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COMMENTS

Juries and Jurors: Juries on Trial: Constitutional Right Versus Judicial Burden: An Analysis of Jury Effectiveness and Alternative Methods for Deciding Cases

I. Introduction

The Framers of the Constitution essentially had two choices with respect to deciding on the method of dispute resolution. First, they could have chosen a non-jury method, in which a great deal of power would be left to one person, the judge. Second, they could have selected a jury to decide the case. As the Sixth and Seventh Amendments evidence, the Framers chose the latter of the two propositions. The Sixth Amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."¹ The Seventh Amendment addresses civil suits, by adding that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."² Now, after two hundred years, we are left to ask ourselves why they made the decision they did. Furthermore, is the reasoning and rationale advanced by our forefathers still valid today?

At the time of its conception, the right to trial by jury was meant to prohibit a large concentration of power in the hands of one person.³ This was to be accomplished by distributing the power of adjudication to many people.⁴ The spreading of power was thought to insure a fair trial by a jury of one's peers. With this historical backdrop in mind, let us skip ahead a couple hundred years to 1987 and examine an actual trial by jury.

In June 1987, the Supreme Court reviewed the case of *Tanner v. United States*.⁵ The defendants in *Tanner* had been convicted of conspiring to defraud

1. See U.S. CONST. amend. VI.

2. See U.S. CONST. amend. VII; see also 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; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.").

3. The strong pro-jury feelings can be seen even as early as 1775 when the colonists listed jury trials as one of their reasons for taking up arms in the "Declaration of the Causes and Necessity of Taking Up Arms." The colonists claimed they had been deprived "of the accustomed and inestimable privilege of trial by jury, in cases affecting both life and property." LLOYD E. MOORE, *THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY* 99 (2d ed. 1988).

4. The number of members on a jury at the time the Constitution was adopted was clearly twelve. Depending on the political jurisdiction and the function of the jury in a given situation, juries of other sizes have been used. See *id.* at 145.

5. 483 U.S. 107 (1987).

the United States and committing various acts of mail fraud.⁶ However, of interest was not so much the acts of the defendants, but rather those of the jurors. As one of the trial jurors stated, several jurors had consistently been consuming alcohol at lunch throughout the trial.⁷ Not surprisingly, the jurors fell asleep during the afternoons. Another juror submitted an affidavit which alleged widespread use of drugs among the jurors as well.⁸

The Court solved this dispute by refusing to do anything. A jury of drug-abusing peers is apparently isolated from any inconveniences, such as evidentiary hearings which probe illegal drug use during a fair trial.⁹ As the Supreme Court held, "testimony of juror alcohol and drug use during criminal trial was barred by rule of evidence,"¹⁰ and "substance abuse does not constitute 'improper outside influence' about which jurors may testify under rule of evidence."¹¹ Thus, the Supreme Court sustained the defendants' convictions,¹² by a jury of their peers.

Obviously, the Framers of the Constitution did not have this sort of judicial travesty in mind when crafting the Bill of Rights. It is fair to presume that had our forefathers believed they were developing a system in which something like *Tanner* could take place, they would have taken necessary precautions to prevent it.

This comment will focus on the inherent flaws within the jury system as it now stands. However, it is not intended to insinuate that such abuses are common to every case, but rather that they are widespread enough to be considered a major problem. Furthermore, the comment will examine steps that have been taken, and additional steps which should be taken, in an effort to cure these jury-trial maladies. Finally, the antithesis of jury trials, the nonjury trial, will be examined as an alternative to our present system.

II. From the "Deciding Faction" to the "Deciding Factor": A Flawed System

Not long ago, the right to trial by jury was held to be so "justly dear to the American people,"¹³ that regardless of "whether guaranteed by the Constitution or provided by statute, it should be jealously guarded by the courts."¹⁴ That is no longer the case. From peremptory challenges¹⁵ to discrimination,¹⁶ jury selection¹⁷ to juror avoidance,¹⁸ juries have become a method of creative lawyer

6. *Id.* at 112-13.

7. *Id.* at 113.

8. *Id.* at 115-16.

9. *Id.* at 127.

10. *Id.* at 125.

11. *Id.*

12. *Id.* at 134 (affirming in part and remanding).

13. *See* *Parsons v. Bedford*, 28 U.S. (1 Pet.) 433, 445 (1830).

14. The constitutional right to jury trial is to be secured upon compliance with laws reasonably calculated to enforce the guaranty in accordance with recognized principles of jurisprudence. *State ex rel. Kennedy v. District Ct.*, 194 P.2d 256, 260 (Mont. 1948).

15. *See infra* notes 66-74 and accompanying text.

16. *See infra* notes 79-80 and accompanying text.

17. *See infra* notes 25-29 and accompanying text.

manipulation to achieve a desired result, perhaps completely inconsistent with the case itself. Furthermore, add to the equation costs,¹⁹ complexities,²⁰ time consumption,²¹ and outside media influence,²² and it becomes difficult not to think the jury trial has outlived its use.

An analysis of these enumerated factors, along with a host of others, will demonstrate that the trend within the judicial branch has been to gradually usurp juries of their power, while increasing the role of the judge. Not surprisingly, this shift in power has occurred as the horror stories increase regarding the actions of jurors. However, the greater role of the judge and diminishing power of the juries may not be enough to cure these present day judicial problems.

Theoretically, the constitutional right to trial by jury was meant to insure a right to a *fair* and *impartial* jury²³ drawn from a cross-section of the community;²⁴ however, this seemingly luck of the draw system is anything but random. In effect, jury selection has become a process whereby both the judge and lawyers battle to assemble the twelve people most likely to support their own beliefs. This process may not only distort justice, but is also costly and time consuming as well.

A. Exorbitant Time Consumption

Jury selection begins with the process known as voir dire.²⁵ Theoretically, voir dire is used to determine the state of the jurors' minds so that a fair and impartial jury can be chosen.²⁶ Unfortunately, this seemingly simple process may in reality last a great deal of time. In *Press-Enterprise Co. v. Superior Court*,²⁷ the voir dire lasted over six weeks.²⁸ Furthermore, counsel indicated that it was not unknown for jury selection to take six months.²⁹

Why does voir dire consume so much time? The main explanation is that while voir dire is in theory supposed to yield a fair and impartial jury, lawyers have a much different agenda. On the contrary, voir dire gives counsel the opportunity to produce the most partial and biased jury it can possibly muster. Lawyers use voir dire to establish a rapport with the jurors, preview their case, and acquaint the jurors with the applicable principles of the law which is most consistent with

18. See *infra* note 55-61 and accompanying text

19. See *infra* notes 99-107 and accompanying text

20. See *infra* notes 81-97 and accompanying text

21. See *infra* notes 99-107 and accompanying text

22. See *infra* notes 108-12 and accompanying text

23. *Piehler v. Kansas City Pub. Serv. Co.*, 211 S.W.2d 459, 463 (Mo. 1948).

24. *People v. Tamble*, 7 Cal. Rptr. 2d 446, 448 (Cal. Ct. App. 1992).

25. "Voir Dire" means literally, "[t]o speak the truth." This phrase denotes the preliminary examination which the court and attorneys make of prospective jurors to determine their qualification and suitability to serve as jurors. See BLACK'S LAW DICTIONARY 1575 (6th ed. 1990).

26. See JAMES J. GOBERT & WALTER E. JORDAN, *JURY SELECTION: THE LAW, ART, AND SCIENCE OF SELECTING A JURY* 324 (2d ed. 1990).

27. 446 U.S. 501 (1984).

28. *Id.* at 503.

29. *Id.*

their case.³⁰ While obviously biased jurors will be excused, a problem remains. Skilled lawyers will still seek to fill the jury with those likely to side with their client, based on reasons which are not so obvious that the court mandates the particular juror's excusal.

B. Stacking Parts of the Jury

Opposing counsel will seldom allow a lawyer to stack the jury with people who favor his position. However, a lawyer need not stack the entire jury in order to assure victory before the trial has even commenced. Research indicates that on most juries, the three most active jurors, or a quarter of the jury, account for over one-half of all juror statements during deliberations.³¹ Accordingly, a lawyer's final argument will concentrate on those select individuals who will assume leadership roles in the jury room.³²

Often times, lawyers will rely on jury consultants for aid in determining who to select for jury duty. Jury consultants are typically former or practicing lawyers with social science backgrounds.³³ A well-trained jury consultant can effectively help the attorney by profiling *ideal* jurors, investigating the jury list, and predicting a jury's response to the case.³⁴

Determining which jurors are likely to side with a given attorney is evidently not too difficult a task. Validation studies using empirical approaches have produced positive hit rates in the range of 70%-90% accuracy in detecting committed jurors, while using as few as ten to twelve juror characteristics.³⁵ Further, the way in which the system for profiling jurors is constructed has a great deal to do with the likelihood that the scientific approach to jury selection will indeed be more effective than intuition or chance.³⁶

An example of a jury consultant's effectiveness occurred in the high profile Florida State trial of William Kennedy Smith. Smith stood accused of raping a young woman. However, Smith's attorneys retained a jury consultant whose

30. See GOBERT, *supra* note 26, at 320.

31. See John A. Call, *Psychology in Litigation*, TRIAL, Mar. 1985, at 48, 50.

32. High status, well educated persons are often looked to for leadership. Also, persons who exercise supervisory authority at work or who hold elected positions are likely to be leaders; they are used to directing others and will probably continue to do so in the jury room. See GOBERT, *supra* note 26, at 451.

