A Unified Right to Jury Trial

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This article looks at the persistence of the unavailability, in equitable claims, of a trial by jury which it argues is an anachronism and should be discarded.

INTRODUCTION

The procedural and substantive merger of law and equity in the United States remains incomplete. Nonetheless, courts appear to be working rather quickly (in common-law terms) to smooth that long and bizarre wrinkle in the law's history. This is evidenced by the growing similarity between the style of claims first developed by law and equity courts, by courts' increasing crossover use of what were traditionally legal and equitable enforcement mechanisms, and by the steady decline of the irreparable injury rule. The most intransigent vestige of the law-equity divide, however, remains stalwart—the unavailability, in equitable claims, of a trial by jury. Because this relic has been constitutionalized, it seems least likely to fade quietly with the memories of Chief Justice Coke and Lord Ellesmere.[1] In this short piece, I argue that the jury issue is the most important incident to the law-equity divide and that its present manifestation in doctrine is ripe for abrogation.

In Part A, I echo the suggestion of others that the salience of the distinction between law and equity is in rapid decline. In Part B, I propose that the jury issue is the most important and most obdurate remaining feature of the law-equity divide. In Part C, I argue that courts can and should rid the law of this anachronism.

The Decline in the Salience of the Distinction Between Law and Equity

The merger of law and equity in American courts began early and has continued, with accretive steps, over the course of almost two centuries.[2] Unified pleading, for example, was adopted in New York with the Field Code of 1848, in the federal courts with the Federal Rules of Civil Procedure of 1938, and not until 2000 by

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1 The famous dispute between Coke and Ellesmere (backed by King James I) is the culminating event solidifying the power of the equitable courts and creating the structure by which equitable remedies would only be available where legal remedies were inadequate. See generally Mark Fortier, 'Equity and Ideas: Coke, Ellesmere, and James I' (1998) 51(4) *Renaissance Quarterly* 1255.

2 See Dan B Dobbs, *Handbook on the Law of Remedies* (West, 1973).

statute in Arkansas and 2006 in Virginia.[3] The merger of law and equity courts, pleading, and procedure has not, however, left the historical distinctions without present-day significance. The distinction remains salient in four primary ways. The elements of claims developed by legal and equitable courts were formally untouched by the merger process, with causes of action developed by equity courts keeping their emphasis on factor-balancing and fairness.[4] The enforcement mechanisms of legal and equitable remedies also remain largely distinct—attachment and execution for the legal remedy of damages, and contempt for the equitable remedy of injunction.[5] Legal remedies remain generally available, while equitable remedies are ostensibly available only where legal relief would be inadequate.[6] Finally—and most apropos to this essay—the constitutional guarantee to a trial by jury is available only for legal claims, not those brought purely in equity.[7]

In recent years, however, each of these distinctions has weakened. Causes of action have begun to lose their distinctive character—actions originating in law courts, for example, are more commonly defined as multi-factor inquiries that expressly consider fairness or the public interest.[8] It is also common for enforcement mechanisms to cross the traditional law-equity divide. Courts increasingly use injunctions as a means of enforcing damages remedies[9] and invoke so-called "equitable clean-up jurisdiction" to issue a damages award where the plaintiff's claim for damages is "incidental" to an equitable claim.[10]

3 See 1848 NY Laws 521 NY CPLR § 103(a) (Consol 1999); Fed R Civ P 2 advisory committee's note; In re Implementation of Amendment 80: Admin. Plans Pursuant to Admin. Order No 14, 345 Ark Adv app (June 28, 2001) (per curiam); *Clark v Farmers Exch Inc,* 347 Ark 81, 83 n 1, 61 SW 3d 140, 141 n 1 (2001) (stating that "law and equity have been merged"); Va Code Ann. §§ 8.01-221, -272, -281 (Repl Vol 2000 & Cum Supp 2006).

4 Russell L Weaver et al, *Remedies: Cases, Practical Problems and Exercises* (West, 2nd ed, 2010) 12, describing equity courts as "courts of conscience".

5 Ibid 14.

6 See Bryan A Garner (ed) *Black's Law Dictionary* (West, 9th ed, 2009) 855 ("A court order commanding or preventing an action. To get an injunction, the complainant must show that there is no plain, adequate, and complete remedy at law and that an irreparable injury will result unless the relief is granted.")

7 Below nn 18-22 and accompanying text.

8 Courts' determinations regarding duty in negligence cases serve as an example. See, eg, *Atcovitz v Gulph Mills Tennis Club Inc*, 812 A 2d 1218, 1222-23 (Pa, 2002): ("[T]he legal concept of duty is necessarily rooted in often amorphous public policy considerations, which may include our perception of history, morals, justice, and society. . . . [O]ur courts are to balance in determining whether a common law duty of care exists: (1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution.")

