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CIVIL JURIES AND COMPLEX CASES: LET'S NOT RUSH TO JUDGMENT

*Richard O. Lempert**

I. AN EMPIRICAL PROBLEM

The Supreme Court acted wisely when it denied certiorari in *In re U.S. Financial Securities Litigation*¹, forgoing, for the moment, the opportunity to decide whether the seventh amendment protects the right to jury trial in complex civil cases. With the Third Circuit's decision in *In re Japanese Electronic Products Antitrust Litigation*,² there is a clash between the circuits on this issue, and the Court may find the temptation to resolve the matter overwhelming. Yet the path of wisdom may well be to let the conflict continue or, if certiorari should be granted on this issue, to decide the matter in a way that invites future reconsideration. The issue of whether the seventh amendment right to jury trial remains inviolate in complex cases should be left open because we currently lack the information needed for an intelligent resolution. While hunches abound, we in fact know little about the likely answers to three crucial questions:

(1) Are there cases so complex that juries cannot render verdicts fairly based upon a rational evaluation of the evidence?

(2) If such complex cases exist, can judges sitting in lieu of juries render verdicts fairly based upon a rational evaluation of the evidence?

(3) If such complex cases exist, is the jury's incapacity inherent when lay decision-makers confront voluminous evidence and complex issues, or may it be avoided by changes in the trial process that do not undermine the essential characteristics of the civil jury?

If the Court were to choose between the circuits today, it might well cloak its judgment in the language of historical scholarship or

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1. 609 F.2d 411 (9th Cir. 1979), *cert. denied*, *Gant v. Union Bank*, 446 U.S. 929 (1980) (holding that there is no complexity exception to the seventh amendment).

2. 631 F.2d 1069 (3d Cir. 1980) (holding that due process considerations mean that the seventh amendment does not necessarily mandate jury trials in complex civil suits).

doctrinal analysis,³ but it is likely that behind such language would lie judgments about the answers to one or more of these questions.

The Justices' perceptions of the correct answers might differ dramatically, yet each of these questions is, in principle, empirical. They may all (again in principle) be answered by a combination of systematic observation, social experimentation, and generalization from a body of established social theory. To date, we have not exploited these sources of information, so debate about the right to jury trial in complex cases is informed more by intuitions and assumptions than by systematic knowledge.

Judge Seitz's opinion in *Japanese Electronic Products*, holding that fifth amendment due process may justify a complexity exception to the seventh amendment, is instructive because it is a serious and thoughtful attempt to deal with this difficult problem. Seitz's discussion of the jury's likely inability to deal with complex cases begins neither with the possibility that the jury will be overwhelmed by the volume of evidence nor with the complexity of the applicable legal standards. Instead, Seitz starts by discussing the burdens that a lengthy trial — however simple or complex the subject matter — places on jurors: "The long time periods required for most complex cases are especially disabling for a jury. A long trial can interrupt the career and personal life of a jury member and thereby strain his commitment to the jury's task."⁴ The salute to the judge begins by sounding the same theme: "A long trial would not greatly disrupt

3. There are a host of articles suggesting approaches that the Court might take. Some find an exception to the right to jury trial in complex cases and others do not. See, e.g., Arnold, *A Historical Inquiry Into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980); Campbell & Le Poidevin, *Complex Cases and Jury Trials: A Reply to Professor Arnold*, 128 U. PA. L. REV. 965 (1980); Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43 (1980); Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEXAS L. REV. 47 (1977); Jorde, *The Seventh Amendment Right to Jury Trial of Antitrust Issues*, 69 CALIF. L. REV. 1 (1981); Kane, *Civil Jury Trial: The Case for Reasoned Iconoclasm*, 28 HASTINGS L.J. 1 (1976); Luneberg & Nordenberg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping With the Complexities of Modern Civil Litigation*, 67 VA. L. REV. 887 (1981); Oakes, *The Right to Strike the Jury Trial Demand in Complex Litigation*, 34 U. MIAMI L. REV. 243 (1980); Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486 (1975); Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973); Note, *Unfit for Jury Determination: Complex Civil Litigation and the Seventh Amendment Right of Trial by Jury*, 20 B.C. L. REV. 511 (1979) [hereinafter cited as *Unfit for Jury Determination*]; Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898 (1979) [hereinafter cited as *Harvard Note*]; Note, *Jury Trials in Complex Litigation*, 53 ST. JOHN'S L. REV. 751 (1979); Note, *Preserving the Right to Jury Trial in Complex Civil Cases*, 32 STAN. L. REV. 99 (1979) [hereinafter cited as *Preserving the Right*]; Note, *The Case for Special Juries in Complex Civil Litigation*, 89 YALE L.J. 1155 (1980). Cf. James, *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655 (1963).

4. 631 F.2d at 1086.

the professional and personal life of a judge and should not be significantly disabling."⁵

The burdens of a lengthy trial are, of course, not unrelated to a fact-finder's ability to grapple with complexity.⁶ But the personal burdens that lengthy trials impose on jurors are so far from the core issue of competence that, as a matter of law, they may be as unpersuasive on the constitutional issue as the burdens of military service are on the constitutionality of the draft. And to the extent that they are relevant, they invite actions that will alleviate the burdens of lengthy trials and not the abrogation of the right to jury trial.

Why does Judge Seitz begin his analysis with what is legally a weak argument? I suspect it is because the empirical support for his position is soundest at this point. A jury is tremendously burdened by a trial of several months or more, while a judge may find it easier to handle one lengthy case than a number of shorter ones. When Seitz focuses directly on competence, the tone of his remarks changes. He notes, for example, that, "[t]he jury *is likely* to be unfamiliar with . . . the technical subject matter of a complex case. . . . The probability *is not remote* that a jury will become overwhelmed and confused by a mass of evidence and issues and will reach erroneous decisions."⁷ The italicized "weasel words" indicate Seitz's proper reluctance to make empirical judgments on little evidence. Indeed, the only empirical evidence that he cites is one judge's observations concerning one case.⁸

The conclusion that a judge can competently hear complex cases does not even pretend to be empirical. After listing the potential advantages of judge over jury, Seitz writes, "the best course to follow is to *presume* the judge's ability to decide a complex case and to focus inquiry on the jury's ability."⁹ No citations to cases or the literature are offered in support of this presumption.

Judge Seitz's reliance on impressions and presumption is understandable. Neither the social science community nor the legal profession has furnished the courts with the information needed for empirically grounded judgments about the capacity of juries to ra-

5. 631 F.2d at 1087.

6. Judge Seitz argues, for example, that the prospect of a long trial may weed out the most able from the venire, and that a judge's greater ability to allocate time can help him to surmount the difficulties of a complex suit.

7. 631 F.2d at 1086 (emphasis added).

8. ILC Peripherals Leasing Corp. v. International Business Mach. Corp., 458 F. Supp. 423 (N.D. Cal. 1978), *affd. per curiam*, 636 F.2d 1188 (9th Cir. 1980). *But see Preserving the Right*, *supra* note 3, at 114 n.78.

9. 631 F.2d at 1087 (emphasis added).

tionally decide the issues posed by complex civil suits. Knowledge about the quality of judicial decision-making in the face of complexity and about the possibility of changing trial procedures to facilitate more rational fact-finding is similarly lacking.

If the Supreme Court were to determine the scope of the seventh amendment now, it would, in the absence of such information, have two basic options. First, the Court could examine the history and jurisprudence of the seventh amendment to determine whether a complexity exception would be justified. This option, in eschewing a functional approach, renders the empirical questions irrelevant, and, as I shall argue in Part II, permits only one good faith decision — protecting the right to jury trial. Alternatively, the Court could adopt the form of a functional approach, but base its analysis on what are at best weakly supported intuitions and presumptions.

The functional approach is the more probable, for the strongest argument against the right to jury trial in complex litigation is not that the seventh amendment is inapplicable, but that the due process clause of the fifth amendment overrides the mandate of the seventh. Unless the Court were to hold that one amendment of the Bill of Rights could not override another more specifically on point, the Justices would, regardless of the quality of the evidence, have to confront the question of whether a jury in a complex case could render a verdict that was sufficiently fair and rational to comport with the demands of due process.¹⁰ However, the absence of valid data might cause the Court to slight the other two questions whose resolution should inform its decision: namely, whether judges can reach fair decisions in cases so complex as to befuddle jurors and whether procedural innovations in complex cases can improve the quality of jury fact-finding. Since judges possess credentials indicative of competence, and since judicial criticism of jurors' abilities is not counterbalanced by criticisms of judicial competence, the Supreme Court might well follow the lead of the Third Circuit in *presuming* that judges are capable of deciding cases that would confound juries. The possibility that we might improve the way complex cases are tried to juries might be ignored entirely. Our experience with truly innovative trial procedures is so limited that most judgments about

10. The Court's past intuitions about jury behavior appear, on occasion, to have been shaped largely by the outcome desired rather than by a serious examination of available research or a concern for actual experience. See, e.g., *Colegrove v. Battin*, 413 U.S. 149 (1973); *Williams v. Florida*, 399 U.S. 78 (1970); Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 643 (1975); Zeisel & Diamond, "Convincing Empirical Evidence" on the Six-Member Jury, 41 U. CHI. L. REV. 281 (1974).

the impact of dramatic procedural change would be pure speculation.

If, however, the Court allows the conflict between the circuits to continue, or decides the seventh amendment issue so as to preserve the competence question, the circuit and district courts will be able to explore different approaches to the trial of complex civil actions. This would provide the opportunity, particularly if the appropriate granting agencies cooperate, for researchers to collect the kinds of information that the Court needs to resolve this matter wisely.

When a fundamental constitutional right is at issue, it is admittedly difficult for the Court to treat the lower courts as laboratories. But if the constitutional right turns on empirical questions, it is better to wait for knowledge than to rush toward a judgment that may later be shown to have vitiated an important right across all circuits. If the Court feels compelled to resolve the conflict, the better decision — if empirical issues are seen as central — is to sustain the right to jury trial regardless of complexity. Sustaining that right will allow courts and researchers to collect the evidence necessary to test crucial empirical assumptions. If it later appears that juries, unlike judges, cannot respond rationally to complexity, the Court will be able to limit the right to jury trial in the future. The opposite decision, finding an exception to the seventh amendment right, will probably forestall future research, for research opportunities will diminish as jury trials in complex cases become less frequent.¹¹

In what follows, I argue that the empirical questions on which the constitutional analysis should turn may be substantially illuminated by various techniques of social science research. Part II establishes a starting point — the legal framework that defines the relevance of empirical data. Building on this framework, Part III discusses research strategies designed to answer the relevant empirical questions, and Part IV suggests ways that we might change the trial of complex cases to lower the likelihood of irrational verdicts.

II. A LEGAL FRAMEWORK

In this Part, I offer four propositions that, taken together, mean that the Supreme Court should begin its analysis with a strong pre-

11. Jury trials in complex cases would not necessarily disappear should the Court hold that they were not required by the seventh amendment. In some cases both parties might desire a jury trial, and trial judges might retain discretion to order jury trials in cases of great complexity. In addition, advisory juries might be used by some judges. Thus, opportunities for exploring jury responses to actual complex cases would still exist if the Court decided against the seventh amendment right. These opportunities would, however, diminish, and the sample of complex cases tried to juries would probably be biased in a number of ways.

sumption that jury trials are required in complex civil litigation. I shall argue that the presumption may be rebutted if two hypotheses can be proved: (1) the jury system as it now exists or as it might possibly be reformed cannot yield fair and rational resolutions of the issues raised in complex litigation; and (2) trial judges can reach fair and rational resolutions of such issues.

PROPOSITION ONE: *There is, under existing law, little if any basis for reading a complexity exception into the seventh amendment.*

The seventh amendment provides that in "[s]uits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."¹² It is standard learning that if in 1791 a matter was triable as of right to a jury because it was legal, the right to try such matters to juries is preserved by the seventh amendment.¹³ Similarly, it is hornbook law that those civil matters triable by right to juries are not limited to causes of action that pre-date 1791.¹⁴ Civil statutes providing remedies that are essentially legal in nature and triable in the federal district courts trigger the seventh amendment right regardless of when they are enacted.¹⁵

Since it is too late in the day to argue that damage actions under statutes such as the antitrust laws are not "legal," and since the complexity of a case, by itself, has no bearing on the question of whether the action giving rise to that case is essentially legal or equitable, opponents of the right to jury trial have taken another tack. They have argued that the English courts before 1791 were willing to withhold the right in certain cases that were legal in nature but so complex as to be thought unsuitable for jury determination.¹⁶ This

12. U.S. CONST. amend. VII.

13. *Ross v. Bernhard*, 396 U.S. 531, 533 (1970); 5 J. MOORE FEDERAL PRACTICE ¶ 38.11[2]-[4] (1981); C. WRIGHT, LAW OF FEDERAL COURTS § 92, at 450 (3d ed. 1976).

14. See 5 J. MOORE, *supra* note 13, at ¶ 38.11[2]-[4]; C. WRIGHT, *supra* note 13, at § 92, at 450-51. Justice Story was apparently the first to state this principle. *Parsons v. Bedford*, 28 U.S. 433, 444 (1830).

15. Kane, *supra* note 3, at 271. ("Only when the statute creates what appears to be a novel cause of action unknown in 18th century England, or one that was not within the jurisdiction of the law court, does it seem totally within the discretion of Congress to decide how that action is to be tried."). See also *Fleitman v. Welsbach St. Lighting Co.*, 240 U.S. 27 (1916); *Hepner v. United States*, 213 U.S. 103 (1909). However, Congress can create a remedy that either did not exist or was not "legal" in 1791 and rest adjudicatory responsibility in a tribunal sitting without a jury. See, e.g., *Katchen v. Landy*, 382 U.S. 323 (1966) (bankruptcy court); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (labor board). It is not clear that Congress can create a new cause of action that is essentially legal in nature, rest enforcement responsibility in an article III court, yet deny the right to jury trial. Where such new rights are created the Court will not read ambiguous language as reflecting congressional intent to bar jury trial. See, e.g., *Pernell v. Southall Realty*, 416 U.S. 363, 365-66 (1974) (suit to recover possession of real property akin to an action of ejectment); *Curtis v. Loether*, 415 U.S. 189, 198 n.15 (1974) (suit under Title VIII of the Civil Rights Act).

16. See *Campbell & Le Poideven*, *supra* note 3; *Devlin*, *supra* note 3.

argument from history has been met by a competing historical analysis.¹⁷

The leading arguments in the historical debate have been propounded by people who, however disinterested their actual scholarship, were employed by one side in a lawsuit and paid — no doubt handsomely — for reaching the results that they did.¹⁸ The nonhistorian approaching this clash is like a judge who must decide which of two conflicting factual accounts makes the most sense. This involves attending more to the form of the opposing arguments and to the sources that they cite than to the conclusions that the authors draw from their sources.

As I read the evidence, it appears that the historical test gives little comfort to those who wish to read a complexity exception into the seventh amendment. There are a few early cases in which judges, choosing not to empanel juries, disparage the ability of jurors to deal with the litigation in question, but these cases appear to involve disputes not remediable at law in the first instance.¹⁹ Even if one could discover a case where jury trial was denied although the action was unquestionably legal, it would not establish a *pattern* of denying jury trials in complex cases. The case would be more properly read as an aberrational decision that cannot be the measure of the right that the framers of the seventh amendment intended to preserve. Furthermore, those who see the basis for a complexity exception to the seventh amendment in a few early cases present no evidence that the framers knew of the cases that they cite. Since none of these cases appears to have been a leading or celebrated one, there is little reason to believe that the framers would have been aware of them.

The other pillar of the historical argument concerns the equitable action for an accounting. This action, which existed prior to 1791, did not involve a jury although the outcome might well have involved an order that damages be paid. There is, however, no reason to believe that jury trial was denied in such cases because of the complexity of

17. See Arnold, *supra* note 3; Arnold, *A Modest Replication to a Lengthy Discourse*, 128 U. PA. L. REV. 986 (1980).

18. Arnold, *supra* note 3; Campbell & Le Poideven, *supra* note 3; Devlin, *supra* note 3.

19. See *Towneley v. Clench* [mistakenly named *Clench v. Tomley* in the report], Cary 23, 21 Eng. Rep. 13 (Ch. 1603) (equitable process was needed to secure documents and testimony). It is not clear whether equity secured the requisite documents or enough other evidence so that it would have been appropriate for the Court of Chancery to dissolve its injunction and let matters proceed at law. See also *Blad v. Bahfield*, 3 Swan. 604 (App.), 36 Eng. Rep. 992 (Ch. 1674) (within equitable jurisdiction as an admiralty case); Arnold, *supra* note 3; Arnold, *supra* note 17; Campbell & Le Poideven, *supra* note 3.

the task. Since the action was in equity, a jury trial was not part of the ordinary routine. More importantly, there is no convincing evidence that the action for an accounting was established as an equitable one because the courts feared that juries could not cope with the issues such cases presented.²⁰ The equity court's advantage appears to have lain not in the judge's ability to handle matters that would have confused ordinary jurors, but in procedural devices — especially discovery devices — that were available in equity but not at law.²¹ Indeed, an action for accounting was available at law, and plaintiffs had the option of electing it.²² A plaintiff's option rule is hardly consistent with the notion that the jury could not handle the matter. If the equitable action came eventually to replace the legal one, it did so because plaintiffs perceived that they could do better with the aid of equitable procedures, and not because the Chancellor was known to be proplaintiff or because plaintiffs magnanimously felt that defendants should have a fairer trial than a jury could give them.

