market forces, to the least-cost forum, irrespective of party advantage. This paper attempts to describe the mechanism through which juries systematically increase uncertainty and thereby impose costs on both sides, driving litigation not just away from the courts by settlements, but to alternative fora that are increasingly attractive to both plaintiffs and defendants.

[12] These trends are only keenly seen over time; trials declined for years before people started widespread discussion of the phenomenon. Phenomena that occur over time constitute a story. We therefore begin as any good story should – long, long ago.

A Lesson from Legal History

[13] To a large extent, the history of the development of the legal system of England from the time of the Norman Conquest through the end of the eighteenth century is the story of evolving notions of jurisdiction (in the sense of a forum's willingness to entertain a case, assuming it has the power to do so). This evolution was powered by the interacting self-interests of fora and litigants.

[14] By the fifteenth century, the jurisdictions of the two superior national courts of England, within bounds set by Magna Carta,¹⁶ had become fairly well settled by tradition and usage: King's Bench had jurisdiction over matters in which the Crown had an interest, while Common Pleas handled private disputes.¹⁷ Until the Crown fell into the hands of the Tudors at the end of the War of the Roses, the King's Bench was not a busy court, as compared to Common Pleas: "Its records filled only a few hundred skins a year, whereas those of Common Pleas filled a thousand or two."¹⁸ During the fifteenth century, both of the superior courts experienced a migration of litigation to alternative fora, i.e., the King's Council and Chancery, where business was taken by "common lawyers, who resorted to them because of the attraction of their relative informality, the ease with which defendants could be arrested, and the inquisitorial method of investigation which bypassed the sheriff and the jury."¹⁹

¹⁶ [MAGNA CARTA](#), cls. 17-18 (1215).

¹⁷ J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 38 (4th ed. 2002).

¹⁸ *Id.*

¹⁹ *Id.* at 40.

[15] Their “initial success was perceived as a threat to the business of the common-law courts.”²⁰ This loss of judicial business principally impacted the King’s Bench, which reacted by developing “swift process and procedure to vie with that of the Chancery, and acquired a jurisdiction over most common pleas by a combination of procedural devices.”²¹ This did not sit well with Common Pleas, resulting in the “legal disputes of the later sixteenth century [which] took on the appearance of an internecine struggle for business between the common-law courts themselves.”²² Although the personnel of King’s Bench had a personal stake “in furthering this amplification of their jurisdiction, they were at the same time meeting strong popular demand.”²³ The key point for the present analysis is that “popular demand” was Adam Smith’s invisible hand, quietly guiding disputes into the forum where they could be resolved at least cost (risk being a form of cost): “The principal competitors were not the judges or officers [of the courts] themselves but the litigants and their lawyers, shopping for the most advantageous forum.”²⁴

[16] King’s Bench, in particular, went to lengths in order to attract more business. In the sixteenth century, King’s Bench “wooed litigants with competitive costs, and sometimes even lowered its fees in order to increase the overall takings,”²⁵ a universal practice of the volume seller. Jurisdictional expansion was accomplished by a device labeled the “bill of Middlesex,” which got around cumbersome, older mechanisms for acquiring jurisdiction over the defendant’s person by alleging a fictional trespass occurring in the County of Middlesex, where King’s Bench sat. There would be an allegation that the defendant had trespassed against the plaintiff in Hendon, and “[i]t mattered not whether the plaintiff or defendant had ever set foot in Hendon, or even Middlesex.” The fictional trespass would simply be disregarded, while the dispute proceeded to be resolved on its merits according to the common law, whether in trespass or in debt or detinue. The net effect of all this was to increase the business of the King’s Bench by a factor of ten between 1560 and 1640.²⁶ This increase was clearly the result of competitive behavior on the part of King’s Bench, which “had no monopoly, and . . . thrived only by satisfying litigants and the profession at large.”²⁷

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 41.

²⁴ *Id.* (Although, perhaps “actors” or “determinants” would have been a more apt term than “competitors.”)

²⁵ *Id.* at 42.

²⁶ *Id.* at 43.

²⁷ *Id.* at 44.

[17] Although Common Pleas attempted to meet the competition, it was bound to the ancient, cumbersome writ procedure for acquiring jurisdiction, and it could not resort to any fiction as convenient as the Bill of Middlesex. Furthermore, it was not economically competitive, as “it failed to make substantial reductions in its own scale of costs, allegedly because the three prothonotaries could never reach agreement on any specific proposal for the cuts.”²⁸ The Common Pleas did not see an overall diminution in its caseload, as there was an overall increase in litigation during this period. Common Pleas’ bar was ten times larger than that of King’s Bench, and it included a substantial number of attorneys who practiced throughout the country, rather than simply at Westminster.²⁹ Thus, “the business of the Common Pleas increased considerably during the sixteenth and early seventeenth centuries, albeit at a slower rate than that of the King’s Bench.”³⁰

[18] Interestingly, the end of the King’s Bench-Common Pleas competition was accomplished both by legislation in 1661 designed to cut back on King’s Bench’s jurisdictional fictions³¹ and by Common Pleas’ own adoption of a jurisdiction-enhancing fiction in 1675.³²

[19] Why did these courts compete with each other for business in the first place throughout the sixteenth and seventeenth centuries? Other than professional pride and prejudice, the most compelling motivation was the compensation of judges and other court officers. It was not until much later that the concept of English judicial and quasi-judicial office as a property right to be held in freehold,³³ capable of being bought and sold, died out; remuneration of the judge in the form of fees³⁴ was not replaced by a stated annual salary until 1826.³⁵ In the period of intense jurisdictional competition discussed above, put simply, more litigation meant more money lining the judicial robe. The courts were acting, in large part, out of selfish economic considerations when establishing their jurisdictions and setting their procedures.³⁶

²⁸ *Id.* at 45.

