UIC Law Review

Volume 14 | Issue 3 Article 3

Summer 1981

Jury Trial, Progress, and Democracy, 14 J. Marshall L. Rev. 679 (1981)

Richard S. Kuhlman

George C. Pontikes

William J. Stevens

JURY TRIAL, PROGRESS, AND DEMOCRACY

RICHARD S. KUHLMAN,*GEORGE C. PONTIKES,**
WILLIAM J. STEVENS***

INTRODUCTION

The concept that technological and economic progress are mutually interrelated, inevitable, and desirable has persisted in America from the colonial period[1] through the nineteenth century[2] and into the modern era.[3] Over the past two centuries this combined economic and technological progress has produced both the most complex technological society and the most complex jurisprudence[4] in human history. Increasing complexity

* Partner in the firm of Foss, Schuman and Drake; member of the Chicago Bar Association, the Illinois State Bar Association, the Illinois Trial Lawyers Association, and the Association of Trial Lawyers of America; J.D. Northwestern, 1968.

** Partner in the firm of Foss, Schuman and Drake; member of the Chicago Bar Association and the Illinois State Bar Association; L.L.B. Harvard, 1961.

*** Partner in the firm of Foss, Schuman and Drake; J.D. Chicago-Kent College of Law, 1966.

1. "From the beginning, people in provincial America noted that in the New World progress was self-evident. . . . [T]he American situation made it natural to identify progress with growth and expansion." D. BOORSTIN, THE AMERICANS—THE COLONIAL EXPERIENCE 155 (1958).

2. "By the early nineteenth century technology and prosperity began assuming for Americans the same sublime and moral significance the Enlightenment had reserved for the classical state and the Newtonian universe." THE GREAT REPUBLIC—A HISTORY OF THE AMERICAN PEOPLE 415 (Bailyn ed. 1977).

3. Our early [post-World War II] programs like the Marshall Plan and Point Four expressed our idealism, our technological know-how, and our ability to overwhelm problems with resources. In a sense we were applying the precepts of our own New Deal, expecting political conflict to dissolve in economic progress. . . . [Similarly, according to] the concept of "containment" that expressed our postwar policy toward the Soviet Union . . . our task was to resist Soviet probes with counterforce, patiently awaiting the mellowing of the Soviet system.

H. KISSINGER, WHITE HOUSE YEARS 61 (1979).

4. Increasing complexity in technology and social organization has always produced a corresponding increase in the complexity of laws and litigation because "[t]here . . . can be no law before a condition arises to which it can be applied. A rule of law . . . cannot exist where the relations on which it is founded do not exist." J. ZANE, THE STORY OF LAW 48-49 (1927). Thus, the creation of mass production facilities and the interstate railroad network after the Civil War destroyed the ability of the individual states to exercise meaningful legal control over these technologies, as evi-

has long since erased the pre-industrial conditions within which our concept of individual liberties and our Constitution evolved.[5] Indeed, technology and its attendant jurisprudence have become sufficiently intricate to generate a legal dispute which raises serious doubts about the ability of the democratic institutions and free market economic philosophies of the pre-industrial United States Constitution[6] to survive the realization of the technology-oriented American dream.

This legal dispute concerns the right of a federal trial court to limit the right to a trial by jury in an otherwise appropriate civil case because the issues involved are assumed to be too technical and complex for the common man to comprehend. The controversy reached major proportions in *Ross v. Bern-*

---

denced in Wabash, St. Louis & Pac. Ry. v. Illinois, 118 U.S. 557 (1886). These developments forced the federal government to create legal machinery to meet the new problems through the Interstate Commerce Commission Act of Feb. 4, 1887, ch. 104, 24 Stat. 379; the Sherman Act of July 2, 1890, ch. 647, § 1, 26 Stat. 209; the Federal Food & Drug Act of June 30, 1906, 21 U.S.C. §§ 1-15 (1934); and the myriad other governmental regulations which, at least in the aggregate, many people complain of today. *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 384-409 (1973). Consequently, "it was of no use to talk of 'states rights' when the economy was ignoring state boundaries and could be regulated only by some central authority." W. DURANT & A. DURANT, THE LESSONS OF HISTORY 68 (1968) [hereinafter cited as DURANT].

Furthermore, a condition must be known before it can be the subject of legislation and jurisprudence. Thus, the five corporations that virtually control the international grain trade and all of its attendant technology from farm to final market have largely escaped regulation because they keep a low profile and few lawmakers or potential litigants know of their existence. Two of these corporations, Cargill Inc. and Continental Grain Co., are the two largest privately held corporations in the United States. Cargill has annual sales exceeding those of Sears, Roebuck & Co. C. MORGAN, MERCHANTS OF GRAIN 28-30 (1980).

5. "Many of these formative conditions [of American democracy] have disappeared . . . [t]hrough the impersonal fatality of economic development. . . . Every advance in the complexity of the economy puts an added premium upon superior ability, and intensifies the concentration of wealth, responsibility, and political power." DURANT, *supra* note 4, at 77.

6. The present supermechanized economy of the United States, with an annual gross national product exceeding a trillion dollars, is governed at least in theory through the legal framework of a Constitution produced by a society in which only 1/20 of the population lived in urban or semiurban communities. E. GREENE, THE REVOLUTIONARY GENERATION 2 (1943). Only seven business corporations had been chartered in the United States before 1781, and only three banks were incorporated before 1789. *Id.* at 355. Thomas Jefferson expressed the widespread distrust of industry: "[A]rtificers [are] the instruments by which the liberties of a country are generally overturned." *Id.* at 356-57. There was no large scale industrial production at all in 1787. R. BROWN, CHARLES BEARD & THE CONSTITUTION—A CRITICAL ANALYSIS OF "AN ECONOMIC INTERPRETATION OF THE CONSTITUTION" 53 (1956) [hereinafter cited as BROWN]. There was no industrial working class. Almost everyone owned property; over 90% of the nation's wealth was in real estate. *Id.* at 49-50.

hard.[7] The United States Supreme Court, reacting to the increasing complexity of litigation, suggested that the "legal" nature of an issue, upon which the right to a jury trial traditionally depended,[8] should be determined by, among other things, "the practical abilities and limitations of juries."[9] Subsequently, the Ninth Circuit declined to apply this standard, refusing "to read a complexity exception into the Seventh Amendment."[10] The Third Circuit, on the other hand, has held that requiring jurors to decide issues too complex for their understanding would itself violate due process rights.[11]

---

7. 396 U.S. 531 (1970).

