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SHOULD JURY TRIAL BE REQUIRED IN CIVIL CASES? A Challenge to the Seventh Amendment*

EDWARD J. DEVITT**

Mark Twain once told us:

"The jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and perjury. It is a shame that we must continue to use a worthless system because it was good a thousand years ago."

IS THE SEVENTH AMENDMENT requirement for jury trial in civil cases a worthless part of our legal system as Mark Twain wrote over a hundred years ago? Do citizen jurors have the competence to understand and decide the complicated issues of fact and law involved in protracted technical and business law suits so common on court dockets today? As the only nation in the world constitutionally requiring civil jury trial, we should ask ourselves whether this is the best method of decision making or whether we have an unreasonable fetish for the jury.*

* This article is an adaptation of the Alfred P. Murrah Lecture on Judicial Administration, delivered by Judge Devitt on Nov. 11, 1981, at Southern Methodist University School of Law.

**Senior United States District Judge, United States District Court for the District of Minnesota. Author, E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS, CIVIL AND CRIMINAL (3rd ed. 1977). I would like to thank my law clerk, Mary E. Bolkcom (William Mitchell College of Law in St. Paul, J.D., 1980) for her assistance in preparing this article.

2 M. TWAIN, Roughing It, in THE COMPLETE WORKS OF MARK TWAIN 309 (1972).

3 We have had an ever growing debate on this important question in recent years. See, e.g., Harris & Liberman, Can the Jury Survive the Complex Antitrust Case?, 24 N.Y.L. SCH. L. REV. 611 (1979); Higginbotham, Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power, 56 Tex. L. REV. 47 (1977); Kirkham, Complex Civil Litigation: Have Good Intentions Gone Awry?, 70 F.R.D. 199 (1976); Redish, Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making, 70 Nw. U.L. REV. 486 (1975); Sperlich, The Case for Preserving Trial by Jury in Complex Civil Litigation, 65 JUDICATURE 394 (1982); Comment, The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh

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The complexities of modern life mirrored in our legal system raise the increasingly important question of whether a jury selected from voter lists, reflecting the age, education, and experience of a cross section of citizens is really competent to decide today's complex cases. I suggest that many cases, by their very nature, are beyond the abilities of the average person to understand and fairly decide. Because of the required trial time and the complexity and difficulty of the legal and factual issues involved, certain cases should not be submitted to juries. I urge that modern realities dictate that we change the obligatory jury system in civil cases in order to preserve fair trials and to improve the efficiency and economy of the whole legal system.

I. Origins of the Jury Trial

The civil jury is deeply rooted in American legal tradition. Long before the founding of our nation, the jury was an important institution for English-speaking people. Indeed, the idea for trial by jury is said to have been originated by an Eighth Century Welsh king. Blackstone, moreover, called it "the glory of the English law." One of the principal complaints of the American colonists was the British Crown's denial of the right to trial by jury and this grievance received forceful expression in the Declaration of Independence.

The understandable desire of the American people for trial by jury in civil cases was thereafter included in the Bill of Rights as the seventh amendment to the United States Constitution. The jury was also an integral component of our le-
gal system as the country expanded westward. In those times, notwithstanding the distance from established machinery of the legal system, justice could still be effectively dispensed through jury trials.⁷

Over the past two centuries, our nation has become very attached to the idea of jury trial. Its use effectively reflects community values, insures the injection of common sense into our legal system and affords an opportunity for participatory democracy.

II. PROBLEMS WITH COMPLEX LITIGATION

However, we live in a different age now and our society has grown increasingly complex, as has our legal system. In earlier times, a jury might have been called upon to sit for a day or two to consider a simple dispute between neighbors.⁸ Today, however, a jury often finds itself sitting for many months, attempting to assimilate mountains of evidence in controversies pitting large corporations against each other in complicated cases involving antitrust, securities, tax, patent, and similar business related issues.

The Federal Judicial Center recently completed a study of protracted and complex litigation. This study defined any civil trial lasting over nineteen trial days or 100 trial hours as a "protracted" case.⁹ Over the period studied, 1977-79, trials lasting twenty days or more accounted for seven percent of total trial days in civil trials in federal courts. The great number of these lengthy trials were concentrated in antitrust, civil

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⁸ At the time the seventh amendment was adopted, the practice of adjourning juries in England was disfavored, and adjournment rarely was granted. A long case was one that might take twelve or fourteen hours to try. See Devlin, Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment, 80 Colum. L. Rev. 43, 58, 67 n.89 (1980) [hereinafter cited as Devlin].
Although length of trial time is not necessarily determinative of complexity, it is one factor to be considered in identifying the complex case. The Judicial Center Study found a high correlation between length of trial and complex cases.  

