THE CIVIL JURY IN AMERICA

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I

AN INTRODUCTION—TEXAS STYLE

Americans have relied on juries of ordinary citizens to resolve their civil disputes since the beginning of the colonial period.[1] Juries were available in virtually all civil, as well as criminal, cases in Virginia no later than 1624.[2] They were specifically provided for in the 1641 Massachusetts Body of Liberties.[3] Indeed, in seventeenth and eighteenth century Massachusetts, juries were the primary instrument of governance.[4] Those who ratified both the state and national constitutions viewed juries as a critical component of the justice system. And juries have endured. Today, men and women from all walks of life are still called upon to resolve the most significant civil disputes confronting American society.

This was the case in 1985 when Pennzoil and Texaco, two of America's petrochemical giants, clashed over the acquisition of Getty Oil, the corporate creation of billionaire J. Paul Getty.[5] At Getty's death, the assets of his company had been divided between a family trust containing approximately forty percent of outstanding shares, the Getty Museum, holding about eleven percent of the company's stock, and the public. The trust was governed by Getty's son Gordon, the museum was directed by Harold Williams, and the oil company was managed by CEO Sidney Peterson. In 1984, a simmering dispute between Gordon Getty and Sidney Peterson came to a head. The two fought each other for control of Getty Oil. A key prize in their contest was the swing block of shares controlled by the museum's Williams. Players representing all the interests in this high-stakes game engaged in a series of nasty tricks and betrayals that degenerated into a no-holds-barred struggle for dominance. The fight eventually spilled over into the public arena where others interested in acquiring Getty Oil might compete. In Wall Street parlance, Getty Oil had been "put in play" and might be seized by the highest bidder.

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1. For an extended discussion of the early history of the American civil jury, see Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579 (1993).

2. *See id*. at 592.

3. *See id*.

4. *See generally* WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 (1975).

5. Unless otherwise noted, my description of the *Pennzoil* litigation is based upon THOMAS PETZINGER, JR., OIL AND HONOR: THE TEXACO-PENNZOIL WARS (1987).

Pennzoil, hoping to obtain control of Getty's huge oil reserves, made an offer of $100 per share for the company. This bid was rejected as too low by Getty's board but led to further bargaining and an offer of $110 per share. This too was rejected. Certain "sweeteners" were then added by Pennzoil resulting in a final offer of approximately $112.50 per share. This proposal was embedded within a highly complex legal package that was accepted "in principle" by the negotiating parties. The deal was to be consummated through the drafting of a series of contractual documents. For a variety of reasons, the drafting dragged on for several days. During this delay, Texaco, which had been watching developments, came forward with an offer that eventually totaled $125 per share. The Getty stockholders abandoned their agreement with Pennzoil and accepted Texaco's proposal.

Pennzoil, believing it had been deprived of the fruits of a binding agreement, decided to sue. After preliminary legal skirmishing, Pennzoil and Texaco squared off in Texas state court on the question of whether Texaco had improperly interfered with a completed Pennzoil deal. The case, as required by law, was to be heard by a jury of twelve ordinary Texans. Their job was to decide if Texaco ought to be required to pay compensatory and punitive damages that might rise as high as $15 billion or more.

The case was assigned to Judge Anthony Farris. As the trial date approached, Texaco discovered that Pennzoil's lead attorney, the flamboyant Texan Joseph Jamail, had contributed $10,000 to Judge Farris's re-election campaign, which was the largest single contribution received by the judge. Texaco's lawyers asked Judge Farris to recuse himself from the case but the judge refused. His decision was affirmed by a Texas appellate court.

The first step in the trial process was jury selection. Before jurors were chosen, the lawyers were given an opportunity to question potential panel members about their possible biases. This questioning process, or *voir dire* as it is usually called, was effectively used by Jamail to lay out Pennzoil's key trial theme: that a deal, sealed with a handshake, had been consummated. In response, Texaco's chief lawyer, Richard Miller, asked potential jurors whether they could accept the limits imposed by law on corporate acquisitions and reject as incomplete the complex series of negotiations carried on by Pennzoil and Getty. After questioning that took five days, the contending parties were each allowed to remove by peremptory challenge as many as eight potential jurors they suspected of being either biased or unsympathetic. Pennzoil would later claim that Texaco had tried to exclude African-Americans, although four were empanelled, and Texaco would accuse Pennzoil of trying to remove Jews, although at least one sat on the panel as originally constituted.

The simple handshake theme so effectively exploited by Jamail during *voir dire* was diluted in Pennzoil's eight-week presentation to the jury. Pennzoil's case featured long and repetitive questioning, mind-numbing videotapes of pretrial witness examinations, and a mass of complex expert testimony including a claim for $7.5 billion in damages. Texaco did no better with its case. Before it

could conclude, however, Judge Farris became mortally ill and was replaced by Judge Solomon Casseb. In the end, the trial took a total of seventeen weeks, involved thirty-five witnesses, and produced a transcript of more than 23,000 pages.

At the conclusion of the evidence, the jury was given five questions (or "special issues" in Texas parlance) to answer, including whether there had been a Pennzoil-Getty contract, whether Texaco had interfered with that contract, what damages might be assessed if interference were found, and what punitive damages might be awarded. On its initial vote on the first jury question, the jury was divided seven to five in favor of Pennzoil. It reached a nine to three majority quickly but appeared stuck there. The majority needed just one more vote, because Texas law allows a nonunanimous verdict of ten to two.[6] After a weekend off, one juror switched sides and agreement was quickly reached on all five questions (the two dissenting jurors eventually joined their ten colleagues). The jury awarded Pennzoil $7.5 billion in compensatory damages and $3 billion in punitive damages.

This $10.5 billion judgment threatened Texaco's very existence. Under Texas law, defendants are required to post a bond in the total amount of the award against them before being allowed to appeal. In Texaco's case, this turned out to be a financial impossibility, because no one could or would write such a bond. Texaco turned to the federal courts for relief from the state court judgment. The question of federal intervention went all the way to the United States Supreme Court, which denied that Texaco had any federal claim.[7] Faced with a crushing judgment, Texaco chose to declare bankruptcy. In the ensuing legal scramble, Pennzoil and Texaco came to a reluctant agreement in which Pennzoil accepted a payment of $3 billion to settle the case. A jury of twelve ordinary Texans had brought one of the country's largest and most powerful corporations to its knees.