9 See Rhonda Wasserman, 'Equity Transformed: Preliminary Injunctions to Require the Payment of Money' (1990) 70 *Boston Law Review* 623.

10 See, eg, *Towell v Shepherd*, 286 SW 2d 143, 145 (Ark, 1985) (holding that a court is able to exercise jurisdiction over legal questions that are incidental or essential to the determination of the equitable questions). This device is arguably unconstitutional even under courts' general jury-right jurisprudence, for it allows a judge to rule on a matter

More significant evidence of the declining relevance of the law-equity distinction is the degeneration of the irreparable injury rule. Courts in nearly every jurisdiction, state and federal, ostensibly require an injunction plaintiff to prove either (or both) that legal relief would be inadequate or that absent an injunction the plaintiff would suffer irreparable harm.[11] This rule traces back to the height of the rivalry between law and equity courts in Seventeenth Century England and has mediated their separation ever since.[12] Despite its ancient pedigree and seemingly pervasive influence extant, however, the rule was pronounced dead in 1990 by leading remedies scholar Doug Laycock.[13] Backed by an extensive survey of the case law, Professor Laycock asserted that rather than reserving injunctions for cases in which there exists no adequate remedy at law, courts in fact—through a variety of interpretations of and exceptions to the traditional rule—allow a plaintiff to seek either a legal or equitable remedy for any alleged wrongdoing, unless there are strong policy reasons to prefer damages.[14] Put differently, as Laycock explains, courts "find damages adequate, only when there is some identifiable reason to deny specific relief in a particular case."[15]

If Professor Laycock's theory signals at least a strong trend in remedies cases—and I agree that it does—, then it seems that the law is indeed working itself pure of the long divide between law and equity.[16] One significant incident of this divide remains, however—equity's limitations on the right to a civil jury.[17] Although courts have been forced to adjust the traditional jury rule to the post-

historically determined by the jury. See *Dairy Queen Inc v Wood*, 369 US 469, 470-73 (1962) (holding equitable clean-up to be unconstitutional under the Seventh Amendment; only in the most imperative circumstances can the right to a jury trial of legal issues be lost through prior determination of equitable claims).

11 Doug Rendleman, 'The Inadequate Remedy at Law Prerequisite for an Injunction' (1980-81) 33 *Florida Law Review* 346, 346.

12 See above n1.

13 Doug Laycock, 'The Death of the Irreparable Injury Rule' (1990) 103 *Harvard Law Review* 687; see also Doug Laycock, *The Death of the Irreparable Injury Rule* (Oxford University Press, 1991). Scholarship criticizing the rule from a normative and descriptive standpoint has been frequent. See, eg, Owen M Fiss, *The Civil Rights Injunction* (Indiana University Press, 1978); Daniel Friedmann, 'Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong' (1980) 80 *Columbia Law Review* 504; Douglas Laycock, 'Injunctions and the Irreparable Injury Rule' (1979) 57 *Texas Law Review* 1065; Margaret Jane Radin, 'Compensation and Commensurability' (1993) 43 *Duke Law Journal* 56; Rendleman, above n 11, 346; Alan Schwartz, 'The Case for Specific Performance' (1979) 89 *Yale Law Journal* 271; Cass R Sunstein, 'Incommensurability and Valuation in Law' (1994) 92 *Michigan Law Review* 779 ; Thomas S Ulen, 'The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies' (1984) 83 *Michigan Law Review* 341.

14 Laycock (1990) above n 13, 691.

15 Ibid.

16 Laycock himself concludes that "[t]he choice between legal and equitable remedies is historical and almost wholly dysfunctional." Ibid 696.

17 Doug Rendleman has also asserted as much, stating that "the legal-equitable distinction is not functional and no longer useful except for analyzing the constitutional right to a civil jury . . . ." Doug Rendleman, 'Irreparability Irreparably Damaged' (1992) 90 *Michigan Law Review* 1642, 1648.

merger world in a variety of ways, courts yet refuse to impanel a jury in claims for purely equitable remedies. The next Section outlines courts' treatment of this issue, its intransigence, and its importance to substantive law.