²⁹ *Id.*

³⁰ *Id.*

³¹ Vexatious Arrests and Delays at Law Act, 1661, 13 CAR. 2, s. 2, c. 2.

³² BAKER, *supra* note 17, at 47.

³³ *Id.* at 112; *see also* D.L. KEIR, THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485, at 390 (9th ed. 1969).

³⁴ Sometimes, the fees, especially in Chancery, could be enormously lucrative. *See* BAKER, *supra* note 17, at 112.

³⁵ KEIR, *supra* note 34, at 390.

³⁶ For a collection of other authorities commenting on judges’ fees as a jurisdictional factor, *see* (continued...)

[20] Interestingly, friction between the arbitral forum itself and the common law courts from economic competition can be traced back to the same period of inter-judicial competition addressed above. The great legal historian and Chancellor Lord Campbell observed:

There was no disguising the fact that, as formerly, the emoluments of the Judges depended mainly, or almost entirely, upon fees, and as they had no fixed salaries, there was great competition to get as much as possible of litigation into Westminster Hall for the division of the spoil And they had great jealousy of arbitrations whereby Westminster Hall was robbed of those cases which came not into Kings Bench, nor the Common Pleas, nor the Exchequer. Therefore they said that the courts ought not to be ousted of their jurisdiction, and that it was contrary to the policy of the law to do so. That really grew up only subsequently to the time of Lord Coke, and a saying of his was the foundation of the doctrine.³⁷

The Jury's In

[21] The archetypal Anglo-American dispute resolution mechanism is, of course, the trial of issues of fact before the jury.³⁸ Juries in English law predate the Norman Conquest. Over many centuries, and for a number of reasons, the jury's character underwent a remarkable change. With small license, the modern jury can conveniently be thought of as having evolved markedly from its ancestor, a group of locals essentially called as witnesses and sworn to speak the true facts as they knew them to the King's justices, as those justices came to the shires from the seat of government to extend the King's writ and to exercise his judicial power. During the fourteenth century, the jury gradually was transformed into a more neutral body of fact-finders, who were not expected to have first-hand knowledge of the disputants or their dispute. Judges exercised tremendous control over juries, and could even attain them for a false verdict.³⁹ Except for this element of judicial control,

³⁶ (...continued)

Kulukundis Shipping Co. S/A v. Amtorg Trading Corp., 126 F.2d 978, 984 n.16 (2d Cir. 1942).

³⁷ *Id.* at 983 n.14 (quoting *Scott v. Avery*, 25 L.J.Ex. 308, 313 (1856)). In *Kulukundis*, Judge Frank, writing for the Court, famously quipped about the doctrine under discussion: "Give a bad dogma a good name and its bite may become as bad as its bark." *Id.* at 983.

³⁸ The discussion in the accompanying text is drawn primarily from BAKER, *supra* note 17, at 72-75.

³⁹ BAKER, *supra* note 17, at 136. Service on a mediaeval jury could be extremely unpleasant, and modern jurors who object to serving could properly be reminded of the ancient rigors:

After their charge, the jurors were confined "without meat, drink, fire or candle," or conversation with others, until they were agreed; and

(continued...)

the modern American jury has not changed much in its basic role in the legal process from its Tudor ancestor to the present, though, as will be shown, it has changed markedly in its composition and – at least in England – its utilization.

[22] The English civil jury, ancestor of America's, has fallen into almost complete desuetude, with what, in historical perspective, has been remarkable swiftness. It started with the enactment of the Common Law Procedure Act of 1854,⁴⁰ enabling the parties to consent to fact-finding by the judge, as “[a]ll the experience suggested that judges were more likely to understand the factual issues than laymen, and were as competent to assess evidence.”⁴¹ The decline was not only swift, it was broad:

In the course of the twentieth century, however, the alternative of jury trial more or less disappeared. The very existence of an option made the decision to ask for a jury suspicious: it suggested the hope of confusion in a weak case, or the expectation of exorbitant damages in cases involving distressing details or high feelings. . . . Since 1933 parties have been allowed juries only with leave of court, except in cases of libel and a few other matters; and the courts have indicated their unwillingness to give such leave.⁴²

[23] These developments are all the more remarkable because they took place without legislation, by the common consent of the participants in the English public adjudication market, primarily

³⁹ (...continued)

if they could not agree they were supposed to be carried round the circuit in a cart until they did. The merest suspicion of misbehaviour was punishable, and we read of Tudor jurors being fined for eating sweets.

The accompanying footnote reports that, “In 1587, four jurors were fined merely for being in possession of raisins and plums.” *Id.* at note 19, at 75.

⁴⁰ 17 & 18 Vict., c.125.

⁴¹ BAKER, *supra* note 17, at 92.

⁴² *Id.* Although juries are still used in serious criminal cases in England, the Blair Government tried as recently as July, 2003, to do away with them in a range of complex and difficult cases. The Government's proposal was effectively defeated in the House of Lords. *See House of Lords Overturns Government Plan to End Trial by Jury for Complex Fraud Cases*, ASSOCIATED PRESS, July 16, 2003. This led to one of the more interesting legal observations of all time. The Home Office Minister, Baroness Scotland, QC, was quoted as having told ITV News, in reaction to the Lords' decision, that the abolition of jury trials as sought by the Government was a “real reform. We're allowing the guilty really to have an opportunity to be found guilty.” Andrew Pierce, *The Lords*, TIMES (London), July 17, 2003, at 6.

English lawyers (who have been historically precluded from taking cases on a contingent fee basis). In short, the market for civil jury trials in England simply dried up.

