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IMPROVING CRIMINAL JURY VERDICTS: LEARNING FROM THE COURT-MARTIAL

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Twelve jurors retire into a closed room to deliberate on the verdict in a felony trial. After they elect a foreman and discuss the evidence, their individual positions begin to emerge. Nine jurors feel strongly that the defendant is guilty, but several jurors argue for acquittal. The judge has instructed them that they must all agree on any verdict, but has given them no guidance on what procedure to use to determine their verdict. Frustration rises over the inability to convince the minority bloc to go along with the majority sentiment. Someone points out that if the twelve cannot unanimously agree, the judge will declare a mistrial, and the defendant will face another long trial in front of a new jury. The jurors holding out for acquittal feel the mounting pressure, and long for some means to vote their consciences without deadlocking the collective decision. There must be a better way for the criminal jury to reach its verdict—and there is. State law ought to permit a super-majority of the twelve jurors to render a verdict of guilty, and when the required majority cannot be convinced of guilt, then a “not guilty” verdict should automatically result. Requiring each juror to indicate her final individual position on the verdict by a secret written ballot of “guilty” or “not guilty,” coupled with an assured outcome of either conviction or acquittal, will protect the integrity of the verdict as a collective expression of the individual jurors’ consciences, rather than as a result of the majority browbeating the exhausted and outnumbered dissenters into submission. Changing state trial procedure to this approach will also promote thorough discussion of all points of view among the jurors, and eliminate the inefficiency of the

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This Article is dedicated in loving memory of my brother, Lieutenant Colonel Daniel E. Holland, United States Army, who was killed in action in Iraq on May 18, 2006, while serving our Nation.

hung jury situation. Fortunately, one American criminal justice system has successfully used such a radical procedure for reaching jury verdicts for almost forty years, and this Article discusses why such procedures should be adopted by states for their criminal jury trials.

I. INTRODUCTION

One of the recurring themes in recent American legal scholarship is the inadequacy of the contemporary jury system.¹ Some proposals for criminal jury “reform” suggest that we abandon our reliance on juries as arbiters of the facts and, ultimately, of culpability, while others propose to increase the jurors’ participation in the trial process to improve the jury’s performance in its crucial role as factfinder.² This Article suggests that adopting several specific procedures used by the modern³ American court-martial would enhance the effectiveness and finality of verdicts in state jury trials for non-capital⁴ criminal cases: reaching the verdict based upon the consensus of a super-majority⁵ of the jurors, through secret written ballot,⁶ with acquittal resulting for any charge for which a guilty verdict is not reached.⁷

¹ See Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 443-44 & n.2 (1997) (citing numerous books and articles critical of the jury as a crucial component of the American justice system).

² See *id.* at 447 (categorizing the proposals as “two competing models for reform of the adjudicatory process [with] one advocating more inquisitorial procedures based on . . . procedures followed in civil law jurisdictions, and [the other] advocating a more active role for the jury in order to improve its [performance as] finder of fact”).

³ For purposes of defining “modern” American courts-martial practice, the year 1969 serves as a meaningful benchmark for the start of the modern era. Since 1969, courts-martial have included a military judge and a group of voting members with roles corresponding, respectively, to the roles of the trial judge and jury familiar to American criminal trial practitioners. See generally discussion *infra* Section II. Before 1969, by contrast, American courts-martial did not have a legally-trained presiding officer, and the role of the members was substantially different than that of jurors in the civilian sector. See Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335-1343 (1968) (creating the position of military judge and defining the powers of such officers in courts-martial). See generally Kevin J. Barry, *A Face Lift (and Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, 2002 LAW REV. M.S.U.-D.C.L. 57, 73-74 (2002) (summarizing pre-1969 military trial practices and the significance of adding military judges to courts-martial).

⁴ This Article does not address trial procedures peculiar to capital cases, where military practice requires the unanimous agreement of twelve (or more) jurors upon an aggravating circumstance, like those employed by the states since *Furman v. Georgia*, 408 U.S. 238 (1972), in order to reach a guilty verdict and to impose the death penalty. See UCMJ art. 25a, 10 U.S.C.A. § 825a (2001); 2 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 23-32.10 (2d ed. 1999 & Supp. 2003).

⁵ See discussion *infra* Section III.C.2.

Readers may ask whether the scope of modern military criminal practice provides significant experience from which civilian practitioners could learn anything useful. Are there enough military criminal trials to offer any meaningful comparison, as opposed to minor anecdotal interest? Are the types of allegations handled by courts-martial significant enough to offer any real parallel to criminal trials in civilian society?

With regard to the first question, the number of courts-martial is indeed significant enough for comparative purposes. Since 2000, courts-martial have tried almost 28,000 American military personnel.⁸ Further, with approximately 1.4 million American military personnel currently on active duty⁹ (and thus potentially affected by the military criminal justice system), military trials conducted under the Uniform Code of Military Justice (UCMJ)¹⁰ affect a larger population than eleven states and the District of Columbia.¹¹ In short, both the number of courts-martial conducted and the number of American citizens subject to the court-martial process are comparable in magnitude to many of our smaller state jurisdictions.

To answer the second question, courts-martial routinely decide the guilt or innocence of Americans charged with an incredibly wide range of

⁶ See discussion *infra* Section III.D.

⁷ See discussion *infra* Section III.C.3.

⁸ This figure was calculated from data reported by each of the armed services separately for fiscal years (FY) 2000 through 2005, including both general and special courts-martial. See U.S. COURT OF APPEAL FOR THE ARMED FORCES, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE (2000-2005 annually), available at <http://www.armfor.uscourts.gov/Annual.htm> [hereinafter USCAAF ANNUAL REPORT].

⁹ The average active duty troop strength of the United States armed forces was calculated by adding the average active duty manpower strength of the Army, Navy, Marine Corps, Air Force, and Coast Guard as reported separately by each of the armed services at the end of FY 2005. The annual report includes a statistical table at the end of each of the several reports from the Judge Advocates General of the armed services; Part 10 of each report gives the average active duty strength (in manpower) during FY 2005 for that particular service. See USCAAF ANNUAL REPORT (2005), *supra* note 8.

¹⁰ Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (2000). In this Article, particular statutory provisions within the UCMJ are cited as "UCMJ art. __, 10 U.S.C. § __" because those who practice or study military criminal law are accustomed to references to the appropriate article of the UCMJ rather than to the differently numbered provisions of the United States Code's Title 10.

¹¹ Each of the eleven smallest states and the District of Columbia had populations of less than 1.4 million persons, according to the United States Census Bureau's 2005 estimates of state populations. See U.S. CENSUS BUREAU, TABLE 1: ANNUAL ESTIMATES OF THE POPULATION FOR THE UNITED STATES AND STATES, AND FOR PUERTO RICO, APRIL 1, 2000 TO JULY 1, 2005 (NST-EST2005-01) (2005), available at <http://www.census.gov/popest/states/NST-ann-est.html>. Thus, the military forces of the United States might be described as our thirty-ninth largest American criminal court jurisdiction.

criminal offenses,¹² whether those offenses were committed in the United States or abroad, and whether the offenses occurred on a military installation or in a “civilian” setting.¹³ The offenses tried by courts-martial may involve victims who are civilian or military,¹⁴ and courts-martial have jurisdiction even where parallel prosecution by civilian authorities (federal, state, or foreign) would be feasible.¹⁵ As long as the person accused is a

¹² See UCMJ art. 18, 10 U.S.C. § 818 (general court-martial has jurisdiction to try persons subject to the UCMJ for “any offense made punishable by [chapter 47 of Title 10, or the UCMJ]”); *id.* art. 19, 10 U.S.C. § 819 (special court-martial has jurisdiction to try persons subject to the UCMJ for “any noncapital offense made punishable by [the UCMJ]”). The field of potential UCMJ offenses is quite broad. Some of the many offenses that may be tried by court-martial are specifically identified within the UCMJ. See generally *id.* arts. 77–133, 10 U.S.C. §§ 877–933 (specific enumeration of crimes). Courts-martial may also punish “all disorders and neglects to the prejudice of good order and discipline in the armed forces” as well as any “conduct of a nature to bring discredit upon the armed forces.” See *id.* art. 134, 10 U.S.C. § 934. Additionally, each federal non-capital offense is incorporated into the UCMJ as a military crime by the UCMJ’s “general article.” See *id.* art. 134, 10 U.S.C. § 934 (“Though not specifically mentioned in [the UCMJ], . . . crimes and offenses not capital, of which persons subject to [the UCMJ] may be guilty, shall be taken cognizance of by a . . . court-martial . . .”).

