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## Speech

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THE HONORABLE KENNETH W. STARR

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We are gathered here to discuss the civil justice system. If I may be permitted one aside before we begin, I think it is important to note that so much ultimately revolves around the people and the system and the integrity of the people in the system.

When I was a young senior associate, now many years ago, and looking ahead with the hope of becoming a partner in my law firm at that time, I was called upon to be in the great state of Florida to handle a very sensitive matter at the Kennedy Space Center for a private client that had gotten into some difficulty with the United States government. We knew right away that as the matter went to litigation, we would need local counsel in addition to national counsel to handle the matter.

We were fortunate enough to engage a leading lawyer of Florida, Harris Dittmar, of Jacksonville, who has a wonderful reputation for both civil work and criminal work. Dittmar had recently and successfully tried a very important case representing Senator Edward Gurney of Florida. Dittmar said, in response to my questions, that one of the most important things in any justice system is that when a statement is being made in court by a lawyer, that the judge can place his or her confidence in that statement, and that the jury can place their confidence in what the lawyer says. So the old-fashioned virtues of integrity and candor with the court and with the trier of fact reflect what is basic to the morality of law—that law has meaning, that facts have meaning, and that we treat both the law and the facts with great respect. Even as we zealously represent the particular interests of our client—as we are charged with doing as officers of the court—we must respect the law, we must respect the facts, and we must not take liberties with either.

I wanted to reflect with you on one almost paradoxical institution in the civil justice system—and indeed, in our entire system of government—and that, of course, is the civil jury. What I propose to do is to very briefly talk about the evolving roles of the civil jury in our democracy.

I would like to first reflect on the philosophy and theory of the civil jury and then move to some observations about how best to use the jury system in our constitutional democracy. I think everyone in the room knows that the civil jury has an extraordinarily long pedigree. The Magna Charta guaranteed the right. It was in a slightly different form than we have today. In fact, one reporter in the seventeenth century reported a case to the following effect: In the criminal setting, the jurors acquitted a prisoner contrary to the evidence, and for that they were fined and imprisoned and they were bound for the behavior of the prisoner during the prisoner's life. So much for independence of the jury.

Nevertheless, the idea slowly grew that it was important for the jury to be able to exercise its judgment. On this side of the Atlantic, it was clear in our colonial period, as well as in the revolutionary period, that the jury was of truly special significance. We all learned as schoolchildren the cry "No taxation without representation." That was, of course, a huge rallying cry at the time of the revolution. Yet, what we have only imperfectly understood is that our forbearers, the colonists, were not simply railing about representation in Parliament. Rather, they were aggrieved about the lack of representation in vice admiralty courts in the United States where crown-appointed judges were sitting without juries. So the issue to the colonists was not simply taxes. It wasn't tax relief. It was the diminution of something that was viewed as virtually sacred to a free people, the right to a jury trial. This was something that had moral significance to our forbearers—the idea that there was an erosion by parliamentary action of public participation in government—and this affected the liberties of English persons.

After the Revolution and the Articles of Confederation came, of course, the great debate over the Constitution. There was no debate over the right to a jury trial with respect to criminal cases. Indeed, that right was secured in the constitutions of all thirteen of the states, and the new Federal Constitution clearly contemplated that right as well. Nevertheless, the Constitution was silent with respect to the right to a jury trial in civil cases. This reticence was one of the rallying cries of the Antifederalists. One pamphleteer at the time contended that representation on juries is more important than representation in the legislature. That may seem like idiosyncratic sentiment, but it was a sentiment shared by no lesser like than Mr. Jefferson.

The upshot of this wave of public opinion was the Seventh Amendment, which, of course, guarantees the right in civil cases to a jury trial "[i]n Suits at common law where the value of controversy shall exceed

twenty dollars."<sup>1</sup> A dollar went farther in those days, but the idea was that if it was a case of some consequence, you should have the right to put your case in front of the jury. The language of the Seventh Amendment is particularly critical in what great respect it shows for the jury: "[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States. . . ."<sup>2</sup>

That's it. No "second bite at the apple." That's according to the rules of the common law. Obviously, there is J.N.O.V., and everyone who has been through civil procedure knows that there are methods for overturning verdicts that are against the weight of evidence. However, a properly substantiated verdict enjoys constitutional status.

And thus it was as a result of the great debate in the thirteen states that the jury was enshrined as a fundamental institution in our democracy. It has since that time captured the attention of some of the leading historians and scholars, in addition to lawyers and judges. Political scientist Jeffrey Abramson, in his book *We, the Jury*, offers this observation: "No other institution of government rivals the jury in placing power so directly in the hands of citizens."<sup>3</sup>

The jury is unique in our political system because it combines elements of participatory democracy. It is a citizen's check on the administration of justice and the enforcement of law, with the potential for counter majoritarian decision-making. If there is a law reflecting the views of the majority, at times, the jury can in fact engage in non-application of that law.

