

Michigan Law Review

Volume 81 | Issue 3

1983

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Michigan Law Review

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Recommended Citation

Michigan Law Review, *Controlling Jury Damage Awards in Private Antitrust Suits*, 81 MICH. L. REV. 693 (1983).

Available at: <https://repository.law.umich.edu/mlr/vol81/iss3/7>

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Controlling Jury Damage Awards in Private Antitrust Suits

Legal commentators have long realized that juries often base decisions on emotional or nonevidential factors.¹ Professor Kalven, dean of the jury behavior researchers, found that jury decisions spring from the "response of the jury's common sense equity when confronted with formal legal rules."² While recognizing this phenomenon, commentators vigorously disagree about its desirability. Many have praised this feature of the jury system because it tempers strict rules of law with notions of fairness and justice.³ Other commentators have criticized jury flexibility for creating uncertainty for the litigating parties and for subverting clear legislative decisions.⁴

Treble damage antitrust suits provide a unique context for this debate on jury equity. Section 4 of the Clayton Act provides that a private plaintiff who successfully brings an antitrust action shall recover treble damages from the defendant.⁵ In a jury trial, the jury

1. Clarence Darrow, speaking of criminal juries, took the extreme view that "[j]urymen seldom convict a person they like, or acquit one that they dislike. The main work of a trial lawyer is to make a jury like his client or, at least, to feel sympathy for him; facts regarding the crime are relatively unimportant." E. SUTHERLAND & D. CRESSEY, *CRIMINOLOGY* 431 (9th ed. 1974) (quoting Clarence Darrow).

For empirical support that juries do sometimes base decisions on nonevidential factors, see H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 104-17 (1964); J. MARSHALL, *LAW AND PSYCHOLOGY IN CONFLICT* 146, 153-54 (2d ed. 1980); Schefflin & Van Dyke, *Jury Nullification*, *LAW & CONTEMP. PROBS.*, 51, 69-71 (1980).

The textual discussion should not be confused with the debate on jury nullification. Jury nullification refers to the power of the jury in criminal cases to disregard the law and acquit the defendant. Commentators have debated whether criminal juries should be *instructed* that they have this power. See Schefflin & Van Dyke, *supra*, at 52-55.

2. Kalven, *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158, 164 (1958) [hereinafter cited as *Personal Injury Damage Award*].

Kalven does not argue that juries ignore the law whenever it suits them. To the contrary, he argues that judge and jury decisions in most cases are identical. See Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1064-65 (1964) [hereinafter cited as *Civil Jury*]. He believes that juries, on average, will tend to follow their equitable propensities more than judges, see H. KALVEN & H. ZEISEL, *supra* note 1, at 320-21, but these propensities only enter into jury decisions when the case is close on the evidence. *Personal Injury Damage Award*, *supra*, at 172.

3. See, e.g., C. JOINER, *CIVIL JUSTICE AND THE JURY* 35-38 (1962); Schefflin & Van Dyke, *supra* note 1, at 69-72; Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1286 (1950).

4. See, e.g., J. FRANK, *COURTS ON TRIAL* 127-35 (1949); Green, *Juries and Justice*, 1962 U. ILL. L.F. 152.

5. The statute provides in pertinent part

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1976). This statute supersedes Section 7 of the Sherman Act, 26 Stat. 210 (1890), which only provided treble damages for Sherman Act violations. This provision awards treble damages for violations of any of the "antitrust laws."

In 1980, Congress amended this provision. Congress gave the trial judge discretion to

determines the economic loss suffered by the plaintiff as a result of the violations,⁶ and the court trebles that amount.⁷ Any jury manipulation of the damage award — that is, any damage determination based on nonevidential factors — is tripled in magnitude by this provision.

This Note takes the position that the courts should better control jury manipulation in private antitrust actions. Part One suggests that manipulation is likely in such actions, and argues that this manipulation offends the legislative judgment reflected in the trebling provision without leading to more equitable results. Part Two presents two complementary proposals to control jury manipulation of treble damage awards. These proposals aim to induce the jury to return accurate awards based on the economic loss actually suffered by the plaintiff.

I. JURY MANIPULATION IN ANTITRUST CASES

This Part examines the likelihood and consequences of jury deviation from actual losses in awarding antitrust damages. An initial examination suggests that juries aware of the trebling rule will reduce damages to compensate for a perceived windfall, while juries unaware of the trebling rule may respond to perceptions of equity by awarding damages in excess of the plaintiffs actual losses. Either possibility offends the legislative judgment fixing the recovery for antitrust violations at three times the losses sustained by the plaintiff. This analysis makes out a compelling case for better guiding the jury's determination of damages in civil antitrust actions.

A. *The Likelihood of Jury Manipulation*

Since a principle justification for the use of juries is their ability to temper the strict language of the law, one would expect some deviation between the level of damages dictated by the law and the

award the plaintiff interest on actual damages running from the date the suit is filed. Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, sec. 4(a)(1), § 4, 94 Stat. 1156 (1980) (to be codified at 15 U.S.C. § 15).

6. The statute refers to "damages by him [the plaintiff] sustained." 15 U.S.C. § 15 (1976). For the plaintiff to recover, he must prove some injury. Once there is proof of injury, courts relax the burden of proof on the amount of economic loss. *E.g.*, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-25 (1969); 2 P. AREEDA & D. TURNER, *ANTITRUST LAW* §§ 343, 345 (1978). Methods of proving damages are varied and complex. *See, e.g.*, Lanzilotti, *Problems of Proof of Damages in Antitrust Suits*, 16 *ANTITRUST BULL.* 329 (1971) (detailing statistical problems of the different theories of recovery).

7. *E.g.*, *Noble v. McClatchy Newspapers*, 533 F.2d 1081, 1090-91 (1977). As this Note went to press, the Seventh Circuit decided *MCI Commn. Corp. v. ATT*, Nos. 80-2171, 80-2288 (7th Cir., Jan. 12, 1983) (available on LEXIS, Genfed library, Newer file). The court upheld some of the jury's findings of liability, but remanded the case for a retrial on damages only, consistent with other appellate findings regarding liability. As the jury award, when trebled, amounted to nearly two *billion* dollars, the decision illustrates very well the potential dimensions of the issue.

amount actually awarded by the jury. This common sense conclusion is supported by the observations of attorneys in antitrust cases⁸ and other contexts.⁹ Judges, too, have recognized the possibility of jury manipulation.¹⁰

While little direct evidence confirms these apprehensions of jury manipulation in antitrust cases,¹¹ some research does indicate that significant manipulation of damages occurs in civil jury trials. In a study of some 4,000 trials,¹² Kalven and Zeisel found that in cases where both the judge and jury agreed that the plaintiff should recover,¹³ there was "considerable disagreement on the level of damages."¹⁴ In these cases, the jury awarded plaintiffs twenty percent

8. See, e.g., Blecher, *The Plaintiff's Viewpoint*, 38 ANTITRUST L.J. 76, 76-77 (1968-1969) (jury decisions are "motivated by emotional factors," just as in any other kind of case).

9. See, e.g., E. SUTHERLAND & D. CRESSEY, *supra* note 1, at 431 (quoting Clarence Darrow).

10. Concern over this possibility frequently leads judges to instruct the jury not to treat corporate defendants differently from other defendants or to restrict their award to compensatory damages. See notes 29 & 72 *infra*. Judges deciding whether juries should be informed that their antitrust awards will be trebled have also expressed concern about the possibility of jury manipulation. See note 21 *infra* and accompanying text.

11. See *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 667 (5th Cir. 1974) (no empirical data on the effect of informing the jury of trebling coupled with a cautionary instruction). The research conducted for this Note did not disclose any empirical study of the impact of a treble damage instruction on jury behavior in antitrust cases. The best available evidence thus appears to be reports of interviews with jurors in antitrust cases conducted after trial; though at best fragmentary, these interviews support the notion that juries would reduce awards if informed of trebling. See note 23 *infra*.

12. The results of this study are discussed in *Civil Jury*, *supra* note 2. This study was part of the University of Chicago Jury Project, a massive empirical and experimental study of jury behavior. Kalven and Zeisel published a volume on the study of criminal juries. See H. KALVEN & H. ZEISEL, *supra* note 1. Unfortunately, the promised companion volume on civil jury behavior was never published. The data on civil juries are scattered among numerous books and law review articles.

To assess the behavior of juries, the Jury Project researchers decided to determine the level of disagreement between juries and the judges presiding over the jury trial. To determine how the judge would have decided the case, judges presiding over jury trials were given questionnaires at the end of each trial. If the judge disagreed with the jury verdict, the judge was asked to explain the reasons for the disagreement. *Id.* at 45-46. The accuracy of this method of determining the reason for disagreement is, therefore, dependent on the judges' ability to infer the reasons for the juries' decisions.