8. The jury trial was a creature of law and unknown to the courts of chancery, which is the reason that equity does not presently provide for jury trials on matters within its jurisdiction. It should be noted that, altogether the major thrust of English and American history has been to enhance the scope and stature of jury trials, there also has been a consistent countervailing effort to preclude jury review of matters considered too complex for laymen. Thus, Blackstone endorsed the use of special juries in cases "of too great nicety for the discussion of ordinary freeholders." 3 W. BLACKSTONE, COMMENTARIES 357. In 1603, English law recognized at least some instances in which judges were "better able to judge [account books] than a jury of ploughmen." Clench v. Tomley, 21 Eng. Rep. 13 (1603). Complexity of issues was also recognized as a basis for consigning a case to equity rather than law in O'Connor v. Spaight, 1 Schoale and Lefroy's Reports 305, 309 (1804) (decided by the Lord Chancellor of Ireland). English Chancellors had occasionally claimed a limited right to "interfere" in legal actions where the remedy at law had become "difficult." *See* Benson v. Baldwin, 26 Eng. Rep. 377 (1739). Certain relatively obscure American cases had concurred, citing the "complexity of accounts" as grounds for equitable jurisdiction. *See, e.g.*, Kirby v. Lake Shore & Mich. S. R.R., 120 U.S. 130, 134 (1887) (complicated nature of accounts sufficient to justify intervention of equity); Fowle v. Lawrason's Executor, 30 U.S. (5 Pet.) 494, 503 (1831) (great complexity ought to exist in the accounts). *See also* Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 70 (S.D.N.Y. 1978) (complexity of issues beyond abilities of jury); *In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99, 103 (W.D. Wash. 1976) (complex accounting issues beyond abilities of jury). The major current of jurisprudence has, however, traditionally rejected "mere complication of facts" as a basis for equitable jurisdiction. Curriden v. Middleton, 232 U.S. 633, 636 (1914). *See also* Beacon Theaters, Inc. v. Westover, 359 U.S. 500 (1959) (only under the most "imperative circumstances" can the right to a jury trial of legal issues be lost through a prior judicial determination of equitable issues in the same case); United States v. Bitter Root Dev. Co., 200 U.S. 451, 477 (1906) (action for unliquidated damages does not necessarily confer equality jurisdiction).

9. Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970).

10. *In re* United States Financial Sec. Litigation, 609 F.2d 411, 431 (9th Cir. 1979).

11. *In re* Japanese Elec. Prod. Antitrust Litigation, 631 F.2d 1069, 1084 (3d Cir. 1980). The court commented as follows on both the revolutionary content of footnote 10 in *Ross v. Bernhard*, and the propriety of using footnotes to enunciate major changes in the law:

> [The footnote] plainly recognizes the significance . . . of the possibility that a suit may be too complex for a jury. . . . [It] strongly suggests that jury trial might not be guaranteed in extraordinarily complex cases. . . . We . . . find it unlikely that the Supreme Court would have announced an important new application of the seventh amendment in

In a 1979 address to the state chief justices, Chief Justice Burger fanned the dispute by saying that there should be a complete reexamination of the validity of jury trials in complex cases.[12] Theodore I. Koskoff, President of the Association of Trial Lawyers of America, responded that the Chief Justice has "a patronizing attitude demonstrating little faith in the jury system and not borne out by those who are experienced in the trial of complicated cases. . . ."[13]

In a second level of attack on jury trials in federal civil cases, the Judicial Conference of the United States, presided by Chief Justice Burger, is studying curtailment or elimination of jury trials in complex cases by court rule.[14] While these federal proceedings would not be directly binding on state courts,[15] there clearly would be great pressure on state courts to follow if the Supreme Court subjects all federal courts to jury trial limitations. The fourteenth amendment does not require the states to provide civil jury trials in all cases.[16] Thus, each state has the legal right to modify or limit civil jury trials.[17] However, each state constitution now protects jury trials through provisions similar to the seventh amendment. State courts customarily follow Supreme Court interpretation of federal constitutional pro-

---

so cursory a fashion. Yet, at the very least, the Court has left open the possibility that the 'practical abilities and limitations of juries' may limit the range of suits subject to the seventh amendment and has read its prior seventh amendment decisions as not precluding such a ruling.

Id. at 1079-80. *Cf.* United States v. Hunt, 265 F. Supp. 178 (W.D. Tex. 1967) (illustrating selection of jury in criminal context—violation of due process to allow defendant to be deprived of life, liberty or property by jurors who did not understand and comprehend evidence).

12. 48 U.S.L.W. 2118-19 (Aug. 14, 1979).

13. Speech before the Sixth Circuit Meeting of the American Trial Lawyers' Assoc., *reported at* 48 U.S.L.W. 2218 (Sept. 25, 1979).

14. 66 A.B.A.J. 953-54 (1980).

15. The seventh amendment jury trial requirement applies only to federal courts and is not made applicable to the states via the fourteenth amendment. Fay v. New York, 332 U.S. 261 (1947). The seventh amendment, however, will apply to the enforcement in state courts of rights created by federal statute. Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359 (1952); Bailey v. Central Vt. Ry., 319 U.S. 350 (1943).

16. New York Cent. R.R. v. White, 243 U.S. 188 (1917) (state's denial of jury trial not violative of due process clause of fourteenth amendment); Walker v. Sauvinet, 92 U.S. 90 (1876) (trial by jury in state court civil proceeding not a privilege or immunity of federal citizenship which states are forbidden to abridge). *Cf.* Snyder v. Massachusetts, 291 U.S. 97 (1934) (illustrating rule in criminal context).

17. Iowa Cent. Ry. v. Iowa, 160 U.S. 389 (1896) (fourteenth amendment does not control power of state to determine process of asserting legal rights or enforcing legal obligations, so long as methods adopted afford due process). *Cf.* Palko v. Connecticut, 302 U.S. 319 (1937) (illustrating rule in criminal context).

visions that are analogous to state constitutional provisions.[18] Therefore, if the Supreme Court creates a complexity exception to the seventh amendment, state courts are likely to do the same with similar state constitutional provisions.

COMPLEXITY AND THE TRIER OF FACT

Factual issues in a case should not be submitted to a fact finder incapable of understanding the issues. This basic concept is reflected, for example, in the rules barring children, insane persons, and persons who do not speak English from jury duty.[19] However, juries are able to comprehend complex cases that are presented to them in an understandable way.[20] Lawyers who condemn juries for failing to understand the complex issues in a case often have failed to present those issues clearly. The primary function of a trial lawyer is to communicate, and juries can master quite difficult material if it is presented in clear, easily digestible segments.[21]

Furthermore, there is no empirical evidence that judges, per se, are more competent than juries, per se, to determine complex factual issues. The judge, to be sure, may take notes, but jurors may also be allowed to take notes if the judge feels the issues warrant such procedures. The judge's advantage in being

18. *See, e.g.*, People v. Jackson, 22 Ill.2d 382, 176 N.E.2d 803 (1961) (Illinois Supreme Court will follow decisions of United States Supreme Court on identical state and federal constitutional problems). *See generally* I F. BUSCH, LAW AND TACTICS IN JURY TRIALS § 21 (1959) [hereinafter cited as BUSCH].

19. 28 U.S.C. §§ 1865(b)(1),(3),(4) (1976).

20. *See* Chicago Daily Bull., July 25, 1980, at 1; Aug. 21, 1980, at 1; and Aug. 22, 1980, at 1 for details on transportation facility negligence cases involving complex engineering, higher mathematics, and human physiology issues comprehended by juries. *See also* Kuhlman & Stevens, *Psychosurgery as Malpractice*, 2 ILL. TRIAL LAW. J. 12 (1980) for details on medical malpractice cases involving issues of brain surgery and lobotomy comprehended by juries. Other cases tried by the authors in which juries have apparently understood very complex issues have centered on allegations of negligent construction of large office buildings; allegations of accounting malpractice in detailed financial transactions and mergers; and intricate police extortion plots.