¹³ Offenses by military personnel on active duty are within the subject matter jurisdiction of courts-martial, regardless of the situs of the offense. See *Solorio v. United States*, 483 U.S. 435, 440–41, 450–51 (1987) (“In an unbroken line of decisions from 1866 [until *O’Callahan v. Parker* in 1969], this Court interpreted the Constitution as conditioning the proper exercise of court-martial jurisdiction over an offense on one factor: the military status of the accused.”). The significance of the “active duty” status of the defendant is discussed *infra* text accompanying note 16.

¹⁴ The subject matter jurisdiction of a court-martial depends on the status of the defendant as a person on military active duty when the crime was committed, not upon the victim’s civilian or military status. See *Loving v. United States*, 517 U.S. 748, 751, 774 (1996) (affirming sentence of death imposed upon soldier by general court-martial (GCM) for murder of two civilian taxicab drivers); *Solorio*, 483 U.S. at 449 (rejecting the service-connection doctrine under which subject matter jurisdiction of courts-martial depended on such factors as the relation of the victim of the crime to the military community).

¹⁵ For many offenses by military members, concurrent jurisdiction exists between courts-martial and federal, state, or foreign courts. See, e.g., *United States v. Irwin*, 39 M.J. 1062, 1063 n.2 (A. Ct. Crim. App. 1994); *United States v. Dutil*, 14 M.J. 707, 709 (N-M. Ct. Crim. App. 1982); cf. MANUAL FOR COURTS-MARTIAL, UNITED STATES, II-10 (RCM 201(d) & app. 3) (2005 ed.) [hereinafter MCM]. The constitutional prohibition against double jeopardy is not implicated except when the later jeopardy is accomplished under authority of the same sovereign as the first jeopardy. *United States v. Wheeler*, 40 M.J. 242, 245 (C.A.A.F. 1994). Thus, trial of the military defendant both by court-martial and in state court for the same act is constitutionally permissible. *United States v. Hutchinson*, 49 M.J. 6, 6–7 (C.A.A.F. 1998); *United States v. Schneider*, 38 M.J. 387, 390–92 (C.A.A.F. 1993). Likewise, a soldier previously prosecuted in the court of another country is not protected by the constitutional double jeopardy provision from prosecution before a United States court-martial, although military departmental policies generally disfavor such repeated prosecution. See *United States v. Miller*, 16 M.J. 169, 174–75 & n.9 (C.A.A.F. 1983) (implying that even if

member of the armed forces in an “active duty” status, that person may be brought before a court-martial to stand trial for virtually any conceivable felony offense.¹⁶

Thus, military trials regularly adjudicate serious felonies such as internet child pornography, child sexual abuse, rape, and murder, and not just minor disciplinary infractions peculiar to military life, such as AWOL or disrespect to superiors.¹⁷ Further, courts-martial frequently impose serious sentences, including substantial periods of imprisonment and the death penalty, on those found guilty of felonies.¹⁸

Skeptics may question whether the procedures followed in military jury trials are fair enough toward the accused that any civilian jurisdiction would even consider adopting any of their features. My own experience as a military trial judge, presiding over hundreds of felony trials by military jury during a recent ten-year period, leads me to conclude that the military jury trial, while no more perfect than any other human institution, is a fundamentally fair and sound process for determining criminal culpability.¹⁹

conviction by a Korean court had been final, that would not preclude court-martial because both nations had concurrent jurisdiction); *United States v. Green*, 14 M.J. 461, 464 n.3, 473 (C.A.A.F. 1983) (ruling that prosecution in a British court did not preclude court-martial); *United States v. Frostell*, 13 M.J. 680, 681-82 (N-M. Ct. Crim. App. 1982) (finding that conviction by a Japanese court did not preclude court-martial); *United States v. Stokes*, 12 M.J. 229, 232 (C.M.A. 1982) (concluding that conviction by a Spanish court did not preclude court-martial).

By contrast, however, since trials before courts-martial and trials in United States magistrate court are both prosecuted in the name of the United States, a soldier cannot be prosecuted before both for the same offense. *See United States v. Chavez*, 6 M.J. 615, 619 (A.C.M.R. 1978).

¹⁶ The term “on active duty” essentially refers to the status of a soldier or sailor as a full-time member of the armed services (as opposed to one in a reserve military component who, while perhaps drilling on a part-time basis, has not been called to return to active service, or a person who is an officer on the retired list). *See* 10 U.S.C. § 101(d)(1). The reach of “in personam” jurisdiction in military criminal law is somewhat broader than simply the category of service members actually on active duty, but persons in the other categories are only infrequently subjected to trial by courts-martial. *See* UCMJ art. 2, 10 U.S.C. § 802.

¹⁷ *E.g.*, *United States v. Miller*, 63 M.J. 452, 454 (C.A.A.F. 2006) (internet child pornography); *United States v. Thompson*, 59 M.J. 432, 432 (C.A.A.F. 2004) (indecent acts or liberties with a child); *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999) (two murders, three rapes, forcible sodomy, two robberies, and burglary).

¹⁸ *E.g.*, *United States v. Shelton*, 62 M.J. 1 (C.A.A.F. 2005) (murder, larceny, and kidnapping); *United States v. Kreutzer*, 61 M.J. 293 (C.A.A.F. 2005) (death penalty for premeditated murder and eighteen counts of attempted murder); *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999) (two murders, three rapes, forcible sodomy, two robberies, and burglary); *United States v. Loving*, 41 M.J. 213 (C.A.A.F. 1994), *aff'd*, 517 U.S. 748 (1996) (death penalty for premeditated murder, attempted murder, and robbery).

¹⁹ The author served as a military “circuit judge” (or trial judge) from July 1992 through June 2002, and he presided over trials by court-martial conducted at more than twenty

More significant than my own opinion is that offered by one of America's most renowned trial lawyers, F. Lee Bailey, in 1996: "If I had an innocent client, I would want that person to be tried in a military court[, where] the accused receives a full and fair trial of the facts."²⁰

Of course, the military criminal law system has always had its detractors.²¹ In 1969, the Supreme Court expressed serious concern about the adequacy of due process within the court-martial system.²² In large part based on its reasoning that "military tribunals have not been and probably never can be constituted in such [a] way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians,"²³ *O'Callahan v. Parker* ruled that courts-martial could only reach criminal offenses by service members if such offenses were "service connected."²⁴ The Court decided that the allegation that a soldier had broken into a downtown Honolulu hotel room and there attempted to rape a young civilian girl while he was on an evening pass away from his military post, in peacetime,²⁵ was not service-connected and, therefore, could not be tried by a court-martial.²⁶

However, in the 1978 case of *Solorio v. United States*,²⁷ the Court rejected that narrow view of the jurisdiction of military courts and held that the subject matter jurisdiction of courts-martial extends to any offense allegedly committed by military personnel while in "active duty" status.²⁸ *Solorio* expressed no criticism of the fundamental fairness of military trials,

different military posts at locations from Alaska to Panama.

²⁰ Kathleen A. Duignan, *Military Justice: Not an Oxymoron*, 43 FED. LAW., Feb. 1996, at 22 (quoting F. Lee Bailey). Clearly, this was no casual comment by Mr. Bailey, since he expressed much the same opinion some twenty years earlier after successfully defending Captain Ernest Medina at a 1971 general court-martial that acquitted Medina of all charges related to the My Lai massacre. F. LEE BAILEY, FOR THE DEFENSE 38 (1976) ("The fact is, if I were innocent, I would far prefer to stand trial before a military tribunal governed by the Uniform Code of Military Justice than by any court, state or federal.").

²¹ Nothing has ever quite captured the vehemence of those critics like the title of this book: ROBERT SHERRILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* (1970).

²² See *O'Callahan v. Parker*, 395 U.S. 258, 262-63 (1969), *overruled by Solorio v. United States*, 483 U.S. 435, 436 (1987).

²³ *Id.* at 262-63. The *O'Callahan* decision also included this memorable comparison: "A civilian trial . . . is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice." *Id.* at 266.

²⁴ *Id.* at 272-73.

