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W(h)ither the Jury? The Diminishing Role of the Jury Trial in Our Legal System

The Honorable Jennifer Walker Elrod*

Thank you for the warm welcome to Lexington and for the privilege of delivering the Eighth Annual Lewis F. Powell, Jr. Distinguished Lecture. I would like to extend special thanks to Patrick Rowe and the Powell Lecture Board for organizing and planning this lecture, Dean Smolla for his hospitality, and the students of Washington and Lee for their ardent academic pursuit and interest in tonight's event. Indeed, students who were interested in the rule of law founded this very lecture series. It is a privilege to be a part of the Powell Lecture Board's devotion to the rule of law, and I am deeply honored to pay tribute to the pragmatic and thoughtful legacy of Justice Powell. While we are on the subject of the Powell Lecture Board, I have with me my law clerk, Jonathon Hance, who co-chaired the Powell Lecture Board from 2007 to 2008. I am very grateful to him for his help and for his willingness to meet me at 4:00 a.m. to travel to Lexington.

This is my first trip to Lexington, yet I feel right at home. Before he became governor of Tennessee, organized a Texas army, defeated Santa Anna at the Battle of San Jacinto, and became the first president of the Republic of Texas, Sam Houston was born right here in Rockbridge County—less than ten miles from this campus.[1] Even though he left for the Tennessee frontier at the age of thirteen, it is hard to imagine a more inspirational birthplace than the Shenandoah Valley of Lexington, Virginia.[2] As a Texan, I am grateful for

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* Circuit Judge, United States Court of Appeals for the Fifth Circuit. This text was delivered as the Eighth Annual Lewis F. Powell, Jr. Distinguished Lecture at Washington and Lee University School of Law on March 31, 2010. I would like to thank my former law clerk, Jonathon Hance, not only for introducing me to the wonderful legal community that is Washington and Lee, but also for his invaluable assistance and tireless research. I would also like to thank my colleague and friend, Judge Rhesa Barksdale, for his personal insights into Justice Powell's gentlemanly manner; Justice Powell's first law clerk, Larry Hammond, for his contributions to this Article; and Archivist John Jacob, for guiding me through the Powell Archives.

1. WILLIAM J. BENNETT & JOHN T.E. CRIBB, THE AMERICAN PATRIOT'S ALMANAC: DAILY READINGS ON AMERICA 71 (2008).

2. *See id.* ("Sam Houston lived a life as big as Texas. Born on March 2, 1793, near Lexington, Virginia, he moved to the Tennessee frontier with his family at age thirteen and soon struck out on his own.").

Lexington's influence on this great hero of my state and the namesake of my city. I must point out, however, that while Sam Houston's birth place here is marked by a 38,000-pound piece of Texas pink granite,[3] his place of death in Texas is marked by a thirty-ton concrete and steel statue in his likeness. At sixty-seven feet tall, it towers over the countryside and can be seen for miles on Interstate 45.[4] Everything is bigger in Texas.

Although I did not have the honor of personally knowing Justice Powell, I am familiar with the vast and impressive body of work that he produced over his long and illustrious career. This work reflects a man of strong character and deeply held convictions: to social justice, to the integrity and accessibility of our courts, and to the highest level of professionalism for the American Lawyer. In short, his work, like the man, reflects the noblest aspirations of our profession. He instructed his law clerks to address every case from the "ground up," and he always strove to get to the root of the issue.[5]

Earlier today, I had the privilege of visiting the Powell Archives. If you have not visited this monumental resource and you are anything but a 1L, you should be ashamed.[6] Justice Powell, both a historian and man who respected the privacy of his colleagues, kept every note except those that revealed the personal thoughts of his colleagues.[7]

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3. *See* JULIA COLBERT, VIRGINIA OFF THE BEATEN PATH: A GUIDE TO UNIQUE PLACES 178 (The Globe Pequot Press 2009) (1986) ("A 38,000-pound piece of Texas pink granite marks the spot at the *Sam Houston Wayside.*"); *see also* ANDREA SUTCLIFFE, TOURING THE SHENANDOAH VALLEY BACKROADS 207 (1999) ("A pink granite boulder brought here from Texas displays a bronze plaque describing Sam Houston's accomplishments.").

4. *See* JUNE NAYLOR, TEXAS OFF THE BEATEN PATH: A GUIDE TO UNIQUE PLACES 134 (Globe Pequot 2006) (1994) ("There's no better testimony to Houston's huge bearing on Texas than the enormous, sixty-seven-foot-tall statue of Sam Houston . . . . Called *A Tribute to Courage*, it's the world's tallest statue of an American hero . . . . [A]rtist David Adickes created the monument from his life-size (6-foot, 6-inch) model . . . .").

5. *See* J. Harvie Wilkinson III, *The Powellian Virtues in a Polarized Age*, 49 WASH. & LEE L. REV. 271, 272 (1992) ("[H]e was conscious of the importance of the facts; he relished the facts; he placed stock in them. The rule of decision was strictly based on the facts of the case then before the Court, with the results of cases with differing facts left for the future.").

6. The Powell Archives include the "The Powell Papers" which "document his legal and judicial careers; military service in World War II, leadership positions in varied civic and professional organizations; and friendships and family relations." *Powell Archives*, Wash. & Lee Univ. Sch. of Law, http://law.wlu.edu/powellarchives (last visited Feb. 16, 2011) (describing the collections held by the Powell Archives) (on file with the Washington and Lee Law Review). "The papers are 363 cu. ft. in extent and span the years 1929–1998." *Id.*

7. *See* John N. Jacob, *Provenance of the Powell Papers*, THE LEWIS F. POWELL, JR. PAPERS: A GUIDE, Sept. 19, 1997, at 26 ("The portions of these papers [include] personal and family correspondence . . . . In December 1989, Powell announced his decision to leave

In addition to his written work, I have been blessed with the friendship and camaraderie of those who had the good fortune to be personally influenced by Justice Powell: his law clerks, colleagues, and friends. Among them is my good friend and fellow judge on the Fifth Circuit, Rhesa Barksdale of Mississippi. Judge Barksdale clerked for Justice White in 1972, the year Justice Powell joined the Supreme Court.[8] By all accounts, Justice Powell was a diligent, hard-working member of the Supreme Court who worked long hours, including every Saturday, at the Court.[9] Even so, as Judge Barksdale has put it, he was always a "true gentleman." Early in 1973, young law clerk Barksdale and his fellow co-clerks for Justice White extended invitations to all the Justices and retired Chief Justice Warren to join them for lunch, one Justice at a time of course. Justice Powell not only accepted the invitation, but in gentlemanly fashion, he reciprocated and invited Justice White's law clerks (including clerk Barksdale), Justice Powell's own law clerks, his two secretaries, and everyone's spouses to his home. Justice Powell was the only Justice to extend such a return invitation. He took to heart General Lee's one rule for the students of W&L: Act like a gentleman at all times.[10]

Washington and Lee continues to embody the honorable tradition that Justice Powell held so dear, one that is certainly evident in your speaking tradition.[11] When one student passes another on campus, it is customary for both to say hello; I have never been so thoroughly greeted in all of my life. And as all of you know, Justice Powell loved W&L.[12] He often spoke to his law clerks about the Fancy Dress Ball and even fretted that the school would, at some point, lose that unique tradition.[13] In fact, Justice Powell was quite the

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his papers to Washington and Lee University (W&L) to be housed in a specially constructed facility at the School of Law.").

