MAKING JURIES BETTER FACTFINDERS

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Tocqueville once commented that the jury was, above all, a "political institution."[1] That belief has, to a large degree been part of the conventional wisdom about juries. They are democracy in action. Indeed, those commenting on the history of the jury have tended to emphasize the trials in which the jury acted politically by rendering a just verdict despite the law and despite the evidence of guilt. Every high school student learns, for example, about the trial of John Peter Zenger, the 18th-century New York publisher who was acquitted of seditious libel by a nullifying jury that ignored the judge's instructions. There have been many other examples throughout American history—for example, cases involving fugitive slaves and anti-Vietnam War protesters.[2]

My view is quite different. As I see it, the most important reason for preserving trial by jury in criminal cases is not to promote democracy or to encourage "appropriate" nullifications; rather, the reason is to promote accurate determinations of guilt. It might be argued that juries are not well able to produce accurate decisions. But a look back at history—around the time the Constitution was adopted—will show that the Framers' belief in the accuracy of jury decisionmaking was one of the primary reasons given for protecting the right to a jury trial.

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1. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 283 (Phillips Bradley ed., Alfred A. Knopf 1945).

2. *See, e.g.*, Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L. J. 677, 703 (describing abolitionist jury nullification); David N. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullifcation in a New Context*, 28 U. MICH. J.L. REFORM 861, 876-77 (1995) (discussing to jury nullification in cases involving prosecutions of Vietnam War protesters and resisters).

In the debates over the Constitution, there was repeatedly mentioned a great fear that judges would be biased or, at least, that they might be too idiosyncratic in their decisionmaking. Thus, while not much discussion of the jury provisions appears in Madison's notes of the convention, at one point Elbridge Gerry says that the Constitution should also provide for juries in *civil* cases in order to avoid against the possibility of corrupt judges.[3] Alexander Hamilton, in Federalist No. 83, argued that by securing a right to jury trial in federal criminal cases[4] the proposed Constitution provided for the surest defense against "the great engines of judicial despotism," which were "arbitrary methods of prosecuting pretended offences, and arbitrary punishments upon arbitrary convictions."[5] An anonymous pamphleteer, during the course of the debates on ratification, had the following to say: "The Chief Magistrate . . . of a republic, is as liable to personal prejudice, and to passion, as any King in Europe; and might prosecute a bold writer, or any other person, who had become obnoxious to their resentment, with as much violence and rigour."[6] And Richard Henry Lee remarked that if the administration of justice be "entirely *entrusted* to the magistracy, a select body of men, and those generally selected by... such as enjoy the highest offices of the state, these decisions in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity."[7]

With all due respect to judges, it thus seems clear that the Framers were concerned that an individual judge might not fairly and accurately weigh the evidence in a case. By contrast, a

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3. 2 *See* 2 RECORDS OF THE FEDERAL CONVENTION 587 (Madison's notes of Sept. 12, 1787, in which he states that "Mr. Gerry urged the necessity of Juries to guard agst. corrupt Judges"), *reprinted in* 4 THE FOUNDER'S CONSTITUTION 391 (1987).

4. Many people seem to forget that, even before the adoption of the Sixth Amendment, the federal Constitution secured the right to a jury trial in federal criminal cases. *See* U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes... shall be by Jury....").

5. THE FEDERALIST No. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

6. A NATIVE OF VIRGINIA: OBSERVATIONS UPON THE PROPOSED PLAN OF FEDERAL GOVERNMENT (*Virginia Gazette* (Petersburg) 1788), *reprinted in* 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 655, 686 (John P. Kaminski & Gaspare J. Saladino eds., 1990).