21. Cases holding that complex facts, properly presented, are not beyond the understanding of a jury include Minnis v. United Auto Workers, 531 F.2d 850 (8th Cir. 1975) (issue of union's breach of duty of fair representation must be determined by jury); Farmers-Peoples Bank v. United States, 477 F.2d 752 (6th Cir. 1973) (issue of bank's knowledge of employer's intent not to pay taxes "peculiarly appropriate for jury resolution"); Jones v. Orenstein, 73 F.R.D. 604 (S.D.N.Y. 1977) (jury trial proper in class action alleging fraud); Bertrand v. Orkin Extermination Co., 419 F. Supp. 1123 (N.D. Ill. 1976) (defendant accused of age discrimination under federal statute providing legal remedies entitled to jury trial); Marshall v. Electric Hose & Rubber Co., 413 F. Supp. 663 (D. Del. 1976) (defendant accused of racial discrimination entitled to jury trial).

able to interrupt proceedings to question witnesses may be counterbalanced substantially by the jury process which allows jurors possessing expertise in the factual matters at issue to serve as triers of fact. Certainly a jury containing some jurors with engineering experience, or even driving experience, would not be necessarily less qualified than a judge to decide the factual matters in a complex transportation facility design negligence case.

Juries, as well as judges, benefit from the extensive stipulations and pretrial orders required in complex cases. The jury may also receive expert guidance from special masters and commissioners under the federal rules,[22] which negates the historic advantage of English chancellors over juries in having available such special masters in equity to sift evidence and frame issues. The superior fact finding facilities of English chancery courts that led equity to assume jurisdiction[23] over complex cases no longer exist in federal courts in the United States.

The contemporary ancillary fact finding procedures which are now available to assist the jury have been limited carefully in American law to protect the ultimate jury prerogatives to make final decisions on the meaning, credibility, and weight of testimony.[24] Both judges and juries are "laymen" to most factual situations, however complex. There is no reason to assume that a jury cannot handle complex technological fact issues as well, or as badly, as a judge simply because the judge may have superior knowledge of the law and local politics.

Furthermore, jurists have traditionally considered juries competent to understand complex cases. Until the current controversy arose, the scope of the seventh amendment had been considered reasonably well settled for two centuries.[25] This general judicial recognition of the competence of juries in complicated cases continues in most American trial courts,[26] which

22. FED. R. CIV. P. 53(b) provides in part: "In actions to be tried by a jury, a reference shall be made only when the issues are complicated. . . ." *See* note 27 *infra*.

23. *See, e.g.*, Weymouth v. Boyer, 30 Eng. Rep. 414 (1792); Duke of Bridgewater v. Edwards, 2 Eng. Rep. 1139 (1733).

24. LaBuy v. Howes Leather Co., 352 U.S. 249 (1957).

25. *See* text accompanying notes 96-101 *infra*.

26. Even a cursory review of any compilation of reported jury cases will reveal verdicts on notably difficult subject matter. *E.g.*, ILL. JURY VERDICT REP. (Urban Ring Ed. June 15, 1980), covering litigation outside the "sophisticated" Chicago metropolis, reports several relevant cases. In Estate of Fischer v. Korsec & Illini Hosp., No. 74L-144 (Rock Island, 1980), a jury awarded $200,000 to plaintiffs for medical malpractice; plaintiffs' decedent died of anaphylactic shock reaction to an intravenous injection of contrast media Renografin -60 for a pyelogram to find a possible kidney tissue-related cause for hypertension. *See also* Johnson v. Tipton & Valspor Corp.,

indicates that widespread legal support for reevaluation of the function of juries in complex cases does not exist.[27]

Of course, some cases will be so complex that juries will not be able to understand them. Given the nature of modern technology, such cases must exist now;[28] and they will become more numerous in the future. However, at present such cases are probably less common than one might assume. In any event, most unspeakably complex technology-oriented cases will be as factually impenetrable for judges as they are for juries assisted by special masters and other supplementary aids to the fact finding process.[29]

The final question on this narrow point, then, is what disposition to make of those cases that judges can understand better than juries, or that neither judge nor jury can master (assuming

---

No. 72-3454 (Winnebago, 1972) (a jury acquitted defendant in a complex engineering negligence case alleging that defendants' barrels of paint waste leaked into plaintiff's limestone water table, polluting plaintiff's well). The significance of these cases from "outlying" courts is that although they seem to involve complex technological issues, there is no indication that any of the judges or lawyers involved questioned the ability of a lay jury to function as a competent fact finder.

27. Special masters, auditors, and commissioners have traditionally been used in complex cases to expedite a "more intelligent consideration of the issues submitted to the jury." *Ex parte* Peterson, 253 U.S. 300, 307 (1920). *See also* Railroad Co. v. Swasey, 90 U.S. (23 Wall.) 405 (1874) (master only determines facts, does not settle rights). Similarly, special interrogatories have long been used, in the court's discretion, to localize "specific problems and issues" for the jury in complex cases. Jamison Co. v. Westvaco Corp., 526 F.2d 922, 935 (5th Cir. 1976). Such procedures, however, have been utilized to *assist* the jury, not to *preclude* it from the important factual determinations. Thus, special masters allowed under Federal Rule 53(b), note 22 *supra*, may not usurp the jury prerogatives in making the ultimate decisions on the meaning, credibility, and weight of testimony. LaBuy v. Howes Leather Co., 352 U.S. 249 (1957); Connecticut Importing Co. v. Frankfort Distilleries, Inc., 42 F. Supp. 225 (D. Conn. 1940) (in action for treble damages under Sherman Antitrust Act, master should calculate damages, whereas jury should determine liability).

28. *See, e.g.*, Diamond v. Chakrabarty, 447 U.S. 303 (1980) (patentability of new life form); Parker v. Flook, 437 U.S. 584 (1978) (computer monitoring of catalytic conversion). Such decisions do not necessarily demonstrate a clear understanding of scientific matters on the part of the Court. Yellin, *High Technology and the Courts: Nuclear Power and the Need for Institutional Reform*, 94 HARV. L. REV. 489, 491 n.9 (1980) [hereinafter cited as *High Technology*].

29. One commentator suggests that Congress establish a committee of "standing masters in complex environmental cases." *High Technology*, *supra* note 28, at 555-60. *See also* Note, *The Environmental Court Proposal: Requiem, Analysis, and Counterproposal*, 123 U. PA. L. REV. 676, 692-96 (1975) (suggesting that federal district courts employ special masters for environmental litigation). The federal courts have employed such masters in water pollution and water rights cases, *e.g.*, Hart v. Community School Bd., 383 F. Supp. 699 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975); and in complex private law litigation, *e.g.*, Avco Corp. v. American Tel. & Tel. Co., 68 F.R.D. 532 (S.D. Ohio 1975).

neither has expertise in the relevant fields). Such cases, obviously, must fall under the constitutionally protected historic right to jury trials granted by the seventh amendment. A litigant's right to have a jury decide the factual issues in a case does not depend on whether a judge and his clerks could do a better job with those facts than a jury aided by special masters. The fundamental tipping of the scales in favor of a litigant's right to a jury trial rests on the same constitutionally predetermined value judgments as the rule that the fact finder must acquit the defendant in a criminal case if guilt has not been established beyond a reasonable doubt at the close of all the evidence.[30] Traditionally, neither Congress nor the courts could deprive a litigant of the right to a jury trial where the seventh amendment granted that right.[31]

In addition, there are a number of legal rights rooted in or closely related to the seventh amendment that would be obscured, if not obliterated, if a complexity exception to that amendment existed. For example, the seventh amendment states that "[n]o 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."[32] This has been interpreted to mean that facts found by a federal jury may only be reexamined as they could have been under the common law of England in 1791, when the seventh amendment was adopted.[33] The only modes for factual reexamination known to the common law were the granting of a new trial by the trial court, or the award of a *venire facias de novo* by an appellate court for some error of law in the proceedings.[34] These important restrictions on factual reexamination are the basis for decisions limiting the ability of the United States appellate courts to modify factual determinations made by juries.[35] Litigants might be deprived of these limitations on review against their wishes if courts can invoke a complexity exception to the seventh amendment.