What is most notable about the attempts to find an eighteenth-century complexity exception to the right to jury trial is not the evidence presented, but that which is not given. Like Sherlock Holmes's dog that did not bark, this is the most important evidence on the issue. Had there been a complexity exception, we would expect to see a number of cases that make use of it, but we are not even presented with cases where counsel argued fruitlessly for one. We would expect the treatise writers of the seventeenth and eighteenth centuries to cite complexity as an explanation for the existence of the equitable accounting. We might even expect some sign that the framers were aware of a possible ambiguity concerning the scope of the seventh amendment in complex litigation. We have not a

20. Lord Devlin, *supra* note 3, attempts to make this case, but the bulk of his evidence suggests that procedural difficulties attached to the jury trial rather than complexity per se led to the equitable accounting. For example, if a jury determined whether an account was necessary, auditors took the account, but the jury had to resolve disagreements. This might have necessitated a different jury to hear each disputed issue. *Id.* at 66-67. Most of the language that Devlin quotes refers to the difficulties or inconvenience of proceeding at law. *Id.* at 68. The language is plausibly interpreted as referring not to the jury's incapacity, but to the procedural advantages of equity. While there apparently were cases where the Chancellor, having properly secured jurisdiction, refused to exercise discretion to return the matter to law or to seat an advisory jury based on his evaluation of the jury's capacity, such decisions were apparently discretionary with the Chancellor and we are presented with no reason to believe they would have justified taking the matter from the jury in the first instance. *See, e.g., id.* at 72-74. Equitable remedies clearly arose because fair remedies were unavailable at law, but no case is presented in which the lack of an adequate legal remedy resulted primarily from an expectation that jurors would be incompetent to deal with difficult fact situations.

21. *See* Arnold, *supra* note 3, at 844.

22. *Id.* at 848.

whisper of such concerns.²³ Although the crucial evidence may exist, as yet unfound, this appears unlikely considering the resources that lawyers have been willing to pour into cases with hundreds of millions of dollars at stake. Thus, even if the cases offered in support of a complexity exception were taken at face value and even if complexity were regarded as a plausible explanation for the equitable accounting, the historical argument for denying a right to jury trial in complex legal actions would be unconvincing. If a complexity exception existed, still other traces should remain. Not finding other traces, the historical case for a complexity-based exception to the seventh amendment appears untenable.

The other legal argument made by those advocating a complexity exception to the seventh amendment is based on footnote ten in *Ross v. Bernhard*,²⁴ which states:

As our cases indicate, the "legal" nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries. Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply.²⁵

It is argued by some that the test's third prong, "the practical abilities and limitations of juries," gives judges discretion to deny jury trials in complex civil cases. This argument is as implausible as the argument from history. Not only does the argument require one to believe that the Court would choose to use a cryptic footnote to authorize an important inroad into the seventh amendment right to jury trial, but it also ignores both the text accompanying footnote ten and the precedential value of *Ross*.

Footnotes should be read in connection with the statements to which they are appended. Footnote ten follows a sentence that reads: "The Seventh Amendment question depends on the nature of the *issue* to be tried rather than the character of the overall action."²⁶

23. I am indebted to Victoria List for searching the following 18th century treatises: 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (London 1763); F. BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS (London 1772); G. DUNCOMBE, TRIALS PER PAIS (London 1766); G. GILBERT, THE HISTORY AND PRACTICE OF THE HIGH COURT OF CHANCERY (London 1758); M. HALE, THE HISTORY OF THE COMMON LAW (London 1794); M. HALE, PLEAS OF THE CROWN (London 1763). Ms. List reports that none of these works alludes to complexity as a reason for vesting any matter, including accountings, in equity or otherwise denying a right to jury trial. It should be noted that 18th century trials were generally not complex. Almost all were concluded in less than a day. Also, special juries might be available in commercial or other matters. On the use of special juries see Devlin, *supra* note 3, at 80-83; Lunenburg & Nordenberg, *supra* note 3; Oakes, *supra* note 3.

24. 396 U.S. 531 (1970).

25. 396 U.S. at 538 n.10.

26. 396 U.S. at 538 (emphasis added).

Thus, even if the footnote were intended to authorize judges in complex cases to deny jury trials regardless of history, they would have that authority only on an issue-by-issue basis.²⁷ Only in the rare (perhaps nonexistent) case where every issue in a matter historically tried at law was too complex to be understood by a group of laymen would the judge be authorized to strike a demand for a jury. But this reading, which is the broadest that can be given the note in light of its associated text, is itself implausible insofar as it suggests that courts may withdraw factual questions from the jury on an issue-by-issue basis. Reading footnote ten this way ignores the basic thrust of *Ross*.

Ross is one of what may be seen in retrospect as a set of three cases that grapple with the vitalizing implications of the merger of law and equity for the seventh amendment right to jury trial. These cases, *Beacon Theatres, Inc. v. Westover*,²⁸ *Dairy Queen v. Wood*,²⁹ and *Ross*, all involved matters that were distinctively or arguably legal, but were so incorporated in actions seeking equitable relief that they were triable to a judge.³⁰ To do otherwise in the pre-

27. See *Unfit for Jury Determination*, *supra* note 3, at 519-20.

28. 359 U.S. 500 (1958).

29. 369 U.S. 469 (1962).

30. In *Beacon Theatres*, the plaintiff had sought declaratory relief and an injunction, pending resolution of the litigation, to prevent the defendant from instituting an antitrust action against the plaintiff. Defendant counterclaimed seeking treble damages under the antitrust laws and demanded a jury trial of the factual issues in the case. The trial judge viewed the issues in the original complaint as essentially equitable, and directed that those issues be tried to the court before a jury passed on the alleged antitrust violations. Had this been done, certain factual findings by the judge might have bound the parties in the later jury trial either by res judicata or collateral estoppel. Cf. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 333-35 (1979). The Court held that with the Declaratory Judgment Act and the merger of law and equity, the justification for equity's deciding legal issues once it obtained jurisdiction and retaining jurisdiction regardless of subsequently available legal remedies must be reevaluated. 359 U.S. at 509. In the instant case the Court believed that the equitable rights of the plaintiff could be fully protected if the legal issues were tried first, and so reversed the decision below. Speaking more generally, the Court stated that the seventh amendment requires a court, in deciding whether to try a legal or equitable claim first, to preserve jury trial wherever possible. 359 U.S. at 510.

Dairy Queen involved an action arising out of a trademark dispute in which injunctions were sought as well as an accounting and payment of the money that the accounting revealed as owing. The Court held that the right to jury trial may not be lost simply because legal issues are characterized as "incidental" to equitable issues. 369 U.S. at 473. The Court also looked behind the label "accounting," and found the suit to be basically an action for damages under a breach of contract or trademark infringement theory. It suggested that, given the power of the district courts to appoint Masters to assist juries, cases in which accounts between the parties were so complicated that only equity could unravel them would be very rare indeed. 369 U.S. at 478.

Ross held that the right to jury trial preserved by the seventh amendment extends to a stockholder's derivative suit (historically available only in equity) with respect to those issues as to which the corporation, had it been suing in its own right, would have been entitled to a jury trial.

merger days would have required separate proceedings, duplicative fact-finding, and inevitable expense and delay. In each case, the Court read the seventh amendment to require what the merger of law and equity had made practicable — jury trial of the legal issues in actions whose primary purpose was to secure equitable relief. The question in each case was whether the seventh amendment required what was, in effect, an extension of the right to jury trial; in none was there any question of restricting that right.

Seen in this context, footnote ten in *Ross* cannot mean that a court may strike a demand for jury trial whenever a legal action promises to be particularly complex, for the question of when a court may limit a previously existing right to jury trial was not raised in *Ross*. The footnote is instead addressed to the question of when a court need not grant jury trial on an *issue* that arises in an action seeking equitable relief. Although the precise meaning of note ten is not clear, the fact that it addresses the question of when jury trial is required *on issues* rather than *in cases* renders several readings plausible. One reading is that we have a lexically ordered test. If an issue was considered legal before the merger of law and equity and was ordinarily triable to a jury, then there is a right to jury trial under the merged procedure even though the issue would have been incidentally triable to a judge in premerger cases seeking equitable relief. On the other hand, if an issue has historically been considered equitable and tried to a judge, it remains triable to a judge because there is no right to jury trial for the seventh amendment to preserve. If this inquiry fails to resolve the matter (most likely because the matter might be characterized in two ways, and was properly for the jury if the action were legal and properly for — rather than incidentally given to — the judge if the matter were equitable), one reaches the second prong of the test: Does the issue in the merged procedure relate to a remedy that is essentially legal or essentially equitable? If legal, the right to jury trial must be extended; if equitable, the judge may decide the issue. If this inquiry does not resolve the matter, perhaps because the cause of action is newly created with a unique remedy, one reaches the third prong of the *Ross* test. If the issue appears to be within the practical limitations and abilities of juries, jury trial is required, but not otherwise. Interpreting footnote ten of *Ross* in this way means that the first prong is always dispositive if investigation under this head yields an unequivocal answer; if not, one turns to the second prong. Only when neither of these tests indicates whether a jury is required does one reach the third prong. In

short, the second test can never trump the first, and the third can never trump the second.

This reading of footnote ten accords well with the language and jurisprudence of the seventh amendment, both of which rely heavily on history to determine the scope of the jury trial requirement. If an issue has historically been within the special province of a jury except when incidental to an equitable action, history controls and the issue is for the jury to decide. If history does not specifically control, one looks to the nature of the relief requested. If that relief was historically available at law, the issue is for the jury to decide. If the relief sought was historically within the province of equity, the matter is for the judge. If history provides no answer, the issue is for the jury unless the practicalities of the trial or the limitations of the jury suggest otherwise.

This reading is also consistent with *Ross*, for the *Ross* Court looks first at whether the issue was historically within the special province of the judge or the jury, and finding history equivocal, it looks at the nature of the relief sought. Having characterized the action as legal, the Court never treats the abilities or limitations of juries.

Other readings of the *Ross* footnote relax the lexical ordering that this analysis imposes but are somewhat less plausible. One might argue that *Ross*'s third prong — the so-called functional test — comes into play if the first two prongs lead in different directions. Although this reading is consistent with the *Ross* opinion, it is less faithful to the historical approach that has characterized seventh amendment jurisprudence and might conceivably remove from the jury's consideration an issue entrusted to it in 1791. Another reading would treat the three prongs as factors that must be weighed together in a balancing process. However, this reading not only works a substantial change in the jurisprudence of the seventh amendment, it is also inconsistent with the Court's analysis in *Ross*.

To sum up, the Supreme Court cannot in good faith discover a complexity exception to the seventh amendment in either history or in its past pronouncements. Thus, a lower court seeking to be faithful to history and Supreme Court precedent cannot strike a jury demand in any case which, if it were less complex, would entail a seventh amendment right to a jury trial.

This does not mean that those seeking to strike jury demands in complex civil cases will be unaided by the historical research that like-minded litigants have sponsored or by the *Ross* footnote. If the Court wishes to abrogate the right to jury trial in complex cases, it

may, as it has in other instances, use a conflict among scholars as evidence that history is unknowable or that opposing positions are equally plausible.³¹ By bowing to rather than critically examining conflicting scholarship, the Court may avoid confronting matters that would otherwise pose serious intellectual difficulties — here the fact that allowing a complexity exception would contravene the relatively specific language of the seventh amendment and almost 200 years of seventh amendment jurisprudence.

If the Court decides to carve a complexity exception out of the seventh amendment, it will almost certainly cite the *Ross* footnote. Its third prong is the Court's first suggestion that a functional test has any place in explicating the scope of the seventh amendment. If my analysis is correct, however, the footnote means that a court's beliefs about the jury's capabilities cannot outweigh the implications of history. It is certainly not a precedent — as the *Ross* case in which it is embedded is not a precedent — for limiting the scope of the seventh amendment. Nevertheless, because the Court sanctioned a functional approach when deciding how far to expand the right to jury trial, it may feel that using a functional approach to impose limits on the seventh amendment does not radically depart from its precedents. This feeling may be justified in the sense that the *Ross* language has alerted lawyers to the need to argue the jury capability question to the Court, thus lessening the surprise associated with radical breaks in past jurisprudence. But it will not be justified if it emerges as a pretension that limiting the right to jury trial on functional grounds is but a step down a path that was implicit in *Ross*.

PROPOSITION TWO: *Lay decision-making in the civil sphere promotes important social values.*

When the institution of jury trial is celebrated, what is typically praised is the criminal jury. The great cases that lead us to associate jury trials with liberty are criminal prosecutions, many of which pre-date the American Revolution.³² When we acknowledge the value

31. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 184-85 (1976), where Justice Stewart could cite only one study finding a deterrent effect to capital punishment to support his contention that the results of statistical attempts to evaluate the death penalty as a deterrent have been inconclusive. The study that Justice Stewart relied upon, [Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975)], is fundamentally flawed and has been soundly criticized by numerous scholars. For a review of the critical literature, see Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1206-13 (1981).

32. The most famous case on the American side was the trial of John Peter Zenger. But the colonists knew of and no doubt celebrated the jury's role in a number of cases tried in England. See, e.g., *Rex v. Shipley*, 99 Eng. Rep. 774 (K.B. 1784); *Rex v. Owen*, 18 How. St. Tr. 1203 (K.B. 1752); *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670).

of an institution that ameliorates the rigors of the law with an infusion of communal values, we are usually thinking of the criminal jury and its "nullification" of criminal statutes either because they are employed to quash dissent or because they seem inappropriately severe. The civil jury seems less important to our freedom because it does not decide whether named individuals should go free. Nor is it easy to think of civil cases that carry the symbolic weight of celebrated criminal trials. Although civil juries may hear cases in which the state is a party, such cases are neither paradigmatic nor routine grist for their mill. Even when it is the state that brings suit against a citizen, an assumption of equality between the parties — reflected in the "preponderance of evidence" standard — is taken to mean that the citizen needs no special protection.

Results in civil cases are admittedly important to the parties, but are rarely seen as consequential to society as a whole. The larger social significance of whether a contract is voided or sustained or whether a parcel of condemned land is valued at twelve rather than ten thousand dollars is not obvious. Indeed, the Court has paid the civil jury its "ultimate" insult, for it has never held that the seventh amendment is, as part of the Bill of Rights, incorporated into the fourteenth amendment and thus binding on the states. More than anything else, this distinguishes the civil jury of the seventh amendment from the criminal jury of the sixth amendment. The former is not, in the Court's view, essential to the constitutional scheme of ordered liberty.

The framers of the seventh amendment might well have been surprised by these attitudes, for there is little reason to believe that they thought the civil jury less important than its criminal counterpart. They certainly saw close ties between economic and political freedom. The civil jury, as Professor Wolfram has shown, was seen to safeguard freedom because it could ameliorate the rigidities of the law and render harmless the biases of judges.³³

Indeed, it may well be that the social impact of the civil jury has been greater than that of its criminal counterpart. Many important statutory and common-law developments have grown out of the tension between the apparent requirements of legal rules and the verdicts that civil juries returned. The wisdom of the common man as reflected in the civil jury verdicts of one generation has often presaged the wisdom of the next generation's legal elites. The movement toward comparative negligence, which is reputed to have long

33. See Wolfram, *supra* note 3.

been the rule in the jury box, is but one example.³⁴ The availability of jury trial has also affected the balance of power on important legislative matters. Interests powerful enough to control legislatures and perhaps judges have found that the one-sided rules they championed did not fully survive jury deliberations. This has apparently led to compromises between interest groups that would otherwise have been absent or much delayed. The best example is the movement toward worker's compensation. The movement was initially resisted by industry, but eventually generated considerable industrial support in part because the fellow servant rule and the assumption of risk doctrine provided but uncertain protection when matters were ambiguous enough to be given to a jury.³⁵

For some people, the possibility of nullification by the civil jury militates against extending the right to jury trial in civil cases and, indeed, provides a reason to regret the adoption of the seventh amendment.³⁶ By the same token, some may regret the enactment of the sixth amendment because juries may interfere with unbridled governmental power at times when dominant elites think unbridled discretion necessary. But the requirement of jury trial was incorporated into the Bill of Rights precisely because of the possibility that those who were most powerful at any particular time would conceive of the jury as an obstacle to their particular agendas. The Supreme Court, therefore, should take the seventh amendment seriously and respect its underlying purpose even if the Justices are uneasy with the idea that the civil jury might "nullify" the law in cases that are neither overtly political nor obvious occasions for mercy.

Those most worried about nullification in civil cases may find comfort in two considerations. First, as with the criminal jury, the civil jury's war with the law is likely to be a small one. If Kalven and Zeisel's seminal research may be taken as a guide, civil jurors do not often ignore a rule that indisputably applies merely because they think that the rule is wrong. Their sense of justice is likely to be crucial only when facts in a case are close and it is not unreasonable to decide either way.³⁷ Second, the civil jury, like its criminal coun-

34. See Green, *Juries and Justice — the Jury's Role in Personal Injury Cases*, 1962 U. ILL. L.F. 152, 159. But see Kalven, *The Dignity of the Civil-Jury*, 50 VA. L. REV. 1055, 1066 (1964).

35. Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 62 (1967).

36. See, e.g., J. FRANK, *COURTS ON TRIAL* 127-35 (1949).

37. This is apparently the case with the criminal jury. See H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966) [hereinafter cited as KALVEN & ZEISEL]. It appears that it is even more likely to be true of the civil jury. Kalven and Zeisel report almost the same level of judge-jury disagreement in criminal and civil cases. The difference is that on four out of five occasions where the criminal jury disagrees with the judge the jury is more lenient, but where

terpart, appears to have performed well even if popular values have at times mitigated the literal demands of the law. The tension between rules and morality that characterizes our system of trial by jury has not noticeably hampered economic growth, and has arguably advanced the cause of social justice.

This analysis suggests that the civil jury helps promote important (albeit disputable) values enshrined by the framers in the seventh amendment. But there is a narrower issue lurking here. It is not obvious that the values the framers sought to promote will be even minimally subverted should jury trial be denied in a small number of exceedingly complex cases that involve both voluminous evidence and technical matters like statistical analysis and economic theory. In the first place, where legal issues turn on technical evidence and esoteric theory, it is not clear that a community as represented by its jurors has values that are particularly relevant to the outcome. Indeed, jurors instructed to decide between litigants like IBM and Memorex on the basis of their own values rather than the law might not know which way their values lead. Second, the political and social influence of the civil jury has apparently been greatest when routine cases were heard by jury after jury. The symbolic decision that can stop the government in its tracks and call for a reassessment of official policy is largely missing from the civil sphere. Complex litigation, on a scale to justify the denial of jury trial, may be so rare or so esoteric that we should not expect the system of jury trial to ameliorate any rigidity or class biases of the law with a sense of popular justice.

