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Has The Right To A Jury Trial As Guaranteed Under The Seventh Amendment Become Outdated In Complex Civil Litigation?

*Recognizing the continually increasing burden placed on the jury in complex litigation cases, the author undertakes an extensive study of the origins of jury trials in the United States and England. Various arguments in favor of eliminating jury trials in complex litigation are discussed, along with a possible constitutional method of limiting the scope of the seventh amendment guarantee. The author also studies the case of *Ross v. Bernhardt* where the Supreme Court outlined a seldom used three-pronged test to determine whether or not a jury trial is constitutionally appropriate. The comment concludes that the factors in favor of the jury trial outweigh any benefit which may be derived from its demise in complex litigation.*

The adoption in 1791, of the seventh amendment to the federal constitution¹ served to preserve the historical English common law guarantee of a right to jury trial in civil cases.² The language, despite an alluring surface simplicity, has proven to be far from self-explanatory. Rather, the guarantee of a right to jury trial in civil cases, once regarded as the very basis of free government, has been a subject of extensive twentieth century interpretation and attack.³ This article seeks to address one of the newest attacks: whether in protracted and complex civil cases,⁴ the sev-

1. For a discussion of the arguments advanced and the circumstances surrounding the adoption of the seventh amendment in 1791, see J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 628-48 (1970); 5 *Moore's Federal Practice* ¶ 38.08[5] (2d ed. 1977).

2. See *Dimick v. Schiedt*, 293 U.S. 474 (1935) (action to recover damages for personal injuries) wherein the Court stated: "In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791." *Id.* at 476. See also, *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935) (action to recover for personal injuries).

3. Debate as to whether the seventh amendment requires adherence to a strict historical test, or serves merely to preserve the substance of the common law right to trial by jury has been compounded by the effect of the merger of law and equity courts under the Federal Rules of Civil Procedure, enacted in 1938. See *Beaunit Mills, Inc. v. Eday Fabric Sales Corp.*, 124 F.2d 563, 565-66 (2d Cir. 1942). For a general discussion on some of the difficulties in interpreting the seventh amendment see e.g., James, *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655 (1963); Kirst, *Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment*, 126 U. Pa. L. Rev. 1281 (1978); Note, *Collateral Estoppel and the Right to a Jury Trial*, 57 NEB. L. REV 863 (1978).

4. As used in this article "protracted and complex civil cases" denotes a

enth amendment guarantee should be limited or perhaps abolished in the interests of fairness and justice.

Although the right to jury trial in all civil cases has often been said to be such a symbol of democracy that it should be preserved at all costs,⁵ the suggestion that a jury trial in complex cases is no longer practical, has found some judicial approval. One such opinion was expressed by Chief Justice Warren E. Burger who stated concern that complex cases "which are the daily fare of the courts in the second half of the twentieth century"⁶ may tax too greatly a system contemplated and designed in the late eighteenth century.⁷ Justice John Paul Stevens also expressed concern that scarcity of judicial time may reduce the jury trial in complex cases to be a "luxury perhaps we can't afford."⁸

Whether the right to a jury trial in civil actions is now to become subject to congested court calendars is a question that

lengthy trial focusing usually on business issues, such as those found in *ILC Peripherals Leasing Corp. v. International Business Machine Corp.*, 458 F. Supp. 423, 444 (N.D. Cal. 1978) (complex antitrust action involving five month trial, 19 days of jury deliberation); *In re United States Financial Securities Litigation*, 75 F.R.D. 702, 707 (S.D. Cal. 1977) (complex accounting case with trial estimated to last two years or more); *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59, 62-63 (S.D.N.Y. 1978) (complex antitrust action contesting over 1000 individual contracts); and *In re Boise Cascade Securities Litigation*, 420 F.Supp. 99, 101 (W.D. Wash. 1976) (four to six month estimated trial time and accountings exceeding one billion dollars).

5. In response to the statements of Chief Justice Burger and Mr. Justice Stevens, Philip H. Corboy, Chairman of the American Bar Association Section of Litigation stated: "The jury is not a 'luxury' that we can no longer afford. To the contrary, it is a necessity that we cannot afford to lose." Corboy, *Corboy Pleads: "Halt Erosion of Jury Right"*, 66 A.B.A. J. 22, 23 (1980). Rather than seeing the jury as burdensome in trying complex litigation, Mr. Corboy stated: "It is the jury, and not the judge, which serves as the popular symbol of democracy in the judicial system This is not the first time that the jury has been singled out for its irrationality or its cost in terms of delay" He concluded that we must find ways of improving the jury system, rather than eliminating it. Corboy, *Chairman's Corner*, *Litigation News*, Jan., 1980 at 5,6.

6. Address by Chief Justice Burger, Conference of State Chief Justices, at Flagstaff, Arizona (August 1, 1979) (Public Information Office Text).

7. Chief Justice Warren E. Burger stated that the following factors should be taken into consideration with respect to the use of lay jurors in protracted and complex civil cases: a jury is rarely a true cross-section since those most competent to understand complex economic or scientific questions rarely survive the jury selection process; the enormous complexity of the factual issues combined with the analysis of documents, expert testimony and visual aids create a burden suitable only for an expert; the instructions as to the law may take days in such cases; the protracted nature of the trial may exceed the capacity of the jurors to understand and remember the matters presented throughout; and finally, the impact of thrusting jurors for weeks or months into an alien environment burdened with the necessity of reaching a decision in areas where they have no experience. *Id.* at 3, 4.

8. In addressing the American Bar Association at Dallas, Texas in August of 1979, Mr. Justice John Paul Stevens suggested that the future of the jury trial in complex civil actions may be uncertain, at best. *Lawscope, Juries May Be Luxury In Future, Says Stevens*, 65 A.B.A. J. 1292 (1979).

strikes directly at the foundation of our judicial system. The answer to such a problem must lie in the nature and scope of our jurisprudence, and not in the facts of individual cases. Interpretation of the scope of the seventh amendment guarantees can only be accomplished through an understanding of the reasons upon which those guarantees were based and the intentions of the framers in preserving them for all citizens. Attempts to modify or limit the right of a jury trial in civil actions were met with jealous and adamant supporters of that right for over a century. Accusations of incompetence and inherent fault in jury verdicts must be examined with an eye to the procedural safeguards and innovations afforded in our courts. Claims that the fifth amendment due process clause necessitates an erosion of seventh amendment rights under the principles of fairness, must be scrutinized with great caution lest in expanding the role of one constitutional provision, we destroy the purpose of the other.

A determination of the right to jury trial in complex litigation necessitates an examination of the following factors: first, the nature of the constitutional guarantees in the seventh amendment; second, the judicial treatment and interpretation of the seventh amendment since its enactment in 1791; third, the recent inroads in the constitutional guarantee due to increasingly complex litigation; fourth, the nature of the jury process, jury composition, comprehension, delay, and the manner in which these might impede complex litigation; fifth, the safeguards against jury incompetence presently afforded by the legislature and the judiciary; and finally, the possibility of a constitutional mandate under the fifth amendment due process clause requiring that due process be an exception to the seventh amendment.

I. SEVENTH AMENDMENT GUARANTEE OF A RIGHT TO JURY TRIAL

The seventh amendment provides: "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ."⁹ The scope of the seventh amendment involved suits at common law where legal rights were determined, rather than those suits which involved equitable rights.¹⁰ In applying the seventh amendment, courts re-

9. *U.S. Const.* amend. VII.

10. *Atlas Roofing Co. v. Occupational Safety Comm'n.*, 430 U.S. 442, 449 (1977); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830). For a list of those actions tradi-

sorted to historical inquiry to determine if the issues involved should be tried as an action at common law in 1791.¹¹ As Mr. Justice Story stated in 1812, “[B]eyond all question, the common law here alluded to is not the common law of any individual state (for it probably differs in all) but it is the common law of England, the grand reservoir of all our jurisprudence.”¹²

In determining the right to jury trial in civil actions, recent courts look to the historical test of the seventh amendment. They raise the question of whether or not a jury trial might be set aside, even though it is historically mandated, because the case involves such complex issues that the jury is unable to competently decide them.¹³ In 1970, the Supreme Court suggested in a footnote¹⁴ that courts might look beyond the historical test to the practical abilities and limitations of juries¹⁵ in deciding whether a jury trial is required under the seventh amendment. Thus, the initial step in determining the scope of the constitutional right to jury trial under the seventh amendment is to look to English Chancery procedure. Inquiry must be made into the use of juries in common law actions in 1791, and the practical abilities and limitations of jurors in cases of great factual complexity.

A. *English Chancery Procedure*

The jury trial, the history of which may be traced back thirty centuries,¹⁶ is said to have been brought to England in the 11th Century.¹⁷ While the actual date of the English jury’s origin is unknown in that its “antiquity is beyond the reach of record of

tionally believed to be actions at common law prior to 1791, see 5 MOORE’S FEDERAL PRACTICE ¶ 38.11 at 118-20 (2d ed. 1977).

11. *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935). If the action was legal under the common law of England then the amendment was applicable and a right to jury trial preserved. *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812). This was also true of the nearest common law equivalent form of action triable to a jury in 1791. *Curtis v. Loether*, 415 U.S. 189 (1974).

12. *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812).

13. See text Part III *infra*.

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

15. The *Ross* case involved a shareholder derivative suit, which was traditionally cognizable only in equity. The Court held that, “The Seventh Amendment question depends upon the nature of the issue to be tried rather than the character of the overall action.” *Id.* at 538. The Court elaborated in a footnote that characterization of a legal issue depended upon consideration of three factors: “first, the pre-merger custom with reference to such questions; second, the remedy sought, and, third, the practical abilities and limitations of juries.” *Id.* at 538, n. 10.

16. This theory is set forth by L. MOORE, *THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY* (1973), wherein he states that the first jury trial is duly recorded in the play *Aeschylus Eumenides*, written by Aeschylus, who died in 456 B.C., *Id.* at 1.