²⁵ *Id.* at 259-60, 273-74.

²⁶ *Id.* at 274.

²⁷ 483 U.S. 435, 436 (1987).

²⁸ *Id.* at 450-51.

and the Court specifically overruled the *O'Callahan* decision.²⁹ In fact, since 1969, the Court has neither questioned the fairness of the military trial nor overturned any court-martial conviction; in each of the eight military cases where it granted certiorari, the Court affirmed the military conviction,³⁰ including one case that directly challenged the imposition of the death sentence by a court-martial.³¹

In *Weiss v. United States*, the Court affirmed several court-martial convictions, rejecting the defendants' assertion that a trial by a court-martial violates the Fifth Amendment's Due Process Clause because military judges who preside over courts-martial are not sufficiently independent to guarantee a fair trial.³² In holding that the lack of a fixed term of office for military judges does not undermine the due process to which a military defendant is entitled,³³ the Court clearly applied the "elementary [principle] that 'a fair trial in a fair tribunal is a basic requirement of due process'" with equal force to military trials.³⁴ Next, the Court reasoned that "[a] necessary component of a fair trial is an impartial judge."³⁵ Thoroughly reviewing the court-martial system's many safeguards aimed at preserving the independence of military judges,³⁶ the Court concluded that "the applicable provisions of the UCMJ, and corresponding regulations, by insulating military judges from the effects of command influence, sufficiently preserve judicial impartiality so as to satisfy the Due Process Clause."³⁷ Moreover, as the Supreme Court recognized in *Weiss*, the Court of Appeals for the Armed Forces³⁸ has demonstrated its willingness to overturn any court-martial conviction that is reached without the fundamental fairness or due process to which a defendant is entitled under the Constitution.³⁹

²⁹ *Id.* at 436.

³⁰ The eight cases in which the United States Supreme Court granted certiorari and directly reviewed military convictions are summarized in 2 GILLIGAN & LEDERER, *supra* note 4, at 550-51 & n.259.

³¹ *Loving v. United States*, 517 U.S. 748 (1996) (upholding the non-statutory aggravating factors prescribed by the President as Commander-in-Chief which a court-martial must use to evaluate whether to impose the death penalty).

³² *Weiss v. United States*, 510 U.S. 163, 181 (1994).

³³ *Id.* at 179.

³⁴ *Id.* at 178.

³⁵ *Id.* at 178.

³⁶ *See id.* at 179-81.

³⁷ *Id.* at 179.

³⁸ UCMJ art. 67, 10 U.S.C. § 867 (2000). Prior to 1994, this Article I court was named the United States Court of Military Appeals.

³⁹ *See Weiss*, 510 U.S. at 181 (observing that the Court of Military Appeals, predecessor of the Court of Appeals for the Armed Forces, "has demonstrated its vigilance in checking

However, this Article does not undertake a general defense of the entire military criminal law system or attempt to demonstrate that the UCMJ provides the military defendant the same procedural fairness at trial that state or federal criminal justice systems generally afford American citizens.⁴⁰ The adequacy of due process within the military criminal justice system has been debated for years in academic circles and in Congress; adding to that huge body of commentary is beyond the more modest objective of this Article.⁴¹

Instead, the thesis here is that several specific aspects of military jury practice satisfy contemporary notions of due process for civilian defendants

any attempts to exert improper influence over military judges”); *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005) (setting aside a plea of guilty as improvident and granting a new trial); *United States v. Rollins*, 61 M.J. 338, 343 (C.A.A.F. 2005) (setting aside findings of guilt in part because they were based upon faulty instructions to jury); *United States v. Sonogo*, 61 M.J. 1, 4 (C.A.A.F. 2005) (ordering corrective action where the accused made a colorable claim of juror dishonesty during voir dire); *United States v. Daniels*, 60 M.J. 69, 72 (C.A.A.F. 2004) (setting aside a conviction resting upon evidence derived from a warrantless search in violation of Fourth Amendment); *United States v. Scheffer*, 44 M.J. 442, 444, 448-49 (C.A.A.F. 1996) (holding that a per se evidentiary rule preventing the accused from attempting to show reliability of exculpatory polygraph results violated the Sixth Amendment right to present defense), *rev'd*, 523 U.S. 303 (1998); *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983) (setting aside a death sentence due to Constitutional defects in then-existing UCMJ & MCM procedures under which a GCM adjudged death penalty in the 1979 murder case), *superseded by changes to MCM, supra* note 15, at II-130-II-132 (R.C.M. 1004), *as recognized in* *United States v. Curtis*, 32 M.J. 252, 257 (C.M.A. 1991) (“President Reagan amended the Manual for Courts-Martial to provide a new procedure for capital cases. Exec. Order No. 12,460, 49 Fed. Reg. 3169 (1984). . . . The death penalty procedure authorized by the President in January 1984 became RCM 1004 in the Manual for Courts-Martial, United States, 1984.”).

⁴⁰ Many scholars remain critical of the hybrid nature of the UCMJ as both a system of criminal justice and a mechanism for commanders to enforce the discipline essential to armed forces. *See, e.g.,* Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 673-74 (2002) (calling for sharp curtailment of a separate criminal justice system for members of the military). For an extensive bibliography of commentary calling for reform or abolition of the military criminal law system, see DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* 41-52 (5th ed. 1999 & Supp. 2002).

⁴¹ One of the salient issues in that debate is whether to change the historic method of military juror selection to some form of random selection of personnel for jury duty. Instead of a random process, senior commanders select the court members by name from among their own military subordinates, as has been the American military custom since before our Nation’s independence. This selection mechanism has been roundly criticized. *See* Turley, *supra* note 40, at 673-74 (2002). For a listing of numerous other articles criticizing the command selection of military jurors, and for a spirited defense of the current UCMJ provisions concerning military juror selection, see Christopher W. Behan, *Don’t Tug on Superman’s Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190, 193-94 & n.25 (2003).

and would enhance the reliability and efficiency of those trials, if these features were adopted for use in state criminal trials.⁴² Accordingly, fair-minded observers ought to consider the relevance of these specific military trial features to state criminal trial procedures.

II. UNDERSTANDING TRIAL PROCEDURES USED BY THE COURT-MARTIAL

Any discussion of how military jury practice differs from that found in many state systems requires an understanding of the structure and proceedings of a military trial. Federal law, and specifically the UCMJ, requires that the courts-martial conducted by any of the armed forces⁴³ conform to certain fundamental trial procedures.⁴⁴ The UCMJ provides the authority of the military trial judge as the presiding officer⁴⁵ of the court-martial, the procedures for challenging the judge and military jurors,⁴⁶ and the procedures for reaching the verdict and the sentence.⁴⁷ While the UCMJ leaves other important procedural details of the military trial process to the President's discretion,⁴⁸ the UCMJ nonetheless requires that such executive directives apply uniformly among the armed forces.⁴⁹ The President, by executive order, has provided those uniform supplementary procedures in the Manual for Courts-Martial (MCM).⁵⁰ The combined effect of the UCMJ and the MCM is that the jury trial practices used by each of the

⁴² The Supreme Court has interpreted the minimum "due process" required of the states by the Fourteenth Amendment somewhat differently than that required in federal criminal trials by the Sixth Amendment. See discussion *infra* Section III.C.1.

⁴³ The armed forces include the Army, Navy, Marine Corps, and Air Force, as well as the Coast Guard. 10 U.S.C. § 101(a)(4).

⁴⁴ See UCMJ arts. 36-54, 10 U.S.C. §§ 836-854 (providing uniform procedures for trials by general and special courts-martial).

⁴⁵ *Id.* arts. 26, 39, 40, 51(b)-(c), 10 U.S.C. §§ 826, 839, 840, 851(b)-(c).

⁴⁶ *Id.* art. 41, 10 U.S.C. § 841.

⁴⁷ *Id.* arts. 51, 52, 10 U.S.C. §§ 851, 852.

⁴⁸ *Id.* art. 36(a), 10 U.S.C. § 836(a) ("[T]rial . . . procedures, including modes of proof, . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.").

⁴⁹ *Id.* art. 36(b), 10 U.S.C. § 836(b) ("[R]egulations made under this article shall be uniform insofar as practicable.").