33. See BILL COLSON ET AL., JURY SELECTION: STRATEGY AND SCIENCE ch. 6, at 5 (1994).

34. Other functions a jury consultant might provide include observing jurors in court, conducting community surveys, conducting a mock jury, conducting a shadow jury, preparing the juror questionnaire, assessing the effect of pretrial publicity, testifying as to the effects of pretrial publicity, criticizing the attorney in nonverbal communication, aiding witnesses in preparing testimony and preparing motions for the administration of juror surveys. *Id.*

35. See JAY SCHULMAN ET AL., IN THE JURY BOX: CONTROVERSIES IN THE COURTROOM 13 (1987).

36. See Robert D. Minick, *Using Jury Consultants to Assist Voir Dire*, in FIFTH ANNUAL LITIGATION MANAGEMENT SUPERCOURSE 289 (PLI Litig. & Admin Practice Course Handbook Series No. 497, 1994), available in Westlaw, 497 PLI/Lit 289.

involvement in the trial was described by opposing counsel as an "instrumental factor" in the jury's decision to render a not guilty verdict.³⁷

Federal courts, concerned with these custom-made juries, have begun using judges, instead of lawyers, to conduct the questioning of prospective jurors in voir dire.³⁸ However, even this method is vulnerable to the work of jury consultants. In the case of *Continental Airlines Inc. v. American Airlines Inc.*,³⁹ the court was faced with an issue concerning an antitrust action involving three major airlines. The judge conducted the questioning during voir dire; however, defense attorneys compensated by using a jury consultant to analyze jury traits and body language.⁴⁰ While the potential jurors were telling the judge one thing, their body language conveyed to the lawyers an entirely different message. Accordingly, the lawyers were able to analyze the body language of given jurors to decipher which of the potential jurors would be sympathetic to their side.⁴¹ This tactic is believed to have been a contributing factor to the jury's quick finding that the airline was not liable for trying to monopolize certain air traffic markets.⁴²

C. The Cross-Section Fairy Tale

Whereas the original English jurors were selected based on their knowledge of the facts,⁴³ juries today are selected based on their unmitigated ignorance. Where once the jury was selected in a straightforward manner — juries were comprised of those familiar with the facts that gave rise to the dispute⁴⁴ — we now search for those as completely removed from the facts as possible. Moreover, jurors are intended to be drawn from a cross-section of the community.⁴⁵

However, there are three stages in the jury selection process at which the ideal of a representative cross-section can be seriously compromised.⁴⁶ The first is the master list of eligible jurors from which the selections are made. It follows that if the list does not represent the community, then neither will the jury.⁴⁷ Second, various prospective jurors thus selected are either excused by judges or disqualified, narrowing the number of eligible jurors even further.⁴⁸ Lastly, peremptory challenges (or legalized discrimination) can be used to excuse all or

37. *Id.*

38. *Monday Morning Quarterback: Jury Selection Gives Defense Winning Edge in Antitrust Trial*, INSIDE LITIG., Sept. 1993, at 4, 4 [hereinafter *Jury Selection Gives Defense Winning Edge*].

39. Nos. G-92-259, G-92-266, 1993 WL 379396, at *1 (S.D. Tex. Aug. 10, 1993).

40. *See Jury Selection Gives Defense Winning Edge*, *supra* note 38, at 4.

41. *Id.*

42. The primary consultant for assisting American's team, Robert Hirschhorn, stated that the fact that the jury returned a verdict in a month-long case in only three hours suggests that jury consulting was valuable in the case. "Especially in federal court," he says, "jury consulting is as essential to a defense as gas is to a car." *Id.*

43. *See* GOBERT, *supra* note 26, at 145.

44. *Id.*

45. *See* *Metallic Gold Mining Co. v. Watson*, 117 P. 609 (Colo. 1911).

46. *See* *People v. Wheeler*, 583 P.2d 748, 758-59 (Cal. 1978).

47. *Id.* at 759.

48. *Id.*

most members of certain groups who make up a significant part of the community.⁴⁹

1. Role of Eligible Juror Candidates

The ultimate object of the jury selection is to bring into court jurors who have been chosen impersonally, methodically, and by equal chance.⁵⁰ Courts attempt to achieve this result through a variety of different methods. The most frequent means utilized are voter registrations, driver's licenses, and, in some cases, property tax roles. However, all of these cases systematically exclude certain members of the community. When using voter registrations, all those who are not registered voters are automatically excluded. When drawing from drivers' licenses, the section of the community which does not drive is eliminated. Finally, the great number who do not own property will never become jurors in some systems.

Amazingly, in a scheme founded on the idea of drawing from as wide a selection of people as possible, the mode of selecting persons for jury service has never been regarded as an essential element in the constitutional right of trial by jury.⁵¹ And while present methods may arguably yield a large selection to choose from, those methods also systematically preclude a true cross-section from ever materializing.

In essence, the master list represents the first opportunity for the jury trial to be stripped of its impersonal, equal chance characteristics. Historically, this can be illustrated by examining the initial methods used. At common law, the panel of jurors was selected by the sheriff from his list of freeholders. However, this process was attended by abuses, such as the packing of juries.⁵²

Accordingly, most of the American states have long since taken the selection of jury lists out of the hands of the sheriff. The responsibility is now generally given to other officers or bodies, such as jury commissioners, the selectmen of the towns, town supervisors, and county commissioners.⁵³

This shift in responsibility raises an interesting issue. A primary argument in favor of the jury system, and against a non-jury system, is that people are extremely hesitant to bestow all the power of adjudication to one person, the judge. Ironically, we do not hesitate to confer similar power to one person, the individual who selects the list of possible jurors, nor ever bother to question it. In essence, however, those who control the jury's origin could realistically control the outcome of the case. The question to be addressed later is why do we thoroughly distrust our judges, while putting our full faith in jury commissioners, town selectmen, and town supervisors?

49. *Id.*

50. *See* 47 AM. JUR. 2D *Jury* § 136 (1964).

51. *See* *People v. Dunn*, 52 N.E. 572, 574 (N.Y. 1899)

52. *See* *Lommen v. Minneapolis Gaslight Co.*, 68 N.W. 53 (Minn. 1896).

53. *See* 47 AM. JUR. 2D *Jury* § 143 (1964).

As much as some people would like to suppress judicial power, the fact is that trial judges themselves are beginning to exercise very important parts in the selection process, particularly in supervising the selection and drawing of jurors.⁵⁴ This is worthy of mention for two reasons. First, it reemphasizes the point that more power is being usurped from the people and given to the judges. Second, if the jurors become nothing more than hand-picked, judicial pawns, selected to carry out the wishes of the judge, what is the use of having them around?

2. *Excusals and Disqualifications*

Once the list of jurors is complete, which in theory represents a cross-section of the community, otherwise eligible jurors are then systematically eliminated, either through excusals or disqualification. The system begins with the premise that the state has an inherent and indisputable right to jury service from its citizens — such service is one of the general duties and burdens of citizenship.⁵⁵ However, this general rule is simultaneously undermined by statutory exceptions.⁵⁶ Often times, the statutes exclude from jury duty lawyers, physicians, and members of other select professional occupations.⁵⁷

Right away, the cross-section of the community has been narrowed. From there, certain exemptions may be granted by the court, regardless of statutes. A person may be exempted from jury service based on their religious beliefs.⁵⁸ Groups of people may also be excused if attendance would be an extreme inconvenience or undue hardship.⁵⁹ Presumably then, high income earners who would lose a great deal of money would be excused, as would lower class workers, who could not afford to live without what little income they might have. The court concedes this by adding that these excuses are allowable, even if they result in underrepresentations of certain cognizable groups.⁶⁰

Disqualifications represent another means whereby the cross-section is whittled down into a very select group. Generally speaking, the qualifications of jurors are to be tested by the state constitutional and statutory provisions.⁶¹ Accordingly, each state has the power to establish the qualifications for jurors to serve in its courts.⁶² Typically, jurors must be a citizen of the United States and a resident

54. *See id.*

55. *See id.* § 90.

56. A statutory exemption is not a vested right. It is a mere gratuity or privilege subject to repeal at the pleasure of the legislature. *See Rawlins v. Georgia*, 201 U.S. 638 (1906).

57. Under Federal statutes, members of the Armed Forces, police and fire departments, and members of the executive, legislative and/or judicial branches, are granted exemptions from jury duty. *See* 28 U.S.C. § 1862(1)-(3) (1988).

58. *United States v. Hillyard*, 52 F. Supp. 612 (D. Wash. 1943) (finding that the refusal of a member of Jehovah's Witnesses to act as a juror for religious reasons is justifiable under the constitutional provision forbidding the passage of any law by Congress prohibiting the free exercise of religion).

59. *United States v. Armsbury*, 408 F. Supp. 1130 (D. Or. 1976).

60. *Id.*

61. *See People v. Mol*, 100 N.W. 913 (Mich. 1904).

62. *Duggar v. State*, 43 So. 2d 860 (Fla. 1949).

of the particular county of the trial. They must be between twenty-one and sixty-five or seventy and in control of their natural faculties. In most cases, they must be able to read and write English and be of fair character and approved integrity.⁶³

Two points should be made about the qualifications of jurors. The first is that the competency to serve is left largely to the sound legal discretion of the trial judge.⁶⁴ This is another illustration of a judge's ability to craft a jury in whatever form he desires. Moreover, the judge's rulings on this matter are not subject to review unless accompanied by some imputed error of law.⁶⁵ In other words, a judge's decision will not likely be reversed.