The *Pennzoil* case raises a host of questions about the function of the modern jury. This article will explore a number of them, including why juries have been given so important a place in the judicial process, and how the jury ought to be constituted to carry out its work. The article also examines the process used to select a jury, instructions used to structure decisionmaking, and the nature as well as the form of jury verdicts. Despite many challenges to the jury system, careful assessment suggests that the jury is still an effective and necessary part of the judicial system.

II

WHY DO AMERICAN CIVIL JURIES HAVE SO MUCH POWER?

Looking at the *Pennzoil* case, one might be moved to ask (as were many critics at the time): Why does the United States allow twelve ordinary citizens

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6. *See* TEX. R. CIV. P. 292.
7. *See* Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 2 (1987).

to make such momentous decisions? The answer to this question involves a complex blend of historical and theoretical factors. Chief among the theoretical considerations is that the United States relies on a robustly adversarial form of justice. This means that Americans trust neutral and passive bodies to render decisions on the basis of the sharp clash of proofs presented by adversaries in a highly structured forensic setting.[8]

The jury is the most neutral and passive decisionmaker available. It is not called upon to rule on any pretrial disputes, nor is it involved in the administration of the lawsuit. At trial, it hears only evidence that has been screened for objectionable and prejudicial material. Juries are made up of people who come together to hear one case; they are, therefore, unlikely to be tainted by the sorts of predispositions judges may develop over the course of their careers either about certain sorts of claims or certain lawyers or litigants. Because the jury comprises a group, no single juror's prejudices can destroy its ability to reach a fair decision. Moreover, its members may be questioned before trial in *voir dire*, which facilitates the removal of potentially biased individuals. All this is to be contrasted with the position of trial judges, like Judge Farris, who have to labor unceasingly to manage the litigation before them, who inescapably bring their legal and political experiences into the courtroom with them, and who cannot be questioned regarding their opinions or sympathies.

The United States's allegiance to the civil jury is the product both of its early colonial history and the constitutional debates at the conclusion of the Revolutionary War.[9] The jury trial came to the New World with the English colonists and was, from the earliest times, the established means of resolving legal disputes. In the Revolutionary era, its value in American eyes was dramatically enhanced because juries regularly thwarted British objectives and provided a bulwark against royal tyranny. All the former colonies enthusiastically embraced the jury. "The right to trial by jury was probably the only one universally secured by the first American state constitutions."[10]

When the initial draft of the United States Constitution failed to make a specific provision for trial by jury in civil cases,[11] a cry of protest went up across the new nation. The Federalists, who had been primarily responsible for drafting the proposed constitution, were forced to defend their choice to omit the civil jury trial right. In pieces like Hamilton's essay Number 83 in the *Federalist*, they argued that although valuable, the jury might not be essential, es-

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8. For a more complete description of America's adversarial system, see STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 1-39 (1988).

9. For a discussion of the colonial period and developments with respect to the jury trial during the era of the drafting of the Constitution, see Landsman, *supra* note 1.

10. LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 281 (1960).

11. The right to jury trial was provided for in criminal cases. *See* U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed . . . ."); *cf. id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .").

pecially in civil cases.[12] These and similar arguments were challenged by the Antifederalists, who treated failure to insist on jury trials as sufficient reason to reject the proposed constitution. The Antifederalists believed that juries were essential in both criminal *and* civil litigation to offset judicial power and overzealous legislatures. They drew support for their argument from Blackstone:

> The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias toward those of their own rank and dignity; it is not to be expected from human nature that the few should always be attentive to the interests and good of the many.[13]

In the end, a compromise was reached: The jury trial right in civil cases did not appear in the body of the Constitution but was incorporated into that document as part of the first ten amendments. The Seventh Amendment declares:

> In Suits 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 Court of the United States, than according to the rules of the common law.[14]

Although much criticism has been leveled at the civil jury since 1791, it is inextricably woven into the fabric of the American justice system. It is the counterweight to a powerful professional judiciary and the occasional, antidemocratic tendencies of the various branches of government.

III

THE USE OF JURIES IN CIVIL LITIGATION TODAY

The jury remains a significant part of the United States's civil justice system. The National Center for State Courts estimates that there are approximately 150,000 state jury trials per year.[15] In the federal courts, there are about 10,000 jury trials a year, of which about half are civil.[16] Civil jury trials in state courts account for about one percent of all civil case dispositions.[17] In the federal system, this figure was about two percent for 1990.[18] Hundreds of thousands of Americans serve on juries in any given twelve-month period. In the federal system alone, more than 400,000 citizens were involved in *voir dire* in 1990 and more than 100,000 were chosen to serve as jurors.[19]

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12. *See* THE FEDERALIST NO. 83 (Alexander Hamilton).
13. EHRLICH'S BLACKSTONE 682 (J.W. Ehrlich ed., Nourse Publishing Co. 1959).
14. U.S. CONST. amend. VII.
15. *See* JEFFREY ABRAMSON, WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 251 (1994).
16. *See id.*
17. *See id.* at 252.
18. *See id.*
19. *See id.*

Although incomplete, there are data available that help us refine our picture of the civil jury at work. In one of the primary areas of civil litigation—torts—jury verdicts are returned in about 2.7% of all state court cases.[20] Juries do most of their tort work in simple cases involving auto accidents and premises liability claims. Often these two categories account for fifty percent of the total civil jury caseload. Plaintiff win rates in tort cases vary widely, but in the aggregate, plaintiffs win about half the time. This figure drops to forty percent in products liability actions and to thirty percent in medical malpractice cases. Plaintiff win rates are virtually identical against individual and corporate defendants but awards against corporations are, on average, substantially larger. The median jury award in state courts is about $52,000, of which about half is consumed in fees and costs. Approximately eight percent of jury awards exceed one million dollars. Punitive damage awards, as in *Pennzoil*, are infrequent and are most likely to be made in contract-related cases. The median punitive award in tort cases is quite modest ($38,000), but the mean is much higher ($590,000) because of the existence of a number of very large awards. The vast majority of tort plaintiffs are individuals rather than corporations. A typical state court trial usually takes about two years from case filing to jury trial.

