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## A Civil Justice System That Works for Working People

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## A CIVIL JUSTICE SYSTEM THAT WORKS FOR WORKING PEOPLE

*John Vail\**

Serial wrongdoers have treated jury trials the same way dogs treat fire hydrants. Over the last thirty years, they have led a campaign, sometimes public, more often quiet and stealthy, to make it progressively harder for working people to get, or to mete out, justice. Too few people have noticed.

Serial wrongdoers—generally, large corporations—have sought to make it more difficult to get into court and, if you get in, to make it more difficult to get cases before juries, the one decision-making institution they have not been able to buy. Their efforts have worked. Lay people decide cases increasingly less often. Power has been transferred from citizens to elites.

An administration that cares more about working people than about elites can wrest power from the uppity class, return it to jurors, and reopen the courts to real people.

Abundant academic literature chronicles the phenomena I describe here.<sup>1</sup> I want to focus, in plain terms, on certain mechanisms by which access to courts,

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<sup>1</sup> See, e.g., Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013); Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085 (2012); Raymond H. Brescia & Edward J. Ohanian, *The Politics of Procedure: An Empirical Analysis of Motion Practice in Civil Rights Litigation Under the New Plausibility Standard*, 47 AKRON L. REV. 329 (2014); Alexander A. Reinert, *The Burdens of Pleading*, 162 U. PA. L. REV. 1767 (2014); Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543 (2014); Lonny Hoffman, *Rulemaking in the Age of Twombly and Iqbal*, 46 U.C. DAVIS L. REV. 1483 (2013); Robert S. Peck & John Vail, *Blame It on the Bee Gees: The Attack on Trial Lawyers and Civil Justice*, 51 N.Y.L. SCH. L. REV. 323 (2007); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, LAW & CONTEMP. PROBS. (Winter/Spring 2004); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33 (1997); Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration As a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17 (2003).

and the power of juries—both of fundamental Constitutional importance<sup>2</sup>—have been diminished.

### *The Woeful State of Court Funding*

I will begin with the obvious and will not belabor it: the courts have been starved of funding. National debates center on the federal courts, but the state courts handle about 95 percent of all cases and their financial condition are grim.<sup>3</sup>

The federal courts have been caught in the political gridlock, the Senate notably refusing to take any action on a Supreme Court nominee but less noticeably dawdling in considering nominees to the lower courts. Resultantly, currently there are 103 judicial vacancies<sup>4</sup> creating 38 “judicial emergencies,” situations in which access to justice is gravely impaired.<sup>5</sup>

Nominally, lack of access affects everyone equally. But it ain’t so. Limiting access hurts people who seek to hold wrongdoers accountable and insulates wrongdoers from responsibility. Thus, in general, corporations—who are serial wrongdoers—benefit. But sometimes corporations want to sue other corporations. How have they dealt with that without losing insulation? One method: business courts. “There are today in the United States more trial courts that hear business disputes primarily or exclusively than at any previous moment in the nation’s history.”<sup>6</sup> Just as racial segregationists created an alternative school system, liability segregationists created an alternative justice system. Even more creatively, though, they did it with state money.

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<sup>2</sup> *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433, 446 (1830) (Right to jury trial is “a fundamental guarantee of the rights and liberties of the people.”); *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 387 (2011) (Right to file civil suits is protected by First Amendment).

<sup>3</sup> See, e.g., Andrew W. Yates, *Using Inherent Judicial Power in A State-Level Budget Dispute*, 62 Duke L.J. 1463 (2013) (footnotes omitted), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3386&context=dlj> (“From 2008 to 2011, legislatures in most states cut judiciary spending by 10 to 15 percent. The result was a dramatic reduction in court services. Including Alabama, at least fourteen states have reduced the hours and days that their courts are open to the public. Litigants and defendants face lengthy delays before appearing on a court docket. Criminal cases in some states may take more than a year to clear, and civil cases fare much worse. State courts, which handle 95 percent of all litigation in the United States, are struggling to provide the critical adjudicatory services that make up an effective justice system. As the chief justice of the Massachusetts Supreme Judicial Court put it, state courts are at ‘the tipping point of dysfunction.’”).

<sup>4</sup> Judicial Vacancies, U.S. COURTS (last visited Nov. 18, 2016), <http://www.uscourts.gov/judgeships/judicial-vacancies>.

<sup>5</sup> *Id.*

<sup>6</sup> John F. Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915 (2012).

### *The Diminished Power of Juries*

A trial before a jury was once an object of community focus and a source of entertainment. As county seats became larger, it lost that luster. But it remains an exercise in direct democracy, the one institution in America where, without intimidation, truth is spoken to power, and where power is judged by citizens. This political function of the jury famously was celebrated by Tocqueville.<sup>7</sup> Nebraska's highest court, barring exclusion from juries on the basis of race, emphasized the leveling influence of citizens knowing that whosoever you may judge, by them you shall be judged.<sup>8</sup> Judge William Young notes that the jury trial "is the New England town meeting writ large. It is as American as rock 'n' roll."<sup>9</sup> The jury trial continues to be acclaimed in rhetoric, but not in practice.

