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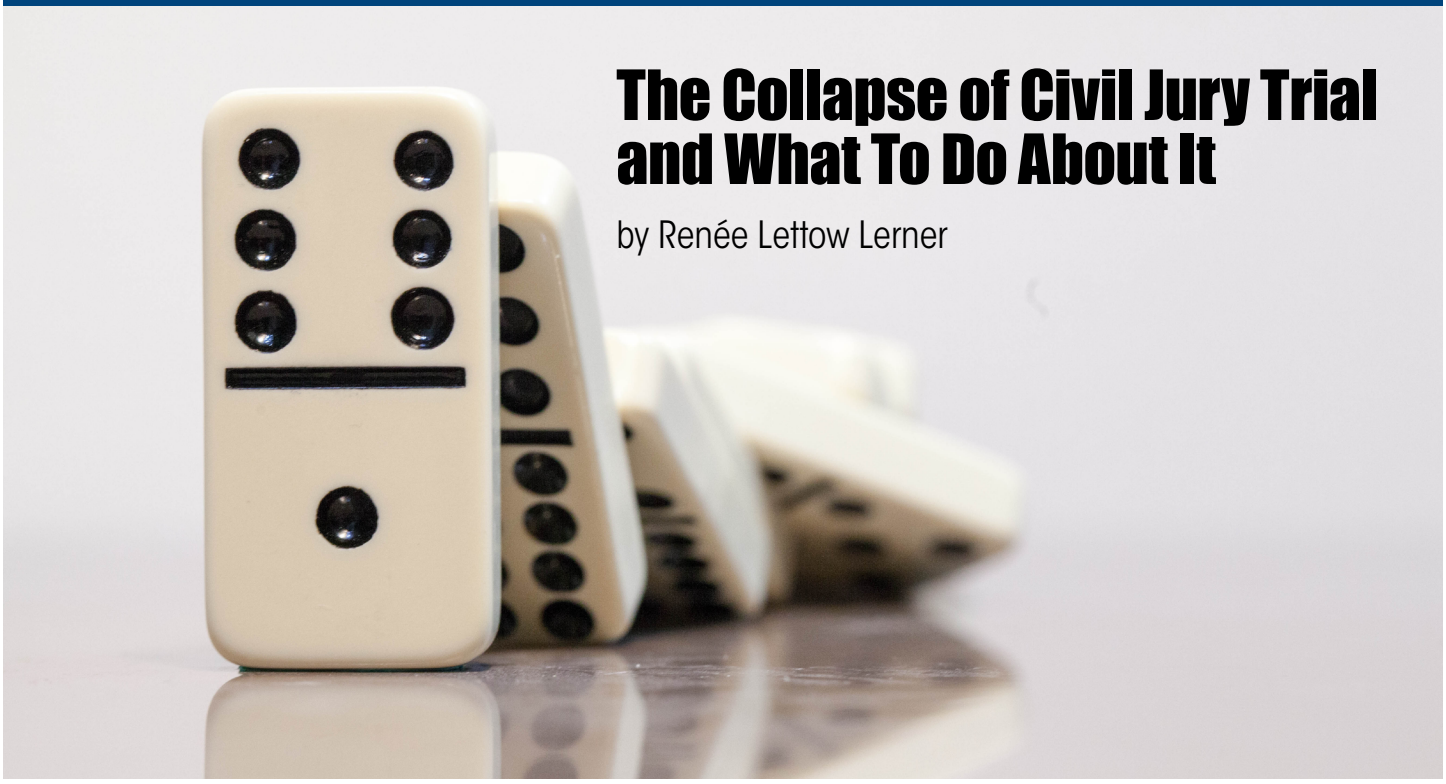

The Collapse of Civil Jury Trial and What To Do About It

by Renée Lettow Lerner

Editor Note: When we at The Jury Expert saw Renée Lettow Lerner's writing on the collapse of the civil jury system in the Washington Post as she guest-blogged for the Volokh Conspiracy it was clear the ideas she expressed were not ideas that resonated with our own experiences in the courtroom. So we asked her to write for our readers here at The Jury Expert and she graciously agreed.