Second, although these qualifications provide sound guidelines for jury selection, they simultaneously reduce the eligible class even further. Thus, to characterize a jury as being selected from a "cross-section" of the community, as the Framers fully intended it to be, is absolutely ludicrous. What is more astonishing is that we are still only dealing with the group of people from which the jury is selected. The narrowing process becomes even more intensified once challenges are utilized.

3. Peremptory Challenges

Originally, a peremptory challenge served as a vehicle for lawyers to challenge certain jurors without showing any cause.⁶⁶ It was not essential to such a challenge that any bias or prejudice be shown on the part of a juror.⁶⁷ Furthermore, the lawyer's right to reject jurors could be exercised without any inquiry into motives.⁶⁸ With such an arbitrary method of dismissing jurors, the question immediately arises as to whether or not peremptory challenges may in effect be a legalized means of discrimination. Examining some recent California cases may provide the answer.

In *People v. Superior Court*,⁶⁹ the California Superior Court held that a party may not use peremptory challenges to remove prospective jurors solely on the basis of group bias.⁷⁰ Moreover, in a criminal prosecution, peremptory challenges based solely on race violate equal protection guarantees when a defendant is a member of the race being challenged, and a defendant, regardless of race, has standing to object to the racially discriminatory use of peremptory challenges.⁷¹

To prohibit such violations, the court enumerated a three step process whereby a defendant may allege an unconstitutional exclusion of some group. First, the

63. See 47 AM. JUR. 2D *Jury* § 100 (1964).

64. *State v. Chavis*, 210 S.E.2d 555 (N.C. Ct. App. 1974).

65. *Id.*

66. *State v. Thompson*, 206 P.2d 1037 (Ariz. 1949).

67. *State v. Ward*, 167 So. 2d 359 (La. 1964), *cert. denied*, 380 U.S. 972 (1965).

68. See 47 AM. JUR. 2D *Jury* § 235 (1964).

69. 10 Cal. Rptr. 2d 873 (Cal. Ct. App. 1992).

70. The court defined group bias as a presumption that jurors are biased merely because they are members of an identifiable group distinguished on racial, ethnic, or similar grounds. *Id.*

71. *Id.*

defendant must make a prima facie showing of some exclusion.⁷² Once a prima facie case has been established, the burden shifts to the prosecution to demonstrate a neutral explanation for the challenge.⁷³ Lastly, the trial court must determine whether the defendant has carried his or her burden of proving purposeful discrimination.⁷⁴

At first glance, this three part test seems to provide a method to eliminate or at least reduce discrimination caused by peremptory challenges. However, the nominal impact it will have is made readily apparent when read in light of *People v. Barber*,⁷⁵ another California decision. In *Barber*, the court held that jury selection is an inexact science, based as much on hunches and inferences about human behavior as it is based on hard facts.⁷⁶ Therefore, peremptory challenges basically lend themselves to the application of popular psychology, the consideration of unarticulated values, and the varied experiences at trial and in the life of the attorneys who use them.⁷⁷ Thus, a decision to exercise a peremptory challenge may be based on factors that an appellate court cannot see when reviewing a cold record.⁷⁸

In other words, although the court cannot glean any explanation from the record for the exclusion of a juror except for discrimination, such discrimination may be overcome simply by writing off the exclusion of the juror based on the lawyer's hunch or inference.⁷⁹ In essence then, it will be a very rare case where a lawyer cannot find some sort of acceptable excuse for excluding certain racial or ethnic groups.⁸⁰

A common response to this is because both attorneys have the same opportunity to use peremptory challenges, these challenges should serve to negate any harmful impact; however, this proposition is not necessarily true. Consider an example of a white man accused of rape in New York's Chinatown. From the master list, a pool of potential jurors composed of all but three Chinese persons is compiled. The prosecution uses its peremptory challenges to dismiss the non-Chinese

72. *Id.*

73. *Id.*

74. *Id.*

75. 245 Cal. Rptr. 895 (Cal. Ct. App. 1988).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *But see* *Batson v. Kentucky*, 476 U.S. 79 (1986). In *Batson*, a black man was indicted in Kentucky on burglary charges. The prosecutor used his peremptory challenges to remove all four black venire persons, leaving an all-white jury. In its decision, the Supreme Court announced a new purposeful discrimination standard, consisting of two steps. First, the defendant had to "establish a prima facie case of purposeful discrimination." *Id.* at 96. Second, if the prima facie case was demonstrated, the burden shifted to the prosecutor to "come forward with a neutral explanation for challenging black jurors . . . [but not one rising] to the level justifying exercise of a challenge for cause." *Id.* Furthermore, the Court held that the prosecutor could not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption — or his intuitive judgement — that they would be partial to the defendant based on their shared race." *Id.* at 97.

people. Now the defense may use the same peremptory challenges, but only a very foolish person could argue the defense has the same power as the prosecution. Regardless of how the defense uses its peremptory power, the jury will inevitably be composed entirely of Chinese people.

III. Trial By Jury: A Harrowing Prospect For Jurors and Parties Involved

A. Complexity

Once the systematic selection of potential jurors is complete, those chosen individuals are bestowed with the responsibility of listening to the facts and arriving at a verdict. Often times, this is more responsibility than they can handle or should be expected to handle. To the credit of the courts, "complexity" is one area where courts have taken significant steps to remedy. The rule the courts once followed was that where the right to a jury trial exists, such a trial cannot be denied simply because the facts involved in the controversy are beyond the comprehension of the jury.⁸¹

In the case of *General American Life Ins. Co. v. Carter*,⁸² the plaintiff brought an action as beneficiary of his deceased sister's insurance policy against the defendant, a Missouri corporation, for the wrongful death of his sister.⁸³ Conceding that the court would be better able than a jury to deal "intelligently" with matters that are multifarious,⁸⁴ the court held that the jury trial should nevertheless stand.⁸⁵

More recently, however, the courts have moved towards ignoring the inherent right to jury trial when jurors are proven to be incompetent to decide the matter.⁸⁶ In the case of *Re Japanese Electronic Products Antitrust Litigation*,⁸⁷ the court took an entirely different position than its predecessors. In *Re Japanese*, the plaintiffs alleged that the defendants sought to drive American television producers out of the American market by selling televisions at artificially depressed prices.⁸⁸ The plaintiffs asserted violations of the 1916 Anti-Dumping Act,⁸⁹ charging that the defendants had maintained lower prices for televisions sold in the United States than for comparable televisions sold in Japan.⁹⁰ The court held that the Seventh Amendment does not guarantee the defendant a right

81. See *Douglas v. United States Fidelity & Guar. Co.*, 127 A. 708 (N.H. 1924).

82. 54 N.E.2d 944 (Ind. 1944).

83. *Id.* at 944.

84. *Id.*

85. *Id.*

86. See *In re Boise Cascade Secs. Litig.*, 420 F. Supp. 99 (W.D. Wash. 1976) (sustaining a motion to strike the jury demand because the case was too complex for a jury). But see *Radial Lip Mach. v. International Carbide Corp.*, 76 F.R.D. 224 (N.D. Ill. 1977) (overruling motion to strike the demand for a jury because no case was too complex for a jury).

87. 631 F.2d 1069 (3d Cir. 1980).

88. *Id.* at 1071.

89. 15 U.S.C. § 72 (1994).

90. *Japanese Electronic*, 631 F.2d at 1071.

to a trial by jury where the complexity of the issues in the case would prevent the jury from performing its task in a rationale manner.⁹¹

In spite of the obvious ineffectiveness of juries to decide cases in which they have no comprehension of the laws involved, there are those that will seemingly do anything to keep juries empowered. One suggestion is "not to dispense with juries, but to improve the trial procedures . . . such as by the use of summaries, masters, simplification of issues, trying one issue at a time, and avoiding joinder in complicated cases."⁹²

In other words, advocates of keeping the jury system would remedy the situation by increasing the time and cost of each complex trial by separating cases and breaking them down into simple terms anybody can follow.⁹³ Of course, this will undoubtedly lead to increases in appeals based on the judge's faulty instructions to the juries.⁹⁴ Nonetheless, apparently some believe that time and money should be sacrificed in order to insure our jury system will remain "inviolable."

Fortunately, courts have begun to reject pro-jury arguments in cases of complexity. Perhaps an even greater indication of the declining value placed on the jury trial can be seen by looking at the case of *Las Vegas Sun, Inc. v. Summa Corp.*⁹⁵ The *Las Vegas Sun* case dealt in part with a claim alleging intra-enterprise conspiracy violations of antitrust laws.⁹⁶ Holding that the laws were technical and complicated, the district judge arrived at his own verdict, refusing to substitute that of the jury.⁹⁷

While *Re Japanese* and *Las Vegas Sun* are unquestionably positive steps toward the attainment of justice in proceedings, the fact remains that these positive steps represent only a very small percentage of cases. Judicial deference in other areas of the law has not met with nearly as much success as it has in the realm of complexity.