IV

THE QUESTION OF JURY SIZE

The Texas jury in the *Pennzoil* case had twelve jurors and four alternates. One of the alternates eventually took the place of a juror who was excused—thus ensuring that twelve jurors were present for deliberations.

From the late thirteenth century on, the Anglo-American legal system recognized that the jury should have twelve members, and, in the fifteenth century, a twelve member jury definitively became the law of England, unless the parties consented otherwise.[21] In 1898, the United States Supreme Court held, in *Thompson v. Utah*, that a "jury" in the constitutional sense of that term must be "composed of not less than twelve persons."[22] The legal implication of this decision was that all jury trials conducted under the mandate of either the Sixth (criminal) or Seventh (civil) Amendment to the United States Constitution (at a minimum all those trials conducted in federal court) had to utilize twelve-person juries. This requirement did not necessarily extend to all state court civil jury trials—a question turning on a difficult question of constitutional interpretation regarding the "incorporation" of various aspects of the Bill of Rights into state proceedings.

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20. The data in this paragraph are drawn largely from Brian J. Ostrom et al., *A Step Above Anecdote: A Profile of the Civil Jury in the 1990s*, 79 JUDICATURE 233, 234-40 (1996).

21. *See* Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 8 (1993).

22. 170 U.S. 343, 350 (1898).

Over the past three decades, the requirement of twelve jurors has come under sustained attack. In 1970, the Supreme Court, in *Williams v. Florida*, upheld a Florida statute mandating six-person juries in all state court criminal prosecutions except those involving the possible imposition of the death penalty.[23] In the *Williams* decision, the Supreme Court referred to reliance on twelve jurors as an "historical accident"[24] and, in an act of analytical oversimplification, declared the only essential purpose of the criminal jury to be the prevention of oppression by government.[25] Based on the assumption that the jury was necessary only to serve this one purpose, the Court could discern no difference between the effectiveness of six- and twelve-person juries and, therefore, upheld the use of a six-person panel.[26] Three years later, the Court extended the six-person rule to federal civil trials in *Colgrove v. Battin*.[27] This decision was particularly noteworthy because the requirements of the Seventh Amendment specifically applied to the federal civil trial under consideration in that case. The court thus declared that whatever the term "jury" had once meant, it was no longer to be defined as a body of twelve. This redefinition opened the way to significant downsizing.

The Court in *Colgrove*, in passing, noted that its analysis was supported by "convincing empirical evidence."[28] Later examination would disclose that this evidence was hardly empirical and far from convincing.[29] In fact, research would strongly suggest that smaller juries are no more efficient than larger ones[30] (efficiency was an important selling point for the Supreme Court majority in *Colgrove*), that the use of smaller juries is likely to lead to more wildly fluctuating verdicts,[31] that smaller panel size reduces the opportunity for minority jurors to serve,[32] and that smaller juries place added pressure on minority jurors who do serve to surrender to the majority point of view.[33]

As evidence mounted regarding the inferiority of six-person panels, the court was confronted with a Georgia effort to reduce the size of its criminal juries to five. In *Ballew v. Georgia*, the Supreme Court rejected five member ju-

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23. 399 U.S. 78 (1970).

24. *Id.* at 89.

25. *See id.* at 100.

26. *See id.*

27. 413 U.S. 149 (1973).

28. *Id.* at 159 n.15.

29. *See* Hans Zeisel & Shari Seidman Diamond, *"Convincing Empirical Evidence" on the Six Member Jury*, 41 U. CHI. L. REV. 281 (1974).

30. *See* William R. Pabst, Jr., *Statistical Studies of the Costs of Six-Man Versus Twelve-Man Juries*, 14 WM. & MARY L. REV. 326, 327 (1972); Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 710-12 (1971).

31. *See* Michael J. Saks, *The Smaller the Jury, the Greater the Unpredictability*, 79 JUDICATURE 263, 264 (1996).

32. *See* Michael J. Saks, *Ignorance of Science Is No Excuse*, TRIAL, Nov.-Dec. 1974, at 18, 19; Zeisel, *supra* note 30, at 716.

33. *See Development in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1485-86 & n.165 (1997).

ries as constitutionally inadequate in criminal cases.[34] Justice Blackmun's explanation for the court's decision suggested that a line had to be drawn somewhere.[35]

The research Blackmun relied on, however, suggests that the line should have been drawn at twelve, not between five and six. Nevertheless, in 1996, the Judicial Conference of the United States rejected the recommendation of its own Standing Committee on Rules of Practice and Procedure that the federal courts return to twelve-person juries in all civil cases.[36]

V

SELECTING A JURY IN A CIVIL CASE—*VOIR DIRE*, PEREMPTORY CHALLENGES, AND JURY CONSULTANT ADVICE

In the *Pennzoil* case, the opposing lawyers spent five days questioning potential jurors about their sympathies. After this *voir dire*, each side used its eight peremptory strikes to remove those individuals who were perceived to be biased or unsympathetic. These two processes, *voir dire* and peremptory strikes, are at the heart of the civil juror selection system; however, each has become controversial over the last quarter-century.

Lawyer-conducted *voir dire* is the traditional American method of screening the members of the panel called for jury service.[37] In some states, *voir dire* has been left so completely in lawyers' hands that the judge does not even preside at the sessions in which opposing lawyers question potential jurors. Over the course of the past two decades, however, the feeling has grown among judges and rules drafters alike that lawyers have been abusing *voir dire* to indoctrinate the jury and to cultivate friendly relationships with individual jurors. Moreover, critics of the traditional approach have suggested that lawyer-directed questioning is inordinately time consuming and likely to veer into inappropriate areas touching on jurors' private lives and specific views about evidence they have not yet heard.

In reaction to the feeling that lawyers have abused *voir dire*, various courts have imposed substantial restrictions on lawyer participation in the questioning process. In the federal courts, the civil rules today authorize judges to conduct the entire *voir dire* themselves.[38] Federal judges have exercised their rule-granted authority and in about seventy percent of cases conduct all *voir dire* alone.[39] This approach has yielded remarkably mechanical questioning that seldom vigorously pursues the issue of bias. Moreover, research suggests that

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34. 435 U.S. 223 (1978).

