1-1-1990

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The Role of the Civil Jury in a System of Private Litigation

George L. Priest†

This paper attempts to examine critically the role of the civil jury by determining what functions it actually serves in the American system of justice. The civil jury is an institution of distinctive importance in American society. The United States employs the lay jury to adjudicate civil claims to an extent far greater than any other modern nation. And because our rules provide jury election to either litigant, the civil jury defines the substance of liability for all civil disputes: directly, for cases litigated to judgment; and through potential recourse, for cases settled out of court. Moreover, beyond its utility as an instrument of claims resolution, the civil jury occupies a central political role in our democratic society. The civil jury is widely viewed as establishing a critical popular counterforce to governmental control of law enforcement and engendering a sense of citizenship and commitment to the rule of law.

Yet, despite the civil jury’s administrative and political importance, there has been little critical joinder in recent years over either the civil jury’s direction or the magnitude of its duties. There has been widespread approval of the civil jury as an institution for claims adjudication. The particular features of the jury’s composition—12 persons, lay citizens, chosen randomly from the population—are frequently invoked to justify the civil jury as the institution best suited to resolve particularly vexing legal disputes. But there has been little attention given to whether the types of disputes that the civil jury actually faces correspond to the types of disputes for which this method of decisionmaking is most appropriate, and equally little attention to the broader implications of delegating all civil disputes to juries in our increasingly litigious times.

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Similarly, virtually all of the literature evaluating the jury concedes its importance as a democratic institution of government. The constitutional delegation to lay citizens of the authority to define the implementation of civil and criminal justice is viewed as closely allied to the right to vote as popular control of the law. Yet, although the role of the criminal jury in protecting citizens from the arbitrary exercise of governmental power has received extensive study, the political role of the civil jury has been largely neglected. There has been little careful analysis of the extent to which the civil jury is called upon to resolve disputes involving the exercise of governmental power. As a consequence, we possess only a dim understanding of the relative importance of the civil jury among our society's political institutions.

The absence of rigorous analysis stems from an extraordinary national consensus on the merits of the civil jury. Both the administrative and political roles of the civil jury have been celebrated since the earliest years of the Republic. Over the past quarter century, however, support for the civil jury has become nearly unanimous. In large part, the overwhelming modern belief in the importance of the civil jury can be attributed to the influential work of the University of Chicago Jury Project led by Harry Kalven and Hans Zeisel. In its time, the Kalven-Zeisel Jury Project was the most ambitious empirical study of jury decisionmaking that had ever been attempted. As a result of their extensive empirical analysis, the authors claimed that the civil jury was a superior institution for adjudicating disputes involving complex societal values, that the jury served as an important instrument of popular control over law enforcement, and that the jury brought a superior sense of social equity to the decisionmaking process. Indeed, the authors interpreted their empirical findings to confirm simultaneously each of these assertions. Kalven and Zeisel discovered from judicial polls that judges agreed on outcomes reached by both civil and criminal juries in roughly 80 percent of the cases and disagreed in

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1 For discussions of criminal jury nullification, see Harry Kalven, Jr., and Hans Zeisel, *The American Jury* 310-12 (Little, Brown & Co., 1966).
3 For a bibliography of the Chicago Jury Project, see Kalven & Zeisel, *The American Jury* at 541-46.
Kalven and Zeisel interpreted this 80 percent agreement as confirming evidence of the overall aptitude of lay jury decisionmaking, and interpreted the 20 percent disagreement as confirming evidence of the jury's role as a democratic counterforce to state authority. In addition, Kalven and Zeisel found that civil juries awarded damages that were, on average, 20 percent greater than judicial awards. They interpreted this as confirming evidence of the jury's comparatively greater sense of equity. Clothed in Harry Kalven's brilliant rhetoric, conclusions such as these removed the civil jury from the range of criticism for more than a generation.

The success of the Kalven-Zeisel defense of the civil jury has been so complete that, despite a great increase in sophisticated analysis of other legal institutions over the past quarter century, critical focus on the civil jury has remained diffused. Analysis of the civil jury has consisted of little more than inspection at the edges of what is accepted as a largely perfected institution. For example, the most important modern research on the jury addresses issues such as whether jury size should be 12 or a number slightly less or how to refine jury representativeness. To date, the strongest form of jury "criticism" has been the supposition that there may exist some limited set of cases involving exceptional scientific complexity that would exceed the capacity of lay jurors. These questions are not insignificant, but they presuppose without question that the jury will continue to perform almost exactly the functions that it performs today. Thus modern jury research falls far short of a fundamental reexamination characteristic of research

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* Kalven & Zeisel, *The American Jury* at 58 (cited in note 1); Kalven, 50 Va L Rev at 1064-65. Kalven and Zeisel never attempted to explain their incredible finding of nearly equivalent judge-jury agreement in civil and criminal cases. The finding suggests either a deeper interactive relationship between judge and jury or some peculiar feature of judicial responses to the questionnaires.


10 See, for example, Harry Kalven's description: "The jury is almost by definition an exciting and gallant experiment in the conduct of serious human affairs...." Id at 1055.


12 Id at 49-57.

13 This literature is reviewed in Paul Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U Chi Legal F 33.
on judicial decisionmaking\textsuperscript{14} or on the political roles of equivalent institutions, such as the legislative or executive branches.\textsuperscript{15} Indeed, as a consequence of the Kalven-Zeisel triumph, modern literature on the civil jury resembles less a careful empirical scrutiny than a form of aspirational mythology, describing society's hopes for the civil jury more than what the jury's role actually is or has been.

It is not obvious that an institution as fundamental as the civil jury should command a position of such critical invulnerability. Three decades ago, as Kalven and Zeisel were beginning the Chicago Project, they detected more serious concerns about the civil jury's modern role. From their earliest empirical inquiries, Kalven and Zeisel saw that the institution of the civil jury was heavily implicated in the pressing problem of court congestion and litigation delay. Kalven and Zeisel feared that public concern about delay in the administration of justice would generate proposals to take cases away from the civil jury.\textsuperscript{16} Anticipating this challenge, they addressed their first extended study to the problem of delay,\textsuperscript{17} and concluded that litigation delay could be eliminated—without impairing the role of the jury—if courts both were expanded and were to institute comprehensive management reforms.\textsuperscript{18} Their program was doubly successful. Their proposals for court expansion and case management reform have been implemented broadly throughout the country during the last three decades.\textsuperscript{19} In addition, criticism of the civil jury as a contributing source of litigation delay has been largely suppressed.\textsuperscript{20} The dominant modern ap-


\textsuperscript{15} See, for example, Jose Edgardo L. Campos, Legislative Institutions, Lobbying, and the Endogenous Choice of Regulatory Instruments: A Political Economy Approach to Instrument Choice, 5 J L Econ & Org 333 (1989).


\textsuperscript{17} Hans Zeisel, Harry Kalven, Jr., and Bernard Buchholz, Delay in the Court (Little, Brown & Co., 1959).

\textsuperscript{18} See, generally, id; Zeisel, 328 Ann Am Acad Pol & Soc Sci 46. For further discussion of the Kalven-Zeisel-Buchholz analysis of delay, see text accompanying notes 86-93. I previously reviewed their reform proposals in George L. Priest, Private Litigants and the Court Congestion Problem, 69 BU L Rev 527, 528-29 (1989).

\textsuperscript{19} For the history of attempted reforms to reduce congestion in the Illinois courts, see Priest, 69 BU L Rev at 544-48. For other reform proposals, see National Center for State Courts, On Trial: The Length of Civil and Criminal Trials 65-83 (1988).

\textsuperscript{20} See, for example, the studies of court delay by the National Center for State Courts ("NCSC"), which only briefly consider the existence of the civil jury as a contributing source of litigation delay. NCSC, Examining Court Delay: The Pace of Litigation in Twenty-Six Urban Trial Courts, 1987 23-25 (1989) (dismissing the jury as a source of delay on grounds
ROLE OF THE JURY

...proach toward the court congestion problem attributes differences in delay across jurisdictions to differences in "established expectations, practices, and informal rules of behavior of judges and attorneys..."' local legal culture,"' cultures that, in all jurisdictions, accept the institution of the civil jury as beyond question.

Yet, despite the widespread acceptance and adoption of the Kalven-Zeisel proposals for case management reform, the problem of civil litigation delay has not disappeared. Indeed, in most urban jurisdictions, it has progressively worsened. There are strong reasons to believe that litigation delay is endemic to civil jury litigation and cannot be substantially resolved by either massive increases in the judiciary or draconian amendments to case-management procedures. Thus the role of the civil jury in modern law enforcement, as well as the link between the jury and litigation delay, compels modern reexamination.

This paper begins that effort with an empirical examination of the types of disputes the civil jury actually faces in a modern urban trial court: the Cook County, Illinois, civil courts from 1959 through 1979. As we shall see, the dominant understanding of the justifiable role of the civil jury—as an institution for the resolution of disputes involving complex societal values and as a popular democratic counterforce—describes very few of the actual tasks of the modern civil jury. At the most basic level, these descriptions of the jury are seriously incomplete. Both portray the civil jury as an institution to which our society consciously delegates the resolution of a particular set of disputes. This view, however, ignores the fact that in the American system of civil litigation disputes are chosen for jury resolution less by conscious constitutional or legislative mandate than by default when private litigants are unable to settle their disputes prior to trial. There is a growing literature showing the importance of the private, decentralized litigation-

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that there is no clear relationship across jurisdictions between delay and the percent of total cases reaching juries). For a description of the economic determinants of the extent of delay across jurisdictions, see Priest, 69 BU L Rev at 537-39.

21 NCSC, Pace of Litigation at 53-54.

22 Id at 44, table 7 (showing increases in tort filing-to-disposition time in ten of 16 urban jurisdictions from 1976-87). See also the comment of Cook County, Illinois Chief Judge Harry G. Comerford to the Cook County Board that "he needs 130-140 new courtrooms, at a cost as high as $500 million, and 50-60 more judges because of mushrooming caseload..." Charles Mount, "Collar Counties Cutting Court Backlogs," Chicago Tribune C1 (May 30, 1989). I am grateful to Geoffrey P. Miller for this information.

23 See, generally, Priest, 69 BU L Rev 527 (describing economic forces creating court congestion equilibrium). For further discussion, see text accompanying notes 93-107.
settlement process to the selection of those disputes ultimately tried to juries in America. 24

Of course, state and federal constitutions and statutes define the broad set of disputes available for civil jury resolution. But, in our society, no more than three to four percent of civil claims are ever tried to juries. 25 It is an important question whether the most dominant determinant of the administrative and political role that the civil jury actually plays is the common and statutory law defining the universe of disputes, or the private parties that select from that universe the three or four percent of cases acutally tried to juries. The modern literature on the civil jury is innocent of this perspective.

Part I of this Article reviews the modern literature on the role of the jury, attempting to define with greater specificity those disputes for which the civil jury has been regarded as a superior adjudicator or for which the civil jury serves an important political purpose. Part II examines the extent to which civil juries in Cook County, Illinois actually served these functions during the two decades between 1959 and 1979. Part III, then, describes the influence of private party litigation-settlement decisions on the functions that the civil jury is called upon to serve, and explains why the promiscuous delegation of all potential civil litigation to the jury is the most likely source of continuing civil trial delay. This review implies that there are few defensible grounds upon which to support unlimited recourse to a jury for all civil litigation and, conversely, strong grounds upon which to conclude that the quality of civil justice in America would be dramatically improved by sharp restrictions on civil jury jurisdiction.

