

# Jury Matters

The Official News-  
letter for the Civil  
Jury Project at NYU  
School of Law



Aug. '17, Vol. 2, Issue 8

## Upcoming Events

Aug. 11 Trial Practice Track:  
Fordham University, New  
York, NY; Steve Susman  
and Shari Diamond are  
panelists on *How Juries  
Think and Behave*.

Aug. 19 American College of Trial  
Lawyers; Wichita, KS; Ste-  
ve Susman and Judge  
Thomas Marten present  
on *Innovative Jury Trials*

Currently Jury Improvement Lunch;  
Reschedul- Cleveland, OH  
ing for Oct.

## Opening Statement

Dear Readers,

The new academic year is right around the corner, and we are delighted to announce that the Civil Jury Project is getting ready for its third year of operation.

We have three great write-ups in this month's newsletter. First, Patty Kuehn, one of our Jury Consultant Advisors and a member of the American Society of Trial Consultants reviews the results of our combined survey of mock jurors' opinions of jury service. That survey validates our hunch that most lay people do not realize that jury trials are vanishing and, once informed that they are, do not perceive this to be a bad development until informed that the right to trial by jury is a constitutional right. Next, our student extern Deepa Devanathan reviews the constitutionality of noneconomic damage caps around the country and reports that one-fifth of the states have found them to be unconstitutional under state constitutions. Finally, our judicial advisor, Judge Marvin E. Aspen of the Northern District of Illinois, makes the case that legal professionals of every ilk must work to demonstrate to our communities that the jury system works and works well.

Thank you for your support of the Civil Jury Project. You can find an updated outline of our status of projects on our [website](#). In addition, you can submit op-ed proposals or full drafts for inclusion in upcoming newsletters and on our website either by [email](#) or [here](#).

Sincerely,  
Stephen D. Susman

## Jurors are Community Heroes

Judge Marvin E. Aspen of the United States District Court for the Northern District of Illinois makes the case for the jury as a critical and local form of democratic participation, involving citizens in the administration of justice within their communities.

Find out more on pg. 4



**ASTC**  
AMERICAN SOCIETY OF TRIAL CONSULTANTS

**CIVIL JURY PROJECT**  
at NYU School of Law

*The Civil Jury Project in conjunction with the American Society of Trial Consultants completed a survey of nearly 1,500 Americans regarding the decline of the civil jury. The preliminary results are fascinating . . .*

In its quest to preserve Americans' right to a civil jury trial the Civil Jury Project, in conjunction with the American Society of Trial Consultants, conducted a brief public survey (2/3<sup>rd</sup> online and 1/3<sup>rd</sup> in person) to investigate a few underlying concepts and assumptions important to retaining civil jury trials.

Regardless of whether the objective of an individual CJP program is to educate the judiciary, encourage a grass roots movement, or participate in a public campaign, it is critical to ensure the assumptions made by the Civil Jury Project about the public's opinions on the issues are valid. Public Survey I is intended to be a first level inquiry of the general public about their awareness, impressions and perceived value of the right to a jury trial in civil litigation.

A total of 1495 U.S. Citizens from 33 different states participated in this study. (The largest groups of respondents came from Illinois (28%), Massachusetts (38%), Arizona (7%), California (6%) and Washington State (6%).) The study asked 6 test questions and collected demographic information from the participants including: age, gender, race,

community type (urban, suburban, rural), education, political affiliation, and political orientation.

Thank you to Fieldwork Chicago for administering the study and collecting the data for Public Survey I. Also, thanks to Consumer Centers of New York for collecting data for the pilot study. Additional acknowledgements will be included in a final report of the study.

#### Preliminary results:

Preliminary results find participants as a whole are split on their impressions and perceptions of the prevalence and importance of civil jury trials. The strongest support for trial by jury was only after participants were reminded that civil jury trials are a right guaranteed by the U.S. Constitution.

Almost a third (32%) had served as a juror in some sort of trial—civil, grand or criminal. Most of the participants think the number of *civil* trials decided by jury has either stayed the same (41%) or gone up (38%) in recent years. Only 21% recognize the number of jury trials has gone down. Furthermore, when in-

*Continued on next page . . .*



Judicial Advisor, Judge Michael Mattice, recently compiled a fantastic reading list of articles focused on techniques to shorten trials. We have included a copy on our [website](#) as a resource for all.