⁵⁰ See MCM, *supra* note 15, at preface & app. 25. Section II of the MCM contains a series of procedural rules applicable to courts-martial that "govern the procedures and punishments in all courts-martial." MCM, *supra* note 15, § II-1 (describing the Rules for Courts-Martial (R.C.M.) that are contained in the MCM at Section II-1 through II-182) [hereinafter MCM, *supra* note 15, R.C.M. —]. Thus, by executive order, the Rules for Courts-Martial, amounting to direct supplementation of the UCMJ, are binding upon all of the armed forces.

several armed forces are the same. Thus, while this Article discusses military jury practices within the context of an Army general court-martial,⁵¹ the same features apply in any military trial, whether the defendant is a sailor, airman, marine, or coastguardsman.

⁵¹ For clarity of discussion, this Article concentrates on the procedures of the GCM, or the felony level military trial, and not on those of the special court-martial (SPCM), or the misdemeanor-level trial. The GCM is the only type of court-martial authorized to impose sentences that include confinement for more than one year, dishonorable discharge, or the death penalty. See UCMJ art. 18, 10 U.S.C. § 818; *cf. id.* art. 19, 10 U.S.C. § 819 (limiting punishment by SPCM). By contrast to the GCM, the SPCM “might well be thought of as a ‘misdemeanor’ level court-martial.” Barry, *supra* note 3, at 77.

In addition to its limited sentencing authority, the SPCM differs from the GCM in several other important respects. By comparison to the senior commanders who are empowered to convene the GCM, somewhat lower-ranking commanders may convene the SPCM. See UCMJ art. 23, 10 U.S.C. § 823; MCM, *supra* note 15, R.C.M. 504. Further, the SPCM may operate with as few as three voting members, while the GCM must have at least five. Compare UCMJ art. 16(2), 10 U.S.C. § 816(2); MCM, *supra* note 15, R.C.M. 501(a)(2), with UCMJ art. 16(1), 10 U.S.C. § 816(1); MCM, *supra* note 15, R.C.M. 501(a)(1).

This Article’s summary of the general steps involved in the prosecution of a felony in military court concentrates on the scenario for a GCM because it most closely corresponds to the felony trial in civilian American jurisdictions. However, all of the particular features of military jury practice discussed in the context of the GCM in Section III of this Article, *infra*, apply equally to the SPCM military jury, except that a SPCM ordinarily includes fewer jurors than a GCM.

Any attempt to be both brief and technically accurate while summarizing the operation of the GCM and the SPCM at the same time is complicated by several factors.

First, the SPCM occur in two species, the “BCD-SPCM” and the “non-BCD-SPCM.” Most SPCM are convened, or created, with the authority to adjudge a bad conduct discharge (BCD) or as much as one year of confinement as part of the sentence, and consequently have some additional procedural safeguards that make these so-called “BCD-SPCM” more like the GCM. Specifically, these BCD-SPCM must, like every GCM, include a military judge (except in narrowly defined exigencies), and the government must prepare a verbatim, as opposed to summarized, record of all its trial sessions. UCMJ art. 19, 10 U.S.C. § 819; MCM, *supra* note 15, R.C.M. 201(f)(2)(B)(ii). The UCMJ permits other SPCM to proceed without a military judge or verbatim record, but such courts do not have the power to impose a BCD or more than six months of confinement in the sentence. See UCMJ art. 19, 10 U.S.C. § 819; MCM, *supra* note 15, R.C.M. 201(f)(2)(B)(ii).

Yet another complication is that, as a matter of departmental policies, commanders in the Air Force, Navy, and Marine Corps do not utilize the non-BCD-SPCM, and Army policy requires that a trial judge preside over every SPCM, even those of the species where a military judge is not statutorily required. See *United States v. Llewellyn*, 32 M.J. 803, 805 n.2 (A.C.M.R. 1991) (“[T]his court is not aware of any cases which have been tried in the Army without a military judge since enactment of the 1968 amendments.”).

In short, this arcanum may be reduced to a more comprehensible discussion by concentrating on the GCM (or felony trial), while emphasizing that the features of military jury practice that are the focus of this Article, *infra* Section III, apply equally to both felony-level military trials (by GCM) and misdemeanor-level military trials (by SPCM).

When a senior commander considers that the allegations of criminal conduct⁵² against a soldier are serious enough to warrant consideration by a military court with authority to impose felony-level punishment, that senior commander designates an experienced officer from within the command to investigate the allegations and then report back in writing.⁵³ This

⁵² Any person subject to the jurisdiction of the UCMJ is entitled to bring an allegation that a soldier has violated the UCMJ, and may do so simply by swearing under oath to her belief in the allegation. UCMJ art. 30, 10 U.S.C. § 830; MCM, *supra* note 15, R.C.M. 307. However, in practice most formal charges are initiated by the accused soldier's immediate commander. See MCM, *supra* note 15, R.C.M. 301(b) and accompanying "Discussion." This lowest level commander, normally the company commander, may have personal knowledge of the misconduct, or she may have received a report of the misconduct from others (for example, the victim, subordinate noncommissioned officers, civilian police authorities, or military law enforcement authorities). See *id.* R.C.M. 301. When the immediate commander lacks personal knowledge of the offense, she will make an informal preliminary investigation. See *id.* R.C.M. 303. Depending on her assessment of the situation, she may terminate the matter, address it herself through the limited disciplinary sanctions at her disposal, or "prefer" a formal criminal charge. See *id.* R.C.M. 306, 307. The act of "preferral" is the formal initiation of a criminal allegation under the UCMJ for eventual adjudication by a court-martial. See *id.* R.C.M. 307. Ordinarily, the immediate commander who prefers a charge is not of sufficient stature in the military chain of command to "forward" the charge directly to a court-martial for trial. Thus, she will forward the charge to a more senior commander in her chain of command with a recommendation that a more senior commander "refer" the charge to a court-martial. See *id.* R.C.M. 306(c)(5) & 401(c). As the matter is passed up the chain of command, with each commander recommending in writing the specific type of court-martial or other disposition considered appropriate, commanders at successively higher levels have a somewhat broader range of options available to them. See *id.* R.C.M. 401-404 (describing options for commanders at different levels in the chain of command). Generally, the lowest-level commander with authority to refer the charge to a GCM is an officer commanding an organization at the level of an Army combat division (a formation of some 10,000 to 16,000 soldiers) or a significant Army installation. See UCMJ art. 22(a)(5), 10 U.S.C. § 822(a)(5). Thus, most officers who can refer charges to a GCM are commanding generals with the rank of brigadier or major general (wearing at least one or two stars). Similarly, in the other services, officers with GCM authority are those who command larger air wings or naval formations, sizeable independent marine units, or significant installations. See *id.* art. 22(a)(5)-(7), 10 U.S.C. § 822(a)(5)-(7).

⁵³ See *id.* art. 32(a), 10 U.S.C. § 832(a); MCM, *supra* note 15, R.C.M. 405. The "Article 32 investigation" is sometimes regarded as "the military equivalent of a grand jury," *United States v. Bell*, 44 M.J. 403, 406 (C.A.A.F. 1996) (quoting *United States v. Nickerson*, 27 M.J. 30, 31-32 (C.M.A. 1988)), but there are substantial distinctions between the military Article 32 investigation and a civilian grand jury. On the one hand, if the investigating officer recommends against sending the case to trial, that recommendation is not binding on the senior commander, see 2 GILLIGAN & LEDERER, *supra* note 4, at 352 ("[The] recommendation of the investigating officer is advisory only and may be ignored with impunity."), whereas a civilian district attorney could not proceed to trial without a "true bill" from a grand jury or a judicial substitute. See, e.g., U.S. CONST. amend. V; cf. *O'Callahan v. Parker*, 395 U.S. 258, 262 (1969) (noting that one of the "fundamental differences" between UCMJ proceedings and prosecution by civilian authorities is that only

procedure, known as an “Article 32” investigation, consists of a preliminary hearing at which the accused and his legal counsel are present.⁵⁴ During the course of this hearing, the investigating officer takes testimony under oath from witnesses for both the prosecution and the defense who are reasonably available, and considers all other relevant evidence reasonably available.⁵⁵ After considering this evidence, the investigating officer recommends whatever disposition he considers appropriate, including that the charges should be dropped or that the allegations do not merit a court-martial.⁵⁶ The senior commander is required to consider the investigating officer’s recommendations and to consult with his senior military legal advisor (the staff judge advocate) before deciding how to proceed.⁵⁷ Assuming that the senior commander does not elect to dismiss the charges or proceed with some less severe mechanism, he will refer the accusations to a general court-martial.⁵⁸