I WAS DELIGHTED to receive this invitation to write about the civil jury for the *Jury Expert*. We academics often are concerned about reaching a relevant audience—or, indeed, any audience at all. In this forum, I have no such worries. I am looking forward to comments from persons working in and with the civil litigation system as a career.

I will come to the point: The civil jury is dying, and should be abolished. I propose an alternative system of adjudication, one that draws on practices that have proven to be effective.

The Decline of the Civil Jury

Readers of the *Jury Expert* are well aware of the decline of the civil jury. The best information available indicates that jury trials constitute less than 1% of civil dispositions in federal and state courts. The decline has been steady, and despite the guarantees of civil jury trial in the federal Constitution and nearly all the state constitutions.

Don't miss the responses at the end of the article:

- Susan Macpherson, ASTC Member
- Tom Melsheimer, Attorney
- Plus, a reply from the author

What happened? Civil jury trial—and the process leading to it—has become so long, so expensive, and so unpredictable that the vast majority of parties would rather settle than endure it. The adversarial system as it developed in America has made it impossible for jury trial to resolve cases on a regular basis. The changes include extensive *voir dire* and other means of jury selection, detailed rules of evidence, elaborate testimony by dueling experts, and exhaustive cross-examination. The merger of law and equity (beginning in the mid-nineteenth century and

continuing into the twentieth) introduced extensive discovery before jury trial, and also confronted juries with the types of cases they were never meant to decide: cases with multiple parties, claims, and complicated facts and law. Lay jurors, especially ones that have been picked over during jury selection by lawyers with the aid of trial consultants, have difficulty deciding these complicated disputes.

Distinction between Civil and Criminal Cases

I support lay participation in deciding serious criminal cases. Private disputes are another matter. Concerns about limiting the government or providing community representation are not as strong in private disputes, and do not justify the limitations and costs of jury adjudication.

In considering the different costs of jury adjudication, we must remember the burden on jurors. For many persons, jury service is a significant financial hardship, and a burden also to their families and employers. For a fascinating study of the burdens of jury service, see trial consultant David Tunno's book *Fixing the Engine of Justice: Diagnosis and Repair of Our Jury System* (2013), pp. 3-12. Supporters of jury trial too easily downplay this burden on the public.

Why Settlement Is Not the Solution

What is wrong with settlement "in the shadow of the jury," based on the expectation of what a jury would do? There is often a significant degree of uncertainty about what a jury might do, including about the likelihood of different outcomes. In some types of cases, systematic juror bias affects settlements. The risk aversion of particular parties, and sometimes even their ability to understand the risks, can play a large role in settlement negotiations. The costs of litigation and the lack of a fee-shifting rule in most cases create enormous pressure to settle. Thanks to the American Rule, in general the losing party does not pay the winner's litigation costs. Even a party with a good chance of success, therefore, has great incentive to settle to avoid the costs of discovery and jury trial. In short, to put it mildly, a settlement often does not reasonably reflect the merits of a case.

Adjudication by Judges, Done the Right Way

The main alternative to civil jury trial or settlement is adjudication by judges. This is the primary method used to resolve civil cases by other countries with decent legal systems. Civil juries as they existed at common law have never been part of the legal traditions of the Continent of Europe or of the legal systems derived from those traditions, including in Latin America and Asia. Even England and its former colonies of Australia, New Zealand, and Canada have abolished the jury for almost all civil cases and hold bench trials instead.

These countries have not been hampered by constitutional rights to civil jury trial, as has the United States. To resolve some cases, judges in this country may grant motions to dismiss or for summary judgment. State and federal constitutional rights to civil jury trial, however, have blocked full and effective development of judicial adjudication. It is time to reinterpret these rights or to repeal them.

Moving to judicial adjudication need not mean merely a switch from jury trials to bench trials. It could have a profound effect on all aspects of litigation, including the elimination of "trials" altogether. In the United States, we often fail to recognize the many ways our system has been affected by the limitations of the jury. Removing the jury could allow faster, less expensive, and more accurate resolution of cases.

The Main Danger of Judicial Adjudication

Other countries are well aware of the main danger of judicial adjudication: the biased or corrupt judge. They take steps to guard against this danger. I will draw on their experiences in the recommendations that follow.