The CJP has teamed with trial consultant Roy Futerman, PhD to produce a weekly blog called "Innovating for Wise Juries." Each week we focus on a new practice that can help make civil jury trial a more appealing form of dispute resolution. You can find the complete series on [Law360](#).

**LAW360**

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With the help of Professor Suja Thomas, the CJP produced a short informational video on the history of the 7th Amendment. Check it out [here](#).

CJP extern, Katherine Stein, collected [links](#) to the court calendars for almost all federal district courts. If your court is missing, it is because the information is not publicly available. You can help us by encouraging your clerks to change that.



formed about the sharp decline of civil jury trials over the last 10 years, many participants indicated a positive or neutral view of this decline. Less than a quarter of the participants (22%) held a negative opinion about the decline.

Although more participants think it is most appropriate for juries (42%) to decide civil disputes compared to either arbitrators (30%) or judges (28%), it was fewer than half – the majority chose a trier of fact other than juries as the most appropriate. That said, a strong majority (66%) rate the importance of the right to have a jury decide any lawsuit they may be involved in instead of a judge, arbitrator or mediator at least a 5 or greater on a 7 point scale.

Nonetheless when put in the context of retaining a constitutional right, the number of participants indicating the right to a jury trial as important increases dramatically. Most participants (85%) rate the importance of keeping the right to a civil jury trial which is guaranteed by Seventh Amendment of the US Constitution at least a 5 or greater on a 7 point scale (54% gave the highest importance rating on the scale). It may be that people recognize the importance of their Constitutional rights, but simply don't recognize how precious the right to a civil jury trial really is until they are reminded it is a right guaranteed by the US Constitution. Interestingly, there were no differences between ratings of those who had and had not served as a juror, on either item. Contrary to findings in other studies,

serving on a jury did not seem to increase the importance of jury trials in their minds.

A complete report of the results, findings and conclusions of this research is forthcoming. As with any research, there are limitations and those limitations will be detailed in the report as well.

For the present time, it is beneficial to recognize the participants in this national study do not view the decline of the civil jury trial as one would hope, but might highly regard the loss of a guaranteed Constitutional right.



**Patricia (Patty) Kuehn, J.D., M.A.**, is a national trial consultant based out of Chicago, IL. She proudly serves on the Board of Directors and is Immediate Past President of American Society of Trial Consultants.

# The Constitutionality of Non-Economic Damage Caps

Deepa Devanathan is a 2L at NYU Law and serves as an extern to the Civil Jury Project.



In July 2017, [the Florida Supreme Court ruled that a Florida law that limited pain-and-suffering damages in medical malpractice suits is unconstitutional](#). That same month, the [Wisconsin appellate court also found such caps unconstitutional](#). Before Wisconsin and Florida, 8 other states had previously struck down similar caps. With the House recently passing federal tort reform including damage caps, it is worthwhile to review the reasons that these 10 states reached their conclusions.

In Florida and Wisconsin, judges focused on how damage caps implicate their states' respective equal protection clauses. For instance, the Florida Supreme Court noted that ["\[b\]ecause there is no evidence of a continuing medical malpractice insurance crisis justifying the arbitrary and invidious discrimination between medical malpractice victims, there is no rational relationship between the personal injury noneconomic damage caps in \[Florida law\] and alleviating this purported crisis."](#) The court reasoned that since caps tend to reduce damage awards for plaintiffs who suffer the worst injuries but do not reduce defensive medicine efforts (efforts by doctors to avoid liability by running unnecessary tests and procedures), the discriminatory effect is arbitrary and violates Florida's equal protection clause.

Wisconsin struck down caps for a similar reason, holding that the evidence did not show that a ["\\$350,000 cap on noneconomic damages is rationally related to the objective of ensuring quality health care by preventing doctors from practicing defensive medicine."](#) The court looked at evidence provided by the Congressional Budget

Office, a non-partisan entity, showing that defensive medicine does not significantly affect the cost of medicine and that some so-called defense medicine may be motivated less by liability concerns than by the income it generates for physicians or by the positive (albeit small) benefits to patients." Since caps were not proven to reduce defensive medicine efforts and because they, by default, made a classification between those who suffer damages less than the cap and those who suffer damages more than the cap, they violated Wisconsin's equal protection clause.

