TRIAL & LITIGATION SECTION SCHOLARSHIP-WINNING ESSAY

Trial & Litigation Section

Chair: John Schifino - Burr & Forman

Each year, the Trial & Litigation Section awards a scholarship to the law student who submits an article that best addresses an important issue facing our adversary system. This year, we asked students to answer the following: "I believe that jury trials are important to American Jurisprudence because ..." We're pleased to present a very thoughtful article by Sienna Osta, a third-year law student at Cooley Law School and our 2014-2015 scholarship winner.

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Jury trials are important to American jurisprudence because they are so rare. Readers of the *Lawyer* magazine will not be surprised by the following trends:

- During the 1970s, about 15 percent of criminal and 8 percent of civil cases went to trial. In 2010, trials accounted for only 2 percent of criminal and 1 percent of civil dispositions.
- From 1991 to 2010, the number of civil jury trials declined by almost 60 percent.
- Among U.S. district courts in 2010, trials accounted for less than 3 percent of all tort, contract, and intellectual property dispositions.

The rarity of trials reveals two important things about American jurisprudence. First, that trials, and jury trials in particular, are inefficient, unpredictable, and expensive. Second, the factors that make jury trials rare also explain why they still exist — jury trials are the best way to solve our most intractable disputes.

In 1787 — a time when physicians treated illnesses by bleeding their patients, physicists argued about aether, and information traveled only as fast as horses could carry it — a handful of American lawyers helped draft the fundamental rules for the most powerful government in history.

Only revolutionary lawyers could have founded a government made of equal parts radical political theory and traditional common law. The protection of jury trials by the Bill of Rights is among the most illustrative examples of our Constitution's synthesis of egalitarianism and establishmentarianism.

Yet the ideology of trial avoidance has become institutionalized throughout the legal community. Legislators, judges, attorneys, and even clients seem to share the same mentality — trials are just too risky. But the laudable desire for increased economy, predictability, and uniformity can be taken a step too far. The risks inherent in a fair trial are a feature, not a bug.

As the most democratic element of an increasingly stratified and bureaucratic system, trials lend credibility to adjudicative decisions in a way that mechanical determinations cannot. Just as a fair election is unpredictable, a fair trial must be unpredictable. All the frustratingly incalculable variables — the biases, the emotions, the sensitivity to initial conditions — meld together into the emergent property called legitimacy.

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Jury trials are important because they are sometimes at odds with the will of those in power. And yet, jury trials serve to vindicate just authority. A government that can enforce any edict it desires, without limitation, is a tyranny. A government that must convince a statistical sample of the community that its laws are just, both in theory and in application, is constitutional.

In civil matters, a public jury trial can actually be a powerful panacea for future litigation. A corporation that can foist operational costs and liabilities on society is a parasite. A corporation that successfully defends against allegations of negligence, corruption, and greed is a citizen.

Jury trials are important to American jurisprudence because they are the difference between democracy and totalitarianism. They are important because we have yet to devise a fairer way to resolve our disputes. They are important because they are not yet dead.

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