in the latter does the accused have the “benefit of an indictment by a grand jury”), *overruled* by *Solorio v. United States*, 483 U.S. 435, 436 (1987). On the other hand, the military defendant and his defense counsel have substantially greater rights to participate in an Article 32 investigation than is customary in a grand jury proceeding. See MCM, *supra* note 15, R.C.M. 405(f)-(h). For example, during an Article 32 investigation, the military defendant is entitled to observe the presentation of all evidence to the investigating officer, make a statement on his own behalf, retain the assistance of defense counsel throughout the investigation, cross-examine any witness called before the investigation, initiate compulsory process to bring reasonably available witnesses before the investigation, register objections to evidence considered or to other steps taken by the investigating officer, and present arguments to the investigating officer before the latter makes his report. *United States v. Garcia*, 59 M.J. 447, 450-51 (C.A.A.F. 2004) (observing that at an Article 32 investigation, “the accused has the right to be represented by counsel, to cross-examine witnesses, and ‘to present anything he may desire in his own behalf’” (quoting UCMJ art. 32, 10 U.S.C. § 832)); MCM, *supra* note 15, R.C.M. 405(f)-(h). As a result, military appellate decisions recognize that the Article 32 investigation provides the military defendant a significant vehicle for discovery of the prosecution’s evidence. See *Garcia*, 59 M.J. at 451 (“The Article 32 investigation ‘operates as a discovery proceeding for the accused’ and stands as a bulwark against baseless charges.” (quoting *United States v. Samuels*, 10 C.M.A. 206, 212 (C.M.A. 1959))). The accused may also object to the particular investigating officer on grounds that he or she is not impartial. See *United States v. Whitt*, 21 M.J. 658, 660 (A.C.M.R. 1985); *United States v. Davis*, 20 M.J. 61, 66 (C.M.A. 1985) (Cox, J., concurring).

⁵⁴ See UCMJ art. 32, 10 U.S.C. § 832; MCM, *supra* note 15, R.C.M. 405(f).

⁵⁵ See MCM, *supra* note 15, R.C.M. 405(g). The scope of permissible evidence at the Article 32 investigation is somewhat broader than the Military Rules of Evidence that apply during trial. See *id.* R.C.M. 405(i).

⁵⁶ See *id.* R.C.M. 405(j)(2)(I).

⁵⁷ See UCMJ art. 34(a), 10 U.S.C. § 834(a); MCM, *supra* note 15, R.C.M. 406, 407(a)(6).

⁵⁸ See MCM, *supra* note 15, R.C.M. 407(a)(6), 601. A GCM is a military court created for a temporary period, comprised of named individuals serving as members (or jurors), and

During the court-martial proceeding, the defendant is represented by military or civilian defense counsel, or both, as she chooses.⁵⁹ The United States is represented by a military prosecuting attorney, called the trial counsel.⁶⁰ Counsel for both the defense and the prosecution must be members of a state bar or the bar of a federal court.⁶¹

The GCM itself has two essential components: a military judge and a panel of voting “members.”⁶² The military judge is a commissioned military officer certified as qualified for judicial duties by the Judge Advocate General of that service and must be a member of the bar.⁶³ The military judge presides over the trial proceedings, exercising those judicial functions familiar to any observer of the American legal system.⁶⁴ Thus, he

charged with deciding guilt or innocence in particular cases referred to it, and, for those accused found guilty, the appropriate sentence. See 1 GILLIGAN & LEDERER, *supra* note 4, at 511-12; 2 *id.* at 373; SCHLUETER, *supra* note 40, at 335; Behan, *supra* note 41, at 191.

⁵⁹ MCM, *supra* note 15, R.C.M. 506. Military defense counsel, even a military attorney requested by name (provided she is reasonably available to participate), is provided without charge to the accused soldier, regardless of the defendant’s financial situation or rank. See UCMJ art. 38(b), 10 U.S.C. § 838(b); MCM, *supra* note 15, R.C.M. 506(a); United States v. Blaney, 50 M.J. 533, 541-42 (A.F. Ct. Crim. App. 1999) (implying that an accused who was serving as an Air Force major was entitled to ask for a particular Marine Corps attorney to represent him, but had waived that right, without mention of any financial inability of the accused to retain civilian counsel of choice).

⁶⁰ MCM, *supra* note 15, R.C.M. 502(d)(5).

⁶¹ *Id.* R.C.M. 502(d)(1), (3).

⁶² *Id.* R.C.M. 501. The qualifications and responsibilities of the military members (or jurors) are discussed *infra* note 72 and accompanying text.

⁶³ See UCMJ art. 26(b), 10 U.S.C. § 826(b).

⁶⁴ See United States v. Graf, 35 M.J. 450, 465 (C.M.A. 1992) (UCMJ “contemplates that a military judge be a real judge as commonly understood in the American legal tradition”); MCM, *supra* note 15, R.C.M. 801 (describing the military judge’s responsibilities). In practice, military judges are generally experienced, senior military attorneys with substantial criminal trial experience as either defense counsel or prosecutors. Additionally, they generally have previously supervised military legal offices, and they must qualify for the assignment by satisfactorily completing a specialized “qualifying course” that prepares the new military judges of all of the armed forces. Military judges then typically serve for several years in that capacity.

Each of the military departments has a trial judiciary that is organized in geographical circuits, so that judges are available to preside over courts-martial wherever needed. Although the number of officers assigned to military judge duty varies from year to year depending on the number of military personnel serving on active duty, and hence on the corresponding trial case load, as of 2006, the Army trial judiciary, the Air Force trial judiciary, and the combined Navy-Marine Corps trial judiciary each had about twenty full-time military judges. Most of these judges travel throughout their circuits presiding over trials at various posts or overseas bases. It is becoming more common for the chief judges of the separate service trial judiciaries to lend and borrow trial judges across service lines when necessary to handle the trial docket at a particular locale in an efficient manner.

controls the docketing, pace, and course of the trial proceedings.⁶⁵ The military judge rules on any motions or other procedural issues raised by the prosecution or defense and instructs the voting members on the substantive and procedural legal principles applicable to the case.⁶⁶ A number of safeguards insulate military judges from inappropriate pressure by senior commanders who may have an interest in the prosecution of soldiers under their command.⁶⁷ Significantly, military judges are not supervised by, and do not report to, field commanders; rather, they are accountable to the Judge Advocates General of their respective military services,⁶⁸ who, as the Supreme Court has noted, “have no interest in the outcome of a particular court-martial.”⁶⁹

The “members” of the court-martial (or military jurors) perform functions very much like the jurors in any civilian criminal trial: they are responsible for the determination of guilt or innocence, and, when necessary, an appropriate sentence.⁷⁰ All military jurors are military

⁶⁵ See MCM, *supra* note 15, R.C.M. 801. The rulings and instructions of the military judge are binding on the court-martial’s voting members (or jury), just as are the decisions of a civilian trial judge in any American trial system. *United States v. Hardy*, 46 M.J. 67, 72-73 (C.A.A.F. 1997) (military judge rules on all interlocutory questions and all questions of law raised during a court-martial and instructs members on questions of law and procedure which arise; such rulings by military judge are “final”).

⁶⁶ See MCM, *supra* note 15, R.C.M. 801; *United States v. Hawks*, 19 M.J. 736, 737 (A.F. Ct. Crim. App. 1984) (the military judge is the sole source of law for the court members, who may not consult any other source of the law during the trial; members are required to follow the military judge’s instructions as to the law); DEP’T OF THE ARMY, MILITARY JUDGES’ BENCHBOOK (PAMPHLET 27-9) ¶¶ 2-5 (2002) [hereinafter MILITARY JUDGES’ BENCHBOOK].

⁶⁷ See *Weiss v. United States*, 510 U.S. 163, 179 (1994) (holding that, although military judges do not have tenure provided by statute, “the applicable provisions of the UCMJ, and corresponding regulations, by insulating military judges from the effects of command influence, sufficiently preserve judicial impartiality so as to satisfy the Due Process Clause”).

