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IS IT A SHORT TRIP BACK TO MANOR FARM? A STUDY OF JUDICIAL ATTITUDES AND BEHAVIORS CONCERNING THE CIVIL JURY SYSTEM

Michelle L. Hartmann*

I. INTRODUCTION

AMIDST the faithful teachings of Old Major, Animalism grew.¹ Though the vision of Napoleon and Snowball differed in several respects, the Rebellion succeeded and “The Seven Commandments” were promulgated—or at least painted on the wall. The guise of service for joy and the dignity of labour at “The Animal Farm” served the animals well. Nevertheless, slow transformations occurred. For instance, “No animal shall kill any other animal,” was ever so slightly altered to “[n]o animal shall kill any other animal *without cause*.” “No animal shall drink alcohol” likewise craftily welcomed “*to excess*” into its commanding stare.² While four legs were good, two legs were found to be undoubtedly better.³ Only substance mattered after all. Without obvious tremor, however, the blunt tyranny soon replaced formality in total. The Seven Commandments were entirely eliminated. In their place, “ALL ANIMALS ARE EQUAL BUT SOME ANIMALS ARE MORE EQUAL THAN OTHERS.”⁴ With delicate art and restrained pride, the once proud “Animal Farm” was abolished. “Henceforward the farm was to be known as ‘The Manor Farm’—which, [Napoleon] believed, was its correct and original name.”⁵ “To the prosperity of The Manor Farm!”⁶

Building on data obtained in a nationwide survey of the jury system, this article explores modern mechanisms that subtly dig into the civil jury’s traditional province. Judge Patrick E. Higginbotham remarked that: “[t]he jury system is under attack by certain elitists in our society

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1. GEORGE ORWELL, *ANIMAL FARM* (Harcourt, Brace & Co. 1946).

2. *Id.* at 91.

3. *Id.* at 112.

4. *Id.*

5. *Id.* at 117.

6. *Id.*

who think that they are better-suited to make decisions than 12 ordinary citizens . . . The people pushing these efforts simply don't trust juries. They supported the move from 12 jurors to six because six is halfway to zero and that's where they want to go."⁷ Are those willing to reduce the role of the civil jury hoping it will suffer the fate of the civil jury in England—all but abolished by habit?⁸ While some with a straight face argue for this result,⁹ the absolute end is unlikely. Nonetheless, the slow drain of its vigor through expanded appellate review, evidentiary shifts of power from jury to judge, and designations of questions as "a matter of law" arguably resembles Napoleon's methodical plan back to Manor.

The Dallas Morning News and *SMU Law Review* conducted a sixteen-month study of the civil and criminal jury system. The study questions federal and state trial judges concerning the status of the modern criminal and civil jury. Though judicial responses have been measured before, this study worked from a specific foundation. First, the study focused broadly on two complete arenas. It questioned all federal trial judges throughout the United States and all state trial judges within the State of Texas. This allowed the entire federal trial system to be juxtaposed against an entire state system. Second, questions focused on the future of the jury system to ascertain both whether they were witness to a modern reduction in an individual's jury right and whether further reductions were on the horizon. Third, questions involved both abstract inquiries into the goals and effectiveness of the jury system as well as behavioral inquiries probing specific situations where the judge had disregarded jury conclusions. This structure allowed judicial attitudes to be contrasted with judicial behaviors in hopes of better understanding nationwide trends.

Questionnaires were sent to federal trial judges throughout the United States and to state trial judges in Texas.¹⁰ A 66-percent response rate resulted in the federal camp (594 federal district judge respondents) and a 70-percent response rate resulted in the state arena (393 Texas state judge respondents).¹¹ The judges were asked thirty-eight questions dealing with both the civil and the criminal jury. As discussed, the questions ranged from abstract inquiries targeting views of the proper role of the jury to more individualized questions pursuing the frequency with which

7. Mark Curriden, *Tipping the Scales: Right to Trial by Jury Fades Under Court Rulings, New Laws*, THE DALLAS MORNING NEWS, May 7, 2000, at 1A [hereinafter Curriden, *Tipping the Scales*], available at 2000 WL 2033720.

8. Patrick E. Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEXAS L. REV. 47, 50 (1977).

9. John E. Babiarez, Jr., *Justice Without a Jury: In Civil Cases, a Judge May be the Better Arbiter*, NEWS JOURNAL (Wilmington, Del. March 12, 2000), available at <http://www/delawareonline.com/opinion/perspect/perspect03122000.html> ("[B]ecause results would become more predictable, more disputes will be resolved by settlement and perhaps without litigation.").

10. Article I, § 15, and Article V, § 10, of the Texas Constitution, like most (49) other states guarantees the right to a jury trial, except in certain limited circumstances. *State v. Credit Bureau of Laredo, Inc.*, 530 S.W.2d 288, 291-92 (Tex. 1975).

11. See R. Perry Sentell, Jr., *The Georgia Jury and Negligence: The View from the Bench*, 26 GA. L. REV. 85, 94 (1991) ("a return rate of twenty percent would be 'normal'").

the judge increased or decreased jury verdicts. The *Dallas Morning News* utilized the responses and resulting data in a series of articles relating to public perception of the jury. *SMU Law Review* likewise assessed the data in a series of articles ranging from the modern use of jury consultants to current reform efforts. This article draws on the data to further the premise that despite giving the jury high marks on its success at reaching a "fair and just" verdict, trial and appellate court judges alter specific jury determinations in practice. Instead of obvious reductions, such as a diminution in the number of jurors, the article argues that subtle restrictions have lessened an individual's jury right within the last thirty years.

To research this path, some of the salient responses to eleven of the thirty-eight questions from the study are broken down by the following demographic factors:

- COURT: This breakdown compares state and federal court responses, responses from Texas judges sitting in highly populated areas to those sitting in sparsely populated areas,¹² and federal court responses by circuit.
- JUDGE: This breakdown compares responses with regard to gender,¹³ political ideology,¹⁴ and employment background in either public or private service.¹⁵

In 1966, Kalven and Zeisel reported that 78% of the judges in civil cases would have decided cases the same as the jury.¹⁶ Data from the *SMU Law Review* study reaffirms this agreement between judges and juries on the outcome of cases. In contrast, significant numbers of respon-

12. For Texas judges, the study broke geographic areas into four groups: those with a resident population greater than 500,000, those with a resident population between 50,000 and 500,000, those with a resident population between 10,000 and 50,000, and those with a resident population below 10,000. To facilitate reporting, this Article compares the extremes—those responses from judges in areas with populations greater than 500,000 to those in areas with less than 10,000.

13. TABLE 1:

	State	Federal	Total
Male	76.1%(299)	88.6%(526)	825
Female	23.9%(94)	11.4%(68)	162

14. TABLE 2:

	State	Federal
Conservative	55.2%(123)	21.5%(128)
Liberal	1.5%(6)	4.5%(27)

This Article mainly examines the "conservative" and the "liberal" responses as opposed to the "moderate" responses. Noteworthy, the "moderate" responses coincided significantly with the "conservative" responses as to most questions.

15. TABLE 3:

	State	Federal
Private	45%(123)	56.2%(334)
Public	28.2%(111)	24.2%(144)
Both	26%(102)	19%(113)

16. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 63-64 (1966).

dents disagreed with expansion of the role of the jury in favor of new mechanisms giving judges a more active role in fact finding.

To simplify the reporting of variables, divisions are constructed. Section A explores five questions on the proper role of the jury and the future of this civil jury right. Section B examines verdicts. It looks for the possible presence of preconceived party favoritism by the jury, judicial agreement with jury verdicts, and judicial involvement with jury verdicts. Finally, Section C scrutinizes the move to reduce a jury's involvement in complex cases.

III. JUDICIAL RESPONSES

"The trial judge's views as to the value of the jury are especially entitled to respectful hearing: he is the daily observer of the jury system in action, its daily partner in the administration of justice, and the one who would be most affected if the civil jury were abolished."¹⁷ He is the only neutral party in a trial other than the jury. He also has the advantage of witnessing the pre-trial rulings and hearings. By the time the jury enters the picture, the judge has likely made up his mind and is in a good place to judge a jury.¹⁸

A. REGARD FROM THE GAVEL—HOW JUDGES VIEW THE CIVIL JURY

"The influence that juries have in determining societal rights and wrongs—determining what's acceptable and what's not—has been gradually sliced away."¹⁹ Reductions started as an open attempt to reduce both the criminal (non-capital) jury and the civil jury from twelve persons to six.²⁰ These patent attempts to alter the jury's traditional form prompted Justice Marshall to remark that: "It appears . . . that the common-law jury is destined to expire, not with a bang, but with a whimper."²¹ Attempts to utilize a five-member jury were unsuccessful.²²

17. Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VAND. L. REV. 1055, 1074 (1964); Paula L. Hannaford et al., *How Judges View Civil Juries*, 48 DEPAUL L. REV. 247 (1998) ("The trial judge would appear to be the person most capable of forming an informed and objective opinion about the value of civil juries. In addition to extensive knowledge of trial procedures generally, his or her involvement in pretrial conferences and evidentiary hearings increases the likelihood that the trial judge is familiar with the specifics of the case and the idiosyncrasies of the lawyers and their clients.").

18. See Michael J. Saks, *Public Opinion About the Civil Jury: Can Reality Be Found in the Illusions?*, 48 DEPAUL L. REV. 221, 240 (1998) (arguing that public opinion polls, as opposed to judge polls, are inherently flawed—"The public is ill-informed about major aspects of the behavior and performance of juries in the tort litigation system; the known empirical facts of jury behavior contradict, to a considerable extent, the beliefs about juries expressed in public opinion surveys.").

19. Curriden, *supra* note 7.

20. See *Colgrove v. Battin*, 413 U.S. 149, 156 (1973) ("In short, what was said in *Williams* with respect to the criminal jury is equally applicable here: constitutional history reveals no intention on the part of the Framers 'to equate the constitutional and common-law characteristics of the jury.'").