Jury trials are disappearing,<sup>10</sup> which is to the benefit of serial wrongdoers. The trend correlates with incremental changes in law that, cumulatively and quietly, have made access to juries more difficult. The Supreme Court effectively has re-written the Federal Arbitration Act, making it a tool for oppressing consumers, employees, and small businesses.<sup>11</sup> Under the Supreme Court's reading of the statute, if you agreed with an illegal bookmaking operation to arbitrate disputes about illegal payouts, an arbitrator, and not a court or a jury, must resolve the dispute.<sup>12</sup> An arbitration agreement that bans small businesses, each with relatively small disputes, to band together to challenge fees charged by American Express, is enforceable, even if it bans with 100% certainty the small businesses from getting relief to which they clearly would have been entitled in court.<sup>13</sup> The Act was written as a set of procedural rules for the federal courts, with the purpose of enforcing arbitration agreements between silk-stocking businesses.<sup>14</sup> It was not meant to be outcome-determinative, nor was it meant to deprive working people of their right to have serial wrongdoers answer to juries.

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<sup>7</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 285–91 (rev. ed., The Colonial Press 1900).

<sup>8</sup> *Brittle v. People*, 2 Neb. 198, 223 (1873) (striking down preclusion of black citizens from jury service); see *Matthew 7:2*.

<sup>9</sup> Honorable William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 69 (2006), available at [http://suffolklawreview.org/wp-content/uploads/2006/12/Young\\_Article\\_FINAL.pdf](http://suffolklawreview.org/wp-content/uploads/2006/12/Young_Article_FINAL.pdf).

<sup>10</sup> *Id.* at 73–75.

<sup>11</sup> See Schwartz and Sternlight, *supra* note 1.

<sup>12</sup> See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

<sup>13</sup> See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

<sup>14</sup> Schwartz, *supra* note 1.

More subtly, the Supreme Court has made procedural law less friendly to working people. Calling yourself an expert in procedure is a sure way to avoid invitations to social events. But Felix Frankfurter noted, “The history of American freedom is, in no small measure, the history of procedure,”<sup>15</sup> and, more prosaically, John Dingell, a savvy legislator who served six decades in the House, would offer to let opponents write the substance of bills: “[Y]ou let me write the procedure, and I’ll screw you every time.”<sup>16</sup> The Court’s moves have resulted in a profound shift of power away from citizen jurors and toward elite judges.

The Supreme Court wrested power from juries when it blessed summary judgment in a set of cases known as *The Trilogy*.<sup>17</sup> In practice, summary judgment motions cater to serial offenders who can outspend their opponents, typically represented by contingent-fee lawyers whose income is drained in long battles on paper that often could be more quickly and easily resolved by short trials before juries. The same problem of empowering the well-resourced occurred when the Court anointed federal trial judges as “gatekeepers” of expert testimony that juries might consider.<sup>18</sup> The Court was concerned that juries would be unwarrantedly swayed by unacceptable scientific methodologies. It put the responsibility for determining methodological acceptability into the hands of elite judges despite the absence of evidence that judges are any better than a jury of twelve in sorting out such questions.<sup>19</sup> In practice, motions to exclude experts generate piles of paper leading to hearings before judges who decide admissibility on the basis of the same evidence that a jury would hear to determine what weight the testimony should be accorded. It is an expensive mess that serves little purpose other than to insulate serial wrongdoers from being judged by jurors.

The Court’s most serious departure from the democratization of justice worked by the adoption of the Federal Rules of Civil Procedure in 1938 and its

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<sup>15</sup> *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring).

<sup>16</sup> Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law and Governmental Regulations of the House Comm. on the Judiciary, 98th Cong. 312 (1983) (statement of Rep. John Dingell) (thanks to Professor Alan Morrison), available at <http://www.levine-california-civil-procedure.com/quotes.asp>.

<sup>17</sup> See Miller, *supra* note 1. I speak here of actions in the federal courts, but state courts often fall in step with federal changes in procedure, and most have done so with regard to the matters I discuss here.

<sup>18</sup> *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Another unholy trinity.