In addition to this empirical work, the Project interviewed jurors after trials, ran public opinion polls and "tried" cases before mock juries. For a further description of the various techniques, see Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744 (1959).

The researchers realized these methods were not perfect, but still felt they were able to approximate actual jury behavior patterns. See H. KALVEN & H. ZEISEL, *supra* note 1, at 3-54; *Personal Injury Damage Award*, *supra* note 2, at 159 n.4, 172 n.38. Other researchers have been far more vehement in their criticisms. See M. BALDWIN & M. MCCONVILLE, JURY TRIALS 6-8 (1979). Still others have strongly criticized Baldwin and McConville for their research methodology. See Hastie, Book Review, 79 MICH. L. REV. 728, 728-33 (1981).

13. Kalven reported that the presiding judges agreed with the jury's decision on liability 79% of the time. *Civil Jury*, *supra* note 2, at 1065.

14. *Id.* at 1065.

more on average than the judge would have awarded.¹⁵ The major reason for this disagreement was that juries incorporated their notions of "common sense equity"¹⁶ into the legal standard of compensation.¹⁷

In antitrust cases, the jury's awareness of the treble damage provision probably will affect significantly its notion of equity. The majority of courts have refused to inform juries of the trebling provision or have held that it is error to do so.¹⁸ These courts assume that juries are typically unaware that the damage award will be trebled.¹⁹ Judges fear that if juries are informed of the trebling provision they will consider it a windfall to the plaintiff and will lower the award to

15. *Id.* Though this is true on average, the judge would have awarded more than the jury in thirty-nine percent of the cases.

16. *Personal Injury Damage Award*, *supra* note 2, at 164. See *Civil Jury*, *supra* note 2, at 1065-66; H. KALVEN & H. ZEISEL, *supra* note 1, at 495. Other researchers have suggested that factors other than equitable considerations may have an important bearing on jury decisions. For example, studies have found that a defendant's unpleasant personality traits, *see, e.g.,* Izzet & Sales, *Person Perception and Juror's Reactions to Defendants*, in 2 PERSPECTIVES IN LAW AND PSYCHOLOGY 209, 216-17 (1981), and even physical attractiveness, can affect the decisions of mock juries. *See, e.g.,* M. SAKS & R. HASTIE, *SOCIAL PSYCHOLOGY IN COURT* 154-60 (1978).

17. In explaining jury behavior, Kalven and others emphasize that they are talking about "tendencies," not absolute laws of jury decision-making. *See, e.g.,* *Personal Injury Damage Award*, *supra* note 2, at 172-73. This circumspection is prompted by both the great variations in jury behavior, *see id.*, and by the inherent limitations in the research methodology. *See* note 12 *supra*.

18. Since 1974, seven appellate courts and a district court have all decided against informing the jury of trebling. *See* *Heattransfer Corp. v. Volkswagen-werk, A.G.*, 553 F.2d 964, 989 n.21 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978); *Noble v. McClatchy Newspapers*, 533 F.2d 1081, 1090-91 (9th Cir. 1975), *vacated on other grounds*, 433 U.S. 904 (1977); *Sulmeyer v. Coca Cola Co.* (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975); *Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc.*, 504 F.2d 896 (5th Cir. 1974); *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 666 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975); *Pollock & Riley Inc. v. Pearl Brewing Co.*, 498 F.2d 1240, 1243 (5th Cir. 1974); *Overhead Door Corp. v. Nordpal Corp.*, [1979-1] Trade Cas. ¶ 62,594 (D. Minn. 1978). *See also* *Arnott v. American Oil Co.*, 609 F.2d 873, 889 n.15 (8th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980) (noting, in dicta, that it would be a "better practice" not to inform the jury of the trebling provision). Of all these cases, only *Noble* had a dissenter. *See generally* 3 E. DEVITT & C. BLACKMAR, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 90.39 (3d ed. 1977) (the authors no longer recommend informing the jury of trebling because of the danger of reversal).

Until this recent line of cases, most cases favored informing the jury of trebling. *See, e.g.,* cases cited in E. TIMBERLAKE, *FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS* § 19.06, at 282 n.18 (1965). *But see* *Sabloskey v. Paramount Film Distrib. Corp.*, 137 F. Supp. 929, 942 (E.D. Pa. 1955); *Webster Motor Car Co. v. Packard Motor Car Co.*, 135 F. Supp. 4, 11 (D.D.C. 1955), *revd. on other grounds*, 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957).

Despite the position taken in recent cases, some courts are still apparently giving an instruction on trebling. *See* SECTION OF ANTITRUST LAW, ABA, *ANTITRUST CIVIL JURY INSTRUCTIONS* 188 (1980).

19. This assumption is implicit in the holdings. In the leading case, *Pollock & Riley Inc. v. Pearl Brewing Co.*, 498 F.2d 1240 (5th Cir. 1974), the court stated that the "probable consequence" of an instruction on trebling would be lower awards. 498 F.2d at 1243. This would only be a "probable consequence" if the jury did not already know of trebling, and so was confronted with the trebling provision for the first time in the instructions.

offset this windfall.²⁰ Although there is no empirical data on the question, courts and commentators uniformly agree that juries with this knowledge are likely to reduce awards.²¹ This conclusion finds some support in Kalven's research, which indicated that juries do decrease damage verdicts if they feel that the plaintiffs are receiving windfalls.²² Interviews with antitrust juries confirm this hypothesis with persuasive, if scientifically informal, evidence of jury sensitivity to the trebling provision.²³

Despite the judiciary's attempt to prevent this type of manipulation by withholding information about trebling, some juries undoubtedly know that damages will be trebled. Juries may recall the publicity surrounding cases like *MCI Communications Corp. v. ATT*, where the plaintiff won a verdict at trial of \$1.8 billion,²⁴ or learn of trebling during the course of the trial.²⁵

20. See, e.g., *Noble v. McClatchy Newspapers*, 533 F.2d 1081, 1090-91 (9th Cir. 1975); *Pollock & Riley, Inc. v. Pearl Brewing Co.*, 498 F.2d 1240 (5th Cir. 1974).

21. See, e.g., cases cited in note 20 *supra*; Note, *Antitrust Law — Jury Instructions on Treble Damages Held Erroneous*, 26 MERCER L. REV. 1003, 1007 (1975). Even those courts and commentators that advocate informing the jury of trebling generally do not dispute that the jury's knowledge of trebling will result in lower verdicts. Instead, they argue that the jury already has this knowledge and hence the likely effect of an instruction will be to prevent misunderstanding. See, e.g., E. TIMBERLAKE, *supra* note 18, §19.06.

22. *Personal Injury Damage Award*, *supra* note 2, at 169.

23. See, e.g., N.Y. Times, June 19, 1980, § D, at 5, col. 1 (In the jury trial involving MCI Communications and American Telegraph & Telephone, some of the jurors did not know of the trebling provision before they returned a 600 million dollar verdict. When the jury foreman learned of trebling after the trial, he said, "I'd feel much better about the whole thing if they reduced the damages."); Cummings, *Anti-trust Administration and Enforcement and the Attorney General's Committee Report, A General Survey and Critique*, 50 Nw. U. L. REV. 307, 308 (1955) ("A recent poll of a Philadelphia jury revealed their dismay when they learned that their already generous antitrust verdict would automatically be trebled.").

24. *MCI Commn. Corp. v. ATT*, Nos. 80-2171, 80-2288 (7th Cir., Jan. 12, 1983) (available on LEXIS, Genfed library, Newer file). The jury awarded the plaintiff \$600 million and this amount was then trebled by the court. See E. TIMBERLAKE, *supra* note 17, § 19.06, at 281 (suggesting that juries "may also learn of trebling from newspapers").

25. See, e.g., *Bordonaro Bros. Theatres v. Paramount Pictures*, 203 F.2d 676, 678 (2d Cir. 1953). These considerations led the Committee on Trade Regulation and Trade-Marks of the Association of the Bar of the City of New York to conclude that "[j]uries can hardly fail to learn that damages will be trebled under the statute." Committee on Trade Regulation and Trade-Marks of the Association of the Bar of the City of New York, *Report on H.R. 3408, reprinted in Discretionary Treble Damages in Private Antitrust Suits: Hearings on H.R. 4597 Before Subcomm. No. 3 of the House Committee on the Judiciary*, 83d Cong., 1st Sess. (1953). But see note 59 *infra* and accompanying text.

