1977

Chapters of the Civil Jury

Doug R. Rendleman

Chapters of the Civil Jury

BY DOUG RENDLEMAN*

The civil jury, though constitutionally protected by the seventh amendment, has remained a controversial institution throughout much of Anglo-American legal history. Our romantic ideals are questioned by critics who view the civil jury as prejudiced and unpredictable; proponents note the sense of fairness and "earthy wisdom" gained by community participation in the legal process. This debate surfaces in the process of accommodation between certain substantive goals of the law and the pre-verdict and post-verdict procedural devices courts have employed to control the jury. In this article, Professor Rendleman examines this conflict in his three "chapters" involving racially motivated discharges of black teachers, defamation of public persons by the news media, and Civil Rights Act lawsuits before deep south juries. He concludes that "some actions are suited to jury freedom, others to jury control" depending on the nature of the substantive legal issues and the competing interests involved.

INTRODUCTION

What is the role of the public in the civil justice process? This question has concerned jurists for centuries. In much of the world, the civil jury is rare or extinct. In the United States, this cumbersome, dilatory, and expensive institution flourishes; the American civil jury is too entrenched in our legal system to be a fad.

The seventh amendment states that in "suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ." A commentator has observed that "the amendment's deceptively simple language belies the countless hours expended in attempts to ascertain the limits of its applicability."[1] There is a "federal policy favoring jury decisions of disputed factual questions."[2]

* Professor of Law, College of William and Mary.

[1] Lazor, *Jury Trial in Employment Discrimination Cases — Constitutionally Mandated?*, 53 TEXAS L. REV. 483, 491 (1975).

[2] Byrd v. Blue Ridge Coop., 356 U.S. 525, 538 (1958).

The jury, the Supreme Court has said, is "the normal and preferable mode of disposing of issues of fact in civil cases at law . . . . [A]ny seeming curtailment of the right to a jury trial should be scrutinzed with the utmost care."[3]

Judges try equitable issues without juries.[4] Equitable relief exists only when the plaintiff's legal remedies are inadequate. However, the Federal Rules of Civil Procedure, the merger of law and equity, and the Declaratory Judgment Act expanded legal remedies. The plaintiff may not defeat another party's right to a jury trial on a legal issue by commencing a lawsuit in equity. A jury hears and decides factual issues pertaining to both legal and equitable relief. The judge grants equitable relief commensurate with the jury's fact-finding.[5] In recent years, the Supreme Court has greatly expanded a civil litigant's right to a jury trial.[6] The right to a jury trial has been upheld in an action for trademark infringement and breach of contract seeking damages and an injunction,[7] a stockholder's derivative action,[8] a suit to recover possession of real property,[9] and a damage action charging discrimination in sale or rental of real property.[10] This, Justice Stewart said in dissent, represents "an unarticulated but apparently overpowering bias in favor of jury trials in civil actions."[11]

For the right to a jury trial to be realistic, the plaintiff must evade the defendant's motions intended to halt the lawsuit before it reaches a jury. On the other hand, a backlog of lawsuits congests court calendars; and jury trials consume time and money. To prevent useless trials, judges need a pre-trial device to identify litigants without enough evidence to submit

---

[3] Dimick v. Schiedt, 293 U.S. 474, 486 (1934).

[4] D. DOBBS, REMEDIES 68 (1973); F. JAMES, CIVIL PROCEDURE 338 (1965); Kane, *Civil Jury Trial: The Case for Reasoned Iconoclasm*, 28 HASTINGS L.J. 1, 4 (1976).

[5] Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 509 (1959); Marshall v. Electric Hose and Rubber Co., 413 F. Supp. 663, 668 (D. Del. 1976).

[6] Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U.L. REV. 486, 501 (1975).

[7] Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962).

[8] Ross v. Bernhard, 396 U.S. 531 (1970).

[9] Pernell v. Southall Realty Co., 416 U.S. 363 (1974).

[10] Curtis v. Loether, 415 U.S. 189 (1974).

[11] Ross v. Bernhard, 396 U.S. 531, 551 (1970) (Stewart, J., dissenting). *See also* Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 HARV. L. REV. 442 (1971).

to the jury. In modern procedure, summary judgment performs this function.[12] When the pleadings reveal an absence of a genuine factual issue, the judge grants summary judgment. The defendant may obtain summary judgment by negating any essential element of the plaintiff's claim. Summary judgment does not deprive parties of a jury trial because judges cannot use it to try issues of fact; they can only determine whether issues of fact exist.[13] Despite summary judgment's acceptance, proponents of jury trials persistently accuse it of treading on the jury's domain.[14]

Judges possess many tools which permit them to regulate the jury. Pre-verdict tools include evidentiary rulings, detailed instructions, and comment on the evidence.[15] Post-verdict tools for regulation of the jury include judgments notwithstanding the verdict, nonsuits, new trials, and remittitur of damages. In theory, the judge uses these devices to guarantee that the jury follows the legal rules. Judges, the authorities say, adjudicate legal matters, not issues of fact which are for juries. However, one question of law for the judge is whether the evidence creates a factual issue for the jury.[16] Controversy surrounds defining issues of fact, distinguishing issues of law, deciding whether to submit a case to the jury, and determining how much evidence will support a jury verdict. In personal injury litigation, the Supreme Court grants the jury freedom to function freely.[17] Different types of litigation may require different measures of control.

Opponents of the civil jury charge that it lacks vision. They find it parochial, prejudiced, and unpredictable, and therefore they argue that control mechanisms should be employed to prevent the jury from deciding questions that would

---

[12] *See generally* Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745 (1974).

[13] 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2712 (1973).

[14] First Nat'l Bank v. Cities Serv. Co., 391 U.S. 353, 304 (1968) (Black, J., dissenting).

[15] *See generally* JAMES, *supra* note 4, at §§ 7.12-.22.

[16] Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 909-17 (1971).

[17] *See, e.g.*, Bailey v. Central Vt. Ry., 319 U.S. 350 (1943); Tiller v. Atl. Coast Line R.R., 318 U.S. 54 (1943). *See generally* Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482 (1956).

be unfavorably influenced by these shortcomings. Even though "procedural," the civil jury constitutes a significant policy choice. Judges accommodate the romantic ideal to practical decision-making and attempt to ameliorate the conflict between procedural and substantive goals. But as Judge Wisdom pointed out, "[I]f the history of the jury in Anglo-American law proves anything, it proves that the civil jury has assumed many forms and has been circumscribed, circumvented, and abandoned in various types of cases in many jurisdictions."[18] Thus courts appear ambivalent about the civil jury. The purpose of this article is to identify the methods courts use to abandon, circumvent, and circumscribe the jury, to evaluate the jury's role in modern litigation, and to explain the inevitable tension in this process. The ambivalence toward the civil jury will be examined through three "chapters" which discuss some of the principal issues of our time.

I. CHAPTER ONE: BLACK TEACHER DISCHARGED

As school desegregation progressed in the late 1960's and the early 1970's, federal courts began to address the problems of illegally discharged black teachers.[19] The plaintiffs brought most desegregation suits in equity seeking injunctive remedies against school districts as entities. Injunctive relief against future segregation, however, may be less than a complete remedy. When a teacher's employment is terminated for racial reasons, an injunction compelling the defendants to reinstate the teacher fails to restore the teacher to consistent constitutional treatment. The teacher who lost some salary will seek reinstatement plus backpay.

In *Harkless v. Sweeney Independent School District*,[20] ten black former teachers sued school officials and sought reinstatement with backpay, alleging that their discharges had been racially motivated. The defendants requested and the

[18] Melancon v. McKeithen, 345 F. Supp. 1025, 1032 (E.D. La. 1972), *aff'd*, 409 U.S. 943 (1972).

[19] *See* Singleton v. Jackson Mun. Separate School Dist., 419 F.2d 1211 (5th Cir. 1969), *cert. denied*, 396 U.S. 1032 (1970).

[20] 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971); *accord*, McFerren v. County Bd. of Educ., 455 F.2d 199 (6th Cir. 1972), *cert. denied*, 407 U.S. 934 (1972); Smith v. Hampton Training School, 360 F.2d 577 (4th Cir. 1966).

district judge granted a jury trial. During voir dire, "for clear and obvious reasons of strategy," the plaintiffs dismissed all claims against the defendants in their "individual" capacities and proceeded against the entity and its officers in their "official" capacity. The jury found that the officials discharged the plaintiffs in good faith and without racial motive. The court of appeals reversed and remanded, holding that neither backpay nor reinstatement were appropriate jury issues: "[T]he prayer for back pay is not a claim for damages, but is an integral part of the equitable remedy of injunctive reinstatement."[21]

Sound reasoning supports this result. For the Constitution to be meaningful, courts must make illegally fired teachers as whole as judicially possible.[22] Partial remedies fail to deter future unconstitutional discharges.[23] If a school board actually discharges a teacher because of the teacher's race, it may be that a local jury will respond to the same impulses and deny backpay to the teacher.[24] Distorted or bigoted "factfinding" might, under the Supreme Court's decisions, also subvert injunctive relief. Treating backpay and reinstatement as a unified equitable remedy permits the judge to award a complete remedy, the money and employment being equivalent to what the teacher would have received but for the illegal discharge.