Although the above argument is reasonable, the assumptions on which it is based are not indisputably true. In the face of empirical uncertainty it is probably wiser — and certainly more faithful to the Constitution — to accept the framers' judgment and allow jury trial in all cases denominated "legal." The presence of great complexity or of esoteric issues does not necessarily mean that there will be no aspects of complex cases that arouse a popular sense of justice. Some kinds of arguably predatory business activity, for example, might seem either so unfair or so unreasonable that, if the issue is a close one, it is appropriate for juries to give the benefit of the doubt to the party that has acted with the greater morality. Also, there is a "slippery slope" problem. Today there may be only a handful of cases that are acknowledged candidates for applying the complexity exception. But once the seventh amendment's command is

the civil jury disagrees with the judge, it is about as likely to find for the plaintiff as for the defendant. *Id.* at 63. See also Kalven, *supra* note 34.

breached, the number of cases might rise dramatically. First, one might require the prospect of voluminous evidence and esoteric issues to justify dispensing with a jury trial. Then either voluminous evidence or esoteric issues might be enough. Finally, the meaning of voluminous evidence and esoteric issues could change so that evidence that will take two weeks to present is considered voluminous, and difficult engineering questions in products liability cases are considered esoteric.³⁸ These problems are exacerbated by the nature of legal practice in high stakes cases. If a jury trial can be avoided if a case promises to be complex, it is a safe bet that the party preferring a bench trial will do its best to create the prospect of a lengthy trial that will turn on esoteric expert testimony.

Finally it must be recognized that complex cases — such as large-scale antitrust litigation — are some of the most “political” cases that the system hears. Vast sums of money are involved, and the structure of the nation’s largest companies may be at issue. The power of businesses vis-à-vis consumers is inescapably implicated. Even if the litigation is so complicated that the jurors have no popular view of where justice lies (apart from the legal test) and no understanding of the political implications of different decisions, judges may well have such a view and such understanding. Unlike most jurors, judges have often been either personally involved in politics or experienced in representing clients before political bodies. In recent years, moreover, a number of judges have received formal training in economics — at no personal expense — from an institute that reportedly takes a decidedly partisan view of the kinds of economic policy questions that are commonly implicated in complex litigation.³⁹ In short, judges will have a good idea of the consequences that different verdicts entail, and they may strongly prefer one outcome to another. If the jury does not infuse popular morality into cases that are so complex as to defy the layperson’s sense of the moral, it may play the equally important role — and one also contemplated by the framers — of preventing judgments in such important cases from being dominated by the morality of an elite.⁴⁰

38. Recently the trial judge refused to seat a jury in a dispute involving Howard Hughes’s competence to enter into certain contracts and the alleged overreaching of people close to him. There is apparently a substantial amount of documentary evidence that will be admissible, but it doesn’t appear from news accounts that the presentation of evidence must consume months of court time and the issues, which turn in large part on the credibility of witnesses, appear well-suited for jury consideration. See Granelli, *Howard Hughes — Lucid or Drugged*, NATL. L.J., Sept. 14, 1981, at 6, col. 1.

39. See Guzzardi, *Judges Discover the World of Economics*, FORTUNE, May 21, 1979, at 58, 66.

40. Wolfram, *supra* note 3.

PROPOSITION THREE: *The decision on the right to jury trial in complex civil litigation should proceed on the assumption that the outcomes of particular cases will turn on the decision.*

When the Supreme Court decided that the sixth amendment allowed six-member juries in state criminal cases, Justice White suggested that there were "no discernible differences" between the verdicts rendered by six- and twelve-person juries.⁴¹ This observation was repeated in *Colegrove v. Battin*,⁴² which sanctioned the use of six-person juries in federal civil cases. The judgment of the Court was almost certainly mistaken, although for a variety of reasons both experimental and real world research are unlikely to reveal substantial differences between the verdicts of six and the verdicts of twelve.⁴³ It will, if anything, be even more difficult to identify specific complex cases in which the verdict will turn on whether a jury is empaneled. Nevertheless, it would be a grave mistake to assume that because a difference is not amenable to measurement, it does not exist. First, that assumption is inconsistent with the hypothesis on which the case against the civil jury is grounded — namely, that juries but not judges are incompetent to deal rationally with complex civil cases. Second, the parties who dispute the right to jury trial in complex cases clearly believe that empaneling a jury is likely to affect the trial's outcome.

This last point is an important one to remember in evaluating the arguments in right to jury trial litigation. Whatever the language in which the arguments are cloaked, due process, popular sovereignty, or fidelity to history, the parties who bring these cases ultimately differ on only one issue — whether they expect their client to be better off before a jury or a judge. Indeed, since the parties will know which judge has been assigned the case before they must make a demand for jury trial or a motion to strike that demand,⁴⁴ arguments over jury trial may be motivated more by the perceived sympathies of a known judge than by the predicted biases and competence of a still to be selected jury. It would be interesting to see how decisions to seek or avoid jury trial would be affected if the appropriate mo-

41. *Williams v. Florida*, 399 U.S. 78, 101 (1970).

42. 413 U.S. 149, 158-59 (1973).

43. See Lempert, *supra* note 10. The Supreme Court itself has noted that studies that purported to document the irrelevance of jury size, studies relied upon by the Court in *Colegrove v. Battin*, 413 U.S. 149 (1973) (holding that a six-member civil jury did not violate the seventh amendment right to a jury trial), have been criticized by scholars. *Ballew v. Georgia*, 435 U.S. 223, 237-39 & nn.30-32 (1978).

44. Demands for a jury trial are made after the commencement of an action and are timely until 10 days after the service of the last pleading directed to an issue triable of right by a jury. FED. R. CIV. P. 38.

tions had to be made before the judge was assigned. It would be even more interesting to see how many parties would move to strike juries from complex cases if that motion waived the movant's right to jury trial in any subsequent litigation of equal or greater complexity.

However one resolves these thought experiments, the Court should respect the judgment of the litigators and approach the question of the right to jury trial as if the fate of not only a particular lawsuit but also a whole class of lawsuits turned on it. The importance of a matter usually argues in favor of Supreme Court resolution. When the available information is insufficient for an intelligent judgment, however, the importance of a decision is further reason to postpone making it.

PROPOSITION FOUR: *The fifth amendment conditions the command of the seventh amendment so that there is no right to jury trial in cases so complex that lay fact-finders cannot rationally assess the facts in light of the law, provided (a) trial judges can rationally make such assessments; (b) the jury's deficiencies cannot be ameliorated by reasonable procedural innovation; and (c) a right to jury trial is retained for those significant legal issues that a jury can rationally resolve.*

If juries simply *cannot* decide complex cases rationally and judges can, no good purpose is served by requiring jury trial. This is true even if we believe that the seventh amendment requires us to accept the possibility of limited jury nullification in civil cases as a valued part of our system.⁴⁵ Nullification, as we have come to value it, entails a *reasoned* decision that rationally elevates certain communal values above the specific language of the law. Verdicts that stem from misunderstandings of the law or from an inability to assess complex facts do not nullify the law so much as they frustrate it. There is certainly no reason to believe that the drafters of the sixth and seventh amendments valued the jury system because it offered the opportunity for lay irrationality. Indeed, if we see nullification for what it usually is — the tendency of jurors to let their values affect their reading of the facts in close cases — we realize that nullification may itself be frustrated by complexity. If jurors cannot un-

45. Henderson has shown that when the seventh amendment was adopted there were in England, as well as in some states, judicial control devices designed to prevent civil juries from returning irrational or unsupportable verdicts or to prevent such verdicts from being enforced. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 299 (1966). *But cf.* Wolfram, *supra* note 3 (seventh amendment framers viewed the jury as a check on the morality of the elite).

derstand the issues in a case, they cannot be sure what decision or benefit of doubt their values imply.

Although nullification is uniquely associated with juries, it is not the only reason for jury trial. Jury trial emerged as the dominant way to resolve legal disputes because it appeared more rational than competing procedures.⁴⁶ If juries had not been capable of rational fact-finding, the institution would no doubt have disappeared long before the framers enshrined it in the Bill of Rights. However highly one values the jury system, little of value is preserved by retaining juries that cannot function rationally because the concepts on which a case turns are too abstruse for jurors to understand or because the quantity of relevant information overcomes their capacity for rational evaluation.

In these circumstances, despite the seventh amendment's clear command and the political importance of the civil jury, there is good reason to withdraw what appears to be a right. Litigants may appropriately claim whatever benefits accrue when jurors use their values to resolve doubt in close cases, but no litigant has a claim to the benefits that the possibility of an *irrational* verdict bring. Indeed, a lawyer would be acting unethically if he brought a case knowing that it could only be won if the jury misunderstood the evidence;⁴⁷ if the lawyer's client prevailed in such a case because the jury did misunderstand, the judge would be obliged to overturn the verdict.⁴⁸ }

The availability of directed verdicts and judgments *n.o.v.* makes it clear that the seventh amendment does not guarantee a right to benefit from verdicts that run counter to the clear implications of the evidence. Nevertheless, the case for striking a jury demand when complexity threatens is an uneasy one. It cannot legitimately rest on an interpretation of the seventh amendment, but must instead rely on the due process clause of the fifth amendment. But relying on the fifth amendment is discomfiting. Contrary to the usual canons of statutory construction, this approach prefers general language to specific language. More importantly, the approach stands the incorporation process on its head. Over the years, the Supreme Court has held that many of the protections of the Bill of Rights are binding on the states because they are aspects of the due process that the four-

46. For a brief sketch of the emergence of jury trial, see Devlin, *supra* note 3, at 45-48.

47. See ABA, MODEL CODE OF PROFESSIONAL ETHICS, DR7-102 and the accompanying ethical considerations.

48. This might be done by ordering a new trial or entering judgment *n.o.v.* See FED. R. CIV. P. 50 & 59.

teenth amendment requires.⁴⁹ Indeed, some have come to view the specific provisions of the Bill of Rights as the basic measure of what due process entails.⁵⁰ To rest the denial of the right to jury trial on due process grounds, one must see due process (albeit fifth amendment due process) as requiring the denial of one of the specific procedural guarantees of the Bill of Rights.

As Proposition Four indicates, I am prepared to read the due process clause this way. Fifth amendment due process has over the years become one of the fundamental values of the Bill of Rights, while the seventh amendment has remained peripheral. Only recently have some courts suggested that trial by jury might in itself be inconsistent with due process, but due process has been used to limit the jury in the past. In particular, due process was cited as a justification for taking away whatever law-deciding powers might, in 1791, have been thought to inhere in juries.⁵¹ Furthermore, although the right to jury trial in civil cases has, by virtue of the seventh amendment, been part of the process due in federal court, it has not been thought so central to our system of justice as to be required of the states.⁵² If the right to jury trial in civil cases is not required by fourteenth amendment due process, it is presumably not required by fifth amendment due process either.

Due process gives one the right to present one's case to a fact-finder capable of understanding the law and comprehending the evidence. The seventh amendment gives one the right to trial by at least six laypersons.⁵³ If a case is so complex that lay jurors cannot understand the law or comprehend the evidence, there is a clash of constitutional rights. The possibility of such a clash is not eliminated by the availability of judgment *n.o.v.*, since a jury verdict may result from a failure to understand the law or evidence without being so obviously against the weight of the evidence that it may be overturned by a judge not privy to the jury's deliberations. The losing party is harmed if a fact-finder that understood both the law and the evidence would have reached the opposite verdict.

But even if due process entitles a litigant to a nonjury trial, it

49. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 11-2, at 567-68 (1978) (collecting cases).

50. *Adamson v. California*, 332 U.S. 46, 89 (1947) (Black, J., dissenting).

51. See *Sparf & Hansen v. United States*, 156 U.S. 51, 103 (1895).

52. See *Walker v. Sauvinet*, 92 U.S. 90 (1876).

53. *Colegrove v. Battin*, 413 U.S. 149, 160 (1973). The Court in *Colegrove* expressed no view on the question "whether any number less than six would suffice." 413 U.S. at 159-60. In *Ballew v. Georgia*, 435 U.S. 223 (1978), however, the Court held that the use of a five-person jury in a state criminal case violated the fourteenth amendment.

does not follow that there is a right to have a jury demand struck merely because a case promises to be complex. When a court grants a motion to strike a jury demand because of complexity, it is predicting both that the trial will be particularly complex and that the jury will fail to understand the law or the evidence. Surely these judgments can be made more accurately at the trial's end. Arguably, due process only gives a litigant the right to have a case withdrawn from the jury after the evidence is in and after the judge has determined that the jurors as a group have so misunderstood the evidence or the judge's instructions as to be incapable of rational deliberation.

The argument that due process requires judges to strike juries in complex cases at the outset of the trial rests on several grounds. The first is that it may cost more to try a case to a jury than to a judge. But the due process right is not to avoid the expenses of litigation; it is to avoid an irrational verdict. Moreover, it is not clear what added expenses are attributable to the use of juries, and if such expenses can be identified, some portion may be properly chargeable to the losing party.⁵⁴

The second argument for striking juries at the outset is that judges may be unduly reluctant to take cases away from juries. This argument is conceptually weak since the law assumes that judges will act as they should, but it may be empirically sound. A judge may ignore signs of jury misunderstanding because he believes that a jury deserves a chance to reach a decision after sitting through a lengthy case or because the judge wishes to avoid the burden of deciding the matter himself.

Finally, there are practical reasons for not seating jurors in complex cases when it appears likely that the case will ultimately be taken from them. A complex jury trial places tremendous burdens on the litigants, on the judge, and, perhaps most of all, on the jurors who hear the case. It may also burden entire court systems. Bench trials not only spare jurors the disruption that lengthy trials entail, but also may ease the burdens on the other actors and on the local court because of the greater flexibility that bench trials make possible.⁵⁵ If due process considerations make it likely that a case will be withdrawn from the jury before deliberations, it might be worth risking an occasional mistake to secure the logistical benefits that can

54. See generally FED. R. CIV. P. 54(d) and the discussion of taxable costs in 10 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 2665-2679 (1973 & Supp. 1980).

55. Some trial judges certainly seem to think so. See, e.g., *In re United States Financial Sec. Litigation*, 75 F.R.D. 702, 713-15 (S.D. Cal. 1977), *rev'd*, 609 F.2d 911 (9th Cir. 1979); *In re Boise Cascade Sec. Litigation*, 420 F. Supp. 99, 104-05 (W.D. Wash. 1976).

accompany bench trials.⁵⁶

One might think that practical considerations like these, which have little to do with due process, should be given no weight when a clash of constitutional values must be resolved. Yet Justices who are charged with overseeing the federal courts as well as with upholding constitutional rights may be more influenced by perceived practicalities than by doctrinal analysis. When the issue is not the fundamental one of whether jury trial must be allowed, but is instead a question of timing, attention to practicalities may be wise. There is virtue in avoiding unnecessary costs and in sparing citizens the experience of sitting through lengthy trials only to be dismissed at the close of the evidence because the court doubts their capacity for rational fact-finding. Yet the case for striking juries at the outset of complex cases remains weak, even if the due process claim to a non-jury verdict is strong, unless we can predict when the likely complexity of a case means that seating jurors will be futile. Not only do we not know whether we can accurately make such predictions, we cannot yet be certain that this will ever be the case.

The preceding analysis assumes that if the fifth amendment's due process clause conflicts with the right to jury trial of the seventh amendment, due process should prevail. Given the respective positions of the two amendments in our constitutional scheme, I believe this assumption is defensible. However, because we are dealing with two clauses of the Bill of Rights we should be certain that conflict actually exists and that there is no practicable way to avoid a clash before the rights guaranteed by one amendment are held to override those guaranteed by the other. The three provisos of my fourth proposition specify circumstances in which a clash is not inevitable even if the fact-finding in complex cases tried to juries is not currently rational.

First, there is no clash if the judge shares the jury's deficiencies in dealing with complex cases or has other deficiencies that render him equally incapable of reaching a rational judgment in accordance with the law. A party's due process right is not to avoid jury trial;

56. Bench trials may also be more manageable than jury trials because the rules of evidence, although nominally the same in bench and jury trials, are typically relaxed when trial is to the judge. Absent some clear indication that the judge relied upon inadmissible evidence in reaching his decision, appellate courts usually are willing to assume that the judge disregarded such evidence in rendering his verdict. Thus, arguments over the admissibility of evidence are likely to consume less time in bench trials than in jury trials. Also the judge in reaching a decision is likely to have information that would have been kept from a jury. Whether this is desirable depends on, among other things, the probative value of the additional evidence, whether it increases the complexity of the case, and whether one regards fidelity to the rules of evidence as a virtue.

rather, it is to receive a fair judgment based on a rational evaluation of the evidence. If the judge cannot perform any better than the jury, there may be a due process right not to be sued at all,⁵⁷ but there is no right to have a judge rather than a jury confounded by the evidence.⁵⁸

The supposition that both judges and juries might be irrational fact-finders in complex cases is not fanciful. Just as a jury may not include people likely to comprehend the details of complex cases, so a judge, assigned at random, may not be well-equipped to cope with complexity. Many judges are bright and diligent, but others are much less so, and a legal education does not mean that one will have more than a layperson's understanding of such subjects as economics and statistics. Furthermore, a judge lacks the advantages of collective decision-making, such as group memory and a mix of biases.⁵⁹

57. There is at least an analogy in cases where pretrial publicity is such that a fair trial is not possible. However, it appears unlikely that the prospect of irrational decision-making in civil cases would ever be so clear that the Court would disallow a judicial proceeding. If the Court did this, it would not necessarily deny plaintiffs all remedies because the Congress could in these circumstances establish expert administrative tribunals to deal with the matter. The problem of disallowing a suit for complexity poses particular problems if the insurmountable complexity inheres only in the case of the party seeking to avoid judicial trial. In these circumstances, the Court would probably have to determine how essential the complex features of the party's case were to a fair presentation of its position.