Without empirical evidence, it is very difficult to estimate how frequently juries are aware of trebling. It is noteworthy, however, that every recent case addressing the issue has implicitly assumed that juries tend not to be aware of trebling (see cases cited in note 18 *supra*). Absent such an assumption, it would make little sense not to provide an instruction on trebling so that the jury does not misunderstand its role. See E. TIMBERLAKE, *supra* note 18, § 19.06, at 281-82 ("Unless the trebling provision is clearly explained to the jury, basic misunderstandings may arise which would result in totally erroneous verdicts and judgments. For example, the jury might itself treble the amount of damages with the effect that plaintiff would recover nine times the amount of actual damages. Or the jury might divide the amount of damages by three.").

Conversely, if a jury does not know of the trebling provision, it is likely to conform with the general tendency of juries to manipulate awards upward.²⁶ This phenomenon seems particularly likely in antitrust cases since defendants are often large corporations. Empirical data indicate that juries have a strong bias against corporate defendants,²⁷ a bias appreciated by attorneys²⁸ and by judges.²⁹

Because it is not clear how often juries are aware of trebling, and because this awareness is likely to determine the direction of jury manipulation of awards, it is impossible to determine whether the aggregate effect of such manipulation in antitrust cases is to decrease or increase awards. Nevertheless, it is reasonable to conclude that in every antitrust case, a strong possibility exists that the jury's sense of equity will have a significant impact on its determination of damages.

B. *The Consequences of Jury Manipulation*

How should the courts respond to the probability that juries rely on extra-legal factors in determining antitrust damage awards? Many commentators have defended jury manipulation on the ground that juries *should* occasionally ignore harsh legal standards

26. Not surprisingly, losing attorneys in antitrust cases have complained about excessive jury verdicts. One lawyer for American Telephone & Telegraph called the jury's decision to award MCI Communications 600 million dollars "obscene." Rowley & Knott, *\$1.8 Billion Antitrust Verdict Against AT&T*, Chicago Tribune, June 14, 1980, § 1, at 1. Another attorney was puzzled by the verdict. He noted that MCI Communications had only claimed 450 million dollars in lost revenue, though the prayer for relief asked for \$900 million. N.Y. Times, June 14, 1980, § 1, at 1.

27. Broeder found juries biased against corporations on both liability and damage issues. Juries found corporate defendants liable two percent more often than did judges. On damages, the jury awarded 25% more against corporate defendants than the judge would have awarded. Broeder, *supra* note 12, at 750-51.

One explanation for this may be that juries "adjust their awards according to the defendants ability to pay." *Id.* at 751. Corporations, like state or city governments, are "deep pockets" — juries believe the defendants are not really hurt by a large award to the plaintiff. Broeder points out that judges and juries are much closer on damages when the defendant is an individual. *Id.* at 750. See also *Personal Injury Damage Award*, *supra* note 2, at 171 (effect of insurance on the size of awards). Another possible explanation could be general bias against corporations. Harold Levy, former general counsel of American Telephone & Telegraph, asserts that juries tend to show an "affinity for the little guy" in big business cases. See Sylvester, *Jury's Still Out on Jury Trials*, Natl. L.J., March 1, 1982, at 1, col. 1.

28. At the July, 1981 convention of the American Trial Lawyers Association, delegates were coached to "seethe with rage at a corporate defendant's villainy." N.Y. Times, July 28, 1981, § D, at 20, col. 1.

29. Judges believe this bias is so pervasive that a special cautionary instruction is required. Devitt & Blackmar, in their set of recommended jury instructions, include a standard instruction for use in all federal civil trials with a corporate defendant. The instruction cautions the jury that "[a] corporation is entitled to the same fair trial at your hands as a private individual." 3 E. DEVITT & C. BLACKMAR *supra* note 18, § 71.05. See SECTION OF ANTITRUST LAW, ABA, ANTITRUST CIVIL JURY INSTRUCTIONS 138-40 (1972); R. MCBRIDE, THE ART OF INSTRUCTING THE JURY § 4.37 (1968).

and reach verdicts based on community norms of justice.³⁰ But whatever the validity of this argument in other situations, it has little merit in the context of private treble damage actions. The private cause of action for antitrust violations exists solely by force of legislation, and jury manipulation in such cases offends both the statutory provision creating the cause of action and the policies behind it.

1. *Statutory Analysis*

"[T]he starting point for interpreting a statute is the language of the statute itself."³¹ Section 4 of the Clayton Act entitles the successful private plaintiff to recover "threefold the damages by him sustained."³² This language suggests that the financial value of the plaintiff's actual losses is the amount to be trebled; the statute refers to the damages "sustained" by the plaintiff rather than those perceived by the jury. Admittedly, antitrust damages frequently defy precise calculation, and juries often can assess damages only approximately.³³ The jury's value in estimating uncertain damages, however, goes only to the determination of damages actually "sustained," and not to any normative adjustment of those damages according to the jury's sense of equity.

The purposes of the trebling provision support such an interpretation. The private damage action serves both as a remedy and as a deterrent, compensating the victim and protecting the public by punishing the offender.³⁴ These objectives frequently conflict, for damages in excess of actual losses impose on the defendant a penalty deliberately disproportionate to the harm caused by his wrongdoing, which accrues to the plaintiff as a windfall.³⁵ The trebling provision, however mechanically, resolves this conflict between fairness and

30. See note 3 *supra*.

31. *Consumer Prod. Safety Commn. v. GTE Sylvania*, 447 U.S. 102, 108 (1980).

32. 15 U.S.C. § 15 (1976). See note 5 *supra*.

33. See, e.g., *Zenith Corp. v. Hazeltine*, 395 U.S. 100, 123 (1969) (the "damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts."); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946) ("the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances, juries are allowed to act upon probable and inferential, as well as direct and positive proof.") (citations omitted); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 561-64 (1931); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 377-79 (1927).

34. *Pfizer, Inc. v. India*, 434 U.S. 308, 314 (1978) ("The Court has noted that § 4 has two purposes: to deter violators and deprive them of 'the fruits of their illegality,' and 'to compensate victims of antitrust violations for their injuries.'") (citations omitted); *Fortner Enterprises v. United States Steel*, 394 U.S. 495, 502 (1969) ("As the special provision awarding treble damages to successful plaintiffs illustrates, Congress has encouraged private antitrust litigation not merely to compensate those who have been directly injured but also to vindicate the important public interest in free competition.").

35. Since punishment cannot deter unless the penalties imposed for violations exceed their rewards, conflict between deterrence and compensation is inevitable. Deterrent punishment makes "a defendant suffer not for what he only has done but because of other people's tenden-

utility by fixing damages at a multiple of the plaintiff's losses.³⁶ Since Congress has already weighed the wrongfulness of the defendant's conduct and the need for deterrence against the principle of compensatory justice, the statute leaves no room for further equitable tinkering according to the conscience of the jury.³⁷ The jury's function in a civil antitrust case, then, is to determine as a factual matter the amount of plaintiff's losses; the statutory trebling provision then determines, as a normative matter, the amount of plaintiff's judgment.

cies." *United States v. Alton Box Board Co.*, [1977] Trade Cas. (CCH) ¶ 61,336, at 71,166 (N.D. Ill.).

This tension surfaces repeatedly in Supreme Court decisions; the Court often appears to emphasize one statutory purpose over another depending on the result to be reached. *Compare* *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977) ("Section 4, in contrast, is in essence a remedial provision. . . . Of course, treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing, as we also have frequently observed."), *with* *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 139 (1968) ("The plaintiff who reaps the rewards of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition.").

36. As Judge Wood noted at the outset of his *MCI* opinion:

If there is any inclination, however, to generally find fault with the impressive verdict, I would shift a good share of the blame on to the law itself. There is necessarily permitted in antitrust cases some laxity in the computation of damages, as we shall discuss. A just and reasonable "estimate," based upon relevant data, will suffice although it must be short of speculation or guess work. After a jury, with that practical computation leeway, has conscientiously rendered a verdict which presumably the jury believes will fully compensate the plaintiff for its damages, the statute then takes over [and] multiplies that verdict by three. . . . In my judgment the trebling requirement deserves Congressional review. . . . But, in any event, we have to try to resolve this case as we now find the law and the evidence.

MCI Commn. v. ATT, Nos. 80-2171, 80-2288 (7th Cir., Jan. 12, 1983) (available on LEXIS, Genfed library, Newer file) (separate opinion of Wood, J.) at n.1.

Congress could have decided that a multiplier lower or higher than three would provide the proper balance between these competing policies. Although the legislative history behind the treble damage provision is scant, it is clear that there was at least some consideration of single or double damages. Bernard, *On Judgments and Settlements in Antitrust Litigations: When Should Damages be Trebled?*, 56 ST. JOHN'S L. REV. 1, 1 n.1 (1981). Moreover, Congress has on a number of occasions rejected, or refused to act on, proposals to modify either the multiplier or to make the treble damage award discretionary. See note 48 *supra*.