And this dichotomy, this ultimate faith in the people represented by the microcosm of the jury, seems to me to be at the very moral essence of our system of government in an increasingly diverse and heterogeneous society. It is, in short, one of the things that binds us, the people, together in our 260 million persons.

A half century after the founding, a young and very bright French aristocrat who came over here to look at our prison system, Alexis de Tocqueville, marveled at the importance of what he saw—which was a lot of things when he was over here. He was a great and prescient sociologist and political scientist, and he marveled at the importance of juries in the United States. To him, the jury was "above all, a political

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1. U.S. CONST. amend. VII.

2. *Id.*

3. JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 1 (1994).

institution"<sup>4</sup> —“political” in the higher Aristotelian sense of ‘life together as the people.’ The jury was an institution that to Tocqueville was as vital as any one he saw here, in the march towards universal suffrage. There clearly were massive imperfections and exclusions from the right to vote. But he saw, prescient as he was, the march of history. There would be a completion of that in the fullness of time, but, in the meantime, he saw the jury as standing as an institution that was quite as important as the idea of no one being excluded from the franchise.

Like the Antifederalists of the 1780s and 1790s, Tocqueville noted that juries and the jury system gave the citizenry a stake in government, a voice in the way the process of government plays out. He also recognized another important role for the jury. While he acknowledged it as a political and judicial institution, he was, however, most impressed by the important socializing effect of jury service. He recognized the jury as an institution for inculcating the Republic’s citizens with civic virtue. Jurors learned respect for the rule of law by taking the oath of office and being instructed by a judge regarding the law of the cases on which they served, and their duty to apply it faithfully. This process also showed jurors that they, as citizens, had an important role in their own governance. Tocqueville concluded:

I think that the main reason for the practical intelligence and political good sense of the Americans is their long experience with juries in civil cases. I do not know whether a jury is useful to the litigants, but I am sure it is very good for those who have to decide the case. I regard it as one of the most effective means of popular education at society’s disposal.<sup>5</sup>

Tocqueville’s point bears repeating. It is not only a question of whether civil juries are useful to the litigants. Indeed, the litigants sometimes may find the jury a bit of an impediment. Rather, juries are good because they make good citizens.

From the pamphleteers of the Revolution to the Antifederalists and to Tocqueville, I think we can clearly identify roles for the jury going beyond the functional, practical need for achieving hopefully a just outcome in a particular case. We can thus view the jury as a check on official power, a way of bringing the public into the judicial branch and educating the jury, the people, about the law and the values of the rule of law. But, ultimately, in Tocquevillian terms, we can view the jury as a school for citizenship, which is critical in a democracy and especially a democracy that suffers stresses and strains as any modern democracy does.

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4. ALEXIS DETOCQUEVILLE, *DEMOCRACY IN AMERICA* 272 (Mayer ed. 1969).

5. *Id.* at 296.

Much is written these days about the power that is wielded by civil juries. Some would say that the jury is the voice of the people, and that it protects the individual, the disenfranchised, the unpopular, the dispossessed, from governmental abuse and from corporate misfeasance.

Others opine that the jury system is merely a redistributive lottery that has simply run amok. That is certainly a voice that is articulated outside the United States these days about our jury system, by interests that are otherwise quite admiring of much of America's legal institutions, but nonetheless skeptical of certain aspects of it.

Regardless of whether jury power is good or bad, I think it is indisputable that as the nation has grown, so too has the power and influence of juries in American life. One need only pick up a paper cup in which one's morning coffee is found to see from time to time these days warnings, "Very hot." I think we may even know a case that may have given rise to that warning. Judge Kozinski of the Ninth Circuit has observed fairly recently in a popular piece, extrajudicially, that in some ways the modern-day American jury has become a mini-legislature with the ability to affect and shape policies nationwide by getting attention with a large damage verdict which will necessarily change behavior.<sup>6</sup> Indeed, as the scope of litigation grows, the effect of a jury verdict obviously grows as well.

The best example of what Judge Kozinski was getting at is the class action jury. When the power of a jury is aggregated to deal with a class action, often nationwide in scope, one can readily see how the legislative function of that jury can in fact be quite enormous. It is, perhaps, that aspect of the civil jury's power that has gained the most recent attention with respect to jury issues—the jury in class actions.