The Jury Issue and the Law-Equity Divide

The most significant remnant of the law-equity division is the two-faced right to trial by jury--significant both due to its intransigence and its substantive importance. The traditional understanding is that a jury is available for suits at common law but not for suits brought in equity. This anachronism has been particularly slow to change for two reasons: First, the doctrine has been constitutionalized. The right to civil jury trial is guaranteed in federal courts by the Seventh Amendment of the United States Constitution, which provides that: "In [s]uits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any [c]ourt of the United States, than according to the rules of common law."[18] Although the federal civil jury provision has not been incorporated as part of constitutional Due Process and therefore doesn't apply to state courts,[19] all but two state constitutions contain a similar provision.[20] Courts have generally defined "suits at common law" as suits that, as of the year of passage of the relevant constitutional provision, would have been brought in common law courts rather than courts of equity.[21] Interpreting state constitutional jury provisions, state courts have adopted a variety of approaches, many of which track the federal.[22] With such deep constitutional roots, it is not surprising that the equitable ban on juries maintains a stronger presence in current law than other vestiges of the law-equity divide.

A second reason for the continuing puissance of the rule is doubtless our country's conflicted affection for the civil jury. The right—or at least availability—of a jury trial is arguably one of the central tenets of American democracy. It is also one of the most tenuous. The civil jury has been attacked from multiple corners, and its purview has been narrowed over the years by both courts and legislatures. In the following paragraphs, I offer an exposition of America's conflicted views of the

18 *United States Constitution* amend VII.

19 See *Curtis v Loether*, 415 US 189, 192 n 6 (1974) ("The Court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment.").

20 Margaret L Moses, 'The Jury-Trial Right in the UCC: On a Slippery Slope' (2001)= 54 *Southern Methodist University Law Review* 561, 565. The exceptions, Louisiana and Colorado, provide a jury right by statute and by court rule, respectively. See *Curtis v Loether*, 415 US 189 (1974).

21 See *Tull v United States*, 481 US 412, 417 (1987) (defining the test for whether the Seventh Amendment applies as "whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty"). The inquiry is actually more complicated, involving consideration of: (1) pre-merger custom, (2) the nature of the remedy sought, and (3) practical abilities and limitations of juries. *Ross v Bernhard*, 396 US 531, 548 n 10 (1970).

22 See below nn 65-67 and accompanying text.

jury, and then an explanation for how this mélange has manifested in post-merger jury doctrine.

In seventeenth and eighteenth century English and colonial American courts, the jury was held in such esteem that it was often said to be the judge of both fact and law.[23] The jury's privileged position likely stemmed from a common post-Enlightenment view that man is inherently reasonable and that even the most ordinary man is capable of discerning natural law and reaching the "right" resolution of a legal dispute.[24] According to this populist notion, ordinary men were not only capable but were the best possible decision makers for most disputes.[25]

In the American colonies, the institution of the jury was one of the founding principles of our fledgling democracy.[26] Indeed, as Justice Rehnquist explained, "its deprivation at the hands of the English was one of the important grievances" that led to the American Revolution.[27] The Declaration of Independence cites any revocation of the jury as one of the gravest injuries to free people, "having in direct object the establishment of an absolute Tyranny over [the] States."[28] Records from early America are filled with descriptions of the jury serving to

23 Laura Gaston Dooley, 'Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury' (1995) 80 *Cornell Law Review* 325, 350; see also James P Levine, *Juries and Politics* (Brooks/Cole, 1993) (noting that juries "had power not only to decide the facts but to interpret the law and to apply their own moral standards").

24 Dooley, above n 23, 350-51; Note, 'The Changing Role of the Jury in the Nineteenth Century' (1964) 74 *Yale Law Journal* 170, 172 ('The Changing Role') ("Since natural law was thought to be accessible to the ordinary man, the theory invited each juror to inquire for himself whether a particular rule of law was consonant with principles of higher law.").

25 "For the most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of trial; and that, when once the fact is ascertained, the law must of course redress it. This therefore preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens. Every new tribunal, erected for the decisions of facts, without the intervention of a jury . . . is a step towards establishing aristocracy, the most oppressive of absolute governments." William Blackstone, *Commentaries* (Royal Furgeson, 'Civil Jury Trials R.I.P.? Can It Actually Happen in America?' (2009) 40 *St Mary's Law Journal* 795, 800) 349, 380 [first published 1766].

26 See generally Edith Guild Henderson, 'The Background of the Seventh Amendment' (1966) 80 *Harvard Law Review* 289, 291-98 (discussing the history of the Seventh Amendment's adoption); Charles W Wolfram, 'The Constitutional History of the Seventh Amendment' (1973) *Minnesota Law Review* 639, 640-41.

27 *Parklane Hosiery Co v Shore*, 439 US 322, 340 (Rehnquist J) (1979). When Thomas Jefferson wrote the Declaration of Independence, he observed that "a decent respect to the opinions of mankind required the colonists to "declare the causes" of revolution, which included England "depriving us in many cases, of the benefits of [t]rial by [j]ury." *The Declaration of Independence* [1], [20] (US 1776).