7. Letter from Richard Henry Lee to Edmund Randolph (Oct. 16, 1787), *reprinted in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 60, 63 (John P. Kaminski & Gaspare J. Saladino eds., 1988). Lee was a member of the Continental Congress; he made the first motion for independence and confederation. *See id.* at 527.

jury was thought to reflect the common sense of the community and thus would not suffer from the biases or idiosyncracies of an individual judge. As Jefferson put it:

> In truth, it is better to toss up cross and pile [heads or tails] in a cause than to refer it to a judge whose mind is warped by any motive whatever, in that particular case. But the common sense of twelve honest men gives still a better chance of just decision than the hazard of cross and pile.[8]

Blackstone made a similar argument in his *Commentaries*, stating that:

> [I]n settling and adjusting a question of fact, when intrusted to any single magistrate, partiality and injustice have an ample field to range in; either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder. Here therefore a competent number of sensible and upright jurymen, chosen from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice.[9]

And a letter, written by one of the convention delegates from Georgia, puts the point this way:

> As to trial by jury in criminal cases, it is right, it is just, perhaps it is indispensable,—the life of a citizen ought not to depend on the fiat of a single person. Prejudice, resentment, and partiality, are among the weaknesses of human nature, and are apt to pervert the judgment of the greatest and best of men.[10]

Indeed, the United States Supreme Court, in its cases discussing the nature of the right to a jury trial, has tended to emphasize the jury's role as an impartial factfinder. In a civil case from the nineteenth century, the Court stated that "[i]t is assumed that twelve men know more of the common affairs of

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8. THOMAS JEFFERSON, NOTES ON VIRGINIA, QUERY XIV, *reprinted in* THE COMPLETE JEFFERSON 656 (Saul K. Padover ed., 1943).

9. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *380. *See also* 4 *id.* *349 (arguing that, in view of the danger of "the violence and partiality of judges appointed by the crown, in suits between the king and the subject," the law has "wisely placed this strong and twofold barrier, of a presentment and a trial by jury, between the liberties of the people, and the prerogative of the crown").

10. Letter from William Pierce to St. George Tucker (Sept. 28, 1787), *reprinted in* 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 442, 445 (John P. Kaminski & Gaspare J. Saladino eds., 1986).

life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."[11] And in *Duncan v. Louisiana*,[12] the case that imposed on the States the requirement of a jury trial in criminal cases, the Court summarized the relevant history as follows:

> Those who wrote our [federal and state] constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. *Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.* If the defendant preferred the commonsense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.[13]

Now, there are contrary voices, to be sure. Justice Holmes was no great fan of the jury and once commented that "[t]he man who wants a jury has a bad case."[14] And anyone who has practiced in the criminal justice system has seen some seemingly terrible jury verdicts.

In general, however, juries do a good job. Statistics for the federal judicial system show some interesting differences between the rate at which juries acquit and the rate at which judges acquit. (Of course, as a prosecutor, I define "error" by the acquittal rate.) Judges in bench trials acquitted the defendant in almost forty-four percent of the federal criminal cases, excluding traffic offenses, terminated during fiscal year 1993.[15] Juries, by contrast, acquitted in only fifteen percent of

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11. Railroad Co. v. Stout, 84 U.S. (17 Wall.) 657, 664 (1873).

12. 391 U.S. 145 (1968).

13. *Id.* at 156 (emphasis added).

14. 1 OLIVER WENDELL HOLMES, HOLMES-POLLOCK LETTERS 74 (Mark DeWolfe Howe ed., 1946). In an address given in 1899, Justice Holmes further commented:

> I confess that in my experience I have not found juries specially inspired for the discovery of the truth . . . they will introduce into their verdict a certain amount—a very large amount, so far as I have observed—of popular prejudice, and thus keep the administration of the law in accord with the wishes and feelings of the community.

Oliver Wendell Holmes, Address (Jan. 17, 1899) *in* THE QUOTABLE LAWYER 152 (David S. Shrager & Elizabeth Frost eds., 1986).

15. There were 546 acquittals in federal bench trials in fiscal year 1993, ending Sept. 30, 1993; 333 of those occurred in drunk-driving and traffic cases. *See* THE

non-traffic cases for that same time period.[16] Undoubtedly this result is due in part to self-selection. That is, lawyers who know that they have a silver-bullet defense based on a technical, legal issue are going to waive their clients' right to a jury trial; in this type of case, defense attorneys do *not* want the "common-sense" judgment of twelve lay persons. But even in the run-of-the-mill case, it seems that the average *federal* judge is less likely to convict than the average jury. Congress apparently agrees: the federal Crime Bill of 1994 expressly commits capital sentencing decisions to juries (unless the government consents to a defendant's motion for a bench trial), and does not permit judges to override jury verdicts of death.[17]