58. My colleague Ed Cooper has made the interesting suggestion that if substantive legal principles create a decisional task that is too complex for rational jury decision, it is the substantive law rather than the right to jury trial that must be bent to accommodate the Constitution. This argument may be made from either of two perspectives. One is the due process perspective: Since there is a seventh amendment right to jury trial, due process imposes a jury rationality limitation on the freedom of courts and legislatures to complicate substantive law beyond reasonable measure. The other is the direct seventh amendment perspective: Courts and legislatures have an obligation to preserve the right to jury trial in shaping substantive law. The two perspectives may have different consequences. At least superficially, the direct seventh amendment argument could be met without altering substantive law by denying any complex litigation exception to the right to jury trial, leaving individual juries free to protect themselves by an ad hoc process of nullification. The due process perspective may suggest that such ad hoc jury nullification is unfair, particularly in light of the equal protection component of fifth amendment due process. The due process approach thus would lead more directly to the conclusion that announced principles of substantive law must change. The same conclusion could be reached from a seventh amendment perspective, however, by arguing that the jury itself is entitled to guidance by substantive principles that are intelligible to its members.

59. See Lempert, *supra* note 10, at 648. See generally Haft, *Business Decisions by the New Board: Behavioral Science and Corporate Law*, 80 MICH. L. REV. 1 (1981).

It might be argued that the judge has other resources that more than compensate for the disadvantages of deciding alone. For example, one judge may not be able to remember as much of the evidence as twelve jurors, but the availability of the trial transcript may mean that his "effective" memory is both more extensive and more accurate than the jury's. To the extent that this is true, it argues for giving the jurors access to the transcript. If this is done, the advantages of group memory should again exist, although in a different and perhaps less important form. When a transcript is voluminous, one must remember what parts are important and worth referring to. A single individual is likely to remember less as important than a group or, if the entire transcript is reread, one person is likely to recall less than a group. The judge does, however, have an advantage that may offset the jury's greater capacity to remem-

The problems that complex litigation poses for rational fact-finding are in many ways more an aspect of the litigation than they are a function of the fact-finder. Education and intelligence aid in coping with the problems of complexity, but they provide no guarantee that the final decision will not reflect either biases that have been "liberated" by the ambiguity of complexity or irrationality attributable to misunderstood evidence and unremembered information. As evidence becomes voluminous, trials protracted, and issues more technical, the capacity of any person or group to remember information, to understand what is important, and to reach rational decisions diminishes. Thus, the best strategies for coping with complex litigation may be those that reduce complexity rather than those that focus on the fact-finder.

If, however, we choose to focus on the fact-finder, and if neither judge nor jury is particularly well equipped to deal rationally with the mass of evidence and the technical issues that confront them, there are substantial reasons to prefer a jury trial. First, if the jury makes an obvious mistake in a case, the judge can correct the jury's error by entering a judgment *n.o.v.*⁶⁰ But where the jury is correct when the judge would have been in error, judgment *n.o.v.* is unlikely to be entered because a correct verdict should appear reasonable even to one who would reach the opposite conclusion.⁶¹ Without a jury, the judge, by hypothesis, would have reached a mistaken verdict.⁶²

ber. Because the judge understands the law much better than the jury, he is likely to be better able to identify those portions of the testimony that are most relevant.

60. For a discussion of the standard that is applied when ruling on motions for judgment *n.o.v.* see note 129 *infra* and accompanying text.

61. Although we are assuming that the judge and the jury will *on the average* be equally confused by complexity, in a given case one is likely to reach a more rational decision than the other. In a case where the judge is more rational and the jury decision is irrational, the judge is likely to realize this and enter a judgment *n.o.v.* If the jury is more rational in a given case, the judge may come to see the error of his reasoning when thinking about reasons for the jury verdict.

62. There is, of course, a wide range of cases in which judge and jury disagree, but neither decision is unreasonable. It is possible that in these cases the judge's decision would better reflect the facts and the law. If, however, neither judge nor jury are well-equipped to deal with the case — and this is the hypothesis on which the discussion here proceeds — it is only in the subset of cases that the judge understands but the jury does not and in which a verdict for either side is reasonable that we would be better off with a bench trial. This is presumably offset by the subset of cases that the jury deals with more rationally than the judge although the judge's verdict would be reasonable.

It may also be the case that the most we should ask of fact-finders hearing exceedingly complex cases is that the verdict be within the bounds of reason. Like the classic figure-ground paradoxes (is it a vase or two profiles?), there may not be a correct verdict. Results may depend on how one looks at things, and the law may not specify with sufficient clarity the perspective in which the evidence should be placed. Where the parties' honest and capable experts can disagree about the implications of the evidence perhaps a legal fact-finder should

Second, jury trials may be better organized than bench trials, and are likely to be better structured for appeal. As Judge Higginbotham has observed, the need to try a case to a jury imposes a certain order on the proceedings.⁶³ In a jury trial, counsel cannot casually decide how to present their evidence, and the judge must explicitly consider what is and is not allowed. Furthermore, a jury trial creates an urgency about deadlines that may be absent when a judge sits alone, and there is strong pressure to minimize interruptions in the presentation of evidence to a jury. While an efficient and energetic judge might be able to accomplish more in less time if unconstrained by a jury, judges who are not outstanding in these respects may benefit from the discipline that a jury imposes. It is, for example, unlikely that either the counsel or the judge in the IBM case, which threatens to become a modern *Jarndyce v. Jarndyce*, would have allowed the matter to proceed as it has if trial had been to a jury.⁶⁴ The organization which jury trial forces on a court is also important on appeal. Specific decisions on the admissibility of evidence and on the choice of instructions emphasize the parties' theories of the case and what the judge sees as relevant. The mode of presenting evidence and the initial and final arguments — which may be waived or condensed in a bench trial — indicate to an appellate court exactly what the parties saw as central in the case.

Although it might appear that an irrational verdict from the bench, which must be justified with an opinion, is more likely to be reversed on appeal than an irrational jury verdict, which is simply a pronouncement,⁶⁵ the procedural difference does not necessarily mean that judicial fact-finding is more closely policed on appeal. In

not be criticized no matter what verdict is reached. As in other areas of law, the fact that a dispute is concluded may be more important than the kind of verdict rendered. Indeed, for some purposes the law may be as well served by decisions that are relatively random in close cases as it is by verdicts that are consistently correct. When a number of corporations in a given time period have possibly, but not certainly, violated the antitrust laws, it may be important from the point of view of national policy that some pay damages, but it may be unimportant which defendants pay. It does, of course, violate important rights of the litigants if burdens are allocated unfairly, but in some complex cases neither plaintiff's nor defendant's verdicts will be necessarily or obviously unfair. In a civil case, we should value equally the plaintiff's right to recover for a wrong actually done and the defendant's right not to pay for a wrong not done.

63. Higginbotham, *supra* note 3, at 54.

64. The case, *United States v. International Business Machs. Corp.*, N.69 Civ. 200 (S.D.N.Y.), was filed in the last hours of the Johnson Administration. It proceeded through the Nixon, Ford, and Carter Administrations. As I write, eight months into the Reagan Administration, the trial has been completed, but a decision has yet to be rendered.

65. Special verdict procedures may allow considerable insight into how juries responded to particular issues raised in a case. See FED. R. CIV. P. 49. See generally Comment, *Special Verdicts: Rule 49 of the Federal Rules of Civil Procedure*, 74 YALE L.J. 483 (1965).

theory, if the decision is obviously contrary to the weight of the evidence, either fact-finder should be reversed. In fact, appellate judges might be more reluctant to reverse fellow judges for irrationality than they are to reverse juries. If the verdict appears mistaken to the appellate court but is not clearly unreasonable, the court may be able to discern a mistake in the instructions or the evidentiary rulings that can explain the jury's apparent error. Moreover, if the court feels strongly that a new trial is in order, the record is almost certain to contain technical errors that will justify a remand. Where a trial has been to the bench and the trial judge has been careful not to make an error of law in the opinion explaining his verdict, it will be more difficult to find grounds for reversing a decision that appears unjust but is not clearly irrational.⁶⁶ Appellate courts indulge in the presumption that trial judges disregard inadmissible evidence, and a cagey trial judge seeking to avoid reversal can write an opinion that not only disguises the real reasons for his decision, but also asserts the irrelevance of all potentially inadmissible evidence and relies in part on factors like demeanor which the appellate court cannot check. Such tactics are more likely, the more self-consciously political the judge's decision.

A third reason to prefer jury trials is that bench trials can facilitate the denial of due process in at least two ways. First, parties have a right to have their case judged only on the basis of admissible evidence. Judges who must hear evidence to pass on its admissibility may, consciously or unconsciously, be influenced by material that would not reach a jury. More importantly, some judges attempt to persuade parties to forgo their due process right to a trial in favor of settlement. Such efforts may extend to sketching the parameters of what the judge sees as a fair resolution of the conflict. Litigants may find it quite difficult to assert their right to a trial in the face of judicial pressure to settle. This pressure naturally increases when one

66. It is, however, the case that the "clearly erroneous" standard for reversing the decision of a trial judge is more lenient than the standard that is used in reviewing jury verdicts. Also, in complex litigation an appellate court may hesitate to order a new trial when it believes the action below was decided incorrectly, although it would not hesitate if it could substitute its judgment for that of the fact-finder below. When the trial has been to the judge, the appellate court is more likely to be in a position where they can reverse by substituting judgment rather than by ordering a new trial. These considerations argue against the point made in the text. However, the factors that make for the greater reversibility of bench trials are less likely to come into play the more carefully the trial judge justifies the decision. Careful justification is most likely where the trial judge has a strong value commitment to the side his verdict favors. The question of whether appellate reversal to avoid injustice is more likely in bench or jury trials is ultimately empirical. My allocation of arguments to text and footnote reflects my judgment of what research would be likely to find.

realizes that, should he insist on his right to trial, the judge who is encouraging settlement will be the fact-finder.

Finally, if neither judges nor juries could reach rational judgments in complex litigation, we might prefer the jury because random error in such cases is more desirable than systematic error. A fact-finder, befuddled by complexity, is likely either to fail to reach a verdict (an option not open to the judge) or to reach a verdict that reflects presuppositions and prejudices. Unless there are strong communal values that appear relevant, the bias that dominates in juries is likely to differ from case to case. Over a series of cases political biases should cancel out. Judges, however, are chosen in part because of political biases. Should one political party manage, over a period of years, to appoint a substantial proportion of the lower federal bench, decisions in cases too complicated for decision-makers to understand may tend to follow the appointing party's line. The resulting pattern of decisions will suggest that fact-finding has been subordinated to politics, when in fact it is simply the result of the way that values affect decisions when evidence does not dominate. Under the hypothesis of complete confusion, trying cases to juries would also not avoid decisions dominated by values, but the judicial system would not be as discredited since the verdicts would not reflect a consistent political preference.⁶⁷

The supposition with which the preceding discussion begins — that judges and juries are likely to be equally skilled or inept at deciding complicated cases — is not likely to be true. Some judges may invariably be more able than juries when cases are complex,⁶⁸ others may invariably be less able, and still others may be more or less able depending on the case. Further research may demonstrate that using a jury in complex cases is a minimax solution to the problems that such cases pose — not as efficient or as rational as trial to the better judges, but never sinking to the levels of inefficiency, irrationality, or bias that characterize the worst of the bench. Whatever research may show, the essential point is that it must be comparative. Both jury and judge must be subject to scrutiny.

67. For purposes such as deterrence, random verdicts might be almost as useful as accurate ones so long as the proportion of plaintiffs' verdicts was close to the proportion of plaintiffs who deserved to win. Systematic error would necessarily over- or underdeter. The potential harm would depend on the mix of deserving parties and on the direction of bias. If the mix of deserving parties were highly skewed, and fact-finder bias were in the direction of the skewing, systematic error might be preferable to random mistakes.

68. Note that this would not justify striking a jury if one accepts the analysis I offer. To strike a jury, not only must the judge be better able than the jury to decide rationally, but there must also be a substantial probability that the jury will be unable to decide the matter rationally.

The second proviso of Proposition Four concerns reforms that might improve the jury's ability to deal with complex cases. If procedural changes can eliminate the potential conflict between the seventh and fifth amendments without infringing on other rights of the parties, there is no good reason why reform should not be preferred to choosing between those provisions. Indeed, if the conflict can be resolved only by infringing on other rights of the parties, the appropriate analysis should consider all of the rights involved. If *A*'s seventh amendment right to a jury trial conflicts with *B*'s fifth amendment right to a fair hearing, there may be good reason to deny *A* his right to a jury trial. But if *B*'s due process interest in a fair hearing can be accommodated by action that preserves *A*'s right to jury trial at the cost of some other of *B*'s rights, the appropriate comparison is between *A*'s right to jury trial and *B*'s other right. *B* should not be allowed to insist that denial of jury trial be preferred to a possible reform unless the right that *B* would sacrifice to reform is more substantial than *A*'s seventh amendment right.

In contemplating potential changes in the way that we try complex cases there are, of course, other issues than those that concern the parties' rights. On the one hand, detriments may be associated with reform. Social costs such as the burdens placed on the judicial system may be so great that particular reforms are not feasible. The burdens placed on jurors may be similarly intolerable.⁶⁹ Finally, if reforms vitiate values that the right to jury trial was intended to promote, they will be to some extent self-defeating. On the other hand, some innovations might improve the quality of judicial as well as jury decisions, and others may aid the jury in simple cases as well as complex ones. Such reforms should be explored no matter how the fundamental constitutional issue is resolved.

The last of Proposition Four's three qualifiers restates the teaching of *Ross*. The right to jury trial turns on characteristics of issues and not on characteristics of cases. The corollary to this is that the fifth amendment's due process clause overrules the seventh amendment right only when the facts surrounding a particular issue are so complex that a jury cannot render a rational judgment on that issue. In an antitrust case, for example, the technical difficulty of determining the relevant product market may justify taking that issue from the jury. But once the judge defines the market, the jury may be quite capable of determining whether there was an attempt to mo-

69. When the seventh amendment was adopted, trials rarely lasted longer than a day. Query whether the framers would have been willing to impose an obligation of attendance in court for six to twelve months upon the citizens.

nopolize the market and, if so, what damages are attributable to the attempt.⁷⁰

Separating issues in this way — should it turn out that this is required by due process — might substantially simplify the jury's task. It could also shorten the period of required jury service since the jurors would not have to hear evidence that bears only on matters taken from them. In some cases, however, so much of the evidence will relate to both court and jury issues that little will be gained by severing the evidence. In these circumstances, the jury might hear the entire case and render an advisory verdict on the issues that have been committed to the judge. If the jury agrees with the trial judge, both the judge and the appellate courts can be more confident of his decision. If the jury disagrees with the judge's holding, the judge has reason to reconsider his decision. In the latter instance, the judge should also take particular care to justify the result that he reached since the disagreement will alert the appellate court to a possible error below.⁷¹

III. RESEARCH STRATEGIES

Propositions One, Two, and Three suggest that courts should approach the question of whether a right to jury trial exists in complex legal actions with a strong presumption favoring that right. The seventh amendment and the values that its drafters sought to promote require at least that much deference. Proposition Four suggests that deference to the seventh amendment does not ultimately resolve the jury trial issue. The ultimate decision should reflect the answers to a series of empirical questions: Can the jury deal rationally with the issues that arise in complex litigation? Can a judge deal rationally with these issues? Can the system of litigating complex cases be changed to increase the probability of rational verdicts? If we can bring only hunches and intuitions to bear on these questions the seventh amendment's clear command should prevail. But the possibility that juries are befuddled by complex cases is real enough, the argument that judges can deal rationally with material that confuses

70. See Jorde, *supra* note 3, at 76.

71. Indeed, the advisory verdict may prove so desirable that courts might want to forgo those economies that are available when an issue is withdrawn from a jury and seek advisory verdicts on all matters that are thought too complex for lay decision-making. Were this done, we could develop some excellent empirical information on whether there are indeed issues in complex civil litigation that exceed the jury's capacity for rational decision-making. A potential difficulty with this approach is that charging juries with respect to matters on which their judgment would only be advisory would make their task more difficult and might cause confusion when they deliberate on matters over which they have the final say.

jurors is plausible enough, and the due process interests of affected litigants are important enough to justify a serious effort to replace intuitions with sound empirical evidence.

Accumulating a body of empirical evidence of sufficient quality to justify judicial reliance will not be easy, but there are ways to shed light on the relevant issues. In Part IV of this paper, I shall suggest a number of possible reforms and discuss ways to evaluate their effects. In this Part, I discuss what appear to be the most promising general techniques of evaluation.

Four strategies can help resolve the relevant empirical questions. The first and most basic relies on the records of completed cases. Researchers can read these records to ascertain the kinds of evidence presented in complex cases and to understand why complex litigation often requires months of trial time. Familiarity with existing records will be most important in exploring ways to simplify trials, but it will aid in answering other questions as well. It is also needed for the intelligent implementation of other strategies. Major obstacles to working with records include acquiring them and finding researchers able to evaluate the material intelligently. For many purposes, subjective judgments must be made. Whatever the purpose, steps should be taken to ensure that such judgments are reliable — *i.e.*, that material will be judged similarly by different observers. This means that much of the material must be read by at least two persons.

A second strategy involves interviewing judges and jurors. This will be most helpful in exploring the comprehension problems posed by complex litigation and in understanding the kinds of evidence that different fact-finders think crucial. Securing the cooperation of fact-finders, however, may prove difficult. Judges are known to be reluctant to sit for lengthy interviews, and this reluctance may be exacerbated when the interviews are designed in part to evaluate judicial competence. Jurors will probably be more willing to be questioned, but interviews with individual jurors will not allow the crucial comparison, which is between the understanding of the judge and the understanding of the jurors as a group. Interviews with the jurors as a group may be difficult to arrange. Not only is it hard to find a time when several unrelated individuals can get together, but also crucial jury members may be unwilling to participate. The most competent may also be the busiest, and so may be unwilling to allocate further time for research, while dissenters, who often contribute

disproportionately to group discussions,⁷² may have found the experience unpleasant enough that they are unwilling to relive it, even in the interests of science.

Substantial memory problems may also confound the interview strategy. Once the trial has ended, both the judge and the jurors may either forget crucial information or distort information to make it more congruent with the verdict rendered. Such failures of memory may not have affected the decision, for they may have occurred only after a verdict was returned. Indeed, the seriousness of the actual task may have led the fact-finders to resort to notes, transcripts, and other memory aids that will not be used in later interviews. This memory problem means that interviews concerning less recent cases may be useful only to learn such gross information as whether the judge agreed with the jury's verdict or which jurors were the most influential. Researchers should, therefore, plan interviews while cases are being tried, and conduct them at the earliest opportunity.