28 *The Declaration of Independence* [2] (US 1776); ("For depriving us in many cases, of the benefits of Trial by Jury.") at [20].

anchor the State to principles of republican governance.[29]

Although the Founders often focused on the necessity of criminal juries, they held civil juries in similar reverence.[30] Patrick Henry even described the right to a civil jury as "one of the greatest securities to the rights of the people, [which] ought to remain sacred and inviolable."[31] The Founders' belief in the centrality of the jury lay in the notion that democratic government must be of, by, and for the people. Whereas the legislative and executive branches of government answered to the popular vote, the federal judiciary and many state judges enjoyed unfettered life tenure. Juries thus provided the only popular check on the power of the judiciary.[32] This, coupled with the widespread belief that judges were either corrupt[33] or biased in favor of wealthy private or government litigants, made the jury a powerful democratic force.[34] As Alexis de Tocqueville put it, "[t]he jury system . . . [is] as direct and as extreme a consequence of the sovereignty of the people as universal suffrage."[35]

A related concept is that a jury comprised of members of the general populace promotes acceptance of and respect for the justice system, thereby cementing the rule of law.[36] This is true both in the context of a particular case and in broader terms. Parties to a case may be more likely to accept a verdict rendered by a

29 See, eg, Letter from Thomas Jefferson to Thomas Paine, 11 July 1789 in Julian P Boyd ed, *The Papers of Thomas Jefferson (Princeton University Press, 1958) vol 15, 269*.

30 See Wolfram above n 26, 664. The center of James Madison's focus when writing the Bill of Rights was to ensure jury trials in criminal cases (the Sixth Amendment) and in civil cases (the Seventh Amendment). See generally Akhil Reed Amar, *America's Constitution: A Biography* (Random House, 2005) (chronicling the evolution of the United States Constitution).

31 Henderson above n 26, 298 (citing ratification debate over the Bill of Rights).

32 Ibid 305-06 ("That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, [the] jury trial is meant to ensure their control in the judiciary."); Stephen Landsman, 'The Civil Jury in America: Scenes from an Unappreciated History' (1993) 44 *Hastings Law Journal* 579, 618 (citing historical evidence that juries were meant to curb judicial power).

33 See Alan M Scheiner, Note, 'Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power' (1991) 91 *Columbia Law Review*, 153-54 (arguing that eighteenth-century view of juries was of an important political body and a check on potentially corrupt judges); The Changing Role, above n 24, 173 (same).

34 Wolfram, above n 26, 679-84; see also Scheiner above n 33, 144 ("For the Antifederalists, the civil jury would play a dual role in the new Republic; it would protect the common people against the judges' biases in favor of the government and the private ruling class, and also establish a small preserve of direct self-government in the face of the remote Federal regime.").

35 Alexis de Tocqueville, *Democracy in America* (Henry Reeve trans, Francis Bowen, 1862) 362.

36 Some have even asserted that because jury deliberations are secret, the jury system neutralizes criticisms of the verdicts. It is difficult to criticize a verdict the reasoning of which one cannot access. 'Developments in the Law–The Civil Jury' (1997) 110 *Harvard Law Review* 1408, 1433-35 ("[Moreover], the jury promotes public acceptance of the legal system by deflecting and neutralizing criticisms of verdicts.").

jury of peers than one coming from the proverbial "wise man sitting under the Bodhi tree." Moreover, the public is more likely to embrace a justice system the substance of which is derived in large part from its own community own mores.

Robert Ackerman has described the importance of the popular jury from another perspective, arguing that the jury operates as a valuable component of civic engagement. Professor Ackerman notes that "social capital--the connections between individuals that build social networks--[is] critical to the norms of reciprocity and trustworthiness that allow us to function as a civil society."[37] According to Ackerman, juries embody the concept of social capital because jury service provides an opportunity for direct, participatory citizenship.[38] Unlike voting, Ackerman observes, jury service requires citizens to watch and think closely, to engage in face-to-face debate with neighbors, and to make a collective decision that impacts a fellow community member. Ackerman points out that "[n]o group can win that debate simply by outvoting others; under the traditional requirement of unanimity, power flows to arguments that persuade against group lines and speak to a justice common to persons drawn from different walks of life."[39] Thus, jury service enhances the bonds of community and promotes a sense that Americans are part of a grassroots, participatory system of government.