---

30. *See High Technology*, *supra* note 28, at 551 n.376: "[I]n criminal cases, our insistence upon selecting jurors that represent a cross-section of the community and our aversion to reducing jury decisions on reasonable doubt to the application of numerical rules reflects recognition of the subjectivity inherent in jury decisionmaking." *See generally* Nesson, *Reasonable Doubt and Permissive Inference: The Value of Complexity*, 92 HARV. L. REV. 1187 (1979).

31. Raytheon Mfg. Co. v. Radio Corp. of America, 76 F.2d 943, 947 (1st Cir.), *aff'd*, 296 U.S. 459 (1935).

32. U.S. CONST. amend. VII.

33. Dimick v. Schiedt, 293 U.S. 474, 476 (1935); Parsons v. Bedford, 28 U.S. (3 Pet.) 432, 447 (1830).

34. Parsons v. Bedford, 28 U.S. (3 Pet.) 432, 447 (1830).

35. *Id.* at 447-48. *But see* Hartnett v. Brown & Bigelow, 394 F.2d 438 (10th Cir. 1968) (ambiguous verdict insufficient to support judgment).

If a litigant chooses a jury trial he has the right to have the jurors resolve issues of credibility in the light of their human knowledge and experience.[36] The most complex cases often involve the proverbial "battle of experts," in which mutually inconsistent expert analyses and arguments collide. Parties who opt for a jury trial have the right to require experts who may be misstating their art or science to undergo cross-examination under the scrutiny of jurors who can judge the appearances of credibility or incredibility at least as well as judges can.

Another valuable protection is the seventh amendment requirement that jury verdicts be unanimous unless the parties agree to the contrary.[37] The party who does not bear the burden of proof thus has the right, if he wishes a jury trial, to escape a hostile verdict if he can persuade even one juror that his opponent's burden of proof has not been met. This strong defensive position will be abrogated if a judge can replace the jurors' perceptions with his own, which remain singular no matter how astute, through invocation of the complexity exception to the seventh amendment. The replacement of several fact finders with one fact finder could obviously determine the outcome of a case, and would be difficult to justify under the traditional rules that the seventh amendment both prohibits the judge from directing the attention of the jury to evidence he considers important,[38] and requires him to instruct the jury that it is not obligated to follow his opinion.[39]

TECHNOLOGICAL PROGRESS AND THE LAW

Historical Development

The current judicial dispute over the competence of jurors to understand the complexities of contemporary industrial society raises questions concerning the nature and future of American democracy that range far beyond purely legal scholarship. Our political system has always been based on the assumed competence of the common man[40] to function in a democracy.[41]

---

36. Head v. Hargrave, 105 U.S. 45, 49 (1882) (jury directed to determine disputed amount of attorney's fees).

37. Springville v. Thomas, 166 U.S. 707 (1897). *Cf.* Andres v. United States, 333 U.S. 740 (1948) (federal criminal case); Thompson v. Utah, 170 U.S. 343 (1898) (state criminal case).

38. *See, e.g.*, Quercia v. United States, 289 U.S. 466 (1933) (judge must exercise sound discretion). *Cf.* United States v. Murdock, 290 U.S. 389 (1933) (federal criminal case; judge must be cautious in directing jury's attention to evidence).

39. Lovejoy v. United States, 128 U.S. 171 (1888). *Cf.* Starr v. United States, 153 U.S. 614 (1894) (federal criminal case).

40. "America lacked enthusiasm for the man of profound, detached, and

The factual basis for this assumed competence of the common man has been questioned increasingly in recent years. Tremendous advances in the pervasiveness[42] and productivity[43] of modern technology have already precipitated fundamental changes in our legal and social institutions.[44] Negligence and individual

'pure' intelligence. A wholesome fear of the exotic and the heiratic, of the power of the mind to raise any man above men, inspired American faith in the 'divine average.' " D. BOORSTIN, THE AMERICANS—THE COLONIAL EXPERIENCE 188 (1958).

41. Democracy has been described as "the most difficult of all forms of government . . . [requiring] the widest spread of intelligence." DURANT, *supra* note 4, at 77-78 (1968).

42. Between 1920 and 1940, in the United States alone, the number of industrial research laboratories increased from 300 to over 2,000. They produced or discovered, among other things: cellophane, synthetic rubber, nylon, plywood, plexiglass, lucite, vinylite, the photoelectric cell, television, commercial radio, the sodium lamp, polaroid lamps, the portable radio telephone, the coaxial cable, the electric organ, dry ice, frozen foods, synthetic vitamins A, B and K, anticoagulent drugs (Herparin), sulfa drugs, typhus vaccine, commercial dessuated blood plasma, the artificial lung, insulin shock treatment, the electroencephalogram, the astronomical Red Shift, the electron microscope, Deuterium, and the atom smasher. D. WECTER, THE AGE OF THE GREAT DEPRESSION 279-90 (1948). Most of these items produced their own consumer demand: like any other narcotic, the ingestion of technology creates an addiction for more. Thus, the mass market for the products of science and industry created by these 1920-40 products stimulated the even more pervasive contemporary technology of computers, transistors, commercial television, and nuclear energy.

43. Between 1850 and 1900 the population and agricultural productivity of the United States tripled, while industrial output increased 11 times, making this country the greatest manufacturing nation in the world by 1898. H. FAULKNER, THE QUEST FOR SOCIAL JUSTICE 28 (1971). By 1929, technical and industrial productivity had far outstripped the purchasing power of the consumer; the resulting disparity was one of the major causes of the Great Depression. WECTER, *supra* note 42, at 9. World War II caused the greatest production boom in American history—the 1940 gross national product of one hundred billion dollars actually doubled to over two hundred billion by 1945. THE GREAT REPUBLIC—A HISTORY OF THE AMERICAN PEOPLE 1101, 1103 (Bailyn ed. 1977).

Today the gross national product exceeds one trillion dollars and, in the wake of this unique productivity, we have drastically reduced our fossil fuel reserves, seriously damaged our environment, and polluted ourselves. For example, in the past 15 years American production of organic solvents increased 700%, while plastic production rose 2,000% and synthetic fiber production rose 4,000%. M. BROWN, LAYING WASTE: THE POISONING OF AMERICA BY TOXIC CHEMICALS 225 (1979) [hereinafter cited as LAYING WASTE]. Our overall organic chemical production has increased 10% each year since 1954, and we are now creating and marketing over 1,000 new chemicals every year. *Id.* at 293. As a byproduct of this productivity, however, our production of toxic wastes has increased from 10 million tons in 1970 to 35 million tons in 1979, and production of 400 million tons by 1984 is predicted. We have no effective procedure to dispose of these wastes. *Id.* at 293-94.