A lengthy trial, whether defined as complex or not, may make it impossible to impanel a jury of "impartial minds of diverse backgrounds." It is unrealistic to suppose that employed persons, who compose the group most likely to have any familiarity with business matters of the type frequently at issue in lengthy litigation, would be available for jury service in lengthy trials.  

Judge Charles L. Brieant of the Southern District of New York aptly put it: "[M]ust litigants be left with a panel consisting solely of retired people, the idle rich, those on welfare, and housewives whose children are grown? Hardly a 'fair cross section of the community wherein the court convenes.'"  

Recent decisions illustrate obvious examples of the extremely complex case. The Japanese Electronic Products
case, decided in 1980 by the Third Circuit Court of Appeals, held that the plaintiffs' demand for a jury trial should be stricken because the case was too complicated for a jury to decide rationally. This case involved complex claims of violations of antitrust and antidumping laws brought by major domestic producers of electronic equipment against numerous Japanese corporate defendants. Plaintiffs alleged, among other things, a conspiracy involving over ninety co-conspirators worldwide to maintain artificially low prices on Japanese products sold in the United States. Equally complicated counterclaims were asserted. Discovery lasting nine years produced millions of documents and more than 100,000 pages of deposition transcripts. It was estimated that the trial would last a year or more, and the jury would be required to resolve many complicated financial issues.

The *Japanese Electronic Products* case well may be an extreme example of the complex case, but the threshold for the level of complexity which should caution against the use of a jury is much lower than that. In the study recently completed by the Federal Judicial Center, diversity contract disputes were identified as a complex casetype on the basis of several additional criteria, such as the nature of the evidence. I have observed juries, in cases that did not involve particularly long trials or issues typically identified as complex, which were completely befuddled by the evidence. A case that comes rap-

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because of a deadlocked jury in antitrust case involving complex computer technology and financial issues, at which 87 witnesses were called and 2300 exhibits introduced into evidence; Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978) (jury demand stricken in class action antitrust litigation requiring proof of injury and damages by each member of large class involving multiple defendants, complex accounting issues, and a projected trial time of at least four months); *In re Boise Cascade Sec. Litig.*, 420 F. Supp. 99 (W.D. Wash. 1976) (jury demand stricken in securities fraud litigation involving multiple plaintiffs, extremely complex accounting and proof questions, with more than 50,000 lawyer hours expended and over 900,000 documents produced in pretrial stage).

17 Id. at 1072.
18 Id. at 1072-73.
19 Id. at 1073.
20 Id.
21 See FJC STUDY, supra note 9, at 76-77.
idly to mind involved what many lawyers would consider a run-of-the-mill contract dispute concerning issues relating to contract formation and agency. The trial lasted eight days. The jury's verdict clearly indicated that the members failed to understand both the factual issues and the law.\textsuperscript{22}

Studies of this subject suggest that factual issues presented in a case can be considered complex, either when the facts needing resolution are conceptually difficult for a non-specialist to understand, or when the facts are made difficult by the volume of evidentiary material needed to establish them.\textsuperscript{23} It also has been suggested that legal issues can be considered complex when they are multiple, overlapping, ambiguous, or pose issues requiring instructions on close questions of statutory interpretation.\textsuperscript{24} Even with instructions carefully crafted with an eye toward clarity and simplicity, it is practically impossible in some specialized fields of law to guide a jury through the awesome job of rationally applying complex instructions to a huge volume of technical evidence.

\textsuperscript{22} In the actual case, it was necessary to grant a new trial which required a retrial before a new jury. In contrast, if the case had been tried before a judge without a jury, and an appellate court later reversed the trial judge's findings of fact and conclusions of law, much of the prior trial proceedings could be salvaged upon remand. See Day v. Amax, No. 3-78-55 (D. Minn. Oct. 29, 1980) (order granting motion for new trial).

\textsuperscript{23} FJC Study, supra note 9, at 22. Illustrative is the case of In re Data Gen. Corp. Antitrust Litig., 529 F. Supp. 801 (N.D. Cal. 1981), described in Legal Times of Washington, March 15, 1982, at 10, 61. The plaintiffs had imposed illegal antitrust restraints tying Data General's computer software products to its hardware products. 529 F. Supp. at 805. The case did not present necessarily complex legal issues, but did involve complex factual issues concerning the economics and technology of the computer industry and the need to define relevant markets. In discovery, 600,000 documents were produced and 150 depositions were taken. The trial judge rejected prospective jurors with knowledge about computers in order to impanel a jury of impartial non-experts. At trial, the plaintiff's lawyers expended substantial effort to present expert testimony and graphic exhibits to educate the jury about computer technology. The jury was allowed to ask written interrogatories through the course of the proceedings. The trial lasted 45 days. The jury deliberated 9 days and returned a general verdict and specific findings for the plaintiff. The trial judge granted a judgment n.o.v., id. at 821-22, and the plaintiffs have appealed to the Court of Appeals for the Ninth Circuit. Needless to say, the lawyers for the plaintiffs and defendants are in sharp disagreement as to whether the jury understood the case.