There is a special danger in the United States because of judicial elections. Judges should be selected adequately and given proper career incentives. This might mean elimination of or strong modifications to the system of judicial elections in many states, a topic beyond the scope of this article. But the dangers of judicial elections, though they should be addressed, need not prevent a switch to judicial decision-making on the merits. Federal judges and those of a number of states are for the most part reasonably competent and free from malignant pressures. Furthermore, even in those states with a problem, changes in procedure can be made to lessen the danger from corrupt or biased judges.

Specific Recommendations

Following are a few key recommendations to improve litigation and judicial decision-making. This is not an exhaustive list.

- **Use of a Panel of Judges in the First Instance**

  One of the main safeguards against judicial bias in countries that traditionally use judges to resolve cases is having a panel of judges decide a case in the first instance, rather than a single judge. These panels allow colleagues to correct a biased judge. Besides, several heads are often better than one at legal decision-making.

  An argument one frequently hears from proponents of juries is that "many heads are better than one." Precisely, which is why a panel of three or five judges should be used in important cases in the first instance. A single judge is not the only alternative to a jury, as many proponents of juries assume.

- **More Efficient Courtroom Proceedings**

  Court hearings would speed up considerably. There would

be no need for conducting *voir dire* and the rest of jury selection, instructing the jury, or administering rules of evidence. The law of evidence is the law of jury control. We fear that lay juries will not be able to handle properly certain kinds of evidence, and so we exclude it. (This is clear in England, which has abolished the hearsay rule in civil cases, because these are now decided by bench trial.)

Judges could come into court having reviewed written evidence from the parties and prepared to ask questions of witnesses that can get directly to the point. No juries means a more active bench. A courtroom proceeding without a jury would resemble an efficient business meeting, rather than an often tedious scripted performance.

- **Sequential Proceedings in Logical Order**

  Judges could focus on different points in separate hearings, and address threshold questions first. If a defendant is not liable, there is no need to hear evidence about damages.

  Such discontinuous proceedings are not possible with lay juries. It is not fair to ask lay jurors to keep coming back to court at different times. The jury requires trial of all issues at once, with related confusion and waste of time.

- **Focused, Effective Discovery**

  Such sequential proceedings should help judges to control discovery. Judges can order and be more active in guiding discovery on each point as it arises. Parties should no longer be able to inflict or threaten to inflict horrible costs and delays on each other with little gain in knowledge of relevant facts.

- **Reform of Expert Testimony**

  Dueling, and confusing, party-financed and party-controlled experts are a major problem in litigation today. More active, involved judges would allow innovations in expert testimony such as the Australian system of "hot-tubbing," or concurrent testimony, which mitigates partisan bias. In Australia, judges consider this system to be appropriate only for bench trials because it requires an informed and active fact-finder.

- **Keeping Cases Moving**

  One advantage of jury trial is that at least a jury has to make a prompt decision. Deliberations cannot drag on for months.

  Some judges will need encouragement to keep cases moving and to make prompt decisions on the merits. These incentives might include time limits and review of performance by judicial peers and superiors.

- **Reasoned Decision-Making**

  One of the most important changes in shifting to judicial adjudication is that decisions on the merits would be accompanied by written opinions explaining facts found and application of law to facts.

  Juries do not give official reasons. The requirement that judges explain their reasoning to the parties and to the public, besides being more satisfying to the litigants, acts as a safeguard in several ways. A biased or corrupt judge would have a harder time justifying a bad decision. In addition, the reasoning of the judge or judges in the first instance can be thoroughly reviewed on appeal.

- **Appeal De Novo, of Fact and Law**

  A thorough appeal is a vital safeguard in legal systems that rely on judges to make decisions. Appeals in these systems are often de novo, with no presumption of correctness attaching to the decision below, and of fact as well as law. These appeals need not be time-consuming. Appellate courts in other systems often rely on the record developed below, although they may add to it if necessary.

  These systems are thorough in guarding against error in decisions on the merits. Our limited appeals are a legacy of the jury system. We try to control inputs, such as what evidence the jury hears or the judge's instructions on law, but there is little control over outputs, that is, the correctness of the verdict. Judicial decisions leading to settlement, such as a decision in a dispute over discovery or the denial of a motion for summary judgment, are virtually unreviewable. The terms of settlement can almost never be reviewed on appeal.