B. Instructions, Time, and Cost

Theoretically, questions of law are left for the judge, while the jury wrestles with issues of fact. Therefore, at the end of each proceeding, the judge is left to explain to the jury the law that is to be applied to the particular circumstances. It may be helpful to once again analyze the theoretical cross-section to which the judge must explain the law. These will generally be nonprofessionals; specifical-

91. *Id.*

92. See MOORE, *supra* note 3, at 145.

93. But see David M. Nocenti, *Complex Jury Trials, Due Process, and the Doctrine of Unconstitutional Complexity*, 18 COLUM. J.L. & SOC. PROBS. 1, 12 (1983) ("If a case is so complicated that a jury can't understand it with the help of lawyers, expert witnesses, auditors, visual aids, accounts, summaries and judges, how could a person whose conduct is sought to be controlled by the law at issue possibly have known what to do without that help?").

94. See *infra* note 99.

95. 610 F.2d 614 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980).

96. *Id.*

97. *Id.*

ly, they will not be lawyers. From the remaining pool, the people selected are those who have little to no legal training and quite often minimal education.⁹⁸ Thus, for some, learning the applicable law which could determine a person's fate will be not only a trying experience, but perhaps a chore beyond their capabilities.

It should come as no surprise, then, that often times cases are appealed solely or partially on the judge's instructions to the jury.⁹⁹ Thus, time and money is spent on another entire case simply because the judge, who knows the law, cannot communicate it properly to the jury.¹⁰⁰

Recently, however, the courts have taken some steps towards reducing costs and the amount of time spent on superfluous cases. During the 1970s, the United States Supreme Court reduced the unanimity requirement for jury verdicts in civil cases and reduced the minimum permissible number of jurors from twelve to six.¹⁰¹ The Supreme Court reasoned that the reduction in size would have only a "negligible" impact on the constitutional requirement that juries adequately represent the community from which they are drawn and that it would not significantly change jury verdicts.¹⁰²

Furthermore, the introduction of small and nonunanimous juries would mean shorter trials, thereby cutting into backlogs and permitting speedier justice for everyone.¹⁰³ The new juries would also lower costs for taxpayers¹⁰⁴ by reducing the amounts spent to pay jurors and courtroom attendants.¹⁰⁵ Moreover, the removal of the unanimous verdict requirements would mean fewer hung juries, many of which lead to second trials, doubling the public's portion of the trial's cost.¹⁰⁶

Of course, this action, like all others that question the sanctity of the jury system, has been met with attack. Opponents claim that the price of these economies is lesser representation of the community and a greater likelihood of a wrong verdict because the collective wisdom of the six jurors is less than that of twelve.¹⁰⁷ However, this argument is easily refuted in two ways. First, the requirement of twelve jurors was an arbitrarily chosen number to theoretically insure a cross-section. As has been discussed extensively, there is no longer a cross-section from which jurors are chosen. Second, the same argument can be made that twelve jurors are twice as likely to err in their decision as are six. Thus, opponents of the recent trend are making baseless arguments.

98. See *supra* note 56 and accompanying text.

99. See *Gavin v. O'Leary*, 983 F.2d 1072 (7th Cir. 1993).

100. See *Brown v. Wal-Mart Stores, Inc.*, 11 F.3d 1559 (10th Cir. 1993).

101. JOHN GUINTEH ET AL., *THE JURY IN AMERICA* 75 (1988).

102. Lawrence R. Mills, *Six-Member and Twelve-Member Juries*, 6 U. MICH. J.L. REF. 671 (1973).

103. Edward N. Beiser et al., *Six-Member and Twelve-Member Juries*, in *JUDICATURE* 426 (1975).

104. See Mills, *supra* note 102, at 671.

105. See GUINTEH, *supra* note 101, at 75.

106. *Id.*

107. See VALERIE P. HANS ET AL., *JUDGING THE JURY* 5 (1986).

C. Media Influence

The effect of the media has made the selection of jurors an even more difficult and laborious task. One of many cases which illustrates the problems caused by the media is *United States v. Blanton*.¹⁰⁸ In *Blanton*, the defendants were convicted of crimes relating to the issuance of retail liquor licenses when one of the defendants was governor of the state.¹⁰⁹ Due to the substantial media interest in the case, a series of extra steps had to be taken to insure an impartial jury. The voir dire examination of the jurors was extended in an effort to measure the prior media impact of the pretrial publicity on the jurors.¹¹⁰ Furthermore, the potential jurors were questioned extensively and were dismissed in mass for even a trace of prejudice, and there was also a substantial increase in the number of peremptory challenges.¹¹¹

The media is able to cause these problems by shielding itself behind a First Amendment¹¹² guarantee of freedom of speech and press. Thus, it is not likely that these guarantees will be sacrificed at any time in the near future for judicial fairness and efficiency. However, in the wake of the high publicity trial of O.J. Simpson, there may be some changes demanded in response to the media circus which almost overshadowed the case itself.

D. The Verdict

The most amazing and shocking part of this entire scheme is that juries do not even have to apply the law. Jurors are not accountable for their decisions; they deliberate in secret and provide no reasons for their verdicts.¹¹³ Thus, when all is said and done, juries can completely disregard the law for whatever reason they choose. Fortunately, there are two safeguards built into the system to afford some protection — JNOVs and waivers.

I. Judgement Notwithstanding the Verdict (JNOV)

The judicial process has built into its system a judge's veto, more commonly known as a judgement notwithstanding the verdict (JNOV).¹¹⁴ This judicial tool allows the court to enter a judgment contrary to the jury's verdict. Judgment *non obstante veredicto* in its broadest sense is a judgment rendered in favor of one party notwithstanding the finding of a verdict in favor of the other party.¹¹⁵ In

108. 719 F.2d 815 (6th Cir. 1983).

109. *Id.*

110. *Id.*

111. *Id.*

112. The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

113. See GOBERT, *supra* note 26, at 6.

114. See BLACK'S LAW DICTIONARY 1055 (6th ed. 1990).

115. Judgment *non obstante veredicto* at common law, was "a judgment entered for plaintiff 'notwithstanding the verdict' for defendant; which could be done only, after verdict and before judgment,

essence, the judge theoretically is empowered to rule in any way, regardless of the jury's findings. However, there are restraints on this judicial veto. First, the judge may only grant a judgment notwithstanding the verdict subsequent to a motion for a directed verdict.¹¹⁶

Therefore, the judge is basically powerless to overrule faulty or baseless jury verdicts unless the motion for a directed verdict requirement is met. This in turn illuminates the real weakness of this judicial tool. A JNOV is designed to only be accessed in situations in which the jury obviously makes a wrong decision. The cases which fall in a grey area, those which *should* go in one party's favor, but *could* conceivably be decided (and are decided) for the other party, are ignored. Thus, the JNOV rule is basically ineffective in all but a few cases. We are therefore left with only the waiver as a possible means of avoiding our constitutional burden to a jury trial in the majority of cases.

2. Waiver

The obvious reply to all the information presented is that if a jury trial is so awful, why not just waive it? However, this rebuttal misses the mark for two reasons. First, in some cases, generally those involving felonies, waiver is not permitted.¹¹⁷ One rationale for denying the power of the accused to waive a trial by jury is that such a proceeding is against public policy. The state has an interest in the preservation of the lives and liberties of its citizens, and it would be highly dangerous to permit a criminal defendant to waive his right to a jury trial.¹¹⁸ Thus, in some cases, the defendant does not have a constitutional right to a jury trial, but rather a constitutional burden.

Second, a defendant may not wish to waive a jury trial because a jury may provide his only means of being found not guilty. A lawyer can often times play on the emotions of jurors. Also, the jurors may render an acquittal for other reasons. Perhaps they do not understand the law or simply choose not to apply it. In any case, the jury can be manipulated in the favor of a guilty defendant as easily as an innocent one. Thus, a defendant with concerns other than "justice" may welcome a trial by jury.

E. Hypothetical Jury Processes

The following are two cases, one criminal and one civil, used to illustrate the potential problems, abuses, and shortcomings inherent within the process of a trial by jury. Again, these hypothetical cases are not meant to imply that these judicial

where it appeared that defendant's plea confessed the cause of action and set up matters which, although verified by the verdict, were insufficient to constitute a defense or bar to the action." However, due to either "statutory enactment or because of relaxation of the early common-law rule, the generally prevailing rule is that either plaintiff or defendant may have a judgment *non obstante veredicto* in proper cases." *Id.* at 1055-56.

116. See FED. R. CIV. P. 50.

117. See 47 AM. JUR. 2D *Jury* § 72 (1964).

118. See *id.* § 73.

miscarriages occur during every case, but that these flaws have the potential of occurring in every case.

1. Criminal Case

Smith, a black man, is charged with murdering Jones, a white man. The preliminary facts indicate that the two men were engaged in an altercation, whereby words were exchanged, both men drew knives, and subsequently Jones was stabbed and died. The jury is to be drawn from a voter registration sheet located in a predominantly white neighborhood.¹¹⁹ Furthermore, the state laws prohibit waiver of a jury trial in cases involving felonies.¹²⁰ Given this not too uncommon fact pattern, a number of possible abuses may occur.

Obviously, Smith has no choice but to have his constitutional burden of a jury trial exercised for him. In addition, the juror pool is comprised of mainly white people. Furthermore, the black jurors who are not excused or disqualified could be subject to removal, either by peremptory challenges or challenges for cause.¹²¹ Conceivably, then, Smith could be tried by an all white jury.¹²² Certainly, this is not what Smith would consider a jury of his peers drawn from a cross-section of the community. Moreover, considering the racial prejudices that permeate society, Smith would probably also be more than a little concerned about his chances for receiving a fair trial.