In any event, it is not my intention to argue the *empirical* point of whether juries are in fact better decisionmakers than judges. Rather, my point is more a normative one. Depending upon *why* a jury system is thought desirable, different judgments will be made about the need for reform and the shape of any changes that should be made. Thus, if one believes the central aim of the jury trial right is to secure unbiased and accurate decisionmaking, then one would suggest reforms to help juries fulfill that goal. If, by contrast, one takes the view that juries are intended to be a political body—a sort of mini-legislature in which citizens bring with them their biases in order to reflect the perspectives of some larger group—then one would want to suggest a different set of changes.[18]

ADMINISTRATIVE OFFICE OF UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, at AI-140 to AI-142, tbl.D-4 (1994). During the same period, there were 491 convictions in federal bench trials, and 219 of those involved drunk-driving or traffic offenses. *See id.* Accordingly, of the 485 non-traffic cases involving bench trials, 213—44%—resulted in acquittals. *See id.* (The vast majority of cases are resolved either by a dismissal or by a guilty plea, hence the seemingly low number of actual convictions and acquittals.) *See id.*

16. In fiscal year 1993, federal juries convicted in 3,797 cases, 13 of which were drunk-driving or traffic offenses, and acquitted in 693 cases, 3 of which were traffic cases. *See id.* Thus, of the 4,474 jury trials not involving drunk driving or traffic offenses, only 690 or 15% resulted in acquittals. The statistics from other years are comparable. For example, in fiscal year 1992, juries acquitted in 16% of all criminal cases not involving drunk driving or traffic offenses, and judges acquitted in 43% of such cases. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, at AI-141 to AI-143 tbl.D-4 (1993).

17. *See* 18 U.S.C. § 3593(b), (e); *id.* § 3594 (1994).

18. Professor Paul Butler apparently takes the latter view. In a recent article, he expressly argues that "it is the moral responsibility of black jurors to emancipate some guilty black outlaws." Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995). This proposal eschews any notion of trying to achieve factually accurate verdicts and instead expressly advocates that jurors

As explained above, the traditional reason for having juries is to promote impartial, factually accurate decisions about criminal guilt. This reason also reflects much of the current thinking in the general populace—whose views are worth more than lawyers'—as to what purpose juries fulfill. Thus, we regularly hear popular criticism about verdicts that are perceived to be inaccurate. And it makes sense that, in any system purporting to separate those who lose their freedom from those who do not, the guiding principle should be whether the former have *in fact* committed a criminal act.

With this focus in mind, I would like to address some of the proposals for improving the fact-finding function of the jury. The first question is whether some sort of structural reform is needed. There have been a number of proposals in recent years, in California and elsewhere, to eliminate the unanimity requirement or to reduce the number of jurors.[19] It is not clear whether these proposals would improve the accuracy of jury decisionmaking, but ultimately that policy question does not matter: the question is settled by the Constitution.

Those who practice in federal court are bound by the original Bill of Rights. The discussion here will operate on the premise that the Supreme Court is correct in applying the provisions of the federal Bill of Rights with equal force to the courts of the States.[20] Contrary to the Supreme Court, however, I believe that the Constitution's guarantee of a jury trial requires a unanimous jury of twelve members.

At the time of the founding, anyone would have thought that the jury right secured by the Constitution meant a unanimous, twelve-person jury. But in *Williams v. Florida*,[21] the Court held that, notwithstanding the consistent verdict of history, the Sixth Amendment did not require that criminal juries have twelve members. And in *Apodaca v. Oregon*,[22] a badly fractured Court further held that unanimous juries were not required in state criminal trials, although a majority of the Court stated in *dicta*

engage in racial discrimination in order to accomplish larger political ends related to group grievances. *See id.*

19. *See, e.g.*, sources cited in Barbara A. Babcock, *A Unanimous Jury is Fundamental to Our Democracy*, 20 HARV. J.L. & PUB. POL'Y 469, 469 n.5 (1997).

20. Though the incorporation debate is still ongoing, I do not propose to reopen it here.

21. 399 U.S. 78 (1970).