\textsuperscript{24} FJC Study, supra note 9, at 5.
III. INTERPRETATION OF THE SEVENTH AMENDMENT

Every litigant is guaranteed under our system of laws the right to an impartial fact finder who is capable of making a fair and reasonable assessment of the evidence and who is able to apply the relevant law to that evidence. Requiring a litigant to try a complicated lawsuit to a jury unable to understand the case denies this fundamental right to a fair trial. How can the seventh amendment requirement for jury trial in all civil cases be satisfied if, as the evidence convincingly shows, the jury is an incompetent fact finder in complex cases? Some have urged that there is a "complex case" exception to the seventh amendment and others argue that complex cases were properly classed as equitable causes of action in England at the time of adoption of the seventh amendment and hence are not entitled to jury trial in this country.

The seventh amendment guarantees a jury trial in suits at common law. This has been interpreted to mean actions that would have been classified as common law or legal actions in 1791, the year the amendment was adopted. In the much discussed case of *Ross v. Bernhard*, the Supreme Court set forth in a footnote three criteria for determining whether an issue is legal or equitable in nature in determining whether

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27 This principle was first set forth by Justice Story in *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830), and has continued to be the touchstone for determining the right to a jury trial under the seventh amendment. See, e.g., *Curtis v. Loether*, 415 U.S. 189 (1974); *Baltimore & Carolina Line v. Redman*, 295 U.S. 654 (1935). The seventh amendment today clearly extends beyond common law actions as they existed in 1791. In *Curtis v. Loether*, 415 U.S. 189, 193 (1974), the Court put to rest any doubts that the seventh amendment right to jury trial applies to causes of action enforcing statutory rights if the statute "creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." *Id.* at 194. In *Pernell v. Southall Realty*, 416 U.S. 363 (1973), the Court, noting it irrelevant whether a close equivalent of an action existed in 1791 in England, reiterated its interpretation of the phrase "suits at common law" as including "suits in which legal rights were to be ascertained and determined, in contradistinction to those, where equitable rights alone were recognized. . . . [T]he amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." *Id.* at 374-75 (quoting *Parsons v. Bedford*, 28 U.S. (3 Pet) 433, 447 (1830)).
the seventh amendment right to a jury trial attaches. The Court stated that federal courts should consider (1) the pre-merger custom; (2) the remedy sought; and (3) "the practical abilities and limitations of juries." Some courts have viewed the third prong of the Ross test, concerning the abilities and limitations of juries, as establishing a new standard for determining the right to a jury trial. Several circuit courts of appeal have applied all three prongs of the Ross test in determining the right to a jury trial. The Third and Ninth Circuits, however, have refused to attach great weight to the third factor.

Ross was a shareholder's derivative action brought against corporate directors which sought money damages on behalf of the corporation. The Court noted that the claim of the corporation was the heart of the action, and held that if it presented a legal issue, the plaintiffs were entitled to a jury trial under the seventh amendment. Id. at 538-39. This right was not lost because of the fact that the shareholders' right to bring the action was an equitable issue which must first have been resolved by the court. Id. at 539.

The holding in Ross rested on the Court's holdings in two prior cases, Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962), and Beacon Theatres Inc. v. Westover, 359 U.S. 500 (1959). These holdings were summarized in Ross as follows:

[W]here equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims. The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action.

Id. at 537-38.


See United States v. New Mexico, 642 F.2d 397 (10th Cir. 1981); Cox v. C. H. Masland & Sons, Inc., 607 F.2d 138 (5th Cir. 1979); Minnis v. UAW, 531 F.2d 850 (8th Cir. 1975); Farmers-Peoples Bank v. United States, 477 F.2d 752 (6th Cir. 1973). These decisions apply the Ross test without examining the controversy surrounding its validity. None of these courts has concluded that a litigant is not entitled to a jury trial on the basis that resolution of an issue is beyond the practical abilities and limitations of the jury.