35. *See id.* at 239.

36. *See Development in the Law—The Civil Jury*, *supra* note 33, at 1478 & nn.106-08.

37. For a general review of *voir dire*, see Barbara Allen Babcock, Voir Dire*: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545 (1975).

38. *See* FED. R. CIV. P. 47(a).

39. *See* JURY TRIAL INNOVATIONS 54 (G. Thomas Munsterman et al. eds., 1997).

judges are not as effective at eliciting juror self-disclosure as are lawyers.[40] Despite these drawbacks, *voir dire* has, more and more, become the judge's province.

Two techniques have been developed in recent years that promise to reinvigorate *voir dire* while restraining lawyer excesses. The first of these is to allow lawyer supplementation of the judge's questioning, thereby making it possible to secure both the benefit of judicial restraint and lawyer probing. Such an approach is authorized by the rules of procedure and is becoming more popular.[41] The second technique is to supplement oral *voir dire* with a written questionnaire answered by each potential juror. Questionnaires have been used in a number of high-profile civil trials, including the massive litigation regarding the safety of the pregnancy drug Bendectin, where a forty-six question form was distributed to potential jurors before oral *voir dire* began.[42]

Once *voir dire* has been concluded, each side is allowed to exercise its peremptory strikes. These strikes have, traditionally, been exercised without explanation or justification. As in a number of other areas, the Supreme Court has challenged tradition, in this instance by requiring that at least certain peremptory strikes be scrutinized and, in some circumstances, justified by counsel. The case requiring such scrutiny was the 1986 decision in *Batson v. Kentucky*.[43] In that criminal case, the Court held that it was improper for lawyers to use peremptory strikes to remove African-American juror candidates simply because of their race. The Court mandated a three-step process beginning with the complaining party making a "prima facie [showing] of purposeful discrimination" based on race.[44] Once the complainant has made such a showing, the burden shifts to the party who exercised the peremptory strikes to articulate a "neutral explanation" for his or her selections.[45] Then it is up to the trial court to decide whether unlawful discrimination has been proven. Subsequent cases have expanded and contracted *Batson* by turns. The Supreme Court has extended *Batson* protection to juror candidates in civil actions[46] and to peremptory challenges that discriminate on the basis of gender.[47] The Court has, however, given trial courts virtually unfettered discretion in deciding *Batson* claims,[48] thereby declining to fix any firm or predictable guidelines. It remains to be seen whether *Batson* and its progeny will rein in discrimination in the use

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40. *See* Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 LAW & HUM. BEHAV. 131 (1987).

41. *See* JURY TRIAL INNOVATIONS, *supra* note 39, § III-1 (lawyer-conducted *voir dire*).

42. *See In re* Richardson-Merrell, Inc. "Bendectin" Prod. Liab. Litig., 624 F. Supp 1212, 1258 (S.D. Ohio 1985).

43. 476 U.S. 79 (1986).

44. *Id.* at 93-94.

45. *Id.* at 97-98.

46. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991) (prohibiting private litigants in a civil case from using peremptory challenges to exclude jurors based on race).

47. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994).

48. *See, e.g.*, Purkett v. Elem, 514 U.S. 765, 769 (1995) (per curiam).

of peremptory challenges. In the *Pennzoil* case, each side accused the other of *Batson* violations, but the accusations were rejected.

The task of selecting jurors has become increasingly difficult as America's population has grown, the diversity of the jury pool has increased, and lawyers with a national practice find themselves more frequently trying lawsuits in communities they do not know. In these circumstances, at least when the stakes are high, lawyers will be attracted by any technique that offers the prospect of making more effective juror selections possible.

Since the early 1970s, one method said to "improve" jury selection has become increasingly popular.[49] This is the so-called "scientific selection" of jurors, which relies on the input of social scientists, or those claiming social science expertise ("jury consultants"), to help lawyers exercise their peremptory strikes. In the 1971 case of the Harrisburg Seven, a group of anti-Vietnam War protestors, Dr. Jay Schulman and a number of confederates sought to use social science methods to help the defense select a more sympathetic jury in the generally hostile community of Harrisburg, Pennsylvania. To do this, the scientists conducted an opinion poll in the Harrisburg area, analyzed it in a search for correlations between favorable juror attitudes and demographic traits, and used a variety of in-court observational techniques to help counsel make their jury selections. When the ensuing trial ended in a jury deadlocked ten to two for acquittal, a new science (or, more accurately, business) was born.

The new business is premised on the notion that statistical assessment of community attitudes can significantly improve the identification of favorable jurors. If true, jury trials might be reduced to contests to see whose social scientists are better at profiling favorable jurors. Fortunately for the jury system, such a scenario is unsupported by careful research. First, the overwhelming majority of decisions are dictated by the weight of the evidence rather than any trait of the jurors.[50] It is almost always the way the witnesses and proof sound that makes or breaks a case. Second, the most significant benefit to be derived from the use of jury consultants is not related to peremptories at all but to the pretrial rehearsal and critique such consultants provide for lawyers.[51] Third, careful assessment of the link between demographic traits (age, sex, race, educational background, employment, etc.) and juror decisions suggests that, even under optimum conditions, jury selection will not be improved by more than ten percent over traditional methods.[52]

Despite all this, great concern has been expressed about scientific jury selection, and, at least in one sense, that concern is justified. Such methods

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49. On scientific jury selection, see generally VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 79-94 (1986).

50. *See* SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 61 (1988).

51. *See* Ross P. Laguzza, *Voodoo Jurynomics*, L.A. DAILY J., Apr. 9, 1997, at 6.

52. *See* Reid Hastie, *Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?*, 40 AM. U. L. REV. 703, 719-20 (1991).

clearly rely on demographic stereotypes,[53] the very thing that has been condemned in some contexts by *Batson* and its progeny. Moreover, effective or not, such techniques give the impression that favorable juries can be bought,[54] as was suggested in the aftermath of the William Kennedy Smith rape trial. It remains to be seen whether any restrictions should be imposed on the use of jury consultants.