21. *Id.* at 168 (Marshall, J., dissenting).

22. See *Ballew v. Georgia*, 435 U.S. 223, 245, 232 (1978) (unanimous ruling that petitioner's trial before a five-member jury deprived him of his constitutional right to a jury

Within the last thirty years, reductions take *issues* from the jury rather than jurors. Procedural mechanisms and review subtly carve out “no-jury” pockets. This is not to say that constriction is a novel occurrence. Reductions in an individual’s right to have a jury assess fault found their way to the jury system early through comments on the evidence, the ordering of new trials, and the use of remittiturs.²³ This article argues that new strategies utilize procedure to an even greater degree.²⁴ In relation to this argument, several questions from the study target the trial judge’s view of the proper role of the jury and whether its role in litigation should be reduced. Future reductions can be anticipated from responses to the following questions:

- Do you think the jury system is:
 - Fine just the way it is;
 - In good condition, just needs minor work;
 - In fair condition, needs work;
 - In poor condition, needs overhaul.
- What do you see as the proper role of the jury?
- The right of individuals to have their civil disputes decided by a jury needs to be:
 - Expanded,
 - Reduced,
 - Eliminated,
 - Left the Same.
- With the continuing debate over tort reform and alternative dispute resolution, do you believe that:
 - Fewer types of cases should be decided by juries;
 - More types of cases should be decided by juries;
 - The jury system is fine.
- If you were personally a litigant in a civil case, how would you prefer the dispute be decided?

1. *Texas Trial Judges versus Federal Trial Judges*

Judicial views on the proper role of the jury differed slightly from state judges to federal judges. Texas trial judges were 16.9% more likely than federal judges to see the proper role of the jury as the “conscience of the community,” while federal judges were slightly (3%) more likely to view its proper role as that of “truth seekers.” Within the state responses, judges sitting in lesser populated areas were 10% more likely than those

trial by relying on empirical data which “suggest that progressively smaller juries are less likely to foster effective group deliberation”).

23. Jeffrey Robert White, *The Civil Jury: 200 Years Under Siege*, TRIAL, June 2000, at 18, 23.

24. Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History*, 44 HASTINGS L. J. 579, 605 (1993) (giving several examples of the demise of the jury: “[J]udges were inclined [during the 19th Century] to take ever more forceful steps to control juries.”).

in densely populated areas to see the proper role as the "conscience of the community." Those judges sitting in areas with greater than 500,000 residents were 16% more likely to see the proper role of the jury as "truth seekers."²⁵

This question is limited by the "words of art" used. "Conscience of the community" and "truth seekers" are difficult to define. One would assume that "conscience of the community" is more likely to respond to community biases, feelings, and understandings whereas "truth seekers" are slightly less bound by community norms, but this is unclear. Texas favors the broad-form jury submission.²⁶ This likely captures the "conscience of the community" more than the specific verdict form. While this article takes no opinion on the effect of broad-form submission on jury effectiveness or understanding,²⁷ Texas' use may have helped state judges shape what they saw as the "proper role" based on experience. Extension of everyday experience into judges' normative conclusions about the proper role of the jury is also arguably seen in the breakdown of responses by population densities. Judges sitting in smaller, more tight-knit communities were much more likely to see the proper role as "conscience of the community" than those sitting in larger cities.

Both state and federal judges gave the jury system positive marks. When asked how the jury is doing, 58.7% of Texas trial judges responding answered that it was "good," and needed only "minor work." Federal judges were 18.7% more likely to answer that the system was "fine just the way it is." In contrast to the "A" and "A+" score on this abstract question, nearly one-third of the judges argued that with the continuing debate over tort reform and alternative dispute resolution, *fewer* types of cases should be decided by juries (see table 4).²⁸ Likewise, nearly one-quarter of the responding judges argued that the right of individuals to have their civil disputes decided by a jury needs to be *reduced* (see table

25. In an amusing twist, the judges sitting in areas with less than 10,000 residents were 10% less likely to want a jury deciding their case as a personal civil litigant than those judges sitting in areas with greater than 500,000 residents. They were 5.8% more likely to want a judge and 11.4% more likely to want arbitration.

26. Tex. Dep't of Human Servs. v. E.B., 802 S.W.2d 647 (Tex. 1990) (interpreting Texas Rule of Civil Procedure 277 to prefer the use of the broad-form submission whenever possible); *but see* H.E. Butt Grocery Co. v. Warner, 845 S.W.2d 258, 260 (Tex. 1992) (finding that it is not harmful error to submit a granulated charge in certain instances).

27. See *Island Recreational Dev. Corp. v. Republic Of Tex. Sav. Ass'n*, 710 S.W.2d 551, 555 (Tex. 1986) (arguing that broad-form submission was designed to simplify the jury's charge).

28. As the table illustrates, Texas judges were slightly more likely to argue that fewer types of cases should be decided by the jury:

TABLE 4:

	Texas	Federal	Total
Fewer Types	30.1%(118)	27.4%(163)	28.5%
More Types	4.1%(16)	2.9%(17)	3.4%
Jury System is Fine	62.5%(245)	67.8%(403)	66%

5).²⁹

Although federal courts are no stranger to reducing the role of the jury in a typical civil trial,³⁰ Texas has taken great strides to make the presence of the gavel harder to ignore in jury trials.³¹ Yet, federal district judges were 6.7% more likely than Texas trial judges to believe that the role of the jury should be reduced, and Texas judges were 2.2% more likely to think the right of individuals to have their civil disputes decided by a jury needs to be expanded (see table 6).³² Though not a double-digit disparity, it is difficult to square the study's figures with Texas' apparent readiness to take questions away from the jury. The sentiment from the highest court in Texas is captured by one of its justices: "If we were to leave it to jurors what the law should be and arrive at any outcome the jurors desired, we would end up with a very unpredictable system."³³ The statistical variance contrasts Texas' duty jurisprudence³⁴ and eviden-

29.

TABLE 5:

	Texas	Federal	Total
Expanded	7.1%(28)	4.9%(29)	5.8%
Reduced	19.4%(76)	26.1%(155)	23.4%
Eliminated	.3%(1)	1.3%(8)	.9%
Left the Same	71.4%(280)	66.5%(395)	68.5%

30. This article focuses on the civil jury. Several questions in the study related to the criminal jury as well. Those notable to this section include: Do you favor or oppose non-unanimous jury verdicts in non-capital criminal cases, and do you favor or oppose non-unanimous jury verdicts in capital cases? On each of these questions, female judges opposed the use of non-unanimous jury verdicts 8% more in non-capital cases and 4% more in capital cases. Conservatives were 27% more likely to favor use in non-capital and 10% more likely to favor in capital offenses. Texas judges from cities with less than 10,000 residents were 10% more likely to oppose use on non-unanimous verdicts in non-capital cases than those judges sitting in cities with over 500,000 residents and 11% more likely to oppose such verdicts in capital cases. Texas state judges were just slightly more likely to favor the use of non-unanimous verdicts in capital and non-capital criminal cases. Unanimity dates back to English common law. In 1972, the Supreme Court re-examined this long-standing requirement and concluded that the Sixth Amendment, which guarantees the right to a jury trial in criminal cases, does not require that the jury's verdict be unanimous. JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* (1994). A Texas task force is considering major changes designed to increase public confidence in the justice system. Mark Curriden, *State Panel Seeks Pay Raise for Juries—Task Force to Unveil Court Reform Plans, Including Call to Add to Judges' Power*, DALLAS MORNING NEWS, Sept. 15, 1997, at 1A, available at 1997 WL 11520617. On the agenda, is a suggestion to abandon in Texas the "centuries-old" requirement that criminal verdicts be unanimous. *Id.*

31. Curriden, *Tipping the Scales*, *supra* note 7 (quoting Chief Judge Phil Hardberger, *Juries Under Seige*, 30 ST. MARY'S L.J. 1, 12 (1998)). "Over the last 10 years, the [Texas Supreme] Court has taken great measures to limit the power of juries."

32.

TABLE 6:

	Expanded	Reduced	Eliminated	Left the Same
Texas	7.1%(28)	19.4%(76)	.3%(1)	71.4%(280)
Federal	4.9%(29)	26.1%(155)	1.3%(8)	66.5%(395)

33. *Tipping the Scales*, *supra* note 7 (quoting Justice Abbott).

34. See William V. Dorsaneo, III, *Judges, Juries, and Reviewing Courts*, 53 SMU L. REV. 1497 (2000) (discussing the Texas Supreme Court's activist movement in the no-evidence standard of review and duty arenas).

tiary jurisprudence, two areas where judges frequent the jury's arena.³⁵

a. Duty in Texas

"It may not be amiss, here, gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court, to decide."³⁶ Law students are quick to learn this absolute distinction in their first year: legal determinations are for the court, fact-finding is for the jury. As with most absolutes in law school, this too is less than rigid. Chief Justice Marshall blurs the distinction in the course of the trial of Burr: "Levying of war is a fact which must be decided by the jury. The court may give general instructions on this as on every other question brought before them, but the jury must decide upon it as compounded of *fact and law*?"³⁷

Evidence exists to support the proposition that the Massachusetts Bay Colony gave the jury significant authority over law and fact in the colonial era.³⁸ This is certainly not the case now. The United States Supreme Court pronounced the jury's purpose in civil cases: "[T]o assure a fair and equitable resolution of *factual* issues."³⁹ There was no disguising the effect of this judge/jury dichotomy in the contributory negligent jurisprudence. Before the onset of comparative fault and modified comparative fault, workers found contributorily negligent were barred from any jury recovery, as a matter of law.⁴⁰ Today, courts embrace "as a matter of law" distinctions in situations that look pretty factual. In doing so, they arguably modify *Palsgraf v. Long Island R. Co.*⁴¹

In 1928, Justice Cardozo warned that the determination of negligence must first be rooted in a "wrong." *Palsgraff* questioned whether the defendant's alleged "wrong" could be a "wrong in its relation to the plaintiff standing far away."⁴² The risk "reasonably to be perceived defines the duty to be obeyed, and risk imports relation."⁴³ Whether the plaintiff, Ms. Palsgraff, stood within the "zone of danger" to justify a "wrong" certainly appears factual. Justice Cardozo on occasion, voiced his concern over the jury system: "Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible

35. While not explored here, the Texas Supreme Court's no-evidence summary judgment has increased the burden on non-movants. *Id.* As described by Chief Justice Phillips, the court has "upped the ante in summary judgment. It was a conscious decision that court dockets are expanding more rapidly than court resources." See Curriden, *Tipping the Scales*, *supra* note 7).