Justices of the Supreme Court have noted the extraordinary nature of this remedy, *see, e.g.*, *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 442-43 & n.1 (Blackmun, J., dissenting) (contrasting the "massive" liability under trebling with financial penalties imposed by other Federal laws); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 615 (Stewart, J., dissenting), while also observing that Congress has refused to adjust this resolution of the competing concerns. See 435 U.S. at 443 & n.2 (Blackmun, J., dissenting); 428 U.S. at 599 n.39 (per Stevens, J.). Similarly, commentators have noted the special attributes of a recovery set above the level of actual damages. *See, e.g.*, K. ELZINGA & W. BREIT, *THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS* 84-96 (1976); Note, *Antitrust Treble Damages as Applied to Local Government Entities: Does the Punishment Fit the Defendant?*, 1980 ARIZ. ST. L.J. 411, 414.

37. See Note, *supra* note 21, at 1007. See also Parker, *Treble Damage Action — A Financial Deterrent to Antitrust Violations?*, 16 ANTITRUST BULL. 483, 501 (1971); *Study of Monopoly Power: Hearings Before Subcomm. on Study of Monopoly Power of the House Committee on the Judiciary*, 81st Cong., 1st Sess. 295 (1949) (testimony of Walton Hamilton). Courts have consistently recognized that the function of juries in antitrust cases is to determine the amount of damages and *not* the sum that the plaintiff will actually receive. *See, e.g.*, *Pollock & Riley, Inc. v. Pearl Brewing Co.*, 498 F.2d 1240, 1243 (5th Cir. 1974); *Semke v. Enid Automobile Dealers Assoc.*, 456 F.2d 1361, 1370 (10th Cir. 1972).

The anomalies that would result from permitting jury manipulation support the conclusion that the statutory trebling provision preempts the jury's normative functions in determining antitrust damages. As indicated earlier, a key factor affecting the jury's sense of equity in antitrust cases is whether the jury knows that the court will treble its damage award. The presence or absence of such knowledge is, however, largely fortuitous from the standpoint of the opposing parties;³⁸ it certainly bears no relevance to the merits or equities of a particular case. Allowing juries to manipulate awards when juries do not uniformly know of trebling³⁹ would, therefore, lead to extremely inequitable results.⁴⁰

A second type of anomaly occurs in cases in which the jury is unaware of trebling. The notion that jury manipulation will result in a more just award depends on the assumption that the damages awarded by the jury will be the amount actually awarded; this is the amount that the jury has deemed an equitable result. Trebling this amount, however, abandons the jury's estimation of an equitable result — in fact, the jury would consider the amount awarded extremely inequitable. Moreover, in those cases where juries are unaware of trebling, there is no possibility that the jury will avoid this result by offsetting the trebling provision. Trebling by its very nature thus supersedes the traditional approval of adjusting damages according to the jury's sense of equity.

These incongruities between the achievement of the jury's notions of equity and the treble damage provision suggest that private antitrust suits are intended to further more important goals than jury equity. Indeed, the Supreme Court expressly recognized the subordinate value of achieving an equitable result in *Perma Life*

38. Since juries are typically not informed about trebling during the trial, their awareness of this fact will usually depend on their knowledge prior to the trial. The litigators may, however, be able to exercise some control over whether the jury is aware of trebling through jury selection or trial conduct. *See Bordonaro Bros. Theatres v. Paramount Pictures*, 203 F.2d 676, 678 (2d Cir. 1953).

39. One should not necessarily conclude from this discussion that courts should begin to inform juries of trebling. Even if one is willing to assume, as few courts have, that most juries are already aware of trebling, it seems likely that at least a significant number do not have this knowledge. To the extent that these juries lower verdicts as a result of trebling, the deterrent effect of private antitrust actions is diminished. *See Note, supra* note 21, at 1007 ("if informing the jury of the treble-damages provision of the Clayton Act could even potentially result in a reduced verdict, then the statutory purpose would be hampered and the instruction should not be allowed.").

40. An illustration should make this inequity clear. Consider an antitrust case with Jury A, where Jury A is aware of the trebling provision. If Jury A decided for the plaintiff, its awareness of the provision is likely to lead it to award less than actual damages. *See notes 21-22 supra* and accompanying text. However, if a case with identical facts is tried before Jury B, which is unaware of trebling, Jury B is likely to award significantly more than actual damages. *See notes 26-29 supra* and accompanying text. Hence, although the facts of the cases, and consequently the relative equities of the cases, are exactly the same, jury manipulation has led to dramatically different results.

Mufflers v. International Parts Corporation.⁴¹ In arguing that *in pari delicto* should not be a defense in private antitrust suits, four justices, in a plurality opinion, stated:

The plaintiff who reaps the rewards of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement.⁴²

Of course, it does not matter whether a particular result is higher or lower than that contemplated by the trebling provision; the point is that in antitrust cases, the statute itself fulfills the functions typically discharged by the jury in setting the damages in other types of civil cases.⁴³

Thus, as a matter of legal method, quite independent of policy concerns, it follows that jury manipulation contravenes the statutory basis of the plaintiff's cause of action. Whether the jury distorts the damage award in favor of the plaintiff or the defendant, manipulation of damages frustrates the congressional intention animating the treble damages provision. Consequently, the courts should do all they can to maximize the jury's fidelity to the statutory damage formula.

2. Policy Analysis

Jury manipulation not only offends the statutory treble damages provision; it also threatens important policies served by the antitrust laws. Too low an award, arrived at in anticipation of statutory trebling, undercuts the deterrent effect of private actions. On the other hand, too high an award stemming from antipathy to the corporate defendant has the opposite effect: potential but innocent defendants may forego legitimate and productive economic behavior, and po-

41. 392 U.S. 134 (1968).

42. 392 U.S. at 139. These four justices clearly believed that equity is a subordinate goal in private antitrust actions. Justice White's concurrence argued that *in pari delicto* should be a defense in some circumstances, but he took this position because of the deterrence policy underlying antitrust actions and not because of equitable considerations. 392 U.S. at 145-46 (White, J., concurring). Justice Fortas also argued that *in pari delicto* could be a defense. Whether he based this on deterrent grounds or on equitable considerations is not clear from his opinion. 392 U.S. at 147-48 (Fortas, J., concurring). Justice Marshall's concurrence argued that deterrence and equitable considerations dictate allowing *in pari delicto* as a defense, but he recognized that in some circumstances the public policies advanced by the antitrust laws may override equitable considerations. 392 U.S. at 151 (Marshall, J., concurring). Justice Harlan, in an opinion joined by Justice Stewart, indicated that equitable considerations justify recognition of *in pari delicto* as a defense. 392 U.S. at 154 (Harlan, J., concurring in part and dissenting in part). The case suggests that at least five of the justices believed that the deterrent policy advanced by private antitrust actions is significantly more important than the achievement of an equitable result. See generally Note, *Plaintiff's Misconduct as a Defense in Private Antitrust Actions*, 11 MEM. ST. U. L. REV. 382 (1981).

43. See note 37 *supra* and accompanying text.

tential plaintiffs with colorable but meritless claims may bring nuisance suits, lured by the prospect of extorting a settlement from a defendant fearful of going to the jury.

Jury manipulation may undercut the policies advanced by the treble damages provision. The provision is intended to facilitate enforcement of the antitrust laws in two ways. First, by increasing plaintiffs' recoveries, trebling encourages antitrust suits and thus enlists private plaintiffs in the enforcement of the antitrust laws.⁴⁴ This financial incentive to bring suit is especially important given the difficulty and expense of litigating private antitrust suits.⁴⁵ Second, by imposing a harsh penalty for violations of the antitrust laws, trebling deters such transgressions.⁴⁶ Congress has twice passed legislation to ensure the forceful implementation of these policies⁴⁷ and has consistently rejected proposals to weaken the trebling provision.⁴⁸ Jury manipulation resulting in a smaller award frustrates these policies, because lower awards diminish both the incentive to bring suit and the penalty on the wrongdoer.

Correspondingly, jury manipulation resulting in larger awards, due to juries' antipathy toward large corporations, aggravates certain negative policy consequences of the treble damages provision. Because of large potential recoveries, trebling creates an incentive to bring harassment suits.⁴⁹ The possibility of such suits, and the dangers incurred when business conduct falls within the gray areas of

44. *E.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977); *United States v. Borden Co.*, 347 U.S. 514, 518 (1954).