I. THE FUNCTIONS BEST SERVED BY THE CIVIL JURY

In the long history of discussion about the relative merits of judge versus jury decisionmaking in civil litigation, 26 there is widespread consensus that the institution of the jury is particularly appropriate for the resolution of two sets of cases: those involving damage measurements that implicate complex societal values, and

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24 See, for example, George L. Priest, Selective Characteristics of Litigation, 9 J Legal Stud 399 (1980); George L. Priest and Benjamin Klein, The Selection of Disputes for Litigation, 13 J Legal Stud 1 (1984). Much of this literature is reviewed in Robert D. Cooter and Daniel L. Rubinfeld, Economic Analysis of Legal Disputes and Their Resolution, 27 J Econ Lit 1067 (1989).

25 Priest, 69 BU L Rev at 540, Table 1 (cited in note 18).

26 See sources cited in notes 1 and 2.
those with overt political content, pitting the government against an individual citizen in the context of civil liability.

Harry Kalven's discussion of the civil jury as an adjudicative institution has been particularly prominent. Kalven defined the tasks appropriate for the civil jury by reverse inference: by inquiring which legal issues are best decided by an institution whose principal characteristics are that it is composed of 12 lay citizens, chosen randomly from the population, called together to decide one case and then dispersed. According to Kalven, the civil jury is essential because some disputes will necessarily arise where the application of "the community sense of values" is especially important. Lay citizens, untrained in law, bring to such decisions a closer "feel of the community" and of its standards. Indeed, the professional training and consequent discipline of a trial judge might be counterproductive for such disputes. More generally, a lay jury may be far more able than a judge to apply societal values in such a manner as to add flexibility to the application of the law. A jury, unlike a judge or legislature, can "legislate interstitially," particularly with respect to questions involving complex value judgments.

Other institutional features of the civil jury serve complementary purposes. Random selection of jurors, rather than the selection of volunteers or of community leaders, ensures that diverse aspects of community sensibility will be considered. In addition, the representative character of the jury, combined with the procedure that calls for its members to terminate their judicial duties and return to their normal positions in society, allows the jury to deflect societal criticism that might otherwise be damagingly concentrated on a continuously sitting judge. In this way, the jury acts as a "lightning rod for animosity and suspicion" of socially necessary, but troubling, judgments. Finally, a jury of 12 introduces greater common sense to the decisionmaking process be-

27 Kalven, 19 Ohio St L J at 161 (cited in note 4); Kalven, 50 Va L Rev at 1058, 1061-68 (cited in note 4).
28 Id. at 161.
29 Id; Kalven, 50 Va L Rev at 1058.
30 Id; Kalven & Zeisel, The American Jury at 8 (cited in note 1).
31 Id at 8-9.
32 Id; Kalven, 19 Ohio St L J at 161.
33 Moreover, 12 persons are less corruptible than one person. Kalven, 50 Va L Rev at 1062.
34 Id.
35 Id; Kalven & Zeisel, The American Jury at 7 (cited in note 1).
cause the judgment of 12 persons is generally superior to the judgment of a single person.\textsuperscript{37}

Kalven’s general view that jury decision is most appropriate for issues involving complex societal values has been elaborated by Guido Calabresi in his prominent book, \textit{Tragic Choices}.\textsuperscript{38} A tragic choice to Dean Calabresi is a selection, sometimes compelled in a complex society, from among alternatives all of which are difficult or impossible according to some widely accepted moral vision.\textsuperscript{39} For example, the allocation of an insufficient number of kidney dialysis machines compels a tragic choice because the assignment of the machine to one patient necessarily implies the otherwise unacceptable decision to allow other patients to die from renal failure.\textsuperscript{40}

Dean Calabresi argues that the lay jury is a particularly appropriate institution for making tragic decisions of this nature.\textsuperscript{41} Calabresi regards the civil jury as prototypical of what he calls a “decentralized,” “representative,” “discontinuous,” “responsible” agency;\textsuperscript{42} on these grounds, it possesses an authority and a decisionmaking freedom unavailable to other adjudicative institutions. The jury is decentralized because it is composed of laypersons; it is societally representative because its members are chosen randomly; it is discontinuous because it disbands after rendering a single decision; and it is responsible because it gives no reasons for its decisions and cannot be overruled absent gross error. Dean Calabresi argues that these features in combination allow the civil jury to render decisions in tragic circumstances in a way impossible for professional, continuous, or more formally responsible governmental institutions.

The jury’s representativeness and lack of responsibility . . . [are] the source of the characteristic and powerful way in which the jury operates . . . [and] why certain decisions are committed to it . . . Juries apply societal standards without ever telling us what these standards are, or even that they exist. This is especially important in those

\textsuperscript{37} Kalven, 50 Va L Rev at 1067; Kalven & Zeisel, \textit{The American Jury} at 8. Kalven’s formulation has had exceptional influence on the current understanding of the role of the jury. See, for example, Fleming James, Jr., and Geoffrey C. Hazard, Jr., \textit{Civil Procedure} 428-29 (Little, Brown & Co., 3d ed 1985) (adopting in its entirety the Kalven formulation of the justification of the civil jury).

\textsuperscript{38} Guido Calabresi and Philip Bobbitt, \textit{Tragic Choices} (W.W. Norton & Co., 1978).

\textsuperscript{39} Id at 17-19.

\textsuperscript{40} Id at 186-89.

\textsuperscript{41} Calabresi & Bobbitt, \textit{Tragic Choices} at 57-64.

\textsuperscript{42} Id.

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situations in which the statement of standards would be terribly destructive.43

According to these views, which kinds of disputes should the civil jury be deciding in modern society? Despite Professor Kalven’s helpful general theory of civil jury responsibility, he unfortunately never provided a list of more specific tasks. Kalven claimed vaguely that the civil jury’s “feel of the community” and sensitivity to social situations was important for its determination of what actions constituted ordinary negligence.44 On similar grounds, he defended jury definitions of substantive liability in defamation disputes, presumably because a jury could better evaluate the impact of a defamatory statement on a litigant’s reputation within the community.45

Kalven gave greater attention to the civil jury as an institution for measuring damages. He admitted that most personal injury damages calculations consisted of routine summing of the basic damages elements: medical expenses, lost income and pain and suffering. He strongly argued, however, that decision by civil jury was needed where any of these elements implicated a complex societal value judgment.46 He claimed, for example, that the calculation of pain and suffering damages in disfigurement cases required a feel of the community and a sensitivity to social situations.47 He also emphasized other cases in which the calculation of economic loss might be inherently difficult—such as where the victim had no market earnings—giving as examples a housekeeper48 or a child. A jury’s unique sensitivity would be desirable, for example, in a case where a child had been killed and the normal standard for wrongful death awards—loss of support—might seem inappropriate.49

Dean Calabresi’s treatment of the role of the civil jury adds some greater precision to this definition. Calabresi’s best and most frequent example of the defensible role of the lay jury—the allocation of kidney dialysis machines—is today most commonly served by special juries convened to advise hospitals compelled to allocate such machines, not by civil trial juries. But Calabresi’s emphasis on the special role of the lay jury in rendering decisions in “tragic”

43 Id at 57.
45 Id at 1071.
46 See, generally, Kalven, 19 Ohio St L J at 160-61 (cited in note 4).
47 Id at 161.
48 Id.
49 Kalven, 19 Ohio St L J at 167-69.
circumstances seems to express more carefully what Professor Kalven had in mind when he referred to the jury’s role in decisions involving “complex value judgments,” where application of the “community sense of values” is important. An illustration of the Kalven-Calabresi point is the calculation of pain and suffering damages for victims who have suffered catastrophic loss. Here the calculation of dollars for purposes of a civil judgment necessarily implicates an evaluation of the “value” of life or of some substantial portion of life. In such cases, it may well be argued that a civil jury is superior institutionally to a judge because the judgment is made by a group of lay citizens with discontinuous existence, acting without formal responsibility. Kalven’s examples of the social judgments inherent in calculating the value of lost productivity to housekeepers or children are closely consistent with this interpretation.

In this view, the civil jury is a superior adjudicative institution for defining liability and evaluating damages in contexts implicating complex or conflicting societal values. Many aspects of the work of a factfinder in civil litigation require judgments that are in some sense difficult, either because there is no empirical or conceptual basis for them, such as judgments about pain and suffering, or because they involve projections into the future, such as estimates of future lost income or future medical costs. According to the Kalven-Calabresi approach, however, it is not the difficulty of a judgment per se that commends the institution of the civil jury, but the appropriateness of resolving the difficult judgment by the application of broad societal values. Where broad or conflicting societal values are implicated, the convening of a democratic institution such as a civil jury may be especially important.

The second function of the civil jury—as a democratic counterforce to state authority—has received less attention. Of course, the criminal jury is relatively more important than the civil jury in this capacity, since the criminal jury is the chief bulwark protecting citizens from arbitrary or unlawful state prosecution. The civil jury might be expected to serve a complementary function, however, first in suits in which the government exercises authority through civil litigation—such as condemnation actions—and, second, where the government is a defendant in suits brought by citizens claiming to have been harmed by governmental action. Indeed, this role of the civil jury has surely increased over

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60 Id at 161.
time as the governmental immunities have been waived or re-
stricted and as courts have expanded opportunities for citizens to
sue for due process violations. Probably of greatest modern signifi-
cance are suits claiming damages for false arrest, false imprison-
ment or assault by a law enforcement officer. In contexts such as
these, the democratic features of jury selection provide a forum in
which the civil jury’s determination of the appropriateness of lia-
ability and the measurement of damages can discipline and con-
strain arbitrary or unlawful behavior by government employees or
agencies.

The final function attributed to the civil jury—also the most
vague and least amenable to precise analysis—is the role of civil
jury service in educating citizens about the operation and impor-
tance of the rule of law. The celebration of the jury’s role in
achieving this end derives from Tocqueville, who, summing up his
study of Democracy in America, concluded that “the main reason
for the practical intelligence and the political good sense of the
Americans is their long experience with juries in civil cases.”51
Tocqueville’s admiration for civil jury service was unbounded:
civil juries . . . instill some of the habits of the judicial mind into
every citizen”; “[spread] respect for the courts’ decisions and for
the idea of right throughout all classes”; “teach men equity in
practice”; “make all men feel that they have duties toward society
and that they take a share in government”; and “are wonderfully
effective in shaping a nation’s judgment and increasing its natural
lights.”52

Since Tocqueville, the importance of the civil jury’s role in ed-
ucating citizens has been endorsed by virtually all commentators,53
indeed, even by those seemingly hostile to the jury.54 Some have
complained that this education of the citizenry comes at too high a
cost in terms of the lost productivity of sitting jurors,55 but the
point does not contest the existence of educative benefits. More-
ever, Kalven studied the reaction of jurors themselves to jury ser-

51 Tocqueville, Democracy in America at 275 (cited in note 2).
52 Id at 274-75.
53 See, for example, Charles P. Curtis, The Trial Judge and the Jury, 5 Vand L Rev
150, 157 (1952).
54 See Dale W. Broeder, The Functions of the Jury: Facts or Fictions?, 21 U Chi L Rev
386, 419-21 (1954) (accepting educative role, but arguing that it comes at the expense of
litigants who deserve professional judgments). Note, however, that Broeder’s criticism of the
jury appears disingenuous; the article is written as a devil’s advocate exercise to summon all
possible criticisms of the jury. Broeder was a prominent contributor to the University of
Chicago Jury Project.
vice and found that, despite lost wages and occasional complaints
about inefficient administration, civil jury service was "very often a
major and moving experience in the life of the citizen-juror."116

The next part presents empirical evidence describing how
these various justifications for civil jury decisionmaking correspond
to the actual role of the jury in modern civil adjudication.