Some scholars consider *Harkless* to be inconsistent with the Supreme Court's jury trial decisions.[25] When the plaintiff

---

[21] 427 F.2d at 324.

[22] *Cf.* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-21 (1975) (stressing backpay as necessary to a complete remedy under Title VII); Thomas v. Ward, 529 F.2d 916, 920 (4th Cir. 1975); Comment, *Burton v. Cascade School District: Failure to Recognize the Need for a Right to Reinstatement Following Unconstitutional Teacher Dismissal*, 17 WM. & MARY L. REV. 781 (1976).

[23] Burt v. Board of Trustees, 521 F.2d 1201, 1207 (4th Cir. 1975) (separate opinion of Winter, J.); Comment, *supra* note 22, at 793.

[24] *Cf.* Harkless v. Sweeny Ind. School Dist., 388 F. Supp. 738, 748 (S.D. Tex. 1975) (plaintiffs, because of strategic disadvantages, dismissed charges against individual school board members and directed their complaint toward the school as an entity); Lawton v. Nightingale, 345 F. Supp. 683, 684 (N.D. Ohio 1972); Redish, *supra* note 6, at 503.

[25] DOBBS, *supra* note 4, at 78-79 n.47; WRIGHT & MILLER, *supra* note 13, § 2307 at 46 n.53; Kane, *supra* note 4, at 30-31. *See also* Lee Pharm. v. Mishler, 526 F.2d 1115, 1117 (2d Cir. 1975); Tights, Inc. v. Stanley, 441 F.2d 336, 338 (4th Cir. 1971), *cert. denied*, 404 U.S. 852 (1971):

> Where there is a claim for money damages which is both legal in nature and

claims money damages, it is argued, the defendant may demand a jury trial.[26] While the judge may decide the reinstatement question in equity, a jury should decide the backpay question.[27] Other commentators, however, defend *Harkless*. A jury, they assert, will favor the official and frustrate the plaintiff's relief. Therefore, instead of equating backpay with money damages, one should analogize it to specific enforcement of a contract.[28]

Critics of *Harkless* have also argued that some statutory actions exclude the right to a jury trial.[29] In *Curtis v. Loether*,[30] however, while specifically declining to pass on *Harkless*,[31] the Court held that in a suit seeking damages and injunctive relief under the Fair Housing Act, either party had a right to a jury trial on the damage issue. The Court said: "[W]hen Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law."[32] Jury prejudice, actual or potential, is "insufficient to overcome the clear command of the Seventh Amendment."[33]

---

dependent upon the validity of equitable claims, the legal and equitable issues are common to each other and the parties are entitled to a determination by a jury of any factual questions related to the equitable issue.

[26] Comment, *The Seventh Amendment and Civil Rights Statutes: History Adrift in a Maelstrom*, 68 NW. U.L. REV. 503 (1973); Meeropol v. Nizer, 417 F. Supp. 1201, 1213 (S.D.N.Y. 1976). *But see* Curtis v. Loether, 415 U.S. 189, 196 (1974), wherein the Court stated: "We need not, and do not, go so far as to say that any award of monetary relief must necessarily be 'legal' relief." *See also* Minnis v. International Union, 531 F.2d 850, 852-53 (8th Cir. 1975); Burt v. Board of Trustees, 521 F.2d 1201 (4th Cir. 1975); SEC v. Petrofunds, Inc., 420 F. Supp. 958 (S.D.N.Y. 1976); Cayman Music, Ltd. v. Reichenberger, 403 F. Supp. 794 (W.D. Wis. 1975).

[27] *See* Wirtz v. Jones, 340 F.2d 901 (5th Cir. 1965); Mitchell v. City Ice Co., 273 F.2d 560 (5th Cir. 1960).

[28] McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I*, 60 VA. L. REV. 1, 66-70 (1974); Comment, *Monetary Claims Under Section 1983: The Right to Trial by Jury*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 613 (1973).

[29] Note, *Congressional Provision for a Nonjury Trial Under the Seventh Amendment*, 83 YALE L.J. 401 (1973).

[30] 415 U.S. 189 (1974).

[31] *Id.* at 196-97 n.13.

[32] *Id.* at 195.

[33] *Id.* at 198.

It might be argued that housing discrimination is more nearly a tort and a legal remedy, whereas racial discharge is more nearly a breach of a contract which can be specifically enforced in equity. But the actions are really similar; both vindicate the plaintiff's right to be free from racial slurs and prejudice.[34] Failure to renew a contract on the basis of race may be unconstitutional, but it is not a breach of contract. The analogy to specific enforcement either assumes a nonexisting legal contract or implies a fictional contract.

Backpay may also be viewed as restitution and therefore equitable. Equitable restitution requires the defendant to disgorge those sums denied the plaintiff which unjustly enrich the defendant.[35] A racial firing, however, does not unjustly enrich the school officials at all. Backpay is simply the damage claim available to any wrongfully discharged employee.[36] Moreover, courts reject the notion that backpay and reinstatement are united and hold that they are separate remedies. This permits a judge, when appropriate, to grant one without the other.[37]

Treating backpay under Title VII, Justice Rehnquist said that the right to a jury trial depends on whether a money award is discretionary or follows automatically from a finding that defendant violated the substantive standard. If backpay follows violation "as a matter of course," then it is legal and a jury issue.[38] If the judge retains the responsibility to decide and the discretion to adjust backpay, then it is equitable and an issue for the judge. The whole Court should repudiate this novel and

---

[34] Pons v. Lorellard, 549 F.2d 950, 954 (4th Cir. 1977); Lazor, *supra* note 1, at 496-97.

[35] Samuel v. Univ. of Pittsburgh, 538 F.2d 991, 994-95 (3d Cir. 1976); DOBBS, *supra* note 4, at § 4.1. *Cf.* SEC v. Petrofunds, Inc., 420 F. Supp. 958 (S.D.N.Y. 1976) (government action to compel disgorgement).

[36] DOBBS, *supra* note 4, at 69 n.18; Redish, *supra* note 6, at 526-28; Lazor, *supra* note 1, at 499. *But see* EEOC v. Detroit Edison Co., 515 F.2d 301, 308 (6th Cir. 1975).

[37] *See* Burton v. Cascade School Dist., 512 F.2d 850 (9th Cir. 1975) (backpay granted, reinstatement denied); Klein v. New Castle County, 370 F. Supp. 85 (D. Del. 1974) (plaintiff reinstated but denied backpay). *See also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 415-22 (1975) (backpay equitable; standards stated); Comment, *supra* note 22.

[38] Albemarle Paper Co. v. Moody, 422 U.S. 405, 443 (1975) (Rehnquist, J., concurring). *See The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 230-31 (1975). *But see* Curtis v. Loether, 415 U.S. 189, 197 (1974): "[T]he decision whether to award backpay is committed to the discretion of the trial judge."

aberrant view. If the legislature or the adjudicator may affect a litigant's right to a jury by altering the standards for awarding money, then the constitutional right to a jury may be avoided in every instance by allowing this flexibility. A litigant's right to a jury trial depends on the nature of the issues, not on the way the issues are decided. Moreover, both law and equity include remedial discretion. The jury has considerable discretion over money awards, including punitive damages.[39] When liability is close, a jury may compromise and award less than clearly proven damages.[40] The imprecise rules employed to measure legal damages allow a jury nearly unlimited discretion.[41] If backpay awards are otherwise legal, then neither the court nor the legislature can make them equitable by granting additional discretion to the fact-finder.

Therefore, school officials appear to have a seventh amendment right to a jury trial in a discharged teacher's suit for backpay. Litigants may not defeat the seventh amendment by labeling money damages as incidental to equitable relief.[42] If the plaintiff joins a legal claim for backpay with an equitable claim for reinstatement, the judge should summon a jury to decide the legal claim and all common factual issues. The judge may not order reinstatement unless it is consistent with the jury's finding of fact.[43]

Judges cannot circumvent defendants' right to a jury trial on factual issues in actions at common law. Prompt suits and preliminary injunctions may obviate or decrease backpay claims.[44] Some termination actions hinge on legal questions, such as whether a statute is constitutional,[45] and thus lack a factual issue for a jury. But many turn on a factual issue:

---

[39] DOBBS, *supra* note 4, at § 3.1.

[40] JAMES, *supra* note 4, at 320-22.

[41] DOBBS, *supra* note 4, at §§ 3.2, 7.1, and 8.1.