A third technique that might prove valuable is the use of shadow juries. Shadow juries consist of people eligible for jury duty who attend the trial at the request of an experimenter rather than of the court.⁷³ If the judge cooperates, the shadow jurors can be treated very much like actual jurors — sitting in a special location and leaving the courtroom whenever the actual jury is excused. Because shadow jurors can be interviewed either individually or in a group at any time, and can be asked to deliberate on specific matters when the trial has recessed, the technique is an especially promising way to research the problems posed by different aspects of a complex case.

The extent to which shadow juries mimic the dynamics of actual juries is affected to an unknown degree by the fact that shadow jurors know that nothing turns on their verdict. This poses special problems when trials are long and complex since responsibility may be an incentive to pay attention. If so, differences between actual and shadow juries may become greater and greater as trials progress. Shadow juries may also be affected by the monitoring process. Researchers can learn most from the shadow jury by interviewing the jurors throughout the case and by observing periodic deliberations. But the more closely shadow jurors are monitored, the more their

72. C. Hawkins, *Interaction and Coalition Realignment in Consensus-Seeking Groups: A Study of Experimental Jury Deliberations* (August 17, 1960) (unpublished doctoral dissertation in University of Chicago Library).

73. See, e.g., S. MCCABE & R. PURVES, *THE SHADOW JURY AT WORK 2* (Oxford University Penal Research Unit Occasional Paper No. 8) (1974); Zeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 492 (1978).

experience will diverge from that of the actual jurors, and the less confident we can be when generalizing from a shadow jury to the jury responsible for a case.

However, in many complex trials a shadow jury will be available that does not have these deficiencies. Because jurors may become unavailable during the course of a lengthy trial, judges hearing complex cases may seat as many as six alternate jurors.⁷⁴ These jurors listen to the entire trial knowing that they might have to decide the case. They are in fact actual jurors. If, after a case goes to the jury, excused alternates form a group to deliberate, researchers monitoring their deliberations could gain a unique insight into the capabilities of ordinary jurors. If the deliberations of alternate jurors and their responses to postverdict questioning were similar to those of shadow jurors who had been monitored throughout, there would be good reason to believe that the study of shadow juries allows substantial insight into the workings of the jury system.

A variant on the shadow jury, which to my knowledge has never been tried, is the shadow judge. Researchers could pay retired judges or practicing lawyers to observe complex litigation and evaluate their ability to comprehend the evidence and the legal issues presented. There are obvious drawbacks. Retired judges may be less alert than active judges, and lawyers who could be paid enough to forsake their practice for social research are not likely to typify the class of lawyers that ascends the federal bench. Nevertheless, the study of shadow judges may provide some interesting insights into the differences between both professional and lay fact-finding and individual and group decision-making.

The fourth research strategy is simulation, ordinarily an excellent way to study jury processes.⁷⁵ In a good simulation, the researcher develops a credible videotape of a trial, recruits subjects more or less at random from the juror population, and manipulates variables with precision. For example, one can study the effects of different decision rules by instructing some mock juries to reach unanimous verdicts and telling others, which witnessed the same taped trial, to reach 9-3 decisions. Or one can measure the utility of limiting instructions by confronting some mock juries with inadmissible evidence followed by an instruction to disregard and others with the same evidence but no instructions. For all practical purposes, how-

74. FED. R. CIV. P. 47(b).

75. See, e.g., R. HASTIE, S. PENROD, & N. PENNINGTON, *INSIDE THE JURY* (in press); M. SAKS, *JURY VERDICTS* (1977); R. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* 34-42 (1967); Hawkins, *supra* note 72.

ever, realistic simulation is impossible if realism requires evidence so voluminous that it takes months to present. Both the production cost of the required tape and the cost of acquiring subjects are likely to be prohibitive.⁷⁶ These difficulties mean that simulations are not a promising tool when trial length is the variable of interest. However, complex litigation poses problems that are not inextricably linked with trial length or voluminous evidence. Simulations are a way of exploring such problems. For example, simulation techniques can be used to measure comprehension of current instructions and to suggest possible revisions, to develop understandable ways of presenting expert testimony, and to compare the intelligibility of oral testimony, depositions read by lawyers, and depositions that jurors read on their own.

The methods that I have briefly outlined provide ways of learning about the characteristics of complex cases and about how jurors and judges deal with them. The techniques are not mutually exclusive. Each type of research may be done well or poorly, but there are no fixed standards of quality that must be reached before we can learn from them. What we learn depends not only on the rigor of the research, but also on the problem to be illuminated. Indeed, at this point we know so little about juries and complex cases that simple observation has much to offer. We may also learn from the uncontrolled innovations that lawyers sometimes call "experiments." For example, if in an effort to increase the average educational attainment of juries seated in complex cases, a court were to increase its jury fees to \$100 a day, a pattern might develop that was so strikingly different from previous patterns of jury service that we could with some confidence attribute it to the higher fee.

Courts should be encouraged to try promising innovations. They should also be encouraged to build arrangements for systematic monitoring into their planned change. Without systematic monitoring, we are likely to miss much. For example, a judge who notes that the average education of seated juries went up after jury fees were raised in his courtroom is much less informative than a researcher who reports that in the twenty juries seated before the fees were raised the average educational attainment was 11.9 years, while in the twenty juries seated after the change average educational attainment

76. Paying shadow jurors is also expensive, but simulations typically require many more subjects because the core concern is to measure effects associated with different states of an independent variable. To be statistically reliable, such effects must be measured over relatively large numbers of subjects. The problems and costs of securing subjects are compounded when one is interested in the behavior of groups because each group will count as only one subject for some purposes of statistical analysis.

was 13.2 years. Furthermore, involving researchers in planning for innovation may lead to better conceived innovations and may allow some innovations to be instituted as true experiments which would dramatically increase our ability to pinpoint precise effects.⁷⁷

Before investigating specific ways in which the trial of complex cases can be improved, one should determine whether there is a serious problem of jury comprehension in such cases and, if so, the exact dimensions of the problem. We can illustrate the potential utility of the four techniques identified above by showing how they might be used to illuminate this issue. A concrete example also illustrates potential shortcomings.

An investigation into jury competence should start by questioning judges who have sat in complex cases to determine the incidence and directionality of judge-jury disagreement. A low level of disagreement would suggest that parties in complex cases are not being greatly helped or seriously disadvantaged by jury trial. However, one should be wary about reading too much into such evidence. We have probably not had a sufficient number of complex jury trials to allow reliable statistical generalizations about the incidence of disagreement between judges and juries. Furthermore, a judge's recollections may be colored by the verdict returned. In particular, a judge who thought the case close might report agreement with any jury verdict. It would be far better to have judges report their opinions during the jury's deliberations, but the scarcity of ongoing complex cases means that evidence from sitting judges would be essentially anecdotal.

Judicial evaluations of jury performance may be supplemented by the judgments that experts reach after studying transcript material. If independent experts agree on the appropriate verdicts in particular cases and if their judgments are similar to the jury verdicts, there is good reason to believe that the losing party was not unconstitutionally disadvantaged by jury trial even though we cannot know how the jury reached its verdict. Again, however, the small number of complex cases may preclude statistically reliable generalization. One way to cope with this problem is to examine cases of gradually increasing length and complexity. Jury disagreement with judges and experts may increase as the degree of complexity or the length of the trials increases. If so, there is some reason to believe that complexity interferes with the jury's capacity for rational judgment. If there is no such corresponding increase, there is less reason to attri-

77. See Campbell, *Reforms as Experiments*, 24 AM. PSYCHOLOGIST 409 (1969).

bute disagreements to the complexity of cases, whatever the overall level of agreement. For this reason, information on cases that vary in complexity is particularly important if the jury often disagrees with either the judge or the experts.

A number of problems inhere in using rates of judge-jury agreement to assess jury competence.⁷⁸ One is that if gross measures are used substantial agreement may be expected by chance alone.⁷⁹ A second difficulty is that gross measures are insensitive to differences in cases. For example, the jury might be capable of dealing rationally with complex cases when the evidence clearly favors one side and strikes no emotional chord but not when a case is close or when passions are raised. If the vast majority of the cases examined are clear and unemotional there may be substantial judge-jury agreement, but the agreement may be confined to cases where little would be lost by giving the matter to a judge since any fact-finder would reach the same result. Disagreement in the rare close case, which might reflect confusion in the face of complexity, would be submerged in the overall rate of agreement. A third problem with assessing jury competence by rates of judge-jury agreement is the tendency to treat the judge's opinion as the "correct" one, and to regard contrary jury verdicts as deviations from a norm.⁸⁰ Yet it is not obvious that the judge's decision will be nearer the ideal than the jury's. Group discussion, for example, can nullify the biases that may dominate individual judgments and enables groups to perform better than individuals who are more competent than any one member of the group.⁸¹

Using expert evaluation is a more promising way of deciding whether the jury's judgment is defensible, but it too has its limitations. Experts often have biases that can affect their readings of the facts. Strong differences of opinion seem particularly prevalent among economists, who are the appropriate professionals to evaluate the antitrust cases that have provided the primary battleground for

78. The first two problems that follow may also confound expert-jury or judge-expert comparisons.

79. If both judge and jury failed to understand the evidence and instead decided randomly, one would expect agreement on half the cases. If one or both fact-finders misunderstands in a systematic way or responds to irrelevant aspects of the case the expected level of agreement — assuming no rational processing of relevant information — would depend on the kinds of errors to which each fact-finder is susceptible and the mix of cases.

80. KALVEN & ZEISEL, *supra* note 37. Cf. J. BALDWIN & M. McCONVILLE, *JURY TRIALS* (1979). For a discussion of this and other problems with the research of Baldwin and McConville, see Hastie, *Judgment Non Obstantibus Datis*, 79 MICH. L. REV. 728 (1981).

81. See Kaplan & Miller, *Reducing the Effects of Juror Bias*, 36 J. PER. & SOC. PSYCH. 1443 (1978). See generally Haft, *supra* note 59; Lempert, *supra* note 10.

those contesting the right to jury trial. Indeed, finding "neutral" economists may be so difficult that one must demand a consensus among economists identified with different schools of thought before treating expert judgments as normative. In cases where it proves impossible to develop a consensus, it would be difficult to conclude that juries had acted irrationally. A second drawback to the use of expert judgments is that they might be based largely on information known to the expert but never introduced into evidence or never properly communicated to the jury. A party cannot complain that jury irrationality produced a mistaken verdict if the verdict results from his failure to present evidence rather than the jury's failure to consider rationally what was presented.

Where both judge and expert disagree with a jury's verdict there is, of course, considerable reason to believe that the verdict resulted from the jury's failure to understand the evidence. But if judges share experts' biases or are similarly susceptible to the influence of nonrecord information, one might expect that where judge and jury disagree experts will more often take the side of the judge regardless of what is rational. Furthermore, disagreements may reflect value judgments that are properly made by the jury in close cases.⁸²

Thus, while measures of judge-jury or judge-expert-jury agreement are a first step in determining whether juries can deal rationally with complex cases, an adequate judgment on this point depends on insight into decision-making processes. Interviews are a potential source of insight. Jurors and judges can be asked to identify the important issues and the crucial evidence in the cases they heard. Their judgments can be compared with the judgments of experts familiar with the case and with the judgments of the lawyers involved. In addition, interviews can probe understandings of specific issues and identify ways in which conflicts in the evidence have been resolved.

Difficulties with the interview approach have already been mentioned. First, because of the difficulty of securing cooperation from judges, it may be that only jurors are interviewed. If this occurs, the temptation will be to contrast juror responses with an ideal of full understanding rather than with the level of understanding that the judge would in fact have achieved. Second, jurors are likely to be interviewed individually, thus underestimating the wisdom and rationality that can emerge from group discussion. Third, memory

82. KALVEN & ZEISEL, *supra* note 37, at 104-449, thoroughly explore the sources of judge-jury disagreement in criminal cases. Often the source of disagreement is the different values that judges and jurors bring to cases. Value differences are most important when cases are close.

problems will be severe unless the interviews occur immediately after trials have concluded, and even immediate interviews may underestimate the capacity of memory that is aided by exhibits, notes, and the special incentives that responsibility for an important decision may bring. Finally, there can be several routes to a rational decision. The jury or judge may fare poorly by the route that the interviewer wishes to explore, but the actual verdict may have resulted from an equally rational way of approaching the evidence and evaluating the legal issues.

The above difficulties are less substantial when interviews are used to probe the processes by which individuals or groups reach decisions. Judges may be requested to lay out their decision-making strategies. For example, it would be interesting to learn how a judge decided which exhibits to review and what transcript material to read as he pondered his decision. Jurors may be asked how their juries functioned, whether and how labor was divided, who the most influential members were, what impasses developed, and how they were resolved. If in a particular case we learn that the jurors seriously examined the issues at the core, their decision-making process was probably sufficiently rational to comport with due process no matter what their verdict. But if the jurors report that the instructions were perceived as meaningless or that crucial expert testimony was ignored because no one could understand it, the right to jury trial in complex cases would be properly vulnerable.⁸³

Monitoring shadow jurors on a day-to-day basis also allows researchers to determine what tends to be understood or misunderstood. If the shadow jurors or some subset of them are allowed to deliberate, the likelihood that group discussion will clear up misunderstanding can also be evaluated. Daily monitoring is important because a juror's understanding of evidence offered at the beginning of complex cases may not be retrievable by interviews at the end. Yet early understanding may color the way in which subsequent information is processed. Although the final gestalt is not equal to the sum of its parts, if jurors or judges systematically misunderstand evidence as it is presented, there is a good chance that the final verdict will reflect that misunderstanding.

Simulations allow a more precise test of how jurors comprehend different kinds of evidence. One might, for example, recreate the expert testimony given in an actual case and present it to a variety of potential jurors. The number of subjects who may be exposed to the

83. One would still want to know how judges utilized the instructions and testimony.

testimony makes it possible to reach statistically reliable conclusions about such things as the difference between group and individual judgments or the relative comprehension of well-educated and less well-educated decision-makers. The problem, of course, is to know exactly what to make of "reliable" results, for the import of the differences between a simulated portion of a trial and the same evidence presented in the context of an actual case is unclear. But if simulations reveal considerable misunderstanding that is not ameliorated by deliberations, there is good reason to believe that actual juries will be confused. Conversely, if mock jurors can comprehend technical evidence, actual jurors would probably understand similar evidence although it was offered in a lengthy case.

No one approach to the question of whether juries can deal rationally with complex cases is likely to yield results sufficient to overcome the presumption that jury trials are constitutionally required in complex cases or, conversely, to quiet all doubts about the ability of juries to rationally decide the issues that such cases pose. If research from a variety of perspectives consistently supports the hypothesis of jury rationality, the Supreme Court will have good reason to hold that due process rights are not adversely affected by jury trials in complex cases. But if methodologically different studies converge on the conclusion that juries, unlike judges, cannot deal rationally with the evidence in complex cases, the Court must consider changing the ways that complex cases are conducted or creating a right to a bench trial.

Of course, decent empirical research need not yield unequivocal policy implications. Instead of learning that juries are either competent or incompetent when faced with complexity, we may learn that they appear to do some things well and other things poorly. We are also likely to hear of certain cases in which juries performed superbly and others in which their verdicts were untenable. Observing that juries sometimes perform well and sometimes do not suggests that there are ways to improve the jury system. Natural variation should not be cursed for its tendency to frustrate empirically based policy analysis but should instead be seized upon for the opportunity that it offers.

IV. IMPROVING JURY PERFORMANCE

To improve the jury's capacity to deal with complex cases, one must first identify those features of complex litigation that are associated with poor jury performance. Cases in which juries are reputed to have performed well or poorly provide a possible starting point.

Looking at such cases may reveal differences that provide intuitively plausible explanations for variations in performance. One possibility is jury composition. Research might disclose, for example, that the better juries had more college-educated jurors or fewer retirees. Jury management techniques may also be important. Judges have considerable discretion in conducting jury trials. Among the possible variations are to allow note taking, furnish jurors with daily transcripts, instruct on the law before evidence is received, allow counsel to sum up when testimony on a particular issue is concluded, and submit written instructions to the jury at the close of the case. Case structure is another crucial variable, for some kinds of complexity may cause greater problems than others. For example, the joinder of numerous claims, any one of which is not particularly complicated, may tax the jury's ability more or less than resolving a single highly technical issue. And juries may handle some issues — like damage questions — well, but other issues — like questions of market structure — poorly. Furthermore, the relative incidence of documents and testimonial evidence might systematically affect the jury's ability to comprehend, and the sheer length of trial can deleteriously affect reasoned decision-making. Finally, differences in jury performance may be traced to the ways that lawyers present their arguments. For example, a lawyer in an antitrust case with a solid argument from economic theory and a possible appeal to local prejudice may think the appeal to prejudice more promising than technical analysis and expert witnesses. In these circumstances, a verdict for the opponent may be rational even if the lawyer's technical argument is sound.⁸⁴ Another lawyer may attempt to confuse a jury or overwhelm it with irrelevant evidence. If a judge allows the lawyer to use such tactics and the jury is misled, the lawyer and judge are as responsible as the jury system for the irrational outcome.

Because we have some idea of the problems complex cases pose for jurors, we can suggest procedural changes that might improve jury performance. As we shall see, some promising innovations can be ordered by judges under existing authority, others require statutory authorization, and a few might pose constitutional problems. Many of these involve little additional expense to the parties, and some might save money. To the extent that innovations are designed to preserve the seventh amendment right to jury trial, there is one constraint: the basic features of the jury system must be retained.

84. Jurors who realize that a lawyer is attempting to arouse their prejudices might sensibly conclude that the lawyer does not believe his case sound, and might decide to trust that lawyer's judgment of the quality of his case more than their own judgment.

Some otherwise promising changes may be problematic in this regard. The discussion that follows reviews a number of possible reforms, noting some of the problems that they pose and the kinds of research that would be relevant to their evaluation.⁸⁵

A. *Restructuring Cases*

Complex cases are problematic for the legal system because they tend to involve lengthy trials, multitudes of issues, numerous parties, technical evidence, and difficult questions of law. Reducing the length and complexity of trials is likely to increase the quality of fact-finding in both bench and jury trials. Reforms designed to do this should be explored even if judges and juries are currently meeting the minimum standards of constitutionally adequate performance.