44. The legal, economic, and social framework of society, like an inflated balloon, depends on maintaining tolerable limits on the production of goods, services, and wealth. If the supporting productivity falls too low the legal and social framework will tend to collapse, like a balloon that has lost too much air. Such a collapse occurred when plague decimated the produc-

fault standards more conducive to industrial development have replaced strict liability standards in cases of personal injury and damage to property.[45] The movement towards corporate consolidation and industrial concentration[46] may have reached proportions which vitiate the fundamental, or at least legal, economic policy of the country favoring free market competition.[47]

---

tive forces of Justinian's Byzantine Empire, and again in Europe during the middle ages. W. DURANT, THE AGE OF FAITH: A HISTORY OF MEDIEVAL CIVILIZATION (CHRISTIAN, ISLAMIC, AND JUDAIC) FROM CONSTANTINE TO DANTE; A.D. 325-1300, at 116, 435, 1003 (1950). Conversely, a drastic increase in productive forces and other forms of wealth may cause new laws and institutions suited to the new holders of power to explode within the structure of the established society, which then suffers the fate of a balloon filled with too much air. Such an explosion occurred when the bourgeoisie generated revolutionary increases in productivity and wealth within the framework of feudal society. H. ARENDT, THE ORIGINS OF TOTALITARIANISM, PART III, at 11, 34 (1951).

45. Before the industrial revolution negligence as a distinct cause of action for individual injury and damage really did not exist, and such matters were generally treated under the strict liability formula that concentrated on the plaintiff's injuries rather than the defendant's fault. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 12.2 (1956). The negligence cause of action, premised on the defendant's fault, emerged around 1825. W. PROSSER, THE LAW OF TORTS 139-40 (4th ed. 1971).

> It was not by chance that this development [of the negligence theory] coincided with the industrial revolution. It was but another manifestation of the individualism which underlies laissez-faire as a political philosophy. . . . A fleet of trucks cannot be operated, a railroad run, or a skyscraper built without the certainty that the enterprise will take some toll in human life and limb. It is the very gist of the fault principle to privilege the entrepreneur to take this toll, so long as the activity is lawful and carried on with reasonable care.

HARPER & JAMES, *supra*, at 752. *See also* Winfield, *The History of Negligence in the Law of Torts*, 42 L. Q. REV. 184, 195 (1926).

46. Revolutionary increases in production after the Civil War produced tremendous displacement of labor, which in turn caused periodic unemployment. The new volume of goods and services also caused a fall in prices that ruined many businesses. To deal with the industrial instability and murderous competition created by the new production capacities of industry, corporations began forming pooling agreements and holding companies dedicated to the proposition that combination and control of competition were necessary and inevitable steps in industrial evolution. I. TARBELL, THE NATIONALIZING OF BUSINESS 88 (1971).

47. "The heart of our national economic policy long has been faith in the value of competition." Standard Oil v. F.T.C., 340 U.S. 231, 248 (1951) *quoted in* National Soc. of Professional Engineers v. United States, 435 U.S. 679, 695 (1977). "The basic purpose [of the Sherman Act in 1890 and the Clayton Act in 1914] . . . was to prevent economic concentration in the American economy by keeping a large number of small competitors in business." United States v. Von's Grocery Co., 384 U.S. 270, 275 (1966). Nevertheless, there is substantial, although admittedly disputed, evidence that the industrial concentration precipitated and sustained by the production revolution may be foreclosing the traditional free market competition underlying American legal and economic theory:

> It is held that nothing must interfere with the independent operation of the market mechanism to which the corporation is subject. The reality in the case of the mature corporation . . . is that prices are substantially

Causes of action for products liability[48] and for the wrongful death of a viable fetus[49] are now recognized. Finally, the preindustrial era standards of duty and foreseeability have been altered in the area of occupiers of land.[50]

The rapidly expanding range and volume of technological production continues to prompt restructuring of legal relationships,[51] and may have grown beyond the power of private corporate[52] and public governmental[53] institutions to control it.[54]

---

controlled by the firm and it goes on to exercise influence on the amounts that are purchased and sold at these prices. The imperatives of technology and capital use do not allow the corporation to be subordinate to the market.

J. GALBRAITH, THE NEW INDUSTRIAL STATE 170 (1967).

48. *See, e.g.*, Dunham v. Vaughan & Bushnell Mfg. Co., 42 Ill. 2d 339, 247 N.E.2d 401 (1969); Suvada v. White Motor Co., 51 Ill. App. 3d 318, 201 N.E.2d 313 (1964), *aff'd*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

49. *See, e.g.*, Chrisafogeorgis v. Brandenberg, 55 Ill. 2d 368, 304 N.E.2d 88 (1973). *See also* 1 J. DOOLEY, MODERN TORT LAW 30 (1977) [hereinafter cited as DOOLEY].

50. *See, e.g.*, Rowland v. Christian, 69 Cal.2d 108, 443 P.2d 561 (1968). *See also* DOOLEY, *supra* note 49, at 29-30.

51. The late Mr. Justice Dooley of the Illinois Supreme Court noted this phenomenon as follows:

> The judgment of society as to the type of conduct regarded as unreasonable does not remain constant. If it did, of course, it would not reflect the spirit and objective of the common law. . . . Since the decision in the Palsgraf case in 1928, the course of events in the world has done a great deal to make life over. What might have been regarded as fanciful, imaginary and conjectural a quarter of a century ago are today matters of common acceptance. Atomic and thermonuclear power, television, jet propulsion, guided missiles, electronics, antibiotics and many other advances and discoveries in science were unheard of in the lay world of not too long ago.

DOOLEY, *supra* note 49, at 29.

52. Corporations have clearly become the primary nongovernmental institutions for generating and, theoretically, controlling technology. In 1961, the upper 0.2% of American corporations owned 65% of all corporate assets (including research and production facilities), and by 1968 the 500 largest corporations (of 4,797,000 corporations) were generating 42% of the entire gross national product and owned over 30% of America's industrial assets. F. LUNDBERG, THE RICH AND THE SUPER RICH 249 (1968). By 1970, the 200 largest corporations owned two-thirds of American manufacturing assets. T. CHRISTOFFEL, UP AGAINST THE AMERICAN MYTH 9-10 (1970).

There is substantial evidence that corporate behavior has exacerbated the problems of controlling technology. Thus, in response to the Resource Conservation and Recovery Act of 1976, which sets 1981 as the target year to eliminate illegal dumping of toxic substances, corporations massively increased the amount of toxic dumping to beat the deadline. LAYING WASTE, *supra* note 43, at 312. The oil companies are not voluntarily putting their tremendous revenues from the sale of high-priced gasoline into efforts to expand American energy resources. In the words of John Sweringen, President of Standard Oil of Indiana, this policy is justified because oil companies "are not in the energy business. [They] are in the business of trying to use the assets entrusted to [them] by [their] shareholders to give them the best return on the money they've invested in the company." B. COMMONER, THE POLITICS OF ENERGY 72 (1979). Ford Motor Company marketed its

Many citizens consequently receive from uncontrolled technology cars unfit to drive, roads unfit to travel,[55] water unfit to drink, air unfit to breath, and food unfit to eat.[56] Three Mile Island, Agent Orange, and Love Canal have become symbols of a harsh contemporary reality. The benefits of rapidly escalating technology are becoming burdens and the corresponding changes in our legal and social institutions now pose a destruc-

---

Pinto with a rear fuel tank that could burst into flames on impact, and sold 1,513,339 such vehicles over six years although the corporation had known of the danger from crash tests conducted before the car went on the market. L. STROBEL, RECKLESS HOMICIDE 80-89 (1980).