22. 406 U.S. 404 (1972).

that unanimity would be required in federal criminal cases.[23]

The *Williams* Court did *not* base its holding on the view that the jury trial right incorporated into the Fourteenth Amendment was less demanding than the Sixth Amendment right. On the contrary, the Court held that "the 12-man requirement cannot be regarded as an indispensable component of the Sixth Amendment."[24] In dissent, Justice Harlan decried what he viewed as the Court's "diluting [of] constitutional protections" long applicable in federal court in order to give the States more flexibility under the uniform version of the "incorporated" guarantee.[25] He noted that "history and numerous pronouncements of [the Supreme] Court" had made clear that the Sixth Amendment required a twelve-person jury, and argued that, before the decision in *Williams*, "it would have been unthinkable to suggest that the Sixth Amendment's right to a trial by jury is satisfied by a jury of six."[26]

Justice Harlan also noted that, by "hoisting the anchor to history," the Court had deprived itself of any clear, principled basis for drawing the line at some other point.[27] The correctness of this observation was quickly confirmed in the opinions that followed *Williams*—opinions that can charitably be described as embarrassing. In *Ballew v. Georgia*,[28] a unanimous Court held

23. Justice White, joined by Chief Justice Burger and Justices Blackmun and Rehnquist, held that although it did apply with full force to the States, the Sixth Amendment did not require a unanimous jury verdict. *See Apodaca*, 406 U.S. at 407-11. Justice Douglas, joined by Justices Brennan and Marshall, dissented, arguing that the Sixth Amendment *did* require jury unanimity in criminal cases. *See Johnson v. Louisiana*, 406 U.S. 356, 383-84 (1972) (Douglas, J., dissenting with an opinion applicable to both *Apodaca* and *Johnson*). He did agree, however, that the Sixth Amendment applied equally to the States and to the federal government. *See id.* Justice Stewart, also joined by Justices Brennan and Marshall, dissented as well on the same ground, arguing that the Sixth Amendment required unanimous juries in both state and federal criminal cases. *See Apodaca*, 406 U.S. at 414. Justice Powell, writing only for himself, took the view that the Sixth Amendment "requires a unanimous jury verdict to convict in a federal criminal trial," *Johnson v. Louisiana*, 406 U.S. 356, 373 (1972) (Powell, J., concurring in *Johnson* and concurring in the judgment in *Apodaca*), but that this element of the Sixth Amendment guarantee was not incorporated against the States. *See id.* at 371-77. The anomalous result is that, although eight members of the Court agreed that the rule should be the same in State and federal cases, *Apodaca* requires unanimity only in federal criminal cases.

24. *Williams*, 399 U.S. at 100.

25. *Id.* at 118 (Harlan, J., dissenting).

26. *Id.* at 123, 122.

27. *Id.* at 126.

28. 435 U.S. 223 (1978).

that the Sixth Amendment required, at a minimum, six jurors. Having abandoned history, a plurality of the Court candidly conceded that it was forced to rely on social science articles about the effects of juries of less than 12 members: "[w]e have considered [these studies] carefully because they provide the only basis, besides judicial hunch, for a decision about whether smaller and smaller juries will be able to fulfill the purpose and functions of the Sixth Amendment."[29] After wading through these studies for several pages, the plurality held that "the assembled data raise substantial doubt about the reliability and appropriate representation of panels smaller than six," and that the risks presented by juries smaller than six were of "constitutional significance."[30]

Of course, history and the consistent precedent before *Williams* would have been better guides to judicial decisionmaking than either "judicial hunch" or social science articles. The *Ballew* plurality's reliance on the latter was especially ironic because almost all of the articles cited in the plurality opinion were ones that unfavorably compared *six-person* juries to *twelve-person* juries.[31] How these cases supported drawing a line between five and six is incomprehensible.