One technique for reducing complexity is to limit the amount of evidence that the parties can present. Rule 403 of the Federal Rules of Evidence authorizes judges to do this by excluding evidence that is cumulative or that promises to be excessively confusing or prejudicial.⁸⁶ Although judges no doubt have appropriate occasions on which to exercise their authority under rule 403, relying on this rule to attack the problem of complexity offers only limited prospects for improvement. Confusion or prejudice are excessive under rule 403 only if they substantially outweigh the probative value of the evidence. Probative value, however, typically depends on the shape of the case to come, and the more complicated the case the more difficult the task of anticipating what future evidence will show. Even redundant evidence is not necessarily cumulative, if by cumulative we mean evidence that has no additional probative value. As long as the source of the earlier evidence was not completely credible and fully understood, redundant evidence may enhance rational fact-finding.⁸⁷ Thus, judges exercising discretion under rule 403 invite

85. Insight into factors that distinguish juries of greater and lesser competence may be tested by simulation and other means. Information gleaned from the study of completed cases may also be communicated to the bench through speeches, articles, and the like. Judges who draw on such wisdom should do so in a systematic fashion. Innovations should be carefully specified and procedures for monitoring their effects should be in place before they are attempted. Districts that regularly handle complex cases would be well-advised if they had social scientists on their staff to monitor the apparent effects of various innovations and suggest revisions where appropriate. Ideally, innovation would be instituted in an experimental fashion. See Campbell, *supra* note 77.

86. FED. R. EVID. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

87. Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1096 (1977).

reversible error and risk inappropriately harming the case of one or both of the parties.

A better way of proceeding is to let the parties present whatever otherwise admissible evidence they wish as long as they do not exceed specified time limits.⁸⁸ If the overall time limits provide the parties with a fair opportunity to present their case, allowing the parties' attorneys to determine the relative importance of the evidence available to them avoids a potential source of reversible error. It also forces attorneys to organize their cases in a tight, coherent fashion. The resulting organization may contribute more to the quality of the fact-finder's decision by clarifying core conflicts than does the sheer shortening of the case. Finally, limiting the length of cases may enable the court to seat a more representative and more able jury. Not only are people more likely to be available for shorter trials than for longer ones,⁸⁹ but if the likely termination date of the trial is known, people may consent to jury duty who would find some way to escape an open-ended commitment.⁹⁰

The major drawback to this strategy for reducing complexity lies in its potential unfairness to one or both of the parties. If a party needs forty days to present the essential evidence in his case and is only allotted thirty days, the verdict will not reflect the strength of his position. To some extent this problem can be alleviated by allowing extra time to parties who can show that their case requires further evidence and that they have not wasted a portion of their original allotment.⁹¹ If such extensions are not strictly controlled,

88. This technique has been used. *See* *SCM Corp. v. Xerox Corp.*, 463 F. Supp. 983, 987-88 (D. Conn. 1978).

89. Although trials of a month or two are exceptionally long, in many jurisdictions terms of jury service have historically been of this length. Thus, people have often been called upon to make themselves available for jury duty over long periods of time. There is of course considerably more flexibility in a two-month jury term than in a two-month trial, since those on the venire are not expected to sit continuously throughout the term and particular events that prevent jury service for a week or two during the term can be accommodated. Nevertheless, some courts have obliged jurors to report for jury duty every day during their term and a morning might be lost to such reporting. Furthermore, service on a number of different juries during each term was common. Although these patterns are changing with modern systems of jury management, it may be that if trials can be confined to two months or less, the effect of long trials on the composition of petit juries will not be as severe as is usually imagined.

90. Jury trial is an obligation, so it might seem that willingness should have little to do with service. In practice, those who do not want to serve on specific trials can usually find some ways to avoid the obligation. This may be fortunate. Because lengthy complicated trials require substantial attention over long periods of time, it is probably unwise to coerce participation in such cases.

91. There is the additional problem of measuring how the allotment is to be used. Cross-examination time, for example, should be part of the cross-examiner's case, or else one party could use up the other party's time by dilatory tactics. However, the plaintiff will typically not cross-examine any of the defense witnesses until his entire case has been presented. Thus, the plaintiff would wish to reserve time from his case-in-chief for later cross-examination. But this

however, the effort to limit the time available to parties would still prove fruitless. An even more difficult problem exists if there are substantial differences in the time that parties need to present their cases. If, for example, the plaintiff's case cannot be fairly presented in less than thirty days but an adequate defense requires only fifteen days, the plaintiff may be substantially disadvantaged if each side is allowed thirty-two days for its case-in-chief.

The question of whether it is desirable to shorten trials by limiting the time available to the parties can be fruitfully informed by empirical research. Since some judges have imposed time limits, one can learn how the participants responded to the procedure. The views of the attorneys will be particularly interesting. One would want to know how their tactics were affected by the time limitations, and whether they thought that the limitations affected the verdict. Reports that time restrictions neither interfered with case presentations nor had any obvious effects on verdicts would provide some reason to urge the wider adoption of this technique. But such favorable responses would not necessarily mean that the technique is appropriate in all lengthy cases. Not only do we have too little experience with such restrictions to allow safe generalization to the range of complex cases, but restrictions may have been disproportionately imposed in cases where the attorneys were unlikely to have required more than the allotted time to present their evidence.

The feasibility of time restrictions could be further checked by looking at cases where the parties were unconstrained by time limits. Experienced attorneys could evaluate case records to determine how much material might have been eliminated without substantially undercutting the probative force of the parties' positions. While *post hoc* examination is likely to reveal opportunities for condensation that would not be obvious to the litigating attorneys, if the opportunities are substantial one may conclude that case-time limitations will not necessarily impose burdens that interfere with just decision-making. Retrospective analysis of this sort can also help determine whether case-time limits should be presumptively the same for both parties. If, for example, the essence of the defendant's case consistently takes less time to convey than the essence of the plaintiff's,

gives the defendant an advantage in that he can adjust his cross-examination in light of the case-in-chief that he intends to present. The plaintiff can only guess at the optimum balance between direct and cross-examination. Possible solutions include not charging cross-examination time to either party and scheduling additional days to allow for this or charging a fixed portion of the cross-examination to the party presenting the witness with additional cross-examination being the responsibility of the cross-examiner. The latter method would not eliminate the defendant's advantage, but might effectively minimize it.

courts might want to allocate more time to plaintiffs than to defendants.⁹²

In the statistician's ideal world, evidence presented in a court case would be a random sample from a normally distributed range of facts that centered around the true state of affairs jurors were required to discern. Trials in this world could be substantially shortened because one could begin to estimate, with remarkable precision, what the distribution of all facts would look like after the first fifty or sixty facts had been introduced. Trial evidence is, of course, not drawn randomly from a normal distribution of facts. Nevertheless, if the evidence on each issue is ranked from the most to the least probative, it may be that the probative impact of evidence drops sharply after the first few facts on an issue are offered. If so, even a dramatic curtailment in the length of complex trials might not affect the resulting verdicts. This possibility can be tested experimentally by having experienced attorneys pick from the records of complex cases the evidence that they would present if constrained by a three-day time limit, a five-day time limit, an eight-day time limit, and so on. These reconstructed records could then be given to mock juries instructed to deliberate to decisions. This experiment might show that, after a certain point, both the verdicts reached and the general tenor of the deliberations remained more or less the same despite the introduction of additional noncumulative evidence. If so, there is further reason to believe that little need be lost by the imposition of reasonable time limits.

For symbolic reasons and because degrees of possible curtailment would differ with the closeness of cases, one would not want to slash time allocations as drastically as such research might suggest. However, if the hypothesized pattern of diminishing returns were shown to exist, lawyers might wish to try a "mini" version of their case to a jury and use the resulting verdict in settlement negotiations. Since such "minitrials" could obviate the need for more protracted proceedings, courts might treat them much like actual cases. Settlement would be further encouraged if, as with certain other schemes of pre-trial arbitration,⁹³ the party rejecting the preliminary adjudi-

92. Such allocations should be presumptive only because of their facial inequality. If a specific defendant — to continue the example — can demonstrate a need for more time, it should be granted. An alternative, and perhaps a symbolically more acceptable way of proceeding, is to allocate equal amounts of case-time to the parties but allow each party to seek more time. In passing on requests for more time, the judge would bear in mind that studies of past cases indicate that — let us hypothesize — it takes plaintiffs, on the average, 20% longer than defendants to present their core case.

93. Wayne County, Michigan, for example, instituted a voluntary mediation program in 1971 to deal with automobile negligence cases. If a party rejected the mediation board's evalu-

cation had to pay the opponent's attorneys' fees if the judgment after trial was substantially the same as the preliminary one. Unlike other schemes, this approach preserves the virtues of jury trial in a non-binding procedure.

Case structure may also be simplified by eliminating parties and dividing issues. If a case is too complicated for a jury only because liberal joinder has allowed the consolidation of related actions, the seventh amendment should be read to require severance once there is a demand for a jury trial. Because the right to join actions is not constitutional in origin it must be subordinated to the right to jury trial. Although denying the otherwise permissible joinder of claims could increase the costs of litigating all claims, several factors suggest that the increase may be smaller than one might imagine. First, the necessary reduction in complexity may still allow large numbers of cases to be tried together. Presumably, each block of cases would be more homogeneous than the original group of joined cases, allowing briefer and better focused cases likely to improve the quality of jury justice within blocks. Second, if the same jury sat on all blocks of cases, evidence presented in earlier blocks would not have to be repeated in full. Finally, the severed actions might well be settled on the pattern established by the first case or block of cases.⁹⁴

A third way of restructuring trials to simplify the jury's task is to separate issues for decision. This can be done either by seeking a series of separate judgments at the end of the trial or by separating the evidence on important issues and receiving verdicts on those separate issues as the trial progresses. The end-of-the-trial method, which can be accomplished either by seeking special verdicts or by submitting a general verdict with written interrogatories, does nothing to simplify the trial, but may promote rational verdicts by structuring jury deliberations. Trying issues *seriatim* involves a substantial restructuring of ordinary procedures, but it promises great simplification since juries would consider only one issue at

ation of damages, that party had to pay the actual costs of a subsequent trial unless the results were at least 10% more favorable than the mediation board's judgment. WAYNE COUNTY (Michigan) Cir. Ct. R. 21.

94. Research on settlement patterns is desirable regardless of its constitutional relevance, for even if joinder did not threaten to make cases too complex for juries, trials limited to single parties and issues or closely related parties and issues would have their advantages. They are shorter, less burdensome to the courts and litigants, and, perhaps, more satisfactorily resolved. The question is whether these benefits are outweighed by the need for trials in the unjoined cases or whether those cases are likely to be settled. Because trials involving only some of a number of related causes of action occur today, the information on settlement patterns needed to evaluate this tradeoff is currently available. One must also determine the extent to which it is the law of collateral estoppel rather than the example of an earlier judgment which accounts for settlements along the lines of a previously decided case or group of cases.

a time.⁹⁵ It could also shorten trials since an early decision might foreclose the need for further litigation.

Trying issues seriatim, however, has an unattractive side. It is likely to change the balance of advantage in jury trials, and it prevents the jury from performing some of the functions that the framers of the seventh amendment sought to preserve. It forces juries to decide issues before they have a perspective on the entire case, limits the juror's understanding of what is at stake at each decision point, and may change the way that evidence is viewed. For example, a witness who appears credible when testifying on one issue might appear less reliable if his testimony were not so confined. Moreover, this procedure, like all special verdict procedures, systematically disadvantages plaintiffs who must prevail on each question to receive an overall recovery.⁹⁶ If the jury reports separately on each issue, the problem is even more acute than when special verdicts are requested at the close of a case because jurors contemplating a series of special verdicts are more likely to see inconsistencies that will lead them to rethink mistaken judgments.

Separating out issues for decision raises so many serious problems that it should be treated as a last resort, appropriate only if the jury cannot deal rationally with complex cases or certain issues in them and less drastic reforms cannot correct the problem. Even then, trying issues seriatim may change the balance of advantage so much and destroy so many of the benefits of the jury system that bench trials would be preferable.

A somewhat less drastic reform, but one that is also suspect because of the inroads that it makes on the jury's prerogatives, is increased reliance on special masters. Rule 53 of the Federal Rules of Civil Procedure permits courts to refer "complicated" issues in jury trials to a master.⁹⁷ In such cases, a master plays a role somewhat like an expert witness, his expertise being his ability to find facts and judge their legal implications. Subject to objections upon points of

95. The extent of simplification would depend on how broadly the trial court chose to define each issue.

96. This may reflect the logic of the law, but if plaintiffs must prevail on each separate issue by only a preponderance of the evidence, it may make deserving plaintiffs the victims of chance. Suppose that the weight of the evidence on each issue favors the plaintiff and the fact-finder's judgment centers, within the limits of random error, around the true probability that the facts are as the plaintiff claims. As the number of issues that the fact-finder considers increases and the evidence on each issue becomes closer, it becomes likely that chance will at some point lead the fact-finder mistakenly to hold for the defendant. Jury dynamics may also have this effect. Where a minority has given in on a series of issues, the majority may defer to them on a question where the evidence seems close, not realizing that this will destroy the plaintiff's entire case.

97. FED. R. CIV. P. 53.

law, the master's report may be read to the jurors, who are then instructed that the master's findings upon the issues submitted to him are evidence in the case, to be treated like any other evidence. The parties may dispute or supplement that report with any admissible evidence, whether or not it was presented to the master.

If parties tend to settle on the basis of masters' reports, the use of masters under rule 53 serves more to take cases away from juries than it does to simplify them or to render verdicts more rational. Where the masters' reports do not induce settlement, they may complicate matters, for they are additional evidence for the jury to consider. Since rule 53 provides that "the master shall not be directed to report the evidence,"⁹⁸ the parties must present evidence to effectively contest or support the master's finding. Treating the master's report as evidence rather than as a commentary on evidence means that it is unlikely to enhance the rationality of the jury's verdict unless the master has dealt with the matter more rationally than the jury⁹⁹ and the jury defers to his judgment.

If the goal of resorting to masters is not to take issues away from the jury by encouraging deference to an "expert" but to simplify complex trials and promote informed jury judgments, there are better ways of using masters than those authorized by rule 53. What might be most helpful to the jury is if the master specified exactly what evidence had influenced him and what he saw as the crucial factual conflicts in the case. The parties could then take exception to the master's report just as parties take exceptions to the report of an administrative law judge on appeal to the agency. In this way, the parties would know the specific aspects of their cases that one factfinder had found most or least convincing and could offer evidence that was directly focused on issues that had been identified as crucial. The jury, with some insight into the quality of the master's reasoning, could better judge how much deference his conclusions deserved. In addition, the need to present evidence might diminish substantially. On peripheral matters, the parties might be content to adopt the master's factual findings. On some important issues, they might accept the master's summary of the evidence and dispute only the inferences drawn therefrom.

98. Fed R. Civ. P. 53(3).

99. This may not reflect relative capacity for rational judgment. The lawyers may present evidence to the master in a way that is more conducive to rational evaluation. Here again we lack useful information. We could better judge the costs and utility of resorting to masters if we knew how frequently master's reports induced settlements, how often juries differed with the suggested findings of masters, and in what ways the parties contested and supported the findings of masters at trial.

Because masters' reports will interfere with parties' abilities to structure their own cases and juries might unduly defer to masters' judgments, reference to masters should not become the routine reaction to threatened complexity. But if juries cannot respond rationally to the factual conflicts of complex cases, using masters to clarify the more difficult issues may avoid due process problems and preserve much that is of value.

Parties, of course, do not need masters to define what is undisputed. Stipulations are a common way of removing factual conflicts from cases. Parties in complex cases should be encouraged to admit facts or stipulate to them. The unreasonable refusal to stipulate should be severely sanctioned. Where matters are not indisputable but the evidence leans strongly in one direction parties might be encouraged to trade stipulations. One party would refrain from contesting a matter on which he would probably not prevail in exchange for the other party's restraint in similar circumstances. A judge who has closely supervised pretrial proceedings is in a good position to suggest appropriate trades.

B. *Restructuring Juries*

A second way to enhance the quality of fact-finding in complex cases is to restructure juries. Some changes in jury composition and decision rules, like some methods for reducing complexity, are desirable regardless of whether they are constitutionally necessary because they promise improvements in jury justice whatever the starting point.

First, all federal district courts should return to twelve-member juries. A jury is in many ways as strong as its strongest link. Limiting juries in complex cases to six members halves the resources that the jury can bring to bear on difficult problems.¹⁰⁰ Larger juries may be especially valuable when substantial amounts of damages are in issue because their verdicts are less likely to be extreme than those of smaller juries.¹⁰¹ Those who argue that the jury cannot deal rationally with the issues in complex cases should certainly be required to show that their arguments hold true for twelve-member juries.

In addition to their superior ability to cope with complexity, twelve-member juries protect against one of the hazards of complex

100. For reviews of the relevant literature, see M. SAKS & R. HASTIE, *SOCIAL PSYCHOLOGY IN COURT*, 72-88 (1978); Lempert, *supra* note 10, at 684-89. See also *Ballew v. Georgia*, 435 U.S. 223, 231-44 (1978) (citing articles).

101. See Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 716-19 (1971).

cases — the possibility that an unexpectedly large number of jurors will be unable to hear the entire case. If a jury starts with six members and the maximum of six alternates that are allowed in federal civil trials,¹⁰² either party could force a mistrial if seven had to withdraw over the course of the proceedings. If the trial had begun with twelve jurors and six alternates, the parties could be required to accept the judgment of the eleven who remained at the end since there is now no constitutional right to a civil jury larger than six.

Six-member juries, however, do have one advantage over twelve-member juries in trying complex civil suits: they are less likely to hang.¹⁰³ Hung juries are always costly to the litigants and the court system, but they are especially so if a retrial will take half a year. The differential hanging propensity of six- and twelve-member juries in civil cases is not serious enough to outweigh the benefits of the larger number,¹⁰⁴ but special efforts to avoid hung juries are justified in complex cases because of the immense costs. One possible approach is to construct a civil equivalent of the *Allen* or "dynamite" charge.¹⁰⁵ Coupling an *Allen*-type instruction with an invitation to compromise on damages should be particularly effective in ending stalemates on the liability issue.