8. *See* Sandra Day O'Connor, *A Tribute to Lewis F. Powell, Jr.*, 56 WASH. & LEE L. REV. 4, 6 (1999) ("[Justice Powell] served on the Supreme Court of the United States from 1972 to June 1987. He wrote more than 500 opinions, many very significant.").

9. Conversation between Jennifer Elrod and Judge Rhesa Barksdale, Fifth Circuit Judge (March 2010).

10. *See, e.g.*, EMORY M. THOMAS, ROBERT E. LEE 397 (1995) ("'We have but one rule here, and it is that every student must be a gentleman.'" (internal citations omitted)).

11. *See* UNOFFICIAL, UNBIASED GUIDE TO THE 311 MOST INTERESTING COLLEGES 655 (2005) ("[A] tradition that makes the Washington and Lee campus a friendly place to be is 'the speaking tradition.' Students are urged to greet each other and faculty as they pass by on campus.").

12. *See* Lewis F. Powell III, *A Tribute to Lewis F. Powell, Jr.*, 56 WASH. & LEE L. REV. 9, 9 (1999) ("[H]e dearly loved Washington and Lee, and was always very proud to claim it as his alma mater. He was especially proud of the school's ascension to the ranks of America's elite academic institutions.").

13. *See* Robert M. Couch, *A Tribute to Lewis F. Powell, Jr.*, 56 WASH. & LEE L. REV.

dancer.[14] He carried in his wallet a photo of him dancing with Justice O'Connor, and he often quipped that he was the first Supreme Court Justice to dance with another Justice.[15] Given his love for dance, I am certain that Justice Powell would be happy to know that W&L's oldest social tradition is still in full swing.

The American jury trial is another great tradition, but unlike Fancy Dress and Washington and Lee's mannerly ways, this tradition may be withering away with far more significant consequences. We can trace the importance of the American jury system to the colonial trial of John Peter Zenger and the common-sense jury verdict that spared his fate. In 1735, the colonial governor of New York arrested Zenger, a New York printer, for "seditious libel" following his publication of a column criticizing the governor.[16] During a highly-publicized trial, the judge instructed the jury to determine only whether Zenger had published the critical statements and not whether the statements were actually seditious.[17] The jury, however, upon the urging of Zenger's lawyers, including the famed Andrew Hamilton, determined that the veracity of the statements absolved Zenger of any guilt.[18]

19, 21 n.7 (1999) (noting that Justice Powell reminisced about "leading the opening procession at the Fancy Dress Ball his senior year").

14. *See* O'Connor, *supra* note 8, at 6 ("Lewis was an excellent dancer and I had the privilege of dancing with him several times.").

15. *See id.* (recalling Justice Powell's jocular suggestion for his own tombstone inscription: "Now on my tombstone it will say 'here lies the first Supreme Court Justice to dance with another Justice'" (internal quotation marks omitted)).

16. *See* Elisabeth Zoller, *The United States Supreme Court and the Freedom of Expression*, 84 IND. L.J. 885, 897 n.71 (2009) (noting that the Zenger trial attracted great attention and established "the rule that, in America, the truth of the facts was always reason for exoneration from the liability incurred for seditious defamation" (citing Leonard W. Levy, *Liberty and the First Amendment: 1790–1800*, 68 AM. HIST. REV. 22, 24 (1962))).

17. Jon P. McClanahan, *The 'True' Right to Trial by Jury: The Founders' Formulation and Its Demise*, 111 W. VA. L. REV. 791, 792 (2009).

18. *Id.* at 801. McClanahan explains:

> Andrew Hamilton, Zenger's attorney, conceded that Zenger had published the materials in question, but he nevertheless maintained that the jury should determine whether the materials were libelous; central to Hamilton's argument was that the jury had a right to determine the law. . . . Hamilton argued for more jury involvement to combat a "widespread fear" that a judge's already vast powers were incompatible with a judge also having the sole power to interpret laws. Although the judge did not agree with Hamilton's contentions, he did allow the jurors to return a general verdict, and Zenger was acquitted. An account of the *Zenger* trial was widely published throughout the colonies, and it "became the American primer on the role and duties of jurors."

Id. (citations omitted); *see also* Zoller, *supra* note 16, at 897 n.71 ("Rejecting the judge's instructions, the jury acquitted Zenger.").

Following the momentous *Zenger* verdict, colonists systematically began to use the jury to rebuke and avoid enforcement of English orders.[19] Colonial juries, for instance, often refused to convict colonists for smuggling, and in response, English officials gave customs jurisdiction solely to judges.[20] In addition, Parliament often barred the right to a jury trial or demanded that the jury trial be conducted in England when defining new statutory offenses.[21] This practice, for instance, extended to violations of the Stamp Act and statutes governing imperial trade.[22] Such eviscerations of the jury trial effectively denied colonists the right to trial by a jury of their peers. Colonists' complaints culminated in the Declaration of Independence's rebuke of King George III for depriving colonists "of the benefits of Trial by Jury."[23]

The colonists' outrage over the deprivations of the jury trial is not surprising given Sir William Blackstone's glorification of the jury. Blackstone called the jury trial "'the grand bulwark' of English liberties"[24] and stated that

> [t]he trial by jury has ever been, and . . . ever will be, looked upon as the glory of the English law. . . . It is the most transcendent privilege which any subject can enjoy or wish for, that he cannot be affected, either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals.[25]

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19. James F. Ianelli, *The Sound of Silence: Eligibility Qualifications and Article III*, 6 SETON HALL CIR. REV. 55, 67 (2009).