17. R. SIMON, *THE JURY: ITS ROLE IN AMERICAN SOCIETY* 5 (1980).

history,"¹⁸ the sentiment of Englishmen toward jury trial was well articulated in the writings of Sir William Blackstone.¹⁹ His *Commentaries on the Law of England*, published between 1765 and 1769, provided the fabric for the colonists' legal tradition.²⁰ In writing about jury trials he stated, "The trial by jury, or the country, *per patriam*, is also that trial by the peers of every Englishman, which as the grand bulwark of his liberties, is secured to him by the greatest charter. . . ."²¹

Another perspective on the importance of jury trials was set forth by Charles Dickens in his novel, *Bleak House*.²² In describing Chancery, where there were no juries, he stated:

Fog everywhere. Fog up the river, where it flows among green aits and meadows; fog down the river, where it rolls defiled among the tiers of shipping, and the waterside pollutions of a great (and dirty) city. Fog on the Essex marshes, fog on the Kentish heights.

. . . .
. . . And hard by the Temple Bar, in Lincoln's Inn Hall, at the very heart of the fog, sits the Lord High Chancellor in his High Court of Chancery.

Never can there come fog too thick, never can there come mud and mire too deep, to assort with the groping and floundering condition which this High Court of Chancery, most pestilent of hoary sinners, holds this day, in the sight of heaven and earth.²³

The English system of law was divided between a Common Law Court and the Court of Chancery. The procedures available in Chancery differed materially from those available at common law.²⁴ Actions at law were tried before juries and the parties could not raise equitable claims or defenses. Suits at equity were

18. THE COMPLETE JURYMEN 3 (anon. 1752) reprinted in L. MOORE, *supra* note 16, at 7.

19. For recent article concerning the contribution of Sir William Blackstone, see Orth, *Sir William Blackstone: Hero of the Common Law*, 66 A.B.A. J. 155-59 (1980).

20. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 653-54 (1973).

21. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 349 (7th ed. 1775).

22. C. DICKENS, BLEAK HOUSE 1-2 (1951).

23. *Id.* at 1, 2.

24. The common law procedures have been described as "very dilatory, inconvenient, and unsatisfactory." 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 442, at 416 (9th ed. 1866) [hereinafter cited as COMMENTARIES ON EQUITY]. Equity procedures such as discovery, joinder, interpleader and the class action, were better suited to complex litigation. D. KARLEN, CIVIL LITIGATION 217-20 (1978); 1 STORY, COMMENTARIES ON EQUITY § 450 (9th ed. 1866). See also, E. MORGAN, THE STUDY OF LAW 9-13 (2d ed. 1948). For an in-depth discussion of the English development of the Court of Chancery, see F. JAMES & G. HAZARD, CIVIL PROCEDURE §§ 1.3-1.5, at 8-16 (2d ed. 1977).

often dismissed when the proper remedy was available at law. Therefore, a single transaction could involve two suits, one to hear the equitable claims and one to try the legal claims.²⁵

At the time of the adoption of the seventh amendment in 1791, the practice of the English Court of Chancery was in transition.²⁶ The court was gradually moving away from the rule that disputed issues of fact were generally, if not invariably, submitted to juries. However, the transition was slow in taking place. Trial by jury was the only mode of trial known at common law as late as 1854.²⁷ Cases involving fraud serve to illustrate this point. In the case of *Webb v. Claverdon*,²⁸ decided in 1742, the court stated that a case of fraud must be tried by a jury at law. Similarly, in *Bates v. Graves*,²⁹ a 1793 case, the Lord Chancellor held that the court could not decide the validity of a will without submission of the issue of fraud to a jury. In 1802, the case of *Kemp v. Pryor*³⁰ involved a fraud allegation in the sale of certain lead for export to New York. The Chancellor stated, "The fraud imputed is cognizable at law; and must be found by a jury."³¹ Thus English cases involving fraud in 1791, were tried by a jury.

The arguments advanced for finding a precedent in English common law for an exception to the right to trial by jury rely heavily on two decisions: *Clench v. Tomley*,³² and *Wedderburn v. Pickering*.³³ In *Wedderburn*, an action disputing property boundaries, the court found that some cases were of "great complexity, or otherwise, not capable of being conveniently tried before a jury."³⁴ The importance of this case must be viewed in light of the rules established under the Judicature Act of 1873 concerning the merger of law and equity.³⁵ It must also be remembered that the *Wedderburn* decision was made in 1879, and that the seventh amendment is construed in light of the English Common law as it existed in 1791.

25. F. JAMES & G. HAZARD, *supra* note 24, § 1.5, at 15-18.

26. *See generally*, Chesnin & Hazard, *Chancery Procedure and the Seventh Amendment: Jury Trial of Issue in Equity Cases Before 1791*, 83 YALE L.J. 999 (1974).

27. Zander, *The Jury in England: Decline and Fall?*, in ROSCOE POUND AMERICAN TRIAL LAWYERS FOUNDATION, *THE AMERICAN JURY SYSTEM, FINAL REPORT* 29, 32 (1977).

28. 26 Eng. Rep. 656 (Ch. 1742).

29. 30 Eng. Rep. 636 (Ch. 1793).

30. 32 Eng. Rep. 96 (Ch. 1802).

31. *Id.* at 99.

32. 21 Eng. Rep. 13 (Ch. 1603).

33. 13 Ch. D. 769 (1879).

34. *Id.* as quoted in *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59, 67 (S.D.N.Y. 1978).

35. *See* discussion in *Zenith Radio Corp. v. Matsushita Electric Industrial Co. Ltd.*, 478 F. Supp. 889 (E.D. Pa. 1979).

The *Clench* decision, decided in 1603, stands alone as a possible rationale for the creation of discretionary application of the right to a jury trial. In that action, the Chancery enjoined an action at law on the grounds that many jurors could not read the complex writings upon which the decision was to be based.³⁶ However, the *Clench* decision should not be viewed as reflective of the English common law in 1791, but as a single case decided in 1603. Although the jury system and jurisdictional boundaries between law and equity changed significantly between the seventeenth and eighteenth centuries,³⁷ the *Clench* decision should be viewed only as an aberration since complex actions were often heard in the law courts during the seventeenth century.³⁸ Further, the fact that the decision is only a single page, raises questions as to its inclusiveness. Prior to 1785, it was not infrequent for unofficial reports to reflect merely "those parts of the opinion deemed by the reporter to be useful to the lawyer."³⁹

Before leaving Chancery procedure, it must be mentioned that the action of account was a unique exception where equity was sometimes permitted to take jurisdiction when accounts were complex.⁴⁰ Account actions were among the most ancient forms of common law suits,⁴¹ and involved an accounting between plaintiff and defendant.⁴² Equity courts gradually began to supercede the common law courts in complex actions of account, mostly as a result of procedural distinctions between the two courts.⁴³

An action of account was distinguishable from the other legal actions and subject to certain specific requirements. An equity court was permitted to take jurisdiction only when both parties were subject to the accounting (mutual accounts) or if the equitable discovery procedures were material to the relief sought.⁴⁴ If

36. 21 Eng. Rep. 13 (Ch. 1603). The Court stated that a jury trial must be denied since the case involved "books and deeds, of which the Court was better able to judge than a jury of ploughmen . . ." *Id.*

37. See Chesnin & Hazard, *supra*, note 26.

38. Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 295, 300-03 (1892).

39. M. PRICE & H. BITNER, *EFFECTIVE LEGAL RESEARCH* 283 (1953).

40. Kirby v. Lake Shore & Michigan Southern Railroad, 120 U.S. 130, 134 (1887).

41. 1 J. STORY, *COMMENTARIES ON EQUITY* § 442 (9th ed. 1866).

42. H. McCLINTOCK, *HANDBOOK OF THE PRINCIPLES OF EQUITY* § 200 (2d ed. 1948). These actions included situations where the defendant was "plaintiff's bailiff, factor, partner, or a receiver of money to the use of plaintiff." *Id.*

43. See note 24 *supra*.

44. J. STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE* 443-49, 458 (1886); Fowle v. Lawrason, 30 U.S. (5 Pet.) 495 (1831).

these specific requirements were not met, equity would decline jurisdiction in that "if under such circumstances the court were to entertain the suit, it would merely administer the same functions in the same way as a Court of Law would in the suit. In short, it would act as a Court of Law."⁴⁵

Those complex accounting actions which were heard in equity courts usually fell under the concurrent jurisdiction of law and equity.⁴⁶ The Plaintiff could decide whether to proceed at law or equity.⁴⁷ In making such determinations, convenience was a major consideration.⁴⁸ It is important to note that the discretion was in the hands of the plaintiff and not the court, in deciding to proceed in equity without a jury. Today, the merger of law and equity has eliminated the concern regarding procedural disadvantages and thereby eradicated the necessity for removing accounting cases to equity jurisdiction except in very rare circumstances.⁴⁹

The above examination of Chancery procedure establishes that at the time of the enactment of the seventh amendment in 1791, the general practice was that all common law suits were tried before a jury. If the seventh amendment required merely that American courts look to the common law of England generally, adopting the spirit rather than the fact, there might be some foundation for permitting increasing judicial discretion in disallowing jury trials. The use of juries in civil cases in England declined sharply in the eighteenth and nineteenth centuries.⁵⁰ Presently, the jury has become virtually extinct in civil cases, with few exceptions.⁵¹ The Supreme Court, however, has traditionally taken a static view of the historical test in interpreting the meaning of the seventh amendment, looking only to English practice as of the date of the adoption, 1791.⁵²

45. J. Story, *supra* note 44, at 458.

46. 5 MOORE'S FEDERAL PRACTICE ¶ 38.25 (2d ed. 1978); 1 POMEROY, EQUITY JURISPRUDENCE §§ 170-74 (1918).

47. 5 MOORE, *supra* note 46, at ¶ 38.11 [6].

48. Shepard v. Brown, 66 Eng. Rep. 681 (CH. 1862). The court stated: "On questions of account, Courts of Equity and Courts of law possess concurrent jurisdiction, and the decision as to the proper tribunal must be governed by considerations of convenience." *Id.* at 681.

49. See text accompanying n. 90 *infra*.

50. Statistics indicate the sharp decline of juries in civil cases in England. Lord Devlin, quoting the figures of the Lord Chancellor's Department as of 1956, stated that "the proportion of jury trials is now 2 per cent or 3 per cent of the whole." DEVLIN, TRIAL BY JURY 182 (1956).

51. See, Zander, *The Jury In England: Decline and Fall?* *supra* note 27 at 29-31.

52. Ross v. Bernhard, 396 U.S. 531, 534 (1970); N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937); Dimick v. Schiedt, 293 U.S. 474, 487 (1935).