See In re Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069 (3rd Cir. 1980) (the court noted that it was "unlikely that the Supreme Court would have announced
A controversy also exists as to whether, prior to the adoption of the seventh amendment, equity jurisdiction was exercised over complex cases by the English courts. Lord Devlin's thorough examination of this topic, in which he concludes that English history supports the proposition that complex cases were matters covered by equity jurisdiction, is persuasive, but not conclusive.

IV. DUE PROCESS CONSIDERATIONS

But there is a more persuasive basis upon which a jury demand properly may, and should, be denied in the complex case. One of the basic requirements of due process is "a fair trial in a fair tribunal . . . ." A litigant's right to due process of law is denied by trial to a jury which cannot understand the evidence and apply the relevant law to it.

The Supreme Court has recognized certain due process protections applicable to fact-finding processes. The Court has held that procedural due process requires that "the deci-

an important new application of the seventh amendment in so cursory a fashion"); In re United States Fin. Sec. Litig., 609 F.2d 411 (9th Cir. 1979), cert. denied sub nom., Gant v. Union Bank, 446 U.S. 929 (1980). The Fourth Circuit Court of Appeals has questioned the validity of the third prong of Ross, in view of the fact that it was not reiterated in Curtis v. Loether, 415 U.S. 189 (1974), where the Court addressed the issue of the seventh amendment right to jury trial in statutorily created claims. See Barber v. Kimbrell's Inc., 577 F.2d 216 (4th Cir. 1978). In Pons v. Lorillard, 549 F.2d 950 (7th Cir. 1977), aff'd on other grounds, 434 U.S. 575 (1978), the Seventh Circuit Court of Appeals applied the third prong of the Ross test in deciding that there is a right to a jury trial in actions brought pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (Supp. 1981). In affirming the decision reached by the court of appeals, the Supreme Court never referred to the Ross test. See Lorillard v. Pons, 434 U.S. 575 (1978).

Compare Arnold, A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation, 128 U. Pa. L. Rev. 829 (1980), and Arnold, A Modest Replication to a Lengthy Discourse, 128 U. Pa. L. Rev 986 (1980) (both stating that there is no evidence that complexity was a basis for equity jurisdiction in England), with Campbell & LePoidievain, Complex Cases and Jury Trials: A Reply to Professor Arnold, 128 U. Pa. L. Rev. 965 (1980) (Chancellors in England tried complex cases in equity if the issues were beyond the jury's understanding.).

See Devlin, supra note 8, at 43-107.


sionmaker's conclusion . . . rest solely on the legal rules and evidence adduced at the hearing." In a case involving an insane juror, the due process clause has been construed to protect a litigant from jurors incapable of rendering a verdict due to incompetence. Practically, there is little difference between a juror incapable of rendering a verdict because of mental incompetence and one incapable due to an inability to understand the evidence and follow the law.

The Third Circuit Court of Appeals, speaking through Chief Justice Seitz in the *Japanese Electronic Products* case, concluded that requiring jury trial in a case too complex for a jury to understand violates due process. Chief Judge Seitz defined a case as too complex for a jury when "circumstances render the jury unable to decide in a proper manner." The court further stated:

> [T]he law presumes that a jury will find facts and reach a verdict by rational means. It does not contemplate scientific precision but does contemplate a resolution of each issue on the basis of a fair and reasonable assessment of the evidence and a fair and reasonable application of the relevant legal rules.

The court further held that "due process precludes trial by jury when a jury is unable to perform [its factfinding] task with a reasonable understanding of the evidence and the legal rules."

Thus, given the due process problem encountered in submitting the complex case to a jury, it will be necessary at some time to resolve the conflict which arises between the fifth and seventh amendments. When that resolution is made, it must be remembered that the Supreme Court has consistently declined to rule that the right guaranteed by the seventh amendment is an essential element of ordered liberty and has not required the states to grant jury trials via the

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91 Id. at 1079.
92 Id.
93 Id. at 1084.
fourteenth amendment. In resolving this conflict, however, the fundamental right of due process guaranteed by the fifth amendment necessarily weighs heavily in the balance.

The Ninth Circuit Court of Appeals rejected the argument that due process is violated by ordering jury trial in a complex case in In re United States Financial Securities Litigation. This case involved alleged federal securities laws violations with pendent common law claims. The district court estimated that the fact finder would have to read over 100,000 pages of evidence, the equivalent of the first ninety volumes of the Federal Reporter Second Series. The trial was expected to last at least two years. The issues requiring resolution involved extremely complicated real estate financing transactions, methods of reporting from many sources in a variety of forms, and the valuation of securities. The jury would have been required to understand the accounts of the corporate defendant over a period of years, and would have had to decide if they accurately reflected the financial condition of the corporate defendant and its many subsidiaries.