20. *Id.*

21. *See* Jones v. United States, 526 U.S. 227, 245 (1999) ("Countervailing measures to diminish the juries' power were naturally forthcoming . . . . One such move on the Government's side was a parliamentary practice of barring the right to jury trial when defining new, statutory offenses." (citing Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 925–30 (1926); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 227–29 (Oxford, Clarendon Pr. 1992) (1765))).

22. *Id.* at 245.

23. THE DECLARATION OF INDEPENDENCE, para. 20 (U.S. 1776); *see also Jones*, 526 U.S. at 246 (noting that practice of barring the right to a jury trial "was one of the occasions for the protest in the Declaration of Independence against deprivation of the benefit of jury trial" (citing PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 118 (1997))).

24. *See Jones*, 526 U.S. at 246 ("Identifying trial by jury as 'the grand bulwark' of English liberties, Blackstone contended that other liberties would remain secure only 'so long as this *palladium* remains sacred and inviolate . . . .'"). Blackstone argued that the jury must be safe "'not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience.'" *Id.*

25. Mitchell v. Harmony, 54 U.S. 115, 142–43 (1851) (quoting BLACKSTONE, *supra*

Other contemporaries echoed the importance of the jury. Thomas Jefferson stated, "I consider trial by jury as the only anchor ever yet invented by man, by which a government can be held to the principles of its constitution."[26] To John Adams, "representative government and trial by jury are the heart and lungs of liberty."[27] To Thomas Paine, the civil jury was an extension of a natural right.[28]

The United States Constitution's express grant of the right to trial by jury, however, is perhaps the best testament to the Founding Fathers' veneration of the jury. In the criminal context, Article III states that "[t]he Trial of all Crimes . . . shall be by Jury . . . [and] held in the State where the said Crimes shall have been committed."[29] In addition, the Fifth Amendment mandates indictment by a grand jury,[30] and the Sixth Amendment sets forth requirements for criminal jury trials.[31] And in the civil context, the controversy over the lack

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note 21).

26. Thomas Jefferson, Letter to Thomas Paine, *in* 3 THE WRITINGS OF THOMAS JEFFERSON 71 (Washington, ed., 1861) (1788).

27. *See* Thomas J. Methvin, *Alabama—The Arbitration State*, 62 ALA. LAW. 48, 49 (2001) ("In 1774, John Adams stated: 'Representative government and trial by jury are the heart and lungs of liberty. Without them, we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swines and hounds.'").

28. *See* Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1009 (1992) (noting that "Thomas Paine felt civil juries were an extension of a natural right" (citing 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 316 (Bernard Schwartz ed., 1971))). Jefferson, Adams, and Paine were not alone in their belief that the jury trial is a fundamental aspect of liberty. James Madison stated that "[t]rial by jury in civil cases is as essential to secure the liberty of the people as any one of the pre-existent rights of nature." J. KENDALL FEW, 1 IN DEFENSE OF TRIAL BY JURY 8 (1993). In addition, Alexander Hamilton stated in his Federalist Papers that

> friends and adversaries of the plan and convention, if they agree in 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, that the former regard it as a valuable safeguard to liberty; the later represent it as the very palladium of a free government.

THE FEDERALIST NO. 83, at 521 (Alexander Hamilton) (G.P. Putnam's Sons ed., 1888).

29. U.S. CONST. art. III, § 2, cl. 3.

30. U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .").

31. U.S. CONST. amend. VI. The Sixth Amendment reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id.

of an expressly granted civil-jury-trial right in the original Constitution was a driving force behind the ratification debate and the birth of the Seventh Amendment.[32]

In Pennsylvania, for example, the Anti-Federalists nearly prevented the ratification convention from even occurring "largely because they believed the Federalists were trying to abolish civil juries."[33] Similar sentiment existed in Massachusetts, New Hampshire, Virginia, New York, and Rhode Island.[34] To ensure ratification of the Constitution, the Seventh Amendment, which protects the right to a jury trial in most civil cases at common law, was born.[35]

Justice Powell likewise championed the jury as a "bulwark against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[36] In *Batson v. Kentucky*, for example, he defined for the

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32. *See* Klein, *supra* note 28, at 1009 (noting that "[w]hen the Constitution went to the states for ratification, it met with immediate concern that it inadequately guarded individual liberties, and in particular that in civil causes it did not secure the trial of facts by a jury" (internal quotation marks and citations omitted)). As Klein explains, the states did not share Hamilton's view that the Constitution's silence did not impinge upon the civil jury trial. *Id.* (citing THE FEDERALIST NO. 83, at 516–32 (Alexander Hamilton) (G.P. Putnam's Sons ed., 1888)). "[W]hen Hamilton reflected on the entire range of stated objections to the Constitution, he opined that the one which met with the most success, at least in his state, 'and perhaps in several of the other [s]tates, is that relative to the want of a constitutional provision for the trial by jury in civil cases.'" *Id.* (quoting THE FEDERALIST NO. 83, at 516–17 (Alexander Hamilton) (G.P. Putnam's Sons ed., 1888) (alteration in original)); *see also* Parsons v. Bedford, Breedlove & Robeson, 28 U.S. 433, 446 (1830) ("One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases.").

33. *See* Klein, *supra* note 28, at 1010 & n.20 (noting also that "this sentiment by the Anti-Federalists may not have been for the pure love of individual liberties, so much as a recognition of a populist issue that would serve their goals").

34. *Id.* at 1010.

35. U.S. CONST. amend. VII ("In Suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States . . . ."); *see also* Klein, *supra* note 28, at 1016 ("[T]he ultimate omission of a civil jury guarantee from the draft Constitution became a matter of central debate in the states, and the keystone of opposition to the Constitution. . . . That opposition would ultimately lead to the Seventh Amendment.").

36. Johnson v. Louisiana, 406 U.S. 366, 373 (1972) (Powell, J., concurring) (internal quotation marks omitted) (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)). It is evident that Justice Powell shared Justice White's respect for the criminal jury trial:

> The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic

modern era what the right to a fair and impartial jury means not only for the defendant—whose "life or liberty" may rest in the hands of that deliberative body—but also for the juror, as a participant in the American system of self-governance.[37]

The Supreme Court, in *Batson*, confronted the question of whether the Fourteenth Amendment prevents a prosecutor from striking a juror from the venire based on race.[38] Justice Powell thought that the *Swain*[39] test—which required a defendant to gather evidence on numerous trials unrelated to his own in order to demonstrate a prosecutor's "consistent pattern" of discrimination—was inconsistent "with the promise of equal protection to all."[40] He recognized that the jury "has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge."[41] Racial discrimination in peremptory challenges was antithetical to the right to a trial by jury "composed of the peers or equals of the person whose rights it is selected or summoned to determine."[42] His reasoning persuaded six other members of the Court, including Justice White—the author of the *Swain* opinion that *Batson* reversed.[43]

> reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.