B. The Adoption of the Seventh Amendment

Trial by jury first came to North America when King James I permitted the Virginia Company to establish the community of Jamestown.⁵³ The First Charter of Virginia (1606) provided that the colonists have and enjoy "all Liberties, Franchises, and Immunities . . ." ⁵⁴ of Englishmen. Jury trial in civil cases came to be seen as an important right of freemen and a symbol of rebellion against English dominance.⁵⁵ Judicial administration in courts of general jurisdiction usually involved juries in civil actions, even though the practices of the states varied widely as to the balancing of the jury verdict and judge opinion in resolving disputes.⁵⁶ The influence of the English common law and the importance of the right to jury trial in civil cases are illustrated by the language of the Massachusetts Body of Liberties, adopted in 1641;⁵⁷ the Concessions and Agreements of West New Jersey, adopted in 1677;⁵⁸ and the Frame of Government of Pennsylvania, adopted in 1682.⁵⁹

Throughout the 1760s, the autonomy of the colonial courts increased.⁶⁰ The striving for independence and freedom from oppression was marked by the observation that "[t]he right to trial by jury was probably the only one universally secured by the first

53. H. Hyman & C. Tarrant, *Aspects of American Trial Jury History*, in *THE JURY SYSTEM IN AMERICA* at 24-25 (R. Simon ed. 1975).

54. R. PERRY & J. COOPER, *SOURCES OF OUR LIBERTIES* 44 (1959).

55. R. SIMON, *THE JURY: ITS ROLE IN AMERICAN SOCIETY* 5 (1980).

56. Henderson, *The Background of the Seventh Amendment*, 80 *HARV. L. REV.* 289, 299-320 (1966). This article examines the differing practices of the thirteen original states.

57. The Massachusetts Body of Liberties was adopted by the General Court of Massachusetts on December 10, 1641. Article 29 states: "In all Actions at law it shall be the libertie of the plaintiff and defendant by mutual consent to choose whether they will be tryed by the Bench or by a Jurie [sic] . . ." R. PERRY & J. COOPER, *supra* note 54, at 151.

58. The Concessions and Agreements of West New Jersey was adopted March 13, 1677, and chapter XVII made provision for trial by jury stating:

THAT no Proprietor, freeholder or inhabitant of the said Province of West New Jersey, shall be deprived or condemned of life, limb, liberty, estate, property or any ways hurt in his or their privileges, freedoms or franchises, upon any account whatsoever, without a due tryal, and judgment passed by twelve good and lawful men.

R. PERRY & J. COOPER, *supra* note 54, at 185.

59. The Frame of Government of Pennsylvania was adopted April 25, 1682, and article VII made provision for trial by jury. R. PERRY & J. COOPER, *supra* note 54, at 217.

60. H. Hyman & C. Tarrant, *ASPECTS OF AMERICAN TRIAL JURY HISTORY*, in *THE JURY SYSTEM IN AMERICA* 28 (R. Simon ed. 1975).

American state constitutions.”⁶¹ All thirteen original states made provision for the institution of civil jury trial.⁶² Virginia’s Bill of Rights enacted in 1776 stated, “That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.”⁶³ Maryland’s constitution also emphasized that a man might not be “deprived of his life, liberty or property, but by the judgment of his peers, or by the law of the land.”⁶⁴

The strong state support for jury trial, emphasized at the first Congress of the American colonies in 1765,⁶⁵ was a subject of much debate and discourse at the Constitutional Convention in 1787.⁶⁶ The correlation between jury trial and independence was articulated by Patrick Henry: “Why do we love this trial by jury? Because it prevents the hand of oppression from cutting you off.”⁶⁷ Yet, when the federal constitution was enacted on March 4, 1789, the absence of a provision for trial by jury in civil cases was noted with concern. Alexander Hamilton in *The Federalist* stated that “the objection to the plan of the convention . . . is *that relative to the want of a constitutional provision* for the trial by jury in civil cases.”⁶⁸ He also stated:

The friends and adversaries of the plan of the convention, if they agree on nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.⁶⁹

It was not, however, until the first ten amendments to the Constitution became effective on December 15, 1791, that the right to jury trial in civil cases was guaranteed to all citizens under the seventh amendment.⁷⁰

61. L. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY - LEGACY OF SUPPRESSION 281 (1963).

62. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 655, n.49 (1973).

63. R. PERRY & J. COOPER, *supra* note 54, at 312.

64. *Id.* at 346, 348.

65. R. SIMON, THE JURY: ITS ROLE IN AMERICAN SOCIETY 5 (1980).

66. For a discussion of the Constitutional Convention of 1787, see Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 657-67 (1973).

67. Patrick Henry made the statement at the Virginia Convention, June 20, 1788, as quoted in J. Van Dyke, JURY SELECTION PROCEDURES 7 (1977).

68. THE FEDERALIST NO. 83 A. Hamilton 538 (National Home Library Foundation, 1937) (emphasis in original).

69. *Id.* at 542-43.

70. For a discussion of the circumstances surrounding adoption of the seventh amendment, see generally Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 725 (1973).

II. JUDICIAL INTERPRETATION OF THE SEVENTH AMENDMENT

The seventh amendment guarantee of a right to jury trial in civil actions has been jealously guarded and vigorously protected by the Supreme Court. The Court has held that "maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."⁷¹

The very language of the amendment in stating that the right "shall be preserved" anticipates and prohibits any restrictive judicial interpretations.⁷² Criticism of the requirement for historical inquiry has included concern that intricate examination of the Chancery procedure may "reek unduly of the study,⁷³ 'if not of the museum.'⁷⁴ Nevertheless, in decision after decision, the Supreme Court has reaffirmed that the right to jury trial must be preserved inviolate in all cases at common law.⁷⁵

In recent years, the Supreme Court has enlarged the right to jury trial by expanding the interpretation of the seventh amendment and redefining which suits must be considered suits at common law. In considering those causes of action statutorily created since 1791, the Court has held that the seventh amendment is not directly applicable, and that the legislature has considerable latitude in deciding whether there shall be a right to jury trial.⁷⁶ However, in those instances, where the cause of action is analogous to a common law action, the Court has held that the legisla-

71. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

72. The language "shall be preserved" has been uniformly interpreted as requiring that the right to jury trial be afforded in all cases where such a right existed at the time of the adoption of the seventh amendment. 293 U.S. at 476.

73. *Damsky v. Zavatt*, 289 F.2d 46, 48 (2d Cir. 1961).

74. *Id.* at 59 (Clark, J. dissenting).

75. See *Simler v. Conner*, 372 U.S. 221 (1963); *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958); *Jacob v. New York*, 315 U.S. 752 (1942).

76. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (Congress may provide for administrative finding of unfair labor practice under the Wagner Act without impairing the seventh amendment); see also *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, 430 U.S. 442 (1977) (Congress may expand the role of administrative agencies in the enforcement of federal regulatory statutes without impairing the seventh amendment).

It should be noted that the legislature might abolish a common law remedy and substitute an entirely new system of compensation administered by a board or commission without resort to court or jury. *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917).

ture probably will not be able to eliminate the right to jury trial.⁷⁷ Further, if the legislature is silent as to the right to jury trial, the Court has required that the nearest historical analogy be applied.⁷⁸

Thus, in 1974, the Supreme Court held that the seventh amendment requires that a right to jury trial be guaranteed in suits brought under the Civil Rights Act of 1968.⁷⁹ In the case of *Curtis v. Loether*, an action enforcing statutory rights, the Court stated:

By common law, [the Framers] meant . . . not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights.⁸⁰

This holding reiterates the importance of the jury trial guarantee and the necessity for expansion beyond the common law forms of actions. Similarly in *Pernell v. Southall Realty*,⁸¹ the Court required in those cases involving actions which did not have a direct counterpart at common law, an inquiry be made into the remedies sought to determine if they were traditionally provided in an action at law in 1791.⁸² Thus, the importance of the right to a jury trial was reaffirmed by the judicial expansion of that right to those actions not traditionally within the bounds of the amendment.

The Supreme Court has also strengthened the seventh amendment's guarantees by applying an expanded historical test, taking into account the availability of modern procedures. In the leading case of *Beacon Theatres v. Westover*,⁸³ an action for injunction and declaratory relief, the plaintiff sought to establish that it had not violated the antitrust laws. The Court held that the defendant's counterclaim for treble damages entitled the defendant to a jury trial under the seventh amendment. Reasoning that the adequacy of a legal remedy must be viewed "not by precedents de-

77. *Fleitmann v. Welsbach Co.*, 240 U.S. 27 (1916); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830). See also: *Olearchick v. American Steel Foundaries*, 73 F. Supp. 273 (W.D. Pa. 1947) (Fair Labor Standards Act suit for overtime compensation was held triable to a jury); *Bellavance v. Plastic-Craft Novelty Co.*, 30 F. Supp. 37, 38 (D. Mass. 1939) (the United States patent statutes permit a jury in an action for damages for the infringement of a patent, 35 U.S.C.A. § 284 (West 1954)); *Meeker v. Lehigh Valley R.R.*, 162 Fed. 354, 357 (C.C.S.D.N.Y. 1908) (antitrust case involving treble damages to a jury).

78. *Luria v. United States*, 231 U.S. 9, 27 (1913) (fraud action to cancel naturalization certificate).

79. *Curtis v. Loether*, 415 U.S. 189 (1974).

80. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433 (1830) cited in *Curtis v. Loether*, 415 U.S. 189, 193 (1974).

81. 416 U.S. 363 (1974).

82. *Id.* at 375.

83. 359 U.S. 500 (1959).

cided under discarded procedures, but in light of the remedies now made available,"⁸⁴ the Court determined that resort to equitable relief was not necessary. While the injunctive proceeding has been tried at equity, historically, "equity has always acted only when legal remedies were inadequate."⁸⁵ Here, the Court found that the legal remedy was adequate in light of the compulsory counterclaim rules, the limitation on voluntary dismissals without prejudice under the Federal Rules of Civil Procedure, and the remedies under the Declaratory Judgment Act.⁸⁶ Therefore, when both legal and equitable issues are presented in a single case, the right to jury trial was held to be so important that it should not be lost through prior determination of equitable claims.⁸⁷

In *Dairy Queen, Inc. v. Wood*,⁸⁸ the Court further reinforced the importance of the seventh amendment guarantees. The complaint in that action sought an injunction against the use of a trade name, an accounting and damages. The district court viewed the entire action as equitable and denied the demand for a jury trial. The Supreme Court followed the approach of *Beacon Theatres* and held that the historical rules should be applied in light of modern procedure. The Court rejected the equitable clean-up doctrine,⁸⁹ which permitted a court to decide legal issues which were incidental to an essentially equitable cause of action.