Nationwide class action juries are still a relatively new phenomenon, and the issues that arise out of a national class action resolving issues in a jury setting continue to unfold. But originally, class action jury trials were limited to more traditional models of class actions, such as a stockholders' securities suit or an antitrust suit. The premise was that behavior on Wall Street affects the nation, so it was more efficient to have it resolved at one time.

But cases such as Judge Reavley's renowned opinion in *Jenkins v. Raymark Industries*<sup>7</sup> for the Fifth Circuit, approving certification of a

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6. Alex Kozinski, *The Case of Punitive Damages v. Democracy*, WALL ST. J., Jan. 19, 1995, at A18.

7. 782 F.2d 468 (5th Cir. 1986).

class of thousands of asbestos-related injuries in 1986, initiated the use of the class action in the mass tort context.

Judge Reavley noted that despite the fact that substantial differences frequently exist among the circumstances of the injuries of individual plaintiffs, in these types of cases there are great efficiencies gained in avoiding duplicative hearings. This was a matter really of common sense—the same facts would be tried over and over again, and indeed in the same jurisdiction by Judge Parker of the Eastern District of Texas, and there had been a learning process as a result of that. So, trying what could be identified as common issues may indeed guide other courts to adopt this use of the class mechanism.

Judge Reavley in fact proved to be prescient. With increasing frequency, a number of cases—tort cases, and with the addition of jury trial rights to Title VII, employment discrimination cases—are more frequently handled using this “common issues jury” trial approach.

Now, it should be noted that logistically, in the context of complex litigation, the same jury cannot possibly hear both the common issues phase and then each of the perhaps thousands of individualized phases. No juror or judge could effectively without essentially having to devote his or her entire career to that activity. Rather, we are speaking, of course, of bifurcation. The trials are bifurcated and one jury hears the common issues of liability, and then other, subsequent juries, if there is not a settlement, hear the individualized issues.

Now, this increasingly common form of class certification has become much more closely watched and has raised an issue about the role of the jury and the limits placed on the role of the jury by the Seventh Amendment. A number of courts of appeals have examined class certifications in the face of challenges that this procedure violated the Seventh Amendment’s proscription against reexamining facts found by a jury, identified by the Supreme Court’s controlling decision two generations ago in a case, a very short opinion, called *Gasoline Products*.<sup>8</sup>

Recent decisions of Judge Reavley’s court, the Fifth Circuit, and the United States Court of Appeals for the Seventh Circuit have taken the view that the Seventh Amendment may not permit this kind of jury trial. The Seventh Circuit analyzed the Seventh Amendment issue in depth in a very controversial case called *In re Rhone-Poulenc Rorer Inc.*<sup>9</sup> In that case, the district court had certified a class of hemophiliacs who alleged that the suppliers of blood products acted negligently in failing to screen blood to detect the HIV virus. The trial court in that case envisioned that common issues, such as whether the suppliers had acted negligently,

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8. *Gasoline Products Co., Inc. v. Champlin Ref. Co.*, 283 U.S. 494 (1931).

9. 51 F.3d 1293 (7th Cir. 1995).

would be tried by one jury and individualized issues, such as comparative negligence, proximate cause, and the like, would be tried by various follow-up juries. The Seventh Circuit decertified the class—over a dissent—due to what it determined was a failure to comply with the Seventh Amendment.

Why was that? The court reasoned that the right to a jury trial, conferred by the Seventh Amendment, was a right to have jurable issues determined by the first jury impaneled to hear them, provided there are no errors warranting a new trial, and was not to be reexamined by another finder of fact. The court did acknowledge that bifurcations, like the customary division between liability and damages, are compatible with the Seventh Amendment—that is settled in law—but emphasized that trial judges must “carve at the joint.” The Seventh Circuit concluded in that case that dividing the elements of liability between those suitable for class treatment on the one hand and those that are too individualized for common adjudication on the other hand does not result in that neat Thanksgiving Day kind of carving. It is not the clean division of issues that is compatible, as Chief Judge Posner put it, with the Seventh Amendment.

The Fifth Circuit recently followed the Seventh Circuit’s lead in *Castano v. American Tobacco Co.*,<sup>10</sup> a case in which I in fact argued. There, the Fifth Circuit reversed the district court’s order certifying a nationwide class action that included all past and present smokers. The certification order purported to separate common issues relevant to the defendant’s conduct from individual issues regarding the conduct and decisions of each smoker and certified only the former for class treatment.

In reversing that order, the Fifth Circuit, which was unanimous, had no petition for rehearing or suggestion for rehearing even filed, nor a *cert.* petition, so that was the end of the line for that particular issue in the Fifth Circuit.

