How to Revive the Jury: One Judge's Observations

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Abstract

Juries and jury trials are an important pillar of American democracy but have increasingly become obsolete, due largely to the professionalization of lawyers and the resulting complexity of litigation. Judges can do much to reverse this trend—for instance, by streamlining pretrial management, limiting discovery, employing time limits, simplifying jury instructions, and curbing wasteful questioning. These modest reforms would not restore juries to their historic prominence overnight, but they would make jury trials more accessible and help preserve the jury's essential role in legitimizing justice.

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Introduction

Juries have all but vanished from most American courts.[1] That departure from tradition should be shocking. In the Declaration of Independence, the Founders complained that bad King George had deprived the colonists of trial by jury.[2] Jury trials were "the heart and lungs" of liberty, "the spinal column of American democracy," and a crucial safeguard against abuse of power.[3] The colonists revolted rather than accept that deprivation.

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1 *See* Suja A. Thomas, The Missing American Jury 2–3 (2016).

2 The Declaration of Independence paras. 2, 20 (U.S. 1776).

3 John Adams, The Earl of Clarendon to William Pym (Jan. 27, 1766), *in* The Revolutionary Writings of John Adams 51, 55 (C. Bradley Thompson ed., 2000); Neder v. United States, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part and dissenting in part).

In response, Article III of the Constitution guaranteed petit (trial) juries in federal criminal cases.[4] Even that was not enough for the Anti-federalists, who demanded more in a Bill of Rights.[5] So the Framers adopted three amendments to give juries central roles in doing justice. The Fifth Amendment guarantees grand juries.[6] The Sixth Amendment guarantees speedy and public trials by jurors drawn from the local vicinage.[7] Finally, the Seventh Amendment guarantees civil juries.[8]

Juries mattered not just as factfinding bodies. They were also checks and balances on all three branches of government. They applied general legislation to particular cases, sometimes exercising a de facto sentencing power to mitigate harsh punishments and show mercy.[9] They reviewed the executive's efforts to brand citizens criminals and deprive them of their liberties.[10] They also applied judicial power themselves so that professional judges could neither be bribed nor pressured into railroading citizens, as bad King George had tried to do.[11]

The Constitution's protections for jury trials seem formidable. Indeed, Article III's language is mandatory, apparently a structural pillar rather than a waivable right: "The Trial of *all* Crimes . . . *shall* be by Jury . . . ."[12] But over time, these parchment barriers have proven no match for the interests, incentives, and pressures that have subverted these rights.

Part I of this Essay briefly recaps how a combination of "lawyerization," the growing length and complexity of jury trials, and judges' and lawyers' interests in clearing their dockets led plea bargaining and settlements to swallow up most jury trials. That has cost not only public trials, checks on power, and jurors' commonsense moral perspective but also the empowerment and civic education that jurors get while doing justice themselves.

Part II turns to my firsthand observations of the problem. I am a federal judge, so I do not see the day-to-day operations of high-volume state courts firsthand. But I was a federal prosecutor, juggling more than a hundred criminal cases and trying four of them. And as a

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4 U.S. CONST. art. III, § 2, cl. 3.

5 *See* Letter from the Federal Farmer (Oct. 13, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST 251, 251–56 (Herbert J. Storing ed., 1981).

6 U.S. CONST. amend. V.

7 *Id.* amend. VI.

8 *Id.* amend. VII.

9 *See* 5 WILLIAM BLACKSTONE, COMMENTARIES *237–38.

10 *Id.* at *349–51.

11 Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 186–87 (2005); *see* THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

12 U.S. CONST. art. III, § 2, cl. 3 (emphasis added). For an exposition of this point, see John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL'Y 119, 120–22 (1992).

current appeals judge, I have now heard more than a hundred civil cases as well as several dozen criminal ones, some of which have gone to jury trials. What I have seen is that many judges are hands-off, leaving litigators to spin their wheels in pretrial discovery before they present the inevitable settlement or plea bargain for a judge's rubber stamp. These litigators often do not really know how to try cases and are not ready for it. Part of the fault lies with judges' pretrial habits. Part lies with the billable hour. And part lies with how we try cases, making trials far lengthier and more cumbersome than they used to be.

Finally, in Part III, I offer suggestions for reform. To raise trial rates, judges must streamline pretrial and trial procedures and reduce pressures to plead guilty or settle. Judges can do far more to keep cases speeding on track, focusing on the heart of each case and limiting discovery and extensions. They can impose time limits on questioning and skip over preliminaries to get to the point. And judges can focus trials on the core disputed questions, learning from England's experience. The parties should feel pressure to stipulate to issues not in general dispute and can use clips of video depositions to provide general background. I conclude that although reform will not be easy, there is no need to wait for some seismic legal change. Individual judges can do much to revive jury trials in their own courtrooms, and they should try doing so.