84. *Id.* at 507.

85. *Id.* at 509.

86. The Court reasoned that the adequacy of the legal remedy and the possibility of irreparable harm had to be determined only with reference to the remedies made available under the Declaratory Judgment Act and Federal Rules of Civil Procedure 42(b) and 57. 359 U.S. at 506-07. For a discussion of the impact of the Federal Rules of Civil Procedure on *Beacon Theatres*, see Note, *Jury Trial in Complex Litigation*, 20 WM. & MARY L. REV. 329, 335-37 (1978); McCoid, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover*, 116 U. PA. L. REV. 1 (1967).

87. 359 U.S. at 511. The dissent by Justice Stewart disagreed with this contention and stated that the district court should not be compelled to try the counterclaim first. 359 U.S. at 513 (Stewart, J. dissenting). For comments on the reasoning of the Court, see Note, *The Supreme Court 1958 Term*, 73 HARV. L. REV. 84, 189-90 (1959).

88. 369 U.S. 469 (1962).

89. See, Levin, *Equitable Clean-up and the Jury: A Suggested Orientation*, 100 U. PA. L. REV. 320 (1951) for a discussion of equitable clean-up. The Court stated: "Since these issues [the factual issues related to the question of whether these has been a breach of contract] are common with those upon which the respondents' claim to equitable relief is based, the legal claims involved in the action must be determined prior to any final court determination of respondents' equitable claims." 369 U.S. at 479.

The Court also held that procedural developments such as merger of law and equity reduce the inadequacy of legal remedies, thereby broadening the right to a jury trial. The opinion stated that a suit need not be basically legal in order for the right to trial by jury to attach. Rather, the right attaches to each legal issue within a case.⁹⁰ The claim that the request for an accounting, an historically equitable remedy, should defeat the defendant's demand for jury trial, was dismissed because the "prerequisite to the right to maintain a suit for an equitable accounting, like all other equitable remedies, is, as we pointed out in *Beacon Theatres*, the absence of an adequate remedy at law."⁹¹ In order to defeat the right to jury trial, the plaintiff would be required to prove that the accounts were so complicated that a jury could not satisfactorily unravel them.⁹² The Court noted, however, that such a burden would be hard to meet, since an exception "should seldom be made, and if at all only when unusual circumstances exist."⁹³ The existence of provisions for a master under the Federal Rules of Civil Procedure⁹⁴ made it "a rare case" in which jury trial might be denied.⁹⁵

Both the *Beacon Theatres* and the *Dairy Queen* cases recognize that the strict historical test may be relaxed to provide the right of a jury trial where they did not previously exist. Under the criteria of those two cases, an action seeking legal as well as historically equitable remedies may now be tried at law under the seventh amendment guarantees.

90. The Court quoted the language from *Beacon Theatres* stating that where both legal and equitable issues are presented in a single case, "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." 369 U.S. at 472-73.

91. 369 U.S. at 478. It is important to note that the Plaintiff in *Dairy Queen* claimed it was not seeking money damages, but rather an accounting which is historically equitable. *Id.* at 477. The Court held that the availability of a constitutional right did not turn upon the wording of the pleading. *Id.* at 477-78. The Court found that a jury could decide the case. *Id.* at 479.

92. *Kirby v. Lake Shore & Michigan Southern R. Co.*, 120 U.S. 130, 134 (1887), as cited in *Dairy Queen*, 369 U.S. at 478.

93. *La Buy v. Howes Leather Co.*, 352 U.S. 249, 258 (1957) as cited in *Dairy Queen*, 369 U.S. at 478.

94. The Court referred to the provisions of rule 53 (b) of the Federal Rules of Civil Procedure which permits the appointment of masters to assist juries in complex cases: (b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated Fed. R. Civ. P. 53(b).

95. 369 U.S. at 478. For further discussion of *Dairy Queen* see Note, *Unfit for Jury Determination: Complex Civil Litigation and The Seventh Amendment Right of Trial by Jury*, 20 B.C. L. REV. 511, 515-16 (1978); Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U.L. REV. 486, 497-99 (1975).

Finally, in *Ross v. Bernhard*,⁹⁶ the Court again departed from the strict historical test. In expanding the seventh amendment guarantee, the Court ruled that a shareholder derivative suit, a traditional cause of action in equity,⁹⁷ could be tried to a jury. The Court focused on those issues which the corporation, had it been suing on its own behalf, would have been entitled to try before a jury.⁹⁸ Justice White, referring to the *Beacon Theatres* and *Dairy Queen* decisions, stated that the seventh amendment guarantee depends upon the characterization of issues rather than the character of the overall action:⁹⁹

[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.¹⁰⁰

The right to jury trial was upheld since the underlying issues and remedies in *Ross* were "legal." Having thus overcome the difficulties of the historical test, *Ross* addressed the further problem of trying to determine the nature of the issue. Footnote ten of the *Ross* case enunciated some factors to be considered: "first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries."¹⁰¹

Justice White's opinion, in analyzing the nature of the issue,

96. 396 U.S. 531 (1970).

97. Prior to *Ross*, shareholder derivative suits were seen as a cause of action in equity. See e.g., *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 548 (1949); *Richland v. Crandall*, 259 F. Supp. 274, 279 n.8 (S.D.N.Y. 1966).

98. The Court stated: "We hold that the right to jury trial attaches to those issues in derivative actions as to which the corporation, if it had been suing on its own right, would have been entitled to a jury." 396 U.S. at 532-33.

99. 396 U.S. at 538. See also *Simler v. Conner*, 372 U.S. 221 (1963).

100. 396 U.S. at 537-38.

101. 396 U.S. at 538. n. 10. The meaning of this footnote has received a great deal of attention. See Pivonka, *The Right to Jury Trial in Complex Civil Litigation*, 16 SAN DIEGO L. REV. 1003, 1009-12 (1979); Note, *Unfit for Jury Determination: Complex Civil Litigation and the Seventh Amendment Right of Trial by Jury*, 20 B.C. L. REV. 511, 517 (1979); Ell, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 CONN. L. REV. 747, 794 (1978); Note, *The Right to Jury Trial in Complex Litigation*, 20 WM. & MARY L. REV. 329, 339-43 (1978); Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U.L. REV. 486, 523-24 (1975); Sower, "Complicated Issues" v. *The Right to a Jury Trial: A Procedural Remnant in Kentucky Law Raises Constitutional Problems*, 3 N.KY. ST. L.REV. 173 (1975); Note, *Ross v. Bernhard: The Uncertain Future of the Seventh Amendment*, 18 YALE L.J. 112 (1971); COMMENT, *From Beacon Theatres to Dairy Queen to Ross: The Seventh Amendment, The Federal Rules, and a Receding Law-Equity Dichotomy*, 48 J. URB. L. 459 (1971).

made no reference to the competence of juries to handle complex securities claims. The Court utilized only the first two portions of the test and rested its opinion squarely on the seventh amendment analysis traditionally employed. The departure from a strict historical test in *Ross* seems to be indicative of a strong federal policy favoring jury trials.¹⁰²

Since the *Ross* decision in 1970, the Supreme Court has completely ignored the test articulated in *Ross*. In *Curtis v. Loether*,¹⁰³ a private damage suit brought in federal court under the housing discrimination provisions of the Civil Rights Act of 1968, the Court enforced the seventh amendment right to jury trial under the reasoning that the right and remedies were of the sort typically enforced in an action at law.¹⁰⁴

Then in *Pernell v. Southall Realty*,¹⁰⁵ a summary eviction procedure in the District of Columbia, the Court held that when Congress provides statutory remedies analogous to those recognized at common law "it must preserve to parties their right to a jury trial."¹⁰⁶ In *Lorillard v. Pons*,¹⁰⁷ a case involving a statute providing for jury trial in a private civil action for lost wages under the Age Discrimination in Employment Act of 1967, the Court failed to mention the limitations of juries as a possible restriction on seventh amendment guarantees, even though the court of appeals had cited *Ross*.¹⁰⁸

Even those cases denying a right to jury trial have not applied the *Ross* test. In *Atlas Roofing Co. v. Occupational Safety Commission*,¹⁰⁹ Mr. Justice White, who also wrote the majority opinion in *Ross*, failed to mention the third portion of the *Ross* test in finding that Congress had the power to create a new cause of action, not recognized at common law, for civil penalties enforceable in an administrative proceeding without violating the seventh amendment.¹¹⁰

Finally, in *Parklane Hosiery Co. v. Shore*,¹¹¹ in holding that the use of offensive collateral estoppel predicated upon a prior court

102. See *Pernell v. Southall Realty*, 416 U.S. 363 (1974); *Curtis v. Loether*, 415 U.S. 189 (1974).

103. 415 U.S. 189 (1974).

104. *Id.* at 194.

105. 416 U.S. 363 (1974).

106. *Id.* at 383.

107. 434 U.S. 575 (1978).

108. See *Pons v. Lorillard*, 549 F.2d 950, 953 (4th Cir. 1977), *aff'd*, 434 U.S. 575 (1978).

109. 430 U.S. 442 (1977). For a discussion of *Atlas*, see Kirst, *Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment*, 126 U. PA. L. REV. 1281 (1978).

110. 430 U.S. at 453.

111. 439 U.S. 322 (1979); For a discussion see Note, *Shore v. Parklane Hosiery*

trial did not violate the seventh amendment, the Court expressly referred to the historical test without mentioning *Ross*.¹¹² It is significant that the majority opinion included a discussion of the procedural devices which have been developed since 1791, and have been held constitutional despite seventh amendment challenges.¹¹³ Had the *Ross* test been considered a test of constitutional magnitude, it would be incongruous for the Court to have omitted it from this discussion.¹¹⁴

III. RECENT DECISIONS CREATING AN EXCEPTION TO THE SEVENTH AMENDMENT ON THE GROUNDS OF COMPLEXITY

The failure of the Supreme Court to apply the *Ross* test to the facts in any subsequent seventh amendment decisions, raises

Co.: The Seventh Amendment and Collateral Estoppel, 66 CAL. L. REV. 861 (1978); Note, *Collateral Estoppel and the Right to a Jury Trial*, 57 NEB. L. REV. 86 (1978).