Duncan, 391 U.S. at 156.

37. *See* Batson v. Kentucky, 476 U.S. 79, 87 (1986) ("The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." (citations omitted)).

38. *See id.* at 82 ("This case requires us to reexamine that portion of *Swain v. Alabama* . . . concerning the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury.").

39. Swain v. Alabama, 380 U.S. 202, 224 (1965).

40. *See Batson*, 476 U.S. at 95–96 ("For evidentiary requirements to dictate that several must suffer discrimination before one could object . . . would be inconsistent with the promise of equal protection to all." (internal quotation marks and citations omitted)). Justice Powell also reiterated the Supreme Court's earlier holding that "'a consistent pattern of official racial discrimination' is not 'a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.'" *Id.* at 95 (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 n.14 (1977)).

41. *Id.* at 86 (citing *Duncan*, 391 U.S. at 156).

42. *Id.* at 86 (internal quotation marks and citations omitted).

43. *See id.* at 81 ("Powell, J., delivered the opinion of the Court, in which Brennan,

As later cases recognized, Justice Powell's opinion in *Batson* "was designed to serve multiple ends, only one of which was to protect the individual defendants from discrimination in the selection of jurors."[44] He recognized that racial peremptory strikes deprived not only the defendant of his right to an impartial jury, but also the potential juror of his right of "participation in jury service."[45] This statement by Justice Powell planted the seeds which later flourished in *Powers v. Ohio*.[46] There, the Supreme Court held that the Equal Protection Clause likewise protected the prospective juror from being denied his right to participate in the process of government.[47] The Supreme Court explained that the deprivation of this right struck at the heart of an individual's participation in democracy, as jury service "affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law."[48]

Batson may be the most well-known opinion of Justice Powell that addresses the American jury. His most significant cases dealing with the American jury, however, were decided by the Supreme Court when he had been on the bench less than a year. He cast the final vote in *Apodaca v. Oregon*[49] and *Johnson v. Louisiana*[50]—two companion cases that addressed whether state-law provisions "allowing less-than-unanimous verdicts in certain cases are valid under the Due Process and Equal Protection Clauses of the Fourteenth Amendment."[51]

White, Marshall, Blackmun, Stevens, and O'Connor, JJ., joined.").

44. Powers v. Ohio, 499 U.S. 400, 406 (1991) (internal quotation marks and citations omitted).

45. *See Batson*, 476 U.S. at 87 ("[B]y denying a person participation in jury service on account of his race, the State unconstitutionally discriminate[s] against the excluded juror." (citations omitted)).

46. *See Powers*, 499 U.S. at 406 (recognizing that "[t]he opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system" (citing Duncan v. Louisiana, 391 U.S. 145, 147–58 (1968))).

47. *See id.* at 409 ("We hold that the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life."). "An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race." *Id.*

48. *Id.* at 407 (internal quotation marks and citations omitted).

49. Apodaca v. Oregon, 406 U.S. 404, 406 (1972).

50. Johnson v. Louisiana, 406 U.S. 356, 362 (1972).

51. *Id.* at 358; *see also Apodaca*, 406 U.S. at 404 (affirming the decision that an Oregon law allowing less-than-unanimous jury verdicts to be sufficient for noncapital cases does not violate the right to trial by jury under the Sixth and Fourteenth Amendments).

I have had an opportunity to examine his papers on these cases at the Powell Archives, and I have spoken with his first law clerk, Larry A. Hammond, about them.[52] Here, his notes and correspondence corroborate the reputation of Justice Powell as the "quiet centrist."[53] As was the case in many of his most notable opinions, Justice Powell reserved his vote in *Apodaca* and *Johnson* until the end. His notes from a preliminary vote taken on January 14, 1972, for example, show that Justices Douglas, Brennan, Stewart, and Marshall would reverse and that Chief Justice Burger and Justices White, Blackmun, and Rehnquist would affirm.[54] Perhaps wisely, as the newest Justice, Powell simply "passed," but in doing so, he opened himself up to courting from other Justices.[55] A mere four days after the initial vote, Justice Rehnquist attempted to persuade Justice Powell to adopt a view that the Sixth Amendment was not incorporated to the states by the Fourteenth Amendment in part by referencing a case from 1884 which categorically rejected the notion of incorporation only fifteen years after the adoption of the Fourteenth Amendment.[56]

Despite this friendly courting, however, Justice Powell may have solidified his opinion by January 15, 1972—one day after the initial vote.[57] He wrote that he was "not prepared to say a state may abolish a criminal jury trial" and "would write [a] separate concurring [opinion] expressing reservations as

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52. Unlike other judges who prohibit their law clerks from discussing chambers matters, Justice Powell specifically permitted his clerks to discuss their work so long as they did not discuss the views of other members of the Court.

53. In an article announcing his death, the New York Times recognized Powell's reputation as the "quiet centrist," noting that he "brought a voice of moderation and civility to an increasingly polarized court during his 15-year tenure." Linda Greenhouse, *Lewis F. Powell Jr., Who Became the Quiet Centrist of the Supreme Court, Is Dead at 90*, N.Y. TIMES, Aug. 26, 1998, at 1. Greenhouse goes on to note that Powell was "the balancer and compromiser, a political moderate with an aversion to heated rhetoric and doctrinal rigidity. Neither his colleagues nor lawyers practicing before the court could take his vote for granted." *Id.*

54. Justice Powell, Personal Note, Re: *Johnson v. Louisiana*, 406 U.S. 365 (1972) (Jan. 14, 1972) (on file with the Washington and Lee Powell Archives); Justice Powell, Personal Note, Re: *Apodaca v. Oregon*, 406 U.S. 404 (1972) (Jan. 14, 1972) (on file with the Washington and Lee Powell Archives).

55. Justice Powell, Personal Note, Re: *Johnson v. Louisiana*, 406 U.S. 365 (1972) (Jan. 14, 1972) (on file with the Washington and Lee Powell Archives); Justice Powell, Personal Note, Re: *Apodaca v. Oregon*, 406 U.S. 404 (1972) (Jan. 14, 1972) (on file with the Washington and Lee Powell Archives)

56. Letter from Justice Rehnquist to Justice Powell (Jan. 17, 1972) (referencing *Hurtado v. California*, 110 U.S. 516 (1884)) (on file with the Washington and Lee Powell Archives).