- **The Need for Thinking Boldly**

  Timid reforms will not solve the many problems with the civil litigation system today. It is time to think boldly. We should save lay participation in adjudication—with all of its costs and limitations—for criminal cases, in which it is most needed.

***Renée Lettow Lerner** works in the fields of U.S. and English legal history, civil and criminal procedure, and comparative law. She focuses on the history of U.S. procedure and legal institutions, especially juries. She also examines the differences between current adversarial and non-adversarial legal systems. She regularly speaks to groups of U.S. and non-U.S. judges about comparative procedure and institutions.You can read more about her work at George Washington University Law School*

Susan Macpherson responds:

Susan Macpherson is a founding member and Vice President of NJP Litigation Consulting's Midwest regional office located in Minneapolis. She has been conducting jury research since 1976, and has advised attorneys across the country on complex commercial, antitrust, intellectual property, class action, product liability, medical negligence, eminent domain, police misconduct, employment and criminal cases. You can contact Susan Macpherson at smacpherson@njp.com.

Response to Professor Lerner

Professor Lerner's provocative proposal raises a number of important questions, but in doing so, she ties together some issues that have no inherent connection. The problems she

describes with current civil litigation procedures, chiefly the cost of discovery and length of trial, are significant concerns that need to be addressed, and a number of organizations have taken up that challenge.[1]

Eliminating the participation of jurors in civil trials should be considered as a separate issue, particularly when that proposal is based on unsupported assumptions about the *voir dire* process, the ability of a jury to handle complex cases, and the superiority of judges as fact finders. While a great deal of research on the civil jury can be cited to challenge Professor Lerner's assumptions about its performance, I want to focus on considering its value. Jury verdicts play an important role in determining the type of conduct that we as a society are going to permit and the type of conduct that we are not going to tolerate.

The fact finders in a civil trial are not only deciding what did or did not happen, but also the nature of the conduct or the decisions or the intentions in dispute. Depending on the type of case, juries are deciding whether one or more parties acted reasonably, fairly, sufficiently, in good faith, in compliance with legal obligations and government regulations, or generally behaved in a manner that is consistent with community standards. In that way, jury verdicts can have an impact on how business is conducted, how medicine is practiced, how other professional services are provided, how products are manufactured and sold, how private property is valued when taken by eminent domain, how employers treat employees, and the conduct of law enforcement officials. The list could go on. In each case, the "common sense" jurors apply to the task of reaching consensus on these issues plays an important role that seems to be overlooked by Professor Lerner's proposal. The fact that there are fewer verdicts does not eliminate their value; in some instances, it actually may increase the broader impact of a jury's decisions. While attorneys understand that case specific factors drive verdicts, the last jury verdict in a comparable case often influences the risk/benefit equation that determines whether the case will go to trial.[2]

While Professor Lerner seems to believe that a panel of judges can do a better job of playing this role, research has demonstrated the benefits of diversity in decision making groups.[3]

We need to work on increasing the level of diversity in the jury pool as well as in the panels of jurors seated for trial, but even with the current limitations, it is safe to assume that the typical three judge panel will be far less diverse than the typical jury panel. While the judiciary in many jurisdictions has become more diverse in regard to gender, race, and ethnicity, the uniform education and training of judges and their shared experience in the legal profession stands in sharp contrast to the wide range of occupations, educational backgrounds, and life experiences found in the typical jury panel. Professor Lerner seems to recognize the value and importance of a more diverse group of decision makers in criminal trials when she cites the need for community representation in the latter. Community participation also maintains public confidence in the legal system, and that requires giving the public the right to make decisions that limit the government's reach in criminal cases as well as those decisions that set community standards in civil cases.

The opportunity to set community standards by being part of "something important, weighty and real" may explain why the jury selection process often "transforms citizens into jurors" as discussed by Nancy Marder in a recent article.[4]

She describes that "palpable moment" when prospective jurors stop looking for a way to get excused and take on the "heartfelt obligation to serve," and this is something we see in almost every jury selection.