Once the "impartial" jury has been selected, the trial will proceed to the stage where the law and facts theoretically converge.¹²³ The degree of the murder charge will depend upon aggravating and mitigating factors.¹²⁴ Likely, the issues of self-defense and/or provocation will be raised.¹²⁵ Each of these considerations will be specifically and explicitly defined for the jury to consider.¹²⁶ Nevertheless, once behind closed doors and in deliberation, the jury is free to decide

119. See *supra* note 50 and accompanying text.

120. See *supra* note 117 and accompanying text.

121. The exclusion by the prosecution through exercise of its peremptory challenges of eight black jurors from one panel is not such a showing of a "systematic use of peremptory challenges" as to deny the defendant due process of law. *Commonwealth v. Banks*, 323 A.2d 780, 781 (Pa. 1974). The State's use of peremptory challenges in the trial of black defendant in which no blacks served on the jury was not reviewable in the absence of any evidence of a systematic course of excluding blacks from jury service. *State v. Hamilton*, 297 So. 2d 419, 420-21 (La. 1974).

122. The trial court did not err in summarily denying the defendant's motion to dismiss the jury array "for the reason that there are no blacks." *State v. Wright*, 224 S.E.2d 624, 627 (N.C. 1976).

123. The final verdict is, in theory, supposed to represent the uniting of law and fact. See *infra* text accompanying note 140.

124. Aggravating factors, among other things, could be prior history of violent crimes, or commission of felonies in the past. See WAYNE R. LAFAYE ET AL., *CRIMINAL LAW* 648 (2d ed. 1986).

125. Self-defense and provocation, if proven, could reduce the offense and accordingly, the possible punishment. *Id.*

126. The judge has the unenviable task of attempting to explain to the jury which degree of murder to apply, depending on the mitigating and aggravating factors they choose to believe. This will often times provide the defendant's attorney with the vehicle he may need to appeal, based on the judge's instructions to the jury. See *supra* note 99.

however they see fit.¹²⁷ Although the convergence of the law and facts point in one way, the final verdict may go completely in the other direction.¹²⁸

Regardless of the decision, the time and money to be consumed by this process are by no means exhausted. Since the decision of the jury is not appealable, appeals will be filed questioning whether the judge's instructions of law to the jury were properly given and received.¹²⁹ This is especially true in instances which involve the death penalty. Research indicates that it is virtually impossible for a judge to instruct the jury on the offenses and the defendant's deserving of capital punishment.¹³⁰ This uncertainty will inevitably render the verdict moot as an appeal will undoubtedly be forthcoming. Finally, we are left to ask, is this really a system worth keeping?

2. Civil Case

White, a testator, asked Black, an attorney, to draft a will whereby bequests were to go to certain beneficiaries. Subsequently, White died, and it was immediately brought to the attention of his relatives that the will was invalid due to the Rule Against Perpetuities. Brown, a relative, brought a civil action against Black for malpractice. Furthermore, Brown requested a jury trial, pursuant to the Seventh Amendment of the United States Constitution.¹³¹

Again, assuming a jury trial is allowed, the process of jury selection begins. Through disqualifications and excusals, the cross-section of the community will be severely narrowed to a small number of individuals.¹³² From there, lawyers from both sides will attempt to locate the jurors most likely to side with their client. Thus, the randomness of the selection process, as intended by the Framers, is effectively eliminated.¹³³

Once intact, the jury will listen to excruciatingly dull facts and laws, which they most likely neither know nor care about. Finally, at the conclusion, the judge will issue instructions to the jury, at some point explaining that the Rule Against Perpetuities prohibits the creation of future interests or estates which by possibility may not become vested within a life or lives in being at the time of the testator's death or the effective date of the instrument creating the future interest, and 21 years thereafter,¹³⁴ "together with the period of gestation when the inclusion of the latter is necessary to cover cases of posthumous birth."¹³⁵ Who can possibly argue that it is in the best interest of justice that a jury decide this case? Consider the case of *Lucas v. Hamm*,¹³⁶ in which the California

127. See *supra* note 113 and accompanying text.

128. See *supra* note 113 and accompanying text.

129. See *supra* note 99.

130. See LAFAVE, *supra* note 124, at 168.

131. See *supra* note 2 and accompanying text.

132. See *supra* notes 55-60 and accompanying text.

133. See *supra* note 66.

134. See BLACK'S LAW DICTIONARY 1331 (6th ed. 1990).

135. *Id.*

136. 364 P.2d 685 (Cal. 1961), *cert. denied*, 368 U.S. 987 (1962).

Supreme Court held that the Rules Against Perpetuities were so confused that not even an attorney could be expected to understand them.¹³⁷ Yet, we live in a nation that permits such issues to be decided by laymen on a sporadic basis. This is nothing less than a travesty of justice.

F. Jury Trials — Conclusion

This comment is not meant to suggest that all jury trials will inevitably lead to a miscarriage of justice. Rather, it is structured to illustrate that the system is inherently flawed in a number of ways. It is important to remember that all the jury packing and discriminating done by lawyers and all the misapplication and/or nonapplication of law done by jurors is done within the parameters of accepted, legal practice. The system is designed to allow these things to happen. Furthermore, there are a number of casualties within this system: defendants, who are not allowed to waive a jury trial, in spite of the obvious flaws;¹³⁸ people awaiting trial, whose rights to a speedy trial¹³⁹ are being sacrificed because of the present system which takes an exorbitant amount of time; insurance companies, which must pay off astronomical awards due to our current juror trend of redistributing the wealth in tort cases; society, which must pay higher premiums to insurance companies straddled by these decisions; jurors, who are asked to make decisions they are not qualified to decide or mentally prepared to address, and who face serious financial loss and the possibility of being sequestered away from civilization for the duration of the trial. Thus, the question we face today is what are the conceivable alternatives to the present system?

IV. Alternatives to the Jury System

A. Fix the Present System: Suggested Areas of Change

Many Americans are beginning to realize that the jury system is fundamentally flawed. However, for most, the thought of abandoning this Constitutional icon is inconceivable. Therefore, one alternative would be to revamp the present system, while leaving enough of the old system intact to quell the anxiety of those who continue to swear by juries.

1. Complexity

The judicial system must cease sacrificing a fair trial in order to preserve the constitutional guarantee to a jury in cases far beyond the jurors comprehension. The theory behind jury trials is that the judge decides the law, while the jurors deal with issues of fact.¹⁴⁰ The judge explains the law to the jurors, who apply it to the given facts and arrive at a verdict. However, the verdict is essentially

137. *Id.*

138. *See supra* notes 117-18 and accompanying text.

139. *See supra* notes 27-29.

140. *See supra* note 123.

meaningless if the jury cannot comprehend the applicable laws. Thus, justice is not properly served.

Therefore, the issue to be addressed is which areas of law are too complex to entrust to a jury. Likely, the attempt to permit jury trials concerning certain areas of civil law, while excluding others from the jury, would lead to confusion and an eventual blurring of any lines drawn. Therefore, it would be both practical and reasonable to eliminate juries in civil cases altogether.¹⁴¹

Not only would such a rule eliminate any confusion that might arise from a less stringent reduction, it would also serve to cure other inherent ills within the system. Astronomical jury awards in tort actions would likely cease, bringing a sense of reality back into a system being played like the lottery by personal injury attorneys. This would in turn reduce appeals based on the outrageous awards and may also encourage settlement once the system is no longer as lucrative as it once was.

Furthermore, cases may actually be decided on the applicable laws, not what the jury perceives the law to be or on who can better afford to bear the financial burden.¹⁴² Moreover, civil cases are more readily adaptable to nonjury trials in the public eye. While society may cling to its responsibility of administering justice to wrongdoers in a criminal case,¹⁴³ the same incentive is not found in civil cases. Therefore, losing a trial by jury is a concession the American people might be willing to make.

2. Jury Selection

The original intent was for jurors to be randomly selected from within a cross-section of the community.¹⁴⁴ This is no longer the case. With disqualifications, excusals, and challenges, the jury is whatever the combating lawyers choose it to be. Often times, the case will be decided on which lawyer did a better job selecting the jury. This can be cured in a number of ways:

First, eliminate preemptory challenges. Regardless of the arguments for keeping these challenges, it is clear that preemptory challenges entirely undermine the system of arbitrarily selected jurors. While challenges for cause serve to eliminate jurors perceived to be partial or biased,¹⁴⁵ preemptory challenges simply serve as a means of rejecting jurors because they do not fit in the model the lawyer is attempting to build. There is nothing in the Constitution that remotely suggests

141. The notion of one judge presiding solely in civil cases is not unknown to civil law countries, such as Germany and France, where the practice is widespread. See *infra* notes 187-89 and accompanying text.

142. In some instances, the main consideration in a case for a jury may not be guilt or innocence, but rather whether insurance is available.

143. See LAFAYE, *supra* note 124, at 24-25.

144. See *supra* note 45.

145. A "challenge for cause" is "a request from a party to a judge that a certain prospective juror not be allowed to be a member of the jury because of certain specified causes or reasons." BLACK'S LAW DICTIONARY 230 (6th ed. 1990).

lawyers should have the ability to custom-craft the jury of their wishes; however, we continue to allow them to do so.