57. Justice Powell, Personal Note, Re: *Johnson v. Louisiana*, 406 U.S. 365 (Jan. 15, 1972) (on file with the Washington and Lee Powell Archives).

to *Duncan* [*v. Louisiana*, 406 U.S. 356 (1972)]."[58] Several months later, Justice Powell did just that.[59]

Also notable is Justice Powell's possible influence on Justice Douglas's dissenting opinion. In a memorandum from Justice Powell to Larry Hammond, Justice Powell sought Hammond's opinion as to whether he should add a footnote in his concurrence rebutting Justice Douglas's characterization of less-than-unanimous jury verdicts as a "totalitarian alternative."[60] Justice Powell noted that,

> this is a curious characterization of a measure adopted by the vote of the people of Oregon in a free election. It also comes to mind that some of the greatest names in the history of this Court—names hardly associated with totalitarian techniques—have shared the view that due process does not require unanimity of jury verdicts. In *Jordan v. Massachusetts*, . . . the opinion to this effect was joined—among others—by then Chief Justice White and Justices Holmes and Hughes. Moreover, the totalitarian analogy hardly seems an apt one as no totalitarian system guarantees the right of jury trial as we know it or, indeed, guarantees anything except the certainty of conviction if this is the will of the state.[61]

Although I do not know precisely what happened next, neither Justice Powell's concurrence nor Justice Douglas's dissent mention the "totalitarian alternative." Perhaps Justice Powell convinced Justice Douglas to modify his opinion.

Aside from the interplay between the Justices, what is striking in the *Apodacca* and *Johnson* cases is the way in which Justice Powell considered incorporation from the ground up.[62] Here, Justice Powell was simultaneously concerned with retaining states' ability to experiment and with ensuring that the right to a jury remained fundamental.[63] In his decisional concurrence, he agreed with the majority that "convictions based on less-than-unanimous jury

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58. *Id.*

59. *See* Johnson v. Louisiana, 406 U.S. 356, 373 (1972) (Powell, J., concurring) ("I find nothing in the constitutional principle upon which *Duncan* is based, or in other precedents, that requires repudiation of the views expressed in *Maxwell* and *Jordan* with respect to the size of the jury and the unanimity of its verdict.").

60. Memorandum from Justice Powell to Mr. Larry A. Hammond re *Johnson* and *Apodacca* (Apr. 3, 1972) (on file with the Washington and Lee Powell Archives).

61. *Id.*

62. *See Johnson*, 406 U.S. at 375 (Powell, J., concurring) ("[I]n holding that the Fourteenth Amendment has incorporated 'jot-for-jot and case-for-case' every element of the Sixth Amendment, the Court derogates principles of federalism that are basic to our system." (quoting Duncan v. Louisiana, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting))).

63. *See id.* ("In the name of uniform application of high standards of due process, the Court has embarked upon a course of constitutional interpretation that deprives the States of freedom to experiment with adjudicatory processes different from the federal model.").

verdicts . . . did not deprive criminal defendants of due process of law under the Fourteenth Amendment."[64] He recognized, however, that "[b]ecause it assures the interposition of an impartial assessment of one's peers between the defendant and his accusers, the right to trial by jury deservedly ranks as a fundamental of our system of jurisprudence." [65] To Justice Powell, the significance of the jury "derives from the special confidence we repose in a body of one's peers to determine guilt or innocence against arbitrary law enforcement."[66] This notion of the jury as the "protector of innocence against the consequences of the partiality and undue bias of judges in favor of the prosecution" was the critical thing, and it remained undiminished by the choice of certain states to permit some formulations of less-than-unanimous jury verdicts.[67]

Nevertheless, although Blackstone, the Founders, and Justice Powell all placed considerable value on the American jury system, the role of the jury as the heart and lungs of liberty is now withering on the vine. The percentage of cases that proceed to trial has long been on the decline.[68] On the civil side, in 1976, approximately eight percent of cases proceeded to trial.[69] By 2000, that percentage had dropped to slightly above two percent.[70] The percentage of criminal cases that were tried has also decreased during the same period. In 1976, approximately fifteen percent of criminal cases were tried to a jury.[71] By 2000, it had fallen to approximately six percent.[72]

This trend has not only influenced the work of our trial courts, but also of the appellate courts. Here in the Fifth Circuit, the reduction of the percentage of civil appeals is due in part to the decrease in civil trials in the district courts, cases which used to be the bread and butter of the court's docket. Since 1985, the overall number of appeals has more than doubled.[73] The decrease in civil

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64. *Johnson*, 406 U.S. at 366 (Powell, J., concurring).

65. *Id.* at 367.

66. *Id.* at 373 (internal quotation marks and citations omitted).

67. *Id.* at 373–74 & 374 n.11 (internal quotation marks and citations omitted).

68. *See* Judith Resnik, *Whither and Whether Adjudication*, 86 B.U. L. REV. 1101, 1126 (2006) (noting that "federal courtrooms have their 'lights on'—meaning lit for at least two hours a day—about half of the time").

69. Patrick E. Higginbotham, *Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?*, 55 S.M.U. L. REV. 1405, 1409 & chart 2 (2002).

70. *Id.*

71. *Id.*

72. *Id.*

73. *See* TABLE OF NEW APPEALS DOCKETED BY CASE TYPE—1984–1985 (noting that parties filed 2,915 total appeals—1,058 criminal and 1,857 civil—during the court year from

trials combined with the minimal increase in civil appeals and the considerable increase in criminal appeals, however, has significantly shifted the court of appeals' criminal-to-civil case ratio.[74] Twenty-five years ago, our docket was comprised of approximately two-thirds civil cases and one-third criminal.[75] Today, the reverse is true: Approximately two-thirds of our appeals are criminal and one-third are civil.[76]

My personal experiences also reflect this trend. On more than one occasion, I have spoken with a federal district court judge who has gone for more than a year without presiding over a single civil-jury trial. There are proposals pending that would require judges to share courtrooms because there is a view that judges may not need them every day.[77] Jury trials have decreased in the state court system as well.[78] Just last year, Harris County, one of the largest counties in the United States and where I happened to serve as a trial judge, converted one of its regular civil courts to a family court because the demand for non-family civil trials had fallen so significantly.

The disappearance of the jury trial, however, is not indicative of a less-litigious society. Rather, many of these would-be jury trials have disappeared into the vortex that is Alternative Dispute Resolution (ADR). ADR can be more efficient and achieve better results in some cases, but it is not a one-size-fits-all panacea.