The desire to serve does not outweigh the important point that Professor Lerner makes about the need to address the burden of jury duty. There are significant financial pressures on jurors whose employers do not continue to pay their regular salary or wages while they are serving, and that problem should no longer be ignored. Creative solutions have been implemented in some jurisdictions, such as increasing the amount jurors are paid after three days or asking jurors who receive their regular salary or wages while serving to donate their jury pay to a fund that covers increased daycare costs for other jurors. But legislation is still needed to reduce the number of jurors who do not receive their regular salary or wages while serving.[5]

The difficulty jurors face in being absent from work or from their normal responsibilities of caring for others at home also requires that trials be conducted in a manner that makes the best use of their time. Courts have made real progress in that regard, by making changes in trial procedures (e.g., preadmission of exhibits, prequalifying experts, et cetera) and by experimenting with scheduling (e.g., a trial day that runs from 8:30 to 1:30, with a few shorter breaks rather than a long lunch.)

Research on decision making does support Professor Lerner's contention that "several heads are better than one," but does not support her assumption that increased accuracy in fact finding will result from the "heads" belonging to judges. Using the term "accuracy" in connection with judicial decisions implies that jurors often make the wrong decisions due to confusion and/or complexity. There is a debate to be had about using the term "accuracy" in regard to deciding the subjective issues described above, but we can agree that having the ability to understand and critically evaluate the evidence and competing arguments is the basic requirement for making a well-informed decision. Almost 40 years of conducting trial simulations and post-trial jury debriefings leads me to believe that most jurors can easily identify the statements, issues or concepts in the evidence that they don't fully understand. Jurors know when they need more information or additional clarification, what they often lack is a procedure that allows them to get it. Even when they have a question that could be answered by simply reviewing a portion of the transcript, their requests are often discouraged or denied. Judges, unlike juries,

can always get their questions answered. Juries who can't ask questions may be more often confused about the facts than judges, but the appropriate remedy is to level the playing field rather than booting the jury off the field.

The jury trial innovations movement that gathered national momentum after the Jury Summit in 2000 produced a great deal of the bold thinking that Professor Lerner calls for, although it was directed at improving rather than replacing the civil jury trial. In most states, there was a critical review of the jury system and the trial process that led to many changes in the rules of procedure. In many states, jurors are now allowed access to the same tools that judges use to increase comprehension and make better informed decisions. Jurors are allowed to take notes, to ask questions, to get a notebook of background materials such as a glossary of technical terms, a chart of the witnesses and a chronology, the judge may review the elements of the claims and burden of proof at the outset of the case, and the jurors may get instructions in writing at the end of the trial. But unfortunately what is allowed is not necessarily what is done. In far too many instances, ***bold action*** is still needed to make those tools available to jurors in every trial. For example, a survey conducted by the National Center for State Courts found only 25% of lawyers and judges reporting that jurors were allowed to ask questions in their most recent trial. Perhaps the unfortunate but predictable consequence of jurors resorting to internet research when they are not allowed to ask questions will finally reduce the stubborn resistance to answering their questions in the courtroom.

Bold action is also needed to implement other changes for improving the trial process that have been suggested and proven viable in pilot tests. Many of these techniques are in line with some of the recommendations made by Professor Lerner, such as back-to-back sequencing of opposing experts, interim argument, and imposing time limits on case presentations. Greater use of these procedures would provide the same benefits for jurors as they would for judges.[6]

As to the claim that "extensive" *voir dire* is a significant problem, the amount of time devoted to jury selection in the courtroom can be reduced in a number of ways.[7]

But given Professor Lerner's focus on speed, the disagreement here may really come down to whether **any** amount of time spent on *voir dire* is too "extensive" because she assumes we would simply eliminate it by having three to five judge panels decide all civil disputes.

The model proposed by Professor Lerner is very similar in many respects to the Financial Industry Regulatory Authority arbitration process that promises "fair, efficient, and effective" resolutions of securities related disputes. However, a recent study of the process FINRA uses to seat its arbitration panels illustrated the need for adding *voir dire* in order to ensure that the parties can obtain meaningful and reliable information to assess bias as well as potential conflicts. If judges were to take on the jury's fact finding role in every case that would also raise similar questions about using a *voir dire* procedure to evaluate potential bias of those judges, as it is well-documented that any self-assessment of bias would not be reliable.[8]