Another approach is to allow federal civil juries to return verdicts although two or three members remain unconvinced. The constitutional status of such a reform is unclear because Justice Powell, who provided the swing vote in the cases that upheld the constitutionality of nonunanimous verdicts in state criminal trials,¹⁰⁶ rested his decision on the belief that the fourteenth amendment does not impose the precise mandate of the sixth amendment on the states. The sixth amendment, in Justice Powell's view, allows defendants charged with federal crimes to insist on unanimous verdicts.

If a purely historical test is used, the seventh amendment must be read like the sixth. There are, however, good policy reasons for not

102. FED. R. CIV. P. 47(b).

103. See Lempert, *supra* note 10, at 649; Zeisel, *supra* note 101, at 720-21. In *ILC Peripherals Leasing Corp. v. International Business Mach. Corp.*, 458 F. Supp. 423, 441 (N.D. Cal. 1978), a jury did hang following a trial of five months. The trial judge indicated that in the event of a retrial he would strike the jury demand. 458 F. Supp. at 444-49.

104. In criminal cases twelve-member juries apparently hang about five percent of the time and six-member juries about half that amount. See Zeisel, *supra* note 101, at 720. Hung jury rates are apparently lower in civil cases because of the different kinds of issues involved and the possibility of compromising on damage amounts.

105. See *Allen v. United States*, 164 U.S. 492, 501-02 (1896). The *Allen* charge encouraged deadlocked juries to return verdicts.

106. See *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356, 359-61 (1972).

reading the amendments similarly, and there is precedent for different readings in that *Colegrove v. Battin*¹⁰⁷ allows seventh amendment juries to have as few as six members while the sixth amendment, under Powell's analysis, requires twelve jurors where a crime is charged.¹⁰⁸

From a policy standpoint the crucial difference between civil and criminal cases lies in the burdens of proof. The plaintiff in a civil case must prove his case by a preponderance of the evidence, while the prosecutor in a criminal trial is constitutionally required to prove his case "beyond a reasonable doubt."¹⁰⁹ Although it is not, strictly speaking, illogical to decide by a vote of 10-2 or even 7-5 that a matter is proven beyond a reasonable doubt, there is something disquieting about the judgment. Not only does it imply that the doubts of the dissenters are not reasonable, but it also eliminates the system's major guarantee that the reasonable doubt standard has been met — that twelve people are willing to agree on a verdict. In a civil case, the situation is different. If a plaintiff has proved his case by only a slight preponderance of the evidence, some disagreement among the jurors is to be expected. Certainly the attainment of the requisite burden is not somehow rendered suspect by the fact that not all jurors agree with the majority's assessment. Nonunanimous verdicts in civil cases, therefore, differ from those in criminal cases in that they do not threaten the core values that the jury system was designed to protect.

There is, however, a further problem with allowing nonunanimous verdicts. They affect both the quality of jury deliberations and the way that dissenters are treated.¹¹⁰ For this reason nonunanimous verdicts should not be received, even in civil cases, until the jury has deliberated for a substantial length of time, reported itself deadlocked on more than one occasion, and failed to respond to a civil version of the *Allen* charge. If these procedures are followed and if twelve-member juries are required, nonunanimous verdicts have a place not only in complex litigation but in civil cases generally.

A second approach to restructuring juries recognizes that the qualities of those who serve as jurors affect the quality of jury deci-

107. 413 U.S. 149 (1973).

108. The issue of whether the Constitution allows criminal juries in federal cases to consist of fewer than 12 jurors has not yet arisen. Justice Powell was not on the Court when *Williams v. Florida*, 399 U.S. 78 (1970), was decided.

109. See *In re Winship*, 397 U.S. 358 (1970).

110. See *M. SAKS*, *supra* note 75, at 20-24.

sion-making, and so emphasizes juror selection. The time demands of complex cases mean that employed workers tend disproportionately to be missing from the juries that hear them.¹¹¹ This is unfortunate because the employed include people with special knowledge regarding the issues that the jury must resolve as well as higher status, better educated individuals who, when they sit on juries, tend to make particularly valuable contributions.¹¹²

The most important step in inducing more able people to serve on juries is, no doubt, to increase the amenities associated with jury duty. Paid parking, a pleasant juror lounge, or a lifetime exemption from further jury duty might all increase people's willingness to serve for extended periods of time. But the most important "amenity" is almost certainly the fee that jurors are paid. Many workers cannot afford extended jury duty unless their employment contract provides for salary continuation, and fees must be quite substantial to compensate individuals who hold well-paying jobs. One way to raise fees is to match — within certain limits — jurors' pre-existing salaries, but the resulting differences in compensation could undermine jury morale. Another approach is to pay the usual jury fees for the short period of jury service that can reasonably be demanded of any citizen, but to raise compensation dramatically after that. If, for example, jury fees were raised to \$200 a day after the first week of trial, only a small fraction of the population would suffer such a substantial loss that it would be unreasonable to require them to serve. Less drastic fee increases would be necessary if the state and federal governments exempted jury fees from taxes. This would allow equal payments while making juror compensation more valuable to those in higher income brackets.

Fees high enough to encourage, or at least not penalize, jury duty by better educated, employed individuals would be costly. With jury fees of \$200 a day, a twelve-person jury with three alternates would cost \$15,000 a week in fees alone. But costs of this magnitude are not prohibitive in large-scale complex cases, where the amount at stake can be half a billion dollars or more and lawyers' fees can run into the millions of dollars. Jury fees are currently limited by statute, but given the discretion that courts have to charge other extraordinary

111. See Comment, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 CONN. L. REV. 775, 776-83 (1978).

112. See A. ELWORK, B. SALES & J. ALFINI, MAKING JURY INSTRUCTIONS UNDERSTANDABLE (in press) [hereinafter cited as A. ELWORK *et al.*]; R. HASTIE *et al.*, *supra* note 75; James, *Status and Competence of Jurors*, 64 AM. J. SOC. 563 (1959); Strodtbeck, James & Hawkins, *Social Status in Jury Deliberations*, 22 AM. SOC. REV. 713 (1957) [hereinafter cited as Strodtbeck *et al.*].

expenses to the parties, a limited grant of discretion to raise jury fees in lengthy cases would not be a startling innovation.¹¹³

Paying substantial jury fees might have virtues beyond its recruitment potential. First, if jurors were generously paid, they could be expected to treat jury duty as a full-time job. They might, for example, be asked to spend otherwise free time studying exhibits in the case or reading transcripts of prior testimony. Second, if juror fees were chargeable to the parties as nontaxable costs, each party would have an added incentive to pare his case within the limits of effective presentation.¹¹⁴

It is possible to do more than merely make it feasible for better educated, employed people to be represented on juries in something like their population proportion. One might require "blue ribbon" juries in complex cases on the theory that jurors who meet minimum standards of education or experience are more likely than others to understand the evidence.¹¹⁵ Unlike the above reforms, which are desirable even if the jury currently has sufficient competence to satisfy the fifth amendment's due process standards, the blue ribbon jury should be treated as a "last resort." We should move in this direction only if ordinary juries cannot rationally deal with complexity because those traits of education and status that distinguish blue rib-

113. Under FED. R. CIV. P. 54(a), trial courts have considerable discretion in deciding what fees and costs to charge to the parties. Special costs attributable to the complexity of cases, such as the costs of daily transcripts and the compensation of Masters appointed by the court under FED. R. CIV. P. 53, are taxable to the losing party. District courts may also proceed by local rule to specify that certain items will or will not be routinely taxed as costs. See generally 10 C. WRIGHT & A. MILLER, *supra* note 54, at §§ 2665-2679. Jury fees, however, are now limited to \$20 a day for the first 30 days of attendance at the place of trial or hearing and, at the discretion of the trial judge, to \$25 a day after 30 days devoted to one case. 28 U.S.C. § 1871(b)(1)-(2) (Supp. III 1979).

114. Even with generous fee schedules and other valued amenities, there may be difficulties in securing anything like the proportionate representation of the most promising jurors. Fees comparable to or in excess of ordinary earnings may still not compensate jurors for the career opportunities that are lost by a lengthy period of jury duty. In particular, an employer may feel an employee is disloyal if he does not seek to avoid a responsibility that will take him away from his job for several months. However, careers usually survive lengthy illnesses. If losing time to extended periods of jury duty came to be perceived of as being as involuntary as losing time to illness, lengthy jury service would not imply disinterest in career so the opportunity costs of such service might not seem as great as they do now.

The benefits of inducing better qualified people to serve on juries may be undermined if one or both lawyers use peremptory challenges to eliminate those who appear the most competent. This is a difficult problem to deal with since indications of competence, such as higher education, may also be indicators of class bias — an appropriate ground for the exercise of peremptories. If a lawyer appears to be targeting his peremptories at jurors who appear unbiased but competent and if the lawyer is unable to provide another plausible explanation for his behavior, it may be appropriate for the judge to replace the challenged juror with others in the venire who have similar indicators of likely competence rather than with those who emerge at random. However, this is a drastic step given important traditions and the association of biases with indicators of status. I am not sure that it is wise.

115. Lunenburg & Nordenberg, *supra* note 3, at 899-900 & n.63.

bon jurors tend to be associated with particular socioeconomic views.¹¹⁶ Moreover, blue ribbon jurors may be more likely than jurors of lesser prestige and attainment to have biases that will be activated by the issues in complex cases and interfere with rational judgment. And although it appears that better educated, higher status jurors are more likely than those of lesser accomplishment to make valued contributions to jury decision-making,¹¹⁷ it does not follow that a jury composed entirely of blue ribbon jurors will perform better than a jury that is socially less homogeneous. As Hastie and his colleagues point out, jurors who participate relatively little in the jury's deliberations may, nevertheless, make valuable contributions when they do speak because they have a perspective that others do not share.¹¹⁸ Incremental contributions to group decision-making do not necessarily reflect individual competence. People with unique perspectives can contribute more to a group than more competent individuals who duplicate the strengths of other members. This suggests that fully blue ribbon juries need never be seated. Even if blue ribbon jurors are superior decision-makers, a jury may reach a sounder decision if only a portion of its members are selected for their blue ribbon credentials. Shadow juries and simulations allow this possibility to be tested.

Should courts start seating blue ribbon jurors in complex litigation, evaluation of the reform would be important. An expensive but promising technique is to sit in each such case a shadow jury representative of those ordinarily called to jury duty. In addition to comparing the verdicts of the shadow and blue ribbon juries, we could (if the actual jurors consented to be interviewed) also learn how well each jury understood the case and how each dealt with the complex issues that arose. If shadow blue ribbon jurors could also be recruited "responsibility bias" might also be controlled.¹¹⁹ Public opinion polling also has a place in evaluating the blue ribbon innovation. Before mandating blue ribbon juries, courts should know how the preconceptions and values of people likely to qualify for

116. Public opinion polls, for example, consistently show strong relationships between political preferences and factors, such as education or employment status, that would differentiate blue ribbon from ordinary juries. See, e.g., G. GALLUP, *THE GALLUP POLL*, *passim* (1972).

117. A. ELWORK *et al.*, *supra* note 112; R. HASTIE *et al.*, *supra* note 75; Strodtbeck *et al.*, *supra* note 112.

118. See R. HASTIE *et al.*, *supra* note 75; James, *supra* note 112.

119. One could also deal with the "responsibility bias" problem by sitting shadow blue ribbon juries in cases heard by ordinary juries. If the shadow blue ribbon jury showed better understanding of the law and facts than the actual jury the difference could not be attributed to the greater attention that might accompany responsibility for the verdict.

blue ribbon service differ from those of other adults. The less the difference between the performance of paired shadow and blue ribbon juries and the greater the value differences between blue ribbon jurors and other citizens, the weaker the case for this reform.

C. *Case Management Techniques*

Changes in the way that cases are handled is a third way to help juries cope with extreme complexity. Again, many of these reforms are desirable even if the difficulties that juries have with complex cases do not deny due process, and some may enhance the quality of jury justice even when cases are not complex.

Jury instructions constitute one area where there is room for substantial improvement. The linguistic difficulties of common instructions have been documented and methods for increasing their comprehensibility have been developed.¹²⁰ Judges in complex cases should carefully consider the instructions that they give, for the issues in such cases are difficult enough to understand when instructions are well drafted. Although instructions may be tailored to the specific facts of cases, many instructions, even those that are to some extent tailored, follow a standard format. Simulation techniques allow researchers to evaluate the comprehensibility of standard instructions and to test reformulations designed to convey the same meaning in simpler language.

Now that we know about the linguistic problems that make jury instructions incomprehensible and know ways to avoid these problems, the redrafting of jury instructions should proceed apace. Regardless of complexity, juries are more likely to reach verdicts faithful to the law if they understand their instructions. In complex cases, clear instructions are particularly important because a principal argument against using juries in such cases is that jurors are unable to understand the legal tests that they must apply. Research designed to make instructions more comprehensible could determine whether (or the degree to which) this accusation is true, and, if so, whether the problem can be remedied.

It may also be desirable to instruct juries on the law before any

120. See A. ELWORK *et al.*, *supra* note 112; Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979); Elwork, Sales & Alfani, *Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 LAW & HUMAN BEHAVIOR 163 (1977); Sales, Elwork & Alfani, *Improving Comprehension for Jury Instructions*, in 1 PERSPECTIVES IN LAW AND PSYCHOLOGY (THE CRIMINAL JUSTICE SYSTEM) (B. Sales ed. 1977).

evidence is presented.¹²¹ This technique can alert jurors to issues that are likely to be crucial, and may help them concentrate their attention on the most important evidence. It is possible, however, that early instructions may lead juries to judge the case prematurely or to ignore evidence that when presented is not obviously relevant to the legal issues highlighted by the instructions. The costs and benefits of early instructions can be tested by a standard simulation technique. Mock jurors can view taped trials that vary only in the time at which instructions are given. If they report less confusion and their deliberations suggest that evidence is considered more rationally when instructions are given at the outset, there is good reason to adopt this technique. Trials used for simulations would, of course, be quite different than the trials of complex cases, but there is little reason to expect the experimental effects to reverse themselves with complexity. If prior instructions seem to enhance the quality of jury decision-making, judges in complex cases may wish to instruct juries on important legal matters as the cases progress — first before the issue is raised by the plaintiff, again when the defendant responds, and finally before deliberations begin.

Another major problem in complex cases is memory. These cases can be so long that the unaided memory is certain to forget much that has transpired. In addition, some of what is recalled will be affected by the natural distortions that occur when information must be retained for long periods of time.¹²²

Memory aids increase the likelihood that material will be accurately recalled. The memory aid that is most commonly suggested is juror note-taking, but I doubt that this is a good idea. The principal danger is not, as is usually argued, that the juror who takes the best notes will dominate discussion. Rather it is that most people do not know how to take notes. While noting one point, jurors may not hear ongoing testimony, or they may record the trivial and neglect more probative information. Moreover, the summarizing that is usually part of note-taking may itself distort what is said. Fortunately, a better memory aid is available. Daily transcripts are routinely produced during complex litigation. Jurors could study these transcripts during recesses or while at home and note what they thought most important. At the close of the trial, the jury might be given an indexed transcript and a list of exhibits to allow quick reference to matters deemed central.

121. A. ELWORK *et al.*, *supra* note 112, at —; Prettyman, *Jury Instructions — First or Last?*, 46 A.B.A. J. 1066 (1960).

122. *See, e.g.*, G. LOFTUS & E. LOFTUS, HUMAN MEMORY 113-15 (1976).

Another way to deal with memory problems is to break cases into smaller chunks. I have already discussed the possibility of seeking verdicts on separate issues as trials progress, and I have suggested that this approach would so severely change the jury system that it should be used, if at all, only as a last resort.¹²³ A related, but less drastic innovation, is to allow jurors to assess the evidence by deliberating periodically during the trial. These assessments should be tentative, and no separate verdicts should be received, for the danger in this approach is that the jury will on the basis of relatively little evidence develop a theory that resists change when counter evidence is received.¹²⁴ Periodic deliberations are most promising where issues are clearly severable. If cases could be restructured so that the defendant's evidence on each issue followed the plaintiff's, the jury could evaluate issues with the evidence clearly in mind. Since verdicts would not be returned, the jurors would not have to reach a consensus in these interim discussions. If tentative judgments were inconsistent with what later appeared correct, the jurors could focus specifically on the inconsistency and decide whether the later or earlier judgment was better informed. The utility of this technique might be tested by the use of shadow juries or by simulations that extend over several days.

Another major threat to rational fact-finding in complex cases is the possibility that crucial evidence will be too technical for lay understanding. Techniques that aid the jury in understanding abstruse testimony and technical documents will lead to better informed decisions.

Perhaps the simplest technique to aid understanding, and one already practiced by a number of courts, is to allow jurors to question witnesses. This can be helpful not only where testimony is technical, but also where jurors think that a crucial issue in the case has not been elucidated by a witness likely to have relevant information. The method for allowing questions is simple. After the parties have finished examining a witness, the jurors write out their questions and give them to the judge. The judge screens the questions to eliminate those that seek inadmissible evidence or are otherwise inappropriate, and puts the remaining questions to the witness. Alerted by the jury's concerns, the judge may also follow up with his own questions.

123. See text following note 94 *supra*.

124. For a discussion of a number of ways in which strong initial theories can lead to irrational decision-making, see R. NISBETT & L. ROSS, *HUMAN INFERENCE* (1980). It appears that the trial is well designed to inhibit undue reliance on early theories. See J. THIBAUT & L. WALKER, *PROCEDURAL JUSTICE* (1975); Weld & Roff, *A Study in the Formation of Opinion Based Upon Legal Evidence*, 51 AM. J. PSYCH. 609 (1938).

Allowing questions in complex cases does more than allow jurors to seek additional information or to probe areas of confusion. The procedure may help maintain juror interest in lengthy proceedings, and may also be a good way to monitor how well the jurors understand the case. If juror questions show good understanding of the evidence and issues, a judge should be restrained in summarizing or commenting on the evidence and should be particularly reluctant to take the case from the jury by a directed verdict or a judgment *n.o.v.* If the questions suggest confusion, the judge may want to use jury control devices more aggressively. Finally, if counsel were shown the unasked questions, they would know what matters were troubling the jurors and might be able to develop admissible evidence that would clarify points of confusion.