[24] American federal courts, of course, do not enjoy the ability of their English cousins simply to dispense with the civil jury as unreliable or outmoded. The Seventh Amendment to the Constitution guarantees most federal civil litigants⁴³ a jury trial when the enormous sum of twenty dollars is in controversy,⁴⁴ and many state constitutions provide similar guarantees.

[25] The jury of the Seventh Amendment's Age of Enlightenment and the modern civil trial jury are, however, two very different institutions. Again, history is instructive.

[26] Alexis de Tocqueville praised the common-law jury of his age, calling it "as direct and extreme consequence of the sovereignty of the people as universal suffrage."⁴⁵ Of course, it is well known that suffrage in America at the time of de Tocqueville was far from universal; indeed, it was not until much later that traditionally excluded groups (women of all races and African-Americans) gained the right to vote.⁴⁶ And what of juries? Were they, in de Tocqueville's day, as far from representative of the general population as was the electorate? Surprisingly, at least in the federal courts, they were, and, more surprisingly, they remained so until well into the latter half of the

⁴³ A noteworthy exception is a claim against the United States Government under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2401 *et seq.* Oddly enough, it seems that in waiving sovereign immunity for claims against the federal government, Congress did not repose sufficient trust in the jury system to grant claimants against the government the right to a jury trial. In such cases, judges are the fact-finders on all issues, including damages. The same is true of actions against foreign states removed to federal courts pursuant to 28 U.S.C. § 1603(b). For an interesting discussion of the constitutionality of the immunity from jury trial given foreign states, see *In re Air Crash Disaster Near Roselawn, Indiana on October 31, 1994*, 96 F.3d 932, 945-47 (7th Cir. 1996).

⁴⁴ Trial by jury is available under the Seventh Amendment when, judging by common law standards as of 1791, the claim is legal, rather than equitable, in nature, and the defendant is suable at law, again under 1791 standards. See *In re Air Crash Disaster*, *supra* note 44. This produces the deliciously ironic result that, although the common law of England has essentially abandoned the civil jury trial, see note 43, *supra*, England's former colonies (at least as a federal body) are forever stuck in the eighteenth century as to their obligation to give civil litigants a jury trial. The Seventh Amendment's guarantee of a civil jury trial has historically been viewed as not binding on the States, see *Walker v. Sauvinet*, 92 U.S. 90, 92 (1876), although recent "revisionist" academic thought about the scope of the Privileges and Immunities Clause takes a differing view. See David Bogen, *Slaughter-House Five: Views of the Case*, 55 HASTINGS L.J. 333, 335 (2003).

⁴⁵ ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 29 (Phillips Bradley ed., Henry Reeve trans., A.A. Knopf 1945) (1835).

⁴⁶ U.S. CONST. amends. XV and XIX, ratified in 1870 and 1920, respectively.

twentieth century. Indeed, it has been said that “Eighteenth-century juries were . . . ‘the Rotarians of their day.’”⁴⁷

[27] The procedure for assembling a jury venire in the federal district courts was not made uniform throughout the country until enactment of the Jury Selection and Service Act of 1968.⁴⁸ Before that Act, most federal juries were selected by the “key man”⁴⁹ system. The chief judge of the District selected a “key man” who would assemble a venire for a term of court, calling upon individuals personally known or recommended to him who would make “good” jurors, in his estimation. From this venire, the petit juries were empanelled at trial, after *voir dire* conducted by the trial judge. As the legislative history of the 1968 Act so eloquently understated it, “Often the [key man] system results in under representation of craftsmen, service workers, and laborers as compared with the professional and managerial classes.”⁵⁰ In fact, the federal trial jury known to the previous generation of lawyers was a select jury.

[28] Surprisingly little is said in general English legal history texts about the method of jury selection at common law.⁵¹ We do know, however, that sheriffs of the counties played the key role in jury selection. For example, in the course of discussing the general state of political and legal corruption in the fifteenth century, one distinguished scholar noted, “[T]he sheriffs were the tools of greater men, and, through their power over juries, the law of the country was at their mercy.”⁵² The so-called gentleman jury, impaneled by the sheriff for important cases, was limited by law to gentlemen of what for the time was substantial wealth (“men of quality”) and, in some cases, required a venire to be assembled from those “legally entitled to be called esquire, or a person of high decree [sic], such as a banker, merchant, or the head of a dwelling rated at not less than one-hundred pounds in a town of 20,000 or fifty pounds elsewhere.”⁵³

⁴⁷ Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 57 (1990) (quoting Professor Morris S. Arnold).

⁴⁸ 28 U.S.C. §§ 1861-1867.

⁴⁹ The gender reference in this term is most likely inadvertently reflective of the reality.

⁵⁰ H.R. REP. NO. 90-1076, at 4 n.1 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 1792, 1794 n.1.

⁵¹ For example, there is no discussion of the mechanics of jury selection in the works of Baker or Keir cited in notes 17 and 34, *supra*.

⁵² J.E.A. JOLLIFFE, *THE CONSTITUTIONAL HISTORY OF MEDIEVAL ENGLAND FROM THE ENGLISH SETTLEMENT TO 1485*, at 417 (4th ed. 1961).

⁵³ Kristy Lee Bertelsen, *From Specialized Courts to Specialized Juries: Calling for Professional Juries in Complex Civil Litigation*, 3 SUFFOLK J. TRIAL & APP. ADVOC. 1, 9 (1998).