Although it makes no sense to forgo the value of the civil jury due to the length of time it takes to conduct the *voir dire*, we should still be looking at ways to improve the results of that process. As Shari Diamond and other commentators have pointed out, we can increase the chances of seating a jury that reflects the diversity of the community by going back to a jury of 12. This would have the added benefit of improving the quality of the jury's decision making process. To reduce the reliance on stereotyping that can lead to the discriminatory exercise of peremptory challenges, law schools and trial consultants need to keep teaching attorneys to ask questions that will elicit information about attitudes, beliefs, and life experiences that could lead to prejudgment or a predisposition to find in favor of one party or the other. The role of trial consultants in the jury selection process is not to recommend striking all of the "smart" jurors as Professor Lerner implies, but rather to help their attorney clients identify cause challenges and base their peremptory challenges on substantive information rather than unreliable and discriminatory stereotypes. Trial consultants also recommend and design case-specific jury questionnaires for cases involving issues that are difficult for jurors to candidly discuss in open court in order to increase the chances of obtaining the information that is needed to make the best use of those challenges. And most jurors appreciate rather than resent the opportunity to express their opinions on paper.[9]

I suspect Professor Lerner has more faith in jurors' capabilities than the article implies because she does not question whether jurors are capable of deciding criminal cases that can also involve complex and highly technical scientific evidence, dueling forensic experts, and multiple defendants. While Professor Lerner recognizes the critical role juries play in limiting the government, I believe she is ignoring the critical role jurors play in setting standards for how we govern ourselves. Professor Lerner's concerns about jury selection and the performance of jurors in civil cases suggest the need for improvements in the civil trial process rather than eliminating the role of jurors.

References

[1]The most recent example is NYU School of Law's Civil Jury Project, http://civiljuryproject.law.nyu.edu. There have also been a number of pilot programs that tested expedited trials with limited discovery. See for example; *"A Return to Trials: Implementing Effective Short, Summary, and Expedited Civil Action Programs,"* IAALS, the Institute for the Advancement of the American Legal System, October 2012. "Action on the Ground: A Summary of Civil Justice Reform Projects Across the United States," IAALS-http://iaals.du.edu Last updated April 11,2014.

[2]Professor Lerner raises important points about what drives settlements and whether settlements reflect the merits of the cases. I defer to those who have the appropriate training and expertise

to debate the underlying public policy issues on those points.

[3]Shari Seidman Diamond, et al., *"Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge",* Journal of Empirical Legal Studies, 425-449, (2009).

[4]Nancy Marder, *"Juror Bias, Voir Dire, and the Judge-Jury Relationship,"* 90 Chicago-Ken Law Review 927 (2015).

[5]NCSC, Juror Pay by State: www.ncsc.org/topics/jury/jury-management/state-links.aspx?cat=juror%20pay

[6]See ABA's 2005 Principles for Juries and Jury Trials for a discussion of these options.

[7]NCSC survey data does not support the conclusion that extensive *voir dire* is a widespread problem. Lawyers and judges reported that 2 hours was spent on *voir dire* in their most recent trial in 2005, and in 2015, they were still reporting 2 hours for federal trials and 3 hours for trials in state court.

[8]Jason R. Doss, "The Importance of Arbitrator Disclosure", PIABA Bar Journal, 21 (2014).

[9]This typically does not require the use of a lengthy questionnaire that has to be mailed out ahead of time. Four-to-six page questionnaires can be filled out and photocopied in the jury assembly room without creating any undue burden on jurors.

Tom Melsheimer responds:

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A Response to "The Collapse of the Jury Trial"

In all the various discussions of the decline of the civil jury trial I have seen, there have been many suggestions to remedy its decline and improve its operation. Rarely, if ever, have I seen someone advocate for the complete abolition of the jury trial in civil cases. It is a terrible idea that is not saved by the author's allowance of jury trials in criminal cases.

There can be no doubt that the jury system in civil cases, which separates the United States from almost every country in the world, and is constitutionally guaranteed by the Seventh Amendment, would benefit from improvements. Indeed, the author's primary justification for abolishing the jury trial in civil cases is rooted in various observations of what is wrong with the civil jury trial. Let me address the alleged problems that she identifies.