The Ninth Circuit nevertheless concluded that juries are competent fact finders in complex cases. The court reasoned that cases that might appear complex at the threshold are "synthesized into a coherent theory by the efforts of counsel" by the time of trial. The court also emphasized that proper pretrial management and use of procedural devices such as pretrial motions under Rules 12 and 56 and appointment of special masters under Rule 53 can organize and clarify the is-

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45 609 F.2d 411 (9th Cir. 1979), cert. denied sub nom., Gant v. Union Bank, 446 U.S. 929 (1980).
46 Id. at 416 n.13
47 Id.
48 Id. at 429
50 609 F.2d at 427.
51 Id.
sues and make them understandable to lay jurors.\textsuperscript{52}

Whether or not the assumptions underlying the Ninth Circuit's decision are correct, the sincerest efforts of counsel to present the evidence in a coherent manner will probably not overcome the inherent inability of a randomly selected group of citizen-jurors to render a reasonable decision in such a case. The Ninth Circuit's judgment appears deficient, even assuming the doubtful probability that a representative jury willing to leave their homes and work places to sit on a case involving a projected two-year trial could be found.

Moreover, the trial court's power to grant a motion for a directed verdict or for judgment notwithstanding the verdict does not meet the due process problems raised by the possibility of erroneous decisions by juries in complex cases.\textsuperscript{53} Such motions must be denied if the evidence would reasonably support a verdict for either side.\textsuperscript{54} This mechanism does not fill the void created by an uncomprehending jury. Due process demands a verdict based on the evidence and if the jury fails to understand the evidence, this demand is unfulfilled. Nor does blind faith in the duty of counsel to present the case in a coherent fashion provide an adequate palliative to the complex case problem. Cases involving concepts far outside the normal experience of the average juror cannot be made understandable solely by an orderly presentation of evidence.

V. ALTERNATIVES TO THE JURY SYSTEM IN COMPLEX CIVIL TRIALS

Those courts that have stricken jury demands, either on the

\textsuperscript{52} Id. at 428.
\textsuperscript{54} See, e.g., O'Connor v. Pennsylvania R.R., 308 F.2d 911 (2d Cir. 1962). If a party is not entitled to a verdict as a matter of law, the grant of a motion for a directed verdict or judgment notwithstanding the verdict is considered an improper invasion into the province of the jury. See Decato v. Travelers Ins. Co., 379 F.2d 796 (1st Cir. 1967). The same standard governs motions for directed verdict and motions for judgment notwithstanding the verdict. See, e.g., California Computer Prod., Inc. v. International Business Mach. Corp., 613 F.2d 727 (9th Cir. 1979); Vander Zee v. Karabotosos, 589 F.2d 723 (D.C. Cir. 1978), cert. denied, 441 U.S. 962 (1979); Compton v. United States, 377 F.2d 408 (8th Cir. 1967).
basis of a complexity exception to the seventh amendment or on due process grounds, have cautioned against this action in all but the most unusual cases.\textsuperscript{66} I believe it is not only those extreme examples of complex cases which are unsuitable for trial by jury but many others as well. While I am realistic enough to appreciate the practical difficulties to be overcome in effecting a change in the seventh amendment, I believe this change is necessary.

The seventh amendment right to jury trial should be abolished, or at least modified so as to withhold it in cases where a jury is not competent to discharge its responsibility. I agree with Judge Frank's assessment: "[T]he jury is the worst possible enemy of this ideal of the 'supremacy of the law.' For 'jury-made law' is, par excellence, capricious and arbitrary, yielding the maximum in the way of lack of uniformity, of unknowability."\textsuperscript{67} The traditional notions that jurors bring a collective wisdom to the jury room and render a better decision because of the group deliberative process are outmoded.\textsuperscript{67} In civil lawsuits, often with large sums of money at stake and involving issues beyond the ordinary experience of most jurors, these concepts have no application.

Nor does the oft-cited virtue that the jury is able to ignore the strict rule of law and reach a result consistent with the equities\textsuperscript{57} have application in the complex civil context. While this notion has some vitality in criminal cases, it is not only inapplicable to civil cases,\textsuperscript{69} but also undesirable. Involved in many civil lawsuits are interbusiness legal relationships be-

\begin{footnotesize}
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\item\textsuperscript{67} J. FRANK, COURTS ON TRIAL 132 (1949).
\item\textsuperscript{67} See C. JOINER, CIVIL JUSTICE AND THE JURY 25, 35 (1962), cited in Luneburg & Nordenberg, Specially Qualified Juries and Expert Nonjury Tribunals: Alternative for Coping with the Complexities of Modern Civil Litigation, 67 VA. L. REV 887, 888 n.9 (1981). See also infra note 106.
\item\textsuperscript{66} See Henderson, The Background of the Seventh Amendment, 80 HARV. L. REV. 289, 327 (1966).
\end{itemize}
\end{footnotesize}
between contracting parties and the issues between them should be decided under the law and the facts. A system which lauds the abrogation of the rule of law in favor of the "equities" brings injustice and encourages inconsistent results with a resulting unpredictability in legal relationships.