⁶⁸ Military judges are directly responsible only to the service’s Judge Advocate General for their assignments for duty and for any evaluation of their “effectiveness, fitness, or efficiency” as a judge. See UCMJ art. 26(c), 10 U.S.C. § 826(c); MCM, *supra* note 15, R.C.M. 502(c). Correspondingly, the service Judge Advocates General are not appointed to such position by the respective Secretaries of the three military departments, but instead are appointed by the President, by and with the consent of the Senate. See 10 U.S.C. §§ 3037(a), 5148(b), 8037(a).

⁶⁹ *Weiss*, 510 U.S. at 180 (“[W]e believe this structure helps protect [the military judge’s judicial] independence.”); *United States v. Norfleet*, 53 M.J. 262, 268 (C.A.A.F. 2000) (observing that arrangements for the separate military trial judiciary are designed to “enhance the independence of judicial decisionmaking by military judges”).

⁷⁰ See MCM, *supra* note 15, R.C.M. 502(a)(2) (“The members of a court-martial shall determine whether the accused is proved guilty and, if necessary, adjudge a proper sentence, based on the evidence and in accordance with the instructions of the military judge.”).

personnel on active duty,⁷¹ and, like civilian jurors, they are ordinarily lay persons rather than lawyers.⁷²

However, unlike jurors for civilian criminal trials, military jurors are not randomly selected for that duty. Instead, military jurors are designated to participate in a particular court-martial by the same senior commander who referred the allegations to the court-martial for trial.⁷³ The senior commander generally selects the members of a court-martial from personnel available within the large organization or unit that he

⁷¹ See UCMJ art. 25(a)-(d), 10 U.S.C. § 825(a)-(c) (describing the persons eligible to serve as members of a court-martial as commissioned officers, warrant officers, and enlisted members, who (for each category) are “on active duty”); MCM, *supra* note 15, R.C.M. 502(a)(1) (“Each member shall be on active duty with the armed forces . . .”).

⁷² The officer who convenes, or constitutes, the court-martial is charged to “detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.” UCMJ art. 25(d)(2), 10 U.S.C. § 825(d)(2); MCM, *supra* note 15, RCM 502(a)(1). To be eligible for duty as a member of a court-martial, the individual must be on active duty in the armed forces as an enlisted member, a warrant officer, or a commissioned officer, and he ordinarily must be of at least equal rank or grade to the defendant; no legal qualifications are specified. See UCMJ art. 25, 10 U.S.C. § 825.

The accused at a court-martial has no right to have a jury of his peers, a representative cross-section of the community, or randomly chosen members; however, the military defendant does have a right to members who are fair and impartial. *United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004); see *United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000) (“While the military defendant does not enjoy a Sixth Amendment right to a trial by ‘impartial jury,’ he or she does have a right to ‘members who are fair and impartial.’” (quoting *United States v. Roland*, 50 M.J. 66, 68 (A.F. Ct. Crim. App. 1999))); *United States v. Rockwood*, 52 M.J. 98, 105-06 (C.A.A.F. 1999) (“The parties are ‘entitled to court members who will keep an open mind and decide the case based on evidence presented in court and the law as announced by the military judge.’”).

The terms “education” and “training” have never been interpreted by the military courts as referring to any required legal education or training. In several cases, however, military defendants challenged members for cause because of training or experience related to the law, suggesting that such legal training created substantial doubt as to the “fairness and impartiality” of the prospective juror under the MCM, *supra* note 15, R.C.M. 912(f)(1)(N). See *United States v. Evans*, 55 M.J. 732, 746-47 (N-M. Ct. Crim. App. 2001) (military judge did not abuse discretion in denying challenge for cause based on claim that member recently attended Legal Officer’s Course taught by the Naval Justice School); *United States v. Powell*, 55 M.J. 633, 645-46 (A.F. Ct. Crim. App. 2001) (in prosecution of Air Force Academy cadet at GCM, military judge did not abuse discretion in denying challenge for cause against a panel member who taught and enforced the cadet honor code).

⁷³ See UCMJ art. 25(d)(2), 10 U.S.C. § 825(d)(2); MCM, *supra* note 15, R.C.M. 502(a), 503(a)(1). In practice, most senior commanders in the Army, Navy, and Marine Corps select “standing panels” for the posts or organizations under their command to hear any cases referred to that particular court-martial during a period of several months; in other words, those commanders do not select a different “jury” for every new case sent to trial.

commands.⁷⁴ Collectively, the voting members of a particular court-martial are generally referred to as the “panel.”⁷⁵ The members of the panel are commissioned officers, warrant officers, enlisted soldiers, or some combination thereof; the particular composition of the panel depends on the rank of the defendant and, in part, on his or her preference.⁷⁶ When the court-martial convenes to begin a particular trial, the members are subject to voir dire and challenges by both the defense and the prosecution,⁷⁷ and the military judge rules on any challenges against members. The parties are allowed an unlimited number of challenges for cause against members,⁷⁸ and additionally each party is allowed one peremptory challenge.⁷⁹

⁷⁴ See MCM, *supra* note 15, R.C.M. 503(a)(3). The senior commander may request military personnel from outside her own command or even from another armed force to serve as a member on a court-martial that she convenes, provided their own commanders make those individuals available.

⁷⁵ See, e.g., *United States v. Haney*, 64 M.J. 101, 102 (C.A.A.F. 2006) (“A court-martial panel of officer and enlisted members convicted Appellant, contrary to his pleas . . .”); GILLIGAN & LEDERER, *supra* note 4, at 16-17.

⁷⁶ See MCM, *supra* note 15, R.C.M. 502(a). The UCMJ generally requires that members of a court-martial be of at least the same rank as the accused soldier. UCMJ art. 25(d)(1), 10 U.S.C. § 825(d)(1). When a commissioned or warrant officer is on trial, the members are all officers. See *id.* art. 25(a)-(c), 10 U.S.C. § 825(a)-(c). However, a defendant who is an enlisted soldier may demand that at least one-third of the members who comprise the panel that will decide his guilt or his sentence come from the enlisted ranks. See *id.* art. 25(c)(1), 10 U.S.C. § 825(c)(1); MCM, *supra* note 15, R.C.M. 502(a)(1)(C), 503(a)(2). In practice, an enlisted defendant who makes such a demand often ends up with a panel that has more enlisted jurors than the minimum one-third of the panel. In the event that the enlisted jurors felt the defendant was being treated unfairly and, consequently, voted as a bloc for acquittal or for a lenient sentence, they would need to pick up, at most, only one more member’s vote to prevail in the verdict or sentence, since the result is generally reached by two-thirds of the voting members. See discussion *infra* Section III.B.

⁷⁷ MCM, *supra* note 15, R.C.M. 912(d).

⁷⁸ *Id.* R.C.M. 912(f)(3). A military trial judge is expected by the appellate courts to “grant challenges for cause liberally.” *United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993); *United States v. Dimberio*, 52 M.J. 550, 561 (A.F. Ct. Crim. App. 1999).

⁷⁹ MCM, *supra* note 15, R.C.M. 912(g). For an excellent discussion of the history of peremptory challenges in military practice, and appellate decisions involving such challenges, see Robert W. Best, *Peremptory Challenges in Military Criminal Justice Practice: It Is Time to Challenge Them off*, 183 MIL. L. REV. 1, 25-42 (2005).

In certain unusual situations, such as when alternate jurors step in to replace challenged jurors because the panel has fallen below the statutory quorum, additional peremptory challenges are allowed, but generally, the counsel for each party is restricted to a single peremptory challenge. MCM, *supra* note 15, R.C.M. 912(g)(2). The net result of the senior commander’s pre-selection of the panel members (instead of a randomly selected large venire or jury pool), followed by the process of challenging some members off the panel (and then, sometimes, the seating of alternates also pre-designated by the senior commander, followed by more challenges), is that the process of seating a jury for a court-martial should be regarded more as a process of selecting which prospective jurors should not participate

In contrast to the mandated number of jurors required in federal and state civilian criminal trials (frequently twelve),⁸⁰ a general court-martial jury may lawfully include as few as five voting members.⁸¹ Typically, however, the general court-martial convenes with ten or twelve members, and after the exercise of challenges by the parties, between six and ten members are left to actually hear and decide the case. (However, there is no prohibition against a significantly larger court-martial panel,⁸² and indeed for a military capital trial, at least twelve members are usually required.⁸³)

Despite the difference between the civilian and military processes for jury selection, the members of the court-martial are the functional equivalent of the civilian criminal jury.⁸⁴ In open court,⁸⁵ the members, as a panel, receive preliminary instructions from the military judge about their responsibilities in the trial, listen to opening statements from counsel for each side, listen to witness testimony, consider any other evidence,⁸⁶ and finally listen to the closing arguments presented by counsel for each side.⁸⁷

rather than one in which counsel decide which people are acceptable as jurors. Thus, from the viewpoint of counsel, the military process is more accurately termed "selection off" rather than "selection onto" the jury. See Best, *supra*, at 4-5 ("Unlike jury selection in the civilian sector, with its typically larger number of available peremptory challenges, the process of seating a panel is more akin to member deselection than member selection.") (footnote omitted).