112. 439 U.S. at 333-37.

113. 439 U.S. at 336.

114. *Parklane Hosiery* is one of a few Supreme Court cases repeatedly cited as indicative of a willingness by the Supreme Court to restrict the scope of the seventh amendment. The cases normally cited are the following: *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (offensive collateral estoppel case); *Atlas Roofing Co. v. Occupational Safety Commission*, 430 U.S. 442 (1977) (administrative proceeding without a jury); *Katchen v. Landy*, 382 U.S. 323 (1966) (bankruptcy action); *Galloway v. United States*, 319 U.S. 372 (1943) (directed verdict); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (statutory proceeding); *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931) (retrial on issue of damages only); *Fidelity & Deposit Co. of Md. v. United States*, 187 U.S. 315 (1902) (summary judgment).

It should be noted that the actions below do not fall into the classification of suits at common law. *Atlas Roofing*, *Katchen*, and *Jones & Laughlin* were all actions enforcing statutory rights in special forums where juries are not usually employed such as administrative tribunals and bankruptcy court. Bankruptcy actions have been recognized to be inherently equitable. *Katchen*, 382 U.S. at 336-37. Administrative tribunals decide cases which were statutorily created and are not suits at common law or of the nature of suits at common law. *Atlas Roofing*, 430 U.S. at 453; *Jones & Laughlin* 301 U.S. at 48-49.

Parklane, *Galloway*, *Gasoline Products*, and *Fidelity & Deposit* can be distinguished from those cases requiring a jury trial in that the cases did not require fact finding. In *Parklane* and *Gasoline Products*, the issues which might properly be submitted to a jury were previously adjudicated, and the Court refused to permit relitigation. *Parklane*, 439 U.S. at 336 n. 23; *Gasoline Products*, 283 U.S. at 498-99. The last two cases, *Galloway* and *Fidelity & Deposit* are distinctive since there existed no issue of fact at all. Rather, the cases were resolved through a directed verdict, *Galloway v. United States*, 319 U.S. at 388-93; and a summary judgment, *Fidelity & Deposit, Co. of Md. v. United States* 187 U.S. at 319. These cases are not properly relied upon as support for the elimination of jury trials in cases where there exist many issues of fact to be decided, since the resolution of factual issues is the central purpose of the civil jury.

questions concerning the constitutional status of the test. The Court's silence as to whether or not a new test has been formulated for deciding the right to jury trial under the seventh amendment, and the parameters of such a test, has caused considerable confusion, reflected in lower court opinions.

There have been four recent decisions by federal district¹¹⁵ courts which have denied jury demands made under the seventh amendment on the rationale that the factual complexity and the massive size of the litigation, impair the ability of a jury to reach a competent decision. The *Ross* decision has been held to be the legal justification for such findings.

Initially, lower courts reacted less favorably to the *Ross* decision as a limitation of seventh amendment rights. For example, in *Tights, Inc. v. Stanley*,¹¹⁶ a case involving alleged patent infringement and a claim for money damages, the court refused to deny a jury trial even though it was charged that patent cases as a class are too complex to be tried by a jury.¹¹⁷ The court distinguished complex issues concerning liability from complex equitable accounting damages and held that the former must be tried to a jury.¹¹⁸

In 1974, the Court of Appeals for the Sixth Circuit considered the applicability of the *Ross* test to complex litigation in *Hyde Properties v. McCoy*.¹¹⁹ That case was an interpleader action involving the solvency of a corporation and corporate accounting procedures.¹²⁰ The opinion of the court of appeals held that a non-jury trial was called for,¹²¹ but the attention given to the third portion of the *Ross* test was extremely brief and failed to indicate whether complexity is sufficient, standing alone, to invoke equitable jurisdiction. This same difficulty arose in *Prudential Oil*

115. *ILC Peripherals Leasing Corp. v. International Business Machines Corp.*, 458 F. Supp. 423 (N.D. Cal. 1978); *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59 (S.D.N.Y. 1978); *In re United States Financial Securities Litigation*, 75 F.R.D. 702 (S.D. Cal. 1977); *In re Boise Cascade Securities Litigation*, 420 F. Supp. 99 (W.D. Wash. 1976). See discussion of these cases, footnotes 125-50 & accompanying text *infra*.

116. 441 F.2d 336 (4th Cir.) *cert. denied*, 404 U.S. 852 (1971).

117. *Id.* at 340.

118. The court stated:

If the scope of equitable accounting is to be expanded to encompass cases felt to be too complex or esoteric for trial to a jury, we think that expansion must come from the Supreme Court. We do not construe any language in the *Dairy Queen* opinion to sanction this further limitation of the right to jury trial.

Id. at 341.

119. 507 F.2d 301 (6th Cir. 1974).

120. *Id.* at 306.

121. *Id.*

Corp. v. Phillips Petroleum Co.,¹²² a breach of contract action where discussion of the practical abilities and limitations of jurors was limited to one paragraph, and jury trial was granted.¹²³

The first case in which an otherwise valid jury demand was stricken was *In re Boise Cascade Securities Litigation*,¹²⁴ an action for alleged violation of securities laws against an acquiring company.¹²⁵ Analyzing the case in light of the *Ross* test,¹²⁶ the district court held that the jury demand could be stricken without violating the seventh amendment.¹²⁷ The court was influenced by a four to six month estimated trial time and accounting problems in excess of a billion dollars. The court found "at some point, it must be recognized that the complexity of a case may exceed the ability of a jury to decide the facts in an informed and capable manner."¹²⁸

The following year, the case of *In re United States Financial Securities Litigation*,¹²⁹ was decided in which, again, all jury demands were stricken. The court noted that intricate accounting problems were central to the resolution of the case, and complicated accounting problems traditionally were within the equity jurisdiction of the court.¹³⁰ Reasoning that neither *Beacon Theatres* nor *Dairy Queen* eliminated equity jurisdiction over accounting cases beyond the competence of the jury to decide, even with the assistance of a special master pursuant to rule 53(b) of the Federal Rules of Civil Procedure. The Court concluded that there was no entitlement to a jury trial. It was held that a lay jury would be "singularly unqualified" to decide the case and that therefore the legal remedy was inadequate.¹³¹

The case of *Bernstein v. Universal Pictures, Inc.*,¹³² was a com-

122. 392 F. Supp. 1018 (S.D.N.Y. 1975), *rev'd on other grounds*, 546 F.2d 469 (2d Cir. 1976).

123. *Id.* at 1023.

124. 420 F. Supp. 99 (W.D. Wash. 1976).

125. For an in-depth discussion of the issues in the *Boise Cascade* case, see Comment, *The Right to Jury Trial in Complex Civil Litigation*, 16 SAN DIEGO L. REV. 1003, 1012-14 (1979).

126. *Id.* at 104.

127. *Id.* at 105.

128. *Id.* at 104.

129. 75 F.R.D. 702 (S.D.Cal. 1977).

130. *Id.* at 707, 709, 712-13.

131. *Id.* at 713. For a more in-depth discussion, see Note, *Unfit for Jury Determination: Complex Civil Litigation and The Seventh Amendment Right of Trial By Jury*, 20 B.C. L. REV. 511, 521-22 (1979).

132. 79 F.R.D. 59 (S.D.N.Y. 1978).

plicated antitrust action in which the issues were all recognized by the court to be legal under the first two portions of the *Ross* test. Nonetheless, the court held that the length of trial and complexity of the issues required striking the jury demand: "to hold that a jury trial is required in this case would be to hold that the Seventh Amendment gives a single party at its choice the right to an irrational verdict."¹³³

Most recently, in *ILC Peripherals Leasing Corp. v. International Business Machines*,¹³⁴ another complex antitrust case, a motion to stike the jury demand was denied, the case was litigated for five months, and at the end a mistrial was declared due to jury deadlock.¹³⁵ The judge subsequently reviewed his earlier decision and ordered the case tried in equity, in the event of retrial,¹³⁶ in light of two factors: first, the difficulty for the jury in comprehending the concepts at trial,¹³⁷ and second, the cost to the litigants and the government of a trial of this complexity.¹³⁸

There are two basic contentions which are central to the reasoning of the above four cases. First, the *Ross* test is the correct statement of law, derived from traditional authority, and equity has inherent power to order non-jury trials in complex civil cases.¹³⁹ Secondly, that in the absence of such an exception to the seventh amendment, considerations of fairness and due process compel non-jury trials in situations where a jury cannot make a competent and rational decision in the opinion of the court.¹⁴⁰ The remainder of this article will concentrate on these specific allegations and concerns. The constitutionality of these decisions rests on their interpretation of seventh amendment history, the finding that juries are incompetent to decide complex cases, and the nature of the due process guarantees.

It is important to note that recent decisions concerning the seventh amendment have considered the arguments advanced in the above cases and found them non-persuasive. In *Radial Lip Machine, Inc. v. International Carbide Corp.*,¹⁴¹ a patent infringe-

133. *Id.* at 71. For a more in-depth discussion see generally Note, *Constitutional Law - Seventh Amendment - Right to A Jury Trial in Complex Litigation - Bernstein v. Universal Pictures, Inc.*, WIS. L. REV. 920 (1979).

134. 458 F. Supp. 423 (N.D. Cal. 1978).

135. *Id.* at 444.

136. The deadlock of the jury prompted the court to declare a mistrial, and thereafter, the court granted IBM's motion for a directed verdict. *Id.* at 444.

137. *Id.* at 447.

138. *Id.* at 448.