Like many of the potential reforms that I have alluded to, it is not clear how well this would work in practice. Jurors may, for example, give disproportionate weight to the evidence that responds to their questions because they feel a stake in this evidence that they do not feel in evidence that the lawyers develop independently. And lawyers may mistakenly change aspects of their cases to reduce only one juror's confusion. Finally, juror questions may take more time than they are worth. Lawyers may typically be good judges of which issues are crucial and may present enough information so that most jurors can infer appropriate answers to the questions that other jurors want specifically addressed. Again our assessment of reform requires empirical information that we do not now possess. Simulation studies, interviews with jurors who have or have not been allowed to ask questions, and analysis of the questions that jurors in fact ask can all aid in evaluating the desirability of this innovation.

Perhaps the most confusing aspect of any case that turns in part on technical issues is the conflict that often exists between the testimony of experts. Most such testimony purports to be scientific, and the lay view of the sciences is that they yield one right answer to difficult questions. If scientists with impressive credentials cannot agree on the implications of the dominant theories in their field, how can a lay jury be expected to reach such a decision?

The most commonly suggested solution to the battle of experts problem is that the court appoint its own "champion" to testify as a "neutral." This reform is undoubtedly oversold. It shares the lay assumption that the scientific implications of evidence are likely to be unequivocal, and implies that the primary reason that parties' witnesses disagree is that they are paid to espouse different positions. In fact, there are often competing theories within scientific disci-

plines, particularly within such forensically relevant sciences as psychology and economics. Even where a theoretical perspective is generally accepted, competent scientists may differ on the implications of particular facts. It is probably more common for experts to be paid because of the positions that they espouse than for experts to espouse positions because they are paid.

A judicially appointed expert may be neutral in the sense that he owes his salary to neither party, but he may have a strong allegiance to a particular theoretical perspective or to a way of reading equivocal evidence.¹²⁵ If the expert's testimony is largely conclusory, it is unclear how that testimony will affect the rationality of the jury's decision. Some will argue that the jury's best strategy is to accept the appointed expert's judgment. Yet because the subject matter is technical and a court-appointed expert's professional biases may be as strong and as controversial as those of the parties' experts, a jury can never be sure when it is rational to defer to apparent neutrality.

I also doubt the value of testimony that reexamines the conclusions of partisan experts and offers an independent judgment of the evidence. If the subject matter is difficult, it becomes likely that the "neutral" expert will interfere with the jury's attempt to evaluate the evidence. The jury is likely to be most tempted to cut short its effort to understand and to uncritically substitute an expert's judgment when comprehension is most difficult. This process yields rational results only when the judgment of the court's expert is right. When the expert's testimony goes to the core of the case and deference to the court's expert is complete, the right to jury trial has, in effect, been suppressed.

There is, however, another role that court-appointed experts can play. They can be used as resource persons for the jury rather than as sources of additional opinions. As such they could outline the theoretical conflicts within their discipline, and tell the jury where the parties' experts fit on the theoretical spectrum. The court-appointed experts could also comment on the credentials of the parties' experts, explaining, for example, the meaning of particular honorific positions or the difference between publishing in refereed or nonrefereed journals. Most importantly they could explain technical language and tell the jurors why, given a particular theoretical perspective, certain facts would be especially relevant. Although court-appointed experts would undoubtedly be influenced by their profes-

125. See Diamond, *The Fallacy of the Impartial Expert*, 3 ARCHIVES OF CRIM. PSYCHODYNAMICS 221 (1959).

sional biases, even in their capacity as educators of the jury, professionals are often able to explain fairly positions with which they do not agree. And much of what the court's expert would tell the jury would be uncontroversial regardless of theoretical perspectives. Ideally, the parties' experts would agree on the neutral expert, thus providing a further expectation of fairness.

Court-appointed experts might also play a role after the case has gone to the jury. If during deliberations the jury was confused or unable to agree about a particular technical matter, jurors might be allowed to question the neutral expert in open court about the source of their confusion or disagreement. The parties might be permitted to examine the expert further or to present their own experts' views as well. If this questioning were confined to probing the meaning of technical testimony, it would help the jurors evaluate complex evidence without encouraging them to substitute an expert's judgment for their own.

D. "Backstopping" the Jury

Where the evidence in a civil case is so clear that only one verdict is reasonable, a judge can take a case from the jury by issuing a directed verdict or reverse a jury's unreasoned verdict by entering a judgment *n.o.v.* Where the evidence is less one-sided, a judge can guide a jury toward what he sees as the correct decision by summarizing and commenting on the evidence and through more subtle cues that may be conveyed while presiding.¹²⁶ If the jury does not respond suitably, a judge can order a new trial when he feels that an injustice has been done.

Thus, if the judge understands the issues in a complex case and follows the evidence, judgments should never be so unreasonable that they could not be rationally supported by a fair reading of the evidence. This does not mean that all sustainable verdicts will in fact reflect good understanding of the law and evidence, but it ensures against egregious failures of rational decision-making. If there is some danger that juries will be unable to evaluate the evidence in complex cases rationally, judges might be encouraged to make greater use of the jury control devices available to them. The most promising of these devices is the right to enter judgment *n.o.v.* because it somewhat paradoxically intrudes least on the right to jury trial. Although it turns the jury's judgment on its head, it does so

126. See Note, *Judge's Nonverbal Behavior in Jury Trials: A Threat to Judicial Impartiality*, 61 VA. L. REV. 1266 (1975).

openly and thus allows for meaningful review of the core issue — was the jury's judgment irrational — on appeal.

It is almost impossible to truly summarize the evidence in complex cases. A useful summary would be so highly condensed that it would necessarily reflect the judge's assessment of what was most important, and so resemble a commentary. Whether such an implicit commentary or the more explicit comments allowed by federal law enhance the rationality of jury decision-making depends in part on the relative abilities of judges and jurors — an unanswered empirical question. Until we are confident that judges deal more rationally with the problems posed by complex cases than do jurors, judges should not increase their use of summary and comment, and jurors should not be encouraged to substitute judicial judgments, as conveyed in commentary, for their own decisions.

There is, however, another use that can be made of summary and comment. Instead of suggesting a view of the evidence, the judge could indicate which disputed matters he considers crucial. In this way, he could highlight conflicts in the evidence without suggesting how the conflict should be resolved. If done skillfully, the jury would have a good sense of the matters most deserving of its attention. If done poorly, the jury might misdirect its energies and miss crucial issues, but at least no verdict would have been suggested to it. The utility of this type of commentary would be enhanced if it were given before the lawyers made their concluding remarks, for then the lawyers could emphasize the evidence and muster the arguments that bore most directly on matters that the judge thought crucial. The lawyers could also serve as critics of the judge, suggesting why the judge's perspective was not necessarily correct and adding to the agenda items that the judge had missed.

Directed verdicts at the close of all the evidence should be avoided in complex cases because they deny jurors the satisfaction that comes from helping to resolve a matter that has occupied their attention for many months. Furthermore, if the matter should not have been taken from the jury, a lengthy retrial will be necessary although had the jury been allowed to deliberate, it would have probably returned the verdict that the judge directed.¹²⁷ The judge might, however, commit himself to a position before the jury concludes its deliberations. If the judge decides which of the possible

127. In *KALVEN & ZEISEL*, *supra* note 37, the authors report that judges agree with juries about three quarters of the time. Where they disagree, cases are usually considered close. When directed verdicts are appropriate, cases should not appear close, so the expected rate of judge-jury agreement would be high.

verdicts is reasonable while the jury is out, his evaluation will not be influenced by his knowledge of the jury's decision. Although the judge may wish to reconsider his position if the jury's judgment differs from his, in considering the inevitable motion for judgment *n.o.v.* the judge should confront the fact that at the close of the case he regarded the verdict that the jury later returned as untenable.

The standard for entering judgment *n.o.v.* is the same as that for a directed verdict. It is appropriate "only where there is no substantial evidence to support recovery by the party against whom it is directed or where the evidence is all against him or so overwhelmingly so as to leave no room to doubt what the fact is."¹²⁸ The standard is strict, but despite the language of some courts, it inevitably leaves leeway for discretion.¹²⁹ If a judge believes that the jury has erred because it has been confused by the complexity of the case, he should resolve all doubts as to the limits of his authority in favor of ordering the judgment *n.o.v.* But in so doing, the judge should state in detail why he feels that the evidence allows only one result. This will allow the appellate court to evaluate the crucial issues and to reinstate the jury verdict if it disagrees with the judge's perceptions. The appellate court is likely to be well-equipped to do this because judgments *n.o.v.* are most likely to be appropriate in complex cases where the position of one party's experts on the implication of the evidence is, as a scientific matter, untenable. This kind of judgment, when presented in the context of a clash between experts, is probably the most difficult for a lay jury to make. Both the trial judge and the appellate court have an advantage over the jury in this respect because they can take judicial notice of the wide range of published materials that bear on the scientific issues.

The judge may also control the jury by ordering a new trial. New trials are available where the trial judge believes that a jury verdict should not stand either because he is convinced that the ver-

128. *Garrison v. United States*, 62 F.2d 41, 42 (4th Cir. 1932). To approach the matter from the other side, the motion for judgment *n.o.v.* should be denied "if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions." *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (*en banc*). See Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903 (1971).

129. It might be thought that the occasion for directed verdicts and judgments *n.o.v.* would be rare in cases with masses of evidence, all of which must be interpreted so as to favor the party resisting the motion. However, the implications of massive evidence often depend entirely on how the evidence fits some scientific theory. If the theory offered by one of the parties is untenable, a directed verdict will be appropriate, however massive the other evidence. The question of whether a party's theory is, in the light of the evidence, so untenable as not to present a jury question is one the trial court can address in the opinion accompanying its grant of judgment *n.o.v.*

dict is mistaken or because he recognizes an error in the trial process that might have distorted the jury's judgment. Since new trials may be ordered despite evidence that supports the jury's verdict, the order for a new trial might appear to be an effective means for avoiding injustice when there are doubts about the rationality of the jury's judgment. But complex trials are exceedingly costly to both the parties and the judicial system, and if a first jury has been confused by the complexity of the litigation there is little reason to believe that the second jury will not be similarly confused. Thus, judges should be receptive to motions for judgment *n.o.v.* when there is a close question whether a jury verdict is tenable and it appears that the verdict resulted from confusion. But when a jury verdict is not so untenable as to justify judgment *n.o.v.*, judges should be reluctant to grant new trials even if they believe the result unfair and attribute the verdict to confusion. The judgment *n.o.v.* is easily reviewable and likely to end the matter. The granting of a new trial, however, will continue what has already been a protracted proceeding — perhaps for years.¹³⁰ The problem is compounded because unconditional orders granting new trials are not considered final judgments and so cannot ordinarily be appealed before completion of the new trial.¹³¹ The cost of relitigating the case can be enormous, and the denouement may be an appellate opinion reinstating the original verdict.

This is likely to be the case even with the partial new trial permitted under rule 59 of the Federal Rules of Civil Procedure since one of the features of complex lengthy trials is the way that evidence and issues are inextricably linked. If this linkage does not exist, as where a damage issue is easily severable from a liability issue, the partial new trial may be a viable way of securing a jury judgment that does not require further lengthy proceedings and is not tainted by confusion.

The case for slightly greater use of the judgment *n.o.v.* as a jury control device may trouble some readers because it appears to assume an answer to the empirical question of whether judges are

130. Even though stakes in complex cases are often huge, the fact of decision may be as important as the decision ultimately reached. Capital markets, for example, may be substantially distorted by the threat of a large liability judgment against a firm. Once the judgment has been entered, the market may be better able to react.

131. For a discussion of the basic "no final judgment" rule and the problems with reliance on appeal by certification under 28 U.S.C. § 1292(b) or resort to extraordinary writs, see 15 C. WRIGHT, A. MILLER, & E. COOPER, *FEDERAL PRACTICE & PROCEDURE*, § 3915, at 593-98 (1976 & Supp. 1981) (final judgment rule); 16 C. WRIGHT, A. MILLER, & E. COOPER, *FEDERAL PRACTICE & PROCEDURE*, § 3930, at 163-65 (1977 & Supp. 1981) (§ 1292(b)); *Id.* at § 3935, at 256-57 (extraordinary writ).

more able fact-finders than juries in complex litigation. But the case does not depend on an affirmative answer to this question. Regardless of which decision-maker is the better fact-finder on the average or which may be expected to do a better job in a given case, the actual performance of judges and juries over a series of cases is likely to range from biased incompetence at one extreme to dazzling insight at the other. When trial is to a jury and the jury's performance is, for whatever reason, incompetent, the judge, even if he is only performing at an average level, may "backstop" the jury and prevent egregious error from infecting the verdict. When a judge trying a case alone performs incompetently no "shadow" trier of fact can step in and order correction.¹³² The argument, therefore, by no means assumes the incompetence of juries — either absolutely or in relation to judges. Properly understood, it is another argument for jury trial. The inevitability of occasional extreme error in any system of human judgment makes redundancy — existing here in the form of a second trier of fact — a desirable characteristic.

CONCLUSION

With increasing frequency, the federal courts are being called upon to resolve a fundamental question in our constitutional scheme for resolving disputes: Should jury trial be required in cases so complex that laypeople cannot find facts rationally in accordance with the law? There are two basic ways to approach this question. The first is by reference to the seventh amendment. We can ask whether it is possible, given the history and jurisprudence of the seventh amendment, to find an exception to the right to jury trial solely because cases are complex. It appears that this question must be answered "no."¹³³ Even if this question were answered in the affirmative, it would not follow that there is a right *not* to have a jury trial.¹³⁴ Yet this is the crucial issue because the availability of jury trial is in dispute only when one party wishes it and the other does not. To find a right to nonjury trial, one must look to another constitutional source. The due process clause of the fifth amendment is the

132. Indeed in bench trials, correction of trial court error may be least likely in the most egregious situation — where a judge is consciously biased for one party because of his views as to the desirability of the law in question. A judge with such a hidden agenda can disguise his motives through a careful presentation of factual findings. Given the mass of evidence in complex cases, it will be difficult if not impossible for appellate courts to review the reasonableness of the trial judge's factual findings.

133. See text at notes 12-31 *supra*.

134. Thus a court may seat an advisory jury in an equity or admiralty case or the Congress could require trial by jury in such cases. See *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963); Note, *The Right to a Nonjury Trial*, 74 HARV. L. REV. 1176, 1176-78 (1961).

obvious source, and to my mind the claimed priority of due process over the seventh amendment is ultimately compelling. If a jury is so unable to understand the issues and evidence that it cannot fairly decide a case and if bench trials would lead to fair decisions, I see no values, including the value of jury nullification, that argue persuasively for jury trial.¹³⁵

However, to prefer the concerns of due process over the specific commands of the seventh amendment requires strong beliefs about the relative capacities of juries and judges to decide complex cases. First, one must believe that juries cannot rationally cope with the facts and law of complex cases. Second, one must believe that judges can react rationally to the problems such cases pose. Yet even these conditions are insufficient. If the defects that render the jury unfit to deal with complex cases are not inherent in the system of jury trial, courts must attempt to preserve the seventh amendment's command by changing the ways that juries are exposed to complex cases so that rational verdicts will emerge. Only if this cannot be done except at extreme cost¹³⁶ or by destroying the very values that the jury system is intended to preserve should a right to strike a jury demand emerge.

We currently know little about the capacity of juries to evaluate rationally the evidence in complex cases or about the capacity of judges to do the same. Nor have we systematically explored reforms that might increase the quality of jury fact-finding. In short, the available empirical evidence does not justify strong beliefs about any of the matters that are crucial to a principled decision. If the Supreme Court were to decide the constitutional issue today, the temptation to assume that complex cases cannot be rationally decided by lay jurors might be overwhelming. The temptation to assume that judges can deal rationally with such matters would be even greater because once the incapacity of the jury is assumed, the possible incapacity of judges becomes psychologically and legally intolerable.

Although a conflict exists between the courts of appeals, the Supreme Court need not rush to judgment. It has two options. The Court can allow the circuits to go their separate ways, and then observe the outcomes of cases brought under different systems.¹³⁷ Or

135. See text at notes 45-48 *supra*.

136. "Extreme" is a relative term. Here it should involve rather high absolute costs since courts are called upon to allocate billions of dollars.

137. The quasi-experiment that the conflict makes possible will be undermined to the extent that plaintiffs can choose the circuit in which they file suit. If there is usually a choice, the result of allowing the conflict to continue will be to concentrate complex cases in circuits recog-

the Court can preserve the issue by holding that (1) *given what we now know, doubts about the capacity of jurors to try complex cases must be resolved in favor of the specific command of the seventh amendment*, and (2) *should it someday be demonstrated that juries, but not judges, cannot respond rationally to complex cases, due process will mandate nonjury trials*. Such a ruling should stimulate social scientists to study the problems of complex litigation, and one may hope that an outpouring of dollars by appropriate funding agencies would also follow.

The empirical questions on which the constitutional analysis should turn may be substantially illuminated by various techniques of social science research. Although no single technique or type of study can provide more than a part of the information needed to reach crucial conclusions, enough different research should allow the Court, perhaps by the end of the decade, to reach the kind of informed judgment that the matter merits.¹³⁸ We might, of course, learn that the fifth and seventh amendments do not clash. This is most likely if we recognize that the most important question in jury research today is not, "Do juries perform well or poorly?" It is, "How may the jury system be improved?"

nizing the right to jury trial to the extent that plaintiffs are disproportionately more likely than defendants to want jury trials.

138. This assumes that the research will be done. It is conceivable and perhaps likely that no concerted effort will be made to develop the information needed for an intelligent decision. In these circumstances the matter should be resolved by traditional legal analysis rather than by armchair speculation. As I have suggested, *see* text at notes 12-38 *supra*, both history and precedent support a seventh amendment right to jury trial in complex cases. Absent empirical research, the proponents of a fifth amendment based exception will not be able to carry their essentially empirical burden of proof. If government and private enterprise (including the proponents of a complexity exception) fail to appropriate the funds needed to illuminate the empirical issue, they will have spoken eloquently about the place which the potential conflict between the seventh and fifth amendments occupies on the national agenda.