In addition to the role of the jury as a democratic institution, there are other pragmatic reasons to support the right to a civil jury trial. Most judgments in common-law cases require common sense, common experience, and application of the standards and behavioral norms of the community.[40] The jury brings to each case multiple perspectives, both shared and diverse experiences, and (with

37 Robert M Ackerman, 'Vanishing Trial, Vanishing Community? The Potential Effect of the Vanishing Trial on America's Social Capital' [2006] *Journal of Dispute Resolution* 165, 166, quoting Robert D Putnam, *Bowling Alone: The Collapse and Revival of American Community* (Touchstone, 2000) 19-20.

38 Ackerman, above n 37, 175. Ackerman is in accord with Alexis de Tocqueville's view that the jury is "a 'political institution,' educating citizens in the responsibilities of democracy."

39 Ibid; see also *Jeffrey Abramson, We The Jury (Harvard University Press, 1994) 8*.

40 See O W Holmes Jr, *The Common Law* (first published 1881, 1963 M D Howe ed) 119-20 (arguing, in the torts context, that leaving wrongfulness to the jury is a way of accessing the common experience of mankind in assessing danger under particular circumstances); Blackstone, above n 25, 349, 380 ("[A] competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice."); 'Development in the Law–The Civil Jury' (1997) 110 *Harvard Law Review* 1433-35 (1997) ("The jury is the institution through which community values enter the judicial process and through which the legal system maintains its connection with public sentiment."); Daniel J Steinbock et al, 'Expert Testimony on Proximate Cause' (1988) 41 *Vanderbilt Law Review* 261, 275 ("The question of what a reasonable person would have done under the circumstances is generally for the jury, because of 'the public's desire to have its conduct judged by the layman ('the man on the street') rather than by the more sophisticated and expert judgment of the trained lawyer, whose judicial experience may have given him a biased point of view.'"), citing Francis H Bohlen, 'Mixed Questions of Law and Fact' (1924) 72 *University of Pennsylvania Law Review* 111, 116.

the exception of the occasional attorney-juror) a legal *tabula rasa*.[41] To put it simply, one might endorse the jury because twelve heads are better than one.[42]

Despite centuries of jury primacy, beginning as early as the eighteenth century[43] and gaining momentum in the nineteenth, the jury fell into disfavor in the courts of England and later in America.[44] English courts initiated procedural rules that allowed courts to review jury-found facts and to rule as a matter of law on the wrongfulness of the defendant's conduct.[45] This development put the jury's primacy at risk and threatened to "reduce the law . . . to a multitudinous set of very specific legal rules of conduct."[46] England's courts gradually abandoned the civil jury, with minor exceptions, beginning with World War I and culminating in 1965 with the Court of Appeal holding that there is no right to a civil jury trial in England.[47] Although American courts have not followed suit, the number of jury trials has consistently declined in America over the last thirty years.[48]

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41 Although it is true that because of their diversity, different juries might arrive at inconsistent results given any one set of facts, at least each decision is made by those whose customs likely guided (or should have guided) the defendant's behavior in the first place. In addition, the jury's independence from the legal tradition might, as one scholar suggests, "humanize the law" and operate as a "backlash against one-sided and harsh, judicially-created tort doctrines" such as contributory negligence. Landsman, above n 32, 605.

42 The Supreme Court once echoed this sentiment in defense of the jury's dominion:

> It is this class of cases [negligence] . . . that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.

Sioux City & Pac R R Co v Stout, 84 US 657, 663-64 (1873).

43 See generally Stephen C Yeazell, 'The New Jury and the Ancient Jury Conflict' [1990] *University of Chicago Legal Forum* 87 (detailing the eighteenth-century shift in power between judge and jury).

44 See generally David Millon, 'Juries, Judges, and Democracy' (1993) 18 *Law & Society Inquiry* 135, reviewing Shannon C Stimson, *The American Revolution in the Law: Anglo-American Jurisprudence Before John Marshall* (Princeton University Press, 1990) (describing the nineteenth-century demise of juridical authority).

45 Patrick J Kelley, "Proximate Cause in Negligence Law: History, Theory and the Present Darkness" (1991) 69 *Washington University Law Quarterly* 49, 62.

46 Ibid.

47 See Mary Ann Glendon Michael Wallace Gordon & Christopher Osakwe, *Comparative Legal Traditions* (West, 2nd ed, 1994) 613-27 (tracing the decline of the civil jury in England).

48 Marc Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts' (2004) 1 *Journal of Empirical Legal Studies* 459, 460 (noting that the "portion of federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2002, continuing a long historic decline."); Marc Galanter, 'A World Without Trials?' [2006] *Journal of Dispute Resolution* 7, 7-9 (providing evidence of the significant decline in federal and state civil trials).