53. Governmental action has often exacerbated the problems of controlling technology through ignorance. For example, the older now-abandoned toxic dump sites are most dangerous to the environment due to packaging deterioration, yet the Resource Conservation and Recovery Act of 1976, the main legislative response to the problem, does not deal with abandoned sites at all. LAYING WASTE, *supra* note 43, at 311-12. Other areas of difficulty can best be attributed to governmental-bureaucratic ineptitude. Thus, our nuclear energy program is supposedly controlled by several overlapping, uncoordinated, independent regulatory agencies, a situation which "assure[s] a regulatory situation in which it is virtually impossible to predict the final decisions that will be rendered or when they will be made." Golay, *How Prometheus Came To Be Bound: Nuclear Regulation in America*, TECHNOLOGY REV. 30 (June/July 1980). Similarly, although § 3001 of the Resource Conservation and Recovery Act of 1976 called for laboratory tests to determine what toxic substances should be proscribed, the various drafting committees have not yet agreed on how the tests should be structured. LAYING WASTE, *supra* note 43, at 312.

54. Some 57 million tons of hazardous industrial waste are produced annually. More than 90% of that waste is disposed of improperly. *See* S. REP. NO. 848, 96th Cong., 2d Sess. 3 (1980) (citing Environmental Protection Agency estimate). A critic of public and private handling of toxic chemicals reports a chilling governmental study conducted on behalf of the state of New York. The study sought to determine the cost of toxic waste pollution by putting a monetary value on human life. LAYING WASTE, *supra* note 412, at 324-27. The researchers "took into consideration such factors as an individual's income, his productivity, and what it would cost to treat his ailment in order to determine whether the state's monies would be wisely invested in reducing the possibility of cancer." *Id.* at 325. The report noted that "it was unlikely that one or two dozen extra deaths from toxic exposure in the entire state would cause public concern. . . ." *Id.*

55. In 1977 there were 3,867,000 miles of rural and municipal roadways in the United States. Of these, 3,313,000 miles had been created prior to 1950, before national standards for road design had been established. *See* U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, THE STATISTICAL ABSTRACT OF THE UNITED STATES 638 (1979). So little work has been done to improve these out-of-date roads that in 1967 the American Association of State Highway Officials issued a "Yellow Book" calling for a crash program to improve the national highways. This call has gone substantially unanswered, and in 1970 alone 54,845 people died in motor vehicle accidents in the United States. *Id.* at 643-44. This exceeds the number of people killed in either the Korean or Viet Nam wars. HAMMOND ALMANAC 628-31 (1980).

56. On September 11, 1980, the Surgeon General of the United States reported that industrial pollution and dumping has now reached such proportions that "virtually the entire population of the nation, and indeed the world, carries some burden of one or several . . . [toxic chemicals]." TIME, Sept. 22, 1980, at 58.

tive threat to an important constitutional right: the right to trial by jury.

The Impact of High Technology

Doubts about the ability of modern man to sit as a competent trier of factual issues in a complex case create disturbing uncertainties about what occurs in the polling places where our democracy periodically renews itself. The very jurors who arguably may not be qualified to decide complex lawsuits are required to decide, as voters, the far more important and often more complex issues of inflation, recession, unemployment, investments, energy development, armaments strategy, foreign policy, social welfare legislation, and hosts of other conundrums. The voters who are called upon to choose between the conflicting complex programs presented on these issues by candidates for office must, by the very act of voting, engage in the same weighing and sifting of competing claims required of jurors.

Certainly few trial attorneys, no matter how complex their cases, would stand before a petit jury and bombard one another and the jurors with the numbing cascade of statistics that often constitute the debates between political candidates. The assumption behind those oratorical extravaganzas is, presumably, that the voters can understand the arguments of the candidates. If that assumption be false, more than our jury system may have to be changed. Both the private and the governmental areas of law in the United States are founded upon the assumption that the individual citizen can master technology and responsibly effectuate ultimate decision-making authority.

Nongovernmental areas of law came to be focused on the rights of the individual in large part because the society that made the American Revolution was remarkably bourgeois. Almost everyone owned private property,[57] and the Revolution was largely founded[58] on the ideas of John Locke that "[t]he great and chief end of men uniting into Commonwealths and putting themselves under laws and government, is the preservation of their property. . . . The power of legislation can never extend farther than the common good and laws are obliged to secure everyone's property."[59] Not surprisingly, then, the post-revolutionary United States Constitution was founded largely upon the concept of the sanctity of private property. A main argument of the anti-federalists, who opposed the Constitution as

57. BROWN, *supra* note 6, at 43.

58. J. LOCKE, TWO TREATISES OF GOVERNMENT, at v (1977).

59. *Id.* at 180-82.

drafted, was the popular thesis that the fourth, fifth, and seventh amendments in the Bill of Rights were necessary to provide additional protection for private property.[60]

Private property-oriented constitutional thinking mandated an individual-oriented private sector of law. If private property is to exist, individuals must have the liberty to make, preserve, own, increase, and bequeath it. Furthermore, the English and colonial antecedents of this private property-oriented jurisprudence required that the government be denied the opportunity to infringe upon the citizen's property without due process of law, or to deny him the equal protection of the laws.[61] The result was an individual-oriented American constitutional theory that "[t]he Constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by the People of the United States."[62]

Early American constitutional jurisprudence further recognized the fundamental importance of the individual: "The government of the union is emphatically and truly, a government of the people. In form and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."[63] Moreover, "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection."[64]

Reflecting this concern of American jurisprudence for the individual citizen, the law of contracts concerned itself with the free exercise of the parties' individual contracting capacity to reach a meeting of the minds. The law of testamentary disposition concentrated on free and knowing exercise of individual testamentary capacity. The law of responsibility for personal injury and property damage became concerned with negligence and individual fault, rather than with the preindustrial concepts of strict liability, to protect the individual entrepreneurs who stimulate industrial growth through private enterprise.[65]

Similarly, the public legal institutions of the United States were based on the assumed individual capacity of citizens to

60. BROWN, *supra* note 6, at 108.

61. Murray v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856).

62. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

63. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

64. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

65. PROSSER, *supra* note 45, at 139-40; HARPER & JAMES, *supra* note 45, at 751-52.

maintain them through intelligent participation in the political process. People who could vote the lawmakers in or out of power in the ultimate sense "owned" the laws. In addition, government and jurisprudence in the United States were oriented towards protection of individual interests as the ultimate end to be served. The legal process helped individual citizens to appropriate and divide the continent in the nineteenth century, and the government instituted massive public aid and social development projects in the twentieth century.[66]