36. *State v. Brailsford*, U.S. (3 Dall.) 1,4 (1794).

37. *Sparf v. United States*, 156 U.S. 51, 66 (1895) (quoting 1 BURR'S TRIAL 470).

38. *Landsman*, *supra* note 24, at 592. *Landsman* cites William Nelson as portraying Massachusetts's trials as being conducted before three judges, each of whom could give their version of the "law." Faced with varying accounts, the jury played a larger role in assessment of law.

39. *Colgrove v. Battin*, 413 U.S. 149, 157 (1973).

40. KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 137 (1997)

41. *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 341 (1928) (Cardozo, C. J.).

42. *Id.* at 341.

43. *Id.* at 344.

without [trial by jury.]”⁴⁴ He would likely not be guilt ridden upon the assertion that invasion of the province of the jury results from his “no-duty” pronouncement. Nevertheless, Texas’ duty jurisprudence stretches *Palsgraff* beyond even Cardozo’s vision.

Benoit v. Wilson reaffirmed the historic Texas Supreme Court pronouncement that a reviewing court cannot substitute its own *factual* conclusion for that of a fact-finder who has fulfilled its responsibilities.⁴⁵ Although even this is questionable under the current Texas Supreme Court jurisprudence,⁴⁶ a way around *Benoit* is through the front door—duty. Dean William Powers described Texas’ duty jurisprudence as “moving away from broad definitions of duty and toward particularized definitions of duty.”⁴⁷ Although most of Powers’ article is “academic” in nature, he does characterize this movement by the court as a wise decision not to give broad policy-making authority to the jury.⁴⁸ “What is really happening is that the court is reinvigorating the concept of duty, and the court is doing this for intellectually sound reasons. Recognizing that fact has important ramifications for Texas lawyers.”⁴⁹ This “reinvigoration” looks an awful lot like particularized extensions into the jury’s province based on the *facts* of a case. As discussed, Justice Cardozo’s duty analysis in *Palsgraf* involved a factual testing. Yet, there was a normative aspect to its investigation. The “zone of danger” inquiry can be repeated with some degree of regularity in later cases.⁵⁰ The Texas horizon, in contrast, is just too particularized to have much bearing on a significant number of later cases. The jury’s province is thus consumed in the name of short-term gratification.⁵¹

Justice Andrews’ proximate cause has not been completely subsumed by “duty” in Texas. But examples of the particularized duties announced within the last ten years undoubtedly demonstrate the pervasiveness of the judge in factual deliberations.⁵² In *Mellon Mortgage v. Holder*, a plu-

44. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

45. 239 S.W.2d 792, 796 (Tex. 1951).

46. See Hardberger, *supra* note 31, at 3-13 (criticizing the current “conservative, activist” Texas Supreme Court for its use of “legal tools of ‘no duty,’ ‘no proximate cause,’ ‘no evidence,’ ‘insufficient evidence,’ ‘unreliable experts,’ ‘unqualified experts,’ and ‘junk science’” to wipe out jury verdicts and providence.). *Wal-Mart Stores, Inc. v. Gonzalez*, 968 S.W.2d 934, 938 (Tex. 1998) and *Provident Am. Ins. Co. v. Castaneda*, 988 S.W.2d 189, 200 (Tex. 1998) are two examples of the current “no-evidence” jurisprudence.

47. William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 TEXAS L. REV. 1699, 1700 (1997)

48. *Id.* at 1719.

49. *Id.* at 1704.

50. *But see* Dorsaneo, *supra* note 34, at 1524 (arguing that Cardozo’s analysis is particularized).

51. See *id.* at 1498 (“During roughly the same ten-year period, the Texas Supreme Court has otherwise modified the respective roles of judges, juries, and reviewing courts in Texas by revising its treatment of the duty and causation issues in tort cases.”).

52. Texas’ duty question involves a two-part test. First, the court must consider the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor’s conduct, the magnitude of the burden of guarding against the injury, and the consequence of placing that burden on the actor. *Bird. v. W.C.W.*, 868 S.W.2d 767, 769 (Tex. 1994). If the court decides that the various factors do not weigh in favor of imposing a duty, then it

rality of the court embraced *Palsgraff's* no-duty analysis.⁵³ A woman sexually assaulted by a police officer in a garage was found to be an "unforeseeable plaintiff." Danger of this *type* was foreseeable given the regularity of criminal activities at or near the garage. Nonetheless, given that the plaintiff was accosted several blocks from the garage before being forced to drive to the garage, she, as a plaintiff, was not in the "zone" of foreseeable danger. The infusion of Texas' proximate cause foreseeability test into the duty analysis was criticized by the concurrence.⁵⁴ Had the court opted to follow their traditional premises-liability framework, as suggested by the dissent, the plaintiff could have been a licensee. The defendant would thus have owed her a duty given the degree of crime known in the area.⁵⁵

For all its harm to Ms. Holder in *Mellon*, this "foreseeable-plaintiff" test was not even mentioned in a later case, *Van v. Pena*.⁵⁶ *Pena* involved the brutal assault and murder of two girls by a teenage gang. The gruesome violence occurred in a wooded area just next to premises where a convenience store sold the underage gang members alcohol. The girls were not "unforeseeable" in a *Palsgraf* sense because they *were* in the zone of danger. Nevertheless, given the uproar organized by the *Mellon* concurrence and dissent over the wholesale abandonment of precedent in that case, one would expect at least a mention of whether *Palsgraf's* zone-of-danger exception to general premises rules applies in Texas. Instead, the court simply reverted to its proximate cause analysis to deny relief.

In addition to these individualized holdings, the court cautioned that the question whether a hazard is an "open and obvious danger" for inadequate-warning product-liability claims is a question of law, not fact.⁵⁷ It also advocated looking to proximity, recency, frequency, similarity, and publicity, in a particularized fashion in each case to determine whether criminal conduct in premises cases was "foreseeable."⁵⁸ Other particularized "no-duty" areas also exist. For instance, there is no stockbroker duty to ascertain the competence of a principal.⁵⁹ No *Tarasoff* duty to warn third parties of a patient's threat toward a specific individual exists in Texas.⁶⁰ As a matter of law, under case-specific facts, the Yellow Cab Company in Houston had no duty to warn its cab drivers not to carry

examines whether a special relationship exists between the parties such that a duty should exist as a matter of law. See also *Golden Spread Council, Inc. v. Akins*, 926 S.W.2d 287, 290 (Tex. 1992).

53. *Mellon Mortgage Co. v. Holder*, 5 S.W.3d 654, 657-58 (Tex. 1999).

54. *Id.* at 663 (Baker, J., concurring).

55. *Id.* at 673 (O'Neill, J. dissenting).

56. *Van v. Pena*, 990 S.W.2d 751, 755 (Tex. 1999).

57. *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 382 (Tex. 1995).

58. *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 759 (Tex. 1998) (no evidence that defendant could have reasonably foreseen the likelihood of violent criminal activity within its apartment complex despite eleven calls within a one mile radius in the last year (four originating in the complex)).

59. *Edward D. Jones & Co. v. Fletcher*, 975 S.W.2d 539, 545 (Tex. 1998).

60. *Thapar v. Zezulka*, 994 S.W.2d 635, 640 (Tex. 1999).

guns.⁶¹ In a move that spites both the comparative fault statute and the jury, the Texas Supreme Court also specifically held that a city owed no duty, as a matter of law, to warn those who are not traveling with reasonable care upon the adjoining highway.⁶² Arguably spurred by their highest court, lower courts appear willing to announce particularized “no-duty” pockets as well.⁶³

Texas has arguably gone further than federal courts were instructed by Justice Story to go in 1835:

My opinion is, that the jury is no more a judge of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case, tried upon the general issue. In each of these cases, their verdict, when general, is necessarily compounded of law and of fact; and includes both. In each they must necessarily determine the law as well as the fact. . . . But I deny, that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions, or pleasure. . . . It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court.⁶⁴

61. *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 526-27 (Tex. 1990); *but see Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 742 (Tex. 1998) (because manufacturer maintained control of its distributor, it owed a limited duty to take some action, even if requiring distributors to do background checks themselves on door-to-door salesmen, to protect plaintiff customer).

62. *City of McAllen v. De La Garza*, 898 S.W.2d 809, 811 (Tex. 1995). Justice Cornyn dissented, stating that “I agree with the court of appeals that ‘[w]hile this evidence [that the driver was intoxicated] may prove dispositive at trial, it fails to prove, as a matter of law, that the City owed no duty to De La Garza as a traveler on the abutting roadway.’” *Id.* at 813.