In a similar vein, the jury has often been championed as the protector of the people from the tyranny of government.60 This is undoubtedly a valid argument in support of a jury in criminal cases, but the seventh amendment was adopted for the protection of debtors in diversity cases, the frustration of unwise legislation, the reversal of the practices of the vice-admiralty courts, vindication of the interests of private citizens in litigation with the government, and the protection of litigants from oppressive judges.61 Many of these concerns originated in the English domination of the colonies62 but are of doubtful force today. Finally, to the extent jury trial promotes the affirmative democratic value of involving lay people in the operation of government, this value is more than adequately promoted by jury service in criminal trials, which in parts of the country threaten to engulf the court dockets.

If complex cases should not be decided by a jury, then how should they be resolved? Few people would seriously suggest that a trial to the court is not a fair trial. We are the only nation in the world which still requires jury trials in civil cases.63 England, from which we drew our jury tradition, substantially abandoned civil jury trials forty years ago as a result of wartime conditions. Moreover, in this country no jury right exists in equity,64 admiralty or maritime matters,65 immigration cases,66 habeas corpus petitions.67 Federal Tort Claims

60 See W. Forsyth, History of Trial by Jury 218-19 (2nd ed. 1875).
62 See DeToqueville, Democracy in America 293 (1835).
Act cases, Fair Labor Standards Act injunctions, NLRA cases, or Longshoremen and Harbor Workers cases. Administrative agencies and the Tax Court decide issues without assistance of juries. In general, all statutory proceedings in which the government is a party created since 1791 have no provisions for, and the Constitution does not require, a jury trial. Yet no complaint is made that the litigants are not fairly treated in these matters. If a federal judge, sitting alone, is qualified to decide the issues of fact and law relating to contract when specific performance is sought, why is the same judge not qualified to decide the same issues without a jury when only damages are demanded?

There are also practical considerations which would be well served by limiting use of the civil jury. Jury trials take longer than court trials. In a bench trial it is not necessary for counsel to present the same amount of evidence to familiarize the court with the concepts as is often necessary in jury trials. Arguments are usually much shorter and the judge can read depositions on his own time, rather than listening to counsel consume everyone's time reading them into the record. Issues can more easily be bifurcated. There is no need for instructions, and naturally no jury deliberation. A bench trial is overwhelmingly more efficient than a jury trial.

The jury system, on the other hand, is extremely inefficient. Most jurors spend a major portion of their time waiting long hours in jury assembly rooms — a loss of productivity as well as an expense to society. In the federal system approxi-
mately $25 million dollars was spent in fiscal year 1980 for petit jury fees and expenses alone.\footnote{77}

Abrogation or substantial modification of our jury tradition will take time, however, and undoubtedly is far in the future. In the meantime, there are other alternatives to civil jury trial. There can be greater utilization of arbitration and mediation procedures, especially in commercial disputes.\footnote{76} For example, California law authorizes the parties by agreement to retain retired judges to resolve disputes by holding court in regular courtrooms, and issuing decisions binding on the parties.\footnote{79} Litigants are invoking this procedure with increasing regularity.\footnote{80}

In the area of complex litigation, the use of special or "blue ribbon" juries and expert nonjury tribunals, as in many civil law countries, should be permitted. Instead of a system which tends to exclude those persons most capable of deciding cases, either because they are unable to serve on longer cases or because lawyers often think it advantageous preemptorily to challenge the better qualified jurors, a system can be developed whereby better qualified jurors are purposefully chosen for service.