II. WHAT THE CIVIL JURY ACTUALLY DOES

The following tables report the work of the Cook County, Illi-
nois (Chicago metropolitan area) civil jury courts from 1959 to
1979. The data were compiled from the *Cook County Jury Verdict
Reporter*, a weekly newsletter describing all cases tried to juries in
the Cook County courts.57 The tables in sections A and B report
both total numbers of cases and total juror time in days for specific
civil casetypes. The trial length calculation includes the time re-
quired for jury deliberation; I am not able to distinguish trial from
deliberation time. Section C addresses the significance of jury ser-
vice as a civic experience. To my knowledge, there are no studies of
comparable detail describing the civil jury caseload nor relative ju-
ror time by casetype.

Some aggregate figures suggest the magnitude of civil jury re-
sponsibilities. For the 21-year period of the sample, jurors resolved
16,984 cases. These cases required jurors to sit, in aggregate,
769,188 juror days. At 250 working days per year, civil jurors in
Chicago spent well over 3000 working years (on average, 142 juror
working years per year) adjudicating civil disputes.

A. The Civil Jury's Burden in Cases Implicating Complex
or Conflicting Societal Values

Table 1 reports all casetypes from the sample that might be
characterized as involving damages issues requiring the jury to
evaluate complex or conflicting societal values. Column 1 presents
the categories of underlying injuries and column 2, the aggregate
number of such cases resolved by civil juries over the period. Col-

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57 The data were collected by the author with support from the RAND Corporation's
Institute for Civil Justice. For a detailed description of the data, see Mark Peterson and
George L. Priest, *The Civil Jury: Trends in Trials and Verdicts, Cook County Illinois,
58 The full sample includes 17,478 cases. Cases dismissed or resolved by motion after a
jury was convened are excluded.
Column 3 shows average trial length in days for each injury category. Column 4 presents the aggregate time jurors spent on such cases, and column 5 calculates time as a percentage of aggregate juror investment.

Rows 1 and 2 describe libel and slander cases in the Chicago courts, cases that Harry Kalven thought particularly appropriate for civil jury resolution because of juror sensitivity to the effect of the defendant's act on the plaintiff's reputation in the community. Column 5 shows that, over the 21-year period, jurors devoted .17 percent and .09 percent of time, respectively, to the resolution of libel and slander cases.

Rows 3-22 describe cases sent to juries involving serious personal injury short of death, where setting a dollar amount for the loss might implicate a societal judgment on either the value of life or of some significant feature of life. Rows 3 and 4 present cases involving catastrophic injury, and rows 5 and 6, permanent brain damage and permanent total disability. Rows 7-12 describe cases in which the victim suffered some form of amputation or loss of an eye; rows 13-16, paralysis; rows 17-18, skull and neck fractures; rows 19-21, head and facial scars and cuts; and row 22, burns over significant body areas. Rows 23-27 report death actions, and row 28, actions for loss of consortium.

Column 3 of the Table shows that almost all categories of cases implicating complex damages calculations required an average trial length substantially longer than the 3.8 day mean for the sample as a whole. Row 3, for example, shows that in cases in which the claimant was rendered quadriplegic, mean trial length was 12.7 days, more than three times greater than the sample average. Cases involving hemiplegic victims (row 4) required 8.8 days on average, less time than for quadriplegics, yet still more than twice the sample average. These relationships are consistent with the general expectation that, presuming liability issues to be randomly associated with injury severity, cases compelling the calcula-

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59 The underlying data report only the dates that trial began and that the jury verdict was rendered. I report the difference. This method exaggerates the length of part-day trials. I attempted to adjust for the reporting problem by subtracting separately one and two days from each case. The relative proportions of time for the various case categories reported in Tables 1 through 5 are not substantially affected by these adjustments.

60 Kalven, 50 Va L Rev at 1071.

61 For each case, the injury listed was described as the most serious injury that the plaintiff suffered.
### Table 1: Juror Time in Damages Cases Involving Complex Values
**Cook County, Illinois, 1959-79**

<table>
<thead>
<tr>
<th>Injury</th>
<th># Cases</th>
<th>Mean Trial Length, Days</th>
<th>Total Juror Days</th>
<th>Percent of Grand Total</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>All Cases</strong></td>
<td>16,984</td>
<td>3.8</td>
<td>769,188</td>
<td>100.00</td>
</tr>
<tr>
<td>(1) Libel</td>
<td>24</td>
<td>4.7</td>
<td>1,344</td>
<td>.17</td>
</tr>
<tr>
<td>(2) Slander</td>
<td>18</td>
<td>3.3</td>
<td>720</td>
<td>.09</td>
</tr>
<tr>
<td><strong>Personal Injury:</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(3) Quadriplegic</td>
<td>17</td>
<td>12.7</td>
<td>2,592</td>
<td>.34</td>
</tr>
<tr>
<td>(4) Hemiplegic</td>
<td>5</td>
<td>8.8</td>
<td>528</td>
<td>.07</td>
</tr>
<tr>
<td>(5) Perm. Brain Damage</td>
<td>128</td>
<td>8.7</td>
<td>13,416</td>
<td>1.74</td>
</tr>
<tr>
<td>(6) Perm. Total Disab.</td>
<td>67</td>
<td>7.4</td>
<td>5,988</td>
<td>.78</td>
</tr>
<tr>
<td>(7) Amput. Arm</td>
<td>17</td>
<td>10.6</td>
<td>2,160</td>
<td>.28</td>
</tr>
<tr>
<td>(8) Amput. Hand</td>
<td>14</td>
<td>7.6</td>
<td>1,284</td>
<td>.17</td>
</tr>
<tr>
<td>(9) Amput. Leg</td>
<td>37</td>
<td>9.9</td>
<td>4,380</td>
<td>.57</td>
</tr>
<tr>
<td>(10) Amput. Foot</td>
<td>5</td>
<td>5.8</td>
<td>348</td>
<td>.05</td>
</tr>
<tr>
<td>(11) Loss, 1 Eye</td>
<td>65</td>
<td>6.3</td>
<td>4,908</td>
<td>.63</td>
</tr>
<tr>
<td>(12) Loss, 2 Eyes</td>
<td>10</td>
<td>10.4</td>
<td>1,248</td>
<td>.16</td>
</tr>
<tr>
<td>(13) Paralysis Arm</td>
<td>14</td>
<td>6.6</td>
<td>1,116</td>
<td>.15</td>
</tr>
<tr>
<td>(14) Paralysis Hand</td>
<td>5</td>
<td>9.2</td>
<td>552</td>
<td>.07</td>
</tr>
<tr>
<td>(15) Paralysis Leg</td>
<td>3</td>
<td>6.7</td>
<td>240</td>
<td>.03</td>
</tr>
<tr>
<td>(16) Paralysis, 2 Legs</td>
<td>6</td>
<td>4.3</td>
<td>312</td>
<td>.04</td>
</tr>
<tr>
<td>(17) Fracture, Head</td>
<td>287</td>
<td>5.0</td>
<td>17,172</td>
<td>2.23</td>
</tr>
<tr>
<td>(18) Fracture, Neck</td>
<td>54</td>
<td>5.1</td>
<td>3,312</td>
<td>.43</td>
</tr>
<tr>
<td>(19) Scarring, Head</td>
<td>29</td>
<td>39.3</td>
<td>13,680</td>
<td>1.78</td>
</tr>
<tr>
<td>(20) Scarring, Face</td>
<td>151</td>
<td>3.5</td>
<td>6,276</td>
<td>.82</td>
</tr>
<tr>
<td>(21) Facial Cut</td>
<td>353</td>
<td>3.3</td>
<td>13,932</td>
<td>1.81</td>
</tr>
<tr>
<td>(22) Burn, Entire Body</td>
<td>24</td>
<td>6.2</td>
<td>1,776</td>
<td>.23</td>
</tr>
<tr>
<td>(23) Death, Child</td>
<td>152</td>
<td>4.8</td>
<td>8,772</td>
<td>1.14</td>
</tr>
<tr>
<td>(24) Death, Housekeeper</td>
<td>5</td>
<td>5.4</td>
<td>324</td>
<td>.04</td>
</tr>
<tr>
<td>(25) Death, Student</td>
<td>9</td>
<td>3.8</td>
<td>408</td>
<td>.05</td>
</tr>
<tr>
<td>(26) Death, Retiree</td>
<td>5</td>
<td>2.4</td>
<td>144</td>
<td>.02</td>
</tr>
<tr>
<td>(27) Death, Unemployed</td>
<td>1</td>
<td>6.0</td>
<td>72</td>
<td>.01</td>
</tr>
<tr>
<td>(28) Loss Consortium</td>
<td>248</td>
<td>5.1</td>
<td>15,192</td>
<td>1.98</td>
</tr>
</tbody>
</table>

Source: Derived by author from Cook County Jury Verdict Reporter.
tion of damages for injuries that have seriously disrupted a life are likely to require more time for trial and jury deliberation than cases involving more routine injuries.

Though average juror time was substantially greater than the average for all cases, column 5 of the Table shows that, for almost all injury and death casetypes, the aggregate proportion of juror time was relatively small. For example, civil jurors spent only .34 percent of total juror time in quadriplegia cases (row 3) and .07 percent in hemiplegia cases (row 4). Among the injury categories, the greatest proportion of juror time was spent in cases involving claims of head fractures (2.23 percent, row 17), facial cuts (1.81 percent, row 21), scarring of the head (1.78 percent, row 19), and permanent brain damage (1.74 percent, row 5).

Rows 23-27 show cases involving the deaths of individuals without market incomes. As described earlier, Harry Kalven believed that the civil jury was superior to a judge for calculating damages in these cases because it could better define society’s views of the “value” of the victims’ productivity losses. Though Kalven only applied the analysis to cases involving the death of housekeepers and children, I have broadened the category to include all victims without market incomes.

Row 23 indicates that, over the 21-year period, juries heard 152 cases involving deaths of children, requiring 8772 juror days, equal to 1.14 percent of total juror time. Row 24 shows that, over this period, juries decided only five cases involving the death of housekeepers, equivalent to .04 percent of total juror time. Rows 25-27 indicate that civil juries spent .05 percent of time adjudicating cases involving the death of students; .02 percent, the death of retirees; and .01 percent (due to rounding up), the death of persons unemployed. Finally, row 28 describes cases involving claims of loss of consortium, included because of the complicated societal judgment implicated in valuing damage to a relationship. The 248 consortium cases over the period required 15,192 juror days, equal to 1.98 percent of total juror time. This figure, however, is surely an exaggeration, since consortium actions are usually joined with the action of the principal victim. I am unable to determine how

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81 See text at notes 46-49; Kalven, 19 Ohio St L J at 161, 167-69 (cited in note 4).
82 My expanded definition may be too broad. Note that cases involving the death of retirees (row 26) require on average only 2.4 days, less than the average for the sample as a whole. Though such individuals lacked market incomes at the time of death, previous market experience may preclude the necessity of making complex value judgments about the economic loss suffered by dependents in cases involving the death of children or housekeepers.
much of trial or deliberation time was allocated to the consortium count.