63. *Wax v. Johnson*, No. 01-98-01202-CV, 2001 WL 83530 (Tex. App.—Houston [1st Dist.] Feb. 1, 2001, no pet.) (despite usual policy of communicating with an associate before transfer, no duty existed until defendant first saw plaintiff); *Capital Metro. Transp. Auth. v. Bartel*, No. 03-98-00372-CV, 1999 WL 176058 (Tex. App.—Austin Apr. 1, 1999, no pet.) (after jury awarded \$40,159.95 in damages to a blind man suing for recovery from injuries received after walking into a bus stop sign located in the middle of the sidewalk, the appellate court reversed, finding no duty to plaintiff because the condition of the bus stop was not unreasonably dangerous, as a matter of law). *Bartel* arguably infringes on the jury’s right not necessarily to find proximate cause, but to find breach under the reasonably prudent person standard. *See also King v. Dallas Fire Ins. Co.*, 27 S.W.3d 117, 130 (Tex. App.—Houston [1st Dist.] 2000, no pet. h.) (as a matter of law, no legal duty to defend King in a personal injury suit existed under the insurance policy, even though a “separation of insureds” clause existed separating the employer from the employee); *Thompson v. CPN Partners, L.P.*, 23 S.W.3d 64, 73 (Tex. App.—Austin 2000, no pet. h.) (on fact-specific circumstances, neither shopping center owner nor security company owed duty to survivor of movie theater employee, even though a past history of assaults and robberies had occurred on premises because “[t]he statistics showing criminal activity at Commerce Park do not indicate that CPN or Premium leased the theatre to AMC with knowledge of an unreasonable risk of harm from criminal intrusions”); *Daftary v. Southwestern Bell Yellow Pages*, No. 05-96-01335-CV, 1998 WL 397346, at *4 (Tex. App.—Dallas July 17, 1998, no pet.) (as a matter of law, no duty existed to warn plaintiff purchaser of new telephone line that the phone number was previously assigned to Mr. Gatti’s); *Allright San Antonio Parking Inc. v. Kendrick*, 981 S.W.2d 250, 254-55 (Tex. App.—San Antonio 1998, no pet.) (despite jury award of \$4.7 million after parking-lot patron was abducted with an alleged attendant witness, the appellate court reversed finding no duty).

64. *United States v. Battiste*, 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14, 545) (Story, J.).

Few would deny that Texas uses an extremely particularized duty analysis.⁶⁵ This specific investigation probes issues that juries should be analyzing as fact questions.⁶⁶

b. Other "Questions of Law" in Texas

In addition to "no-duty" designations, many members (one shy of a majority) of the Texas Supreme Court hope to give judges greater access to factual questions in the insurance field.⁶⁷ Those Justices "would take the resolution of bad-faith disputes away from the juries that have been deciding bad faith cases for more than a decade" and give it instead to the judge.⁶⁸

Kissing cousin to "no duty" designations is the increased role now played by judges to admit or exclude expert testimony. The growing battle over the admissibility of expert testimony exists in both Texas and federal courts. After *Daubert v. Merrell Dow Pharmaceuticals*,⁶⁹ federal courts follow a gate-keeping method of harnessing "unreliable" and "irrelevant" testimony.⁷⁰ This procedural structure tightens the admissibility of expert testimony. Rather than basing "reliability" of evidence on general acceptance in the particular field in which the evidence belongs, courts filter "reliable" and "relevant" evidence to the jury by balancing a series of factors. These range from whether the theory or technique was prepared specifically for litigation, to whether the theory was subjected to peer review or publication.⁷¹ In *E.I. du Pont de Nemours & Co. v. Robinson*,⁷² the Texas Supreme Court expressly adopted the *Daubert* factors.

In *Merrell Dow Pharmaceuticals v. Havner*,⁷³ the jury awarded a child born with a limb-reduction birth defect allegedly caused by Benedictin \$3.75 million in actual damages and \$30 million in punitive damages. After the trial court reduced the punitive award to \$15 million and the appellate court reversed and rendered the punitive damage award, the Supreme Court found the expert's testimony unreliable. They were then

65. See Michael J. Saks, *Judicial Nullification*, 68 IND. L. J. 1281, n.18 (1993) (quoting *United States v. Wooton*, 518 F.2d 943, 946 (3d Cir. 1975) (footnote omitted)) ("In the division of responsibilities between judge and jury, the jurors have no prerogative to question in the slightest degree the law to be applied to an issue, as announced by the court in its instructions.").

66. "The view that the particularized application of the general standard should be conducted by the fact finder, not by the trial judge, is held so strongly that it is conventional for torts scholars to assert that the duty element is easily resolved since all persons have a general obligation to exercise ordinary care to avoid the infliction of harm on others." Dorsaneo, *supra* note 31, at 1535.

67. *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 58 (Tex. 1997) (Hecht, J., concurring).

68. *Id.* at 49 (opinion of Spector, J.).

69. 509 U.S. 579, 591 (1993).

70. *Id.* at 579; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

71. *Daubert*, 509 U.S. at 585.

72. 923 S.W.2d 549, 556 (Tex. 1995).
549, 556 (Tex. 1995).

73. 953 S.W.2d 706, 709 (Tex. 1997).

able to declare “no evidence” to support the jury verdict.⁷⁴ This extreme holding not only usurped the jury, but also uprooted the trial judge who had ruled on the issue of scientific reliability in a motion for summary judgment, in motions in limine, and in a motion to exclude certain expert testimony.⁷⁵

As evidenced by *Havner*, Texas may have created a tougher admissibility standard for experts to meet than at the federal level. In addition to meeting the two-part “relevance” and “reliability” test, expert testimony will be excluded if “there is simply too great an analytical gap between the data and the opinion proffered.”⁷⁶ In *Gammill v. Jack Williams Chevrolet*, the Texas Supreme Court excluded expert testimony that a child in a car accident had been wearing her seatbelt. Although the expert opinion was based on gliding abrasions found on the child’s body and shirt fibers observed in the seat belt webbing, the court held that the expert failed to adequately account for “other possibilities” through a probing comparative survey.⁷⁷ If *Gammill* is the threshold, Texas is well positioned to sculpt one of the most stringent admissibility tests, *as a matter of law*.

Although the door is open for challenges on any type of expert, after *Daubert* and *Robinson* Texas courts have been willing to exercise their gate-keeping function almost exclusively in the context of product liability, personal injury, and medical expert testimony.⁷⁸ This is the type of case that first bred false fears of juries following the “white coat” down any scientific path.⁷⁹ Studies consistently reject any finding that juries

74. *Id.* at 730.

75. *Id.* at 708.

76. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 727 (Tex. 1998).

77. *Id.* at 726.

78. See *Guillory v. Domtar Indus. Inc.*, 95 F.3d 1320, 1331 (5th Cir. 1996) (affirming exclusion of expert testimony where the accident reconstruction expert used a forklift model different from the one at issue and failed to connect things analytically); *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995) (testimony of medical doctor about the cause of plaintiff’s injury was held to constitute “no evidence” because it was based on assumed facts at odds with actual evidence); *Purina Mills, Inc. v. Odell*, 948 S.W.2d 927, 934 (Tex. App.—Texarkana 1997, writ denied) (excluding evidence from a veterinary expert arguing that metal in Purina feed caused hardware disease in cows because the connection between the feed and the disease was not tight enough); *North Dallas Diagnostic Ctr. v. Dewberry*, 900 S.W.2d 90, 96 (Tex. App.—Dallas 1995, writ denied) (excluding testimony concluding that the plaintiff’s health problems were caused by an injection of iodinated radio contrast dye because the expert could not specify particulars about the testing technique, the relationship between the technique and the contrast dye, or the threshold predictability of the test).

79. See PETER W. HUBER, *GALILEO’S REVENGE: JUNK SCIENCE IN THE COURTROOM* (1991) (criticizing what Huber calls “junk science” or “pseudoscience” in the courtroom ranging from theories of breast cancer caused by a single traumatic fall to children born with limb defects as a result of Bendectin). *But see* Kenneth J. Chesebro, *Galileo’s Retort: Peter Huber’s Junk Scholarship*, 42 AM. U. L. REV. 1637 (1993) (arguing that Huber should have researched his subject before setting off a time bomb with his scholarship concerning “junk science”); Daniel W. Shuman & Anthony Champagne, *Removing the People from the Legal Process: The Rhetoric and Research on Judicial Selection and Juries*, 3 PSYCHOL., PUB. POL. & L. 242, 255 (1997).

believe whatever the expert tells them.⁸⁰ Nevertheless, the gate persists.

The study finds many judges, an astounding 24% on average, believing the role of the jury in civil cases should be reduced or eliminated and nearly a third believing fewer types of cases should be given to the jury. On any front, federal or state, the data reflect a significant willingness to reduce an individual's jury right. Considering recent particularized "no-duty" pronouncements and designations (such as those seen with expert testimony) in Texas shifting power to the judge, the statistical difference between Texas and federal judges is curious. Perhaps the state trial judges' hesitation to further reduce the jury right is in reaction to what many consider an extremely conservative Texas Supreme Court.⁸¹ Or, this may represent the fact that federal courts are willing to limit the jury right even more than Texas' active jurisprudence. What the 6.7% difference between state and federal judges' willingness to reduce the right does not deny, however, is the general presumption in favor of retaining the jury system in its current reduced form. In fact, the vast majority, close to 69%, finds comfort in the current scheme.

2. *Circuit Breakdown*

Dividing federal responses by circuit failed to render extensive statistical difference. The Eleventh Circuit repeatedly scored within the range of those jurisdictions less content with the jury system. For instance, when asked whether the right of individuals to have their civil disputes decided by a jury needs to be expanded, reduced, eliminated, or left the same, the jurisdictions averaged the following: 65.7% opted to leave the right as it currently exists and 21.9%, on average, opted to reduce the right. The Eleventh Circuit figures differed considerably: 45.6% of the judges would leave the right the same, while 45.6% would also reduce the right.

3. *Other Demographics Considered*

Responses were also broken down by political ideology, legal background, and gender. Male, "conservative" judges, on average, were approximately six percent more likely to see the proper role of the jury as "truth seekers."⁸² Male judges from private backgrounds were approxi-

80. Shuman & Champagne, *supra* note 78, at 255. ("We did not find evidence of a 'white coat syndrome' in which jurors mechanically deferred to certain experts because of the field of expertise. Instead we found jurors far more skeptical and demanding in their assessments. . . . Instead our data suggest that jurors approach decisions about experts thoughtfully using a construct that is as sensible as any we might suggest.").

81. Hardberger, *supra* note 31, at 3 ("The various [conservative] groups who felt victimized by the judicial system of the 1980s were not a homogenous group, but whatever differences they had were set aside to concentrate on electing conservative, activist judges to the Texas Supreme Court.").