Scholars have proffered a number of theories to explain the backlash against the common-law jury. One frequent explanation is that the industrial revolution spurred judicial concern that jury verdicts might thwart corporate and industrial progress.[49] Another cites the fact that turn-of-the-century formalists, led by Dean Langdell of Harvard, ushered in the notion that the study of law should be approached as a science, and that law itself consists of a closed system of uniform, predictable rules.[50] Because, according to this theory, such rules stem from the decisions of judges, not juries, the formalist movement influenced judges to co-opt jury questions for judicial resolution.[51] Other scholars have attributed the jury's decline to the increasing sophistication and training of the judiciary and the fading need for the jury to serve as a weapon against English imperialism.[52] Still others point to the possibility that professional elitism or classism on the part of lawyers and judges[53] or the inclusion of women and minorities in the jury pool may have sparked scorn and distrust toward the jury system.[54]

Perhaps the most frequent modern criticisms are that juries are unsophisticated, unpredictable, and subject to unruly passion and prejudice, and that they are biased against corporations and the wealthy.[55] Such criticisms are worthy of further comment, for they have been the subject of decades of systematic quantitative study. Studies have largely shown that in a vast majority of cases, judges approve of juries' verdicts.[56] Professors Valerie Hans and Neil Vidmar have been researching juries for twenty years, and "[a]fter evaluating all of the evidence, [have come down] strongly in favor of the American jury" on the metrics cited

49 Landsman, above n 32 605-07, citing Morton J Horowitz, *The Transformation of American Law 1780-1860* (Harvard University Press, 1977); William E Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society,* 1760-1830 (University of Georgia Press 1975).

50 See Thomas C Grey, 'Langdell's Orthodoxy' (1983) 45 *University of Pittsburgh Law Review* 1, 5 (describing Langdell's attempts to shape the study of law into a scientific inquiry).

51 Dooley, above n23, 354.

52 Valerie P Hans & Neil Vidmar, *Judging the Jury* (Basic, 1986) 38-39.

53 See Levine, above n 23, 25 (explaining the movement against the jury in the late nineteenth century and noting that "[t]he jury's freedom of action was also restricted, perhaps in part as a result of the growing professionalism of the legal system and the disdain that many prominent lawyers of the late-nineteenth century had for the nation's growing masses.").

54 Dooley, above n 23, 355-56.

55 See, eg, *TXO Prod Corp v Alliance Res. Corp*, 509 US 443, 474 (O'Connor J) (1993) ("[J]urors are not infallible guardians of the public good. . . . Arbitrariness, caprice, passion, bias, and even malice can replace reasoned judgment and law as the basis for jury decisionmaking."); Jerome Frank, *Law and the Modern Mind* (first published 1930, 1985 ed) 172 ("The general-verdict jury-trial, in practice, negates that which the dogma of precise legal predictability maintains to be the nature of law. A better instrument could scarcely be imagined for achieving uncertainty, capriciousness, lack of uniformity, disregard of former decisions--utter unpredictability.").

56 See generally Valerie P Hans & Neil Vidmar, 'The Verdict on Juries' (2008) 91 *Judicature* 226, 226-27 (surveying studies spanning five decades showing that judges agree with jury verdicts in most cases); see also Furgeson, above n 25, 805 ("After forty years in the civil justice system and after observing hundreds of juries, my experience strongly validates the efficacy of juries.")..

above.[57] Hans and Vidmar also have found no evidence to support claims of jury bias leveled by doctors, insurance companies, and corporate executives.[58]

Further evidence of Hans's and Vidmar's findings may be seen in statistics regarding plaintiff win rates and damages awards. Plaintiffs win approximately 50% of tort jury trials, for example, a figure that has remained fairly consistent for decades.[59] Plaintiffs' win rate in tort bench trials is slightly higher, however, at approximately 56%. The median damages award for tort plaintiffs winning in jury trials trial was $24,000 in 2005. The median award was only slightly lower in bench trials, at $21,000.[60] Thus, although the figures are roughly equal, plaintiffs win somewhat more often before judges and are awarded slightly more damages before juries. Such statistics hardly evidence a cast of juries wildly biased in favor of the downtrodden plaintiff. If anything, the numbers reveal that juries perform very similarly to judges.[61] This conclusion is supported by scholarship showing that jurors' assessments of the critical issues in torts cases are indistinguishable from those of judges, plaintiffs' lawyers, and defense lawyers' alike,[62] and in medical malpractice cases, from neutral physicians.[63]