[29] The “gentleman jury,” moreover, was only one type of jury, and none of the others was very different in terms of its lack of inclusiveness:

Four types of special juries existed in common law England. The first type, the gentleman jury, consisted of men of high social or economic status. The second type, the struck jury, was selected upon the demand of either party and consisted of principal landowners selected from a list of forty-eight names. The third type, the professional jury, had members who possessed special knowledge or expertise. The fourth and most unique type, the party jury, attempted to ensure a foreign defendant of fairness by encompassing only individuals who were the same race, sex, or origin as the defendant.⁵⁴

[30] Of course, the “key man” system utilized in federal practice until the late 1960s did not differ much in terms of its product from the subjective selection processes noted above and no doubt familiar to those who drafted the Seventh Amendment.⁵⁵ And the practice was not much different in most state courts, select juries yielding only over time to those chosen, as today, from the populace at large (or some segment thereof, such as registered voters), more or less at random.⁵⁶ The present, randomly-selected and minimally qualified (i.e., meeting only criteria such as having a driver’s license or being registered to vote) jury may be labeled the “modern” jury.

Judicial Economics

[31] Of course, judges are no longer remunerated by fees (or, one hopes, in bribes),⁵⁷ but are paid a stated salary, no matter how much or how little judicial business comes before them. Thus, they no longer have any financial motive to increase the judicial business of the courts on which they serve; rather, if there is too much judicial business, there may be an incentive to decrease it.⁵⁸ As

⁵⁴ *Id.* at 8-9.

⁵⁵ [U.S. CONST. amend. VII](#) (establishing the right to jury trial in federal actions at law with twenty dollars or more in controversy).

⁵⁶ Bertelsen, *supra* note 54, at 9-13.

⁵⁷ See BAKER, *supra* note 17, at 112 (discussing Bacon’s and Macclesfield’s dismissals as Chancellor on account of “accepting ‘presents’”).

⁵⁸ Miller takes the federal judiciary to task for overzealous grants of (mostly defendants’) motions for summary judgment, in part because some judges tend to use summary judgment as a docket-clearing tool (i.e., granting summary judgment motions in close cases that probably ought to go to trial) to cope with a “litigation explosion” that is, to Miller, more imagined than real: “A cynic might say, therefore, that ‘getting it right’ no longer is near the top of the priority list, indeed, it may well (continued...) ”

discussed above, it has been suggested that judges are selfishly abandoning their duties, for example, by unjustifiably granting defendants' motions for summary judgment.⁵⁹ But an examination of their actions alone is misdirected, though understandable. It is quite natural to conclude that judges will do what they can to avoid the hard work of conducting trials, but it is not a lack of judges' services (supply) that is shifting the market to ADR. In fact, the shortfall is in *demand* for the ultimate exercise of judicial authority – the trial – which can spring only from the population of litigants.

[32] Much has been written addressing the rising costs of litigation, most of which focuses on the cost and delay associated with a modern jury trial of the facts.⁶⁰ Time has always been equated with money, as the old saying bears witness, and the delay and added work associated with the jury trial burden both sides.

[33] The burgeoning role of jury experts⁶¹ points us to the crux of the topic at hand. Any lawyer has some conception of his ideal jury panel, but jury consulting firms go far beyond the practitioner's common sense and employ professional psychologists and sociologists. Why would a litigant add so drastically to litigation costs, when already faced with mounting expenditures? The answer lies in the existence and perception of risk in today's jury system.

[34] As history demonstrates, there is a market in dispute resolution, and there is no reason to think it behaves any differently from other markets. In today's adjudication market, economists have identified as a driving force the implicit cost of the jury – the risk that comes from the jury's uncertainty of outcome.⁶² Modern market theory, well established and accepted in the field of economics, tells us that bearing risk⁶³ is work, just like any other, and is compensated as such. We

⁵⁸ (...continued)

rank below 'getting it over with.'" See *Miller*, *supra* note 4, at 1003.

⁵⁹ *Id.*

⁶⁰ For example, former Chief Justice Warren E. Burger called the judicial system "too costly, too painful, too destructive, and too inefficient for a truly civilized society" in a speech to the American Bar Association on Feb. 12, 1984. *Mid-Year Meeting of the American Bar Association*, 52 U.S.L.W. 2471, 2471 (1984).

⁶¹ "By the mid-1990s, the jury consulting business was estimated to have passed \$200 million in annual revenues, mostly catering to lawyers handling civil cases. . . ." Walter K. Olson, *Courting Stupidity: Why Smart Lawyers Pick Dumb Juries*, REASON, Jan. 2003, at 23, 25.

⁶² See Jeffrey M. Perloff, Daniel L. Rubinfeld, & Paul Ruud, *Antitrust Settlements and Trial Outcomes*, 78 REV. ECON. & STAT., 401, 401-409 (1996). See also Joni Hersch, *Jury Demands and Trials*, J. LEGAL STUD. (forthcoming Jan. 2006) available at <http://www.law.harvard.edu/programs/olin_center/papers/pdf/447.pdf>.

⁶³ Risk (or variability) may be measured mathematically as variance.

assume this has not been central to much previous legal analysis because the relevant economic literature is fairly recent, and the factors involved are not explicit costs in classic economic theory.

[35] All legal professionals have been exposed to the concept of bearing risk as work, although they may not be aware of it. It is common knowledge that plaintiffs' lawyers seek to maximize fees, taking advantage of the so-called "American rule" that tolerates contingency payments that are often quite large. Their size is justified (and accepted by even those who stand in moral opposition to what they do) because these lawyers are not guaranteed payment in every case. But that is only half the story; the key here is that their higher fees are justified not only with regard to individual cases, but over their entire careers, because aside from being lawyers, they are also in the business of being small banks that finance litigation. They are entitled to a sort of interest payment that defense attorneys do not charge, because the latter do not carry risk.