[42] Dairy Queen, Inc. v. Wood, 369 U.S. 469, 470-73 (1962); Redish, *supra* note 6, at 527-28. *But cf.* SEC v. Petrofunds, Inc., 420 F. Supp. 958 (S.D.N.Y. 1976) (cleanup doctrine apparently applied in accounting action).

[43] Dairy Queen, Inc. v. Wood, 369 U.S. 469, 470-73 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 509 (1959); Lee Pharm. v. Mishler, 526 F.2d 1115, 1117 (2d Cir. 1975).

[44] *See, e.g.*, Fisher v. Snyder, 346 F. Supp. 396 (D. Neb. 1972), *aff'd*, 476 F.2d 375 (8th Cir. 1973).

[45] *See, e.g.*, Burton v. Cascade School Dist., 512 F.2d 850 (9th Cir. 1975).

whether officials fired the teacher because the teacher was incompetent, which is permissible, or because of the teacher's race, which is impermissible.[46] Discharged teachers may avoid jury prejudice by seeking only reinstatement and not back-pay.[47] A judge may avoid jury prejudice by submitting factual issues to the jury in carefully drafted instructions, directing verdicts, and granting judgments notwithstanding the verdict or new trials.[48] Perhaps, as Justice Marshall pointed out in *Curtis*, jury duty will sensitize jurors to racial problems, raise their consciousness, and contribute to the education of the whole society;[49] but this will hardly console a disappointed plaintiff.

The foregoing discussion focuses upon the friction between procedural and substantive goals, which is the subject of this article. To achieve a "correct" substantive or constitutional result, a judge may exclude the public from the decision-making process. On the other hand, permitting a jury to follow its collective impulses may deny plaintiffs their constitutional rights. Judge Lumbard's dissenting opinion in *Burton v. Cascade School District*,[50] although not aimed at the jury issue, is precisely on target.

> If community resentment was a legitimate factor to consider, few Southern school districts would have been integrated. One of the major purposes of the Constitution is to protect individuals from the tyranny of the majority. That purpose would be completely subverted if we allowed the feelings of the majority to determine the remedies available to a member of a minority group who has been the victim of unconstitutional actions.[51]

---

[46] *See, e.g.*, Adams v. Rankin County Bd. of Educ., 524 F.2d 928 (5th Cir. 1975); Burt v. Board of Trustees, 521 F.2d 1201 (4th Cir. 1975); Harkless v. Sweeny Ind. School Dist., 388 F. Supp. 738 (S.D. Tex. 1975), *rev'd* 554 F.2d 1353 (5th Cir. 1977). The reversal on appeal does not alter the reasoning of the Fifth Circuit in its original Harkless Decision at 427 F.2d 319 (1970).

[47] This is only a half remedy for the illegally discharged, and no remedy at all for the teacher nearing retirement. It may deprive a judge of remedial flexibility, force unwanted personal relations on all, and ironically, allow a successful teacher to coerce a large cash settlement.

[48] Curtis v. Loether, 415 U.S. 189, 198 (1974).

[49] *Id.*

[50] 512 F.2d 850 (9th Cir. 1975), *cert. denied*, 423 U.S. 839 (1975).

[51] *Id.* at 855-56. *See also* Kane, *supra* note 4, at 35 n.144.

A black teacher discharged in violation of his constitutional rights is entitled to be made whole. This cannot be satisfactorily accomplished under existing jury trial doctrine.[52]

II. CHAPTER TWO: NEWS MEDIA LIBELS A PUBLIC PERSON

Defamation law attempts to reconcile conflicting values. Almost everyone condemns falsity but approves free expression. At common law, libel was an imposing threat to freedom of speech. Beginning with *New York Times v. Sullivan*,[53] the Supreme Court created an immunity or privilege to police the boundary between protected expression and actionable defamation. Public figures and officials generally cannot recover for proven defamation concerning matters of public interest or official conduct unless they show "malice," *i.e.*, the defendant knew the statement was false or recklessly disregarded truth.[54]

---

[52] Courts may never have to adjudicate the jury trial question in school cases. That a school district is a "person" under the Civil Rights Act was a major premise in *Harkless*. But two Supreme Court opinions reject the idea that other governmental entities are Civil Rights Act "persons." City of Kenosha v. Bruno, 412 U.S. 507 (1973); Moor v. County of Alameda, 411 U.S. 693 (1973). These opinions, as the district court in *Harkless* on remand recognized, question the premise of the court of appeals. Harkless v. Sweeny Ind. School Dist., 388 F. Supp. 738, 746 (S.D. Tex. 1975). Under the district court's view, the teacher may sue officials in their official capacity seeking reinstatement, but a teacher seeking backpay must sue officials in their individual capacity and surmount a qualified immunity. *Id.* at 749-51. The present state of law in the fifth circuit is found in Campbell v. Gadsden County Dist. School Bd., 534 F.2d 650 (5th Cir. 1976), and Muzquiz v. City of San Antonio, 528 F.2d 499 (5th Cir. 1976). In the fourth circuit, Burt v. Board of Trustees, 521 F.2d 1201 (4th Cir. 1975), rests on an unstated premise that backpay is equitable. *Burt* holds that a teacher may sue board members (but not the board) in their official capacity to be reinstated and to receive back pay without a jury, and a teacher may sue board members in their individual capacities for reputation or punitive damages, but the defendant has a jury right and the plaintiff must surmount an immunity barrier. Judge Russell, concurring in *Burt*, raises the jury issue. *Id.* at 1209. *See also* Thomas v. Ward, 529 F.2d 916 (4th Cir. 1975); Paxman v. Wilkerson, 390 F. Supp. 442, 446-47 (E.D. Va. 1975) (backpay is "an integral part of the equitable remedy of reinstatement"; immunity defense is inapplicable to backpay). The jury trial issue will be adjudicated in private employment cases which are based on statute and lack a government employer. *See* Marshall v. Electric Hose and Rubber Co., 413 F. Supp. 663 (D. Del. 1976); Lazor, *supra* note 1, at 483; Small, *Class Actions Under Title VII; Some Current Procedural Problems*, 25 AM. U.L. REV. 821, 851-69 (1976).

[53] 376 U.S. 254 (1964).

[54] *See generally* Gertz v. Robert Welch, Inc., 418 U.S. 423 (1974); St. Amant v. Thompson, 390 U.S. 727 (1968). This chapter deals with the "malice" issue in actions by public figures and officials. It omits the broadened "private citizen" issue opened in *Gertz*. *See* Time, Inc. v. Firestone, 424 U.S. 448 (1976). While *Gertz* narrowed the

The Supreme Court has instructed lower courts to discard fictional malice, malice inferred from the publication, and the prudent person test as guides to the defendant's conduct. Rather, malice is to be determined from whether the defendant in fact knew the statements were false or recklessly entertained serious doubts about their truth.[55]

Dissenting Justices felt that this standard did not sufficiently protect free speech. In *Sullivan*, Justice Black said that malice is "an elusive, abstract concept, hard to prove and hard to disprove." This record, he continued, "does not indicate that any different verdict would have been rendered here whatever the court had charged the jury about 'malice' . . . or any other legal formulas. . . ."[56] Justice Goldberg stated that the right to speak about public officials and public affairs "should not depend upon a probing by the jury of the motivation of the citizens or press."[57] Procedural developments, however, have weakened the basis for these fears.

Defamation actions serve several purposes. First, if the plaintiff lost employment or suffered other tangible losses, damages may compensate.[58] Second, a damage award, in addition to compensating the plaintiff, may civilize the defendants, publicly condemn their conduct, and thereby deter others. This is especially true when the jury awards punitive damages.[59] Aside from money awards, lawsuits also have symbolic and educational functions. The plaintiff may be fully but symbolically compensated by an authoritative statement and nominal damages;[60] moreover, a trial may be a public forum for the plaintiff to expose the behavior of the defendant.[61]

---

range of actions in which *Sullivan* operates, it did not limit *Sullivan's* scope after the court finds that the plaintiff is a public figure or official. Commensurate with the analysis herein, whether a plaintiff is a public official is a question of law for the judge. Rosenblatt v. Baer, 383 U.S. 75, 88 (1966). This chapter also omits the legal question of what is defamatory. *See* National Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974); Buckley v. Littell, 539 F.2d 882, 890-96 (2d Cir. 1976).

[55] *See, e.g.*, St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

[56] 376 U.S. 254, 293, 295 (1964).

[57] *Id.* at 298. *See also* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 535-37 (1970).

[58] Faulk v. Aware, Inc., 244 N.Y.S.2d 259 (1963) (career destroyed).

[59] DOBBS, *supra* note 4, § 3.9 at 220.

[60] *Id.* § 3.8 at 191-94; 1 F. HARPER & F. JAMES, THE LAW OF TORTS 468 (1956).