I. The Decline of the Jury: From Morality Play to Assembly Line

The erosion of jury trials has been well told by George Fisher, John Langbein, and others, so I recap it only briefly.[13] One of the main culprits is the shift from a lay-run to a lawyer-dominated system. Over the course of the nineteenth century, prosecution shifted from being run by victims to public prosecutors, who had many cases to juggle and so plenty of incentives to clear their dockets.[14] To level the playing field, criminal defense lawyers then displaced defendants.[15] Once lawyers were on both sides of many cases, courts developed increasingly elaborate rules of procedure and evidence for both sides, as these repeat players could learn the jargon and navigate the technical rules.[16] Motions and objections made trials longer and more elaborate.[17] And once nineteenth-century industrial torts swamped the courts, judges had their own reasons to clear their dockets.[18] The result, as George Fisher

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13 *See, e.g.*, George Fisher, Plea Bargaining's Triumph 16–17 (2003); Langbein, *supra* note 12, at 119–22.

14 *See* Stephanos Bibas, The Machinery of Criminal Justice 16, 18 (2012).

15 *Id.* at 16.

16 *Id.* at 16–17.

17 *Id.*

18 *Id.* at 19.

argues convincingly, was that all the repeat players worked together to plea-bargain away most of their criminal cases.[19]

Note the interests omitted from the story above: the parties who want to have their say and day in court and the public that wants to see justice done and have confidence in its process. The public expects criminal justice to be a morality play—a cathartic, educational social theater as seen on TV. Yet lawyers sacrificed these private and public goods for speed and efficiency.[20]

Something comparable happened to civil trials. As George Priest and Benjamin Klein have shown, bargaining theory predicts that if both sides can forecast the expected value of their case, they will tend to reach settlements that split the gains from avoiding trial costs.[21] And as the cost and length of trials grew, the gains from settling grew as well. Civil trials are now viewed as "less predictable, slower, and less cost-effective than alternative[s]."[22] And these alternatives have multiplied. Mandatory arbitration, mediation, bench trials, and increased summary judgment keep cases from ever reaching juries.[23] Caps on damages make litigants even more reluctant to risk their case with unpredictable juries.[24] Despite all this, lawyers and judges think juries are just about the fairest way to litigate civil cases.[25]

So far from being prevalent, trials are now rare. As Langbein colorfully put it, they are like hippos in New York City: You can find a few at the Bronx Zoo, but they are freak specimens, far out of their native habitat.[26]

Some of these developments may have been inevitable. And some may be irreversible. But I am not so sure. When I look at current pretrial and trial procedures, I see many needless deterrents to trial and pressures to settle. Discovery and trials take far longer and cost much more than they need to. Let me now offer a few observations on how current practices contribute to the problem.

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19 *See* FISHER, *supra* note 13, at 14–17; BIBAS, *supra* note 14, at 18–20. Note that scholars disagree about how much to blame caseload pressure for plea bargaining. Some, such as Milton Heumann, argue that lawyers would plea-bargain even if their caseloads were much lower because their interests and incentives favor it. *See generally* MILTON HEUMANN, PLEA BARGAINING (1981) (presenting evidence and arguing that the prevalence of plea bargaining results from attorneys adapting to the realities of the court system rather than caseload pressure).

20 BIBAS, *supra* note 14, at 26–27.

21 *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 26 (1984).

22 Shari Seidman Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 LA. L. REV. 119, 121 (2020).

23 *Id.* at 122–24.

24 *Id.* at 125.

25 *See id.* at 132.

26 Langbein, *supra* note 12, at 121.

II. Observations About Trials Today

Many lawyers call themselves litigators, but few are trial lawyers. What I see from my perch is dispiriting. The bread and butter of litigation is pretrial, from investigation through discovery and motions practice. Civil litigators spend all their time exchanging documents, deposing witnesses, moving for summary judgment, and squabbling about the other side's compliance with these rules before settling. Criminal litigators spend all their time investigating crimes, moving to suppress, and negotiating plea bargains. Few clients, few lawyers, and few judges really expect or want cases to go to trial.

Some of the fault lies with judges. Judges have hundreds of cases on their dockets. They are often reactive, resolving motions as they are teed up and otherwise staying pretty hands-off. They grant extensions freely, trusting that the parties will eventually settle, perhaps after the court narrows the case by dismissing or granting summary judgment on some claims. They hold many more pretrial hearings—on motions to suppress, discovery disputes, and the like—than trials.

These delays may make settlement inevitable. For instance, when a criminal defendant does not make bail and is detained pretrial, the pretrial detention may exceed the expected sentence for a minor crime. Plus, jail—where pretrial detention happens—is often much more chaotic and less pleasant than prison.[27] So defendants plead guilty in exchange for time served, obviating any trial. Justice delayed is justice denied.