Thus the individual-oriented legal framework of American democracy has always rested, in both the public and private spheres, on notions of citizen competence quite different from the assumptions of nondemocratic states where in earliest times, laws were presumed to be inflicted upon the incompetent masses by malevolent deities speaking through the local king or priest.[67] Even today, nondemocratic legal authority of all kinds is perceived as something separate from and superior to the individual citizen.[68] Thus, the Soviet legal system has always subjected the individual to the demands of overriding factors. The 1936 Soviet Constitution provided in chapter I that the basic structure of Soviet society could not be challenged.[69] Chapter X made the individual citizen's right to exercise a long list of civil liberties dependent upon whether the exercise of those liberties was "in conformity with the interests of the working people and a strengthening of the Socialist System."[70] The Soviet legal system has been inflicting extrajudicial arrests, trials, sentences, and confiscations upon its citizens since 1918.[71] As one commentator observed:

> Laws in the Communist system guarantee all sorts of rights to citizens, and are based on the principle of an independent judiciary. In practice, there is no such thing. Freedoms are formally recog-

66. The United States government had to decide how to occupy, exploit, divide, develop, and defend an entire continent. Government in America thus, from force of circumstance, was an agency for creating and protecting new property. Americans from the beginning have expected government to help them make the most of their unprecedented opportunities. Governments here have thrust on them new tasks and new expectations of service. D. BOORSTIN, THE AMERICANS—THE NATIONAL EXPERIENCE 250 (1965). The continuation of these "tasks and expectations of service" under Franklin Roosevelt and subsequent twentieth century presidents, for better or for worse, is self-evident.

67. "The earliest notion of law is not an enunciation of a principle, but a judgment in a particular case. When pronounced, in the early ages, by a king, it was assumed to be the result of a direct divine inspiration." H. MAINE, ANCIENT LAW, at xv-xvi (1967).

68. N. KORKUNOV, GENERAL THEORY OF LAW 140 (1922).

69. N. RIASONOVSKY, A HISTORY OF RUSSIA 561 (1963).

70. *Id.*

71. A. SOLZHENITSYN, THE GULAG ARCHIPELAGO 299-432 (1973).

> nized in Communist regimes, but one decisive condition is a prerequisite for exercising them: freedoms must be utilized only in the interest of the system of socialism which the Communist leaders represent, or to buttress their rule. Legal forms must be protected on the one hand while the monopoly of authority must be insured at the same time.[72]

Similarly, under the jurisprudence of the Peoples' Republic of China, "[a]ny violation of the individual becomes acceptable if in the service of the larger vision. So long as it is Revolutionary, no action is a crime. The goal of each person is to become a stainless screw in the locomotive of Revolution."[73]

Undermining the Basic Assumptions

As the complexity of technology escalates, societal controls over technological decisions have proven increasingly incapable of functioning.[74] As the individual becomes less able to master his technology through his private, public, and legal institutions, his stature in society diminishes, which in turn undermines the basic assumptions of individual competence underlying our law. As the individual becomes increasingly unable to utilize the benefits his laws were intended to bestow, those laws become increasingly meaningless and burdensome. Thus, the right to vote becomes meaningless if the issues are too complex for the voters to understand; and the value of the right to a trial becomes diluted if the issues are too complex for any fact finder.

To the extent that the individual sees himself no longer as the controlling force in his institutions, alienation results. Government becomes not the creation of its citizens, but their master. Legal process under that government is perceived as

---

72. M. DJILAS, THE NEW CLASS 88-89 (1962).

73. R. LIFTON, REVOLUTIONARY IMMORTALITY—MAO TSE TUNG AND THE CHINESE CULTURAL REVOLUTION 59-60 (1976).

74. Had a malevolent deity set out to test our system for overseeing technological decisions, he would have enabled the creation of a technology with overwhelming military importance, distanced its underlying physical laws from ordinary experience, given it attractive commercial applications, and designed those applications to endanger public health. Moreover, he would have acted at a time of sensitivity to threats to national security, when the legitimacy of administrative government had been settled, and after economic, military and social crises had encouraged unquestioning faith in the efficiency and dispassion of governmental experts. Under these circumstances he could have been confident of an extraordinarily deferential judiciary and could have expected technological enthusiasm to overshadow the constraints of legislative oversight and safety regulations. . . . The data [from nuclear power] cannot be ignored, for they suggest there are inherent weaknesses that prevent existing institutions from adequately controlling the risks that flow from technological decisions.

High Technology, *supra* note 28, at 490. *See* text accompanying notes 54-56 *supra*.

imposed upon the individual rather than voluntarily accepted.[75] The proposed curtailment of the right to trial by jury will further remove individual citizens from control of their institutions.

In one sense, the juror who cannot understand the factual issues in a lawsuit because trial counsel has not properly communicated those facts is in a situation analogous to that of the individual citizen unable to control his technology, not because he or she has become less intelligent, but because the corporate and governmental institutions that were supposed to regulate that technology have failed to perform their functions. In both the microcosmic instance of the complex lawsuit and the macrocosmic instance of uncontrolled technology, the individual is unable to discharge his responsibility to the legal and social systems because those systems have not discharged their responsibilities to the individual. In societies where citizens consider their legal systems to be imposed burdens, the jury trial, in many ways a microcosm of the democratic process, historically has been one of the major ameliorating institutions.[76]

EVOLUTION OF THE RIGHT TO JURY TRIAL

It is curious that eastern societies which are noted for legal curtailment of individual liberty make little use of juries, whereas jury trial principles are common elements in much of the formative jurisprudence of the western world, including the

75. Alienation from, and subjugation to, legal process is characteristic of nonindividual-oriented totalitarian jurisprudence. Compare the growing popular disapproval of rising taxes to finance increasingly irrelevant governmental activities as reflected in California's Proposition 13 with the absolute contempt for law and government reflected in current Russian literature. *See, e.g.*, A. SOLZHENITSYN, THE GULAG ARCHIPELAGO (1973).

76. The value of the jury system as a democratic institution creating popular acceptance of judicial supremacy (an insight which indicates that judicial attempts to reduce the scope of jury trials may be counterproductive for the judiciary itself) was noted by de Tocqueville as follows:

> I do not know whether the jury is useful to those who have lawsuits, but I am certain it is highly beneficial to those who judge them. . . . [I]n democracies the members of the legal profession and the judicial magistrates constitute the only aristocractic body which can moderate the movements of the people. [In civil cases] the jurors look up to [the judge] with confidence and listen to him with respect, for in this instance, his intellect entirely governs theirs. . . . His influence over them is almost unlimited. If I am called upon to explain why I am but little moved by the arguments derived from the ignorance of jurors in civil causes, I reply that in these proceedings, whenever the question to be solved is not a mere question of fact . . . the jury only sanctions the decisions of the judge . . . by the authority of society which they represent. . . . The jury, then, which seems to restrict the rights of the judiciary, does in reality consolidate its power; and in no country are the judges so powerful as where the people share their privileges.