[36] Once assessed, risk can be divided into two kinds, "systemic" and "idiosyncratic." These categories of risk can be applied to the judicial system if we consider the payoff from a case – whether it be an award or the avoidance thereof – as a sort of legal "security."⁶⁴

[37] The behavior of the securities market has been the subject of considerable study. In that market, idiosyncratic risk describes uncertainties associated with a particular security. In law, idiosyncratic risk would be the unknowns of an individual case, such as a client's information not divulged to counsel or uncertainty of outcome. (Indeed, a certain amount of risk is *necessary* to have a live case or controversy, the risk being uncertainty about the applicable law or the facts.) In theory, idiosyncratic risk can be minimized by diversification. For example, a plaintiff's lawyer who takes, on a contingency basis, a large number of cases might typically charge a smaller percentage than another plaintiff's lawyer who only pursues a small number of large cases. A useful analogy would be to compare a bank with a large volume of small loans to a venture capital firm that has a small number of very large loans.

[38] In contrast, systemic risk applies to variables that affect multiple securities and those securities' collective response. Having factored out idiosyncratic risk, evaluating systemic risk allows careful investors to choose precisely the amount of risk they wish to bear and, accordingly, the compensation they wish to receive. Investing is again illustrative, as in the simple case of bonds versus stocks. An investor with a long time horizon would choose a diversified portfolio of stocks, which are far riskier in the short-term, but bring higher reward in the long-term. Nearing retirement, the investor would move her money into bonds, giving up remuneration, but lowering her risk. This phenomenon is reflected in the practice of law; it is generally true that those who practice in the less predictable areas of the law (such as plaintiffs' tort work) ask an accordingly higher compensation, usually in the form of a contingency fee that can run into the millions, as opposed to an hourly fee or "value billing." But, salient legal risk depends not only on the merits or circumstances of an individual case, or even its general type, but also on the forum that entertains it. If we think of the

⁶⁴ Economists most often use the terms "payoff" or "reward" to describe lawyers' fees. We use the word "security" because it is fundamentally a payoff with risk built into it, and we thus hope to engage the non-economically-inclined reader's intuitive understanding of economics.

courts as stocks, and ADR as bonds, the modern jury brings systemic risk – especially from high-end outlier verdicts – to the courts. Hence, the careful investor, in our case, the prudent lawyer, can maximize gains or minimize losses by choosing one dispute resolution mechanism over the other.

[39] As mentioned above, there is evidence that it was the self-interest of litigants and their attorneys that dictated forum choice in the Tudor through Stuart periods.⁶⁵ Self-interest, as a basic motivator of human behavior, of course, cannot be expected to have disappeared or diminished appreciably in the few hundred years since the jurisdictional wars of the English courts came to an end. If a litigant has the power to maneuver the resolution of a dispute into a forum perceived as more advantageous to him – whether from the standpoint of exposure to unpredictable high outlier verdicts, speed and cost of adjudication, or other factors – both common sense and microeconomic theory⁶⁶ suggest that he will do so,⁶⁷ as, for example, by inserting a binding arbitration clause or other sort of forum selection clause (*e.g.*, home-state federal court only) in a contract. And, of course, those same fundamental forces suggest that, if both sides perceive the advantage of one forum over another, their behavior will demonstrate mutual accord, even if no agreement on dispute resolution was reached in a particular case *ex ante*.

[40] Estimations of a forum's cost have various roots and take various forms. There are some obvious factors that will influence litigants. For example, defense lawyers quite naturally and correctly perceive that a judge is less likely to award a huge amount of damages (especially for non-economic injury or punitive damages) than a jury (yet, there are data showing that plaintiffs have a higher mean success rate in a number of categories of cases, in terms of win/loss, not of damage award size, when a judge is the fact-finder).⁶⁸ One should note, though, that alternative dispute resolution does not always (or necessarily) benefit the defendant alone. For example, the speed and low cost with which arbitration can settle a dispute may work in favor of the plaintiff's attorney who handles a large volume of cases and/or is underwriting costs for an impecunious clientele.

⁶⁵ See note 17, *supra*, and accompanying text.

⁶⁶ One of the basic assumptions of economic theory is that actors are rational, in that they will always seek to minimize costs. This creates problems when actors are ill-informed or irrational, but one can safely assume that most litigants are neither. To be sure, any lawyer or judge with extensive trial experience can relate tales of cases that no rational person would take to trial and that are tried only at the insistence of a litigant who wants to settle a grudge or make a point. Such people frequently throw good money after bad – including attorney's fees – but they form only a small part of the overall population of disputants; most people simply cannot afford to litigate with irrational motives. However, statistical data show that lawyers generally respond as predicted by economic models.

⁶⁷ Thus, pressure from segments of the Bar to preserve the existence of federal diversity jurisdiction – these days an anachronistic vestige of pre-Revolutionary distrust among Colonials – continues.

⁶⁸ See Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 UCLA L. REV. 1935, 1939 (1997).

[41] Although there are arguably many possible costs and benefits that might steer either side towards a particular forum, economic analysis demonstrates that the observed drift away from the jury is the product of a mutual decision. Recent articles have shown that parties on both sides of a case will seek to avoid an unpredictable verdict.⁶⁹ Furthermore, the Coase Theorem⁷⁰ states that actors will seek efficiency by cooperating to divide the surplus created by adding value or, as this paper proposes, eliminating waste. If the only alternative is settlement, then parties will be induced to settle. However, if there is some value to be had in bringing a dispute before a third party, then, where ADR is available, parties will seek it instead of trial. Thus, so long as both sides perceive that they can get “justice,” and if it can be had at a lower cost, the dispute-resolution process will migrate to the least expensive alternative.

[42] In short, the variability of jury awards – especially the “outlier” verdicts at the upper extreme – tends to make the system economically inefficient, and this inefficiency creates excess profits and costs. Returning to our earlier question, and as an example, one such cost is the fee of the jury consultant, who is hired in an attempt to reduce the variance introduced by the jury. The money that a defendant’s jury consultant is paid can be thought of as a slice of the “pure profit pie” that the plaintiff’s lawyer might receive, were the consultants not able to advise their client to select a jury that minimizes the risk of an outlier verdict.