VI

TRYING CIVIL CASES

Pennzoil's lawsuit against Texaco resulted in a seventeen-week trial with thirty-five witnesses and a great deal of highly technical expert testimony.[55] It was, by virtually any measure, a complex case. Many critics of the civil jury have suggested that one of the jobs it cannot satisfactorily perform is the resolution of such complicated matters. It may be well and good for the jury to resolve simple disputes, so the argument goes, but it is a serious mistake to let a group of laymen decide the fate of giant corporations or ponder weeks of esoteric expert testimony. In *Pennzoil*, there was a chorus of complaints of exactly this sort when the jury's $10.5 billion award was announced. What few of the critics noted was the fact that Texaco offered no evidence on damages and did not in any way help the jury assess the punitive question. Whatever one thinks of the *Pennzoil* decision, the case typifies the new breed of information-intensive, expert-populated, lengthy cases that critics suggest juries should never be allowed to decide.

Under the Seventh Amendment, most civil actions involving monetary claims filed in federal courts must be tried by a jury if either party so requests. However, at least one federal court of appeals has indicated that if a case is too complex, it is unfair, and a violation of the Fifth Amendment right to due process, to insist that a jury hear the matter.[56] This complexity exception to the right to jury trial in civil cases has not been reviewed by the Supreme Court, but at least one other federal circuit court has denied the existence of such an exception.[57]

The most significant problem with a complexity exception is that over the long run it is likely to swallow the jury trial right. Almost every substantial lawsuit will have something difficult or complicated in it. To bar the jury from such cases is to invite their ouster from all meaningful civil litigation. Moreover, a complexity exception fails to take into account the difficulties a lone judge may have in dealing with a complex case. There is little basis to assume that the judge will be any more effective than a properly informed group of ju-

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53. *See* ABRAMSON, *supra* note 15, at 146-47.
54. *See id.* at 149.
55. With respect to details of the *Pennzoil* litigation, see generally PETZINGER, *supra* note 5.
56. *See In re* Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069, 1086 (3d Cir. 1980).
57. *See In re* United States Fin. Sec. Litig., 609 F.2d 411, 432 (9th Cir. 1979).

rors. Professor Richard Lempert, a lawyer and sociologist, has made another telling point about complexity:

> A close look at a number of cases, including several in which jury verdicts appear mistaken, does not show juries that are befuddled by complexity. Even when juries do not fully understand technical issues, they can usually make enough sense of what is going on to deliberate rationally, and they usually reach defensible decisions. To the extent that juries make identifiable mistakes, their mistakes seem most often attributable not to conditions uniquely associated with complexity, but to the mistakes of judges and lawyers, to such systematic deficiencies of the trial process as battles of experts and the prevalence of hard-to-understand jury instructions, and to the kinds of human error that affect simple trials as well. The anecdotal evidence should also remind us that it is difficult to predict which complex cases will trouble juries and which they will handle well.[58]

In light of the Supreme Court's avoidance of the issue, it does not appear that entire trials are likely at the present time to be treated as too complex for jury adjudication; yet there is some indication that specific issues raised in certain cases may be kept from juries because of their complex nature. On the strength of such an assessment, the Supreme Court in *Markman v. Westview Instruments, Inc.*[59] unanimously concluded that in patent infringement cases the judge retains responsibility for construing the patent's language, despite a finding that the jury trial right is applicable.[60] This decision was based, in part, on a functional assessment that concluded "judges . . . are better suited to find the acquired meaning of patent terms."[61] Although the jury was left to decide the question of infringement, the Supreme Court's focus on judicial competence and juror limitations may signal future receptivity to the narrowing of jury responsibility in areas other than the language of patents.

Comparable attitudes may explain judicial reliance in difficult or complex cases on a procedure generally referred to as bifurcation (meaning a cutting into two pieces). Pursuant to this approach, exposure to certain issues in a case may be delayed until the jury has decided a number of preliminary questions. This sequenced approach to trial has been popular in cases concerning such questions as exposure to toxic chemicals, involvement in a mass disaster, and injury from a potentially dangerous product. It has also frequently been considered in cases containing claims for punitive damages. In all these situations, bifurcation serves to screen the jury from arguably prejudicial information about the extent of a claimant's injury or the scope of a defendant's wrongdoing until preliminary questions like responsibility for manufacture or conformity to industry-wide standards have been answered.

It has been argued in bifurcation's behalf that it simplifies the jurors' task by placing one issue before them at a time and eliminating exposure to potentially biasing or confusing information until absolutely necessary to the resolu-

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58. Richard Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 181, 234 (Robert E. Litan ed., 1993).

59. 517 U.S. 370 (1996).

60. *See id.* at 391.

61. *Id.* at 388.

tion of that issue. Research suggests that while bifurcation is helpful in some situations, it is no panacea. It has been found to increase significantly the percentage of defendant victories.[62] Paradoxically, it has also been found to increase the likelihood of large punitive awards.[63]

Juries are expected to decide the case presented to them on the strength of the evidence adduced by the contending parties. The introduction of evidence is regulated by a series of rules circumscribing the use of certain sorts of proof. The most important evidence restrictions require that only relevant materials be presented in court and that prejudicial materials be excluded.[64] The judge must serve as gatekeeper by deciding what is relevant and what is prejudicial. In the course of making those decisions, the judge is, of course, exposed to the challenged proofs. Preliminary psychological investigation suggests that the judge may, unwittingly, be biased by what she or he hears.[65] One of the values of the jury is that it will not, generally, be exposed to prejudicial material and, therefore, will be more likely to decide cases without the biases with which judges must contend. A famous study by legal scholars Harry Kalven, Jr., and Hans Zeisel concluded that judicial exposure to inadmissible prejudicial materials concerning criminal defendants' prior records clearly affected judges' judgments about guilt and innocence and led them to decide more cases against defendants than untainted juries did.[66]

Many of the rules of evidence operate on psychological assumptions about how jurors will react to various sorts and forms of proof. It is assumed by the rules that things like criminal records are powerfully biasing, both in criminal and civil litigation[67]—leading juries to decide against those who have been previously convicted.[68] This assumption has been borne out in a variety of experiments.[69] Another assumption made by the rules is that hearsay (the in-court use of material from a person not available for cross-examination) will be overvalued by jurors. For this reason, among others, hearsay is usually barred from being introduced. However, experimental testing suggests that this assumption may not be warranted and that jurors instinctively tend to discount hearsay ma-

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62. *See* Hans Zeisel & Thomas Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606, 1612 (1963).