The striking feature of Table 1, of course, is the relatively small amount of aggregate juror time devoted to cases involving complex or conflicting damages value judgments. Again, the data presented in Table 1 were selected to correspond most faithfully to the casetypes that Kalven and Calabresi suggested might implicate complex or conflicting societal values, those casetypes for which the special characteristics of the civil jury—nonprofessional, representative, discontinuous, and responsible—are most justified. Yet the civil jury in Chicago was required to spend more than one percent of its aggregate time for only six of the 28 categories of the Table. Undoubtedly, the small numbers of cases reported in column 2 reflect—fortunately—that the underlying numbers of catastrophic or serious personal injuries that occur in society are small. In addition, of course, the more precisely individual case categories are disaggregated, the smaller individual percentages will appear (though see Tables 2 and 5). Yet even adding all of the case categories in Table 1 together (though some are overinclusive), civil juries spent 15.88 percent of their time on cases potentially implicating complex or conflicting damages value judgments.

If cases involving complex societal values comprise a relatively small proportion of the civil jury caseload, where does the jury spend its time in damages determination? Table 2 presents those injuries for which damages determinations required the greatest percentage of juror time. The injury categories are arranged in descending order of the magnitude of juror days. I report all individual injury categories requiring more than two percent of aggregate juror time.

Row 1 shows that the injury category on which jurors spent the greatest aggregate time was a single broken leg. Over the 21-year period, 1184 cases were tried to civil juries in which a single broken leg was the most serious claimed injury, requiring 60,936 juror days (equal to 244 juror years), comprising 7.92 percent of total juror time.

Row 2 shows that whiplash cases were actually more numerous than single broken leg cases (1739 cases), but required slightly less aggregate juror time: 60,216 juror days (241 juror years), equal to

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44 Of course, not all catastrophic injuries nor deaths to non-market participants will generate litigation.

45 Again, I report for each case only the most serious injury claimed by the plaintiff.
Table 2: Juror Time in Most Frequent Damages Cases, Complex Values
Cook County, Illinois, 1959-79

<table>
<thead>
<tr>
<th>Injury</th>
<th># Cases</th>
<th>Mean Trial Length, Days</th>
<th>Total Juror Days</th>
<th>Percent of Grand Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Cases</td>
<td>16,984</td>
<td>3.8</td>
<td>769,188</td>
<td>100.00</td>
</tr>
<tr>
<td>(1) Fracture, 1 leg</td>
<td>1,184</td>
<td>4.3</td>
<td>60,936</td>
<td>7.92</td>
</tr>
<tr>
<td>(2) Whiplash</td>
<td>1,739</td>
<td>2.9</td>
<td>60,216</td>
<td>7.83</td>
</tr>
<tr>
<td>(3) Strain, back</td>
<td>1,007</td>
<td>3.0</td>
<td>36,780</td>
<td>4.78</td>
</tr>
<tr>
<td>(4) Strain, neck</td>
<td>899</td>
<td>3.2</td>
<td>34,356</td>
<td>4.47</td>
</tr>
<tr>
<td>(5) Fracture, back</td>
<td>588</td>
<td>4.9</td>
<td>32,784</td>
<td>4.26</td>
</tr>
<tr>
<td>(6) Fracture, 1 arm</td>
<td>475</td>
<td>4.1</td>
<td>23,028</td>
<td>2.99</td>
</tr>
<tr>
<td>(7) Fracture, head</td>
<td>287</td>
<td>5.0</td>
<td>17,172</td>
<td>2.23</td>
</tr>
<tr>
<td>(8) Fracture, 1 foot</td>
<td>322</td>
<td>4.2</td>
<td>16,044</td>
<td>2.09</td>
</tr>
</tbody>
</table>

Source: Derived by author from Cook County Jury Verdict Reporter.
7.83 percent of the Chicago civil jury's total workload. The remaining rows show that other fracture cases as well as cases involving neck and back strains were also voluminous. The only potentially serious injury among the group is head fractures (row 7), which required 2.23 percent of total juror time.

The disaggregated character of the focus on individual specific injuries in Tables 1 and 2, however, disguises broader features of the allocation of juror time. In Table 3, I have attempted to aggregate specific case categories into more generic injury types to present a broader perspective on civil jury damages calculation. Rows 1-10 in Table 3 present summaries of cases where the damages calculation might be thought to implicate complex or conflicting societal values, and rows 11-16, truly routine damages categories.

Row 1, for example, adds together the case categories of the sample dealing with the necessity of evaluating reputation within the community. It shows that libel and slander cases in aggregate comprised .26 percent of total juror time. Row 2 shows a summary of cases involving catastrophic injury, including quadriplegia and hemiplegia, cases in which the victim was rendered comatose, and in which there were claims of permanent brain damage or permanent total disability. In aggregate, catastrophic injury cases required slightly less than 3 percent of total juror time.

Rows 3-6 extend substantially beyond the injury categories reported in Table 1 to attempt to dispel concerns that the categories listed earlier were underinclusive of cases implicating complex or conflicting societal values. Row 3 shows all cases involving a claim of either amputation of any body part or loss of an organ. Row 4 shows claims of paralysis to any portion of the body; row 5, all head or neck fractures; and row 6, all claims involving scars or cuts to the head or face. Of course, individuals will interpret differently the meaning of "complex and conflicting societal values," but the figures listed here must be overestimations. For example, it is not clear that Harry Kalven's view of the important role of the civil jury as a "lightning rod for animosity," or Guido Calabresi's advocacy of the importance of the civil jury in contexts of tragic judgments, would be extended to the jury resolutions of the 82

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46 Whiplash reported in row 2 is a neck and back strain suffered in a rear-end accident. The neck and back strains reported in rows 3 and 4 were suffered in non-rear-end accident contexts.

47 Row 5 includes the head fractures reported at Table 2, row 7.

## Table 3: Juror Time in Damages Cases—Summary, Cook County, Illinois, 1959-79

<table>
<thead>
<tr>
<th>Injury</th>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
<th>(4)</th>
<th>(5)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Injury</td>
<td># Cases</td>
<td>Mean Trial Length, Days</td>
<td>Total Juror Days</td>
<td>Percent of Grand Total</td>
</tr>
<tr>
<td>All Cases</td>
<td>16,984</td>
<td>3.8</td>
<td>769,188</td>
<td>100.00</td>
<td></td>
</tr>
<tr>
<td>Complex Values:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(1) Libel, slander</td>
<td>42</td>
<td>4.1</td>
<td>2,064</td>
<td>.26</td>
<td></td>
</tr>
<tr>
<td>(2) Quad., hem., perm. damage</td>
<td>217</td>
<td>8.6</td>
<td>22,524</td>
<td>2.93</td>
<td></td>
</tr>
<tr>
<td>(3) Amput. or loss, any body part</td>
<td>304</td>
<td>6.7</td>
<td>24,276</td>
<td>3.16</td>
<td></td>
</tr>
<tr>
<td>(4) Paralysis, any body part</td>
<td>44</td>
<td>6.6</td>
<td>3,468</td>
<td>.45</td>
<td></td>
</tr>
<tr>
<td>(5) Head or neck fractures</td>
<td>341</td>
<td>5.0</td>
<td>20,484</td>
<td>2.66</td>
<td></td>
</tr>
<tr>
<td>(6) Head or face scars or cuts</td>
<td>747</td>
<td>4.7</td>
<td>41,940</td>
<td>5.45</td>
<td></td>
</tr>
<tr>
<td>(7) Nerve damage, any body part</td>
<td>194</td>
<td>4.1</td>
<td>9,576</td>
<td>1.24</td>
<td></td>
</tr>
<tr>
<td>(8) Burn entire body</td>
<td>24</td>
<td>6.2</td>
<td>1,776</td>
<td>.23</td>
<td></td>
</tr>
<tr>
<td>(9) Death all non-mkt.</td>
<td>172</td>
<td>4.7</td>
<td>9,720</td>
<td>1.26</td>
<td></td>
</tr>
<tr>
<td>(10) Loss consortium</td>
<td>248</td>
<td>5.1</td>
<td>15,192</td>
<td>1.98</td>
<td></td>
</tr>
<tr>
<td>Total rows 1-10</td>
<td></td>
<td></td>
<td></td>
<td>19.62</td>
<td></td>
</tr>
<tr>
<td>Truly Routine Damages:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(11) Fractures*</td>
<td>3,686</td>
<td>4.3</td>
<td>189,228</td>
<td>24.60</td>
<td></td>
</tr>
<tr>
<td>(12) Strains, sprains</td>
<td>2,405</td>
<td>3.1</td>
<td>89,064</td>
<td>11.58</td>
<td></td>
</tr>
<tr>
<td>(13) Whiplash</td>
<td>1,739</td>
<td>2.9</td>
<td>60,216</td>
<td>7.83</td>
<td></td>
</tr>
<tr>
<td>(14) Bruises</td>
<td>1,204</td>
<td>2.9</td>
<td>42,084</td>
<td>5.47</td>
<td></td>
</tr>
<tr>
<td>(15) Cuts**</td>
<td>412</td>
<td>3.3</td>
<td>16,416</td>
<td>2.13</td>
<td></td>
</tr>
<tr>
<td>(16) Dislocations</td>
<td>194</td>
<td>4.4</td>
<td>10,020</td>
<td>1.30</td>
<td></td>
</tr>
<tr>
<td>Total rows 11-16</td>
<td></td>
<td></td>
<td></td>
<td>52.91</td>
<td></td>
</tr>
</tbody>
</table>

*Not including head and neck fractures
**Not including head and facial cuts

Source: Derived by author from Cook County Jury Verdict Reporter.
cases among those of row 3 involving amputation of a finger or a finger-digit, or of the 14 cases of row 4 involving claims of shoulder paralysis.

Row 3 shows that, in aggregate, all claims regarding amputation of a body part or loss of an organ required 3.16 percent of juror time. Row 4 indicates that paralysis cases, in sum, required .45 percent of civil jury time, and row 5, that head and neck fractures required 2.66 percent. Row 6 shows that the more voluminous category of scars or cuts to the head and face required 5.45 percent of juror time.

Row 7 presents all cases involving any claim of nerve damage. Again, this category is surely overinclusive of issues involving complex or conflicting societal evaluations; over 20 percent of juror time in nerve damage cases, for example, involved claims of some form of nerve damage to one hand or one arm. Nerve damage cases, in aggregate, required 1.24 percent of total juror time. Rows 8-10 reproduce figures from Table 1 for serious burns (.23 percent), deaths to non-market participants (1.26 percent), and loss of consortium (1.98 percent).