Second, choose from a legitimate cross-section. One method towards effectuating a true cross-section would be to eliminate artificially imposed barriers. In other words, eliminate restrictions based on gender, race, and religion.¹⁴⁶ The fact that a person may be a Hispanic Catholic does not override the fact that the person is, first and foremost, a United States citizen who has a duty to serve on a jury when called. Furthermore, the money saved by eliminating juries in civil suits could be used to supplement the income of juries in criminal cases. Thus, people in high and low income brackets will be able to afford to serve on juries, significantly increasing the communal representation.

3. *Juror Accountability*

While altering the present method of jury selection may provide a greater measure of fairness at the outset of a trial, another safeguard is needed at the conclusion. In no other facet of life with such important ramifications would we allow decisions to be made with no attached justification or rationale. However, this is what happens when we permit jurors to arrive at verdicts with no explanation for how the verdict was reached.

This is not meant to imply that a grand inquisition in which each juror is interrogated at length is necessary. Rather, perhaps a simple mandate that the jurors accompany their verdicts with an explanation is needed. For example, in the hypothetical case of Smith, the jury could announce its verdict as follows: "We, the jury, find that the defendant's actions were premeditated and not acted upon by self-defense. We therefore find the defendant guilty of murder in the first degree." This change would have a couple of soothing effects. First, it should eliminate any beliefs that the jury acted arbitrarily or with a misunderstanding of the law. Second, it should reduce appeals based on the judge's instructions, as the court is expounding on the law as they render their verdict. Furthermore, if the jury were to misapply the law as they understood it or misunderstand the instructions, the matter could be dealt with at the current trial, rather than wasting time and money dealing with the issue in a subsequent hearing.

4. *JNOVs*

We must ask ourselves why the JNOV exists. Presumably, this judicial tool was developed because someone, somewhere, realized a jury's enormous potential for completely screwing up. Remember that this safeguard was developed and is used in instances where a jury's verdict is entirely inconsistent with the facts of the

146. See *supra* notes 58-61 and accompanying text.

case.¹⁴⁷ Unfortunately, such a safeguard is not available for wrong jury decisions which are not so glaring.¹⁴⁸

Now, consider the ramifications of eliminating the motion for a directed verdict prerequisite before allowing a JNOV. Presumably, within the present system, time and energy are wasted in writing and ruling on frivolous motions for directed verdict, filed solely for the purpose of keeping a possible JNOV alive. Eliminating this prerequisite would save time and money for clients and taxpayers. It would also serve to expand the areas in which a judge could overturn incorrect verdicts.

Of course, opponents will complain that to do so would eventually lead to the complete usurpation of jury power by the judge who might theoretically employ a JNOV in every case. However, this is not exactly true. A judge's erroneous decision would likely be subject to appeal. Thus, it would not behoove a trial judge to arbitrarily overturn the jury's verdict, putting himself under the constant microscope of an appellate court.

B. Look to Non-Jury Systems for Alternatives

Civil law countries provide a source which we may look to for certain advances in our judicial system. From their educational system to their judicial structure, civil law jurisdictions provide certain aspects which might benefit American courts. However, of equal importance is the way in which judges are perceived in their countries in contrast to ours. Before any changes can be made within the United States, we must first deal with the fear of judicial autonomy that exists at home in an attempt to achieve the judicial schemes that survive abroad.

1. Fear of Judges

Perhaps the single greatest explanation for why Americans still cling to an obviously flawed jury system is due to our inherent distrust and lack of faith in judges. As the argument goes, judges, like jurors, may be biased by experience, education, or upbringing, but they act alone, without the benefit of eleven others to serve as a counterweight to their prejudices.¹⁴⁹ Furthermore, if a judge dozes during a witness' testimony, there are not eleven others to assure that the witness' testimony is taken into account.¹⁵⁰ Moreover, judges quickly become habituated to trials and lack the fresh perspective that jurors can bring to a case.¹⁵¹

147. See *Perkin-Elmer Corp. v. Computervision Corp.*, 732 F.2d 888, 893 (Fed. Cir. 1984). The court held that in ruling on motion for judgment notwithstanding the verdict, the trial court determines whether evidence viewed in light most favorable to non-mover constitutes "substantial evidence" in support of the jury's finding. *Id.* If so, those findings must support legal conclusions necessarily drawn by the jury in accord with its instructions enroute to its verdict. *Id.* For such purposes, "substantial evidence" is "such relevant evidence from the record taken as a whole as might be accepted by a reasonable mind as adequate to support the finding under review." *Id.*

148. *Id.*

149. See GOBERT, *supra* note 26, at xi.

150. *But see supra* notes 7-8 and accompanying text.

151. See GOBERT, *supra* note 26, at xi.

Therefore, critics of judicial decision making rhetorically ask whether it is irrational to prefer the common sense judgment of lay persons, with their ability to inject community values into the adjudicational process, to the technical methods of the legal logician.¹⁵²

However, there is an inherent problem to this argument. It assumes that the common sense of a judge is somehow proportionally diminished as his legal knowledge is increased. This assumption is based not on facts, but rather on ill-founded, preconceived notions. Also, a judge is just as capable, if not more so,¹⁵³ of instilling the communal values within his judgement. Furthermore, the judge may perform these acts with a clear knowledge of the laws which govern, as opposed to the layperson who may either be indifferent or ignorant of the governing legal principles.¹⁵⁴

The real problem with judges, the problem which must be overcome if we are to ever remedy our justice system, is the stigma which has been attached to the concept of "judges." The American people are still afraid of delegating too much power to one individual, a fear which has lived at least as long as our Constitution.¹⁵⁵ A judge with the sole ability to adjudicate disputes is seen as a potentially deadly cancer which may grow and spread throughout the entire system of justice. Thus, we are willing to live with the widespread ills of a jury system, which we perceive to be at least nonfatal.

However, an analysis of civil law countries, which primarily employ nonjury systems, may prove remedial. By examining how judges are educated and viewed in other parts of the world, perhaps those who live in fear of judicial autonomy may be somewhat placated. Moreover, such an examination may suggest avenues of partial, if not complete, structural change within our system.

2. *Overcoming Fear by Comparison*

a) *Education*

Judges in civil law countries are viewed, for the most part, with a great deal more faith that they will adequately perform their functions and with much less fear that they will somehow abuse their powers in doing so. This is, in part, attributable to the way in which a judge is simultaneously educated and molded to perform his function in the civil law community.

In the civil law world, the practicing lawyer or judge is seen as a technician, as the operator of a machine designed and built by others.¹⁵⁶ Conversely, in the

152. *Id.*

153. Because of his position and ability to apply certain laws in particular circumstances, the judge may inject community values without offending the law. However, when juries inject community values, they usually do so in disregard of the legal guidelines that should govern. *See supra* note 107 and accompanying text.

154. *See supra* notes 84-85 and accompanying text.

155. *See supra* note 3 and accompanying text.

156. *See* JOHN H. MERRYMAN ET AL., *COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS* 410 (1958) [hereinafter MERRYMAN, *COMPARATIVE LAW*].

United States, the practicing lawyer or judge is seen as a sort of social engineer, as a person specially equipped to perceive and to solve social problems.¹⁵⁷ Thus, the civil law judge, perceived as being more one-dimensional, does not pose the threat to society that he or she will overstep his or her boundaries. As a tool of the institution which developed him, the civil law judge will perform tasks without abusing the judicial position.

Of course, the institution which develops the judges is the civil law educational system. Legal scholarship is generally pure and abstract in the civil law tradition, and pays little attention to the operation of legal institutions or to solving concrete social problems.¹⁵⁸ Rather, the primary objective is to create a theory or science of law.¹⁵⁹ In its most extreme form, such scholarship displays a detachment from society, people, and their problems that astonishes a common law lawyer.¹⁶⁰ On the common law side, we view the work of legal scholarship as another facet of social engineering;¹⁶¹ our responsibility as scholars is to oversee the operating legal order, to critique it, and to make suggestions for its improvement.¹⁶² To common law lawyers, improvement means dealing more adequately with concrete social problems.¹⁶³

Which approach is the better of the two is open for debate and is of little consequence for purposes of our discussion. Suffice it to say that the more mechanical, scientific approach of civil law countries would have a couple of impacts. The perception of judges as scientists would likely be more favored than the image of judges as political pawns and legal manipulators. Unfortunately, the same image would serve to enhance the critics present notion that U.S. judges are stiff and unwilling to inject social and communal standards in their decisions.¹⁶⁴

However, more important than the legal theory while in school is the education that the student of civil law receives after graduation. To Americans, a lawyer is still a lawyer, no matter what kind of legal work he happens to be doing at the moment.¹⁶⁵ Although many young graduates start out as private attorneys, government lawyers, or members of the legal staffs of corporations and stay in those positions for life, it is also common for them to change from one branch of the profession to another.¹⁶⁶ Things are different in civil law jurisdictions. There, a choice among a variety of distinct professional careers faces the young law graduate.¹⁶⁷ He can embark on a career as a judge, a public prosecutor, a government lawyer, an advocate, or a notary. He must make this decision early

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *See supra* note 149 and accompanying text.

165. *See* MERRYMAN, *COMPARATIVE LAW*, *supra* note 156, at 452.