When the occasional case does go to trial, it is far longer, more sprawling, and more abstruse than colonial trials were. Jury selection alone now takes hours if not days or even weeks. In the eighteenth century, criminal trials might have taken a couple of hours.[28] Now, they run days if not weeks or months.[29]

The same is true of civil trials. As cases became more complicated and sprawling—involving tricky financial instruments, complicated antitrust violations, complex injury cases with cutting-edge scientific data, and intricate science in patent cases—trials stretched on and on.[30]

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27 *See* Elisa L. Toman, Joshua C. Cochran & John K. Cochran, *Jailhouse Blues? The Adverse Effects of Pretrial Detention for Prison Social Order*, 45 Crim. Just. & Behav. 316, 317 (2018) ("Jails are responsible for a larger and more diverse clientele with wide-ranging physical and mental health needs and they typically have more limited resources [than prisons], which makes them less well equipped to provide treatments and services." (citations omitted)).

28 John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. Chi. L. Rev. 263, 277–79 (1978).

29 *See, e.g.*, Brian J. Ostrom, Lydia E. Hamblin, Richard Y. Schauffler & Nial Raaen, Nat'l Ctr. for State Cts., Timely Justice in Criminal Cases 6 (2020), https://ncsc.contentdm.oclc.org/digital/collection/criminal/id/352/ [https://perma.cc/Q85A-A3HV].

30 Nora Freeman Engstrom, *The Trouble with Trial Time Limits*, 106 Geo. L.J. 933, 941–43 (2018).

Records ran for tens of thousands of pages, with thousands of exhibits.[31] Judges had to begin imposing time limits to rein in these long civil trials.[32]

It is no surprise that, as a result, there are now many fewer trials. In 1962, juries decided about eight percent of federal criminal trials; by 2013, that was down to under four percent.[33] One dataset showed juries decided state felony cases 3.4% of the time in 1976 but only about 1.3% of the time in 2002.[34] In the civil context, the federal courts "conducted half as many civil trials in 2016 as they did in 1962, even while disposing of over five times as many civil cases."[35]

Obviously, that means many fewer juries. Less obviously, it also means that justice usually is not public but results from settlement conferences or plea discussions in courtroom hallways, conference rooms, or phone calls. And the trials that do occur are not nearly as speedy. "The average time to disposition is 256 days for a felony case and 193 days for a misdemeanor."[36] Civil cases are even slower. One study showed the mean length of state civil cases decided by a jury was over two and a half years.[37] That is far too long.

III. How to Streamline Litigation to Revive Jury Trials

At this point, some academics wish upon a star for millions more dollars or some other *deus ex machina* to solve the problem. I do not see that happening. What I do see is that individual judges have plenty of discretion to streamline litigation, making more jury trials possible. Rather than making each jury trial as expensive as a new Cadillac, so to speak, judges could bring the complexity and price down enough to give more people used Chevys. In that spirit and based on my experience, I offer some suggestions for grassroots reform.

First, judges need to take charge. The path of least resistance is the status quo, and that is easiest—especially for state courts facing congested dockets. But trial judges have a lot of power over discovery and timing. Often, they simply react to the parties—for instance, by granting routine extensions. But that lets lawyers spin their wheels, racking up billable hours on discovery that may be tangential. Judges can keep cases on track, moving ahead toward trial. One way to do that is focusing

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31 *Id.* at 942.

32 *Id.* at 946.

33 Diamond & Salerno, *supra* note 22, at 122.

34 Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459, 510 (2004).

35 Engstrom, *supra* note 30, at 935.

36 Ostrom et al., *supra* note 29, at 6.

37 Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 Case W. Rsrv. L. Rev. 813, 822, 834 (2000).

discovery on issues at the heart of the dispute and getting the parties to agree on much of the rest.

Second, a focused trial requires vigorous pretrial management. By encouraging and ruling on motions in limine several weeks before trial, judges can focus the parties. They can agree on most evidentiary issues, and judges can rule on remaining disputes shortly before trial. That averts time-consuming sidebar conferences.

Third, judges can speed up jury selection. Judge-run jury selection is much faster than lawyer-run fishing expeditions. Judges could do away with peremptory challenges entirely, relying only on for-cause challenges to ferret out disqualifying biases.[38] Even if they do not, judges need not question prospective jurors about things that would not expose those biases, like the TV shows that they watch or websites they visit. Jury officials can have prospective jurors fill out questionnaires online before they show up. With such measures, even with peremptory challenges, juries can be seated in two hours or less.

Fourth, judges can set time limits for trials. Some academics complain about time limits as arbitrary and prone to gamesmanship.[39] But I have seen how flabby and undisciplined closing arguments or meandering lines of questioning can be.