[61] *Cf.* Garcia v. Daniel, 490 F.2d 290, 295 (7th Cir. 1974) (purpose of administra-

In defamation cases procedural tools are used to reconcile the competing values. The courts cannot prevent a publicity-seeking litigant from filing a lawsuit,[62] but a pretrial motion may prevent a baseless suit from reaching trial. While the pretrial motion may short-circuit the court system's symbolic and educational functions, it relieves the defendant from the burden and uncertainty of defense.[63] Since juries have traditionally favored claimants,[64] courts may expand liability by allowing more plaintiffs to reach the jury.[65] Conversely, courts restrict liability by erecting a formidable substantive standard, granting pretrial motion, and limiting plaintiffs' access to the jury. The procedural allocation of functions between judge and jury may be more important to the litigants than the substantive rules the judge applies.

Courts may favor a group or an interest by creating an absolute immunity like the one that protects judges and executive officials from defamation actions.[66] A defendant with absolute immunity wins on a pretrial motion.[67] Judge Learned Hand stated the reason: "[T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the

---

tive hearing was to give plaintiff a chance to clear his name); Wellner v. Minnesota St. Junior College Bd., 487 F.2d 153, 156-57 (8th Cir. 1973) (administrative hearing to refute charges); G. STERN, THE BUFFALO CREEK DISASTER 114, 168, 194, 251, 262 (1976); Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theatre*, 28 STAN. L. REV. 81, 107-13 (1975).

[62] Campbell v. New York Evening Post, 245 N.Y. 320, 157 N.E. 153 (1927).

[63] Blonder Tongue Lab., Inc. v. Univ. Foundation, 402 U.S. 313 (1971).

[64] *Cf.* Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1065 (1965) (judge favors claimant as often as jury but jury awards more money).

[65] 2 HARPER & JAMES, *supra* note 60, § 19.5 at 1081 n.19; R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 204 (1971).

[66] Pierson v. Ray, 386 U.S. 547, 553-54 (1967); Barr v. Matteo, 360 U.S. 564, 569-76 (1959). *See also* Dombrowski v. Eastland, 387 U.S. 82, 85 (1967) (speech or debate clause shields Congressmen from both the consequences of litigation and the burdens of defense).

[67] *See, e.g.*, Keeton v. Guerdy, 544 F.2d 199 (5th Cir. 1976); Lowenschuss v. West Pub. Co., 542 F.2d 180 (3d Cir. 1976); Williams v. Sepe, 487 F.2d 913 (5th Cir. 1973); Berndtson v. Lewis, 465 F.2d 706 (4th Cir. 1972); Turack v. Guido, 464 F.2d 535 (3d Cir. 1972); Blum v. Campbell, 355 F. Supp. 1220 (D. Md. 1972); Garcia v. Hilton Hotels, 97 F. Supp. 5 (D.P.R. 1951). As a practical matter, an absolute privilege also blocks discovery.

unflinching discharge of their duties."[68] Judge Craven applied the formula: the defendant "is entitled not only to immunity from an assessment of damages after trial; he should also be protected from the harassment, inconvenience and apprehension inherent in litigation."[69]

Sullivan's malice-recklessness standard in public figure defamation cases appears to create a qualified or conditional immunity. Generally, when the plaintiff must prove that malice or recklessness motivated the defendant, the court denies the defendant's pretrial motions. Decisions construing qualified immunities under federal Civil Rights Acts establish that the plaintiff can allege enough to avoid a motion to dismiss[70] and may demonstrate factual issues sufficient to avoid summary judgment.[71] The trial judge submits the action to a jury with instructions defining the privilege.[72] In defamation suits, the defendant realistically fears the delay, expense, and uncertainty of a trial.[73] When the court denies defendant's pretrial motion, the settlement value of the case is increased for the plaintiff.[74]

While *Sullivan's* defamation immunity appears to be conditional or qualified, courts frequently employ summary judgment to allow defendants to win before trial. Summary judgment has moved the qualified privilege far in the direction of an absolute immunity.[75] Before the Court decided *Gertz v.*

---

[68] Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949).

[69] Berndtson v. Lewis, 465 F.2d 706, 709 (4th Cir. 1972).

[70] Scheuer v. Rhodes, 416 U.S. 232 (1974); Gaffney v. Silk, 488 F.2d 1248 (1st Cir. 1973). *See* Garcia v. Hilton Hotels, 97 F. Supp. 5 (D.P.R. 1951); *The Supreme Court, 1974 Term*, *supra* note 38, at 222-23.

[71] *See, e.g.*, Kassman v. American Univ., 546 F.2d 1029, 1032 (D.C. Cir. 1976); Jones v. Jefferson County Bd. of Educ., 359 F. Supp. 1081 (E.D. Tenn. 1972).

[72] Anderson v. Dun & Bradstreet, Inc., 543 F.2d 732 (10th Cir. 1976); Slocinsky v. Radwin, 144 A. 787 (N.H. 1929); Campbell v. New York Evening Post, 245 N.Y. 320, 157 N.E. 153 (1927); Creswell v. Pruitt, 239 S.W.2d 165 (Tex. Civ. App. 1951).

[73] *See, e.g.*, Smoot v. Fox, 353 F.2d 830 (6th Cir. 1965) ($37,000 expense); Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 435-37 (1975).

[74] *See, e.g.*, *Publisher's Page*, ESQUIRE, November, 1974, at 6 (after court decided that case must be tried, defendant settled). *See also* Buckley v. Esquire, Inc., 344 F. Supp. 1133 (S.D.N.Y. 1972).

[75] Professor Anderson argues that the *Sullivan* privilege "operates too late in the litigation process" and that summary judgment procedure is "an important and useful step," but he appears to feel that the plaintiff's victory comes too late and that summary judgment is too little. Anderson, *supra* note 73, at 436-38, 456-57, 468-69. The

Welch,[76] the *Michigan Law Review* counted reported defamation decisions and found that defendants won twenty-eight on summary judgment or pleading motions, four by directed verdicts, two on judgments notwithstanding the verdict, and one by jury verdict. Appellate courts reversed four plaintiff's verdicts, and only three decisions allowed plaintiff to retain a jury award.[77] After *Gertz*, courts continue to decide defamation actions brought by public persons against media defendants on pretrial motions in a high percentage of the reported decisions.[78]

The substantive legal standard may also interact with jury submission practice and summary judgment to alter the qualified privilege. To prevent the media from censoring itself, the substantive law permits nonmalicious but damaging errors to escape redress. The plaintiff has an affirmative duty to show the defendant's state of mind and must prove that the defendant circulated false information maliciously, knowing that it was false or with a high degree of awareness that it was probably false.[79] Shortly after the plaintiff files the action, the defendant may move for summary judgment, arguing that there is no question of fact on the malice issue. The defendant may accompany the motion with affidavits which deny malice, out-

present author views the summary judgment development as more significant from both substantive and procedural perspectives.

[76] 418 U.S. 423 (1974) (first amendment protection afforded news media against defamation suits by public persons is not to be extended to defamation suits by private individuals even though the defamatory statements concern an issue of public or general interest).

[77] Comment, *The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis*, 70 MICH. L. REV. 1547, 1565-66 (1972).

[78] *See, e.g.*, Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947 (D.D.C. 1976); Carey v. Hume, 390 F. Supp. 1026 (D.D.C. 1975); Meeropol v. Nizer, 381 F. Supp. 29 (S.D.N.Y. 1974). After *Gertz* a clear category of "private person" actions will be beyond the *Sullivan* standard. These actions will be less appropriate for summary judgment because negligence is less appropriate for summary judgment. Anderson, *Libel and Press Self-Censorship*, 53 TEXAS L. REV. 422, 456 (1975). No one knows now how large that category is. "Perhaps if attorney Gertz was not a public figure, no one is." Hotchner v. Castillo-Puche, 404 F. Supp. 1041, 1044 (S.D.N.Y. 1975), *rev'd*, 551 F.2d 910 (2d Cir. 1977). *See also* Time, Inc. v. Firestone, 424 U.S. 448 (1976).

[79] St. Amant v. Thompson, 390 U.S. 727, 731 (1968); Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1974).

line the research process,[80] and describe diligent efforts to determine the defamatory statement's source and accuracy.[81]

If the defendant moves for summary judgment on the malice issue with supporting affidavits, the plaintiff must produce evidence of malice, excuse the failure to do so, or lose.[82] The plaintiff cannot rest on the strength of the allegations.[83] Unless the plaintiff produces evidence that defendant proceeded "in reckless disregard for the truth" or "entertained serious doubt," the court should grant the defendant's motion.[84] Conclusory charges of malice,[85] conjecture, speculation, surmise or suspicion,[86] simple error which may be due to a misinterpretation,[87] failure to investigate further,[88] careless research,[89] or reliance on a previously accurate source[90] are inadequate to show malice and do not withstand a motion for summary judgment.[91]

---

[80] Perry v. Columbia Broadcasting Sys., Inc., 499 F.2d 797, 802 (7th Cir. 1974); Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970); Fadell v. Minneapolis Star and Tribune Co., 425 F. Supp. 1075, 1077-82 (N.D. Ind. 1976).