The Jury’s Out

[43] Of course, despite popular sentiment, there is not universal agreement that very high outlier verdicts or even a “litigation explosion” actually exist to a significant extent. In fact, Professor Arthur Miller, in an article cited earlier in this work,⁷¹ rests a large part of his argument against the overzealous grant of summary judgment on his perception that there has been no “litigation explosion.”⁷² He argues that, overall, the number of cases filed is not growing disproportionately to the population. He also downplays a perceived rising tide in jury damage awards: “[A] RAND Institute of Civil Justice study finding that *mean* jury verdicts increased in Cook County and San Francisco...found that the *median* jury verdict figures, when certain procedural changes in San Francisco were accounted for, actually remained ‘strikingly stable’ over the twenty-five-year period.”⁷³ An increase, however, in the mean – but not the median – most likely reflects an increasing incidence of high-end outlying verdicts. That is, it is reasonable to conclude that, as the high-end awards move higher, the *variance* in awards – and therefore risk – increases, because there is no reason to believe that, over the span of time studied, the bulk of verdicts became more

⁶⁹ See note 63, *supra*.

⁷⁰ Steven G. Medema & Richard O. Zerbe, Jr., *The Coase Theorem* (1999).

⁷¹ Miller, *supra* note 4.

⁷² *Id.* at 996.

⁷³ *Id.* at 995 (Emphasis in original.)

concentrated around the median. Even those who might doubt that the empirical evidence for variance substantiates perceptions of variance adduced by anecdotal evidence do not doubt the reality of the perceptions themselves and their effect on the vanishing jury trial.⁷⁴

[44] In short, drastic unpredictability inheres in the power of the jury (above and beyond its basic determination of a verdict on liability – a process which itself has come under academic scrutiny⁷⁵) to fix damage awards, as it sees fit, with limited review, and with reversal only in the most egregious cases, and even then, not often. The jury can be seen as a sort of “black box” into which various versions of the facts are dumped and from which an unpredictable answer rolls out. No one suggests that the award of damages should be taken out of the jury’s province altogether, or that there is a need radically to overhaul theories underlying damage awards. Indeed, scholars have shown that punitive damages are an efficient means to achieve proper deterrence.⁷⁶ But excessive damage awards have an inefficient over-deterrent effect.⁷⁷ More importantly, the simple possibility of excessive damages – whether compensatory or punitive – raises costs for litigants across the board and affects the dynamics of settlement. This phenomenon was noted in a recent law review article, in terms of its effect on “repeat player” defendants: “[F]or insurance companies and other repeat litigants, a major goal (if not the major goal) in pretrial negotiations must be to avoid those huge verdicts that inflate the mean awards.”⁷⁸ Economists might deem this whole situation, instead of a “litigation explosion,” a “verdict bubble.”

[45] Legal economists have advanced numerous theories in an attempt to arrive at an efficient calculation of damages, concentrating on punitive damages, which, of course, are purely non-economic damages, i.e., are not premised upon any loss to the plaintiff reducible to dollars.⁷⁹ One impediment to rationalizing the process is that jurors often encounter difficulty comprehending and

⁷⁴ Syverud, *supra* note 69, at 1944-45.

⁷⁵ See Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727 (1991); see also Bertelsen, *supra* note 54.

⁷⁶ See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998). Generally, efficient punitive damages are the cost of an infraction inversely multiplied by the probability of being punished, such that the expected loss of breaking the law (the probability of losing in court multiplied by the punitive damages) becomes greater than the economic gain.

⁷⁷ *Id.* at 879.

⁷⁸ Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 38 (1996).

⁷⁹ A number of theories are presented in Richard Craswell, *Deterrence and Damages: The Multiplier Principle and its Alternatives*, 97 MICH. L. REV. 2185 (1999).

implementing a judge's instructions.⁸⁰ A recent study has shown that even when presented with a model (e.g., the Polinsky-Shavell model) for determining punitive damages, jurors will arrive at "incorrect" determinations, i.e., those that are not efficient.⁸¹ Indeed, other research drawing on psychology has shown that factors such as so-called "benchmarks," subconsciously set in the jurors' minds by external sources such as the media, can be just as determinative as the factors that jurors "should" weigh to achieve an efficient outcome.⁸² What is most intriguing, and perhaps highly significant, is that jurors' abilities to weigh properly the factors that determine efficient damages seem to vary directly with demographic variables.⁸³ The data suggest that jury awards are not only positively correlated to the demographic makeup of the jury, but also to other, broader socioeconomic factors, such as the poverty rate in the community from which the venire is drawn.⁸⁴ Factor in group dynamics that actually tend to increase the variability of jury awards⁸⁵ with random, cross-sectional jury selection, and the conclusion is inevitable that variability, risk, and costs all *must* be higher now than in the days of the select jury.⁸⁶

[46] The unpredictability and unreliability of modern jury discretion in fixing punitive damages has been well-documented, as discussed above.⁸⁷ One would certainly expect the same sort of unpredictability and unreliability to inhere in an average jury's ability to fix compensatory damages, particularly in light of the fact that jurors' accuracy in determining punitive awards is directly correlated to their socioeconomic and educational background,⁸⁸ a factor that would seem to figure equally in a compensatory damage calculation, especially for non-economic damages, such as pain and suffering. In such cases, juror sympathy or empathy can be played upon by a skillful plaintiff's

⁸⁰ DANIEL H. MARGOLIS, AM. BAR ASS'N, *JURY COMPREHENSION IN COMPLEX CASES* (1990).

⁸¹ See W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J. LEGAL STUD. 313, 316 (2001) ("The mathematical formulas for guiding jury behavior in this experiment consequently achieve none of the purported objectives of the approach and remain vulnerable to the same kinds of contaminating influences that could distort punitive damage awards under the current regime.")