In summary, the American jury is deeply rooted in Americans' notions of democratic government and in our hopes for a fair system of justice. Our affair with the jury has also been a troubled one, however. What's more, our conflicting feelings regarding the jury have manifested in jury doctrine post-merger of law and equity. Although the essential dual-approach to the right to jury trial has been preserved, courts struggle with how to handle mixed cases—that is, cases in which the plaintiff seeks both legal and equitable remedies, or where the plaintiff

57 Hans & Vidmar, above n 56, 230.

58 To the contrary, studies have rather consistently shown that:

> [J]urors subject plaintiffs' evidence to strict scrutiny. Most members of the public adhere to an ethic of individual responsibility, and many wonder about the validity of civil lawsuits . . . . Although the research finds that juries treat corporate actors differently, the differential treatment appears to be linked primarily to jurors setting higher standards for corporate and professional behavior, rather than to anti-business sentiments or a "deep pockets" effect. Members of the public, and juries in turn, believe that it is appropriate to hold corporations to higher standards, because of their greater knowledge, resources, and potential for impact. The distinctive treatment that businesses receive at the hands of juries is a reflection of the jury's translation of community values about the role of business in society.

Ibid.

59 US Department of Justice, Bureau of Justice Statistics, *Civil Bench and Jury Trials in States Courts*, *2005* (2006).

60 Ibid.

61 Of course, such summary statistics say nothing about what types of cases and parties are preferred by juries versus judges. It is theoretically possible, although unlikely, that although overall jury win-rates approximate those of judges, juries are more inconsistent regarding the circumstances under which a plaintiff might win.

62 Rosell L Wissler et al, 'Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers' (1999) 98 *Michigan Law Review* 751, 812.

63 See Neil Vidmar, 'The Performance of the American Civil Jury: An Empirical Perspective' (1998) 40 *Arizona Law Review* 849, 859.

has sought an equitable remedy and the defendant has asserted a legal defense or counterclaim, or vice versa. A variety of approaches have developed, from a strong default in favor of a jury to a preference for judicial resolution of all issues in any case involving an equitable claim, whether or not legal claims coincide.[64] Other courts condition the jury on whether the issues in the case are predominantly legal or equitable.[65] The approach of the federal courts, and that of some states, is to weigh three factors: (1) the pre-merger custom regarding the claims at issue; (2) the nature of the remedy sought (whether enforced by attachment and execution or contempt); and (3) the practical abilities and limitations of juries.[66] Even where a jurisdiction has clearly adopted a particular approach, however, courts' application of the doctrine is often at best difficult to predict and at worst internally inconsistent or confused.

Discarding the Anachronism

In light of America's conflicted feelings regarding the jury, why should courts care that a jury is not always available to private litigants? My first answer is that the political, social, and jurisprudential reasons to favor jury resolution of common-law claims are, in my view, compelling. Certainly, the fact that a remedy was developed by one group of Sixteenth Century Englishmen rather than another cannot be relevant to the question of whether a litigant is entitled to be judged by a group of her peers. There are also more subtle reasons, however.

Because a jury is only required for legal claims, litigants' choice of cause of action and remedy are influenced by the party's jury preference. This is problematic for two reasons. First, it is the tail wagging the dog—a litigant should be free to pursue the cause of action that best addresses the litigant's wrong and seek relief that most completely makes her whole. The availability of a jury should not mediate such choices. Second, a part-time jury-trial right opens the path to strategic conduct on the part of both plaintiffs and defendants. Particularly where the law regarding mixed claims is unpredictable, it leaves parties room to maneuver their way toward or away from a jury. And where jurisdictions differ widely in their interpretation of the jury trial tight, the impetus for forum shopping is significant. Every aspect of litigation focused on tactics rather than substantive justice favors wealthy litigants, increases transaction costs, and generally erodes the legitimacy of the legal system.

In addition to being subject to manipulation by the parties, the disjointed right to jury trial is pliable in the hands of judges. At several stages, a judge may take advantage of the law-equity divide to resolve herself a case that might otherwise go to a jury. For example, a court might take advantage of the many holes and

64 *Merritt v Craig*, 746 A 2d 923 (Md, 2000) (summarizing some of the approaches adopted by various states).

65 Ibid.

66 *Ross v Bernhard*, 396 US 531, 538 n 10 (1970).

exceptions in the irreparable injury rule to avoid impaneling a jury. Likewise, judges might avail themselves of the vagaries in the rules governing mixed claims or the similarly nuanced historical jury-right analysis in order to keep a case from the perceived infirmities of the jury. Although quantitative studies do not indicate that judges are any more (or less) biased than juries in most respects,[67] a judge's mere desire to decide a case herself might reflect prejudgment. Furthermore, because judicial, but not juridical, decisions carry the weight of precedent, if judicial manipulation of jury doctrine reflects any form of bias, that bias will shape the law in a way the reflects that bias.