82. This average can be broken down further. Male judges were 6.6% more likely than female judges to see the proper role as "truth seekers." The female judges who saw the proper role as either "scorekeepers" or "conscience of the community" recovered this difference. "Conservative" judges were 5.8% more likely than those judges labeling them-

mately nine percent more likely than female judges from public backgrounds to assess the jury system as "fine just the way it is."⁸³ This contentment flipped, however, when asked if the right of individuals to have their civil disputes decided by a jury needed to be: expanded, reduced, eliminated, or left the same. Male judges from private backgrounds were more likely than female judges from public background by approximately four percent to argue that the jury right should be reduced.

Those judges labeling themselves as "liberal" were, interestingly, 14.6% more likely than those labeling themselves "conservative" to see a need to expand the jury right while "conservative" judges were nine percent more likely to argue for a reduction in the right (see table 7).⁸⁴ Similarly, when asked whether fewer, more, or the same amount of cases should be decided by juries given the continuing debate over tort reform and alternative dispute resolution, those judges labeling themselves "conservative" were twenty-four percent more likely than those labeling themselves "liberal" to respond that "fewer" cases should be decided by juries (see table 8).⁸⁵

The tendency of judges claiming to be generally considered "liberal" to embrace the jury continued on further questioning. Judges were asked who they would prefer to decide their dispute if a civil litigant. "Liberal" judges were twenty-seven percent more likely to want a jury to decide their case. "Conservative" judges were twenty percent more likely to

selves "liberal" to see the proper role as "truth seekers." "Liberal" judges divided this difference between "scorekeeper" and "arbiters of justice." Judges from a private background were 5% more likely than judges from a public background to see the proper role as "truth seekers." Judges from a public background divided this difference among responses offering the proper role as either "scorekeeper" or "conscience of the community."

83. Male judges were 10% more likely to say that the jury system is "fine just the way it is" than their female counterparts. Judges from a private background were 7.5% more likely to say the jury system is "fine just the way it is" than their public counterparts.

84. About 2.3% of the conservative judges also argued that the jury right should be eliminated:

TABLE 7:

	Expanded	Reduced	Eliminated	Left the Same
Conservative	3.4%(12)	27%(92)	2.3%(8)	65%(225)
Liberal	18%(6)	18%(6)	0%(0)	64%(21)
Moderate	5.8%(32)	21%(119)	.2%(1)	71%(391)

85.

TABLE 8:

	Fewer Decided by Juries	More Decided by Juries	Fine the Way It Is
Conservative	33%(113)	2.3%(8)	61.7%(213)
Liberal	9%(3)	18%(6)	67%(22)
Moderate	27.7%(152)	2.9%(16)	68%(374)

want a judge to decide their case (see table 9).⁸⁶ As noted earlier, however, because of the low number of respondents categorizing themselves as "liberal," the results may not be statistically significant, even if illustrative.⁸⁷

Looking to the backdrop of recent case law, the "conservative" judges likely portray a more accurate picture as to the future of the jury. *Greenleaf v. Birth*⁸⁸ held that courts "cannot legally give any instruction which shall take from the jury the right of weighing the evidence and determining what effect it shall have." Yet that appears to be exactly what directed verdicts are designed to accomplish.⁸⁹ Mourning this usurpation of the jury, Justice Black dissented in *Galloway v. United States*: "Since we do not approve of this sapping of the Seventh Amendment's guarantee of a jury trial, we cannot join even this technical coup de grace." The "coup" referred to the Court's imprimatur on the eased "substantial" evidence directed verdict standard as constitutional under the Seventh Amendment. Increasing the use of directed verdicts to disregard jury findings unearths willing companions in several responding judges.⁹⁰ Decreasing the prefecture of the jury is greeted with open arms both in Texas and on the federal scene. The blur between law and fact is pronounced. New "no-duty" pockets are created, summary judgment effectiveness is augmented,⁹¹ re-evaluation standards are relaxed,⁹² judicial gate-keeping roles are enhanced,⁹³ and as Section B presents, jury ver-

86.		TABLE 9:			
	Judge	Jury	Arbitration	Depends on the Case	
Conservative	23%(78)	55%(191)	12%(40)	8%(26)	
Liberal	3%(1)	82%(27)	3%(1)	9%(3)	
Moderate	17%(93)	60%(329)	10.4%(57)	11%(60)	

87. See discussion *supra* note 15.

88. 34 U.S. (9 Pet.) 292, 299 (1835).

89. See *Galloway v. United States*, 319 U.S. 372 (1943) (upholding the constitutionality of a "substantial" evidence review as opposed to a "scintilla" evidence review as non-invasive of the Seventh Amendment).

90. Texas is slightly different. Directed verdicts or motions for instructed verdict are appropriate when there is "no evidence" or the party with the burden of proof has the right to judgment as a matter of law. *Seideneck v. Cal Bayreuther Assoc.*, 451 S.W.2d 752 (Tex. 1970) (stating that more than a "scintilla" of evidence must be shown); *Collora v. Navarro*, 574 S.W.2d 65 (Tex. 1978) (as a matter of law). If there is "insufficient" evidence, or the judgment is against the "great weight and preponderance of the evidence," a motion for new trial may be granted. *Cooper v. Argonaut Ins. Co.*, 430 S.W.2d 35 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.).

91. Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L. J. 95, 99-100 (1988). Stempel looks critically at *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), as expanding a judge's power at the expense of the jury.

92. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) (re-examination of a jury finding of "actual malice" is adjudicated under a *de novo* standard of review).

93. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Charmichael*, 526 U.S. 137 (1999).

dicts may not be sacred.⁹⁴

B. HOW SAY YOU? A BREAKDOWN OF JUDGES' GENERAL AGREEMENT WITH JURY VERDICTS

*"We perceive attitudes as the driving force behind behavior and assume that the behavior a person chooses reflects his or her true attitudes. However, when peoples' attitudes are measured and their behavior observed, the consistency between the two is surprisingly low."*⁹⁵ This was seen in Section A. Despite an extremely positive attitude toward the juries in the abstract, statistics showed a tendency of many judges to favor a diminution of the jury when pressed. The questions relating to jury verdicts attempt to unravel this attitude/behavior dichotomy with respect to jury verdicts. This section probes five related questions:

- How often do you agree with jury verdicts in your cases?
 - All of the time
 - Most of the time
 - Half of the time
 - Less than half the time
- In general, how well do you think juries do in actually reaching a just and fair verdict?
 - Very well
 - Moderately well
 - Not very well
- Have you ever decreased or eliminated a verdict on compensatory or punitive damages because you didn't believe it was based on fact or law?
- Have you ever made a legal determination that a jury's verdict in setting damages was too low and then took steps to increase it?
- Coming into a civil case, do you think most jurors:
 - Favor the plaintiff
 - Favor the defendant
 - Favor neither side

Modern perceptions of jury verdicts are extreme: "Juries are believed to find liability when judges would not, grant higher awards than judges, and to grant inappropriate punitive damages awards."⁹⁶ The Supreme Court of the United States held that a State violates due process by letting juries set punitive damages but not permitting review for excessiveness,⁹⁷ found that a citizen sued under the Clean Water Act had a right to

94. *Gasparini v. Center for Humanities, Inc.*, 518 U.S. 415, 448 (1996) (Scalia, J., dissenting).

95. G. THOMAS MUNSTERMAN ET AL., *JURY TRIAL INNOVATIONS* 12 (1997).

96. Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 *CORNELL L. REV.* 1124, 1127 (1992); see also Paul Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 *U. CHI. L. REV.* 179 (1998) ("It is time to recognize that, at least in federal court, asking juries to set punitive damages is neither constitutionally required nor sound policy.").

97. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994).

a jury as to liability, but not to the penalty amount imposed,⁹⁸ criticized punitive damage awards as appealing to the “unbridled discretion” of the jury,⁹⁹ constitutionally approved of the JNOV,¹⁰⁰ constitutionally approved of the directed verdict,¹⁰¹ instituted an “inherently imprecise”¹⁰² judicial test for determining whether punitive damages were unconstitutionally grossly excessive,¹⁰³ ruled that a court of appeals should apply *de novo* standard when reviewing a district court’s determination of constitutionality of punitive damages awards,¹⁰⁴ and strengthened its use of summary judgment as a procedural device to filter cases with insufficient evidence as a matter of law.¹⁰⁵ But verdict studies demonstrate that this race from jury to judge as arbiter is unnecessary.¹⁰⁶ Juries are not found to be the common marauder. Instead, several factors, including the type of case, the severity of the injury, the heinousness of the act, and the amount of proof presented, guide the damage award given by the judge or the jury.

In 1966, Harry Kalven, Jr. and Hans Zeisel published the classic study of the American jury.¹⁰⁷ They reported that 78 percent of judges in civil cases would have decided the case the same as the jury.¹⁰⁸ Recent studies confirm this agreement.¹⁰⁹ This study is no stranger. Ninety-two percent of the judges in the SMU study responded that they agreed with the jury

98. *Tull v. United States*, 481 U.S. 412, 426 n.9 (1987) (“no evidence that the Framers meant to extend the right to a jury to the remedy phase of a civil trial” has been seen).

99. *Int’l Brd. Elec. Workers v. Foust*, 442 U.S. 42, 52 & 51 n.14 (1979) (“[P]unitive damages may be employed to punish unpopular defendants”); *Rosenbloom v. Metromedia, Inc.* 403 U.S. 29, 84 (1971) (Marshall, J., dissenting); *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) (“[P]unitive damages are frequently based upon the caprice and prejudice of jurors”).

100. *Galloway v. United States*, 319 U.S. 372 (1943).

101. *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654 (1935).

102. *United States v. Bajakajian*, 524 U.S. 321, 336 (1998).

103. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996).

104. *Cooper Ind., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S. Ct. 1678, 1683 (2001).

105. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

106. Neil Vidmar, *Pap and Circumstance: What Jury Verdict Statistics Can Tell Us About Jury Behavior and the Tort System*, 28 SUFFOLK U. L. REV. 1205, 1234 (1994) (arguing that verdict studies criticizing juries have many methodological problems because “by themselves the statistics cannot tell us one way or the other”); Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, WIS. L. REV. 15, 59 (demonstrating the rarity of punitive damage awards and the frequency with which judges reduce them: “There were only 34 punitive damage awards of \$1 million or more upheld by the federal circuit courts of appeals for the period 1984-1994.”).

107. KALVEN & ZEISEL, *supra* note 16.

108. *Id.* at 63-64.

109. Sentell, *supra* note 11, at 98-99. (1991).

verdict "most of the time" (table 10).¹¹⁰ Further, 76% urged that most jurors coming into a civil case favor neither the plaintiff nor the defendant,¹¹¹ and 73% responded that, in general, juries are doing "very well" in actually reaching a just and fair verdict. Despite these significantly positive markers, 47% had decreased or eliminated a jury verdict and 10% had taken steps to increase damages that were set too low. This finding is in line with modern jury constraints such as statutory caps on damage awards as well as the traditional judicial remedy of remittitur.¹¹² Dissection of the responses according to demographic variables further explores these and other techniques used to invade the jury's historic verdict precinct.

1. Texas Trial Judges versus Federal Trial Judges

Relating to verdict questions, the study revealed significant differences between the state and federal responses. Although both agreed with jury verdicts "most of the time,"¹¹³ federal district judges were 9% more likely than state trial judges to argue that juries do "very well" in reaching a just and fair verdict. Breaking the state responses down further by population density, those judges sitting in jurisdictions with a population under 10,000 were 4.5% less likely to agree with the jury verdict "all the time" than those state judges sitting in jurisdictions with greater than 500,000 residents. Texas state judges were also 15.2% more likely to respond that coming into a civil case, most jurors favor the *defendant* (see table 11).¹¹⁴

Although more apt to find the jury doing "very well," federal judges were 38.8% more likely to have decreased or eliminated a damages ver-

110.	TABLE 10:		
	Total	State	Federal
All the time	4.9%(48)	5.1%(20)	4.7%(28)
Most of the time	91.5%(903)	90.8%(356)	92.1%(547)
Half of the time	2.3%(21)	2.8%(11)	1.7%(10)
Less than half the time	.9%(9)	.8%(3)	1.0%(6)

111. About 8.9% argued that most jurors favor the plaintiff coming into a civil case and 11% asserted that most jurors favor the defendant coming into a civil case.

112. Hannaford, *supra* note 17, at 258 ("Whether implemented as a legislative, judicial, or contractual arrangement, the sentiment underlying these approaches is the same: civil juries are untrustworthy and their power to decide liability and impose damage awards on litigants should be sharply curtailed.").

113. The difference between state and federal responses on this question were negligible, 1.3%.

114.	TABLE 11:		
	State	Federal	Total
Favor the plaintiff	6.9%(27)	10.3%(61)	8.6%(88)
Favor the defendant	19.9%(78)	4.7%(28)	12.3%(106)
Favor neither side	66.3%(260)	81.6%(485)	74%(745)

dict (see table 12),¹¹⁵ and 8% more likely have taken steps to increase a verdict (see table 13).¹¹⁶ Within the state reporting, those judges from more thinly populated areas again broke the mold. They were 16% less likely to reduce a verdict and 23% less likely to increase a verdict (see table 14).¹¹⁷

From another State, many of these numbers might be easier to comprehend. But Texas has a rich history of altering damage verdicts. "A power such as may be exercised by juries in awarding exemplary damages is liable to great abuse. . . . In cases based on facts which merit condemnation, or even punishment, though not by law constituting a crime, juries, under commendable impulses, but with judgment warped by passion, no doubt often render excessive verdicts."¹¹⁸ Of the fifty-one jury verdicts reviewed by the Texas Supreme Court between 1997 and 1999, thirty-five were reversed.¹¹⁹ In the same period, the court reinstated just one jury verdict that had been thrown out by a lower court.¹²⁰ Texas also, like approximately nine other states, places severe caps on exemplary damage awards, requires clear and convincing evidence of the allegations sought to be established to obtain exemplary damages,¹²¹ and succumbs a jury's mental anguish award to a factual sufficiency review.¹²² Judge Merrill Hartman suggested that "by putting caps on damages, we are saying that

115. TABLE 12:				
	State	Federal	Total	
Yes	23.7%(93)	62.5%(371)	43.1%(464)	
No	68.9%(270)	34.5%(205)	51.7%(475)	
116. TABLE 13:				
	State	Federal	Total	
Yes	5.6%(22)	13.6%(81)	9.6%(103)	
No	87%(341)	85.9%(510)	86.5%(851)	
117. TABLE 14:				
	Ever Reduced/Eliminated a Verdict?		Taken Steps to Increase a Verdict?	
	Yes	No	Yes	No
>500 Thousand	21%(29)	62%(87)	6%(9)	75%(106)
<10 Thousand	22%(12)	78%(42)	1.8%(1)	98%(53)

118. *Tynberg & Co. v. Cohen*, 13 S.W. 315, 317 (Tex. 1890).

119. *Curriden, Tipping the Scales*, *supra* note 7 (citing statistics from records kept by Court Watch, an Austin based watchdog group);

120. *Id.*

121. TEX. CIV. PRAC. & REM. § 41.003 (1997). After September 1, 1995, exemplary damages ordinarily may not exceed: (1) two times the amount of economic damages, plus an amount equal to any non-economic damages found by the jury not to exceed \$750,000, or (2) \$200,000. *Id.* § 41.008(b). These caps do not apply in favor of a defendant found to have knowingly or intentionally committed conduct described as a felony in specific sections of the Texas Penal Code. *Id.* § 41.008(c). See also *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 614-19 (1996) (discussing States enacting punitive cap legislation); *Cooper Ind., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S. Ct. 1678, 1683, n.6 (2001) (adding to this list).

122. *Saenz v. Fidelity & Guar. Ins. Underwriters*, 925 S.W.2d 607 (Tex. 1996) (appellate courts must now assess the reasonableness of a jury's mental anguish award).

we no longer trust juries to do it.”¹²³ Judge Phil Hardberger describes recent movements from the Texas Supreme Court as follows: “[P]revious expansions of the law were stopped, then rolled backwards. Jury verdicts became highly suspect and were frequently overturned for a variety of ever-expanding reasons.”¹²⁴ Perhaps because the Texas appellate courts are so diligent in their motivation to reduce or eliminate jury verdicts, the trial judges pass the buck. “Jury verdicts, few as they may be, are now subject to harsh scrutiny by conscientious appellate judges who are sworn to follow the Texas Supreme Court’s precedent and who are aware that the chance of reversal increases if a large plaintiff’s verdict is affirmed.”¹²⁵ Under Texas law, reversal of a punitive damage award or suggestion of a remittitur may be had only if the evidence supporting the award is so factually insufficient or the verdict is so against the great weight and preponderance of the evidence as to be manifestly unjust.¹²⁶ Under *Alamo National Bank v. Kraus*, reviewing courts balance the nature of the wrong, the character of the conduct involved, the degree of culpability of the wrongdoer, the situation and sensibilities of the parties concerned, and the extent to which such conduct offends a public sense of justice and propriety.¹²⁷ Despite the extraordinary nature of relief, Texas courts frequently order remittitur and reversal of punitive damage awards.¹²⁸

Federal courts, as the study confirms, are not afraid of upsetting a jury’s damage verdict either. *BMW of North America, Inc. v. Gore*¹²⁹ is a remarkable case. There, the Alabama Supreme Court affirmed a punitive damages award, following a reduction from \$4 million to \$2 million, against a foreign automobile manufacturer and American distributor for failing to disclose that the automobile purchased had been repainted after being damaged prior to delivery. The Supreme Court, in a plurality opinion authored by Justice Stevens, nevertheless reversed the damages award as “grossly excessive” and violative of the due process clause.¹³⁰ In doing so, the court utilized a three-part test to ascertain whether the

123. Mark Curriden, *Jury Awards Fall Under Weight of Obscure Law*, DALLAS MORNING NEWS, May 7, 2000, at 23A, available at 2000 WL 20333726 (quoting Dallas County District Judge Merrill Hartman).

124. Hardberger, *supra* note 31, at 4.

125. *Id.* at 8.

126. *Trans. Ins. Co. v. Moriel*, 879 S.W.2d 10, 30 (Tex. 1994).

127. 616 S.W.2d 908, 910 (Tex. 1981).

128. *Interstate Bank of Dallas, N.A. v. Risser*, 739 S.W.2d 882, 909-10 (Tex. App.—Texarkana 1987, no pet. h.); *Nissan Motor Co. v. Armstrong*, 32 S.W.3d 701 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.) (despite parties’ stipulation to a punitive damages award of \$2 million, the court was still authorized to order a remittitur reducing amount to \$800,000); *Lesikar v. Rappeport*, 33 S.W.3d 282, 315 (Tex. App.—Texarkana 2000, pet. denied) (reducing punitive damages award from \$2 million to \$600,000 because the award appeared to be the “result of passion rather than the result of an objective assessment of the evidence”); *Peshak v. Greer*, 13 S.W.3d 421, 428 (Tex. App.—Corpus Christi 2000, no pet) (“we reverse the trial court’s judgment and remand this cause for new trial, unless plaintiff wishes to make voluntary remittitur of the punitive damages award”).

129. 517 U.S. 559 (1996).