Finally, below row 10, I have added the proportion of jury time spent on all of the injury categories that might conceivably implicate complex or conflicting societal values with respect to damages calculation. Again, this total acknowledges that the categories have been defined overinclusively to sketch the outer bound of juror responsibility for complex value determinations. In sum, jurors in Chicago spent 19.62 percent of time on complex value damages judgments.

By contrast, rows 11 through 16 present the time spent by the civil jury determining damages at the other end of the injury spectrum: truly routine injuries. For consistency, these categories, too, were expanded beyond the categories of the single most frequent injuries presented in Table 2. Thus, row 11 includes—besides the leg, back, arm and foot fractures of Table 2—all cases involving bone fractures other than of the head and neck. Similarly, row 12 includes all strains and sprains; row 14, all bruises; row 15, all cuts except for cuts to the head and face, and row 16, all dislocations. Row 13, for convenience, reproduces the whiplash results from Table 2.

This half of the Table shows that civil juries spent 24.60 percent of time measuring damages in fracture cases, over one and one-quarter as much time as the total for rows 1-10. Row 12 shows that jurors spent 11.58 percent of time in cases in which strains or sprains were the most serious reported injury. Indeed, if the whip-
lash total (row 13) is added to the total for strains and sprains, the sum is only slightly less (19.41 percent) than the total for all injuries arguably implicating complex value judgments. The remaining rows show that Chicago juries spent large amounts of time on even more routine injuries: 5.47 percent evaluating bruises; 2.13 percent on cuts; and 1.30 percent on dislocations.

This Table shows that the civil jury in Chicago spent overwhelming portions of its time evaluating truly routine injuries. To focus the comparison, the civil jury spent 12 times as much time on bruises as on paralysis, and about four times as much on strains and sprains as on all catastrophic injuries. The civil jury spent more time on cases in which the most serious claimed injury was a dislocation than on all cases involving death to non-market participants. The most frequently litigated injury, fractures, required 96 times as much time as libel and slander; 55 times as much as paralysis; 19 times as much as death to non-market participants; eight times as much as catastrophic injury; and seven times as much as amputation of a body part or loss of an organ.

Compare in aggregate the two ends of the injury spectrum: the civil jury spent 19.62 percent of its time in damages evaluations arguably involving complex or conflicting societal values. In contrast, adding together all cases reported in rows 11-16, the civil jury spent 52.91 percent of its time on routine injuries.

B. The Civil Jury’s Burden in Cases Implicating Governmental Power

This section addresses the work of the civil jury in terms of the substantive liability decisions it is called upon to make. As described above, the second principal justification of the civil jury is its role, like that of the criminal jury, as a democratic counterforce to the state in actions that implicate the exercise of governmental power. Though there has been little effort in the civil jury literature to specify precisely the character of disputes for which the civil jury might serve this role, I have attempted in Table 4 to collect all cases fitting this description. Rows 1-4 present all cases involving direct exercise of the police power. In rows 5-12, I expand the definition of governmental power to include all cases in which some governmental unit was a party to the litigation.
Table 4: Juror Time in Governmental Power Cases
Cook County, Illinois, 1959-79

<table>
<thead>
<tr>
<th>Casetype</th>
<th># Cases</th>
<th>Mean Trial Length, Days</th>
<th>Total Juror Days</th>
<th>Percent of Grand Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Cases</td>
<td>16,984</td>
<td>3.8</td>
<td>769,188</td>
<td>100.00</td>
</tr>
<tr>
<td>(1) Malicious prosecution</td>
<td>39</td>
<td>3.3</td>
<td>1,536</td>
<td>.20</td>
</tr>
<tr>
<td>(2) False arrest</td>
<td>102</td>
<td>3.4</td>
<td>4,200</td>
<td>.55</td>
</tr>
<tr>
<td>(3) False imprisonment</td>
<td>8</td>
<td>3.6</td>
<td>348</td>
<td>.05</td>
</tr>
<tr>
<td>(4) Assault by police</td>
<td>19</td>
<td>5.6</td>
<td>1,284</td>
<td>.17</td>
</tr>
</tbody>
</table>

Governmental Litigation:

Government as defendant:
(categories overlap)

<table>
<thead>
<tr>
<th>Case Type</th>
<th># Cases</th>
<th>Mean Trial Length, Days</th>
<th>Total Juror Days</th>
<th>Percent of Grand Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>(5) Police officer</td>
<td>75</td>
<td>4.5</td>
<td>4,056</td>
<td>.53</td>
</tr>
<tr>
<td>(6) Police Dept.</td>
<td>30</td>
<td>5.6</td>
<td>2,016</td>
<td>.26</td>
</tr>
<tr>
<td>(7) Fire Dept.</td>
<td>17</td>
<td>4.5</td>
<td>924</td>
<td>.12</td>
</tr>
<tr>
<td>(8) Private Security Guard</td>
<td>21</td>
<td>4.6</td>
<td>1,164</td>
<td>.15</td>
</tr>
<tr>
<td>(9) All City of Chicago</td>
<td>425</td>
<td>4.4</td>
<td>22,308</td>
<td>2.90</td>
</tr>
<tr>
<td>(10) All Cook County</td>
<td>11</td>
<td>3.5</td>
<td>468</td>
<td>.06</td>
</tr>
<tr>
<td>(11) All State of Illinois</td>
<td>4</td>
<td>8.5</td>
<td>408</td>
<td>.05</td>
</tr>
</tbody>
</table>

Government as plaintiff:

<table>
<thead>
<tr>
<th>Case Type</th>
<th># Cases</th>
<th>Mean Trial Length, Days</th>
<th>Total Juror Days</th>
<th>Percent of Grand Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>(12) All govt. as plaintiff</td>
<td>14</td>
<td>3.8</td>
<td>636</td>
<td>.08</td>
</tr>
</tbody>
</table>

Source: Derived by author from Cook County Jury Verdict Reporter.
Row 1 shows that claims of malicious prosecution required 1536 juror days, equal to .20 percent of total juror time. Rows 2 and 3 indicate that cases involving claims of false arrest and false imprisonment required .55 and .05 percent of total juror time, respectively. Row 4 shows cases in which the plaintiff claimed that he or she had been assaulted by a police officer. These cases required .17 percent of civil juror time.

Though the most prevalent and persuasive justification of the civil jury as a democratic counterforce focuses on the casetypes presented in rows 1-4, civil jury decisionmaking is arguably appropriate for any case in which some governmental agency is an adverse party to a citizen. Rows 5-11 present cases in which a citizen-plaintiff has sued any governmental employee or agency as a defendant. Row 8 presents suits against private security guards. Here the democratic features of the jury are arguably less crucial, but I have included the category because of the police-like character of the underlying dispute.

The figures in rows 5-11 overstate total governmental litigation—perhaps substantially—because they overlap. In many cases, citizen-plaintiffs sue more than one governmental entity in the same case. As an example, there is substantial overlap between rows 5 and 6, involving suits against an individual police officer as well as the police department instructing or monitoring the officer. Note that rows 5-11 include virtually all of the cases reported above in rows 1-4.

Row 5 shows that suits against police officers comprised .53 percent of civil jury time. Rows 6 and 7 indicate that suits against police and fire departments required .26 and .12 percent of juror time, respectively. Row 8 shows that civil juries in Chicago spent .15 percent of time resolving suits against private security guards.

Rows 9-11 present claims against broader political entities: the City of Chicago, Cook County and the State of Illinois. These suits, typically, are brought for injuries suffered on poorly maintained sidewalks or streets, in public parks or in forest preserves. It is not at all obvious that the political content of a typical pothole case or a slip-and-fall at a streetcorner should compel the convening of a jury.

The malicious prosecution and false arrest categories are overinclusive. Although such actions are most typically brought against the police, some are brought against institutions like stores or restaurants that summon the police or other governmental actors against private citizens. The only possible exception is suits for false arrest or malicious prosecution against private parties in which the police were not joined as defendants.
representative, discontinuous, a responsible adjudicative institution, but I include them to sketch the upper bound of governmental power cases. Suits against the City of Chicago required almost 3 percent of juror time (row 9); against Cook County, .06 percent (row 10); and against the State, .05 percent (row 11). Finally, Row 12 sums all civil cases referred to juries in which a governmental plaintiff has sued a citizen-defendant;71 between 1959 and 1979, such cases required .08 percent of juror time.

Once again, the striking feature of Table 4 is the infrequency of occasions on which a civil jury is compelled to resolve cases involving the exercise of governmental power. Cases involving claims of malicious prosecution, false arrest or imprisonment, and assault by a police officer required, in aggregate, only .97 percent of civil jury time. Cases in which some governmental employee or agency was a party-litigant, again in aggregate, required only 4.15 percent of civil jury time. At the maximum, if we add all malicious prosecution and false arrest cases to the governmental party cases—again, surely an overstatement72—the total is only 4.9 percent.

On which types of disputes does the civil jury spend more of its time? Table 5 shows those casetypes from the data that required the greatest proportion of civil jury effort. I have segregated the case categories as narrowly as the data will allow so as not to exaggerate the figures. Row 1 shows that civil juries spent 22.57 percent of their time, equal to 173,616 days (694 juror years), on cases involving auto collisions at intersections. Row 2 shows that rear-end auto collision cases required 15.06 percent of total civil jury time, equal to 115,824 juror days (463 juror years). Suits by pedestrians hit by autos required 9.64 percent of juror time (row 3); guest actions, 4.12 percent (row 4); head-on collision cases, 3.24 percent (row 5); and collisions between autos and motorcycles or bicycles, 2.37 percent (row 6). Just below row 6, I have summed all auto accident cases. In aggregate, civil juries in Chicago spent 63.17 percent of total time resolving auto accident cases. This juror investment is equal to 485,904 juror days, or 1943 juror years.

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71 This category includes the two condemnation cases tried to juries during the relevant period.