[81] Rosanova v. Playboy Enterprises, Inc., 411 F. Supp. 440, 446-48 (S.D. Ga. 1976); Lewis v. Reader's Digest Ass'n, 366 F. Supp. 154, 156 (D. Mont. 1973).

[82] *See, e.g.*, Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947 (D.D.C. 1976); *Louis, supra* note 12, at 750.

[83] Meeropol v. Nizer, 381 F. Supp. 29, 32 (S.D.N.Y. 1974).

[84] Cervantes v. Time, Inc., 464 F.2d 986, 995 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814, 821-22 (N.D. Cal. 1977).

[85] Fram v. Yellow Cab Co., 380 F. Supp. 1314, 1336 (W.D. Pa. 1974) (alternative holding).

[86] Guitar v. Westinghouse Elec. Corp., 396 F. Supp. 1042, 1052-53 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 309 (2d Cir. 1976).

[87] Waskow v. Associated Press, 462 F.2d 1173, 1176 (D.C. Cir. 1972); Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814, 822 (N.D. Cal. 1977).

[88] Fadell v. Minneapolis Star and Tribune Co., 425 F. Supp. 1075, 1084-85 (N.D. Ind. 1976); Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947, 959 (D.D.C. 1976); Rosanova v. Playboy Enterprises Inc., 411 F. Supp. 440, 446-48 (S.D. Ga. 1976); Otepka v. New York Times Co., 379 F. Supp. 541, 544 (D. Md. 1973); *aff'd*, 502 F.2d 1163 (1974); La Bruzzo v. Associated Press, 353 F. Supp. 979, 985 (W.D. Mo. 1973).

[89] Buchanan v. Associated Press, 398 F. Supp. 1196, 1204-05 (D.D.C. 1975); Alpine Constr. Co. v. Demaris, 358 F. Supp. 422, 424 (N.D. Ill. 1973).

[90] Walker v. Cahalan, 542 F.2d 681, 684 (6th Cir. 1976); Grzelak v. Calumet Pub. Co., Inc., 543 F.2d 579, 583 (7th Cir. 1975); Carey v. Hume, 390 F. Supp. 1026 (D.D.C. 1975); F&J Enterprises, Inc. v. Columbia Broadcasting Sys., Inc., 373 F. Supp. 292 (N.D. Ohio 1974). *See also* Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947, 958 (D.D.C. 1976).

[91] Of course a "defendant in a defamation action cannot automatically escape

Thus, courts place a heavy burden on the defamation plaintiff. Since malice refers to the defendant's knowledge or the state of his mind, the defendant may have sole access to the proof. A news reporter's interested, self-serving affidavit that his mental state while writing the article was not reckless and that he made an "honest error" is hard to refute. How can the plaintiff present facts of "possible evidence, either direct or circumstantial, bearing on [defendant's] thought processes surrounding the writing of the article"?[92]

When the court grants the defendant's motion for summary judgment, on defendant's affidavits the plaintiff loses an opportunity to cross-examine the defendant. If the court grants the motion on the strength of the defendant's deposition, the plaintiff cannot expose the defendant's demeanor before a judge and jury. Courts solve this problem in similar situations by denying summary judgment and submitting the issues to a jury. "We think," said Judge Frank for the majority in *Arnstein v. Porter*,[93] "that Rule 56 was not designed thus to foreclose plaintiff's privilege of examining defendant at a trial, especially as to matters peculiarly within defendant's knowledge."[94] In defamation actions, however, many courts respond differently. They discount the plaintiff's argument that, because the malice issue concerns the defendant's state of mind and because the defendant has sole access to the evidence of malice, a jury should hear the defendant testify. "A plaintiff is required to offer evidence on the threshold issue of [defendants'] knowledge or doubt [of falsity] and mere speculation

---

liability by submitting affidavits which attest to the fact that the publication was made with a belief that the statements therein contained were true." Hotchner v. Castillo-Puche, 404 F. Supp. 1041, 1049 (S.D.N.Y. 1975), *rev'd*, 551 F.2d 910 (2d Cir. 1977). When the court denies defendant's summary judgment motion, it means one of two things: "there are questions of fact which preclude granting the motion," or "there may be questions of fact and I will not grant a motion until the record is more complete." Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814, 823 (N.D. Cal. 1977). While we can say that summary judgment has "moved" the qualified privilege in the direction of absolute immunity, we stop short of saying that it has been "transformed" into absolute immunity.

[92] Kent v. Pittsburgh Press Co., 349 F. Supp. 622, 626 (W.D. Pa. 1972) (plaintiff might have won under the *Gertz* standard).

[93] 154 F.2d 464 (2d Cir. 1946).

[94] *Id.* at 471. *See also* Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464 (1962); Gellhorn & Robinson, *Summary Judgment in Administrative Adjudication*, 84 HARV. L. REV. 612, 613-15 (1971).

and conjecture or the mere chance that on cross-examination something might be uncovered does not fulfill that requirement."[95] "That state of mind should generally be a jury issue does not mean it should always be so in all contexts, especially where the issue is recklessness, which is ordinarily inferred from objective facts."[96]

Summary judgment, Justice Black said, "tempts judges to take over the jury trial of cases, thus depriving parties of their constitutional right to trial by jury."[97] When dealing with expression, a judicially favored right, courts may restrict the jury's power to infer malice.[98] Judges may limit access to the jury because they consider jurors to be insensitive to first amendment interests.[99] Courts, in any event, overcome retrograde doctrine to award summary judgment to defamation defendants.[100]

Professor Louis argues that courts should approach all summary judgment motions by defendants in approximately the way defamation courts now do.[101] Interested affidavits negating an element of the plaintiff's claim should lead to summary judgment.[102] State of mind issues should be treated like any other factual issues: unless the plaintiff has evidence of defendant's mental state, the court should discount credibility, demeanor, and the potential of cross-examination.[103] Defamation summary judgment, however, may even exceed Louis' proposals. Courts may deny summary judgment, Louis says, because "where access to the evidence is unequal, deposition will often be an inadequate substitute for examination as on cross-

[95] F&J Enterprises, Inc. v. Columbia Broadcasting Sys., Inc., 373 F. Supp. 292, 299 (N.D. Ohio 1974). *See also* Guitar v. Westinghouse Elec. Corp., 396 F. Supp. 1042, 1053 (S.D.N.Y. 1975).

[96] Washington Post Co. v. Keogh, 365 F.2d 965, 967-68 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967).

[97] First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 304 (1968).

[98] *Cooper, supra* note 16, at 967.

[99] Monaghan, *First Amendment Due Process*, 83 HARV. L. REV. 518, 527 (1970).

[100] Cervants v. Time, Inc., 464 F.2d 986 (8th Cir. 1972). The court stated that no summary judgment unless defendant was entitled "beyond all doubt" and "plaintiff would not be entitled to recover under any discernible circumstance." *Id.* at 993.

[101] *Louis, supra* note 12, at 745.

[102] *Id.* at 755.

[103] *Id.* at 765-66.

examination of hostile witnesses at trial."[104] Yet courts, after receiving defendants' affidavits denying recklessness, award summary judgment to defendants even though they have sole access to the facts.[105]

Since the substantive law of defamation hinders a defamed plaintiff from recovering money, the injury remains unredressed, and the deterrent effect of a damage verdict is missed. The question is not merely whether the defendant will win, but increasingly, when the defendant will win. Even unsuccessful libel suits, courts say, may have a harassing or chilling effect on the media's willingness to comment.[106] "Summary judgment," a court noted, "is particularly appropriate at an early stage in cases where claims of libel or invasion of privacy are made against publications dealing with matters of public interest and concern."[107] Because of the defendant's constitutional right, the court independently determines the facts.[108] Courts award summary judgment to media defendants with alacrity.[109] Summary judgment saves defendants the time, expense, and uncertainty of a trial. The plaintiff loses symbolic vindication in a public forum; and the public loses a trial's

---

[104] *Id.* at 757.

[105] *See, e.g.*, Washington Post Co. v. Keogh, 365 F.2d 965, 967-68 (D.C. Cir. 1966); Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814, 822-23 (N.D. Ind. 1976); Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947 (D.D.C. 1976).

[106] Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947, 954 (D.D.C. 1976); Cardillo v. Doubleday & Co., 366 F. Supp. 92 (S.D.N.Y. 1973).

[107] Meeropol v. Nizer, 381 F. Supp. 29, 32 (S.D.N.Y. 1974).