I propose a unified right to jury trial, regardless of the historical or substantive nature of the claimant's requested remedy. A unified right would not, of course, mean that the jury would decide every issue necessary for resolution of the plaintiff's case. Certain matters are better decided by judges—for example, the issuance of a preliminary injunction or the task of defining the scope of a permanent injunction. A judge typically has the experience necessary to craft an injunction that will be both practically enforceable and efficacious, while preserving, to the extent possible, the interests of the losing party. But courts should focus the decision of whether a court or jury should decide any particular issue on the relative merits of the entities (the third, unloved, factor from *Ross v. Bernhard*),[68] rather than the history of the remedy or the nature (as opposed to the practicalities) of its enforcement mechanism.

Not only should courts create a unified right to jury trial, they have the power to do so, whether by constitutional re-interpretation or by simple common-law requirement.[69] Although Supreme Courts have thus far defined "suits at common law" such that it excises any role for the jury in a wide swath of cases, such an interpretation is by no means self-evident. The court might have interpreted (and might still interpret) "suits at common law" to mean that a jury is required for all suits brought in a common law court.

Indeed, without overturning precedent in such dramatic fashion, courts might learn from historical research, which indicates that until well after the Seventh Amendment was passed, equity courts used a variety of devices to send most cases to a jury for determination of disputed facts and even to make judgments

67 See, eg, Anthony G Amsterdam & Jerome Bruner, *Minding The Law* (Harvard University Press, 2000) (discussing psychological processes of judges and lawyers); Chris Guthrie, Jeffrey J Rachlinski & Andrew J Wistrich, 'Inside the Judicial Mind' (2001) 86 *Cornell Law Review* 777, 784-821 (describing a quantitative study showing that judges rely on the same cognitive biases as laypersons, including framing effects, egocentric biases, anchoring effects, errors caused by the representativeness heuristic, and hindsight bias); Jeffrey J Rachlinski, 'A Positive Psychological Theory of Judging in Hindsight' (1998) 65 *University of Chicago Law Review* 571, 595-602 (discussing the effect of hindsight bias on the judiciary).

68 See above n 66 and accompanying text.

69 A legislature could also require juries for all cases, but given the divided and vested political views of the jury, such action seems unlikely.

of law applied to fact. Research by Harold Chesnin and Geoffrey Hazard has shown that at the time the Seventh Amendment was adopted in 1791, the English Chancery was just beginning to move away from the rule that disputed issues of fact and law applied to fact were "generally, if not invariably" submitted to law courts for decision by a jury.[70] Such cases were then sent back to the Chancery for entry of a final order and, if relevant, fashioning of an in personam injunction.[71] English courts gradually moved from this system to one in which jury referral was merely at the discretion of the Chancery court. American courts followed a similar procedure, but according to Chesnin and Hazard, American courts did not complete the move to a discretionary system until the beginning of the Twentieth Century, long after most constitutional jury trial provisions had been adopted.[72] Thus, even accepting courts' reading of the limitation of the jury-right to "suits at common law," the practice of the courts of equity was to allow jurors to resolve disputed issues of fact and law applied to fact, retaining only the determination of pure questions of law and the fashioning of in personam relief.[73] Such a practice mirrors precisely the proposal in this paper for a unified jury right.

CONCLUSION

The jury trial right has been interpreted narrowly through the years. The chief example of this narrowing is that the right has been interpreted by courts to apply only to legal claims and not equitable claims—that is, claims in which the remedy sought is equitable. Such an interpretation is neither self-evident nor historically accurate. Legal historians have proven that the Chancery send disputed factual issues and questions of law applied to fact to juries. In this short piece, I have argued that in light of the increasing breakdown of the irreparable injury rule, courts ought to make a jury available in both legal and equitable claims, leaving to the judge the decision among remedies and the crafting of any resulting injunction. My argument stems both from my own views about the social, political, and jurisprudential import of the jury as well as from the practical, rule-of-law problems stemming from a divided right to jury trial.

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70 Harold Chesnin & Geoffrey C Hazard Jr, 'Chancery Procedure and the Seventh Amendment: Jury Trial of Issues in Equity Cases before 1791' (1974) 83 *Yale Law Review* 999, 999-1010.

71 Ibid 1013 (describing a similar procedure in American courts).

72 Ibid 1011.

73 A handful of states already follow this practice. According to Doug Laycock, the somewhat disputed list includes a combination of Arizona, Georgia, North Carolina, Tennessee, Texas, and Virginia. Laycock (1990) above n 13, 213.