130. *Id.* at 574.

constitutional due process line had been crossed: (1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the defendant's actions; and (3) the sanctions imposed in other cases for comparable misconduct.¹³¹ Dissenting, Justice Scalia took offense at the Court's proactive movement: "The Constitution provides no warrant for federalizing yet another aspect of our Nation's legal culture (no matter how much in need of correction it may be), and the application of the Court's new rule of constitutional law is constrained by no principle other than the Justices' subjective assessment of the 'reasonableness' of the award in relation to the conduct for which it was assessed."¹³² The willingness of the Court to disturb a verdict ruling approved by a highest state court sets the threshold of future prudence low.¹³³

As discussed, *Cooper Industries Inc. v. Leatherman Tool Group, Inc.*, arguably upset the jury verdict's punitive damage award further.¹³⁴ *Cooper's* pinnacle issue evolved from a false advertisement and trademark infringement dispute. It questioned whether federal appellate courts should use de novo or abuse of discretion standard when reviewing a district judge's decision to uphold a punitive damage jury verdict. An eight-person jury in *Cooper* awarded Leatherman Tools \$50,000 in actual damages and \$4.5 million in punitive damages after Cooper used photographs of a modified version of plaintiff's tool in posters, advertising, and packaging to introduce its competing tool. The Ninth Circuit upheld this award finding no abuse of discretion. Arguing that "[m]eaningful [c]onstraints [o]n [p]unitive [d]amage [a]wards [n]eed [d]iscernible [p]arameters,"¹³⁵ Cooper Industries succeeded in convincing the United States Supreme Court that *de novo* appellate review of a trial judge's decision to uphold a jury verdict is necessary to ensure adequate adjudication of due process attacks on excessiveness and unpredictability of punitive damage awards.

The decision looks invasive on the surface but can actually be interpreted as fairly mild. The Court does not "conflate" the question of the proper standard for reviewing the district court's due process determination with the question of the standard for determining whether the jury award is in "conformity with due process in the first instance."¹³⁶ Further, the *de novo* standard is limited to situations when no constitutional

131. *Id.* at 575-86.

132. *Id.* at 599 (Scalia, J., dissenting).

133. See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (setting out factors to measure the reasonableness of a punitive damages award but finding that the punitives assessed against the insurer, although large in proportion to the insured's compensatory damages, did not violate due process); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 418 (1994) (holding that an amendment to the Oregon Constitution prohibiting judicial review of a jury's punitive damages award unless no evidence was found to support the verdict violated the Due Process Clause).

134. 532 U.S. 424, 121 S. Ct. 1678 (2001).

135. Petitioner's Brief at *12, *Cooper* (No. 99-2035), available at 2000 WL 1793080 (Dec. 4, 2000).

136. *Cooper*, 532 U.S. 121 S. Ct. at 1682 n.4.

issue is raised. Here, the jury's assessment of punitive damages was interpreted by the Court as "an expression of its moral condemnation" rather than a "factual determination" as is found with compensatory damage determinations.¹³⁷ Justice Ginsburg's dissent confronts this apparent distinction as inaccurate because punitive damages are fundamentally dependent on determinations characterized as fact finding, such as the extent of harm caused by the defendant's misconduct, whether the defendant acted in good faith, whether the misconduct was part of a broader pattern, and the malice of the defendant.¹³⁸ The majority apparently understands this reasoning. Justice Stevens, in footnote 13, expressly leaves open the opportunity for a State to possibly avoid *de novo* review.¹³⁹ By "more tightly" tying a jury's award of punitive damages to the jury's finding of compensatory damages through definitions of punitive damages as a multiplier of compensatory damages or the like, *de novo* may be avoided.¹⁴⁰ Thus, though *Cooper* can be read narrowly, constitutionalizing the predictability of punitive damages awards through a *de novo* appellate review standard nevertheless bites into quasi-factual issues reserved for the jury in a way that this and other studies have deemed wholly unnecessary.¹⁴¹ In fact, although this article disagrees with an apparent increased willingness of trial judges to limit jury verdicts, the study's finding that federal trial judges are 38.8% more likely than Texas trial judges to reduce or eliminate a damages verdict contradicts any purported need for increased scrutiny of trial judges decisions on appeal.¹⁴²

2. Other Demographics

A nearly 40% difference between state and federal judges' willingness to reduce or eliminate a jury verdict was uncovered. Because this disparity affected the breakdown of other demographics, such as gender, on questions dealing with reductions or additions to jury verdicts, state and federal responses were analyzed separately as to other demographics. Reminiscent of the positive marks given in Section A, those labeling themselves "liberal" were 16% more likely than those labeling themselves "conservative" to argue that juries do "very well" in reaching a just and fair verdict. In line with this, conservative federal judges were 18% more likely to decrease or eliminate a damages verdict (see table 15).¹⁴³ In contrast to the "liberal" championing of juries as doing "very well,"

137. *Id.* at 1683.

138. *Id.* at 1691 (Ginsbury, J., dissenting).

139. *Id.* at 1687, n.13.

140. *Id.*

141. See discussion *supra* notes 107-108 (92% responding that they agree with the jury verdict "most of the time"); Rustad, *supra* note 105.

142. See *supra* note 112.

143. The state responses regarding political affiliation were largely useless because only six (1.5%) of the state judges responded that they would characterize themselves as "liberal." The federal breakdown for responses from judges questioned on whether they had ever decreased or eliminated a damages verdict not thought to be based on fact or law is as follows:

however, "liberal" judges were 10.3% more likely than "conservative" judges to take steps to increase a jury verdict thought to be too low (see table 15).¹⁴⁴ This willingness to supplement jury verdicts contrasts with "liberal" responses from Section A as well. There, the "liberal" judge was 14.6% more likely to argue that the right to a jury trial should be expanded and "conservatives" were 9% more likely to argue for its reduction.

Those judges labeling themselves "conservative" were also 12% more likely than "liberal" judges to say that jurors come into a civil case favoring the plaintiff. This is in line with the popular view held by the public.¹⁴⁵ Modern comparisons of verdict outcomes in federal, civil courts actually find plaintiff win rates higher in bench trials than in jury trials.¹⁴⁶

One of the only detectable differences between male and female responses related to the judges' eagerness to decrease, eliminate, or increase a damages verdict. In line with responses discussed in Section A, where male judges were slightly more likely to argue for a reduction in an individual's right to a jury, male judges were 5% more likely in state responses and 7% more likely in federal responses to decrease or eliminate a damages verdict not believed to be based on fact or law (see table 17).¹⁴⁷ In response to whether the judge had made a legal determination that a jury's verdict in setting damages was too low and taken steps to increase it, male federal judges were 10.8% more likely than female federal trial judges to take steps to increase a verdict believed to be too low. Similarly, male judges on the state level were 5% more likely to take

TABLE 15:

	Conservative	Liberal	Moderate
Yes	66%(84)	48%(13)	64%(247)
No	31%(40)	52%(14)	33%(127)

144.

TABLE 16:

	Conservative	Liberal	Moderate
Yes	11.7%(15)	22%(6)	13%(51)
No	88%(113)	74%(20)	86%(335)

145. Clermont & Eisenberg, *supra* note 95, at 1127 ("Tort reformers and others portray juries as having a pro-plaintiff bias.").

146. Neil Vidmar et al., *The Efficacy of the Jury System*, VOIR DIRE, Summer 1999, at 9, 13 (discussing Clermont and Eisenberg's large-scale verdict study); Valerie P. Hans, *The Contested Role of the Civil Jury in Business Litigation*, 79 JUDICATURE 242, 244, 245 (1996) ("Yet results from public opinion surveys and studies of jury decision making clearly show that the public is quite suspicious of, and sometimes downright hostile to, civil plaintiffs.").

147.

TABLE 17:

	Texas-Male Judges	Texas-Female Judges	Federal-Male Judges	Federal-Female Judges
Yes	25%(74)	20%(19)	63%(333)	56%(38)
No	70%(19)	67%(63)	33.6%(177)	41.2%(28)

steps to increase a jury's verdict (see table 18).¹⁴⁸

Dividing the judges based on those practicing in public backgrounds and those practicing in private backgrounds, on the whole, did not differ significantly on most verdict questions. When asked whether they had ever decreased or eliminated a damages verdict, however, state judges from private backgrounds were 16% more likely than judges moving to the bench from public backgrounds to alter the verdict (see table 19).¹⁴⁹ Though federal judges from a private background were also more likely to alter or eliminate a damages verdict, the difference (3.1%) was minor.

C. DEOXYRIBONUCLEIC WHAT? HOW JUDGES VIEW A JURY'S ABILITY TO HANDLE "COMPLEX" CASES?

"The jury system puts a ban on intelligence and honesty, and a premium upon ignorance, stupidity, and perjury."¹⁵⁰ Mark Twain would likely have enjoyed *Herbert Markman and Positek, Inc. v. Westview Instruments, Inc.*¹⁵¹ There, the Supreme Court held that the construction of a patent, including the terms of art within its claim, is exclusively within the province of the court.¹⁵² Though the Supreme Court took pains to rest its holding on the need for "desirable uniformity" on issues of patent construction as opposed to some "complexity" exception to the Seventh Amendment, language is suspect:

Patent construction in particular "is a special occupation, requiring, like all others, special training and practice. The judge, from his training and discipline, is more likely to give a proper interpretation to such instruments than a jury; and he is, therefore, more likely to be right, in performing such a duty, than a jury can be expected to be."¹⁵³

The ultimate question of whether a patent has been infringed remains a jury issue. Still, the 1996 *Markman* decision shrewdly invades the twelve-man arena.¹⁵⁴

148. TABLE 18:				
	Texas-Male Judges	Texas-Female Judges	Federal-Male Judges	Federal-Female Judges
Yes	7%(20)	2%(2)	63%(333)	56%(38)
No	88%(264)	75%(78)	33.6%(177)	41.2%(28)
149. TABLE 19:				
	Yes		No	
Private	28%(49)		69%(123)	
Public	12%(19)		71.2%(79)	

150. Mark Twain, *Roughing It*, in *WORKS OF MARK TWAIN* 2:309 (Franklin R. Rogers ed. 1972) (1872).

151. 517 U.S. 370 (1996).

152. *Id.* at 390.