166. *Id.*

167. *Id.*

and then live with it.¹⁶⁸ Although it is theoretically possible to move from one of these professions to another, such moves are comparatively rare. The initial choice, once made, tends to be final in the majority of cases.¹⁶⁹

Upon law school graduation (or following the period of postgraduate training, where required), the student who desires to become a judge immediately applies for admission to the judiciary. If selected (often on the basis of a competitive examination), he enters at the bottom of the profession.¹⁷⁰ Generally, the student will find himself or herself assigned to the lowest in the hierarchy of courts in a remote part of the country. Based on considerations of seniority and demonstrated merit, the student will gradually rise in the judicial hierarchy to more desirable and prestigious judicial positions and eventually retire.¹⁷¹ Normally, he or she will compete for desirable positions only against other members of the judiciary.¹⁷² The highest courts, like the lower courts, are likely to be manned exclusively by those who have risen within the judicial career service. The typical judge will have no other legal experience outside of his profession as a judge.¹⁷³ Moreover, his social circles will tend to be composed solely of other judges. He will see the law exclusively from the judge's point of view. He will be, for all practical purposes, a specialist.¹⁷⁴

b) Applying the Civil Law Education

Although one can easily find certain faults and aspects of the legal system in civil law countries that they do not particularly care for, there are undeniable properties of the civil law system which the United States could adopt to improve our common law system. The stigma attached to judges could be significantly reduced if we were to view judges as solely judges, not "lawyers who happen to be judges." In other words, as painful as it may be to hear, the reputation of

168. *Id.*

169. *Id.* at 453.

170. However, there are significant local variations. In Germany, the *Referendarzeit* intervenes between the university and the career. In France, since establishment of the *Ecole nationale de la magistrature* (National School for Magistrates) in 1958, the person aspiring to become a judge must be admitted to the School and complete the three-year course. Once a judge, he (or she) will probably remain a judge until retirement. *Id.* at 494-95.

171. *Id.* at 454.

172. Although appointment to positions on the highest court — a supreme court of cassation or its equivalent — may in theory be open to distinguished practicing lawyers or professors, such appointments are rare. *Id.*

173. However, in the emerging European judiciary (as distinguished from the national judicial systems of individual European countries) there are no career judges.

Judges of the European Court of Justice at Luxembourg, as well as their counterparts, both in the Commission and the Court of Human Rights at Strasbourg, are not career magistrates: their background is not one of an entire life spent in the judiciary: their appointment to those high adjudicatory bodies is not based on seniority in the judicial service; their personalities are far from bureaucratic and anonymous.

Introduction, in NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE 17 (Lionel N. Brown & Mauro Cappelletti eds., 1978).

174. *Id.*

lawyers in America is not at an all-time high. Thus, it would make sense to disassociate the concept of judges with the notion of lawyers as much as possible. By viewing the two as separate entities, the hostilities of those who view lawyers and judges as one in the same may be somewhat assuaged.

Another civil law characteristic worthy of adoption is the means by which civil law judges scale the ranks. In its purest sense, it is a system based on merit and "what you know," not "who you know." This could be important for a couple of reasons. First, more qualified, well-trained individuals will compete for judicial appointments. Thus, judges will not only work for promotion, they will not become the sleeping-on-the-job burnouts as critics claim.¹⁷⁵ Secondly, promotion based on merit and seniority, rather than election, will help to reduce the fear of decisions based purely on political grounds.¹⁷⁶

This should in turn foster respect from people who also may start to view judges differently. Rather than being seen solely as political puppets, powermongers, or as incompetent but well connected, judges will be looked upon as competent individuals who have worked hard to achieve their status and are capable in their position. In all walks of life, people admire those who are hard working, while loathing those who are handed everything. The judicial infrastructure is no different. With this new perception would come a marked increase in the faith of the people and a decrease in their fear of judicial decision making.

3. Restructuring the Courts

Assuming the stigma and fear attached to judges is a negotiable hurdle, the next issue becomes how to restructure the court systems in an attempt to allocate more power to the judge and less to the juries. An examination of civil law jurisdictions reveals two possible alternatives. First, the court could be comprised of a mix of judge(s) and laypersons, who deliberate together to decide the defendant's fate. Second, the court could be made up solely of judges, with no jury as we know it. Both of these scenarios have their advantages and disadvantages. Ultimately though, the final question will be how effective these systems are in their entirety, compared to our present day jury system.

a) The Civil Law Tradition

The modern civil law is the product of three great legal systems: the law developed by the juriconsults of Rome from the foundation of the city (traditionally given as 753 B.C.) until the codification by the Emperor Justinian in A.D. 533;¹⁷⁷ the folk laws of Germanic origin, many of which were written down from the fifth century A.D.;¹⁷⁸ and the canon law, the law of the Church, which

175. See *supra* note 149 and accompanying text.

176. There exists a justifiable fear that certain judges are inclined to arrive at judgements based on political pressures, to either keep their position or elevate themselves to a higher one.

177. See MERRYMAN, *COMPARATIVE LAW*, *supra* note 156, at 77; see also K.W. RYAN, *AN INTRODUCTION TO THE CIVIL LAW* 1-9, 12-15 (1962).

178. See MERRYMAN, *COMPARATIVE LAW*, *supra* note 156, at 77.

was in many respects based on the Roman law, but which nevertheless constituted a distinct system.¹⁷⁹

The ordinary courts in a typical civil law country are essentially limited to criminal prosecutions and cases involving matters of private law, such as contracts, torts, property rights, matrimonial disputes, and controversies over decedents' estates.¹⁸⁰ However, as shall be illustrated, there are important differences in the overall judicial scheme from one civil law country to the next.¹⁸¹

b) Mixing Judge and Jury — France

Perhaps the civil law country whose judicial structure may be most adaptable to the United States is that of France. Much like our own constitution, France's Constitution of the Fifth Republic¹⁸² was based on the principle of separation of powers.¹⁸³ The judiciary does not have the prestige in France that it has in England. Nor does it have or aspire to the functions and responsibilities of judges in the United States.¹⁸⁴ Moreover, in the private and criminal law areas, the courts' powers are restricted by the codification,¹⁸⁵ which at least theoretically

179. *Id.*

180. RUDOLPH SCHLESINGER ET AL., *COMPARATIVE LAW* 371 (5th ed. 1988).

181. A discussion of every civil law country is naturally outside the parameters of this Comment. Accordingly, the discussion will be limited to the civil law jurisdictions of France, Germany, Italy, and Latin America.

182. The First Republic existed from 1792 to 1804. The Second continued from 1848 until 1852. The Third, established after the war of 1870, lasted until 1940. The Fourth, began after the liberation of France in 1944 and survived until 1958. The Fifth was set up following the events of May and June 1958. MERRYMAN, *COMPARATIVE LAW*, *supra* note 156, at 257.

183. It should be noted that as between the U.S. and France, the concept of "separation of powers" is viewed quite differently. In the latter, the historical roots of separation of power lie in the goal of preventing judicial intrusion into the other branches. *See generally* JOHN H. MERRYMAN ET AL., *THE CIVIL LAW TRADITION* 15 (2d ed. 1985). Italy similarly developed their judiciary with the concept of separation of powers in mind. The Italian philosophy can be summed up as follows: Judicial decisions as a source of law are rejected based on Italy's strong emphasis on a strict separation of powers. While making the law is one thing, interpreting and applying the laws is very much another. Therefore, in deciding the case, the judges responsibility is merely to interpret and apply the law, not create it. The decision is binding on the parties, but does not bind others. Thus, *stare decisis* is rejected. Otherwise judges would become legislators, and the dogma of shared separation of legislative and judicial power would be violated. *See id.* at 557; *see also* French Civil Code, C. CIV. art. V (requiring courts to decide only the actual case before them and enjoins them from rendering decisions laying down general principles); SCHLESINGER, *supra* note 180, at 266.

184. For comparative purposes, examine the systems of Latin America. With the exception of Cuba, all Latin American countries have made it a principle to ensure independence of the courts through a system of the separation of powers. Anglo-Saxon influence (English rather than North American) is shown in the selection of judges under a procedure generally regarded as promoting their independence. There is no watertight division between careers on the bench and the bar, since all over Latin America judges and public prosecutors are recruited among lawyers who have practiced for a long time. They may be appointed directly to the highest judicial posts. MERRYMAN, *COMPARATIVE LAW*, *supra* note 156, at 340.

185. "Codification" simply means that judges look to 'codes' rather than to prior case law and precedent as a primary source for resolving disputes. *See* BLACK'S LAW DICTIONARY 258 (6th ed. 1990).

solves all problems.¹⁸⁶ However, the infrastructure provides us with a model of a system which operates around the premise of judge and layperson interacting to resolve disputes.

Within the French courts of general jurisdiction, only the court of minor jurisdiction and the police court in the criminal areas are composed of a single judge.¹⁸⁷ Among the courts of exceptional jurisdiction, the landlord-tenant courts, the referee's court (*jurisdiction des referes*), and the court of the president of the court of major jurisdiction (*jurisdiction du president du tribunal de grande instance*) are single-judge tribunals.¹⁸⁸ In all other cases, the principle of judicial collegiality prevails. In most courts, three judges collaborate in a decision, and in the Court of Cassation the minimum number is seven.¹⁸⁹

For criminal cases, different courts have jurisdiction depending on how the offense alleged, judged by the penalty involved, is classified. There are three classifications of offenses under the French system: a major offense (*crime*);¹⁹⁰ an intermediate offense punishable by brief imprisonment or fine (*delit*);¹⁹¹ or a minor offense (*contravention*).¹⁹² Major offenses are judged, in first and last instance, by the court of assize (*Cour d'assises*), a court composed of three magistrates and nine jurors who are selected randomly for each session of the court of assize from a previously established list.¹⁹³

An application of the French system to the two hypothetical cases discussed earlier yields interesting results. To begin, let us consider Brown's civil action against Black for malpractice. Using the French method, this case would most likely fall under the jurisdiction of a single judge.¹⁹⁴ The immediate benefits of this style of adjudication are numerous.