The separate opinions in *Ballew* also failed to rely on any objective support for their reasoning. Justice White, in a one-sentence opinion concurring in the judgment, stated that "a jury of fewer than six persons would fail to represent the sense of the community and hence not satisfy the fair cross-section requirement of the Sixth and Fourteenth Amendments."[32] Justice Powell's opinion concurring in the judgment, while sarcastically criticizing Justice Blackmun's "heavy reliance on numerology derived from statistical studies," was forced to rely entirely on *ipse dixit*: "[T]he line between five- and six-member juries is difficult to justify, but a line has to be drawn somewhere if the substance of jury trial is to be preserved."[33]

Equally unprincipled is the Court's decision in *Burch v.*

29. *Id.* at 232 n.10 (plurality opinion).

30. *Id.* at 239.

31. *See* SAUL M. KASSIN, THE AMERICAN JURY ON TRIAL 197 (1988) ("It is ironic that studies on the differences between 6- and 12-person juries were used to justify a ruling about 5- versus 6-person juries. Based on the Court's review of this research, it logically should have reversed *Williams* and reinstated the full 12-person tribunal.").

32. *Ballew*, 435 U.S. at 245 (White, J., concurring in the judgment).

33. *Id.* at 246 (Powell, J., concurring in the judgment).

Louisiana,[34] which held that six-person juries must reach a unanimous verdict.[35] The Court reached this conclusion for "much the same reasons that led us in *Ballew* to decide that use of a five-member jury threatened the fairness of the proceeding and the proper role of the jury."[36] The Court then added:

> We are buttressed in this view by the current jury practices of the several States. It appears that of those States that utilize six-member juries in trials of nonpetty offenses, only two, including Louisiana, allow nonunanimous verdicts. *We think that this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.*[37]

The irony in the italicized sentence is almost more than one can bear. At the time that the Court rejected the nonunanimity standard in *Apodaca*, only two States—Louisiana and Oregon—generally permitted nonunanimous juries in criminal cases.[38] If, as the Court in *Burch* claimed, a 48-2 judgment of the States "provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not," then that is simply another reason for concluding that *Apodaca* was wrong in the first place.

In sum, I think that *Williams* and *Apodaca* were wrong and should be overruled. Because, in my view, the Constitution compels a unanimous jury of 12 citizens, I would not advocate a reduction in jury size or the use of nonunanimous juries.

I hasten to add, however, that I do not advocate a unanimity requirement for capital sentencing juries. There is no basis in either history or case law for concluding that there is a right to a jury determination of a death sentence,[39] and therefore I see no reason to think that such a determination is constitutionally required. In addition, unanimous capital juries seem to me to

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34. 441 U.S. 130 (1979).

35. *See id.* at 134 ("[W]e believe that conviction by a nonunanimous six-member jury in a state criminal trial for a nonpetty offense deprives an accused of his constitutional right to trial by jury").

36. *Id.* at 138.

37. *Id.* (emphasis added).

38. *See Williams*, 399 U.S. at 138 (appendix to opinion of Harlan, J.). Texas also permitted a verdict by less than 12, but only when a juror became incapacitated. *See id.* at 139.

39. *See, e.g.*, Walton v. Arizona, 497 U.S. 639, 647-50 (1990) ("Any argument that the Constitution requires that a jury impose the sentence of death ... has been soundly rejected by this Court.").

be a bad idea, because they fail to take account of the important differences between the function of a jury at trial and its function at sentencing. As I have explained, a criminal trial jury is intended to be an accurate determiner of factual guilt, but a capital sentencing jury is essentially making a normative, moral judgment. Given the diversity of views that exist on the subject of capital punishment, I think in many cases insistence on a unanimous verdict is more than we should reasonably expect.

A further structural issue concerns the use of peremptory challenges. I have come reluctantly, but firmly, to the view that they should be all but abolished; each side should be permitted only one or two peremptories at most. *Batson v. Kentucky*[40] and its progeny[41] have created so much satellite litigation about peremptories that I no longer think the option is worth retaining. Criminal defendants routinely object to almost every strike of a juror who is a member of a racial minority, regardless of *Batson*'s requirement of a prima facie showing. Judges all too often incorrectly sustain these challenges, and it is not hard to see why: judges know that if there is a conviction, criminal defendants can appeal erroneous *Batson* rulings, but that if there is an acquittal the government cannot appeal. Consequently, there is an enormous practical incentive to rule against the government on these sorts of questions. The same reasoning holds true when defense peremptories are at issue: I can think of only three cases in the last three years in my district in which a judge sustained the government's *Batson* objection against a defense peremptory.[42] Given that *Batson* errors—whether erroneously overruling the defendant's objection or erroneously sustaining the government's—have been held to be subject to automatic reversal,[43] peremptories have simply

40. 476 U.S. 79 (1986) (forbidding the use of peremptory challenges based on race).