[108] Time, Inc. v. Pape, 401 U.S. 279, 284 (1971); New York Times v. Sullivan, 376 U.S. 254, 285-86 (1964); Buchanan v. Associated Press, 398 F. Supp. 1196, 1205 (D.D.C. 1975).

[109] *See, e.g.*, Walker v. Cahalan, 542 F.2d 681, 684 (6th Cir. 1976); Time, Inc. v. Johnston, 448 F.2d 378, 383-84 (4th Cir. 1971); Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970); Time, Inc. v. McLaney, 406 F.2d 565, 566 (5th Cir. 1969), *cert. denied*, 395 U.S. 922 (1969); Washington Post Co. v. Keogh, 365 F.2d 965, 967-68 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967) (leading case by Wright, J.); Pierce v. Capitol City Communications, Inc., 427 F. Supp. 180 (E.D. Pa. 1977); Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947 (D.D.C. 1976); Buchanan v. Associated Press, 398 F. Supp. 1196 (D.D.C. 1975); F&J Enterprises, Inc. v. Columbia Broadcasting Sys., Inc., 373 F. Supp. 292, 297-98 (N.D. Ohio 1974); Cerrito v. Time, Inc., 302 F. Supp. 1071, 1075-76 (N.D. Cal. 1969), *aff'd per curiam*, 449 F.2d 306 (9th Cir. 1971). *But see* Gordon v. Random House, Inc., 486 F.2d 1356 (3d Cir. 1973); University of the South v. Berkley Pub. Co., 362 F. Supp. 767 (N.D. Cal. 1973).

educational experience. The paramount importance of free expression forces the controversy away from the jury, out of the courtroom, and into the marketplace of ideas. This is the larger public benefit. As Judge Carter said, "Because importance of free speech, summary judgment *is* the 'rule' and not the exception, in defamation cases."[110]

III. CHAPTER THREE: LAW ENFORCERS OVERREACH A CITIZEN

Directed verdicts for plaintiffs are scarce. They exist[111] but usually in extreme cases.[112] To direct a verdict[113] for the plaintiff, the judge must find that plaintiff has carried his burden to the extent that the evidence is insufficient to permit any different result. The judge must "test the body of evidence not for its insufficiency to support a finding, but rather for its overwhelming effect."[114] This standard accommodates two conflicting goals: the constitution protects the civil jury; but the judge must guard the integrity of substantive legal rules.[115] Because the judge can direct a verdict for the plaintiff, a civil jury cannot subvert substantive law.[116] But within the scope of its duty to find facts and apply the law, the jury retains abundant latitude to circumvent the law.[117]

This chapter on the civil jury examines four Civil Rights Act lawsuits tried before deep south juries.[118] In each suit the plaintiffs sued local government officials, alleging that the defendants deprived them of constitutional rights under color of law. The judge submitted each case to the jury on relatively

---

[110] Guitar v. Westinghouse Elec. Co., 396 F. Supp. 1042, 1053 (S.D.N.Y. 1975).

[111] 9 WRIGHT & MILLER, *supra* note 13, at § 2535. *But see* Cutts v. Casey, 180 S.E.2d 297 (N.C. 1971) (forbidding directed verdict for claimant).

[112] Knierim v. Erie Lackawanna R.R., 424 F.2d 745 (2d Cir. 1970) (two of defendant's trains collided).

[113] The term directed verdict as used here includes judgment notwithstanding the verdict, because a judgment notwithstanding the verdict is technically a delayed ruling on the motion for a directed verdict.

[114] Mihalchak v. Am. Dredging Co., 266 F.2d 875, 877 (3d Cir. 1959). *See also* Cooper, *supra* note 16, at 948.

[115] Cooper, *supra* note 16, at 906-07.

[116] United States v. Dougherty, 473 F.2d 1113, 1130 (D.C. Cir. 1972).

[117] Skidmore v. Baltimore & O. Ry., 167 F.2d 54 (2d Cir. 1943), *cert. denied*, 355 U.S. 816 (1948).

[118] *See also* Stewart v. Gilmore, 323 F.2d 389 (5th Cir. 1963) (common law tort); Bullock v. Tamiami Trial Tours, Inc., 266 F.2d 326 (5th Cir. 1959) (tried by judge).

clear and undisputed facts. Each jury found for the defendants. On appeal by the plaintiffs the appellate courts considered whether the trial judges erred in refusing to direct a verdict for plaintiffs.[119]

In *Nesmith v. Alford*,[120] a white Illinois educator visited Montgomery, Alabama in March 1960 with his wife and some students to study nonviolence and the bus boycott. They had lunch with black people at a cafe in a black neighborhood. Eating with blacks implies social equality and violated a local custom.[121] An unruly crowd gathered in the street outside. The local officials arrested Nesmith and his group. They were convicted of disorderly conduct, but all convictions were later upset.

The Nesmiths sued local officials in federal district court charging malicious prosecution, false imprisonment, and deprivation of the constitutional right to liberty under color of law. The jury returned a general verdict for defendants. The court of appeals held that the Nesmiths' simple and peaceful lunch with Blacks was not a crime, and that the arrests and imprisonments were illegal as a matter of law. The court said:

> Liberty is at an end if a police officer may without warrant arrest, not the person threatening violence, but those who are its likely victims merely because the person arrested is engaging in conduct which, though peaceful and legally and constitutionally protected, is deemed offensive and provocative to settled social customs and practices.[122]

The court of appeals held that as a matter of law the defendants had falsely imprisoned the plaintiffs and had deprived them of constitutional rights to speak, associate, and be free from illegal arrest, and remanded the case for determination of damages. The court also reversed the jury verdict for defendants on malicious prosecution and remanded for retrial.

---

[119] The opinions highlight two relationships: judge-jury and trial court-appellate court. This article concentrates on the former. Because of the procedural posture, the appellate court technically passes on the trial court's decision on plaintiff's motion for judgment notwithstanding the verdict.

[120] 318 F.2d 110 (5th Cir. 1963), *cert. denied*, 375 U.S. 975 (1964).

[121] J. DOLLARD, CLASS AND CASTE IN A SOUTHERN TOWN 351 (1957).

[122] 318 F.2d at 121.

In *Whirl v. Kern*,[123] Whirl was arrested, jailed, and indicted. The court later dismissed the indictments, but someone lost the documents. "Whirl languished in jail for almost nine months after all charges against him were dismissed."[124] Whirl sued Sheriff Kern for false imprisonment and deprivation of the constitutional right of liberty. The jury, finding Kern not negligent, exonerated him. The court of appeals held that Kern's "good faith" did not justify restraining Whirl unlawfully:

> Whirl, quasi-literate and one legged, languished in jail for nine months after he was entitled to be free of his fetters. Unfortunately, a non-malicious restraint is no sweeter than restraint evilly motivated, and we cannot sanction chains without legal justification even if they be forged by the hand of an angel. . . . A jury finding that a man's freedom is worthless is clearly erroneous. It is an impossible judgment to render against a sentient person, be he one legged, unschooled, friendless or without earning capacity.[125]

The court of appeals held that the district court should have directed a verdict for Whirl on both the Civil Rights Act and common law false imprisonment claims. The case was remanded for a jury to determine damages.

In *Anderson v. Nosser*,[126] the plaintiffs were arrested in 1965 while participating in a Natchez, Mississippi civil rights march. Many of those arrested were sent to Parchman Penitentiary where they "were subjected to sub-human treatment which beggars justification and taxes credulity."[127] They sued the Natchez and Parchman officials charging false imprisonment, other state torts, and deprivation of their right to be free from cruel and unusual punishment. The jury returned a verdict for defendants.

On appeal, the court held that as a matter of law the defendants were liable to plaintiffs for deprivation of constitutional rights and false imprisonment by failing to take them

---

[123] 407 F.2d 781 (5th Cir. 1969), *cert. denied*, 396 U.S. 901 (1969).

[124] *Id.* at 785.

[125] *Id.* at 794-95, 798.

[126] 438 F.2d 183 (5th Cir. 1971), *modified en banc*, 456 F.2d 835 (5th Cir. 1971), *cert. denied*, 409 U.S. 848 (1972).

[127] 438 F.2d at 186.

promptly before a magistrate. The court found that "the treatment in the maximum security unit was totally unfounded . . . . We deal with human beings, not dumb, driven cattle."[128] The court left damages for trial on remand.[129]

Finally, at Jackson State College in May 1970, sixty-nine police and highway officers confronted several hundred unruly black students. Officers heard a sound resembling a pistol shot; and someone cried "sniper." Thirty-eight officers opened fire; and bullets hit at lest fourteen black persons and killed two. In *Burton v. Waller*[130] the plaintiffs sued the officers and their supervisors for wrongful death and deprivation of constitutional rights. The jury returned a verdict for all defendants.