63. *See* Stephan Landsman et al., *Be Careful What You Wish for: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 WIS. L. REV. 297, 329-30 (finding large punitive damages in cases where a jury reaches the punitive issue after having decided against the defendant on the preliminary question of liability).

64. *See* FED. R. EVID. 401, 403 & advisory committee note.

65. *See* Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113, 125 (1994).

66. *See* HARRY KALVEN JR. & HANS ZEISEL, THE AMERICAN JURY 121-33 (1966).

67. *See* FED. R. EVID. 609 (allowing court to admit evidence of a conviction only if it determines that its probative value outweighs its prejudicial effect).

68. *See id.* advisory committee note.

69. *See, e.g.*, Roselle L. Wissler & Michael J. Saks, *On the Inefficiency of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37 (1985).

terials.[70] Be that as it may, American courts tend to shield jurors from this form of proof.

For much of the last century, it was felt that members of the jury panel should remain absolutely passive during the trial of a case.[71] Pursuant to this view, it was believed that jurors should neither be allowed to take notes nor ask questions. Furthermore, they were strictly prohibited from discussing the case before the evidentiary presentation was concluded. These precepts consigned jurors to almost total inactivity, increasing the risks of inattention and disengagement.

Recently, there has been a substantial shift in thinking about juror passivity. A number of judges and scholars have attacked the idea and have suggested that jurors should be encouraged to participate more actively in the trial process. To this end, many courts have embraced juror note-taking.[72] In addition, some courts have adopted a somewhat more controversial step by allowing jurors to present judges with written questions that the judges may screen and ask if appropriate.[73] This is more controversial because of the risks that jurors may come to see themselves as advocates or seek answers to improper or prejudicial questions.[74] Both these techniques have been adopted in an effort to engage jurors more fully in the trial of the case they are to decide.[75] Perhaps the most radical proposal along these lines is to allow jurors to discuss the lawsuit while it is in the process of being tried. The risks here—premature decision, loss of neutrality, and heightened inter-juror conflict—are serious; nevertheless, some courts have begun experiments to determine the usefulness of such discussions.[76] It would appear that America is moving toward a new jury concept, one based on the active engagement of jurors in the cases they hear.

It should be noted, however, that there are countervailing trends in the law regulating juror conduct. Some recent legislation has attempted to blindfold jurors by depriving them of a number of critical pieces of information as they hear and decide cases. The Illinois legislature, for example, has sought to hide from jurors the fact that a plaintiff in a tort case will be barred from all recovery if he or she is found more than fifty percent responsible for the accident in question as well as the fact that there are legal ceilings on noneconomic and punitive damages.[77] Additionally, the United States Court of Appeals for the Fifth Circuit has held that juries should not be informed of the rule that dam-

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70. *See* Richard Rakos & Stephan Landsman, *Researching the Hearsay Rule: Emerging Findings, General Issues, and Future Directions*, 76 MINN. L. REV. 655 (1992).

71. For a careful examination of the issues of note-taking and question-asking, see Larry Heuer & Steven Penrod, *Juror Note Taking and Question Asking During Trials*, 18 LAW & HUM. BEHAV. 121 (1994).

72. *See* JURY TRIAL INNOVATIONS, *supra* note 39, § V-6 (juror note-taking).

73. *See id.* § V-7 (juror questions to witnesses).

74. *See id.*

75. *See id.* at 142, 145.

76. *See id.* § V-5 (juror discussions of evidence during the trial).

77. *See* 735 ILL. COMP. STAT. 5/2-1107.1 (West 1992).

age awards in civil antitrust cases under the Clayton Act will be trebled.[78] These and similar blindfolding exercises seek to keep the consequences of their decisions from jurors, apparently on the assumption that doing so will help to control or steer those decisions. Such an assumption conceptualizes jurors as passive sponges, who will "soak up" only what they are permitted and then "squeeze" out a decision. Such an image is deeply flawed and often yields skewed and unsatisfactory results distorted by juror speculation about embargoed information concerning legal consequences. Dr. Shari Diamond and Professor Jonathan Casper have studied blindfolding and concluded: "When jurors are taken seriously and efforts are made to deal with their concerns and expectations, that is, when they are treated as active co-participants rather than passive sponges, they appear to be willing and able to respond more appropriately to the dictates of legal rules."[79]

VII

INSTRUCTIONS TO THE JURY AT THE END OF THE CASE

Once all the evidence has been presented, it is the judge's job to inform the jury of the law to be used in deciding the case. Depending on the practice of the locality, the judge may do this either before or after the lawyers have been given an opportunity to make their closing arguments; traditionally, instructions come last.[80] In the federal courts, since at least 1895 and probably a good bit earlier, it has been insisted that it is the jury's duty in a criminal case "to take the law from the court, and apply that law to the facts as they find them to be from the evidence."[81] This view is clearly at odds with the proposition that the jury may reject or "nullify" the law. The question of nullification is explored in another piece included in this symposium.[82]

In most cases, the judge's legal instructions are drawn from previously drafted models.[83] Quite often, these models are produced by officially constituted groups of lawyers, judges, and legal scholars whose primary goal is to reflect as accurately and fully as possible the current state of the law. What these so-called pattern instructions have generally lacked is concision and plain English. They tend to be long, repetitive, and filled with legal jargon. It has generally been thought more important that instructions be complete than comprehensible.

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78. *See* Clayton Act § 4, 15 U.S.C. § 15 (1994); Pollock & Riley, Inc. v. Pearl Brewing Co., 498 F.2d 1240, 1242 (5th Cir. 1974); *see also* Shari Seidman Diamond & Jonathan D. Caspor, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 L. & SOC'Y REV. 513, 517-18 (1992).