While ADR advertises itself to be cheaper and faster, this may not be the case. When I served as a trial judge, my practice was to give anyone a trial in forty-five days for the mere cost of a filing fee. Similarly, the median time from hearing to final disposition of criminal matters in the Fifth Circuit is just over one month.[79] With increased discovery in arbitration, on the other hand,

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1984 to 1985) (on file with the Washington and Lee Law Review); TABLE OF NEW APPEALS DOCKETED BY CASE TYPE AS OF 6/20/10 (noting that parties filed 7,337 total appeals—5,143 criminal and 2,194 civil—during the court year ending June 20, 2010) (on file with the Washington and Lee Law Review). *See generally* Jennifer Walker Elrod, *Forward*, 42 TEX. TECH L. REV. 549, 549 (2010).

74. Elrod, *supra* note 73, at 549.

75. *Id.*

76. *Id.*

77. *See* Tony Mauro, *Federal Judges May Start Sharing Courtrooms*, LEGAL TIMES, Sept. 17, 2008, http://www.law.com/jsp/article.jsp?id=1202424565603 (last visited Feb. 16, 2011) ("Federal trial judges may start doubling up to reduce the need for courtroom space at a time when budgets are tight and fewer cases go to trial.") (on file with the Washington and Lee Law Review).

78. *See* G. Thomas Munsterman & Shaua Strickland, *The Vanishing Trial*, 19 THE CT. MANAGER 50, 51 (2004) (noting a 15% decline in criminal jury trials and a 32% decline in civil jury trials from 1992 to 2002 in the twenty-two states reporting).

79. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS:

both the length and the relative cost of such proceedings have increased in recent years.[80]

There are also other costs associated with ADR. For example, arbitration proceedings are often more likely to conclude in "split the difference" results which are often unsatisfactory to both parties.[81] When Solomon proposed to "split the baby," he had no intention of cutting the infant in half.[82] But most practitioners believe that this happens far too often in arbitration.[83] Moreover, when things go wrong, there is no mechanism to correct the decision.[84] Repeatedly, parties would appear before me when I was a trial judge and argue that an arbitration award should not be confirmed because the arbitrator failed to follow the law. One time, a party even argued that he was denied the right to have an attorney present at the arbitration because he missed the deadline for designation of his attorney. In each of these instances, the court was unable to grant any relief due to the deferential standards used by courts in confirming arbitration awards.[85] In addition, there are other systematic costs associated with ADR that we should not overlook. The secrecy of the proceedings provides insufficient data points to guide the outcome of future disputes and creates a limited, and often insufficient, record of precedent for appellate

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ANNUAL REPORT OF THE DIRECTOR, MEDIAN TIME INTERVALS IN MONTHS FOR MERIT TERMINATIONS OF APPEALS ARISING FROM THE U.S. DISTRICT COURTS, BY CIRCUIT DURING THE 12-MONTH PERIOD ENDING JUNE 30, 2010 (2010) (on file with the Washington and Lee Law Review). For cases not receiving oral argument, the median time from submission of the appeal to a panel and final disposition is only less than nineteen days. *Id.*

80. *See* Richard Chernick, *E-Discovery Threatens to 'Litigize' Arbitration*, THE RECORDER, Apr. 16, 2010, http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202448121439 (last visited Feb. 16, 2011) ("The key problem in commercial arbitration . . . is that it has become as costly and almost as slow as litigation. The main culprit has been identified as discovery cost and abuse.") (on file with the Washington and Lee Law Review).

81. *See* David S. Steuer, *A Litigator's Perspective on the Drafting of Commercial Contracts*, *in* DRAFTING CORPORATE AGREEMENTS 459, 467 (Practising Law Institute 2010) (noting that "[c]ommon wisdom suggests that arbitrators tend to 'split the difference' in deciding disputes").

82. 1 *Kings* 3:16–28 (New International Version).

83. *See* Steuer, *supra* note 81, at 467 ("Common wisdom suggests that arbitrators tend to 'split the difference' in deciding disputes . . . .").

84. *See id.* (noting that "[o]ften, defendants prefer arbitration over litigation, although lately even defendants have begun to question the unreviewable nature of arbitration").

85. *See, e.g.*, Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 584–85 (2008) (stating that *Wilko v. Swan*, 346 U.S. 427 (1953), stands for the general proposition that courts will not review arbitral awards); *see also* 9 U.S.C. § 10 (2006) (enumerating the limited grounds upon which an arbitral award may be vacated).

review. Furthermore, secret trials do little to foster public confidence in the rule of law.[86]

There is pushback; some lawyers are advising clients to take arbitration clauses out of their agreements and are even taking them out of their own contracts:

> [L]itigators are starting to find the quicker, cheaper, more private aspects of arbitration have turned into lengthy, expensive and often public quasi-trials. This has a growing number of attorneys advising clients to either take their chances in court or tailor very specific arbitration clauses with the hopes of limiting the expense of arbitration.[87]

Nevertheless, change is a "slow-moving process,"[88] and we must recognize that we did not reach this point overnight. The progression has taken years, and the reasons for the decreasing use of the jury system are myriad. Although the increasing role of arbitration is certainly a factor, as numerous articles have recognized, we must be wary of making arbitration the scapegoat for many of the courts' own failures and delays that have certainly tarnished the efficiency of the traditional legal system. This was evident in the case of *Huss v. Gayden*,[89] which the Fifth Circuit heard last year.[90]

More than ten years ago, Barbara Huss and her husband filed a medical malpractice lawsuit.[91] She had been given Terbutaline during her pregnancy, and she developed cardiomyopathy, pulmonary edema, and congestive heart failure, which endangered her life and necessitated frequent and continual medical treatment.[92] At issue in the suit was whether there was a link between

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86. *See* Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 492 (2006) ("Unlike publicly available court decisions, unpublished arbitral awards do not communicate public values or educate the community about the underlying law.").

87. Gina Passarella, *Litigators Losing Love of Arbitration Argue for Trials*, LEGAL INTELLIGENCER, Sept. 1, 2010, http://www.law.com/jsp/article.jsp?id=1202471400934 (last visited Feb. 16, 2011) (on file with the Washington and Lee Law Review).

88. *See id.* (noting that transitioning favor from arbitration to trial is a "slow moving process" because "litigators are rarely consulted when corporate attorneys are drafting contracts").

89. Huss v. Gayden, 571 F.3d 442 (5th Cir. 2009); *see also generally* Huss v. Gayden, 465 F.3d 201 (5th Cir. 2006); Huss v. Gayden, 508 F.3d 240 (5th Cir. 2007); Huss v. Gayden, 991 So. 2d 169 (Miss. 2008).