72 See text accompanying note 70.
Table 5: Juror Time in Most Frequent Casetypes, Cook County, Illinois, 1959-79

<table>
<thead>
<tr>
<th>Casetype</th>
<th># Cases</th>
<th>Mean Trial Length, Days</th>
<th>Total Juror Days</th>
<th>Percent of Grand Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Cases</td>
<td>16,984</td>
<td>3.8</td>
<td>769,188</td>
<td>100.00</td>
</tr>
<tr>
<td>(1) Auto collision intersection</td>
<td>4,352</td>
<td>3.3</td>
<td>173,616</td>
<td>22.57</td>
</tr>
<tr>
<td>(2) Auto rear-end</td>
<td>2,968</td>
<td>3.3</td>
<td>115,824</td>
<td>15.06</td>
</tr>
<tr>
<td>(3) Auto-pedestrian</td>
<td>1,552</td>
<td>4.0</td>
<td>74,112</td>
<td>9.64</td>
</tr>
<tr>
<td>(4) Auto, guest action</td>
<td>688</td>
<td>3.6</td>
<td>31,728</td>
<td>4.12</td>
</tr>
<tr>
<td>(5) Auto head-on</td>
<td>492</td>
<td>4.2</td>
<td>24,912</td>
<td>3.24</td>
</tr>
<tr>
<td>(6) Auto-cycle</td>
<td>408</td>
<td>3.7</td>
<td>18,240</td>
<td>2.37</td>
</tr>
<tr>
<td>Total Auto</td>
<td>11,545</td>
<td>3.5</td>
<td>485,904</td>
<td>63.17</td>
</tr>
<tr>
<td>(7) Action against property owner</td>
<td>1,613</td>
<td>3.8</td>
<td>73,020</td>
<td>9.49</td>
</tr>
<tr>
<td>(8) Job-site, 3d-party action</td>
<td>767</td>
<td>5.7</td>
<td>52,488</td>
<td>6.82</td>
</tr>
<tr>
<td>(9) Product Liability</td>
<td>553</td>
<td>6.0</td>
<td>39,876</td>
<td>5.18</td>
</tr>
<tr>
<td>(10) Common carrier alighting-jerking</td>
<td>585</td>
<td>3.3</td>
<td>23,424</td>
<td>3.05</td>
</tr>
<tr>
<td>(11) Malpractice</td>
<td>328</td>
<td>5.7</td>
<td>22,380</td>
<td>2.91</td>
</tr>
</tbody>
</table>

Source: Derived by author from Cook County Jury Verdict Reporter.
Finally, rows 7-11 show the other principal liability categories of the civil jury workload. The civil jury spent 9.49 percent of this time resolving suits against property owners (for instance, landlord-tenant and slip-and-fall cases) (row 7); 6.82 percent, worker suits against third-party defendants (row 8); 5.18 percent, products liability suits (row 9); 3.05 percent, suits against the Chicago Transit Authority for injuries incurred in alighting a bus or an elevated train or because of jerking while in transit (row 10); and 2.91 percent, malpractice actions (row 11).

A comparison of Tables 4 and 5 shows a striking difference between the relative investment of civil juror effort in cases involving governmental power and in more routine societal disputes. The civil jury spends 75 times as much time on disputes involving rear-end collisions as on disputes involving malicious prosecution, 24 times as much on auto guest actions as on assaults by the police, and 65 times as much on head-on collisions as on claims of false imprisonment. Indeed, the magnitudes of these differences are astounding. The civil jury spends over 15 times as much time on auto accident cases alone as on the aggregate of cases in which any governmental agency or employee is a party to the litigation.

Even in absolute terms, the numbers are overwhelming. In terms of juror years, over the 21-year period of the sample, the civil jury spent almost seven centuries resolving cases involving auto collisions at intersections; over four and one-half centuries resolving rear-end collisions; over a century and a quarter on auto guest actions. Almost incredibly, the civil jury spent almost two millennia, 1943 juror years, on aggregate auto accident cases.

The role of the civil jury as a democratic counterforce in cases implicating governmental power was trivial in comparison, suggesting that the occasions upon which civil juries are actually employed in a political role are very limited in our society. Although the period of the sample, 1959-79, perhaps understates the current extent of suits against government agencies, especially because I report only state court and not section 1983 federal decisions, the comparison is extraordinary. Twenty-one years of false arrest, false imprisonment and assault actions against the police required no more than 16.8, 1.4, and 5.1 juror years, respectively. At the maximum, cases implicating governmental power in the aggregate (Table 4, rows 1, 2, 5-12) required less than eight percent of the juror time invested in auto accident cases.
C. Civil Jury Service as Civic Education

The third principal justification for the institution of the civil jury is the practical instruction jury service provides in the operation of the rule of law in a democratic society. As is well-known, the educative effects of jury service were invoked at the country's founding in support both of the Seventh Amendment and of those state constitutional provisions guaranteeing a right to a civil jury.73 Perhaps more importantly, the civil jury experience was later celebrated as central to the political genius of American society in Tocqueville's highly influential study of the United States.74 Indeed, in the civil jury literature over the years, the educative function of the civil jury has come to trump effectively any jury skepticism, perhaps because the postulated product of jury experience—increased civic responsibility—can be thought to be of nearly infinite value in a democracy. Whatever the reason, there has been little effort over the years either to measure with any precision how jury service alters commitment to democracy, or to compare jury service to other civic experiences or to other educational mechanisms for improving citizenship.

There surely are no data available to evaluate the extent to which civil jury experience enhances civic responsibility. But it is possible to examine the magnitude of the effect. Based upon observations from his travels about America in the early 1830s, Tocqueville reported that civil jury responsibility was just frequent enough to educate all American citizens, but not so frequent as to become burdensome.75 According to Tocqueville, "[t]he jurors being very numerous, each citizen's turn to serve hardly comes more than once in three years."76 Put in reduced form, in Tocqueville's time the probability of an average citizen serving on a civil jury during any one year was somewhere between .25 and .33.

Table 6 presents comparable figures for citizens in Chicago during the period 1959 to 1979. Column 1 shows the number of jury trials in Cook County during each year, and column 2 the number of sitting jurors. Although a recent account has emphasized that large numbers of citizens have at some time been called

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74 Tocqueville, Democracy in America at 270-76 (cited in note 2). See text accompanying notes 51-52.
75 Id at 729, App I.
76 Id.
for jury service, it is unclear that merely reporting for service provides civic education equivalent to actual deliberation and judgment. Thus, column 2 reports the number of jurors actually rendering a verdict. According to Max Sonderby, founder of the Cook County Jury Verdict Reporter, during the years reported here, individual jurors served for a two-week period. During the early years, Sonderby reports, it was not uncommon for a single individual to serve on more than one jury, though during the later years service on a jury would excuse a citizen from further service. To err on the high side, I neglect multiple service.

In Cook County, civil jurors are chosen from the list of registered voters. Column 3 presents the number of registered voters during each year, constituting the pool of available jurors. Finally, Column 4 derives the probability of civil jury service by dividing, for each year, the number of jurors (column 2) by the number of registered voters (column 3). Thus, for example, in 1959, 6408 of the 2,418,907 registered Cook County voters served on civil juries. Each voter faced a probability of .0026 of jury service, equal to service once every 377.5 years. Similarly, in 1960, 5844 of the 2,653,804 Cook County voters served on juries, equal to an annual probability of service of .0022, or a chance of service once every 454.1 years. Because I ignore multiple jury service, the probabilities of civil jury service reported in column 4 are overestimates.

Table 6 makes clear that the magnitude of the educative effect of civil jury service has changed substantially since Tocqueville's account. Citizens may have served on juries once every three or four years in the 1830s, but today, in urban jurisdictions like Chicago, their opportunities for civic education are dramatically lower. For the years of study, Table 6 shows that Chicago voters faced the greatest likelihood of civil jury service in 1968: .0054, equal to service once every 186.7 years. On average for the 21-year period, Chicago jurors faced an annual probability of civil jury service of .0038, equal to service once every 260.2 years. Those extremely diligent citizens who register to vote during each of their years of eligibility face a probability of serving on a civil jury of roughly eight

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77 Stephen J. Adler and Wade Lambert, More Americans are Called for Jury Duty, Wall St J B8 (July 10, 1990) (reporting Defense Research Institute study claiming 45 percent of U.S. adults have been called at least once for jury duty, though only 17 percent have ever begun a trial).

78 I am grateful to Donna McNamara of the Chicago Board of Election Commissioners and Peter J. Johnen, Chief of Administrative Services for the Chief Judge, Circuit Court of Cook County, for compiling these data.
Table 6: Jury Service as a Civic Experience
Cook County, Illinois, 1959-79

<table>
<thead>
<tr>
<th>Year</th>
<th>Jury Trials**</th>
<th>Total Jurors**</th>
<th>Registered Voters***</th>
<th>Probability Jury Service/yr.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1959</td>
<td>534*</td>
<td>6,408</td>
<td>2,418,907</td>
<td>.0026</td>
</tr>
<tr>
<td>1960</td>
<td>487</td>
<td>5,844</td>
<td>2,635,804</td>
<td>.0022</td>
</tr>
<tr>
<td>1961</td>
<td>583</td>
<td>6,996</td>
<td>2,552,014</td>
<td>.0027</td>
</tr>
<tr>
<td>1962</td>
<td>614</td>
<td>7,368</td>
<td>2,430,107</td>
<td>.0030</td>
</tr>
<tr>
<td>1963</td>
<td>1,045</td>
<td>12,540</td>
<td>2,414,834</td>
<td>.0052</td>
</tr>
<tr>
<td>1964</td>
<td>914</td>
<td>10,968</td>
<td>2,663,693</td>
<td>.0041</td>
</tr>
<tr>
<td>1965</td>
<td>849</td>
<td>10,188</td>
<td>2,663,693</td>
<td>.0038</td>
</tr>
<tr>
<td>1966</td>
<td>1,078</td>
<td>12,936</td>
<td>2,506,298</td>
<td>.0052</td>
</tr>
<tr>
<td>1967</td>
<td>1,121</td>
<td>13,452</td>
<td>2,522,560</td>
<td>.0053</td>
</tr>
<tr>
<td>1968</td>
<td>1,175</td>
<td>14,100</td>
<td>2,633,036</td>
<td>.0054</td>
</tr>
<tr>
<td>1969</td>
<td>928</td>
<td>11,136</td>
<td>2,562,160</td>
<td>.0043</td>
</tr>
<tr>
<td>1970</td>
<td>915</td>
<td>10,980</td>
<td>2,444,841</td>
<td>.0045</td>
</tr>
<tr>
<td>1971</td>
<td>1,041</td>
<td>12,492</td>
<td>2,455,047</td>
<td>.0051</td>
</tr>
<tr>
<td>1972</td>
<td>894</td>
<td>10,728</td>
<td>2,810,618</td>
<td>.0038</td>
</tr>
<tr>
<td>1973</td>
<td>892</td>
<td>10,704</td>
<td>2,810,618</td>
<td>.0038</td>
</tr>
<tr>
<td>1974</td>
<td>820</td>
<td>9,840</td>
<td>2,548,280</td>
<td>.0039</td>
</tr>
<tr>
<td>1975</td>
<td>861</td>
<td>10,332</td>
<td>2,574,454</td>
<td>.0040</td>
</tr>
<tr>
<td>1976</td>
<td>691</td>
<td>8,292</td>
<td>2,703,176</td>
<td>.0031</td>
</tr>
<tr>
<td>1977</td>
<td>627</td>
<td>7,524</td>
<td>2,865,174</td>
<td>.0026</td>
</tr>
<tr>
<td>1978</td>
<td>746</td>
<td>8,952</td>
<td>2,530,253</td>
<td>.0035</td>
</tr>
<tr>
<td>1979</td>
<td>581*</td>
<td>6,972</td>
<td>2,554,118</td>
<td>.0027</td>
</tr>
</tbody>
</table>

Average 1959-79 .0038

*Extrapolated from part year results.

Sources:

** Derived by author from Cook County Jury Verdict Reporter.

*** Derived by author from Chicago and Cook County Boards of Election Commissioners. See note 78.
percent by age 40, 16 percent by age 60 and 20 percent at some point during their lifetime.\textsuperscript{79}

The striking feature of Table 6, however, is how relatively few citizens experience the civic educational effect of jury service. Cook County is one of the largest metropolitan areas in the United States; its total population during the years of study exceeded five million.\textsuperscript{80} Yet on average, less than 10,000 citizens per year served on civil juries. In the year of the greatest number of trials, 1968, only 14,100 citizens served on civil juries.