⁸² Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 126-128 (2002).

⁸³ Viscusi, *supra* note 82, at 338; see also Eric Helland & Alexander Tabarrok, *Race, Poverty, and American Tort Awards: Evidence from Three Data Sets*, 32 J. LEGAL STUD. 27 (2003).

⁸⁴ Helland & Tabarrok, *supra* note 84.

⁸⁵ Viscusi, *supra* note 82, at 334.

⁸⁶ As previously mentioned, jury consultants make their profits by reducing precisely this variability, at least from the perspective of the party that has hired them.

⁸⁷ Viscusi, *supra* note 82, at 316.

⁸⁸ *Id.*

attorney like Perlman plays a fine Stradivarius. We may safely speculate that research would show a general migration by defendants toward courts whose juries are drawn from the higher socioeconomic strata. Indeed, removal of cases from urban state courts to federal courts (with venirees drawn from suburban and rural areas as well as from the urban area) has been noted anecdotally as a favored tactic of the defense, as has avoidance of certain rural or depressed counties that are “plaintiff-friendly” in terms of high-end verdicts.⁸⁹ In short, the social forces that brought about the demise of the select jury have injected an element of increased risk (flowing from unpredictability and variability at the highest end) that, at least in the perception of some of the users, renders the system inefficient. Obviously, there are potentially as many factors that could account for variance in verdicts among juries hearing similar cases as there are factual differences among cases, and we do not mean to suggest that the composition of the jury is the sole determinant of variance and unpredictability, but it is nonetheless a very important one that must be taken into account in explaining the lamented disappearance of the jury trial.

[47] To find anecdotal evidence that the verdict bubble is real and is not a geographically isolated phenomenon, one need go no further than a major city’s classified telephone directory. In one such East Coast directory, one finds advertisements for lawyers who have “won verdicts and settled cases involving millions of dollars . . . \$3.3 MILLION awarded for negligent death . . . \$2.4 MILLION awarded . . . \$3.35 MILLION awarded . . . \$5 MILLION awarded”⁹⁰ A few pages later is an ad for a lawyer who claims damage awards won in amounts of \$10,250,000, \$4,100,000, \$7,390,000, and \$12,000,000, and who boasts that “juries just love him.”⁹¹ The perception of huge jury awards as the norm – based perhaps on a factor as inherently unpredictable as a jury’s “love” for a particularly personable lawyer – is thusly formed.

[48] As the movie *Wall Street*’s fictional tycoon Richard Gekko noted, “Information is the most valuable commodity I know of.”⁹² This is true because it is information that drives markets to efficiency, or inefficiency. While Miller notes, correctly, that “jury awards considered excessively high often are reduced by the court or by the parties themselves by way of settlement, or are reversed altogether on appeal[,]”⁹³ the damage of unpredictable variance is done as soon as the verdict is returned. Because these large awards form subliminal benchmarks⁹⁴ for future jurors – and the initial verdict is sure to be the front page, while its reduction, if it comes, will get one-half column inch on page twenty-three – the verdict bubble is a self-reinforcing phenomenon. It matters

⁸⁹ See, e.g., Kenneth P. Nolan, *Tilting the Playing Field*, LITIGATION, Spring 2003, at 6.

⁹⁰ *Advertisement for Marvin Ellin of Ellin & Baker*, GREATER BALTIMORE SUPERPAGES 540 (Verizon, December 2002).

⁹¹ *Advertisement for Stephen L. Snyder*, *id.* at 529.

⁹² WALL STREET (20th Century Fox 1987).

⁹³ Miller, *supra* note 4, at 995.

⁹⁴ See Robbennolt, *supra* note 83.

not what the final outcomes of individual cases are, because the mere public perception of rising jury awards adds momentum to the same; this creates a trickle-down effect. If plaintiffs perceive even the slightest chance of receiving a very large verdict, the power of numbers and expected returns⁹⁵ substantially raises their leverage in demanding a settlement.⁹⁶ In this way, the jury's influence today extends beyond its immediate domain and raises costs for litigants across the board, above the level that represents efficiency.

The Verdict

[49] Given sufficient information, markets will not tolerate inefficiencies. The modern jury trial entails such an inefficiency. To escape the real and perceived costs of the federal jury trial, litigants are flocking to arbitration and other forms of ADR.⁹⁷ The expectation is that, there, plaintiffs will find faster and less expensive justice and defendants will be more likely to have their "punishment fit the crime," thereby avoiding the "deep-pocket" phenomenon⁹⁸ and optimizing the risk vs. benefit for both sides.

[50] The inescapable fact is that, unless prohibited from doing so by law or conduct of their adversaries, disputants will do as they please. This is not to say that traditional trials will disappear. But there are some often-overlooked aspects to the decline in tried cases that argue for again making the courts more attractive to litigants. Most importantly, as dispute resolution moves out of the

⁹⁵ Mathematically, the expected return is the sum of the products of all possible outcomes and their probabilities, a forward-looking weighted average.

⁹⁶ Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1012 (1999).

⁹⁷ See Syverud, *supra* note 69.

⁹⁸ The "deep-pocket phenomenon" can apply not only to spuriously naming wealthy corporations as defendants, but to the fact that jurors tend to perceive corporations as simply having large amounts of assets, rather than as bundles of productive goods, as Justice O'Connor noted in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993):

Corporations are mere abstractions and, as such, are unlikely to be viewed with much sympathy. Moreover, they often represent a large accumulation of **productive resources**: jurors naturally think little of taking an otherwise large sum of money out of what appears to be an enormously larger pool of wealth. Finally, juries may feel privileged to correct perceived social ills stemming from unequal wealth distribution by transferring money from "wealthy" corporations to comparatively needier plaintiffs.