41. In *Georgia v. McCollum*, 505 U.S. 42 (1992), the Supreme Court extended *Batson*'s prohibition on prosecutorial race-based peremptory challenges to strikes made by criminal defendants.

42. One of these cases was *United States v. Koon*, 34 F.3d 1416, 1439-43 (9th Cir. 1994), *reversed in part on other grounds*, 116 S. Ct. 2035 (1996). In *Koon*, which involved the federal prosecution of the officers who beat Rodney King, the appeals court found no error in the district court's refusal—based on *Batson*—to permit the defense to strike two black jurors. *See id.* at 1439-43. *Koon*, of course, was not a typical case, and is more akin to an exception that proves the rule. Another of these cases was *United States v. Annigoni*, 96 F.3d 1132, 1134 (9th Cir. 1996) (en banc) (overruling a district court's decision that a defense strike of an Asian juror was racially motivated, and holding that the defendant was *automatically* entitled to a new trial).

43. *See Annigoni*, 96 F.3d at 1134.

become "too dear a luxury."[44]

I would retain only one peremptory—or at most two—for each side. There is sometimes the need to get rid of someone on a jury venire who is an obvious eccentric, but who is not challengeable for cause. I do not think such cases are too common, and so one or two peremptories should be sufficient. Moreover, significantly reducing peremptories would all but eliminate the widespread impression that jury selection is designed to secure jurors who are "favorable" to one side or another. It would also substantially reduce the number of persons who need to be called for jury duty, because, with fewer peremptories, venires would not have to be so large. Finally, fewer peremptories would mean quicker jury selection, with obvious benefits to the courts, the parties, the long-suffering conscript jurors, and society as a whole.

In attempting to improve the quality of jury decisionmaking, I think a number of reforms would be helpful.

First, many jury instructions are difficult for the average laymen to understand. We should instead strive to make instructions as short and simple as possible.

Second, we should consider reviving the discouraged practice of permitting judges to comment on the evidence. Although I recognize the danger—the jury may be tempted to give too much weight to such comments—such a practice, at least in complex cases, has countervailing benefits.

Third, we should endeavor to diversify jury pools by eliminating many of the existing exemptions for professionals, raising the pay of jurors to reduce financial hardships associated with jury service, and fining (if not criminally prosecuting) people who intentionally disregard jury summonses. These measures might mitigate some of the bias that currently creates juries filled predominantly with persons having only a high-school education. Better-educated jurors may not produce smarter verdicts, but I think it is important to eliminate this systemic bias. Reducing the number of peremptories will also help in this regard, since many attorneys seem to use

44. *Id.* at 1150 (Kozinski, J., dissenting). As Judge Kozinski explained, arguing against the automatic reversal, "[a] rule that turns every peremptory challenge error into a retrial gives a strong incentive to federal and state legislators to cut down the number of peremptories—or eliminate them altogether." *Id.*

peremptories to "dumb-down" the jury by eliminating better-educated people who might examine the case more critically.

Fourth, we should eliminate all leading questions in voir dire. Asking jurors whether they can be "fair and impartial" is not a terribly effective tool for discerning bias. Rather, questions should be open-ended, while still focused on the bias sought to be discovered. For example, if there is a concern about racial bias against the defendant, it is more likely to be elicited by an open-ended question about the juror's attitudes on issues relating to race than by a question such as "Would you convict the defendant simply because he or she is a member of a minority group?" Even Klan members can guess the desired answers to such leading questions, and anyone with a deep-seated racial bias will likely be malicious enough (or sufficiently self-deceived) to lie about it.

These suggestions may not be a panacea for all of the current ills of the juror system. However, before we attempt risky and constitutionally problematic structural reforms, we have an obligation to employ more limited measures to help juries better perform their task of making accurate decisions about guilt and innocence.