139. See 79 F.R.D. at 67; 458 F. Supp. at 445-46; 75 F.R.D. at 710; 420 F. Supp. at 104.

140. See 79 F.R.D. at 71; 458 F. Supp. at 447-48; 75 F.R.D. at 712-13; 420 F. Supp. at 104.

141. 76 F.R.D. 224 (N.D. Ill. 1977).

ment case, the court declined to grant constitutional significance to the *Ross* test. The court interpreted the *Ross* test, which requires consideration of "the nature of the issue to be tried rather than the character of the overall action,"¹⁴² as condemning any application which might "characterize a class of actions as creating a right to trial by jury."¹⁴³ It further found that a case-by-case approach, characterizing an action on the basis of complexity, defied the creation of manageable judicial standards. An ad hoc application of the seventh amendment is unsuitable because the *Ross* opinion gives no indication of how complex a case must be before a jury demand may be struck. Without such guidelines, a judge would be left with unfettered discretion to grant or deny jury trial. The unpredictability and amorphous standard would inevitably result in "dilution of the right to a jury trial."¹⁴⁴

The reasoning in *Radial Lip* has been adopted and echoed as recently as 1979, when in *American Can Co. v. Dart Industries*,¹⁴⁵ a patent case, the motion to strike the plaintiff's jury demand was denied on the grounds that *Ross* did not create a broad exception to the seventh amendment. The opinion stated that complexity is often a result of the failure of counsel to adequately prepare their cases in a comprehensible manner. In noting that such difficult cases as medical malpractice, products liability and criminal anti-trust actions are daily before juries, he concluded:

It would serve the bar well to look to clean its own house and improve its performance before clamoring to abolish or diminish the cherished right to trial by jury. If we are to strive to improve the quality of factual presentation in our courts we must strike at the cause of the disease, not its symptoms.¹⁴⁶

Similarly, in *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*,¹⁴⁷ a complex antitrust action, the court considered the question of whether the plaintiff's jury demands should be struck on the grounds of complexity under the *Ross* test. The court here, however, went further than other courts and ruled that the *Ross* test is not of constitutional magnitude. The court found that *Ross*

142. *Ross*, 396 U.S. at 538.

143. 76 F.R.D. at 227. The court held that "[t]he portion of the *Ross* test which weighs the practical abilities and limitations of juries contemplates a general analysis of the problems typically presented by those claims, not a specific case-by-case analysis of the complexity of the litigation."

144. *Id.* at 228.

145. *American Can Co. v. Dart Industries*, 205 U.S.P.Q. 1007 (1979).

146. *Id.* at 1008.

147. *Zenith Radio Corp. v. Matsushita Electric Industrial Co. Ltd.*, 478 F. Supp. 889 (E.D. Pa. 1979).

“may not be read as requiring or permitting the consideration of ‘the practical abilities and limitations of juries’ in determining whether the constitutional right to trial by jury extends to matters committed . . . to federal district court.”¹⁴⁸ Rather, the court concluded that the *Ross* test was never considered by the Supreme Court to be a test for seventh amendment issues, the test was unworkable, and the application of the test would conflict with policies underlying the role of the jury in civil actions in our courts.¹⁴⁹

Thus we have seen that the possible interpretation of the meaning of *Ross* is a double-edged sword. In light of Chancery procedure, circumstances surrounding the adoption of the seventh amendment, and judicial treatment of the seventh amendment prior to the *Ross* case, it seems clear that any exception to a right of a jury trial for complex cases, other than complex accounting actions, would have to be derived from the third portion of the *Ross* test. Whether the Supreme Court even elaborates on the meaning of the footnote or adopts it as a seventh amendment test will probably rest on the necessity for such an exception. It is therefore beneficial to spend some time considering the difficulties inherent in complex litigation and the possible incompetence of juries in deciding such cases.

IV. JURY COMPOSITION, COMPREHENSION AND DELAY

With the increase in the time required for trial in federal district courts,¹⁵⁰ and the increase in the filings of private antitrust suits,¹⁵¹ the question arises of whether or not the jury has become an anachronism in the twentieth century. The desire to streamline the administration of justice and reduce the costs of judicial administration has led to the adoption of six-member juries,¹⁵² non-unanimous verdicts,¹⁵³ and judge-conducted voir dire.¹⁵⁴

148. *Id.* at 78, 334-35.

149. *Id.*

150. Chief Justice Burger pointed out in his recent speech that the total number of trial days in protracted civil cases, those lasting more than a month, have more than doubled in the period from 1970 to 1978, with 1017 trial days in 1970, now measured against 2195 trial days in 1978. Address by Chief Justice Burger, Conference of State Chief Justices, at Flagstaff, Arizona (August 1, 1979).

151. There was an increase of 9.4% in private antitrust suits filed in 1976, over those filed in 1975. [1976] DIV. OF ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. 191 (Table 27). There were 20 federal civil jury trials concerning contract, antitrust and securities violations in 1976, which lasted over 19 days. *Id.* at 332-33 (Table C-8).

152. *See Williams v. Florida*, 339 U.S. 78 (1970); *Colegrove v. Battin*, 413 U.S. 149, 155-56 (1973).

153. *See Apodaca v. Oregon*, 406 U.S. 404 (1972).

154. *See Hamling v. United States*, 418 U.S. 87 (1974).

Whether the time has come to strike again at the domain of the jury seems to be very much before us.¹⁵⁵

Before addressing the actual workings of the jury system, a slight deviation from the problematical concerns into the nature of the jury system seems appropriate. Joseph H. Choate, in addressing the American Bar Association stated: "The truth is, however, that the jury system is so fixed as an essential part of our political institution . . . that there can be no substantial ground for fear that any of us will live to see the people consent to give it up."¹⁵⁶

United States District Court Judge Charles W. Joiner has been a strong advocate of the civil jury.¹⁵⁷ In balancing the relative merits of a system with and without a jury, he points to the traditional role of the jury in representing the public,¹⁵⁸ providing a system of internal checks and balances between judge and jury,¹⁵⁹ making fair and accurate application of general rules and standards of law¹⁶⁰ without danger of prejudice, permitting the parties trial according to the conscience of the community¹⁶¹ and controlling an ever expanding bureaucracy in the dispute resolution process.¹⁶²

In representing the community, the jury has the important role of educating members of the community to the law. As Alexis de Tocqueville stated, "Thus the jury, which is the most energetic means of making the people rule, is also the most efficacious means of teaching it to rule well."¹⁶³ The law requires community wide acceptance and comprehension. Suggestion that the new age of computer technology and scientific advancement alter the need to make the law comprehensible to a jury, or warrant the intervention of experts such as judges or masters, seems to over-

155. The controversy concerning civil jury trials has even been recognized by *Time Magazine* which suggested that the elimination of juries in civil trials might lead to better use of judicial resources in complex cases. *Judging the Judges*, TIME, Aug. 20, 1979, at 54.

156. Sacks, *Preservation of the Civil Jury*, 22 WASH. & LEE L. REV. 76, 78 (1965).

157. See generally, C. Joiner, *Perspectives on the Function and Value of the Jury in America from the Bench*, in THE JURY SYSTEM IN AMERICA (Simon ed. 1975). C. JOINER, CIVIL JUSTICE AND THE JURY, (2d. reprinting 1977).

158. C. JOINER, CIVIL JUSTICE AND THE JURY, 24-25 (1977).

159. *Id.* at 14-20.

160. *Id.* at 25-35.

161. *Id.* at 35-38.

162. *Id.* at 9, 14-20.

163. De Tocqueville, *Causes Which Mitigate the Tyranny of Majority in the United States* in DEMOCRACY IN AMERICA 214 (Henry Steele Commager ed. 1953).

look this important role of jury trial. Chief Justice Burger's concern that the law and litigation have changed substantially since the adoption of the seventh amendment,¹⁶⁴ might be answered by Judge Joiner as follows:

The developments in science and the advance in engineering are changing the size and character of problems placed before the courts. Problems are becoming more complex and larger in scope, making wise solutions even more imperative than in the past. With the slingshot and the buggy, wisdom and community acceptance were important ingredients in dispute resolution; with the gun and automobile they are imperative.¹⁶⁵

In providing a system of checks and balances, the judge and jury have traditionally complemented one another by integrating legal expertise with community common sense. The procedural devices available to the judge¹⁶⁶ have guarded against unreasonable and unwarranted verdicts. The jury infuses the litigation with community wisdom to balance against the opinions of legal experts. Mr. Justice Hunt wrote of the balance:

Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard . . . these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.¹⁶⁷

In making determinations based upon the law, it is interesting to note that the jury is often called upon to apply standards relating to common sense. Legal language is permeated with the words "reasonable," "ordinary, reasonable prudent man," "reasonable notice," "reasonable time" and similar phrases. The very language of the law, therefore, calls for the wisdom of laymen, rather than experts. It has been said that "[t]he jury is to the inside technical world of our common law system a representative of that outside sense, and outside animation."¹⁶⁸

Thus, after noting the political, philosophical and legal role of juries, the next inquiry must center on the practical limitations which have focused so much concern on the future of jury trials in complex civil actions. Frustrations with the workings of the jury system are certainly not new. An attack on the jury system in the American Bar Association Journal in 1924 stated: "Too long has the effete and sterile jury system been permitted to tug at the throat of the nation's judiciary as it sinks under the smothering

164. See text accompanying footnote 6 *supra*.

165. C. JOINER, CIVIL JUSTICE AND THE JURY, 12 (1977).

166. See text accompanying notes 197-216 *infra*.

167. Railroad Co. v. Stout, 84 U.S. 657, 664 (1873).

168. W. HOLDSWORTH, A HISTORY OF ENGLISH LAW (7th ed. 1956) as quoted in C. JOINER, CIVIL JUSTICE AND THE JURY, 121, 124 (1977).

deluge of the obloquy of those it was designed to serve."¹⁶⁹ These sentiments have increased as frustrations mount over the new onslaught of complex litigation.

A. *Jury Selection Process*

The complexity of litigation has increased concern over the difficulty of impaneling individuals competent to resolve the complex factual issues presented in the new cases. It has been suggested that only experienced business and professional persons are capable of deciding complex economic or scientific questions.¹⁷⁰ Those individuals competent to understand the issues are felt to be eliminated in the jury selection process, resulting in a jury that is rarely a true cross-section of the community.¹⁷¹

Even if competent jurors are not eliminated, there are other problems which are seen as impeding their ability to serve. First, the belief that few jurors can afford to serve for an extended period of time. The direct negative correlation between protracted litigation and empaneling a representative jury was recognized in *Bernstein v. Universal Pictures, Inc.*,¹⁷² wherein the four month estimated trial time caused the court to conclude that "it would be impossible to empanel a representative jury in this case, whose verdict would enjoy the appearance of fairness."¹⁷³ The present compensation for jurors in federal courts is thirty (30) dollars a day, plus travel and subsistence allowance.¹⁷⁴ Compensation from employers is often limited to a period as low as two weeks.¹⁷⁵ Thus, the protracted nature of complex cases brings hardship upon the jurors and, in one court's opinion, makes jury service "beyond the practical limitations of the human being who would be asked to serve."¹⁷⁶

Secondly, many jurors dislike the prolonged intrusion into their

169. Sebille, *Trial by Jury: An Ineffective Survival*, 10 A.B.A. J. 53, 55 (1924) reprinted in, H. Kalven & H. Zeisel, *THE AMERICAN JURY* 5 (1966).