Id. at 491 (O'Connor, J., dissenting).

courts, society is necessarily deprived of a number of cases that could advance our body of law by adding new precedents. And, as any lawyer knows, trials as learning opportunities for junior members of the bar are increasingly rare. Many “litigators” have garnered most of their experience at depositions or in mock proceedings, thus diminishing the body of experiential learning, not to mention “war stories,” which themselves play an important educational role.

[51] We have demonstrated that, like any market, the adjudication market is subject to forces beyond the control of any single actor, but the inputs of every actor undoubtedly influence the market. Accordingly, those who think the federal courts should retain a significant part of the adjudication market should seriously consider making those courts more attractive. This requires the difficult step of questioning whether the modern jury, as an exercise in pure democracy, is the appropriate dispute-resolver for all cases, especially complex or otherwise difficult ones. Commentators have questioned whether, for example, “it [is] fair to ask a millworker, school custodian, receptionist, plumber, nurse’s aid [sic], housewife, and others possessing no expertise in economics or accounting, to render an accurate verdict based on average variable cost determinations and consequences of inventory accounting?”⁹⁹ The question might just as well have been put as to whether it makes sense to do so, a question that has been answered *no* in England and most other industrialized nations.¹⁰⁰ One answer is to return, at least in complex commercial cases,¹⁰¹ to a more select jury than the “modern” one.¹⁰² Although, to be sure, any return to greater selectivity in jury venire selection according to educational achievement or particular expertise implicates sensitive social and, perhaps, constitutional questions,¹⁰³ it has been suggested in the literature.¹⁰⁴ If such a

⁹⁹ Bertelsen, *supra* note 54, at 1.

¹⁰⁰ *Id.* at 2.

¹⁰¹ Such cases are apt to generate larger mean verdicts than personal injury cases, at least according to some research. *See* Gross & Syverud, *supra* note 79, at 34 tbl. 19.

¹⁰² Indeed, Lord Mansfield, perhaps the greatest common law judge of his (or, arguably, any other) day, was well-known for his use of special merchant juries, composed of people steeped in a particular trade, to judge mercantile disputes arising in that trade and to deliver “special verdicts” expounding the commercial interests’ view of the governing law. In doing so, he was responding to a market demand, i.e., “pressure from the City [the merchant and financial interests centered in the City London] for the formulation of clear rules of mercantile law.” BAKER, *supra* note 17, at 351. Lord Mansfield also used special juries in patent cases. *See Morris v. Bramson*, (1776) 1 Carp. P.C. 30 (K.B.). After Mansfield’s death, however, his successors did not regularly continue the practice of utilizing merchant juries, probably because they lacked Mansfield’s ability to form special and personal bonds with commercial men. *See* CECIL HERBERT STUART FIFOOT, LORD MANSFIELD 104 (Scientia Verlag Aalen 1977) (1936).

¹⁰³ The Seventh Amendment preserves the right to a jury trial, as it existed at common law, but it does not address jury composition or selection, or other incidents of civil jury trial. *See Colgrove* (continued...)

course – even given adequate safeguards against intentional, invidious discrimination – is too politically unpalatable to be implemented, lesser measures to influence the sophistication of the venire can surely be undertaken without objection, e.g., discontinuation of the practice of granting automatic (whether *de jure* or *de facto*) exemptions to classes of individuals such as proprietors of businesses, doctors, and the like.¹⁰⁵ While we have not found any reported data, we seriously doubt that many executive officers of Fortune 500 companies are empanelled in jury venires, let alone actually serve as trial jurors.¹⁰⁶

[52] The bottom line is this: Serious consideration should be given to offering appropriate alternatives to the current jury selection process in appropriate cases if the federal courts are to continue to present a viable choice for those shopping for dispute resolution. Otherwise, one can reasonably expect that the decline in cases reaching trial – in favor of other forms of dispute resolution – can, on the basis of elemental market forces, be expected to continue at its present, fairly steady rate to some irreducible minimum, perhaps consisting mostly of suits involving irrational litigants¹⁰⁷ or those with nothing to lose by “rolling the dice.” The question is whether resistance to jury reform can be overcome by those in the position – and with the determination – to at least experiment with meaningful change.

¹⁰³ (...continued)

v. Battin, 413 U.S. 149 (1973) (no constitutional impediment to six member juries in civil cases). An argument can be made, based on historical references earlier discussed in this article, that selectivity in jury empanelment was well-accepted at the time of the Revolution. Supreme Court case law has addressed the right to be tried in a criminal case by a jury that is fairly representative of the community at large, see *Taylor v. Louisiana*, 419 U.S. 522 (1975), and has held that jurors in a civil case cannot be excluded from service on an invidious basis such as race, see *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), but it has not spoken to the constitutionality of a “select” or “expert” jury in civil cases that involve complex issues. Of course, because the right to trial by jury is waivable, the parties may very well, with or without a suggestion from the trial judge, agree to a specially-qualified venire, just as they may agree to a non-Article III magistrate judge without Constitutional impediment. Cf. *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix*, 725 F.2d 537 (9th Cir.), cert. denied, 469 U.S. 824 (1984). Finally, the Supreme Court has consistently held that the “key man” system of jury selection is not facially unconstitutional, most recently in *Castaneda v. Partida*, 430 U.S. 482 (1977).

¹⁰⁴ See, e.g., Bertelsen, *supra* note 54, at 34.

¹⁰⁵ See, e.g., *Plan of the United States District Court for the District of Maryland for the Random Selection of Grand and Petit Jurors*.

¹⁰⁶ Of course, such high-powered people might be peremptorily challenged by one side or the other, but even the potential of their service as jurors could have a salutary effect on the process as a whole.

¹⁰⁷ See note 67, *supra*.