79. Diamond & Caspor, *supra* note 78, at 558.

80. *See* JURY TRIAL INNOVATIONS, *supra* note 39, at 161.

81. Sparf v. United States, 156 U.S. 51, 102 (1895).

82. *See* Nancy Jean King, *The American Criminal Jury*, 62 LAW & CONTEMP. PROBS. 41, 50-53 (Spring 1999).

83. On the question of jury instructions, see HANS & VIDMAR, *supra* note 49, at 120-27.

Unfortunately, but not surprisingly, such attitudes have produced instructions that are difficult for jurors to understand. In an archival study of 400 cases from the State of Washington, it was discovered that about one quarter of all juries halted their deliberations to request judicial clarification of one or more instructions.[84] It should be noted that in virtually all these cases the courts refused to elaborate on the original instructions provided.[85] Experimental work regarding the comprehensibility of instructions has found that jurors frequently fail to understand what instructions are saying.[86]

In light of such findings, a number of lawyers and scholars have asked what steps might be taken to improve juror understanding of instructions. Several quite simple steps that have been proposed have focused on the timing of the delivery of instructions and the format of their presentation.[87] As things now stand, jurors are usually given instructions only once—after all the evidence has been heard and the lawyers have made their closing arguments. This arrangement keeps jurors in the dark about the law throughout the case and allows them only a single chance to learn about its requirements. If relevant instructions were given at the start of the case or before final arguments, jurors would be afforded extra opportunities to consider the law's import and apply it to the facts. Moreover, lawyers would have a clearer picture of the law being presented to the jury and could more effectively tailor their proof and remarks to the legal principles laid down. On the question of format, it was traditionally believed that the proper way to instruct a jury was by means of a single oral recitation of the law. Jurors were not given a copy of the instructions but were expected to reconstruct the law from memory. Recent practice has moved away from this approach by providing jurors with a written copy of instructions. The supplying of written copies (or, in some cases, tape recordings) facilitates jury review during deliberations, enhances the accuracy of recollection of legal requirements, and focuses jurors on the precise legal questions to be resolved.

Beyond these simple steps, a number of reformers have set about the task of rewriting a vast array of legal instructions in plain English. It has been the hope of the drafters that the rewritten instructions will more effectively communicate the law's goals and requirements. Judges have not been particularly receptive to rewritten instructions.[88] As one group of commentators has put it: "It is as if the courts prefer not to communicate clearly to their juries."[89]

While, at first blush, this may seem an absurd attitude, there are several considerations that may help us understand it. First, the present pattern in-

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84. *See* Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 L. & SOC'Y REV. 153, 172 (1982).

85. *See id.*

86. *See* AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 12 (1982); Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1358 (1979).

87. On the question of the improvement of jury instructions, see JURY TRIAL INNOVATIONS, *supra* note 39, §§ VI-1 to VI-11.

88. *See* KASSIN & WRIGHTSMAN, *supra* note 50, at 152.

89. *Id.*

structions have been carefully vetted and accepted by appellate courts. If they are used, there is little danger of appellate reversal. The same may not be true of plain English replacements. Until such time as the substitutes are officially endorsed, they remain a legally risky choice. Second, and perhaps more importantly, the present instructions often represent a compromise about difficult legal questions, granting each contending interest some part of its objective. This fine balance of interests is likely to be undone by plain English instructions. Indeed, research suggests that changing the wording of instructions often has a profound impact on the percentages of plaintiff and defendant victories.[90] If outcomes are likely to be affected, then redrafting is a far from neutral exercise and poses serious social and political questions.

VIII

VERDICT FORMS AND SPECIAL VERDICTS

Along with its instructions, a court may specify what sort, or form, of verdict a jury must reach in order to resolve a civil case. There are, essentially, three forms of verdict possible: a general verdict, a general verdict with interrogatories, and a special verdict. The most frequently used form is the general verdict, which leaves all questions about the legal and factual merits in the jurors' hands. It asks the jury only to declare which side has prevailed and fix damages, if appropriate. This form cedes the jury maximum authority. Jurors do not have to explain or justify their decision in any way.

General verdicts with interrogatories take a significant step away from jury control toward judicial management and oversight. The jury is still asked to deliver a verdict but is also required to answer a series of supplemental questions. These questions focus on the factual underpinnings of the verdict and require the jurors to specify a number of their factual conclusions. The jury's responses allow the court to scrutinize the soundness of the panel's reasoning. If the interrogatory answers are consistent with the verdict rendered, then the judgment is fully validated.[91] If the verdict is inconsistent with the interrogatories but the interrogatories are internally consistent, the court may enter a verdict on the interrogatories, ask the jury to deliberate further, or order a new trial. When the interrogatories are internally inconsistent, the jury may be asked to deliberate further or a new trial may be required. The point of the exercise is to make sure that the jurors have understood the case and rationally integrated facts and law. The general verdict with interrogatories is viewed as particularly useful in complex cases.

The special verdict is a device which shifts even more responsibility to the court. When used, it requires that jurors answer a series of special questions about the facts of a case. The court then uses these answers to determine the

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90. *See generally* Michael J. Saks, *Judicial Nullification*, 68 IND. L.J. 1281 (1993); Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77 (1988).

91. *See* FED. R. CIV. P. 49(b).

legal outcome. The special verdict removes the jury's ultimate decisionmaking power. This restrictive device, obviously, raises serious questions about respect for the civil jury as an adjudicatory body.

IX

JURY DECISIONS—UNANIMOUS OR NOT?

By the fourteenth century, if not before, it was agreed that jury verdicts should be unanimous—that all jurors should agree on a decision or the case should be retried. This proposition was specifically embraced by the United States Supreme Court in 1897 in *American Publishing Co. v. Fisher*.[92] *American Publishing* stood until 1972, when, in reviewing a pair of state criminal decisions, the Supreme Court held that less than unanimous verdicts are constitutionally permissible in state court convictions.[93] In *Apodaca v. Oregon*,[94] the Court upheld an eleven-to-one verdict in an assault with a deadly weapon case,[95] while in *Johnson v. Louisiana*,[96] a nine-to-three conviction regarding a robbery charge was accepted.[97] As had been the case in their jury size decisions, the Supreme Court attributed the most narrowly circumscribed functions to the jury—claiming that the criminal jury does little more than serve as a counterbalance to the exercise of official power by the government. As the Supreme Court saw it, the size of the jury majority has little to do with containing government overreaching. The court also argued that unanimity is another historical accident that can be disposed of in the name of efficiency; the efficiency here being the avoidance of hung juries, at least down to the nine-to-three level.