On appeal, the plaintiffs argued that the district court should have directed a verdict for them. In this case, however, the court of appeals affirmed. The jury, plaintiffs conceded, could have found that a sniper caused the noise before the barrage.[131] While the barrage was excessive, the jury could have concluded that individual police officers, fearing immediate harm, fired either in self-defense or to suppress a riot.[132] Although some defendants fired negligently, the court refused to direct a verdict against them because the plaintiffs lacked conclusive proof that these defendants actually caused their injury.[133]

The directed verdict guards the vital border between the judge's and the jury's domain. A jury must be free to find facts; but a judge must prevent a jury from circumventing the rule of law. Courts and scholars cannot translate the twin policies of jury freedom and obedience to the law into standards which automatically determine when to direct a verdict. Reported

---

[128] *Id.* at 193.

[129] Anderson v. Breazeale, 507 F.2d 929 (5th Cir. 1975); Anderson v. Robinson, 497 F.2d 120 (5th Cir. 1974). On rehearing en banc, the court affirmed the basic decision but switched the legal basis of the Civil Rights Act theory from cruel and unusual punishment to deprivation of due process through summary punishment, exonerated the Natchez officials from paying for damage suffered at Parchman, and exonerated the Parchman officials from damage in Natchez. Anderson v. Nasser, 456 F.2d 835 (5th Cir. 1972).

[130] 502 F.2d 1261 (5th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975).

[131] *Id.* at 1269.

[132] *Id.* at 1276.

[133] *Id.* at 1282.

opinions are written to support the result and are too pliable for an observer to note anything but a clear departure from conventional practice. But the constant reader of advance sheets knows that these four decisions are exceptions to usual jury submission practice.

These cases are partly explained by their factual simplicity. A jury must credit a disinterested witness' uncontradicted, unimpeached testimony.[134] In *Anderson, Whirl*, and *Nesmith* the facts were undisputed.[135] A judge should not permit a jury to ignore an interested witness' testimony which the opponent could deny but does not.[136] In *Anderson*, defendants even stipulated the damaging facts.[137] When, however, as in *Burton v. Waller*, the defendant attacks the plaintiff's evidence even slightly, the jury may believe either; and the court must accept this jury's verdict for the defendant.[138]

The legal doctrines also affect the result. In *Nesmith, Whirl* and *Anderson*, the plaintiffs alleged intentional torts. These torts protect the individual's interests in liberty and bodily integrity; the standards may be relatively blunt and inflexible. When the court decided *Whirl*, for example, the defendant's good faith or intent to imprison was only an attenuated defense.[139] Changes in doctrine and differences between doctrines affect the decision to submit a case to a jury. After *Whirl*, the Supreme Court developed a qualified good faith immunity defense for official defendants.[140] This mixed objective and subjective standard will lead to more jury decisions and make those decisions harder for judges to alter. As a result,

---

[134] Cooper, *supra* note 16, at 928, 940.

[135] 438 F.2d at 186; 407 F.2d at 785; 318 F.2d at 116.

[136] Cooper, *supra* note 16, at 944. *See also* Gaines v. McGraw, 445 F.2d 393, 396 (5th Cir. 1971): "[A]lthough [defendants] here rely upon their 'good faith' as the only defense to the right of the [plaintiff] to establish liability against them, there is not a word in the record of the trial that indicates that Deputy Sheriff McGraw did not know the Alabama law . . . ."

[137] 438 F.2d at 191-92.

[138] *See also* Gaines v. McGraw, 445 F.2d 393 (5th Cir. 1971) (where the court reversed a jury verdict for the defendant officer and entered a judgment for plaintiff on liability); *accord*, Fults v. Pearsall, 408 F. Supp. 1164, 1167-78 (E.D. Tenn. 1975) (testimony contrary to physical facts denied probative value).

[139] 407 F.2d at 791.

[140] Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974).

an en banc Fifth Circuit modified *Whirl* by allowing a jailer charged with false imprisonment to interpose a "reasonable good faith" defense.[141] If plaintiff Whirl appealed today, the court of appeals would probably affirm the jury's verdict for Sheriff Kern.

The simplicity of intentional tort doctrine contrasts with the subtle standards of negligence law. The jury relies on common experience and is more valuable when a legal standard, like the prudent person standard, is part of their experience. When negligence standards are at issue, the jury assumes a more prominent role. The court of appeals began to stress causation and responsibility in the en banc rehearing in *Anderson*.[142] This development resulted in the complex mixture of negligence, causation, and responsibility in *Burton v. Waller*.[143]

The decisions of both the juries and courts have cultural and political ingredients. Professor Cooper points out that courts go to extreme lengths to submit FELA actions to the jury,[144] but he argues that courts should "allow jury adjustment of the law only in situations where the dangers of the more common forms of prejudice are minimized."[145] The four lawsuits in this chapter emerged from the deep south's racial problems of the 1960's. They concerned basic interests—liberty and bodily integrity—which society must protect. Defendants' assertions of good faith often paled before violations of clear and knowable constitutional rights.[146] Some actions are suited to jury freedom, others to judicial control. Jurors seldom disbelieve officials. Blacks and outsiders fare poorly before white, southern juries. Personal deficiencies may blind any fact-finder. As the court said about a similar lawsuit, "the jury overcame its nobler instincts and turned its back on the law

---

[141] Bryan v. Jones, 530 F.2d 1210 (5th Cir. 1976).

[142] Anderson v. Nasser, 456 F.2d 835 (5th Cir. 1972).

[143] 502 F.2d 1261 (5th Cir. 1974).

[144] Cooper, *supra* note 16, at 924-27.

[145] *Id.* at 971.

[146] Gaines v. McGraw, 445 F.2d 393, 397 (5th Cir. 1971). *See also* Wood v. Strickland, 420 U.S. 308 (1975) (official who knew or "reasonably should have known" that particular act violates constitutional right may be liable); Bryan v. Jones, 530 F.2d 1210 (5th Cir. 1976).

and the facts."[147] Judges are trained to lay passion aside.[148] The judge's power to direct a verdict may ameliorate jury prejudice.[149] Juries roam at will in FELA litigation. *Nesmith, Whirl,* and *Anderson,* however, illustrate almost every attribute that summons the judge to regulate the jury. To uphold plaintiffs' constitutional rights and the rule of law, the court rejected the juries' verdicts.

The *Nesmith, Whirl,* and *Anderson* courts directed verdicts for plaintiff on liability, but remanded for a jury to pass on damages. "What happens," Professor Carrington asks, "when the next jury awards a verdict of $1?"[150] In Louisiana, an appellate court may reverse a jury verdict for the defendant and enter judgment on liability with an appropriate award of damages.[151] The Louisiana appellate courts' power to review both law and facts does not violate the Constitution.[152] Judge Wisdom equated the Louisiana and federal standards of factual review.[153] Thus in the lawsuits this chapter reviews, the courts of appeals could have directed both a liability verdict and an appropriate damage award. Instead, the courts chose an

---

[147] Stewart v. Gilmore, 323 F.2d 389, 391 (5th Cir. 1963).

[148] At the very least, judges must think about their decisions enough to draft explicit factual findings which the appellate court can reverse if clearly inconsistent with the record. FED. R. CIV. P. 52(a). Jury verdicts are often only a general conclusion which cannot be reviewed so thoroughly. Courts may, however, propound questions to juries, and juries may return special verdicts. *See, e.g.*, Bryan v. Jones, 530 F.2d 1210, 1212 (5th Cir. 1976); FED. R. CIV. P. 49. *Compare* Green, *Blindfolding the Jury*, 33 TEX. L. REV. 273 (1955) *with* Skidmore v. Baltimore & O. Ry. Co., 167 F.2d 54, 61 (2d Cir. 1948), *cert. denied*, 335 U.S. 816 (1948).

[149] *But see* Cooper, *supra* note 16, at 954 n.167.

[150] P. CARRINGTON, CIVIL PROCEDURE 272 (1969). In fact, a jury awarded 157 *Anderson* plaintiffs $500 apiece in compensatory damages against the superintendent of Parchman Penitentiary. Anderson v. Breazeale, 507 F.2d 929 (5th Cir. 1975). *See also* Anderson v. Robinson, 497 F.2d 120 (5th Cir. 1974) ($5.00 per day against police chief); SOUTHERN JUSTICE 55-56 (L. Freidman ed. 1967). *Nesmith* was settled for costs on remand. In *Whirl v. Kern*, the court allowed the plaintiff to recover from the defendant's surety, but the case is not further reported. 407 F.2d at 796. Where the money would come from today is a conundrum in light of recent eleventh amendment and federal jurisdiction decisions. *See* Warner v. Bd. of Trustees, 528 F.2d 505 (5th Cir. 1976); Muzquiz v. City of San Antonio, 528 F.2d 499 (5th Cir. 1976); Gates v. Collier, 525 F.2d 965 (5th Cir. 1976); Newman v. Alabama, 522 F.2d 71 (5th Cir. 1975).