Such a system would require modified jury selection procedures that remain sensitive to the cross-representational principles present in our current law.\footnote{81} The educational equivalent of a bachelor's degree would be a practical measure of required juror competence.\footnote{82}


\footnotetext{76}{For a discussion of arbitration and mediation procedures, see Devitt, \textit{Federal Civil Jury Trials Should be Abolished}, 60 A.B.A.J. 570, 574 (1974).}


\footnotetext{80}{\textit{Terry, Rent-a-Judge: A Fast Way to a 'Day in Court'}, Christian Sci. Monitor, Feb. 9, 1982, at 1.}

\footnotetext{81}{\textit{Luneburg \& Nordenberg, Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation}, 67 VA. L. REV. 887, 888 n.9 (1981) [hereinafter cited as \textit{Luneburg \& Nordenberg}].}

\footnotetext{82}{See id. But see Note, \textit{The Right to a Jury Trial in Complex Civil Litigation}, 92 \textit{Harv. L. Rev.} 898, 916 (1979) (the problem is one of assembling jurors versed in the
Use of special juries would require modification of the Jury Selection and Service Act of 1968, which requires as a policy matter that all citizens have the opportunity to serve on juries. Such modifications can be made consistent with the requirements of the Constitution. The use of such specially qualified juries has a strong historical basis in common law, and was a practice in England prior to the adoption of the seventh amendment.

The Supreme Court has never set forth the exact cross-representation required under the seventh amendment. The seventh amendment’s preservation of the right to trial by jury in “suits at common law” on its face preserves jury trial right for certain kinds of cases, but does not govern other jury trial incidents which are mere matters of form or procedure, such as the size of the jury. Whether the representativeness of the jury is of constitutional dimensions under the seventh amendment is unclear, but it is noteworthy that the Supreme Court has upheld the use of a special jury in a criminal case.

In considering the constitutionality of the use of special juries in complicated civil cases, the strong historical basis for the use of special juries and the Supreme Court’s prior approval of the practice provide strong support for the proposi-
tion that the seventh amendment allows their use. Moreover, the Court has emphasized on several occasions the permissibility of utilizing new devices to keep the jury system responsive to the changing needs of the judicial system.\textsuperscript{80}

Another possible alternative to the use of civil juries is the statutory creation of non-jury expert tribunals, in the nature of administrative adjudicatory agencies, to decide complex cases.\textsuperscript{81} The constitutionality of this type of forum must be examined in light of the Supreme Court's holding in *Atlas Roofing Co. v. OSHA.*\textsuperscript{82} In that case the Court had before it the issue of whether Congress may create a new cause of action in the United States for the enforcement of civil penalties where there is no right to jury trial. In a unanimous decision, the Court held that where "public rights" are being litigated, the Congress may designate a non-jury forum for the adjudication of issues.\textsuperscript{83} It has been suggested that the concept of "public rights" could be applied to both old and new statutory causes of action,\textsuperscript{84} such as any case where Congress has created substantive rights and remedies in response to the inadequacies of common law actions existing in 1971. Cases brought before a tribunal of this sort could be appealed to Article III courts.\textsuperscript{85} Another alternative is to provide Article III courts with the option of referring complex issues in a case to the expert tribunal, much in the way "primary jurisdiction" references are made to administrative agencies.\textsuperscript{86}

We need to take a fresh look at the jury system. The Supreme Court has already been doing this in recent years as

\textsuperscript{80} See, e.g., Colgrove v. Battin, 413 U.S. 149, 157 (1973) (citing *Ex Parte Peterson,* 253 U.S. 300, 309-10 (1920)); Funk v. United States, 290 U. S. 371, 382 (1933). In *Fay v. New York,* the special jury statute upheld by the Court provided for the use of a special jury where "'the due, efficient and impartial administration of justice in the particular case would be advanced . . . ."' 332 U.S. at 268-69 (quoting N.Y. JUD. LAW § 749-994 (McKinney 1901)).

\textsuperscript{81} See generally Luneburg & Nordenberg *supra* note 81, at 950-1007.

\textsuperscript{82} 430 U.S. 442 (1977).

\textsuperscript{83} Id. at 450.

\textsuperscript{84} See Luneberg & Nordenberg, *supra* note 81, at 975-97.

\textsuperscript{85} See id.

\textsuperscript{86} See id. at 998.
shown in *Williams v. Florida*, upheld the use of a six-member jury in a state criminal proceeding. Despite the strong influence of history and tradition the Court found that it had to consider "other than purely historical considerations to determine which features of the jury system, as it existed at common law, were preserved in the Constitution."

Just two years later, in 1972, the Court continued its new look at traditional views of the jury and upheld less-than-unanimous state jury verdicts in criminal cases. The following year, in *Colgrove v. Battin*, the Supreme Court upheld a local rule of the Montana federal district court providing for six-member juries for the trial of all civil cases. Eighty-six of the ninety-five United States district courts now have local rules providing for juries of less than twelve in civil cases. Marked progress is being made in modernizing our judicial machinery to respond to modern needs.

While trial by jury in criminal cases has been widely supported by the bench and bar and by legal writers, use of juries in civil cases often has been criticized. Justice Cardozo wrote, "Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without" civil jury trials. The distinguished Professor Fleming James, Jr. proposed in the Yale Law Journal in 1936 that, "the right of jury should not be expanded. This method of settling disputes is expensive and dilatory — perhaps anachronistic."