Today, more than thirty states permit nonunanimous verdicts in civil cases.[98] Interestingly, only two, Oregon and Louisiana, allow such decisions in felony prosecutions. Due to an anomaly regarding interpretation of the Seventh Amendment, federal courts are still required to seek unanimous verdicts in civil cases.

One of the first questions that comes to mind about the nonunanimity rule is whether there is any limit whatsoever on how small the majority must be to satisfy constitutional constraints. In criminal matters, the Supreme Court has provided at least a partial answer. In *Burch v. Louisiana*,[99] the Court held that conviction by a vote of five to one is unacceptable because it yields less than six votes for conviction, thereby, arguably, offending the six-person jury rule ar-

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92. 166 U.S. 464 (1897).
93. See *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972).
94. 406 U.S. 404 (1972).
95. See id at 406.
96. 406 U.S. 356 (1972).
97. See id. at 358-59.
98. See Michael H. Glasser, Comment, Letting the Supermajority Rule: Nonunanimous Jury Verdicts in Criminal Trials, 24 FLA. ST. U. L. REV. 659, 671 (1997).
99. 441 U.S. 130 (1979).

ticulated in *Ballew v. Georgia*.[100] Still unanswered are questions about the validity of votes like eight to four and seven to five. These numerical questions point up the absence of any principled rationale for the Supreme Court's preference, since it appears to rely on neither historical tradition nor authoritative empirical assessment.

In fact, the empirical data on nonunanimous juries suggest that such juries do not function as well as their unanimous counterparts. Reid Hastie and his colleagues in a book-length study published by the Harvard University Press detailed a series of alarming findings about nonunanimous juries.[101] First, they discovered that majority rule juries virtually always cease serious deliberations once they have reached the required majority for decision.[102] Moreover, the smaller the size of the required majority, the faster the deliberations.[103] For example, juries that needed only to reach an eight to four verdict in a particular mock case deliberated seventy-five minutes on average, while their unanimous-jury counterparts needed 138 minutes, and ten-to-two juries needed 103 minutes.[104] Perhaps most troubling, majority rule juries felt significantly less certain about the correctness of their decisions and the winning majority tended to "adopt a more forceful, bullying, persuasive style" of deliberating.[105]

What is lost under a nonunanimous rule, suggests Jeffrey Abramson, is respect for genuine and robust deliberations as well as a commitment to strive for real consensus.[106] The loss of all this undermines the deliberative ideal, thereby challenging the central purpose of the jury—to have the entire community meaningfully contribute to the search for justice in our courts. Under a majority rule regime, minority viewpoints and contributions may be marginalized or even disregarded altogether.

X

POSTVERDICT REVIEW

A jury's decision is subject to review both at the trial court level and on appeal. After a verdict has been returned, the losing party may ask the trial judge for any one of a number of different forms of relief. The process of trial court review has its roots in eighteenth century common law procedure and was well established by the time the United States Constitution was adopted, thereby bringing such review into conformity with the Seventh Amendment's requirement that facts tried by a jury not be "otherwise re-examined [except] according to the rules of the common law."[107]

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100. *See id.* at 138.
101. *See* REID HASTIE ET AL., INSIDE THE JURY (1983).
102. *See id.* at 95.
103. *See id.* at 60, 76.
104. *See id.* at 60.
105. *Id.* at 112.
106. *See* ABRAMSON, *supra* note 15, at 183.
107. U.S. CONST. amend. VII.

The primary sort of relief available for a fatally flawed jury decision is a new trial of the case before a new jury.[108] This may be ordered if the trial judge feels she or he has committed a serious error with respect to such matters as jury instructions or the application of the rules of evidence. Alternatively, a judge may grant a new trial if jurors may be shown to have seriously misbehaved, for example, by considering evidence not presented at trial. Finally, the trial court may grant a new trial if the verdict is against "the clear weight of the evidence."[109] This last ground is generally said to be available only when the original decision is manifestly unjust. A new trial may not be ordered simply because a judge disagrees with the jury's assessment of the credibility of a witness or the weight of the evidence; instead, it must be dictated by the overwhelming weight of all the proof taken together.

The reviewing judge may use several alternative procedures rather than requiring a new trial. She or he may grant judgment to the losing party (called a judgment notwithstanding the verdict) if such a result is the only one rationally possible. Alternatively, the judge may insist that a new trial be held unless the plaintiff accepts a reduction in the damages award (remittitur) or, in rare cases, the defendant agrees to an increase in the award (additur).

Despite this impressive array of possible responses to jury error, trial courts are expected to respect jury decisions. The case law regarding review stresses the latitude a jury has in assessing the believability of the witnesses and persuasiveness of the proof. Inquiring into the mental processes of jurors after the rendering of a verdict is prohibited.[110] The rules regarding appellate court reversal are even more circumscribed. When an appellate court reviews a jury's decision about the facts of a case, it is limited to asking whether "the jury 'might reasonably' have found as it did."[111] If there is some basis for the jury's choice, it must be upheld.

XI

CONCLUSION

The American civil jury is vested with enormous power and responsibility. Its authority touches virtually all sorts of civil disputes. Despite substantial modification of a number of jury mechanisms over the past several decades, the jury still occupies the exalted place originally envisioned for it in the Seventh Amendment. When the likes of Texaco and Pennzoil prepare for legal combat, it is likely they will be required to make their case before a group of ordinary citizens called away from their normal tasks to decide the most momentous questions of the day.

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108. *See* FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE 382 (4th ed. 1992). Much of the following discussion is based upon this text.

109. *Id.* at 393 (quoting Aetna Cas. & Sur. Co. v. Yeatts, 122 F.2d. 350, 352-53 (4th Cir. 1941)).

110. *See* FED. R. EVID. 606(b).

111. JAMES ET AL., *supra* note 108, at 669.