First, the entire process of juror selection is eliminated. Time, energy, and money would all be saved before the trial had even begun. Second, once the trial begins, a judge with experience and knowledge of the subject matter will theoretically preside over the case. Finally, in all civil law nations judges are required to base their decisions on the law.¹⁹⁵ The judicial function involves the correct interpretation and application of the law.¹⁹⁶ Thus, the case will be

186. MERRYMAN, *COMPARATIVE LAW*, *supra* note 156, at 262.

187. *Id.* at 272.

188. *Id.*

189. Since 1941 the judges and jurors have joined together to decide both on the question of guilt and on the penalty. *Id.*

190. *Id.* at 270.

191. *Id.*

192. *Id.*

193. Intermediate offenses are judged, in the first instance, by the correctional court (*tribunal correctionnel*), the criminal law equivalent of the court of major jurisdiction. Appeals, if any, go to the correctional appeals chamber (*Chambre des appels correctionnels*) of the court of appeals. Minor offenses are handled by the police court (*tribunal de police*) which corresponds to the court of minor jurisdiction. Appeals, if any, go to the court of appeals. *Id.*

194. *See supra* note 188 and accompanying text.

195. *See MERRYMAN, COMPARATIVE LAW, supra* note 156, at 451.

196. *Id.*

decided based on the law, not on what a bewildered set of jurors perceives the law to be.

The criminal case against Smith would be dealt with in France by the court of assize.¹⁹⁷ Thus, three magistrates and nine jurors would decide the case.¹⁹⁸ Unfortunately, following current thinking on this issue, such a system would likely be undesirable for a number of reasons. First, all the aforementioned problems with jurors and their selection would still exist. Second, critics of this idea will point out that the fact that we are too paranoid to allow lawyers to act as jurors should be a great enough sign that the idea of judges deliberating would also meet with hostility. The American people's first reaction would be that of fear that the judges will use their persuasive powers to manipulate the decisions of the lay persons. Thus, critics will conclude although such a scheme is perfectly acceptable in a country like France, it would not gain favor in the United States.

This difference may once again be attributable to the perception of the judge. In France, the judge is generally considered to be harmless. The French judicial system attracts some relatively unambitious men who prefer the security of a modest but sure salary to the hazards of battle, the risks of business life, or the uncertainties of competition.¹⁹⁹ The contrast with the United States is fundamental and important. In the United States, a judicial appointment is regarded as a crowning achievement that comes relatively late in life after a successful legal career in practice or government service. A judicial appointment is a form of recognition that brings respect and prestige. However, with respect and prestige comes the people's need to harness the increasing power of the judiciary and to mitigate the threat of judicial autonomy.²⁰⁰

In short, although they perform many similar functions, judges in France and the United States occupy entirely different positions in their respective cultures.²⁰¹ The judiciary stands very high in our hierarchy of legal professions, but relatively low in theirs.²⁰² Thus, the gap between the judge and lay person is much smaller in France, and, accordingly, so is the potential for the juror to be inevitably swayed by the views of the judge during deliberation.

c) An Increase in Judicial Power — Germany

Judges are more powerful under the German system than under the French system. In Germany, the decision of legal disputes is entrusted exclusively to judges; the courts have a monopoly on the judicial function. The judges are

197. See *supra* note 193 and accompanying text.

198. See *supra* note 193 and accompanying text.

199. See MERRYMAN, *COMPARATIVE LAW*, *supra* note 156, at 495.

200. *Id.*

201. The classical discussion of the problem of a career judiciary, stressing the inconsistency between constitutional "independence" and administrative dependence on a ministerial bureaucracy, is to be found in the slim but significant book, PIERO CALAMANDREI, *PROCEDURE AND DEMOCRACY* 35-44 (1956).

202. MERRYMAN, *COMPARATIVE LAW*, *supra* note 156, at 496.

independent and subject only to the law.²⁰³ In addition, in order to protect the judge from indirect encroachment by means of administrative measures, he is granted a guaranty of personal independence.²⁰⁴

Germany adheres to the classical civil law system of judicial organization. The single judge inferior court is called *Amtsgericht*, while the first-instance court of general jurisdiction, which normally sits in three judge panels, is named *Landgericht*. Germany also places a high value on specialized judicial expertise for certain areas.²⁰⁵ Thus, Germany may be viewed as a country which affords its justices a great deal of autonomy to perform the work for which they have been educated.

In criminal cases, the bench normally will be comprised of one or three professional judges and a number of lay assessors. Under this system, not unlike the French system, the professional judges and the lay assessors form the court together, which as a single body passes on issues of law as well as fact and determines both guilt and sentencing.²⁰⁶

Applying the German method to the two hypothetical cases discussed earlier would most likely yield the same results as did the French method, with one important exception. In the civil case, a single judge would likely preside,²⁰⁷ removing the need for a greatly flawed process of juror selection. Moreover, the case would be decided on both fact and law,²⁰⁸ as a specialized judge would apply the latter to the former. As for the criminal case, the matter would once again be settled by a panel composed of professional judges and laypersons working in conjunction with one another to arrive at a verdict.²⁰⁹

However, the important exception is recognized in an analysis of the power and perception accorded to the judges in Germany. Whereas in France, critics could argue that the mixed system worked solely because the French judges did not present a threat of overpowering the layperson, such an argument is not possible in this case. German judges are afforded a great deal of power, perhaps even more so than are American judges. Therefore, it follows that if such a system is possible within the German structure, it may also achieve success within the courts of the United States.

In essence, the German system is ongoing proof that a mix of judge and layperson in adjudicating disputes is not only possible, but can work in a beneficial manner. While such a scheme would still allow for the abusive process

203. *Id.*

204. *Id.* at 278.

205. Altogether, Germany has four separate judicial hierarchies: ordinary courts, labor courts, tax courts, and administrative courts. Each of these hierarchies includes tribunals of first instance, intermediate appellate courts and a court of last resort. In addition, there is a Federal Constitutional Court. See SCHLESINGER, *supra* note 180, at 499. For a description of the entire system, see Hans G. Rupp, *Judicial Review in the Federal Republic of Germany*, 9 AM. J. COMP. L. 29 (1960).

206. SCHLESINGER, *supra* note 180, at 477.

207. See *supra* note 205 and accompanying text.

208. See *supra* note 206 and accompanying text.

209. See *supra* note 206 and accompanying text.

of jury selection, it could also provide a safeguard against arbitrary decisions which do not adhere to the applicable governing laws. In its purest sense, the German system could represent the matrimony of law and fact in deliberation.

4. Eliminate Juries Altogether

The final alternative to our present system of dispute resolution is to abolish juries altogether, leaving a judge or a series of judges to resolve all matters. This idea has roots both in the United States and abroad. As was previously mentioned, courts in France and Germany will often times adjudicate claims without juries. In the United States, we generally delegate minute claims to the judge to resolve.²¹⁰

The most obvious benefit would be the elimination of all the problems and abuses related to the selection and use of the jury system. Moreover, significant time and money would be saved, thus preserving another aspect of the Constitution which has all but been forgotten — the right to a speedy trial. Furthermore, such an abolition would serve to relieve common people of a duty they most likely view as an intrusion, and one which most are ill-equipped to handle.

The elimination of the jury system would unquestionably put a large amount of power into the hands of the judge (or judges). However, as it presently stands, the name judge is a misnomer, as the person wearing the robe generally does nothing of the sort. By allowing the judge the ability to adjudicate the dispute, rather than simply serve as an orchestrator of the process, the system will permit the judge to apply the law to the facts, something juries don't always do, to arrive at a decision.

The power does not necessarily have to be put exclusively in the hands of one person. A series of judges may well be used. Again, the money saved on the elimination of juries and their selection could be used to supplement the judges' income. Furthermore, the time saved should also allow for lower costs of bringing suit.

Ideally, three judges could be used in criminal cases to insure that the proper law is applied, while simultaneously checking any prejudices or outside influences which may be present on behalf of one of the judges. The effectiveness of this scheme would also be furthered by abrogating the necessity of a unanimous decision. By allowing a simple majority, a judge's prejudice may be overcome by the other two judges, and the case may be decided one way or the other without a hung trial.

V. Conclusion

Within the current jury system, there are several problems which demand immediate attention. The jury system is fraught with faults and potential abuses which must be remedied if ours is to be considered a system of justice. There are

210. For example, traffic violations are presided over by a single judge in most cases.

a number of means whereby the system can be significantly improved, if not completely cured.

Perhaps the simplest step to take would be to effectuate changes within the current system; however, it could be argued quite effectively that the present system is beyond hope and a new one is needed. In that case, there are two options. The first is to mix judge and jury. While this alternative would theoretically blend law with fact, the time, money, and abuses of jury selection will still survive. The second and more radical choice would be to eliminate juries altogether. Although this option could present the best opportunity for significant improvement, it has little chance for adoption. The fear of a great deal of power in the hands of a few, along with the present stigma against all related to the legal profession, would likely present an insurmountable hurdle.

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