1. **Jury trials are long and expensive.**

There can be no doubt that many jury trials suffer from the bloat of excess time and expense. But there are a variety of remedies short of abolishment. I have written extensively on this subject. *See Trial by Agreement: How Trial Lawyers Hold the Key to Improving Jury Trials in Civil Cases*, 32 Rev. Litig. 431 (2013). For example, timed trials, which many federal judges already employ, notably in the jury trial rich Eastern District of Texas, force economy on the parties, limiting the time commitments of the jurors and the expense for the parties. Time limits can apply to any stage of the trial, including *voir dire*, opening statements, and closing arguments. There can also be more limits on pre-trial discovery, which is the single biggest factor in the overall cost of civil litigation.

2. **The issues put before juries are complex and hard to understand.**

This argument is one used by corporations and other "Chamber of Commerce" type groups to justify taking issues away from juries. In my experience, it's bunk. The wisdom of juries in separating fact from fiction, truth from spin, and actual damage from greed is second to none. When juries fail to understand something, it is usually the fault of the lawyers or, in some instances, the judge. I have tried cases to juries involving complex technology and sophisticated financial transactions. I have argued on behalf of plaintiffs and defendants. My clients have won in most instances and lost in a few, but in no instance did I come away thinking the jury did not understand the issues. Of course, I might disagree with their conclusions, and I have argued legal error. But that is not grounds for an attack on the jury system, which comes with long-established legal checks and balances in the trial court and the appellate courts.

Moreover, there are well established and proven ways of empowering the jury with better tools to understand the issues before them. One is the practice of juror questions. Allowing jurors to ask questions, in a procedure supervised by the attorneys and judges, is an excellent way of improving juror comprehension. Issues can be clarified in real time, and the attorneys can better tailor their presentations to what is on the jurors' minds. Similarly, providing the jurors with instructions on the legal issues in the case at the beginning of trial adds to juror comprehension.

3. **Jury service is a burden on jurors.**

Shortening trial length is one way to minimize the burden on jurors. But I reject the notion that jurors, for the most part, feel burdened by their service. My experience, which is echoed by the judges with whom I have discussed the issue, is that jurors embrace and enjoy their experience in the judicial process as a way for them to be involved in one branch of our democratic government. Indeed, that is the primary reason that I think

a discussion of burden is misplaced. We ask citizens to participate in adjudicating a variety of disputes because it is the collective wisdom, as embodied in our federal constitution and most state constitutions, that citizen participation is a civic virtue and one that should be encouraged. The decision made by a group of citizens is more likely to be accepted by the population as a whole and, given that it reflects the collective wisdom or common sense of a group, the decision ought to be deemed legitimate by the parties as well.

The author's solution of deciding civil cases by judges does not really address the problems she identifies with jury trials. Bench trials can be just as lengthy as jury trials. Consequently, they can be just as expensive if not more so. The ability of a judge to recess a case and return to it later, which the author presents as an advantage to judge-decided cases, is actually a recipe for more lawyer time and expense associated with delay. Moreover, there is no reason to believe that judges are any better than ordinary citizens at deciding the key elements of a typical civil dispute—for example, who is telling the truth or how much personal or economic harm has occurred—than a schoolteacher, a warehouse foreman, or a nurse. Similarly, why should we believe that a judge is better able to understand a complex or sophisticated issue than an ordinary citizen? Because they have a degree and more education? That strikes me as either elitism or intellectual snobbery. It is also anti-democratic.

Perhaps the most outrageous characterization by the author is that it would be a more desirable situation for the adjudication of disputes by judges to resemble an "efficient business meeting" than what currently exists in what she calls the "scripted" presentations in a jury trial. In this characterization, the author fundamentally misapprehends the purpose of our jury system and how it performs. First, juries are often called upon to decide what happens in the "business meetings" that the author elevates as a paradigm—business meetings that allow, for example, dangerous airbags and faulty ignition switches to be placed in cars. Or meetings that allow pharmaceutical products intended for a narrow patient population to be marketed to children. Or business meetings that lead to the breaking of promises or the abdication of fiduciary duties. We do not need our civil justice system to resemble business meetings. We need the common sense and good judgment of juries to police the occasionally bad decisions that come out of those very meetings. Second, a jury trial is anything but a scripted presentation, at least the ones in which I have been privileged to participate. A jury trial is a dynamic process with an ebb and flow of witness testimony and documentary evidence that is anything but scripted, and a trial lawyer that treats it as such is likely to end up on the losing side of the argument.