Judges can also encourage the parties to stipulate to facts and elements not in serious dispute and to use clips from video depositions to efficiently provide background and cover side issues. Usually, for instance, no one is disputing that venue is proper, that a particular car was stolen, or that a store's goods have moved in interstate commerce. In England, criminal defense lawyers must list ahead of trial the specific issues they plan to dispute, obviating proof of the rest.[40]

Fifth, judges can move questioning along. Often, lawyers spin their wheels and spend a lot of time warming up. I have found it helpful to nudge lawyers to move on. And when lawyers or witnesses lapse into acronyms or jargon, I can usually get them to explain themselves to the jury in plainer English.

Sixth, judges can do much more to streamline jury instructions. Empirical research shows that jurors understand surprisingly little of what is in pattern jury instructions.[41] Judges can do more to rewrite them in plain English. Judges can format them with indentation, bullet

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38 *See generally* Anna Offit, *Rethinking Juror Impartiality*, 93 GEO. WASH. L. REV. 1386 (2025) (arguing that peremptory strikes undermine jury impartiality and should no longer be allowed in jury selection).

39 Engstrom, *supra* note 30, at 985.

40 *See* Criminal Procedure Rules 2025, SI 2025/909, r. 15.4; Crim. Proc. Rule Comm. & Ministry of Just., *Defence Statement*, GOV.UK (Aug. 19, 2011), https://www.gov.uk/government/publications/defence-statement [https://perma.cc/4KBF-EYQK].

41 *See* Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 77–78 (1988).

points, and checklists to make clear the various elements the jury must find. And judges can streamline out a lot of repetition, as multiple instructions often belabor the same simple concepts, like not doing outside research or reading about the case.

Lastly, some might suggest virtual trials held over videoconference—though they are a less-than-ideal solution. During the COVID-19 pandemic, the legal community learned the judicial system can operate virtually if it must.[42] And one might think that virtual proceedings come with benefits, like reducing "the inconvenience and burden of in-person processes."[43] Jury duty would become much less of a burden when it can be done from a bedroom, the car, or workplace without having to take off work, get childcare, and drive to a courthouse.

Yet virtual trials go a step too far. There are, of course, obvious downsides to virtual trials. Sometimes lawyers might appear as cats.[44] More seriously, many Americans lack internet access, people focus less well virtually, they may even be influenced by external sources, and it is easier to judge credibility in person.[45]

But the main thing lost with videoconference juries is solemnity. Much of American culture is fast and cheap now. But a jury trial is slow (sometimes much too slow), deep, and grand—the United States' seal, the judge's robe, the witnesses swearing to tell the truth. These symbols weigh heavily on jurors.[46] When a flesh-and-blood judge in robes tells jurors that they must follow the law, they feel the weight of that duty. All this is an important ritual of civic duty. Many of these kinds of rituals have been lost, so judges should not dilute the jury trial by removing it to videoconference.

Conclusion

Judges have a lot of power to make litigation more efficient, if only they would take the driver's seat. They can craft discovery deadlines that keep things moving. They can hear and resolve evidentiary motions weeks before trial. They can have jurors fill out questionnaires in advance, minimizing time-consuming courtroom voir dire. They can

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42 *See* Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond*, 115 Nw. U. L. Rev. 1875, 1877–79 (2021).

43 Nat'l Ctr. for State Cts., Guiding Principles for Post-Pandemic Court Technology 7 (2020), https://nationalcenterforstatecourts.app.box.com/s/wm8gqkndkco49agy35njjx48bfva7u0a [https://perma.cc/MLV7-KZMD].

44 Daniel Victor, *'I'm Not a Cat,' Says Lawyer Having Zoom Difficulties*, N.Y. Times (May 6, 2021), https://www.nytimes.com/2021/02/09/style/cat-lawyer-zoom.html [https://perma.cc/H5EA-8WAK].

45 *See* Eric Scigliano, *Zoom Court Is Changing How Justice Is Served*, Atlantic (Apr. 13, 2021), https://www.theatlantic.com/magazine/archive/2021/05/can-justice-be-served-on-zoom/618392/ [https://perma.cc/92EN-7XZH].

46 *See* Fed. R. Civ. P. 43 advisory committee's note to 1996 amendment.

set time limits for trials and move questioning along when an advocate is dragging. And they can make jury instructions clear enough that jurors will not waste time asking for clarification. Those reforms could lead to more jury trials and fewer settlements or plea bargains.

No doubt, judges must preserve the best aspects of jury trials. But when "the heart and lungs" of "liberty" are fading fast, it is worth taking some risks.[47] The changes I propose here are mild. Judges can try them individually, sharing what works and what does not with their colleagues. Eventually, a common law of best practices will emerge in each district. And when judges from different places get together, they can share how their tinkering has improved things. After all, the status quo is far from perfect. Judges and lawyers can do much to fix this vital part of American democracy.

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47 Adams, *supra* note 3, at 55.