⁸⁰ See discussion *infra* Section III.A.

⁸¹ See UCMJ art. 16(1), 10 U.S.C. § 816(1); MCM, *supra* note 15, R.C.M. 501(a)(1)(A).

⁸² When the senior commander appoints the members of a GCM panel, he generally appoints a large enough slate of principal and alternate members so that, after the defense and prosecution have exercised challenges, the remaining number of members will at least satisfy the statutory quorum. Most military courtrooms are configured with a jury box designed to seat a dozen or so voting members, with a jury deliberation room designed to accommodate a panel of about that size.

⁸³ UCMJ art. 25a, 10 U.S.C.A. § 825a (2005).

⁸⁴ Weiss v. United States, 510 U.S. 163, 167 n.1 (1994) ("The members' responsibilities are analogous to, but somewhat greater than, those of civilian jurors."); see United States v. Scheffer, 523 U.S. 303, 312-13 (1998) (implicitly equating the members of a court-martial to civilian jurors in a discussion of the role of the jury in determining credibility of witnesses); 2 GILLIGAN & LEDERER, *supra* note 4, at 3-4.

⁸⁵ Trials by court-martial are almost always open to any interested member of the public or press, although there is legal authority to close public access in some rare circumstances, such as cases involving classified information. See MCM, *supra* note 15, R.C.M. 806; see also SCHLUETER, *supra* note 40, § 15-3.

⁸⁶ MCM, *supra* note 15, R.C.M. 913(a)-(c). Rules of evidence in a court-martial are generally consistent with those used in federal criminal trials. The Military Rules of Evidence are contained in Part III of the MCM, *supra* note 15, and are largely patterned after the Federal Rules of Evidence, with a few "modifications [that] incorporate specialized military practices." SCHLUETER, *supra* note 40, § 15-19.

⁸⁷ MCM, *supra* note 15, R.C.M. 919.

Then, guided by the military judge's instructions about the governing law,⁸⁸ the members go behind closed doors to collectively deliberate in order to reach their verdict.⁸⁹ If the accused is found guilty, the trial moves promptly into a sentencing phase, during which the same members hear additional evidence, further argument by counsel, and additional instructions from the military judge. Then, the panel members deliberate together in private in order to determine an appropriate sentence.⁹⁰ In contrast with civilian criminal trial juries, the military court members have significant discretion in the formulation of a sentence; for most offenses, the MCM specifies only the maximum punishment, and the members decide what period of imprisonment or other punishment is appropriate subject to that upper limit, taking into consideration the particular circumstances of the case.⁹¹

The military defendant often elects to have a bench trial ("trial by military judge alone") instead of a trial in which jury members determine the verdict and sentence.⁹² Moreover, even when the defendant prefers a

⁸⁸ UCMJ art. 51(c), 10 U.S.C. § 851(c) (2000); MCM, *supra* note 15, R.C.M. 920.

⁸⁹ UCMJ art. 39(b), 10 U.S.C. § 839(b) (deliberations must be in closed session); *id.* 51(a), 10 U.S.C. § 851(a) (verdict, or "findings," must be by secret ballot); MCM, *supra* note 15, R.C.M. 921. The finding as to any particular allegation may be guilty, guilty only of a less serious offense included in the charged offense, guilty with minor variance, not guilty by reason of lack of mental responsibility, or not guilty. MCM, *supra* note 15, R.C.M. 918.

⁹⁰ MCM, *supra* note 15, R.C.M. 1001; *see* 2 GILLIGAN & LEDERER, *supra* note 4, § 23-11.00.

⁹¹ The UCMJ provides for a specific punishment only with respect to a few particular offenses. *See, e.g.*, UCMJ art. 106, 10 U.S.C. § 901 (prescribing death for spying); *id.* art. 118(1); 10 U.S.C. § 918(1) (prescribing death or imprisonment for life for premeditated murder); *United States v. Shroeder*, 27 M.J. 87, 90 n.2 (C.M.A. 1988) (ruling that currently, the only mandatory sentences prescribed by the UCMJ are mandatory death sentence for spying and mandatory minimum sentence of life imprisonment for premeditated murder or felony murder). For most crimes, however, the members may impose "any lawful sentence," as long as the combination of punishments does not exceed the jurisdictional authority of that type of court-martial and does not exceed the maximum specified by the President for that offense in Part IV of the MCM. *See* UCMJ art. 56, 10 U.S.C. § 856. The members' discretion even extends to adjudging a sentence of "no punishment." *See* MCM, *supra* note 15, R.C.M. 1002.

⁹² At the point when such election must be made, the accused and his defense counsel know the identity of the jurors who comprise the panel as well as the identity of the military judge. UCMJ art. 16(1)(B), 10 U.S.C. § 816(1)(B); MCM, *supra* note 15, R.C.M. 903.

The accused must affirmatively elect to have his trial conducted by the "military judge sitting alone," but the prosecution has no authority to block the election of a bench trial. *See* MCM, *supra* note 15, R.C.M. 903(c)(2)(B). Here, the military defendant has a significantly broader entitlement than his civilian counterpart to choose a bench trial instead of a jury trial. The defendant in federal court may choose a bench trial only if the prosecutor concurs with that request. *See* FED. R. CRIM. P. 23(a) (criminal defendant has right to trial by judge alone only if the judge and prosecutor concur); *United States v. Singer*, 380 U.S. 24, 36 (1965)

panel of voting members, the accused frequently elects to plead guilty,⁹³ leaving the jury to determine only the appropriate sentence for the crime. As a result, in the majority of courts-martial, as in most criminal trials in civilian jurisdictions, jurors do not determine guilt or innocence. Nonetheless, in several thousand military trials each year, both in the United States and wherever else American forces are deployed around the world, defendants who plead “not guilty” and who do not elect to have a bench trial have their culpability determined by military jurors.⁹⁴ Section III of this Article examines how several key features of the procedures followed by military juries in such contested cases compare to the usual practices in state felony trials, and suggests that adopting those military verdict practices would improve the criminal trial process in state courts.⁹⁵

III. IMPROVING STATE CRIMINAL VERDICTS BY ADOPTING MILITARY JURY PROCEDURES

A jury decision reached through the military approach, which allows a non-unanimous verdict, requires secret balloting, and provides for a default acquittal, results in a more reliable verdict and increases the efficiency of the criminal trial.

The historic function of the jury in the American criminal trial is to insure that the judgment that a citizen is culpable of a serious crime is reached by a group of his fellow citizens, rather than by a government

(holding that Federal Rule of Criminal Procedure 23(a) is valid since the defendant has no constitutional right to trial by judge alone).

⁹³ MCM, *supra* note 15, R.C.M. 910. Before accepting a guilty plea, the military judge is required to conduct an extensive “providence inquiry,” during which the defendant answers the judge’s questions under oath, to satisfy the judge that the guilty plea is being made voluntarily and with an appreciation of its consequences. *See* 2 GILLIGAN & LEDERER, *supra* note 4, § 19-20.00. The military judge’s providence inquiry, under MCM provisions and judicial decisions, is considerably more extensive than those required of federal district courts. *Id.* at 205 n.89.

⁹⁴ This approximation is based on the aggregate number of courts-martial involving a panel of members, for all of the armed forces, from the annual reports of the service Judge Advocates General for FY 2000 thru 2005. *See* USCAAF ANNUAL REPORT (2000-2005 annually), *supra* note 8.