Our civil jury system is not perfect. But it is a key part of our participatory democracy. Attempts to improve the jury system should be met with encouragement. Attempts to abolish it should be met with derision.

Reply by Renée Lerner

I am grateful for the responses of Ms. Macpherson and Mr. Melsheimer. They highlight important issues.

I would like to address first a fundamental point that Ms. Macpherson discusses most thoroughly, and that Mr. Melsheimer alludes to: the application of "community standards" in civil litigation. This phrase raises important questions. Is the application of "community standards" desirable in individual civil cases? What is the relevant community, and how could one determine its standards? If it is achievable, are the costs worth it?

The question of applying "community standards" in civil cases has created a debate over several centuries of U.S. history. At the time of the founding, the Anti-federalists were in favor of local juries deciding civil cases according to their ideas of justice, whereas Federalists in general were not. Federalists were concerned that local juries and their verdicts were unpredictable and changeable, so that rules were not clear and could not be known in advance. Also, verdicts could vary considerably depending on locality. This level of uncertainty and variability in the civil system, Federalists argued, was damaging to the ability to plan activities and therefore to social and economic development. Federalists and many others throughout U.S. history argued for, and often got, clearer legal rules and less jury discretion.

Even if one were to agree that application of "community standards" is desirable in civil cases, how is one to achieve that? There may be sharp divides within the "community" on standards, a situation that becomes more likely the more diverse a community is. Who is going to determine community standards? Juries today are not representative of persons living in a certain geographic area, if that is how we are going to define community. There is a considerable problem with no-shows and persons who otherwise seek to avoid jury service. Both responses argue that most persons who actually serve on a jury appreciate it and learn from it. That may be true, but it does not address the problem of the many persons who succeed in avoiding jury service altogether.

More fundamentally, by its nature, the party-driven process of jury selection in the United States weeds out potential jurors with certain experiences and views. This process distorts any representative function of the jury. Cutting back or eliminating jury selection is an important way the jury can be made more representative so that it has a more plausible claim to apply "community standards." There is a tension between juries serving a representative function and applying the law in unbiased fashion.

Furthermore, it is unlikely that the sole purpose of jury selection as practiced by trial consultants or trial lawyers is to eliminate biased jurors. Presumably these persons are trying to select jurors who will be as favorable as possible to their client. The classic argument of proponents of the adversarial system is that

the partisan efforts of each side will cancel each other out and the resulting jury will be impartial. This argument assumes that each side has equally skillful lawyers and trial consultants and equal bias among the venire, a set of conditions that must often fail. Thus the civil jury today neither represents the community nor is it selected for impartiality.

On juror performance, certainly jury trial may be made faster, and juror comprehension improved. I have devoted much of my career to studying how jury trial got bogged down. Even with improvements, however, jury trial carries with it necessary shortcomings. One is the need for trials at all, as opposed to sequential, targeted hearings. Mr. Melsheimer makes the important point that having sequential hearings might result in greater delay. There are ways to address this issue. For example, other legal systems set time limits on judicial handling of actions, and give judges professional incentives to keep cases moving diligently.

A huge shortcoming of jury trial, one that neither response addresses, is that lay jurors do not and cannot give official reasons for their decisions, and there is no thorough appeal on the merits of their verdict. Judges must give reasoned decisions. In most legal systems, the decisions of judges of the first instance are subject to a thorough appeal on both law and fact. This is a crucial safeguard, missing in our system because of juries.

I was interested in Mr. Melsheimer's critique of my suggestion that civil proceedings should resemble an efficient business meeting. I meant a calm, reasoned discussion of evidence and the law, with orderly participation of all present as needed. Such a discussion by no means precludes moral judgment, but it does help to control blinding emotions and bias. Mr. Melsheimer demonstrates the rhetorical skills that have made him a successful jury trial lawyer in repeating the word "business" while describing various apparently reprehensible actions that employees of corporations might take. A calm, reasoned discussion with multiple participants is an effective way to determine facts and application of law to facts, as I have observed in this country and in others. Such a discussion is also useful in debates about the civil jury, and I thank *The Jury Expert* for providing a forum for it.