170. See comments of Chief Justice Burger, text accompanying note 6 *supra*.

171. 28 U.S.C. § 1861 (1976) requires that a jury be selected at random from a fair cross-section of the community. For a discussion of the difficulties inherent in such a selection process, see *THE AMERICAN JURY SYSTEM supra* note 27, at 72.

172. 79 F.R.D. 59 (S.D.N.Y. 1978).

173. *Id.* at 70.

174. 28 U.S.C.A. § 1871 (West. Supp. 1979) sets the compensation for jurors at \$30.00 per day.

175. See J. VAN DYKE, *JURY SELECTION PROCEDURES* 114-15 (1977).

176. This conclusion was reached in *In re United States Financial Securities Litigation*, 75 F.R.D. 702, 713-14 (S.D. Cal. 1977) (two year estimated trial time).

lives. Resentment of the time taken from work, family or friends is hardly beneficial in the reaching of a competent and rational decision.¹⁷⁷ Therefore, judges have a tendency to excuse those who request it on the grounds that such persons will not be a good juror and would serve to the detriment of the court and litigants.¹⁷⁸ These preliminary excusals have caused one court to observe that "a basic purpose of the jury, the determination of facts by impartial minds of diverse backgrounds, is defeated if a sizable and significant portion of the community must be excluded from service."¹⁷⁹

The imbalance resulting from the early stages is felt to be reinforced during the challenge stage. Lawyers are commonly known to exercise peremptory challenges for the purpose of eliminating jurors who possess education or expertise for fear that they might bias the jury with their knowledge.¹⁸⁰ Thus, it would appear that attorneys seek to empanel those least equipped to decide the cases.

B. Resolution of Complex Factual Issues

The resolution of the factual issues in complex litigation is frequently thought to be beyond the ability of laymen. Those cases striking the jury demand involved extensive analysis of documents, expert testimony, charts, graphs, and other visual aids. In *In re United States Financial Securities Litigation*,¹⁸¹ the jury was faced with 24,000 documents, and 100,000 pages of documentary evidence.¹⁸² The burden of comprehending and retaining all that evidence was held to be too great for the jury.¹⁸³ The frustra-

177. Richert, *Juror's Attitudes Toward Jury Service*, 2 JUST. SYS. J. 233, 244 (1977).

178. In *SCM Corp. v. Xerox Corp.*, 463 F. Supp. 983 (1978), a complex antitrust and patent action, over fifty percent of the jurors were excused for reasons relating to hardships in serving the estimated six month trial time. See Note, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 CONN. L. REV. 775, 779 (1978).

179. In *re Boise Cascade Securities Litigation*, 420 F. Supp. 99, 104 (1976). The court noted that the limited number of available employed persons "suggests that at least the appearance of fairness would be diminished, if not eliminated." *Id.*

180. J. VAN DYKE, *JURY SELECTION PROCEDURES* 152-60 (1977); See also, Burns & Furth, *The Anatomy of a Seventy Million Dollar Sherman Act Settlement - A Law Professor's Tape Talk With Plaintiff's Trial Counsel*, 23 DE PAUL L. REV. 865, 880-81 (1974). It has been noted by several judges that the above complications "defeat the purpose of the jury system, which was to have a cross-sectional jury of one's peers." 1977 Judicial Conference of the Second Judicial Circuit of the United States, Transcript of Proceedings, at 29 (Sept. 9, 1977), *id.*

181. 75 F.R.D. 702 (S.D. Cal. 1977).

182. *Id.* at 707.

183. *Id.* Concern over the ability of twelve laymen to make accurate factual findings is reflected in the writings of Dean Griswold of Harvard Law School who stated: "The jury trial at best is the apotheosis of the amateur. Why should any-

tion of attempting to resolve complex factual issues was articulated by the foreman of the jury in *ILC Peripherals Leasing Corp. v. International Business Machines Corp.*,¹⁸⁴ who stated, "If you can find a jury that's both a computer technician, a lawyer, an economist, knows all about that stuff, yes, I think you could have a qualified jury."¹⁸⁵

C. *Extensive Legal Instructions*

The complexity of the factual issues, and the protracted nature of the trial is often felt to be complicated by the need for lengthy instructions to the jury.¹⁸⁶ The more complex the action, the longer it may take to instruct the jury on the law. The fact that a judge can often review the law and record, while the jury is usually limited to oral instructions at the beginning of trial, raises concern as to the competence of the jury's verdict.¹⁸⁷ While some authors have expressed concern, others believe in the inherent competence of the jury verdict claiming that:

sometimes the jury's common sense perceptions, considerations of fairness to the defendant, on appraisal of the law (in contrast to the judge's statement of it) are so weighty that they justify departure from the requirement that the jury defer to the judge's instructions.¹⁸⁸

Departure from instructions for common sense reasons is a part of the innate character of the jury process and usually tolerated

one think that 12 persons brought in from the street, selected in various ways, for their lack of general ability, should have any special capacity for deciding controversies between persons?" 1962-63 HARVARD L. SCH. DEAN'S REP. 5-6 quoted in O'Connell, *Jury Trials in Civil Cases?*, 58 ILL. B.J. 796, 800 (1970). The greater the factual complexity of a case, the greater the concern of those who doubt the fact-finding capacity of jurors generally. See J. FRANK, COURTS ON TRIAL 118, 179 (1973).

184. 458 F. Supp. 423 (N.D. Cal. 1978).

185. *Id.* at 447. In Prosser, *Book Review*, 43 CALIF. L. REV. 556 (1955) he expresses concern about the effectiveness of the verdict in personal injury cases "when twelve inexperienced, innocent, and often ignorant and uneducated men and women become the target of so elaborate a plot, a preparation and a production [by certain counsel]." *Id.* at 558-59.

186. See comments of Justice Burger, note 7 *supra*.

187. It has been argued that:

The feats of memory required of jurors are prodigious. Applicable legal rules are announced only after and not before the evidence is introduced. So far as the jurors are concerned, the litigants' competing factual versions are presented in a non-legal vacuum. The successful integration of the facts with the law long after the facts have been presented and many of them forgotten is doubtless often impossible.

Broeder, *The Functions of the Jury: Facts or Fictions?* 21 U. CHI. L. REV. 386, 392 (1954).

188. Kadish and Kadish, *THE INSTITUTIONALIZATION OF CONFLICT, IN LAW, JUSTICE AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES* 311 (1977).

as being implicit in the nature of jury trial. The departure, however, usually connotes a conscious decision not to adhere to the instructions. The concern in complex actions is that the instructions are never understood, or are forgotten, because of their voluminous nature and presentation.

D. Length of Trial

The final area of judicial concern is that the protracted nature of the complex litigation will impair the ability of the jurors to understand and remember the evidence presented.¹⁸⁹ Unusually long estimated trial times have been considered as a factor in cases denying jury trials.¹⁹⁰ The rationale for striking the jury demand rests on the theory that there is a limit to the capacity of individuals to comprehend and retain information. Jurors required to sit for weeks listening to foreign subjects of a highly technical nature may find it beyond their capacity to render a verdict based on the law and the evidence.

One argument advanced for the elimination of jury trials in complex litigation is that the trial by judge is normally shorter and less expensive than jury trials.¹⁹¹ The Supreme Court had held that there is not an inconsistency between the demand for a jury trial by right and the desire for speedy trial.¹⁹² The need or desire for a rapid litigation should not preclude a party from exercising seventh amendment rights. Yet, as the cost of litigation increases, with millions of dollars at stake,¹⁹³ such considerations may play an increasingly stronger role in the debate over the future of jury trials.

V. PROCEDURAL SAFEGUARDS IN JURY TRIALS

Having examined some of the most common complaints against the use of juries in complex litigation, it seems appropriate to discuss the ways in which a jury can be assisted in reaching a com-

189. See comments of Justice Burger, note 7 *supra*. See also, J. FRANK, COURTS ON TRIAL 118 (1973): "The longer the trial lasts, the larger the scanning crowds, the more intensely counsel draw the lines of conflict, the more solemn the judge, the harder it becomes for the jury to restrain their reason from somersault." *Id.*

190. See *ILC Peripherals Leasing Corp. v. International Business Machine Corp.*, 458 F. Supp. 423, 444 (N.D. Cal. 1978) (five month trial); *In re United States Financial Securities Litigation*, 75 F.R.D. 702, 707 (S.D. Cal. 1977) (estimated trial of two years or more); *In re Boise Cascade Securities Litigation*, 420 F. Supp. 99, 101 (W.D. Wash. 1976) (four to six month estimated trial time).

191. Zander, *The Jury in England: Decline and Fall?*, in *THE AMERICAN JURY SYSTEM*, *supra* note 27 at 52.

192. *Pernell v. Southall Realty*, 416 U.S. 363, 384 (1974).

193. The SCM litigation has cost the litigants in the area of five to ten million dollars per year. See, Note, *The Right to an Incompetent Jury: Protracted Commercial Litigation and The Seventh Amendment*, 10 CONN. L. REV. 775, 786 (1978).

petent verdict. In the interest of reaching a fair decision, the burden of assisting the jury should rest upon both the judge and counsel. The means of diminishing the complexity of a case are found in judicial practice, the Federal Rules of Civil Procedure and the United States Code.