Of course, there is every reason to believe that the civic training from jury service will have an impact beyond that on actual jurors themselves, as citizens relate their jury experiences to family and friends. But even if we imagine that this ripple effect triples the educative effects of jury service, still no more than 40,000 Chicago citizens in any year were beneficiaries of this civic education, a number that constitutes only 1.5 percent of the average number of registered voters and .76 percent of the Cook County population.

Finally, proponents of the civil jury have tended to regard all jury service as equivalent in terms of the civic education that it provides. It is worthwhile in this regard, however, to reconsider the allocation of civil jury responsibility shown earlier in Tables 1-5. It is not clear that, regardless of subject matter, all disputes possess identical educative opportunities in the civic virtues.

Surely the strongest case for jury service as civic education can be made for disputes involving exercise of the police power: false arrest or imprisonment, assault by a police officer, malicious prosecution, and possibly condemnation actions. As shown in Table 4, however, these cases comprise only .97 percent of civil juror time. An argument, though less strong, can be raised that jurors learn about civic responsibility from all cases in which a governmental entity is a party. Again, this position seems strained with respect to pothole and slip-and-fall cases in public parks. Still, Table 4 shows that adding these disputes to the police power disputes totals to no more than 4.9 percent of aggregate juror time. Similarly, disputes categorized as implicating complex or conflicting societal values would appear to provide some form of civic education.

\textsuperscript{79} For the continental United States from 1959 to 1980, the life expectancy for those reaching age 20 was roughly 51 years for males and 58 years for females. 1988 \textit{Statistical Abstract of the United States} 71, Table 107.

\textsuperscript{80} According to the U.S. Census, the population of Cook County in 1960 was 5.13 million; in 1970, 5.49 million; and in 1980, 5.25 million.
ROLE OF THE JURY

Many of these cases involve the evaluation of enormous pain and suffering—perhaps heart-rending, even tragic—but are more educative of the vagaries of life than of the role of a citizen in a democracy.

Yet, as shown earlier, even if all of these disputes are conceded to provide civic education, they comprise less than 25 percent of the burden of the jury. Measured in terms of numbers of jurors sitting on such cases, rather than in terms of aggregate time, an average of only 1755 jurors per year deliberated on disputes involving governmental power or complex societal values. Even tripling this number to account for the ripple effect on friends and relatives, no more than 5265 Cook County citizens in any year were beneficiaries of the civic education function of civil jury service. This equals .2 percent of the average number of registered voters and only .1 percent of the Cook County population. Converted to life expectancy, Chicago citizens registered to vote during every year of eligibility face between a five and six percent chance during their lifetimes of serving on a jury in a civil dispute involving governmental power or complex societal values.

III. IMPLICATIONS: THE JURY AND CIVIL TRIAL DELAY

Most important among the findings regarding the work of the modern civil jury are not the specific proportions of time spent resolving cases involving intersection collisions or single broken legs. The civil courts of Chicago may well differ from the courts of other jurisdictions in terms of the comparative proportions of cases involving traffic accidents versus worker injuries, or bruises versus fractures. Surely, in all jurisdictions the number of cases reaching juries is influenced by the underlying volume of specific accidents and injuries flowing from the activities of its citizens. Rather, the single most important finding of Tables 1-5 is the sheer magnitude of cases involving routine accidents and injuries that reach civil juries. The Chicago experience suggests that, though proportions and specific casetypes may differ across jurisdictions, civil juries in the U.S. are saddled with an extraordinary burden of resolving the routine.

It is not readily apparent that the institution of the civil jury is well-designed for such cases. Again, for disputes implicating

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81 Derived from Tables 3 and 4, column 2.
82 See text accompanying notes 96-102 (discussing the determinants of routine versus difficult litigation and whether Chicago is likely to differ from other jurisdictions in this respect).
complex or conflicting societal values or for disputes with political content, one may defend the idea of decision by a group of twelve rather than one; of laypersons rather than professionals; of persons chosen randomly from the population, who sit discontinuously and decide a responsibly, without explanation and largely beyond appellate review.

It is considerably more difficult to justify these various institutional features of the civil jury for the resolution of routine litigation. For example, in contexts of commonplace auto litigation or routine injuries, why is it appropriate to insist upon decision by laypersons rather than professionals, or to choose those persons randomly from the population? What purpose is served by providing for discontinuous decisionmaking, dispersing the finders of fact after a single decision? What is added to the concept of the rule of law by a responsibility: allowing decisions to be rendered by a randomly chosen group without explanation or justification and, moreover, reversing such decisions only in cases of extreme error? These various characteristics of the civil jury may be appropriate for cases implicating complex or conflicting societal values or difficult political conflicts, but it is difficult to justify them for the resolution of the broad range of routine litigation faced by the modern civil jury.

Issues of this nature have not been widely discussed in the jury literature. Of course, heretofore there has been little precise information available showing the extent to which routine litigation dominates the civil jury caseload. Perhaps more importantly, there has been a sense in the literature that any limitations of the jury as a decisionmaking institution are outweighed by the benefits from the civic training of jury service, either as benefits to society as emphasized by Tocqueville, or as individual benefits as shown from juror polls. Regrettably, we have learned that the magnitude of civic training that derives from jury service is minimal. The proportion of the population in a major urban jurisdiction that can ever be expected to serve on a jury, or to learn vicariously from another's service, is very small.

The discovery of the magnitude of routine litigation burdening the civil jury, however, begins to suggest that there may be substantial societal costs from the current institutional design of the civil jury. A society committed to the rule of law must be concerned about the accountability of decisions rendered by random groups of citizens. Of even clearer concern is the link between the current methods of civil jury case selection and the recurrent problem of civil litigation delay. As is well known, litigation delay in
the U.S. chiefly afflicts civil jury calendars. In the Chicago courts during the period of study, for example, the average time from suit to trial was 4.71 years, and from incident to trial, 5.68 years. In the ten years since, civil jury delay in Chicago has increased substantially.

As described earlier, Harry Kalven and Hans Zeisel were deeply troubled by the delay attending the civil jury calendar. Seeking some practical solution, they analyzed the problem by estimating the extent to which substitution of judge for jury decisionmaking would reduce trial length and affect the pretrial settlement process. Kalven and Zeisel recognized early that they could obtain no good empirical data on comparative judge-jury trial length, because it was likely that the cases reaching the bench and the cases assigned to jury trials were fundamentally different. In an attempt to estimate the difference, however, they polled plaintiffs' attorneys, defense attorneys and judges, and concluded that, on average, the same case would take 40 percent longer if tried to a jury than if tried to a judge. They conceded that a 40 percent time difference was significant, but argued that an identical time savings could be achieved either by adding new judges or by implementing procedural reforms to preserve full civil jury jurisdiction.

Kalven and Zeisel also saw that civil jury delay could be reduced if litigants waived their right to a jury trial more frequently. They considered various procedural and substantive changes in the law that would create incentives to increase jury waivers, but rejected them all. To find a solution, they again polled lawyers to

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83 See, for example, Thomas Church, Jr., et al, Justice Delayed: The Pace of Litigation in Urban Trial Courts Tables 2.1, 2.4 (NCSC, 1978) (showing jury delay roughly four to five times greater in civil than criminal courts).

84 Priest, 69 BU L Rev at 532 (cited in note 18).

85 According to Max Sonderby of the Cook County Jury Verdict Reporter, the current suit-to-trial delay in Chicago is over six years. Telephone interview with Sonderby, July 13, 1990. For a recent reaction to the increase in delay in Chicago, see note 22.

86 See text accompanying notes 16-20.

87 Hans Zeisel, Harry Kalven, Jr., and Bernard Buchholz, Delay in the Court 72-74 (Little, Brown & Co, 1959).

88 Id at 76-79.

89 Id at 82-86. Kalven and Zeisel, of course, had strong personal commitments to retaining the jury system. See, generally, Kalven, 50 Va L Rev 1055 (cited in note 4); Kalven & Zeisel, The American Jury (cited in note 1); Zeisel, 328 Ann Am Acad Pol & Soc Sci 46 (cited in note 16).

90 Zeisel, Kalven & Buchholz, Delay in the Court at 87-93. Kalven and Zeisel rejected additional fees for jury trials as inconsistent with the basic right. They also addressed the adoption of a comparative negligence standard that some had proposed to reduce the substantive difference between judge and jury decisionmaking by preventing judges from rigorously applying the contributory negligence doctrine, in contrast to more equitable juries.
determine the motivations for jury waivers, and this time discovered a paradox: 43 percent of the lawyers polled explained that they had waived their client's right to a jury trial because of the extent of civil jury delay. From this finding Kalven and Zeisel concluded that increasing jury waivers could have little ultimate effect on the delay problem because, to the extent greater numbers of waivers reduced delay, the reduced delay would reduce the number of waivers.\footnote{Id at 90-91.}

There are serious shortcomings, however, to the Kalven-Zeisel analysis of the effect of the prospect of jury trial on litigation delay. Polling individual lawyers about settlement decisions can never explain the full reasons why cases proceed to trial, because individual polling fails to take account of the reciprocal nature of litigation-settlement and bench-jury trial decisions.\footnote{Id at 64-65, 89. In an earlier treatment of the delay problem, I did not fully appreciate the Kalven-Zeisel point mentioned here. See, generally, Priest, 69 BU L Rev 527 (cited in note 18).} Disputes are settled rather than litigated, or brought before a judge rather than a jury not by the choice of one party alone, but only through what might be called a "cooperative" decision of the parties. To understand the effect of the right to a jury trial on delay, it is necessary to understand the conditions under which litigants are more or less likely to reach such cooperative decisions.\footnote{For estimates of the proportion of judge versus jury litigation, see Zeisel, Kalven & Buchholz, Delay in the Court at 88 (cited in note 87).}

Under the American system of civil procedure, trial by jury is at the election of either plaintiff or defendant. Disputes will be referred to the civil jury calendar whenever either litigant believes that decision by a jury will be more favorable than decision by a judge. Conversely, the only cases that will not be referred to the civil jury calendar are cases in which both parties believe that decision by a judge will be more favorable than decision by a jury. Since the parties' individual preferences for trial by judge must necessarily derive from competing reasons, it should not be surprising that in most jurisdictions overwhelming proportions of civil cases are referred to the jury calendar.\footnote{For an introduction to this approach, see sources cited in note 24.}

\footnote{Lawyer polls also fail to account for more subtle effects of delay on decisionmaking, such as the effect on negotiations from changes in the expected value of the stakes of the case. For an elaboration of this point, see Priest, 69 BU L Rev at 536.}
Reference to the civil jury calendar, however, is only the first step. The most important determinant of the cases that actually reach civil juries for decision is the success of the parties’ settlement negotiations prior to trial. By far the largest majority of civil disputes are settled prior to trial rather than litigated. In the Cook County courts during the period of study, for example, typically only two to four percent of disputes were ever tried to juries. All the rest were settled on terms mutually more favorable to the parties than undergoing the expense of actual civil trial.

Disputes will be settled or litigated depending upon whether the difference in the parties’ settlement offers is greater or less than the combined costs of trial. The difference in the parties’ settlement offers will be determined by the stakes of the case and by the parties’ predictions of the outcome. Thus, of cases on the jury calendar, those most likely to proceed to trial will be those for which the stakes are very high and those for which there is the greatest uncertainty as to how a jury will decide.