<sup>19</sup> Indeed, my analysis of jurors in one jurisdiction suggests strongly that jurors are better equipped than judges to decide these questions. Brief of amicus curiae Trial Lawyers Association of Metropolitan Washington, D.C. submitted in *Motorola Inc. v. Murray*, 2016 WL 6134870 (D.C. 2016) (on file with ECGAR).

vesting of judges with the power to dismiss cases when they did not find the story a plaintiff pleaded to be “plausible.” The subjectivity introduced through this threshold determination of whether a lawsuit lives or dies is unwarranted and dangerous, and it has resulted in disproportionate dismissal of civil rights complaints.<sup>20</sup> In brief, the federal judiciary does not look much like America. It is more educated, which is good, but it is also more white and more male, and it disproportionately has been shaped by experience representing corporations and the government. Its experiences, which feed what it might find “plausible,” are very different from the experiences of America in general, and from the experiences of persons of color and members of other politically disfavored groups in particular. How many more people believe persons of color plausibly fear encounters with the police after having watched the video of Philando Castile being shot in Minneapolis? How many more people believe it is plausible that corporations bend the truth after they have seen the documentary, *Hot Coffee*?

The jury remains out on the Court’s newest venture into procedural constraint—its December 2015 instruction to trial judges to assess the proportionality of discovery requests. The Court’s rulemakers candidly admit that discovery is not a problem in the run of cases in the federal courts.<sup>21</sup> The problem addressed by this rule occurs primarily in huge cases between corporate leviathans.<sup>22</sup> The Court’s rulemakers, not having the tools they need to persuade judges of the need to manage discovery in litigation between giant beasts, foisted a new paperwork task on everyone. An unprecedented response from the bar, staggering in volume, told the rulemakers: do not do this.<sup>23</sup> They did it anyway, to the delight of serial offenders. The hopes of serial offenders are great; the fears of advocates for working Americans are greater; empiricists must tell us what has been wrought.

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<sup>20</sup> Reinert, *supra* note 1.

<sup>21</sup> Briefing Book for June 3–4, 2013 Standing Committee meeting, at 65, *available at* <http://www.uscourts.gov/rules-policies/archives/agenda-books/committee-rules-practice-and-procedure-june-2013> (“In most cases discovery now, as it was then, is accomplished in reasonable proportion to the realistic needs of the case. This conclusion has been established by repeated empirical studies, including the large-scale closed-case study done by the Federal Judicial Center for the Duke Conference.”).

<sup>22</sup> *Id.*

<sup>23</sup> *See* Judicial Conference of U.S., Report of Advisory Committee on Civil Rules (May 2, 2014), in Committee on Rules of Practice and Procedure (May 29–30, 2014), at 331, *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf>.

*Restoring Power to the People*

The incoming administration and Congress profess to be on the side of working Americans. Here are three things they can do to make the civil justice system more fair:

**Feed the courts.** On the federal and state levels, give the courts the resources they need to do their jobs. It is heinous that in some states courts have become inaccessible to persons needing domestic violence protective orders or enforcement of child support. Fill judicial vacancies. This proposal will be politically difficult, especially on the federal level. But, consensus can be reached by focusing on appointees to the trial bench who actually have tried cases and who believe in juries. The Seventh Amendment is not a partisan cause.

**Restore the original intent of the Federal Arbitration Act.** Exclude employees, consumers, and small businesses from its judicially-expanded coverage. The mechanism to do so, the Arbitration Fairness Act, is ready.<sup>24</sup> Arbitration is a fine dispute resolution mechanism when agreed to after a dispute arises. Mindless enforcement of pre-dispute arbitration clauses found in boilerplate agreements is a shameless abdication of the Constitutional “first duty” of government to provide a mechanism for the peaceful resolution of disputes.<sup>25</sup>

**Restore the power of juries.** Procedural law should be viewed through the lenses of the Seventh Amendment and the analogous respect for citizen decisionmakers shown in virtually all of the state constitutions. The first rule is that the People shall judge.

Summary disposition is appropriate in some cases, but procedural rules should put a fat thumb on the scale in favor of resolution by jury trial. Any summary judgment motion that relies on a list of 250 assertedly uncontested facts is a candidate for trial, not summary disposition by a judge. Disputes about expert testimony should be regarded more as disputes about the weight which it is to be accorded rather than disputes regarding its admissibility.

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<sup>24</sup> See, e.g., Jean R. Sternlight, *Counterpoint: Fixing The Mandatory Arbitration Problem: We Need The Arbitration Fairness Act Of 2009*, 16 NO. 1 DISP. RESOL. MAG., Fall 2009, at 5, also available at <http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1880&context=facpub>; *Arbitration—Congress Considers Bill to Invalidate Pre-Dispute Arbitration Clauses for Consumers, Employees, and Franchisees*. - *Arbitration Fairness Act of 2007*, S. 1782, 110th Cong. (2007), 121 HARV. L. REV. 2262 (2008).

<sup>25</sup> *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.”).

A robust civil justice system, in which citizen decisionmakers play a primary role, is a hallmark of the American experiment. It has faded. A government that cares about working people will restore its luster.