The Fifth Circuit stressed—and these are the words of the Fifth Circuit speaking through Judge Smith—“the risk that in order to make this class action manageable, the court will be forced to bifurcate issues in violation of the Seventh Amendment.”<sup>11</sup>

So the Fifth Circuit aligned itself with the Seventh Circuit in *Rhone-Poulenc*, taking the view that you must have one jury resolving all liabil-

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10. 84 F.3d 734 (5th Cir. 1996).

11. *Id.* at 750.



ity issues. Other courts, including the First Circuit in Boston, have adhered to this view of the Seventh Amendment and their interpretation of the Supreme Court's *Gasoline Products* decision.

But there are other courts that have gone the other way. Does it sound as if this is heading for the Supreme Court of the United States? It is a big issue. It is one of the biggest issues out there now, in terms of civil justice. Most recently, the Ninth Circuit in *Valentino v. Carter-Wallace, Inc.*,<sup>12</sup> which had a lot of popular attention as well, rejected the argument that a separate trial of common issues, which would leave individual issues to follow-up juries, violated the Seventh Amendment. The Ninth Circuit rejected that position, and the Ninth Circuit is not alone in taking this view. Indeed, the Third, Fourth, and Sixth Circuits, as well as a number of district courts in circuits that have not yet spoken to this issue, have likewise rejected such Seventh Amendment challenges.

This circuit split represents two very different and ultimately irreconcilable approaches to this interplay between the Seventh Amendment and the role of the jury in aggregating and dealing with issues of aggregate justice.

I want to close with a return to the broader Tocquevillian notions, Mr. Jefferson's notions, and the Antifederalists' concerns about the jury, because one of the great and burning issues right now with respect to the civil jury is what should its size be. The Judicial Conference of the United States has recently taken steps that would suggest that the present authorization of the federal system for a jury of six, typically with alternates, will in fact be the order of the day. I should hasten to note, as I am sure everyone appreciates, that the six-person jury has long since been found constitutional as compatible with Seventh Amendment norms by the United States Supreme Court. We are not talking about whether there is a constitutional right to a twelve-person jury. Rather, we are talking about what is a good thing, and there is a real clash, I think, that is underway and has now essentially been resolved in favor of what I would call the efficiency model: It is more efficient for busy judges and busy courtrooms to seat juries of six and to manage the litigation. If someone gets sick, if someone is late, it is just a lot easier to manage a smaller jury for all kinds of fairly self-evident reasons. But there has also been a fair amount of discussion and study regarding the quality of the decision-making in juries of various sizes—what size jury is the best in terms of achieving the right result, how does size affect jury dynamics inside the jury room, and other similar questions.

I have not made my own independent study of this issue, and I do not have a view. But what I fear is being lost in the debate—in the efficiency

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12. 97 F.3d 1227 (9th Cir. 1996).

and fairness debate—is the scope of the focus. It would be a good thing for us to broaden the lens and to think once again of the jury—which is clearly here to stay in our constitutional traditions—more in Tocquevillian terms and to think of the jury more as Mr. Jefferson did. This is especially true in a time in which the country is bound to face additional internal stresses, and could richly benefit from an institution capable of educating our citizens and instituting in them a sense of civic duty.

Is it a better thing for us to bring more persons into the jury system and to say, with all due respect, you will serve? I have made a number of suggestions in the past with respect to the virtual elimination of exemptions from jury service, and I won't get into strikes, preemptories, and the other kinds of issues with respect to the actual composition of juries. Rather, I will leave you with this philosophical, or at least Tocquevillian, thought: that it is a good thing for the *country* for the jury system to be viewed as a form of civic responsibility. Having served on the jury committee of the United States Court for the District of Columbia, serving with two renowned United States district court judges when I was privileged to serve as a circuit judge I read the exit questionnaires that we ask each juror serving in federal court to answer. I observed that the jurors were saying, "It may have been inconvenient for me, it may have been difficult to find parking around the courthouse, there may have been some inefficiencies, the food in the cafeteria isn't particularly good," and the usual kinds of complaints that we can all understand at a very human level, but at a much more elevated and moral and enduring level, those jurors were saying—and I think Mr. Tocqueville must have been smiling when we were reading those jury questionnaires—"It is good that we were here. It is a good thing that we served. We learned from that experience. It makes us proud to be part of the citizenry. It makes us proud of our government. We feel very good about the experience, and we would recommend that others have the experience as well."

We should not lose sight of Tocqueville's understanding of the valued role of civil juries, an understanding ratified by the exit questionnaires of recent jurors, when we discuss what the civil jury should look like.

We should, in determining the future of the civil jury, focus not just on efficiency, but rather think about what is in the best interest, over the long term, of the United States.