This method of choosing trial versus settlement presents a much different picture of delegation to the civil jury than might be imagined from the traditional literature justifying the institution. In our system of private litigation, disputes are delegated to civil juries for decision not on the ground that the jury is the most appropriate decisionmaking institution because the disputes implicate complex societal values or political issues. Rather, disputes are delegated to the civil jury because the parties’ settlement offers diverge. Parties’ settlement offers diverge, in turn, because the underlying uncertainty over the outcome overwhelms the potential savings in litigation costs.

Note that the large personal injury caseload of the civil jury does not result from the simple fact that juries are likely to be more sympathetic than judges toward injured victims. An expectation of relatively greater jury than judge sympathy will surely lead the plaintiff to place the case on the civil jury calendar. But the litigation-settlement decision is necessarily a cooperative one. Defendants are equally aware of jury sympathy. Large volumes of routine personal injury cases reach juries because parties have dif-

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* Priest, 69 BU L Rev at 540, Table 1.
* For a more precise description of the trial-settlement decision process, see Priest & Klein, 13 J Legal Stud 1 (cited in note 24).
* Holding other factors constant, however, any institutional feature that increases the chance of plaintiff’s success will increase the likelihood of litigation by increasing the expected value of the case to both parties.
different expectations about the extent of jury sympathy; thus their settlement demands and offers diverge, and they fail to settle the case.

What determines the relative caseload mix across jurisdictions? Of course, in all jurisdictions, disputes will arise that involve issues of sufficient importance to the parties that settlement is not available on any terms. For all other disputes, however, the chief determinants of settlement versus trial are the stakes of the case, uncertainty over the outcome and litigation costs. Disputes involving very high stakes, as well as disputes involving complex legal or factual issues, are likely to be pressed to trial because of consequent differences in settlement offers. Cases involving routine injuries (and thus routine damages) or routine accidents (and thus routine issues of liability) are far more likely to be settled because differences in the expected outcome are likely to be less. For routine cases to proceed to trial, levels of uncertainty in outcomes must be exceedingly high.

Why then do so many cases involving routine accidents and injuries reach juries in Chicago? The Chicago courts are dominated by routine litigation because the difficulty of predicting how Chicago juries will decide these cases makes it impossible for the parties to agree on a settlement amount to save litigation costs. Is Chicago likely to differ from other jurisdictions in terms of the volume of routine civil jury litigation? Under the American system of unconstrained jury election, jurisdictions will differ in terms of routine cases only as they differ in terms of the stakes of cases, the predictability of jury decisions or the magnitude of litigation costs. There is little reason to believe that litigation costs are differentially lower in Chicago to justify an exaggerated level of routine litigation. There is equally little reason to believe that Chicago is atypical in terms of stakes. Indeed, since trial delay encourages settlement by reducing the present value of disputes, and since the Chicago courts are among the most congested in the country, one would predict that Chicago would have a lower proportion of routine litigation than less congested jurisdictions.

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99 Some, though probably not all, of political content litigation is of this character. For example, the NAACP was not likely to settle Brown v Board of Education, though an individual citizen may be very willing to accept a monetary settlement from a police department.

100 See Zeisel, Kalven & Buchholz, Delay in the Courts at xxi n 1 (cited in note 87); Priest, 69 BU L Rev 527 (cited in note 18).

101 Id.
only likely to differ from other jurisdictions in terms of routine cases if Chicago juries are inherently less predictable.\textsuperscript{102}

The source of the great volume of routine litigation is the institution of the civil jury itself. The civil jury is an engine of uncertainty. Each of the principal institutional characteristics of the civil jury impairs the efforts of private litigants to settle and leads to the dominance of routine disputes among the civil jury caseload. Decision by lay citizens rather than professionals increases the uncertainty of outcome. Random selection of citizens increases the uncertainty of outcome. The discontinuous nature of decision by any single jury and the failure of the jury to explain or justify its decision precludes a careful estimate of the outcome based upon past behavior and, thus, increases the uncertainty of outcome. One may readily endorse the idea that it is crucial for our democratic system to convene a group composed of twelve citizens, chosen randomly from the population, sitting discontinuously rather than professionally, and deciding arresponsibly, for the resolution of disputes involving conflicting societal values or political issues. But each of these characteristics is antagonistic to the private resolution of routine disputes.

The extensive civil trial delay in Chicago necessarily derives from the large volume of disputes involving routine accidents and injuries that proceeds to trial. Large urban jurisdictions like Chicago are characterized by an enormous inflow of civil litigation that must ultimately be processed through a narrow bottleneck of civil juries. For example, during the period of study, over 41,000 cases on average, remained pending each year on the civil jury calendar, with over 10,000 new cases filed each year.\textsuperscript{103} As shown in Table 6, Chicago civil juries were able to process on average roughly 800 of these cases per year. All the rest of the cases either had to settle out of court or wait for trial, generating the then-average 4.71 years suit-to-trial period. Today, the problem is worse. In 1989 in Cook County, over 67,000 cases were pending on the civil jury calendar with 25,000 new cases filed during the year. The Cook County courts were able to process only 728 jury trials.\textsuperscript{104}

\textsuperscript{102} Chicago, of course, is a city with a diverse population. But more diverse than other large cities? The question deserves further study.

\textsuperscript{103} Derived from Annual Reports of the Administrative Office of the Illinois Courts, 1959-79.

\textsuperscript{104} I am grateful to Max Sonderby and Rich Atkins of the Cook County Court Administrator's Office for these figures.
An appreciation of these dynamics suggests why the focus of the civil delay literature on case management reform, the addition of judges or the alteration of "local legal culture," is woefully inadequate to the problem. Imagine that it were possible through case management reform and reorientation of the legal culture to increase the output of civil juries, say, 50 percent (frankly more than any reformer could hope). Imagine further that, after implementing the management reforms, the legislature were convinced to, say, double the number of sitting trial judges. At current rates, such reforms would triple the annual number of jury decisions from roughly 800 to 2400. But in 1989, there were over 67,000 cases pending and 25,000 new cases filed and placed on the civil jury calendar during the year. In the face of such massive inflow, an increase of 1600 in the outflow of jury trials would be barely noticeable. It is implausible that either management reform or increases of the judiciary will ever solve the litigation delay problem in urban jurisdictions like Chicago.

These aggregate numbers show how heavily dependent our civil litigation system is on the private settlement of disputes. Indeed, although litigation delay in the Chicago courts of four to six years may seem extreme, the delay is only as low as it is because 96 to 98 percent of disputes settle out of court. The only way to affect significantly the level of litigation delay in a major urban jurisdiction like Chicago is to increase the rate of civil settlement.

The most promising prospect for reducing delay is constraining the jurisdiction of the civil jury. The institution of the civil jury may be justified for litigation involving complex or conflicting societal values, political issues, or the government as a party. If civil jury jurisdiction were limited to these categories of cases—even if the categories were defined expansively—the problem of civil jury delay would be reduced dramatically. As shown earlier, cases involving evaluation of complex or conflicting societal damages—defined broadly—comprise, at the maximum, 19.62 percent of the civil jury caseload. Cases implicating governmental power—again defined broadly—comprise at most 4.9 percent of the civil jury caseload. Together these categories of cases comprise less than one-quarter of the current civil jury burden. It follows directly that, without change, our current jury apparatus could

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105 See source cited in note 21.

106 For recommendations of this nature, see note 22.

107 I disregard here the complicating effect that reducing delay reduces the extent of settlement. See, generally, Priest, 69 BU L Rev 527 (cited in note 18).
handle those cases with a dramatic reduction in the extent of litigation delay.  

Restricting the jurisdiction of the civil jury, however, would not eliminate routine cases; it would only shift them from the jury to the bench trial calendar. Thus there would be no point to the change unless there were reasons to believe that it would reduce delay. There are strong reasons, however, to think that it would. Kalven and Zeisel estimated that trial by judge is 40 percent faster than trial by jury, but this effect is hardly the most important. The principal benefit from shifting routine litigation from the civil jury to the bench calendar is that the shift is likely to increase dramatically the settlement rate.

For purposes of evaluating the effect of the civil jury on trial delay, the important issue is not whether judges process cases more rapidly than juries, but whether the prospect of trial by judge will make the outcome of the dispute more predictable than the prospect of trial by jury. To the extent that parties are better able to predict the outcome of disputes tried to judges, the disputes are more likely to be settled rather than pressed to trial and the backlog of pending lawsuits will decline.

Each of the differences between the characteristics of the civil jury and the civil judge suggest that the shift of routine litigation to the judicial calendar will increase predictability and promote settlement. The judge is a professional, not a lay citizen. The judge sits continuously, and his or her previous decisions—especially if accompanied by written or oral opinion explaining and justifying them—will provide a guide for the prediction of future decisions. It follows necessarily that the prospect of decision by judge will increase settlements and reduce trials.

Some commentators have disparaged the civil settlement process, extolling the societal values of authoritative judge or jury decisionmaking. These values are surely important. But in the context of a judicial system that in 1989 was burdened with 67,000 pending cases, upon which 25,000 new cases were filed, the conception that all disputes should be tried to a verdict is unrealistic. Our society necessarily must rely on the private settlement process for the resolution of civil litigation. Restricting the jurisdiction of the civil jury to cases for which jury resolution can be defended—cases

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108 This would be the case even where the rate of litigation versus settlement of such cases increases because of the reduction in delay. See id.
109 See text accompanying note 88.
involving complex or conflicting societal values or political content—will reduce the extent of civil court congestion. There is little clear social purpose in convening twelve randomly chosen citizens to resolve a rear-end accident case in which the most serious injury was a bruise or fracture. Litigants proceed to trial by jury in routine cases not because of some individual or societal conception that trial by jury will fulfill a fundamental social objective but because differences in their expectations of the jury’s decision are too great to allow them the settlement which they would most probably prefer.

Finally, the time has come to reanalyze the importance to a modern society of the civic education provided by jury service. When Tocqueville traveled around the country in the early decades following the Revolution, civil jury service may well have contributed significantly to citizen identity with the nation and commitment to its democratic management. At a time when a functional democracy was a relatively new idea and there were few existing sources of formal education, the experience of civil jury service may have been a very effective mechanism for imparting societal norms and for providing training in the operation of the laws.

But times have surely changed. Democracy is no longer an unknown and little tried technique of political organization. There are many existing sources for education in civic responsibility, from our schools, in which it has become part of the traditional elementary curriculum, to our modern communications media. The pervasive effect of these institutions on civic consciousness was, of course, inconceivable to Tocqueville.

Moreover, even if, in a metaphorical sense, civic responsibility is of infinite value, a modern society must have some sense of proportion. Can it be justified to subject all of Cook County’s litigants—the 67,000 with cases pending in 1989 and the 25,000 with newly filed disputes—to an average six year suit-to-trial delay in order to provide direct civic education to 1755 citizens per year? Clearly, it is the burden of those who celebrate unlimited jurisdiction of the civil jury to defend its role in light of its attendant trial delay.

Note that the simple number of cases filed and pending ignores multiple plaintiffs, and so is a substantial understatement. Moreover, the numbers ignore those who, discouraged by litigation delay and interested in getting on with their lives, decline to file suit and suffer deprivations of rights without remedy.