153. *Id.* at 388-89 (quoting *Parker v. Hulme*, 18 F. Cas. 1138, 1140 (C.C. E.D. Pa. 1849) (No. 10, 740)).

154. In a related case, *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 529 U.S. 205, 214 (2000), despite a jury ruling, trial-court denial of JMOL, and circuit affirmation, all finding for a clothing designer against a retailer selling "knockoff" copies of the designer's clothes,

While the *Markman* court did not base its decision on the jury's inability to understand complex issues, such as patents, the argument has supporters.¹⁵⁵ Judge Jerome Frank, one of the harshest critics of the jury system, abhorred the jury and the inability of jurors "to absorb and evaluate the testimony that they hear and to apply the explanations of the law tendered to them by the court."¹⁵⁶ In a footnote in *Ross v. Bernard*, the Supreme Court indicated that "the practical abilities and limitations of juries" may affect the right to a trial by jury in civil cases.¹⁵⁷ The Court declined to answer whether this language supported a Seventh Amendment exception to the right to a jury trial in complex civil cases.¹⁵⁸

Embracing the opportunity, the Third Circuit picked up where the Supreme Court left off. *In re Japanese Electronic Products Antitrust Litigation* ("*Zenith*") argued that "a jury is likely to be unfamiliar with . . . the technical subject matter of a complex case . . . The probability is not remote that a jury will become overwhelmed and confused by a mass of evidence and issues and will reach erroneous decisions."¹⁵⁹ Concluding that a trial by an uncomprehending jury would violate the Fifth Amendment, the court created an exception to the Seventh Amendment. In this remarkable decision, the court "prohibited trial by jury as soon as [the judge] perceived, to use the words of the *Zenith* court, complexity 'so great that it renders the suit beyond the ability of a jury to decide by rational means with a reasonable understanding of the evidence and applicable legal rules.'"¹⁶⁰ The case has had few followers willing to so blatantly disregard an apparent Seventh Amendment pronouncement.¹⁶¹ Yet, few would deny that many lack faith in the jury's ability to comprehend complex issues and cases.¹⁶²

the Supreme Court reversed. The Court found that in close cases, courts should err on the side of caution and classify ambiguous trade dress as product design requiring "secondary meaning." *Id.*

155. Morris S. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980); Richard O. Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICH. L. REV. 68 (1981) (arguing that "the issue of whether the seventh amendment right to jury trial remains inviolate in complex cases should be left open because we currently lack the information needed for an intelligent resolution").

156. 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND CIVIL PROCEDURE*, § 2301 (2d ed. 1995).

157. 396 U.S. 531, 539 n.10 (1970).

158. See *In re U.S. Fin. Sec. Litig.*, 609 F.2d 411 (9th Cir. 1979) (holding that no complexity exception exists to the Seventh Amendment), *cert. denied sub. Nom.*, *Gant v. Union Bank*, 446 U.S. 929 (1980).

159. 631 F.2d 1069, 1086 (3d Cir. 1980).

160. Patrick Devlin, *Equity, Due Process and the Seventh Amendment: A Commentary on the Zenith Case*, 81 MICH. L. REV. 1571, 1599 (1983) (quoting *Zenith*, 631 F.2d at 1088).

161. See *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59 (S.D.N.Y. 1978); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423 (N.D. Cal. 1978); *In re Boise Cascade Sec. Litig.*, 420 F. Supp. 99 (W.D. Wash. 1976); but see *SRI Int'l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107 (Fed. Cir. 1985); *Phillips v. Kaplus*, 764 F.2d 807, 814 (11th Cir. 1985).

162. Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 728-29 (1991) ("The increasing complexity of issues

In *City of Columbia v. Omni Outdoor Advertising, Inc.*, Justice Stevens remarked on the position of trial judges: "Judges who are closer to the trial process than we are do not share the Court's fear that juries are not capable of recognizing the difference between independent municipal action and action taken for the sole purpose of carrying out an anti-competitive agreement for the private party."¹⁶³ A single question in the SMU survey seeks to uncover the judges' view on jury comprehension. The federal and state trial judges were asked the following question: *In general, how well do you think the average juror understands the legal and evidentiary issues in cases?* The response options included: "very well," "moderately well," "not very well," or "not at all." As seen in Table 20, approximately 62% of the judges polled asserted that the juries understand the issues "moderately well" and 27% found the juries to understand the issues "very well." Only 9.6% argued that the juries did not understand "very well" and only .2% asserted "no" understanding on the part of the jury.

TABLE 20:

	Texas	Federal	Combined
Very Well	17.3	33.5	27
Moderately Well	66.6	59.9	62.5
Not Very Well	15.1	6.1	9.6
Not at all	.3	.2	.2

Federal judges on average were 16% more likely than Texas state judges to find that the juries understand the legal and evidentiary issues "very well." Likewise, as is consistent with Texas' procedural mechanisms decreasing the role of the jury,¹⁶⁴ Texas judges were 9% more likely to contend that juries do not understand the issues "very well" (see table 21).¹⁶⁵

As far as the response breakdown by circuits is concerned, district court judges sitting in the Ninth, Tenth, Eleventh, and D.C. Circuit jurisdictions were less likely to argue that juries understand the legal and evidentiary issues "very well." District court judges sitting in the First, Fourth, and Seventh Circuit jurisdictions were slightly more likely to argue that the jury understands the issues "very well" (see table 22).¹⁶⁶

Judges characterizing themselves as "liberal," were 17.4% more likely to argue that the jury understands the issues "very well." In contrast to

presented for adjudication causes some commentators to question the ability of civil juries to fulfill [their] traditional role.").

163. 499 U.S. 365, 395-96 (1991) (Stevens, J., dissenting).

164. See discussion, *supra* Section A.

165.

TABLE 21:

	Very Well	Moderately Well	Not Very Well	Not At All
Texas	17.3%(68)	66.6%(261)	15.1%(59)	.3%(1)
Federal	33.5%(199)	59.9%(356)	6.1%(36)	.2%(1)

166. The average percentage among the different jurisdictions were as follows:

the connection between liberal and female responses found in section A, female judges on this question were 4% more likely than male judges to say that juries did *not* understand the issues "very well," and males were 7% more likely to argue that juries comprehend the legal and evidentiary issues "very well" (see table 23).¹⁶⁷

The vast majority of judges polled—more than 60%—argued that the jury understands complex issues "moderately well" which is consistent with earlier studies.¹⁶⁸ This finding, combined with the responses indicating that judges overwhelmingly agree with the jury's verdict, does not support the need for a complexity exception, even assuming some due process or equity distinction exists. In ferreting out whether a jury possesses the tools to tackle a complex or technical case, the "collective ability" of the jury cannot be underestimated. "Apart from the occasional situation in which a judge possesses unique training . . . the assumption that a jury collectively has less ability to comprehend complex material than does a single judge is an unjustified conclusion."¹⁶⁹

IV. CONCLUSION

Blackstone would be appalled to learn that what he described as "the most transcendent privilege . . . any subject can enjoy" transcends no more in England.¹⁷⁰ The destiny of the "Manor Farm" is likely not in the near future for the American civil jury system. That said, less subtle mechanisms—such as appellate standards of review, directed verdict standards, gate-keeping mechanisms on evidence, particularized "no-duty" pronouncements, novel designations of complexity exceptions, and

TABLE 22:

	Very Well	Moderately Well	Not Very Well	Not At All
All Circuits	34.1	58.4	6.9	.15

In contrast to the 34.1% average under the "very well" column, the Ninth Circuit averaged 27.7%, the Tenth Circuit averaged 27.3%, the Eleventh Circuit averaged 26.3%, and the D.C. Circuit averaged 28.5%. On the higher end, the First Circuit averaged 45%, the Fourth Circuit averaged 42.9%, and the Seventh Circuit averaged 43.1%. Notably, trial judges within the D.C. Circuit were, on average, 7.3% more likely to argue that the jury did not understand the issues very well. Limitations caution against making too many generalizations from data out of the D.C. Circuit because the response rate from district judges sitting in that jurisdiction was low. While the other eleven federal jurisdictions polled averaged fifty-three respondents, only seven district judges from the D.C. Circuit jurisdictions responded.

167.

TABLE 23:

	Very Well	Moderately Well	Not Very Well	Not At All
Male	28%(233)	62%(513)	9%(74)	.2%(2)
Federal	21%(34)	64%(105)	13%(21)	0%(0)

168. Sentell, *supra* note 11, at 116 (finding that 92% of the judges questioned rejected jury miscomprehension as the reason for any disagreement between the judge on verdict).

169. Higginbotham, *supra* note 8, at 53; *see also* Kalven, *supra* note 17, at 1067 ("[t]he jury can operate by *collective* recall. Different jurors remember, and make available to all, different items of the trial so that the jury as a group remembers far more than most members could as individuals.").

170. 3 WILLIAM BLACKSTONE, COMMENTARIES *379.

tools capable of reducing or eliminating a jury's damages verdict—chip away at the traditional role of the jury.

The study questioned judges as to their view of the role of the jury, the accuracy of verdicts, and the precision of jury comprehension in an effort to better understand where the civil jury now stands and where it is likely to stand in the future. In contrast to previous studies, the study spread its base purposefully broad so as to encompass all federal trial judges in the United States and all state trial judges in Texas. This Article broke down responses by demographic variables. In what is one of the most salient findings, most judges in the abstract ardently support the civil jury system and approximately 92% agree with the jury's verdict "most of the time." Yet, as the responses indicate, the dichotomy between attitude and behavior cannot be underestimated. While the significant majority praised the jury system, nearly a third of the respondents argued that fewer types of cases should be decided by a jury, nearly a quarter pushed for reductions in an individual's jury right, and federal judges were nearly 40% more likely to have reduced or eliminated a jury verdict than trial judges from a State active in its application of limitations on the jury. Though tremors were not predicted, the data arguably mirror sentiments surrounding the subtle yet deliberate drain on the jury system. What is more, several responding judges indicated that the procedural erosion is and should be still in its youth. "Four legs good . . ."