45. *E.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977) (quoting Sen. Sherman, sponsor of the Sherman Act, on the difficulty of maintaining antitrust suits).

46. *E.g.*, *Pfizer, Inc. v. India*, 434 U.S. 308, 314-15 (1978); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* 429 U.S. 477, 485 (1977).

47. In 1980, Congress granted trial judges the discretion to award plaintiffs interest on their actual damages in addition. See note 5 *supra*. Though the primary purpose of this amendment was to punish delaying tactics rather than to compensate plaintiffs, see 126 CONG. REC. H8047-48 (daily ed. Aug. 28, 1980) (remarks of Rep. Mazzoli), this amendment does indicate congressional support for vigorous, undelayed use of the treble damage provision.

Additionally, the compensatory portion of the plaintiff's recovery is exempted from taxes in some circumstances. The plaintiff will pay no taxes on the compensatory portion when he received no tax benefit on the loss caused by the antitrust violation. I.R.C. § 186.

The Supreme Court has also accorded generous treatment to private plaintiffs because of these policy goals. The Court allows plaintiffs to recover even where the proof of the amount of damages is not concrete or detailed. In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), the Court stated that the lower courts must observe "the practical limits of the burden of proof which may be demanded of the antitrust plaintiff. . . . damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts." 395 U.S. at 123. The Court requires, however, that the plaintiff show he suffered some injury before these liberal rules as to the *amount* of injury apply. See note 6 *supra*.

48. Efforts to have the treble damage award reduced or eliminated were unsuccessful in 1898 and 1908. Attempts to give courts discretion to reduce the damage award below the trebled amount were unsuccessful in 1953, 1955, 1957, 1959, and 1961. K. ELZINGA & W. BREIT, *THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS* 64-65 (1976).

49. 2 P. AREEDA & D. TURNER, *supra* note 6, at § 331; Breit & Elzinga, *Antitrust Enforce-*

antitrust law,⁵⁰ may deter some socially valuable competitive activity.⁵¹ This risk of "overdeterrence" is exacerbated when jury manipulation increases the potential liability of defendants.⁵² Finally, courts sometimes hesitate to expand the law to encompass new anticompetitive practices.⁵³ Fear of the enormous verdicts that may result from jury manipulation may further entrench this cautious attitude.

In short, jury manipulation of antitrust awards furthers neither the purposes advanced by defenders of jury discretion nor the purposes of the antitrust laws. To the contrary, such manipulation is very likely to lead to results that are both inequitable and, in terms of antitrust policy, unwise.⁵⁴

II. CONTROLLING JURY MANIPULATION

This Part reviews current precautions against jury manipulation, and then presents two proposals designed more effectively to minimize manipulation in private antitrust suits. These proposals attempt to reduce the incidence of manipulation by changing the way the jury undertakes its function and by rendering jury manipulation more susceptible to appellate review. Given the obstacles to more ambitious reforms, these proposals offer the most realistic means of controlling jury manipulation.

ment and Economic Efficiency, 17 J.L. & ECON. 329, 340-44 (1974) (authors note that "nuisance suit" incentives are compounded by the unpredictability of jury verdicts).

50. See Comment, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L.J. 1010, 1061 n.334 (1962).

51. See Elzinga in *Panel Discussion: Private Actions — The Purposes Sought and the Results Achieved*, 43 ANTITRUST L.J. 73, 99 (1973) (arguing that antitrust suits based on predatory behavior may result in "a lessening of price competition, additional price rigidity, and a greater propensity for companies to use non-price avenues of competition, such as advertising and frivolous product differentiation.").

52. Even if jury manipulation does not increase the average recovery in private antitrust actions (because upward and downward manipulation of awards may offset each other), it should increase the likelihood of extremely large verdicts. By either increasing or decreasing awards, manipulation pushes verdicts away from the norm and toward extreme results. In considering whether to undertake activity that may lead to an antitrust suit, it is possible that corporations are more deterred by the low risk of an extremely large verdict than the more likely risk of a moderate verdict. See Breit & Elzinga, *Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis*, 86 HARV. L. REV. 693, 705-06 (1973) (arguing that modern businesses tend to be risk avoiders, and "that a risk adverse management is more likely to be deterred by high financial penalties than by a high probability of detection and conviction with accompanying penalties not severe.").

53. 2 P. AREEDA & D. TURNER, *supra* note 6, at § 331.

54. Achieving a proper balance in antitrust cases between the competing policies "is clearly a difficult if not impossible task." Parker, *The Deterrent Effect of Private Treble Damage Suits: Fact or Fantasy*, 3 N.M. L. REV. 286, 292 (1973). Congress is in a far superior position to investigate and balance these competing policies than is a jury that has neither expertise nor investigative capacity.

A. Current Efforts To Minimize Jury Manipulation

The courts currently rely on two procedures to avoid jury manipulation of antitrust damage awards. First, recent authority uniformly disfavors informing the jury of the trebling rule. Second, trial judges typically admonish the jury with general instructions on the nature of damages and the need to treat corporate defendants fairly. While fully justified, neither procedure offers an adequate response to the manipulation problem.

Although some division of authority exists,⁵⁵ current authority unanimously rejects informing the jury of the trebling provision.⁵⁶ The reason for this approach is the apprehension that juries aware of the trebling rule will reduce damages accordingly, frustrating the deterrent purposes of the statute.⁵⁷ The older, contrary authority reasoned from the premise that the jury would learn of the trebling provision in the course of the trial, requiring an instruction on trebling to avoid confusion.⁵⁸ The more recent opinions have the better argument, for three reasons. First, given a proper pretrial motion by plaintiff's counsel and appropriate rules of court, the trial can proceed without betraying the treble damage requirement.⁵⁹ Second, the court can adopt a cautionary instruction to clarify the jury's role in assessing damages without discussing trebling.⁶⁰ Finally, given the overriding importance accorded the deterrent function of the treble damages provision, the risk of the jury reducing damages outweighs the risks associated with jury uncertainty.⁶¹ Since informing the jury of the trebling provision does not advance any independent

55. See note 18 *supra* for a summary of the conflicting authorities.

56. Since 1974, seven appellate decisions have approved not informing the jury of trebling; only one judge dissented from this result. See note 18 *supra*.

57. This assumption is implicit in the holdings. See note 19 *supra*.

58. See *Bordonaro Bros. Theatres v. Paramount Pictures*, 203 F.2d 676, 678-79 (2d Cir. 1953) ("Such a statement is more desirable than a half-recital, with attempted concealment of a part — a method leading inevitably to an overemphasis of an otherwise not significant detail.").

59. There appears to be no inherent barrier to conducting the trial so as to avoid references to treble damages; the trial court can grant a plaintiff's motion *in limine* to forbid discussion of the trebling provision, and references in the pleadings to trebling can be excised if the court rules call for reading the pleadings to the jury. See generally *Pollock & Riley, Inc. v. Pearl Brewing Co.*, 362 F. Supp. 335, 337-38 (W.D. Tex. 1973), *aff'd*, 498 F.2d 1240 (5th Cir. 1974) (rules of this district court permit conduct of trial without disclosing pleadings or statutory damage provision to jury). The motion *in limine* should be made before voir dire to avoid any prejudicial questions during jury selection. See 498 F.2d at 1242.

60. "Our immediate reaction [to the confusion argument] is that a district court can sufficiently instruct the jury to determine only actual damages. In those cases where an accidental revelation occurs, the court can give curative instruction to alleviate confusion." *Pollock & Riley, Inc. v. Pearl Brewing Co.*, 498 F.2d 1240, 1243 (5th Cir. 1974).

61. See *Semke v. Enic Automobile Dealers Assn.*, 456 F.2d 1361, 1370 (10th Cir. 1972) ("The consequences of advising the jury of this can only be that the jury will adjust its award accordingly. . . . therefore, it serves no useful function to communicate this information to the jury and it is potentially harmful, and hence [instructing the jury on trebling] was error.").

policy, trial courts should rely on the more recent authority and attempt to prevent the jury from learning, from the trial or from instructions, that the court will treble the jury's estimate of damages.⁶²

But this refusal to inform the jury of trebling will do no more than help reduce some types of jury manipulation. Avoiding any discussion of treble damages prevents a jury unaware of trebling from lowering its award, because the jury never perceives a windfall to the plaintiff.⁶³ To ensure accurate damage determinations, however, courts must prevent two further possibilities of manipulation. First, juries may impose their own punitive sanctions on defendants. Second, some juries may know of trebling independently of the trial, and decrease the award accordingly.