90. I note here that my remarks about *Huss v. Gayden* are not to the merits of the case, but rather are confined to the procedural history and the time-frame involved.

91. *See Huss*, 571 F.3d at 444 (noting that the medical malpractice diversity suit was filed on June 30, 2000).

92. *Id.* at 444–45, 448.

Terbutaline and her condition.[93] Her case was tried before a jury, and the jury awarded her $3.5 million.[94] The victory was short lived. The defendants appealed, and a panel majority reversed and rendered, holding that the litigation had been barred by the statute of limitations.[95] The Husses requested rehearing en banc, which was denied in 2006.[96] However, the panel granted rehearing *sua sponte* and withdrew its opinion.[97] Eleven months later, the panel issued a certified question regarding the statute of limitations to the Mississippi Supreme Court,[98] and the Mississippi Court found the statute of limitations defense to be without merit.[99]

The panel then issued a decision in favor of the defendants on yet another ground—the district court had improperly excluded a defense witness's testimony on specific causation, despite the district court's belief that the expert lacked the scholarship and experience necessary to opine that Terbutaline did not weaken Huss's heart.[100] A petition for rehearing followed, which the court denied.[101] Now, ten years after the start of litigation, the parties are still awaiting a new trial on the merits of the case. In his opinion on the denial of rehearing en banc, my colleague, Judge Patrick Higginbotham, lamented this result, stating that "trials of civil cases are disappearing in federal courts. Litigation is fleeing the courts. Much is written about this phenomenon and why it is occurring. To those students I say: [R]ead this case."[102]

Unfortunately, malaise has set in within the legal community about protecting the jury system. Lawyers are often the first to tell people "how to get out of jury duty." In fact, I have overheard judicial law clerks, who work in the courts every day, saying that they "don't want to bother people" by calling them for jury duty. I am likewise dismayed at the public's lack of response to the jury summons. The Harris County district clerk recently reported that "only 20 percent of those summoned for jury service actually respond or report to

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93. *Id.* at 444–45.

94. *Id.* at 444.

95. *See* Huss v. Gayden, 465 F.3d 201, 204 (5th Cir. 2006) ("Because we hold that the Husses' claims are barred by limitations, we do not address causation, exclusion of the defense expert's testimony, or any of the other issues raised in this appeal.").

96. Huss v. Gayden, No. 04-60962, 2006 WL 5013195, at *1 (5th Cir. Dec. 27, 2006).

97. *Id.*

98. Huss v. Gayden, 508 F.3d 240, 241–42 (5th Cir. 2007).

99. Huss v. Gayden, 991 So. 2d 162, 168–69 (Miss. 2008).

100. *See Huss*, 571 F.3d at 455–56 ("We hold that the exclusion was reversible error, and defendants are entitled to a new trial on this basis.").

101. Huss v. Gayden, 585 F.3d 823, 823–24 (5th Cir. 2009).

102. *Id.* at 832–33.

serve."[103] And even judges sometimes do their part to keep civil cases from the jury. Parties are banished to mandatory mediation, or if the case goes to trial, scheduling is often unclear, cases may be cancelled, and issues of law potentially remain undecided for years. This is a far cry from Justice Powell's sentiment that the trial by jury, especially in criminal cases, "deserves to be defended and maintained."[104]

If after all this you say, so what—what do I care? I say you should care because if you dream of being a litigator, you may need a new dream. Your generation's experience in the practice of law will be shaped by a reality in which civil jury trials are becoming the rare exception rather than the rule. The lack of jury trials has killed off a great many of those "interesting-lawyer jobs" which have not already been lost due to the recession. Gone are most opportunities to be a modern-day Clarence Darrow,[105] or even—lowering the bar quite a bit—an Ally McBeal[106] or even a Lionel Hutz.[107] What we used to call trial lawyers in Texas are now a dying breed. When I was a law student, I interviewed at a large, Texas-based law firm. I said that I wanted to be a "litigator." The corner-office partner responded, "Litigation is what lawyers do on the east coast to keep out of court. What you want to be is a 'Texas Trial Lawyer.'" Unfortunately, today I can assure you that Texas law firms are filled with litigators.

In addition, lack of experience may make you risk averse to even try a case. If you get to the point where you are a partner, you are expected to know how to try a case. If you have never tried a case, or perhaps only tried one, however, you probably would be ill-prepared for trial and you certainly don't want anyone to find out that you have no idea how to pick a jury. So you might be tempted to settle when you should not.

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103. Loren Jackson, *Reporting for Jury Service Matters*, HOUSTON CHRON., Sept. 13, 2009, http://www.chron.com/disp/story.mpl/editorial/outlook/6617164.html (last visited Feb. 16, 2011) (on file with the Washington and Lee Law Review).

104. *See* Lewis F. Powell, Jr., *Jury Trial of Crimes*, 23 WASH. & LEE L. REV. 1, 10–11 (1966) (noting that although "[a]ppropriate steps are indeed long overdue to assure genuinely fair selection of jurors and impartial administration of justice, . . . in accomplishing needed administrative reforms care must be exercised to preserve the jury system itself").

105. Famed defense attorney who defended teacher John Scopes in "The Scopes Monkey Trial." *See* Scopes v. Tennessee, 289 S.W. 363, 367 (Tenn. 1927) (reversing John Scopes's conviction under the Tennessee Anti Evolution Act, 1925 Tenn. Pub. Acts, ch. 27 for teaching evolution in a Tennessee public school).

106. Fictional television lawyer from *Ally McBeal* (Fox TV series, 1997–2002).

107. Fictional television lawyer from *The Simpsons* (Fox animated TV series, 1989–2010).

With ever increasing frequency, I now counsel young lawyers who are eager to experience the thrill of a jury trial to go to the district attorney's office, the U.S. attorney's office, or the public defender's office, as they are not going to get trial experience otherwise. These diminished civil opportunities have rendered trial litigation a lost art, as firm lawyers often see their first jury in their fourth or fifth years, if at all. By that point, the opportunity to garner valuable experience has passed. And as a consequence of this lack of training, I have witnessed dismal performances by law firm partners who lack the skills necessary to persuasively communicate to a jury. Indeed, in one employment case that I heard as a trial judge, an attorney at a major civil law firm had great difficulty getting any of her exhibits into the record. She could not overcome the most basic hearsay objection for what should have been business records. The next day she came in prepared and promptly got all of her exhibits admitted. She apologized to me for the previous day's delay saying, "I am sorry, your Honor. I have never actually had to get an exhibit admitted. I always get summary judgment." And she was a partner.