[151] Johnson v. Horace Mann Mutual Ins. Co., 241 So. 2d 588 (La. Ct. App. 1970) (student beaten brutally and without provocation by teacher).

[152] Melancon v. McKeithen, 345 F. Supp. 1025 (E.D. La. 1972), *aff'd on appeal*, 409 U.S. 943 (1972).

[153] *Id.* at 1048.

intermediate and less activist way of accommodating jury freedom and plaintiffs' constitutional rights.

CONCLUSION

In civil cases, the judge tells the jury the law. The jury reaches a verdict by determining the facts and by applying the law to those facts. The Supreme Court expressed our romantic ideal more than 100 years ago: "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."[154] To achieve a day in court before a jury instead of a judge, litigants must surmount several barricades. In equity, a judge decides factual questions.[155] Before a defamation case reaches trial, a judge studies the evidence carefully.[156] When considering whether to direct a verdict or to grant judgment notwithstanding the verdict, a judge necessarily examines the facts.[157] The judge may undertake the fact-finder's role, grant the defendant's pretrial motion, or permit the plaintiff to win after the jury finds for the defendant. While we formally defer to the jury, it often appears as if we have successfully dissembled this deference before practical application. The romantic ideal may not survive its collision with hard reality.

An ideological debate about the lay jury rings through Anglo-American legal history.[158] Defenders of the jury view it as expressing a Rousseauian "collective earthy wisdom," a natural sense of fairness based on shared morality. Staunch believers in the jury emphasize the people, political freedom, citizen participation in government, and the need to adjust the law's harsh strictures to human realities.[159] Scheflin defends a criminal jury's ability to acquit a defendant in the face of the law:

---

[154] Sioux City & P. Ry. Co. v. Stout, 84 U.S. (17 Wall) 657, 664 (1874).

[155] DOBBS, *supra* note 4 at 68; JAMES, *supra* note 4, at 338.

[156] New York Times v. Sullivan, 376 U.S. 254, 284-86 (1964).

[157] Melancon v. McKeithen, 345 F. Supp. 1025, 1046 (E.D. La. 1972).

[158] H. KALVEN, JR. & H. ZEIZEL, THE AMERICAN JURY 3-9 (1966).

[159] *See, e.g.*, Green, *supra* note 17, at 483; Wigmore, *A Program for the Trial of Jury Trial*, 12 J. AM. JUD. SOC'Y 166, 170 (1929).

> Thus, jury service is a two-way street. Community values are injected into the legal system making the application of the law responsive to the needs of the people, and participation on the jury gives the people a feeling of greater involvement in their government which further legitimizes that government. This dual aspect of the concept of the jury, flowing from its role as a political institution in a constitutional democracy, serves to keep both the government and the people in touch with each other. But should there be a divergence of sufficient magnitude, as the Founding Fathers were aware there often is, the jury can serve as a corrective with a final veto power over judicial rigidity, servility or tyranny.[160]

Eminent scholars celebrate the civil jury's analoguous ability. "Juries sometimes take the law into their own hands and decide a case according to popular prejudice which often embodies popular notions of what the law ought to be." This, according to Professor James, is "a great strength of the jury system."[161] Roscoe Pound stated the same idea more strongly: "Jury lawlessness is the great corrective of law in its actual administration."[162] Defenders of the civil jury should take their stand on higher ground.

The jury limits government action. Bumble, one of Dickens' autocratic villians, participated in this anti-jury harangue: " 'Juries' said Mr. Bumble, grasping his cane tightly, as was his wont when working into a passion, 'juries is ineddicated, vulgar, grovelling wretches.' 'So they are,' said the undertaker."[163] Authoritarians like Bumble naturally fear the jury.[164] The jury is a political mechanism which may oppose particular applications of governmental power. In criminal prosecutions, a jury with a tendency to acquit is a buffer between a citizen and the state. In chapters one and three of this article, we see that a civil jury may "acquit" governmental defendants, school officials and law enforcement officers. But this exonerates a government official who may have trampled citizens' constitu-

---

[160] Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 190 (1972).

[161] James, *Tort Law in Midstream*, 8 BUFFALO L. REV. 315, 342-43 (1959).

[162] Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910).

[163] C. DICKENS, OLIVER TWIST, Ch. IV.

[164] LORD JUSTICE DEVLIN, TRIAL BY JURY 164 (1956).

tional rights. Precisely because of the citizen's substantive right, a judge may intercede on the citizen's side.

Detractors of the jury stress judicial expertise and intellectual consistency.[165] "To overrate the function of the jury (or other trier of the facts)," Professor Griswold wrote, "is to shirk the function of the court, and to fail to administer justice rationally, consistently, and soundly."[166] Detractors perceive the argument for the jury to be ephemeral and illusory rhetoric, a cloak for mean-spirited prejudice.[167] They agree, however, that the jury represents the community. A premise opposed to decisions based on majority sentiment appears. What a jury approves or disapproves, a community approves or disapproves; and the "town meeting"[168] may become a plebicite or, at worst, a lynch mob.[169] Racial issues have proved particularly intractable, perhaps because "the concept of an impartial trial by one's peers did not originate in a country containing visually distinct racial and national groups one of which had not been the peers but the slaves of the other."[170]

The legal developments the three chapters describe are not obviously wrong, yet they distort conventional jury procedure. The results perplex both liberals and conservatives. Despite the seventh amendment's clear language, rules intended to allow a judge to regulate a civil jury have, as Judge Wisdom observed, a "plastic nature."[171] Can we cherish jury "equity" in personal injury actions for cripples, widows, and orphans but withhold it from prejudiced school boards, libeled public persons, and Dixie sheriffs?[172]

Policymakers designed the courtroom ritual to suspend prejudgment, but sometimes it fails to work. The question is simple: When will the judge permit the jury to ignore or alter

---

[165] JAMES, *supra* note 4, at 240-41. *See also* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 90 (1965).

[166] Griswold, *The Supreme Court 1959 Term, Foreword: Of Time and Attitudes —Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 89 (1960).

[167] *See, e.g.*, J. FRANK, LAW AND THE MODERN MIND 173-78 (1930); Kane, *supra* note 4, at 35 n.144.

[168] Anderson v. Robinson, 497 F.2d 120, 121 (5th Cir. 1974).

[169] Moore, *Redressing the Balance*, TRIAL, Nov.-Dec. 1974, at 31.

[170] *Id.* at 29.

[171] Melancon v. McKeithen, 345 F. Supp. 1025, 1047 (E.D. La. 1972).

[172] Redish, *supra* note 6, at 508.

the law? The question can be stated another way: What values do judges think are too important to expose to possible jury prejudice? The substantive legal issue, we discover, is relevant to formulating the jury's role, submission practice, and jury regulation. As all three chapters reveal, it helps to be a constitutional litigant.[173] In addition, racial tensions permeate chapters one and three, and the immunity in chapter two originated from a white Alabama jury's $500,000 libel verdict against an out-of-state newspaper and several civil rights leaders for an advertisement to solicit money for racial equality. [174]

Practical questions about the jury's role cut to the core of the type of society we desire to create and maintain. In a pluralistic society, tension, change, and conflict are inevitable. The adjudicatory process simply reflects society. Contemporary jury issues grow out of present controversies. In a complex, pluralistic, and law-laden society, a civil jury as a miniature legislature may soften the substantive law's impact,[175] but we purport to be governed by a democratically elected legislature and to live under a judicially construed constitution. Serious questions arise when a jury, or even one juror, creates regional or individual variations in substantive law developed by courts and legislatures.[176] To ensure that litigants receive their just desserts, must the process appear capricious, arbitrary, and irresponsible?

The civil jury, finally, reflects a fundamental paradox between authority delegated and authority retained. Ultimate sovereignty resides in the people. In the end, those who look only to results must yield to process values. Juries prevent legalisms from vanquishing justice. The civil jury survives, tarnished but sentient. Within a constitutional framework, officials possess delegated authority. Constitutional government ensures that to the extent possible, people and officials live by the rule of law instead of the rule of a person or group of persons. Judges protect the Constitution from the people. To limit

---

[173] *See also* McNary v. Carlton, 527 S.W.2d 343, 348 (Mo. 1975) (submission of obscenity issue).

[174] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[175] Norton, *What a Jury Is*, 16 VA. L. REV. 261, 262-63 (1930).

[176] J. FRANK, COURTS ON TRIAL 127-35 (Princeton ed. 1973); Simpson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 511-14 (1976).

the government, we divide its power with the jury, but the jury may exercise that power irresponsibly. Litigants seek, in particular courtrooms, to secure benefits of substantive rights to which all have an equal but abstract claim. The judge exercises delegated authority; the jury represents retained authority. The courtroom unites dour elitism and zealous populism in intrinsic discord.