The second procedure currently relied on to discourage manipulation, i.e., cautionary instructions, may somewhat, but not completely, alleviate these concerns. Courts typically instruct juries to treat corporate litigants fairly.⁶⁴ These instructions, however, have not quelled the widely acknowledged bias against corporate defendants, and to the extent these instructions alert the jury to the corporate "deep pocket," they aggravate rather than mitigate the problem.⁶⁵ The judge also typically instructs the jury to award only compensatory damages, to "put the plaintiff in as good a position as if the . . . violation had not occurred."⁶⁶ But judges give such in-

62. Even the courts which have approved of instructing the jury on trebling have not held it error to do otherwise. Thus, district courts in circuits where the older opinions prevail should exercise their discretion and follow the contemporary approach of not informing the jury of trebling, and of conducting antitrust trials so as to avoid references to treble damages.

63. The present assumption that juries are unaware of trebling seems plausible. All courts deciding the issue in the past eight years have come to this conclusion. *See* note 18 *supra*. Perhaps most persuasive, plaintiffs apparently believe juries do not know of trebling. If plaintiffs thought juries did know of trebling, they would desire an instruction explaining the purposes of trebling to offset the perception of a windfall.

64. *See* note 29 *supra*.

65. Kalven has noted that cautionary instructions can sensitize a jury to an issue. Using mock juries, he found that instructing the jury to disregard insurance actually raised awards. *Personal Injury Damage Award*, *supra* note 2, at 163; Kalven, *A Report on the Jury Project of the University of Chicago Law School*, 24 *INS. COUNSEL J.* 368, 377-78 (1957). Similarly, an instruction to treat a corporation fairly might emphasize the "deep pocket" of the corporate defendant. *See generally* note 27 *supra*.

66. *See, e.g.*, cases cited in SECTION OF ANTITRUST LAW, *supra* note 18, at 170-72. A typical instruction where the plaintiff alleges a conspiracy is: "The purpose of awarding damages in a private antitrust case is to put the plaintiff in as good a position as if the conspiracy had not occurred." *Reno-West Coast Distrib. Co. v. The Mead Corp.*, 613 F.2d 722 (9th Cir. 1979).

The cautionary instruction given at trial in *MCI Commn. Corp. v. ATT*, Nos. 80-2171, 80-2288 (7th Cir., Jan. 12, 1983) (available on LEXIS, Genfed library, Newer file), admonished only that "Any damages you do award must have a reasonable basis in the evidence and cannot be based upon speculation, guess or conjecture." Appendix, jury instruction 54. Whether the jury increased the damage award in the case because of perceived inequity, and whether an instruction reserving questions of equity to the court would have countered this tendency, are of course unanswerable questions. What is clear is that the jury arrived at a reversibly excessive damage award despite a conventional cautionary instruction.

structions in most civil cases, and juries nevertheless manipulate damage awards.⁶⁷ Given that these instructions have not succeeded in eliminating jury manipulation in other civil cases, it seems doubtful that they can do so in the special context of antitrust suits. Consequently, the courts should consider additional measures to encourage accurate damage assessments in treble damage actions.

B. *New Procedures for Reducing Jury Manipulation*

The courts might take advantage of several possibilities for further curtailing jury manipulation of damages in antitrust cases. Some of the options, both traditional⁶⁸ and radical,⁶⁹ reject the very idea of jury determination of damages. The seventh amendment poses a serious obstacle to such approaches. Moreover, properly guided, the jury performs a valuable function in estimating real but uncertain damages.⁷⁰ Consequently, this Note proposes two re-

67. See notes 14-17 *supra* and accompanying text.

68. The most direct response to perceived jury manipulation is the remittitur, by which the trial judge orders a new trial unless the plaintiff consents to a lower damage award set by the judge. The device, however, is of limited utility in the antitrust context. The determination of antitrust damages is often highly uncertain. See note 33 *supra* and accompanying text. This uncertainty restricts the use of the remittitur in two ways. First, as a threshold matter, most courts require that the damages be clearly excessive as a matter of law. See, e.g., *Brents v. Freeman's Oil Field Serv., Inc.*, 448 F.2d 601 (5th Cir. 1971); *Collum v. Butler*, 288 F. Supp. 918 (N.D. Ill. 1968), *aff'd*, 421 F.2d 1257 (7th Cir. 1970). Quite aside from any policy preference for jury determinations in cases of uncertainty, a clear showing of excessive damages may be impossible. Second, even where a remittitur is ordered, the judge may still set the damages at the highest level not clearly erroneous; while there is some dissent as to where the court has the authority to fix the remittitur amount, "[t]his is the only theory that has any reasonable claim of being consistent with the Seventh Amendment." 11 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2815 at 104-05 (1973). Setting damages at the highest level permitted by uncertain evidence, to be trebled subsequently, does little to reduce the problem. An additional problem is that plaintiffs may elect a new trial (particularly if limited to damages only), resulting in a certain waste of judicial resources and a repeated risk of jury manipulation in the second trial. And where knowledge of trebling leads to a reduced award, no direct tampering with the verdict is possible, because the federal courts do not permit the practice of additur. *Dimick v. Schiedt*, 293 U.S. 474, 486-87 (1935).

69. The issue of whether the risks of jury decisions in complex cases so jeopardize the due process interests of defendants as to override the seventh amendment's guarantee of the right to jury trial in civil cases is beyond the scope of this Note. Compare *In re United States Fin. Sec. Litigation*, 609 F.2d 411 (9th Cir. 1979), *cert. denied sub. nom.*, *Grant v. Union Bank*, 446 U.S. 929 (1980), with *In re Japanese Electronic Prods. Antitrust Litigation*, 631 F.2d 1069 (3d Cir. 1980). For an analysis of the uncertainties involved in this issue, see Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICH. L. REV. 68 (1981). For a summary of the literature on the subject, see *id.* at 69 n.3. For the purposes of this Note, it suffices to observe that abolishing jury trials for civil antitrust cases remains an approach fraught with constitutional doubts, particularly where the jury manipulation complained of involves precisely the sort of jury value judgments which inspired the seventh amendment, rather than any inability to comprehend the technical issues admittedly presented in many antitrust cases.

70. This, of course, is one of the reasons for relying on juries in the first place. Judge Wright, in defending the strict standard of review applied to trial court decisions to uphold jury awards, voiced the received wisdom by acknowledging "the deference properly given to the jury's determination of such matters of fact as the weight of the evidence and the quantum of damages," a deference "further weighted by the constitutional allocation to the jury of ques-

forms intended to minimize manipulation without disturbing the important role of the jury in deciding civil lawsuits.

1. *Proposed Jury Instruction*

Many courts already give juries instructions intended to discourage jury manipulation. Courts often instruct juries to treat corporate defendants fairly⁷¹ and, in treble damage actions, to award only compensatory damages.⁷² Both types of instructions are given as admonitions: the jury is told what or what not to do.

Such instructions do have some influence. Since jurors perceive judges as authority figures, they feel some pressure to follow the judges' instruction.⁷³ Clearly, however, these instructions are not totally effective at controlling juries: manipulation continues despite such instruction.⁷⁴ Furthermore, because the instructions concerning corporate defendants may sensitize a jury to the corporate "deep pocket," such instructions may prove counterproductive.⁷⁵

A growing number of researchers have adopted a sociological theory that helps explain jury manipulation and the limitations of admonishing instructions.⁷⁶ This theory, termed "equity theory,"⁷⁷

tions of fact." *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 148 (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969).

71. See note 29 *supra*.

72. See note 83 *infra*.

73. Juries are influenced by the judge. See H. KALVEN & H. ZEISEL, *supra* note 1, at 426-27 (in criminal cases where the evidence clearly favors one side, judges virtually eliminate jury manipulation if they exercise the power to comment on the evidence). The judge, as an authority figure, might be successful in persuading jurors to ignore their evaluations of equity in favor of the law. See Note, *Toward Principles of Jury Equity*, 83 YALE L.J. 1023, 1049-50 (1974).

Subjects in social psychology experiments have been willing to trust the value judgments and perceptions of authority figures. Milgram, in one famous experiment, persuaded his subjects to continue administering increasingly large electric shocks even after the "victims" of the shocks cried out in pain. 62% of the subjects continued to administer the shocks when instructed to do so. The "victims" were accomplices of Milgram in the experiment. See Milgram, *Some Conditions of Obedience and Disobedience to Authority*, 18 HUMAN REL. 57 (1965). The legal analogy to this obedience is that the jury does not often openly disobey the judge. See note 85 *infra* and accompanying text.

74. Despite the fact that juries are typically instructed on awarding actual damages, manipulation is common. See notes 14-17 *supra* and accompanying text. The limitations of such instructions are clearly recognized by judges who refuse to inform juries of trebling, since such judges implicitly reject the alternative of providing such information and instructing the jury to provide full compensatory damages. See generally note 18 *supra*.