The highly respected Judge Learned Hand observed in 1921 that he was "by no means enamored of jury trials, at least in civil cases."

To summarize the current views of many distinguished crit-

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98 Id. at 99.
100 413 U.S. 149 (1973).
101 JUROR UTILIZATION, supra note 77, at A-12-34.
104 J. FRANK, COURTS ON TRIALS 124 (1950).
Circuit Judge John Minor Wisdom of the Fifth Circuit stated:

It is presumptuous and chauvinistic to argue that civil trials in such countries as France and Germany and the Scandinavian countries are unfair. It is paradoxical and anachronistic to assert that the civil jury of 1791 is necessary to assure fair trials in suits at common law in this country when civil juries have been all but done away with in England, the source of the common law.\(^{106}\)

IV. CONCLUSION

Mark Twain was right 100 years ago in questioning the competence and utility of the American jury system. We should preserve its use for criminal trials where it effectively serves as the "Palladium of Liberty," but continuing its required availability for trial of all civil cases is unwise and antagonistic to fair trials and the efficient administration of justice. Unlike the British, we have a written Constitution guaranteeing a jury trial "in suits at common law where the value in controversy shall exceed twenty dollars . . . ."\(^{107}\) It will take many years to satisfy two-thirds of the membership of each body of Congress and three-fourths of the state legislatures of the wisdom of repealing or substantially modifying the compulsory jury trial provisions of the seventh amendment. For good or evil, amendment of our Constitution is a

\(^{106}\) Senator Robert A. Taft, Jr. told the Cincinnati Bar Association on April 15, 1971, that the time had come to question seriously the institutions of the civil jury and called it a reform long overdue. Taft, The Question of Curtailing the Size and Use of Juries, Pro, in The U.S. Jury System, Pros & Cons, 50 CONG. DIG. 193, 210 (1971).

\(^{107}\) Davis v. Edwards, 409 U.S. 1098 (1973); Melancon v. McKeithen, 345 F. Supp. 1025, 1035 (E.D. La.) (three-judge court), aff'd mem. sub nom., Hill v. McKeithen, 409 U.S. 943 (1972). Professor Gilmore speculates that distrust of the jury in contract cases led the 19th century American courts to convert and distort almost all questions of fact into questions of law in order to control the arbitrary power of the jury. This development was part of an exaggerated tendency to make American contract law scientific and overly complex in contrast to developments in France, Germany and Scandinavia. G. Gilmore, The Death of Contract 99 (1974).

\(^{107}\) U.S. CONST. amend. VII.
difficult and time-consuming process.\textsuperscript{108}

This does not mean that we should not advocate constitutional change and work for general public understanding of the need for it. The bench, the bar and the law school communities are best qualified to afford leadership in the movement for change. While working for it, we can look forward to court decisions and legislation which may, in part at least, remedy some of the described problems occasioned by obligatory jury trial. The most pressing of these problems relates to the complex case. It would be helpful if the Supreme Court would resolve the conflict between the Third and Ninth Circuits as to the requirement for jury trial in protracted and complex business litigation. Involved is a confrontation between the seventh amendment requirement of a jury trial and the fifth amendment due process clause requirement of a fair trial by a jury able to understand and competently decide the factual and legal issues. I suggest that this decision, when it comes, will be viewed as a landmark.

The Supreme Court may thus have occasion to explain what it meant in \textit{Ross v. Bernhard} when it said that "the practical abilities and limitations of juries"\textsuperscript{109} is a factor to be considered in determining whether an issue is legal, requiring a jury trial, or is equitable. The Court may also decide whether, as Lord Devlin tells us, English history shows that complex cases were administered by the chancellor and not by the law courts, and hence jury trial in complex cases is not required under the seventh amendment.\textsuperscript{110} But absent constitutional amendment, or enlightened judicial decisions, the problems of which we speak can be met by legislation authorizing special juries and expert non-jury tribunals as are commonly used in European countries.

The burden of my message is that we need change in our legal machinery to respond to change in the times. The civil

\textsuperscript{108} It took, for example, many years to repeal the unpopular 18th (Prohibition) Amendment. \textit{U.S. Const. amend. XVIII} (1919, repealed 1933).


\textsuperscript{110} \textit{See generally} Devlin, \textit{ supra} note 8.
jury today is an anachronism, best illustrated by its inadequacy to respond to the demands of complex and protracted litigation of the twentieth century. I urge your concern and support for this change in the interest of ensuring fair trials and improving the administration of justice.