1 A. DETOCQUEVILLE, DEMOCRACY IN AMERICA 285-86 (1972).

legal systems of the early Hebrews,[77] Romans,[78] Germans,[79] and Scandinavians.[80] Jurors were called to sit in trials in the Greek city states of the fifth century B.C.,[81] and it was a basic tenet of Athenian law that every citizen over thirty years of age could sit and vote in the law courts.[82] William the Conqueror brought the jury trial to England in 1066,[83] and statutes were passed in England as early as 1352 regulating the qualifications of jurors to sit on the Assizes that had been called since the time of Henry II (1133-1189).[84] The Magna Carta recognized the right to jury trial in 1215.[85] Indeed, the entire English legal system was "deliberately structured as a compromise between the professional element of the bench on one side, and the popular element of the jury on the other."[86]

American history itself lends very little support to the idea that the founding fathers could have intended to create a complexity exception to the seventh amendment. The institution of the jury trial arrived in America with the first colonists.[87] Its underlying premise that the common citizen could make the factual decisions upon which the operations of the legal and judicial systems depended quickly "found a receptive atmosphere in the egalitarian principles of the colonists."[88]

The colonists had brought with them a political heritage making it highly unlikely that any popular support could be found for abridging the right to a trial by jury. English history from the time of Cromwell records the reduction of the status of judges to subservience, whereas Englishmen increasingly viewed the jury as the champion of popular rights.[89] Indeed, "the effect of the various English political struggles in the Seventeenth Century was to make the jury system impregnable,"[90] whereas "colonial judges added little to the prestige judges had

77. *Exodus* 22:10, 11; *See also* BUSCH, *supra* note 18, at 1.

78. BUSCH, *supra* note 18, at 1.

79. W. FORSYTH, HISTORY OF TRIAL BY JURY, at ch. III (1875).

80. *Id.*

81. 2 P. VINOGRADOFF, OUTLINES OF HISTORICAL JURISPRUDENCE 77 (1920).

82. W. FOWLER, THE CITY STATE OF THE GREEKS AND ROMANS 136 (1895).

83. BUSCH, *supra* note 18, at 4-5.

84. A. CARTES, A HISTORY OF ENGLISH LEGAL INSTITUTIONS 217, 225 (1906).

85. BUSCH, *supra* note 18, at 11.

86. 2 P. VINOGRADOFF, OUTLINES OF HISTORICAL JURISPRUDENCE 7 (1920).

87. Hyman & Tarrant, *Aspects of American Trial Jury History*, in THE JURY SYSTEM IN AMERICA 24-25 (R. Simon ed. 1975); Simon, *Introduction* to THE JURY SYSTEM IN AMERICA 11 (R. Simon ed. 1975).

88. *In re* Financial Sec. Litigation, 609 F.2d 411, 420 (9th Cir. 1979).

89. J. ZANE, THE STORY OF LAW 199 (1927).

90. *Id.* at 302.

lost in England because, prior to the Revolution, they were mostly laymen appointed by, and subservient to, the Crown."[91] For this reason, American law during the colonial era established few precedents that were preserved after the Revolution.[92]

One of the primary popular grievances against England at the time of the American Revolution was the English restriction on the colonial right to jury trials.[93] One of the "repeated injuries and usurpations of the English King" cited in the Declaration of Independence was that George III "deprived us in many cases of the benefit of trial by jury."[94] By 1776, "the jury system was an established colonial institution in both civil and criminal cases, and was esteemed a valuable right."[95]

After the Revolution, one of the strongest popular arguments against the Articles of Confederation and in favor of the proposed Constitution was the need for a national government strong enough to prohibit the states from abolishing or abridging civil trial by jury.[96] The fact that the Constitution itself failed to recognize the right to civil jury trial in the proposed federal court system[97] raised objections to the Constitution itself which were "pressed with an urgency and zeal which were well nigh preventing its ratification."[98]

To meet these objections, which endangered the entire Constitution, the seventh amendment was drafted to

---

91. D. BOORSTIN, THE AMERICANS—THE COLONIAL EXPERIENCE 199 (1958).

92. *Id.*

93. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 340 (1979).

94. BUSCH, *supra* note 18, at 14.

95. *Id.*

96. Both the First Continental Congress in the 1774 Declaration of Rights, 1 J. OF CONG. 28, and the Judiciary Act of 1789, 1 Stat. 73, 77, attempted to establish the right to civil jury trial in federal courts. Before the adoption of the Constitution, the legislatures of at least five states had attempted to abolish or substantially abridge the right to a jury trial supposedly established in their own state constitutions. The Constitutional Convention of 1787 specifically considered, and condemned, all five of these attempts. C. WARREN, CONGRESS, THE CONSTITUTION AND THE SUPREME COURT 43-44 (1925); BUSCH, *supra* note 18, at 15.

97. The original draft of the Constitution protected only the right to jury trial in "all crimes except in cases in impeachment." BUSCH, *supra* note 18, at 15-16.

98. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION § 1757 (1970). *See also* THE FEDERALIST, No. 83, at 146 (1901), in which Alexander Hamilton, who may have been the most elitist founding father, anticipated Chief Justice Burger as follows:

> The circumstances that constitute cases proper for courts of equity are in many instances so nice and intricate, that they are incompatible with the genius of trials by jury. They require often such long, deliberate, and critical investigation as would be impracticable to men called from their occupations, and obliged to decide before they were permitted to return to them.

"[c]onstitutionally preserve the right of trial by jury as it existed under the English common law when the Amendment was adopted."[99] At least until the recent controversy, the purpose of the amendment was accepted by most courts to be "the preservation of the common law distinction between the province of the Court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court."[100] In 1835, Alexis deTocqueville, studying the effects of American laws on society entering the industrial era, noted that "[t]he institution of the jury may be aristocratic or democratic, according to the class from which the jurors are taken; but it always preserves its republican character, in that it places the real direction of society in the hands of the governed . . . and not in that of the government."[101]

CONCLUSION

From this record it is clear that the competence of the common man and the validity of the jury trial are two basic closely related notions upon which American democracy has always rested. If the Supreme Court declares a new complexity exception to the seventh amendment, one of the main historical connections between citizens and their government will have been broken, and a hitherto unquestioned rationale for popular election of public officials will be seriously undermined.

On an even deeper level, history shows that societies perish when those who are given the ultimate responsibilities to control society (which always accompanies ultimate power) are unable to meet those responsibilities. Rome fell when the plebians and patricians who won the Punic War and maintained the Pax Romana degenerated into irresponsible and degraded rabble. The French and Russian monarchies perished when the aristocracies upon which they depended were unable to master the new technologies and ideas of the Enlightenment and the Industrial Revolution.

The common man who was given the ultimate responsibility to maintain American democracy has, in recent decades, lost an alarming amount of individual liberty to the overwhelming opposing forces of increasingly pervasive technology on the one

99. Baltimore & C. Line v. Redman, 295 U.S. 654, 657 (1935); Parson v. Bedford, 28 U.S. (3 Pet.) 433, 436-48 (1830).

100. Capital Traction Co. v. Hof, 174 U.S. 1, 5 (1899).

101. 1 A. DETOCQUEVILLE, DEMOCRACY IN AMERICA 282 (1972).

hand, and the growing governmental laws and bureaucracies originally invoked to control that technology on the other. This unfortunate process may very well have become irreversible, for both technology and the laws it generates are expanding geometrically. Even if it were possible, weakening either would merely make society all the more vulnerable to the other. If the entire process cannot be slowed or redirected in more benign directions, individual liberty may become increasingly anachronistic. Contrary to the general assumption that "the more developed a nation is, the greater the chances are that it will sustain democracy,"[102] we may find that our democratic institutions cannot survive the realization of the American dream. Forcing juries and advocates to clarify and confront complex issues may preserve and protect democracy.

102. S. LIPSET, POLITICAL MAN 31 (1963).