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***Twenty percent of states have held non-economic damage caps in medical suits unconstitutional.***

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Other states have struck down damage caps as violating plaintiffs' right to trial by jury. For example, in 2012, the Missouri Supreme Court struck down a \$350,000 limit on noneconomic damages in a lawsuit by a parent whose child suffered brain damage during birth. The Missouri Constitution says, "the right of trial by jury ... shall remain inviolate." The court held, ["The individual right to trial by jury cannot 'remain inviolate' when an injured party is deprived of the jury's constitutionally assigned role of determining damages according to the particular facts of the case."](#) And in 1991, the Alabama Supreme Court found that damage caps violated the Alabama Constitution's jury protections: ["\[I\]n cases involving damages incapable of precise measurement, a party has a constitutionally protected right to receive the amount of damages fixed by a](#)

[jury unless the verdict is so flawed by bias, passion, prejudice, corruption, or improper motive as to lose its constitutional protection."](#) The court reasoned that since there is a constitutionally protected right to receive the amount of damages determined by a jury, damage awards had to be reviewed on a case-by-case basis. [Kansas, Ohio, Oregon, Utah, and Washington also found that damage caps violate their respective constitutions' right to a trial by jury.](#)

These types of rationales might apply to federal damage caps as well. The federal Equal Protection Clause works much like that in states like Florida and Wisconsin, requiring a rational relationship between a classification and a legitimate governmental goal. If no evidence exists that federal caps reduce defensive medicine efforts, then such caps might also violate the Fourteenth Amendment. Likewise, the Center for American Progress argues that in the same way that the Missouri Constitution's right to a jury trial was violated by the state cap, a federal damage cap would violate the 7<sup>th</sup> Amendment's right to a jury trial: ["These steep hurdles \[damage caps\] to holding health care providers accountable infringe the right to a jury trial, which is protected by state constitutions and the Bill of Rights."](#)

Two states finding damage caps unconstitutional in the same month is remarkable; one-fifth of all states finding caps unconstitutional is instructive. Senators should account for these considerations as they carefully consider the House's federal tort reform bill. If they do not, the courts will undoubtedly get involved.



# Jurors Play a Critical Role in the Operation of Democracy in our Nation

By:



Judge Marvin E. Aspen, of the United States District Court for the N.D. of Illinois.

Although news media and commentators routinely scrutinize citizen alienation from our elected and appointed officers and representatives of the Executive and Legislative branches of Government, relatively little attention is paid to the role of the ordinary citizen in the day-to-day management of the Judicial branch—the service jurors provide to our court systems. Each year, on every work day of every week, more than 1.5 million American citizens take a solemn oath<sup>2</sup> to perform their vital civic responsibility as jurors, and in so doing, they directly participate in the democratic process of the governance of our Nation.

Few citizens fully appreciate that the functioning of democracy in America is a hands-on, populist undertaking. In particular, the right to a trial by jury of one's peers is the hallmark of our judicial system and an essential feature of our democracy as a whole. In fact, it was one of the rights that our founding fathers believed justified their revolt against England.<sup>3</sup>

In today's society, although heroes are more often celebrated in the sports or entertainment sections of media news, I would add jurors—whose efforts keep state and federal judicial systems running—to my list of community heroes. Our system of justice depends on people who are willing to serve on jury duty. It is self-apparent that without the performance of our citizen juries, the wheels of justice would spin to a halt.

Yet, the reaction of one receiving a summons to jury duty frequently is not one of joy, and perhaps on occasion, one of resentment. Jury service often is not a convenient obligation. It takes time out of one's daily routine and can necessitate major personal and occupational scheduling adjustments. Sometimes the cases jurors are asked to consider are not particularly interesting. On the other hand, the glare of the spotlight in trials of prominent people or sensational cases can focus unwanted public attention on jurors. Perhaps for these reasons, some jurors go to great lengths to

come up with a unique excuse to avoid service. For example, a New York newspaper article<sup>4</sup> listed some excuses potential jurors used: a surgeon claimed he was too nervous to serve; a United Nations interpreter claimed he didn't speak English; a man claimed he had to relieve himself every five minutes, even though he drove a cab in New York City 12 hours a day.