75. See note 65 *supra* and accompanying text.

76. See E. WALSTER, G. WALSTER & E. BERSCHIED, EQUITY 64-81 (1978) [hereinafter cited as EQUITY]; Izzet & Sales, *supra* note 16. Izzet and Sales have concluded that equity theory is more consistent with the data on jury behavior than other proposed explanations of jury behavior.

77. Homans first developed this theory as a "rule of distributive justice." G. HOMANS, SOCIAL BEHAVIOR 74-75 (1961). He advanced equity theory as the grand design overarching the discrete theories of sociology. See *id.* at 10-12. Walster, Walster and Berschied also advance equity theory as the all-encompassing construct of sociology. See EQUITY, *supra* note

posits that people consider a relationship equitable when both parties to the relationship receive outcomes proportionate to their investments.⁷⁸ A participant in an inequitable relationship will feel distressed⁷⁹ and will have a psychological need to correct the inequity.⁸⁰ Researchers have found that observers of an inequitable relationship react similarly to participants⁸¹ and consequently will attempt to remedy the inequity. Jurors are observers of the relationship between the plaintiff and defendant, and like other observers, feel a real psychological need to restore equity to inequitable situations.⁸² If a jury thinks legal remedies alone, such as compensatory damages, will fail to rectify any inequities, the jury will strive to remedy the situation through its decision on liability and damages.⁸³

The cautionary instructions, though somewhat effective because of the judge's authority, do not satisfy this psychological need. The

76, at 1-2. For the purposes of this Note, equity theory is only used to explain the behavior of juries, not the entire sociological universe.

Adams is the other early developer of equity theory. In Adams, *Inequity in Social Exchange*, in 2 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 267 (L. Berkowitz ed. 1965), he presented a more sophisticated version of the theory, emphasizing the reactions of people to "inequitable relationships."

Both Homans and Adams used equity theory to explain industrial relations problems. Because of the abundance of empirical and experimental research in this area, the field has become a prime testing ground for equity theorists. See EQUITY, *supra* note 76, at 114-41 (review of research in this area, indicating the consistency of equity theory with actual behavior).

78. See Izzet & Sales, *supra* note 16, at 211-13; Walster, Berschied, & Walster, *New Directions in Equity Research*, 25 *J. PERS. & SOC. PSYCH.* 151, 151-53 (1973).

More rigorously, equity theory explains how observers to a relationship react to that relationship. The theory presumes that people wish to maximize the outcome from any given relationship. It does not presume that people are altruistic. The outcome of a relationship consists of the ratio of rewards to costs (rewards being those satisfying results such as health, happiness, increased wages or an interesting job; costs, such as losing a job, are the frustrating obstacles to psychological and emotional satisfaction). Individuals maximize their outcomes, however, within an accepted set of societal norms which allocate rewards and costs. See Izzet & Sales, *supra* note 16, at 212-13; Walster, Berschied & Walster, *supra* at 151-53.

An equitable relationship can be expressed by the equation:

$$R_1 = R_2$$

$$C_1 = C_2$$

where R_1 and R_2 signify the rewards of the two people, and C_1 and C_2 signify the costs. Each reward and cost can be broken down into inputs and outputs, but this level of sophistication is not required here. See Izzet & Sales, *supra* note 16, at 212.

79. The Walsters and Berschied call the research evidence of this distress "compelling." EQUITY, *supra* note 76, at 17. What is particularly convincing is that even the beneficiaries of an inequitable relationship, the "exploiters" of the relationship, feel "distressed" by the inequity. *Id.* at 17-18, 22-44.

80. EQUITY, *supra* note 76, at 18.

81. Izzet & Sales, *supra* note 16, at 214. See Baker, *Experimental Analysis of Third Party Behavior*, 30 *J. PERS. & SOC. PSYCH.* 307, 315 (1974).

82. Izzet and Sales note the similarity in how observers are used in psychological personal perception studies, and the manner in which jurors are used to evaluate the litigants. Both the observers and jurors are neutral third parties who react to the inequities in the relationship before them. Izzet & Sales, *supra* note 18, at 214-15.

83. When a jury manipulates its damage award to reflect the equities, it is reallocating the costs and rewards of the relationship in an attempt to restore equity. See *id.* at 215.

instructions create a tension between the desire to obey the judge and the need to restore equity to inequitable situations.⁸⁴ While a jury might not consciously disregard the judge, Kalven and Zeisel's research indicates that when cases are close and evidence is indecisive, the jury "yields to sentiment in the apparent process of resolving doubts as to evidence."⁸⁵

To reduce the likelihood of jury manipulation, an instruction must recognize and address the jury's need to restore equity.⁸⁶ The instruction proposed here is intended to convince the jury that the judge will remedy any perceived inequities. Under the proposed instruction, the judge does not say that factors such as intent, culpability and motive are irrelevant; he instead reserves these questions for himself. Specifically, courts should instruct the jury:

If you find for the plaintiff in accordance with these instructions, it then becomes your responsibility to determine the actual economic damages which the plaintiff has suffered. You are only to concern yourself with determining actual damages.

I realize that over the course of the trial you may have developed strong personal feelings about the parties or their conduct. The jury, however, is a fact-finder. You should reach your decision on the facts and not on the basis of your emotions. Questions of fairness and punishment are for the court and the court has and will take these into account in rendering *judgment*.⁸⁷

This instruction minimizes the jury's psychological need to manipulate the damage award by advising the jury that its equitable concerns will be addressed. Instead of creating tensions between the tendency to obey the judge and the need to restore equity, the in-

84. The tendency to follow the judge, *see* note 73 *supra* and accompanying text, can be included in the equity equation. Because of the strong moral pressure to obey the judge, emphasized by the decorum and solemnity of the courtroom, there is a psychological cost to the jurors in restoring equity in disobedience of instructions.

85. H. KALVEN & H. ZEISEL, *supra* note 1, at 165 (criminal cases). *See Personal Injury Damage Award*, *supra* note 2, at 172 (civil cases) ("[T]he jury's special equities are likely to come into play only where there is a gap or ambiguity in the facts, where that is the controversy [*sic*] is close to indeterminate. Then the jury may utilize the freedom created by the doubt to add some equities the law ignores.").

86. Because of the subtle influence of bias, more strident admonishing instructions would probably not eliminate jury manipulation. In close cases, the jury could still impose its value judgments with the belief that it was resolving difficult issues of fact.

87. It might seem somewhat deceptive to tell the jury that adjustments of the award are "questions for the court" when in fact trebling is mandatory. One court, however, approved a similarly deceptive instruction precisely because it hides the mandatory nature of the adjustment. *Standard Indus., Inc. v. Mobil Oil Corp.*, 475 F.2d 220, 223-24 (10th Cir.), *cert. denied*, 414 U.S. 829 (1973). This deceptive language seems desirable for the same reason that juries are not informed of trebling; if the jury knows the court has to make some adjustments, it may not believe the final result will be equitable and hence may manipulate its award.

This instruction avoids another potential problem. Juries are given wide latitude in determining damages in antitrust suits. *See* note 6 *supra*. An overemphasis on actual damages in the instructions might tend to cut back on this latitude. This proposed instruction, however, only restricts the jury's latitude in assessing awards based on noneconomic considerations. It does not restrict the jury's freedom in computing awards on the basis of economic loss.

struction should assure jurors that obeying instructions will result in a fair and equitable conclusion. The jury will then be more likely to restrict itself to determining the actual losses suffered by the plaintiff.⁸⁸

2. *Special Procedures for Verdicts*

Courts can complement the use of this cautionary instruction by using special verdicts and general verdicts accompanied by interrogatories.⁸⁹ When the court adopts a special verdict, the judge asks the jury to answer written questions upon each issue of fact, and the court then reaches a verdict by applying the law to the jury's factual findings.⁹⁰ A general verdict accompanied by interrogatories also requires the jury to answer written questions submitted by the judge on specific factual issues. Under this procedure the jury still returns a normal liability and damage verdict.⁹¹

These procedures offer useful tools for minimizing jury manipulation, because they encourage the jury to focus on the specific issues

88. The instruction will probably have less effect on the problem of a jury reducing its award than on a jury increasing its award. A jury aware of trebling must infer that "questions of fairness" includes adjustments to offset the plaintiff's windfall. If the jury does not infer this, it may lower its award to offset the perceived windfall to the plaintiff. In contrast, a jury unaware of trebling is explicitly told not to impose its value judgments. In this situation, the instruction does not rely on an inference.