A. *Pretrial Proceedings*

Elimination of some of the problems in complex litigation can take place before the empaneling of the jury. Under the Federal Rules of Civil Procedure, the court may direct the attorneys to appear for a conference for the purpose of simplifying the issues, eliminating unnecessary proof, limiting the number of expert witnesses, making preliminary reference to a master and bringing about any other changes necessary for disposition of the matter.¹⁹⁴

The provisions for pretrial discovery under the Federal Rules of Civil Procedure¹⁹⁵ can be crucial in narrowing the issues for the jury. The provision for admissions of fact¹⁹⁶ reduces the need for juror inquiry. The provision for the use of a master,¹⁹⁷ provides the court with the ability to assist the jurors in complex matters by permitting a master to make findings on issues submitted to him and then allowing these findings to be presented as evidence to the jury for their consideration. The important function of a master in complex actions was recognized in *Dairy Queen v. Wood*,¹⁹⁸ wherein the Court stated:

In view of the powers given to the District Courts by Federal Rule of Civil Procedure 53 (b) to appoint masters to assist the jury in those exceptional cases where the legal issues are too complicated for the jury to adequately handle alone, the burden of such a showing is considerably increased and it will indeed be a rare case in which it can be met.¹⁹⁹

194. FED. R. CIV. P. 16. For a discussion of this, see *In re United States Financial Securities Litigation*, 75 F.R.D. 702, 714 (S.D. Cal. 1977).

195. FED. R. CIV. P. 26-37. Note that the Federal Rules of Civil Procedure, enacted in 1938, merged the law and equity courts. See, *Beaunit Mills, Inc. v. Eday Fabric Sales Corp.*, 124 F.2d 563, 565-66 (2d Cir. 1942).

196. Fed. R. Civ. P. 36(a) governs requests for admissions.

197. FED. R. CIV. P. 53 controls the appointment, compensation, reference, powers, proceedings, and report of a master. Under the section pertaining to reference it makes special note of the ways in which a master might compliment a complex jury trial: "(b) *Reference*. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made *only when the issues are complicated*. . . ." *Id.* (emphasis added).

198. 369 U.S. 469 (1962).

199. 369 U.S. at 478.

The Federal Rules of Civil Procedure also permit the court to order separate trials of any claim, cross-claim, counterclaim, third-party claim or of any separate issue, while preserving the right to jury trial under the seventh amendment.²⁰⁰ This power to bifurcate the trial preserves the right to jury trial in the role to which it has been traditionally assigned, and allows removal of complex issues for separate adjudication.

B. The Trial Proceedings

The federal rules govern the right to jury trial and require that a demand for jury trial be made in a timely manner.²⁰¹ In the interests of assisting the jury, the federal judge may, during the course of the trial, express to the jury his opinion on the facts, while leaving to them the ultimate determination.²⁰² He may direct the jury's attention to evidence he believes to be of special significance, provided he distinguishes between matters of law and matters of opinion.²⁰³ The jury may be informed by the court when there is insufficient evidence to justify a verdict.²⁰⁴

The federal rules empower the court to entertain motions for a directed verdict or a judgment notwithstanding the verdict.²⁰⁵ The federal judge may also grant a new trial if there is precedent for such action.²⁰⁶ All of these court powers have at one time been criticized as encroachments on the right to jury trial.²⁰⁷ Yet, they serve to preserve the checks and balances, to guard against irrational verdicts and to facilitate the use of juries. The rules do not, however, deal with the particulars of presentation of evidence. For this reason, a number of studies have been made in the interests of providing guidelines for jury use.²⁰⁸

During trial, the court may be able to aid juror recollections by permitting jurors to take notes in notebooks which they can con-

200. FED. R. CIV. P. 42.

201. FED. R. CIV. P. 38 (b).

202. *United States v. Reading Railroad*, 123 U.S. 113, 114 (1887).

203. *Transportation Line v. Hope*, 95 U.S. 297, 302 (1877); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 131 (1851).

204. *Sparf v. U.S.*, 156 U.S. 51, 99-100 (1895).

205. FED. R. CIV. P. 50.

206. FED. R. CIV. P. 59.

207. *See e.g.*, the dissenting opinion of Mr. Justice Black in *Galloway v. United States*, 319 U.S. 372 (1943), wherein he objected that the process of directing verdicts "marks a continuation of the gradual process of judicial erosion which in one-hundred-fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." *Id.* at 397.

208. *See generally*, SOLOMON, *MANAGEMENT OF THE JURY SYSTEM* (1975); U.S. Department of Justice Law Enforcement Assistance Administration National Institute of Law Enforcement and Criminal Justice, *A GUIDE TO JUROR USAGE* (1974).

tinue to refer to throughout trial and during deliberations.²⁰⁹ The court can also provide interim jury charges, reemphasizing the law, refreshing their recollection, helping them to maintain perspective.²¹⁰ The deliberations might be eased by permitting jurors to review exhibits and transcripts and allowing them to read the depositions out of sequence.²¹¹

Also, the court may require that the jury deliver a special verdict, or a general verdict accompanied by special answers to interrogatories.²¹² This should safeguard against irrational verdicts by requiring more than a mere affirmative or negative answer to a general question. Instead, specific questions can be propounded and the answers thereto will establish whether the jury comprehended the issues and acted in accordance with applicable law.

All of these rules and judicial precedents provide a means whereby the court can prevent problems with jury trials in complex litigation without abolishing the use of juries and the traditional role they have held in our system of justice. The necessity for eliminating jury trials in complex litigation must therefore be proven to be so great that utilization of all of the above procedures will be ineffective. The Supreme Court has held that there is no *right* to a nonjury trial.²¹³ Our history, our Constitution, and our present jurists²¹⁴ have called for the preservation of civil jury trials. However, it has been suggested that the compelling nature of this right can only be overcome by a conflicting constitutional mandate. Our last area of inquiry will focus on such a conflict.

VI. THE DUE PROCESS CLAUSE

It is possible that the Supreme Court could end the constitutional ambiguity surrounding the seventh amendment by constru-

209. See, Comment, *Taking Note of Note Taking*, 10 COLUM. J.L. & SOC. PROB. 565 (1974).

210. These possibilities and others are discussed in Ell, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 CONN. L. REV. 775, 785 (1978).

211. *Id.*

212. FED. R. CIV. P. 50. In the event that the court wishes immediate review of such a decision, the court can certify the question for interlocutory review so that the court of appeals may thereupon, in its discretion, permit an appeal to be taken. 28 U.S.C. § 1292(b) (1976). Note also the sections pertaining to jury trials mentioned earlier: 28 U.S.C. § 1861 (1976) (fair cross section); 28 U.S.C. § 1871 (West Supp. 1979) (compensation of \$30.00 per day).

213. *Fitzgerald v. United States Lines*, 374 U.S. 16 (1963).

214. See discussion of *Zenith* case in text accompanying notes 143-49 *supra*.

ing the fifth amendment as a limitation on the seventh. The possibility of such an occurrence has been raised by some legal commentators.²¹⁵ Thus, this troublesome question must focus on the possibility that procedural safeguards of the fifth amendment prevent the trial of complex cases by a jury under the concepts of due process and fairness.

The thrust of the due process argument lies in the fifth amendment requirement that where suits are litigated in a federal forum, the court must utilize appropriate procedures to ensure fair decisions.²¹⁶ The Supreme Court has stated that a "fair trial in a fair tribunal is a basic requirement of due process."²¹⁷ Since the thrust of the due process clause has always been the implementation of a constitutional scheme of fundamental fairness,²¹⁸ submission of a case to a body incapable of deciding the issues would violate the provisions of the fifth amendment.

The trial by jury has generally been associated with the traditional notion of fundamental fairness.²¹⁹ The Court in seeking to provide an impartial jury drawn from a fair cross section of the community has held that this right does not guarantee a representative jury, but a representative panel from which the jury is drawn.²²⁰ The focus of the law has therefore centered on the array from which the jurors are drawn, rather than the composition of any particular jury.²²¹

Further, any allegations that the fifth amendment requires that determinations of factual and legal issues must be made by a body capable of fairly and equitably resolving them, and that a jury cannot serve this purpose, must be answered by the language of the Court:

[W]e have never held that it is beyond the power of the State to provide for the trial by jury of questions of fact because they are complicated. Cases at law triable by a jury in the federal courts often involve most difficult and complex questions, as, for example, in patent cases at law presenting issues of validity and infringement. Most difficult questions of fact in protracted trials, with much conflicting expert testimony are not infrequently presented in criminal cases triable by jury. The issue of life or

215. Huttner, *Unfit for Jury Determination: Complex Civil Litigation and The Seventh Amendment Right of Trial by Jury*, 20 BOS. L. REV. 511, 533 (1979); Note, *Jury Trial in Protracted Commercial Litigation*, 10 U. CONN. L. REV. 775 (1978); see also Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898 (1979).

216. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

217. *Withrow v. Larkin*, 421 U.S. 35, 46 (1975); see also, *In re Murchison*, 349 U.S. 133 (1955); *Adamson v. California*, 332 U.S. 46 (1947).

218. *Joint Anti-Fascist Refugee Committee v. McGarth*, 341 U.S. 123 (1951); *Honeywell Inc. v. Metz Apparatewerke*, 509 F.2d 1137 (7th Cir. 1975).

219. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

220. *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946).

221. *Ballard v. United States*, 329 U.S. 187 (1946); 28 U.S.C. § 1861 (1976).

death may be decided in such a case.²²²

The history of jury trials, and the potential use of available aids, stand for the proposition that the jury is as capable as the trial judge to act as the trier of fact in all cases, complex or not. Therefore, it is unlikely that the due process guarantees of the fifth amendment will continue to be a limitation upon the right of a jury trial under the seventh amendment.

CONCLUSION

The question of whether or not the right of trial by jury should be restricted or even eliminated in protracted and complex civil cases in the interest of fairness and justice must be answered in the negative. The right to jury trial is part of the fundamental freedoms painfully won by the colonists and preserved for us under the seventh amendment. The concept of judgment by one's peers is a bulwark of our democracy, lauded again and again by the philosophers, authors and leaders of our country. More importantly, it calls for the representation by the community prior to deprivation of property, and representation to the community of the fairness of our laws and judicial system.

Each individual is responsible for knowing and abiding by the laws. It must continue to be the duty of the judiciary to answer to the people in the enforcement of the law. Concerns of delay or expense cannot justify retreat to a judicial bureaucracy. Allegations of irrationality and incompetence will exist in greater force when the courts need not explain their verdicts on the grounds of complexity and the incapacity of laymen to comprehend. The solution lies not in abandonment of justice as we have always known it. Surely fairness includes the right to community knowledge and concern. The right to jury trial is premised upon such community participation and therefore, should be preserved.

GEORGIANA G. RODIGER

222. *United Gas Public Service Co. v. Texas*, 303 U.S. 123, 140-41 (1938) (citations omitted). For the argument that determinations must be made by a body capable of fairly and equitably resolving them, see Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 308 (1976).