Negative publicity of jury verdicts and portrayals of jury duty have the potential to undermine the public's respect for and recognition of the central role jurors play in our justice system. If people thought the entire jury system was flawed based on controversial cases like the trials of Bill Cosby, George Zimmerman, Casey Anthony, or O.J. Simpson, would they ever want to be jurors themselves? Of course, these lengthy, media-heavy trials are the exception rather than the rule. Nevertheless, there is always a concern that these outliers will cause other summoned citizens to seek excuses to bow out instead of lining up for civic duty.

Our judicial system is only as fair and just as the people willing to serve as jurors. Members are chosen from the community, hear the facts of a case, deliberate among themselves, then vote to decide the fates of other members of the community. A jury makes, in some cases, life and death decisions about criminal guilt and innocence, decisions about liability and how much money will reasonably compensate a wronged party, and decisions about denial of rights and how to redress injustice. It is democracy in action.

All of us—judges and lawyers—who work in and with our state and federal judiciaries have a responsibility to demonstrate to our communities that the jury system works and works well. Jury service provides an opportunity to celebrate and educate the public about the important function of our courts. It has been my experience that an overwhelming majority of jurors leave their service with a better understanding and appreciation of, and greater support for, our system of justice in America.

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In its most recent nationwide survey, the National Center for State Courts (NCSC) reported that nearly 32 million citizens are summoned for state-court jury service each year, of which approximately 8 million report for duty, and only 1.5 million are selected and impaneled. Hon. Gregory E. Mize, et al., *State of the States Survey of Jury Improvement Efforts 7–8* (NCSC April 2007). The most recent federal statistics available show more than 192,000 citizens report for federal petit jury duty per year, of which approximately 44,000 are selected and impaneled. *U.S. District Courts—Petit Juror Service on Days Jurors Were Selected for Trial—During the 12-Month Period Ending Sept. 30, 2016*, available at <http://www.uscourts.gov/statistics/table/j-2/judicial-business/2016/09/30>.

<sup>2</sup> Note, jurors in civil cases take this oath: “You and each of you do solemnly swear that you will well and truly try the matters in issue now on trial, and render a true verdict, according to the law and the evidence; So Help You God.” Benchbook, U.S. Dist. Ct. Judges, § 7.08. Each potential juror summoned for service likewise “solemnly swear[s]” to “truthfully answer all questions that shall be asked of you, touching your qualifications as a juror, in the case now called for trial; So Help You God.” *Id.*

<sup>3</sup> See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 875 (1994); *The Civil Jury*, 110 Harv. L. Rev. 1408, 1417 (1997).

<sup>4</sup> Bob Liff, *Excuses, Excuses Avoiding Jury Duty Getting a Lot Harder*, New York Daily News, April 9, 1999.

## Status of Project: Summer 2017



The Civil Jury Project looks forward to continuing its efforts throughout 2017 with the following objectives:

- Continue our efforts to enlist and involve judicial, academic, and practitioner advisors around the country
- Identify and study those judges who are trying the most jury cases, endeavoring to understand their techniques
- Develop plain language pattern jury instructions
- Encourage public discussion and debates about the pros and cons of public dispute resolution, particularly through the use of social and traditional media

This is but a sampling of our objectives for the coming year. A comprehensive list is available on our website, [here](#).

*Thank you for your involvement in this important project. By working together we can reach a better understanding of how America's juries work and how they can be improved.*

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## A Preview of Next Month . . .



We offer a report on our study with Baylor Law School concluding that 57% of material business contracts entered into by major companies do not seek to avoid jury trials.



Judge Jack Zouhary of the Northern District of Ohio reminds us that jury duty is a founding principle of American democracy.



Judge Mark Bennett of the Northern District of Iowa argues that we should empower jurors as good will ambassadors for the court.