89. Rule 49 of the Federal Rules of Civil Procedure authorizes a court to use either of these procedures at its own discretion. FED. R. CIV. P. 49. See generally 38 ANTITRUST L.J. 95-97 (1968-69) (proceedings of the National Institute on Preparation and Trial of Antitrust Treble Damage Suits, American Bar Assn., Nov. 7-8, 1968) (discussing the use of rule 49 procedures from the tactical perspectives of antitrust litigants).

The MCI court also suggested use of a special master on remand to assist in the determination of damages. See *MCI Commn. Corp. v. ATT*, Nos. 80-2171, 80-2288 (7th Cir., Jan. 12, 1983) (available on LEXIS, Genfed library, Newer file) n.122. This suggestion is of limited utility in controlling jury manipulation. First, rule 53(b) provides that "reference to a master shall be the exception and not the rule." Second, in a jury trial, the master's report is not even a discretionary guide to the fact-finder, as it would be in a bench trial; instead, the report is read to the jury as evidence, and subject to attack by the parties. While the report may serve the important functions of providing the jury with a reasonable standard to fall back on, and of informing appellate review of the damage determination, so long as the jury is inclined to manipulate damages a third estimate added to that of the plaintiff and the defendant may have limited impact. See generally FED. R. CIV. P. 53.

90. Nordbye, *Use of Special Verdicts*, 2 F.R.D. 138, 139 (1941). The court gives the jury such instructions and explanations as are necessary to answer the questions. FED. R. CIV. P. 49(a). Cautionary instructions, such as the one proposed in this Note, would accompany a special verdict charge.

There is a split in the federal courts on whether to inform the jury of the legal effect of its answers. Compare *Gullett v. St. Paul Fire & Marine Ins. Co.*, 446 F.2d 1100 (7th Cir. 1971), with *Lowery v. Clause*, 348 F.2d 252, 261 (8th Cir. 1965). Presumably courts using special verdicts in antitrust cases would not inform the jury of the treble damage provision. Since jurors are not told the legal effect of the damage determination when a general verdict is used, see note 18 *supra* and accompanying text, courts should not inform them of the legal effect of the special verdict questions on damages.

91. Rule 49 provides for special procedures if the answers to the interrogatories are inconsistent with the general verdict, inconsistent with other answers, or both. FED. R. CIV. P. 49(b).

involved in a case.⁹² By requiring the jury to reach a factual determination on each theory of damages advanced by the plaintiff, the court forces the jury to concentrate on these theories instead of simply providing a lump sum damages figure.⁹³ Additionally, these procedures simplify the jury's task by identifying specific questions, instead of leaving the jury broad discretion to unsort a large aggregate of complex facts.⁹⁴

Appellate courts have already suggested that trial judges make more use of these devices in complex antitrust cases. In addition to reducing the likelihood of jury manipulation, the use of these procedures facilitates appellate review of jury decisions.⁹⁵ Because the

92. See *Lowrey v. Clause*, 348 F.2d 252, 260 (8th Cir. 1965); *Moore-McCormack Lines, Inc. v. Maryland Ship Ceiling Co.*, 311 F.2d 663, 669 (9th Cir. 1962); 9 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2511 (1971); Nordbye, *supra* note 90, at 139. But see *Personal Injury Damage Award*, *supra* note 2, at 162.

93. Kalven noted that juries tend to think of recoveries as single sums, rather than analyzing each recovery as a sum of component damage awards. He felt a more effective instruction could make the jury conscious of its duty to compute the component sums. See *Personal Injury Damage Award*, *supra* note 2, at 161. Even when judges have used special verdicts in verdicts in antitrust cases, they have used open-ended questions on damages. After asking detailed questions to establish an antitrust violation, courts typically ask for a lump sum damage figure for each violation. See, e.g., *E. DEVITT & C. BLACKMAR*, *supra* note 18, § 90.43; SECTION OF ANTITRUST LAW, *supra* note 18, at 193-204.

Such a "lump sum" technique may be an important cause of jury manipulation. Since this technique does not require the jury to consider each theory of damages carefully, the jury can award what it deems a reasonable amount without limiting itself to the amount suggested by the merits of each separate theory. As this approach allows a significant amount of discretion, the jury may not feel that it is disregarding the judge's instruction if it arrives at an equitable result.

Special verdicts can be used to help control damage awards by forcing the jury to specifically decide the merits of each theory of damages advanced by the plaintiff. See Nordbye, *Comments on Selected Provisions of the New Minnesota Rules*, 36 MINN. L. REV. 672, 687 (1952) (noting that through the use of interrogatories accompanying a general verdict, courts can direct the attention of juries to the important issues: "[t]oo often juries generalize in their determinations . . . without deliberating upon the crucial questions which are conditions precedent to the general verdict").

94. Sunderland, *Verdicts Special and General*, 29 YALE L.J. 253, 259 (1919-20). To the extent that this helps clarify the factual issues, and ease their resolution, it should reduce jury manipulation. See note 85 *supra* and accompanying text.

95. See *MCI Commn. Corp. v. ATT*, Nos. 80-2171, 80-2288 (7th Cir., Jan. 12, 1983) (available on LEXIS, Genfed library, Newer file). The special verdict employed in that case detailed the theories of liability quite extensively, but reduced the issue of damages to a single lump-sum question. Appendix, special verdict questions 1-7. Since the lost-profit study plaintiff offer to prove damages did not, and probably could not, separately account for the effect of each claim of liability, the Court of Appeals could only remand for another determination of damages. This illustrates both that special verdicts facilitate appellate review (for without the special verdict on liability the appellate court could never have scrutinized the link between the liability claims actually upheld by the jury and the damage award), and that special verdicts should be designed to encourage the more specific connection of damages with theories of liability. *MCI* may present a case where the only available measure of damages, plaintiff's study, measures only the cumulative impact of all liability claims — some of which were dismissed before trial. In such cases the trial will be dispositive only when defendant prevails on all liability issues, unless the jury adjusts the damage estimate to account for liability claims thrown out before trial or by the jury itself, in such a way as to survive appellate review. This sort of adjustment may prove impossible, but is surely more likely if special verdicts relate

procedures identify the theories of liability and damages that the jury relied on, appellate courts need not speculate on these matters in determining whether the evidence supported the verdict. Additionally, if an appellate court reverses the jury on an issue, only that specific issue need be retried, not the entire case.⁹⁶ These advantages, together with the potential for minimizing jury manipulation, strongly recommend the use of the rule 49 procedures.⁹⁷

CONCLUSION

Kalven and Zeisel, in their epic work on the jury system, conclude that the jury embodies "a daring effort in human arrangements to work out a solution to the tensions between law and equity and anarchy."⁹⁸ Without challenging the wisdom of this effort, it is clear that jury behavior can often impede the just enforcement of the antitrust laws. This Note offers a modest solution to this problem. But this restraint should not obscure the genuine need for additional guidance to the jury in assessing antitrust damages, even as it underscores the absence of serious disadvantages to the proposed procedures. By following the approach advocated here, courts will better harmonize the use of the jury as a fact-finder and the policies advanced by private antitrust suits.

liability claims directly to damage estimates. Such procedures also encourage plaintiffs to devise damage estimates which can be adjusted for adverse judgments on some liability claims, potentially avoiding retrials in situations like *MCI*.

Appellate courts have suggested that trial judges make more use of these devices in complex antitrust cases. See *SuperTurf, Inc. v. Monsanto Co.*, No. 80-1484, slip op. at 19 n.14 (8th Cir. Oct. 2, 1981); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 279 (2d Cir. 1979).

96. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 279 (2d Cir. 1979).

97. In spite of these advantages, commentators have noted that these procedures are rarely used. See 9 C. WRIGHT & A. MILLER, *supra* note 92, § 2505. One reason is that trial judges are often pressed for time and these procedures require extra work. See Gunn, *The Jury System and Special Verdicts*, 2 ST. MARY'S L.J. 175, 178 (1970). To ease the workload, the judge could ask counsel to submit proposed jury instructions. Indeed the courts should do everything possible to ensure accurate verdicts in large, complex cases. Precisely because these cases involve so huge a commitment of judicial resources, the costs of error increase accordingly. It has also been suggested that these procedures impermissibly intrude upon a jury's freedom. Justices Black and Douglas in fact considered the devices an unconstitutional impairment of the right to a jury trial. See 374 U.S. 861, 867-68 (1963) (dissenting from the amendments to Rule 49). In the context of treble damage actions, this argument is unpersuasive, since jury freedom can undercut the important policies served by such actions, and can lead to results which the jury itself would consider inequitable.

98. H. KALVEN & H. ZEISEL, *supra* note 1, at 499.