This situation, however, is not without remedy. A renewed commitment by lawyers and judges to the rule of law and to the jury can make a difference. Increased use of technology can also help. A little known fact is that Justice Powell single-handedly increased the efficiency of the Supreme Court. Prior to Justice Powell's time on the Court, every preliminary draft of every opinion had to be printed by the Supreme Court print shop prior to circulation.[108] He had come from a law firm and was used to big law firm amenities.[109] Instead of using an expensive and time-consuming print shop to print draft opinions for circulation, Justice Powell pioneered the use of "cut-and-paste" (with scissors and glue).[110] He would cut out an insert, paste it into a draft opinion, photocopy it, and then circulate the modified opinion to the Court.[111] During my visit to the Powell Archives, I actually witnessed, first hand, the "cut-and-paste" efficiencies of Justice Powell.

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108. *See* JOHN C. JEFFRIES, LEWIS F. POWELL, JR. 270 (2001) (noting that before Justice Powell's arrival, "Justices either had their drafts and memos set in type and printed or relied on onionskin carbon copies known as 'flimsies'").

109. *See id.* ("[Justice Powell's] three law clerks seemed a sufficient number to the Justices who had long worked with two, but to Powell, fresh from managing a large team of partners and associates at Hunton & Williams, it seemed a distressingly small staff.").

110. *See, e.g.*, Justice Powell, Draft Opinion, Re: *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (showcasing Justice Powell's cut and paste method) (on file with the Washington and Lee Powell Archives).

111. The files at the Lewis F. Powell, Jr. Archives at Washington and Lee University School of Law are full of examples of Justice Powell's cut-and-paste draft opinions.

He recognized that the value of an opinion is increased when it reaches parties in time for them to reap the benefits of this resolution. At the Fifth Circuit, we have recently followed Justice Powell's example, and in 2010 we implemented an electronic filing system, and now we also internally circulate most of our opinions electronically. This is a far cry from the print shop or even cut-and-paste.

Trial judges should also follow in his model by taking responsibility to make jury trials more efficient in terms of both cost and time. In addition, judges can keep pre-trial costs down by taking seriously their responsibility to monitor each case. Not every case requires a special master to copy every hard drive. Judges must be diligent to set trials quickly and prevent parties from saddling cases with endless delay. They must also ensure that once a trial begins, it ends in a timely manner. Most can be resolved within forty-five days, and all but the most complex case can be tried in 180 days.[112]

Courts must also do their part to make jury service a more enjoyable experience. It is critically important for courts to respect both the time and financial resources of jurors. For example, courts can minimize unwanted intrusions upon a juror's time by allowing them to check in online and by ensuring jurors that they will serve a maximum of one day or, if selected, one trial. This prevents the often painful experience many jurors face when they are called back to the courthouse day after day only to sit in an empty room for eight hours with nothing to do. Courts should also consider heightened reimbursements for travel and other expenses if a juror is asked to serve for multiple days. Texas, for example, reimburses jurors six dollars for the first day of service and forty dollars for each additional day.[113] In addition, courts should provide jurors with free transportation to the courthouse or money for parking. Meals and comfortable accommodations can also add much to the experience. Indeed, Washington and Lee is quite the example; I was delighted to see signs advertising free pizza and marking reserved juror parking spots for the school's mock trial tournament. Thank you for making it easy for your jurors to serve.

Education is also of utmost importance—especially for young people. Justice O'Connor is blazing a trail with "iCivics," a "web-based education project designed to teach students civics and inspire them to be active

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112. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS: ANNUAL REPORT OF THE DIRECTOR, U.S. DISTRICT COURTS—LENGTHS OF CIVIL AND CRIMINAL TRIALS COMPLETED, BY DISTRICT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2009 181–83 (2009) (on file with the Washington and Lee Law Review).

113. TEX. GOV'T CODE ANN. § 61.001 (West 2009).

participants in our democracy."[114] iCivics, originally known as "Our Courts," launched its first online civics games, *Do I Have A Right?* and *Supreme Decision* in August 2009, and it recently released *Argument Wars*—an online simulation where players argue landmark Supreme Court cases.[115] In addition to video games, iCivics hosts an interactive website where students can ask Justice O'Connor questions and express their opinions about civic participation.[116] If we are to preserve the jury, we must follow Justice O'Connor's example and educate the public about the importance of jury duty, and we must do so in entertaining and engaging ways. Moreover, we must strive to correct any public misconception that the courts are overworked and backlogged. As I did with a law clerk candidate this week, when the myth of backlogged courts is raised as a reason for forsaking the jury, we must correct them.

If we fail to purposefully guard and defend the jury, we risk losing one of America's greatest traditions and protectors of our liberty—the indispensable barrier between the liberties of the people and the prerogatives of the government.[117] We should always remember that inconveniences suffered by the jury trial pale in comparison to the lamentable loss of freedom and justice that would accompany the elimination of this institution. As Blackstone stated over 200 years ago,

> [h]owever *convenient* these [new and arbitrary methods of trial] may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent

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114. ICIVICS, *What is iCivics?*, http://www.icivics.org/about (last visited Feb. 16, 2011) (on file with the Washington and Lee Law Review).

115. *See* ICIVICS, *Games*, http://www.icivics.org/games (last visited Feb. 16, 2011) ("In *Argument Wars*, you will try out your persuasive abilities by arguing a real Supreme Court Case. In *Do I Have A Right?*, you'll run your own firm . . . specializ[ing] in constitutional law. In *Supreme Decision*, you help cast the deciding vote.") (on file with the Washington and Lee Law Review).

116. *See* ICIVICS, *Talk to the Justice*, http://www.icivics.org/forum (last visited Feb. 16, 2011) (allowing students to post questions for Justice O'Connor) (on file with the Washington and Lee Law Review).

117. *See* Lewis v. United States, 518 U.S. 322, 335 (1996) ("Blackstone . . . described the right to trial by jury as a 'strong . . . barrier . . . between the liberties of the people and the prerogative of the crown.'" (quoting BLACKSTONE, *supra* note 21, at 349–50)).

> may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concerns.[118]

Likewise, over 150 years ago, Alexis de Tocqueville recognized that "[t]he institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority [and] invests the people, or that class of citizens, with the direction of society."[119] By losing the jury, we may lose something far greater than simply a mechanism of resolving disputes between parties. A new generation of lawyers, judges, and citizen jurors must be educated and empowered to preserve the jury system as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people.

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118. *See* United States v. Booker, 543 U.S. 220, 244 (2005) (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343–44 (1769)).

119. Powers v. Ohio, 499 U.S. 400, 407 (1990) (quoting 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 334 (1st ed., 1961)).