⁹⁵ This Article does not propose that the jurors for state practice be selected in any manner that would approximate the military practice. The military practice of appointment of the voting members of a court-martial by the senior commander, as opposed to the random selection process common in the civil sector, has been thoroughly debated. *See* discussion *supra* note 41. Likewise, this Article does not suggest that the size of state juries be reduced to less than twelve jurors, like the smaller quorum ordinarily permitted in courts-martial. *See supra* text accompanying notes 80-83 for a discussion of the number of members required for courts-martial.

official.⁹⁶ To accomplish that, every American state except Louisiana and Oregon provide that the verdict in a felony case can be reached only with the unanimous assent of the jury.⁹⁷ Stated another way, no verdict (whether of guilt or acquittal) can be reached without the agreement of every participating juror. By comparison, the military practice improves the reliability and efficiency of the jury trial by combining three features. The court-martial practice: (1) allows a super-majority to reach a guilty verdict;⁹⁸ (2) dictates a verdict of acquittal whenever guilt is not established to the satisfaction of the requisite super-majority of the jurors;⁹⁹ and (3) requires that each member of the jury vote confidentially.¹⁰⁰ The conjunction of these three critical features of military jury procedure results in a verdict that better protects a defendant from improper conviction and, at the same time, improves the efficiency of the trial process.¹⁰¹

A. HOW THE TYPICAL STATE JURY REACHES ITS VERDICT

In forty-eight American states, the verdict in a felony trial can be reached only by unanimous agreement of the jurors.¹⁰² Louisiana allows ten of the twelve jurors to reach a verdict in non-capital felony trials.¹⁰³ Oregon likewise permits a verdict when at least ten of the twelve jurors

⁹⁶ “[T]he jury’s essential feature lies in the ‘interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group’s determination of guilt or innocence.’” *Burch v. Louisiana*, 441 U.S. 130, 135 (1979) (quoting *Williams v. Florida*, 399 U.S. 78, 100 (1970)). At the time the Bill of Rights was added to the Federal Constitution, “[b]oth the militia and the jury reflected suspicion of paid, professional central officialdom—a central standing army on the one hand, and judges, prosecutors, and bureaucrats on the other.” Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1170 (1995).

⁹⁷ See DAVID B. ROTTMAN ET AL., CONF. OF STATE COURT ADM’RS & NAT’L CTR. FOR STATE COURTS, STATE COURT ORGANIZATION 1998, 278-82 tbl.42 (2000), available at <http://www.ojp.usdoj.gov/bjs/abstract/sco98.htm>. In Louisiana, for non-capital felony trials, the verdict may be reached by agreement of ten of the twelve jurors. LA. CODE CRIM. PROC. ANN. art. 782(A) (1998). In Oregon, for most non-capital felony trials, the verdict may be reached by agreement of ten of the twelve jurors; however, to convict for non-capital murder, at least eleven of the twelve jurors must concur. OR. REV. STAT. § 136.450 (2005).

⁹⁸ See discussion *infra* Section III.C.

⁹⁹ See discussion *id.*

¹⁰⁰ See discussion *infra* Section III.D.

¹⁰¹ See discussion *id.*

¹⁰² See ROTTMAN ET AL., *supra* note 97, at 278-82 tbl.42; J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 HASTINGS L.J. 1433, 1494 & app. M (1996).

¹⁰³ LA. CODE CRIM. PROC. ANN. art. 782(A) (1998).

agree in most non-capital felony trials; for non-capital murder, eleven of the twelve jurors must agree.¹⁰⁴

In most states, the trial judge provides the jurors with very little guidance about the deliberative process and the procedure for actually adopting a verdict. Of course, the typical pre-deliberation charge includes detailed discussion of such matters as the elements of the offenses under consideration, the burden of proof, the reasonable doubt standard, and the jurors' responsibilities to assess the credibility of the various witnesses and to determine the facts, but "[m]any jurisdictions still shy away from giving jurors any advice on their deliberations."¹⁰⁵ Typically, with regard to the *process* of reaching a verdict, the trial judge simply instructs the jury that it must engage in a thorough consideration of the evidence, that it must elect a foreman to present the verdict, and that unanimous agreement of all jurors is required for any verdict (whether guilty or not guilty).¹⁰⁶

The judge's charge ordinarily makes no mention of whether an actual *vote* by the jury is necessary to signify each juror's position (regarding either the individual's preliminary viewpoint or final position), except to state that a verdict must represent the view of all of the jurors.¹⁰⁷ In other words, the judge instructs the jury that all jurors must assent, but does not provide any guidance on how such assent can or must be registered. The judge does not instruct the jurors that once they have discussed the evidence, they should register their own personal assessments of the proper verdict by casting secret ballots, or even that they *may* vote secretly if they choose to do so.¹⁰⁸ As will be seen, the military judge's instructions to a

¹⁰⁴ OR. REV. STAT. § 136.450 (2005).

¹⁰⁵ Robert G. Boatright & Beth Murphy, "*Behind Closed Doors*": *Assisting Jurors with Their Deliberations*, 83 JUDICATURE 52, 52 (1999).

¹⁰⁶ See, e.g., COMM. ON STANDARD JURY INSTRUCTIONS, CALIFORNIA JURY INSTRUCTIONS, CRIMINAL § 17.50 (2004 ed.); ILL. SUPREME COURT COMM. ON PATTERN JURY INSTRUCTIONS IN CRIMINAL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS, CRIMINAL § 26.01 (2000 ed.); HOWARD G. LEVENTHAL & BUDD G. GOODMAN, CHARGES TO THE JURY AND REQUESTS TO CHARGE IN A CRIMINAL CASE, NEW YORK § 3:02 (1968 ed.); PAUL J. MCCLUNG, TEXAS CRIMINAL JURY CHARGES § 1:360 (1999 & Supp. 2004).

¹⁰⁷ See *id.*

¹⁰⁸ When researchers for the American Judicature Society convened focus groups of people who had actually served as jurors in several jurisdictions, "[n]one of the focus group participants recalled receiving *any guidance* on how or when to vote." Boatright & Murphy, *supra* note 105, at 53, 55 (emphasis added). The researchers discovered that "[a]dvice on how and when to take the initial vote is virtually non-existent in court-provided juror handbooks and judges' instructions." *Id.* at 55. Because of the dearth of information given to most juries on how to work toward a verdict, the American Judicature Society published a guidebook, *Behind Closed Doors: A Guide for Jury Deliberations*, in 1999, and recommended that trial judges provide it to their jurors. See *id.* at 53. Unfortunately, the guidebook stopped short of recommending any particular voting approach; it simply

court-martial jury are much more specific, and that specificity furthers the integrity of the verdict as the honest viewpoint of the individuals who make up the jury.¹⁰⁹

If the state criminal jury's discussions and deliberations result in agreement among all twelve of the jurors that the defendant should be convicted, or alternatively that he ought to be acquitted, then the jury has reached a verdict. If the twelve jurors report that they are unable to reach complete agreement for either conviction or acquittal, the judge will typically attempt to prod them toward unanimity with what is commonly called the "Allen charge."¹¹⁰ Eventually, if prospects grow dim that the jurors will be able to reach unanimous agreement either way, the judge will accept the jury's belief that it has deadlocked and that further efforts to reach a verdict will be futile. In such a "hung jury" situation, the state trial judge will declare a mistrial.¹¹¹

The double jeopardy clause is applicable to state prosecutions.¹¹² However, when a trial judge declares a mistrial under circumstances of manifest necessity, the jeopardy of the first trial does not end, and a subsequent retrial is considered to continue the same jeopardy. Thus, re-prosecution after a mistrial does not violate the double jeopardy prohibition.¹¹³ The hung jury situation "is the paradigmatic example of manifest necessity" justifying a mistrial.¹¹⁴

Assuming that prosecutorial misconduct did not cause the hung jury,¹¹⁵ the district attorney may lawfully pursue the same charges against the defendant at a subsequent retrial, before a different jury.¹¹⁶ In theory, there is no legal limitation on the number of times a hung jury caused by failure

"mention[ed] various voting techniques—for instance, written and secret votes, or open voice votes—as options available to the jury." *See id.* at 55.

¹⁰⁹ *See* discussion *infra* notes 118-120 and accompanying text.

¹¹⁰ *Allen v. United States*, 164 U.S. 492, 501 (1896).

¹¹¹ *See, e.g., United States v. McIntosh*, 380 F.3d 548, 551-53 (1st Cir. 2004).

¹¹² *See Arizona v. Washington*, 434 U.S. 497, 503 (1978) ("A State may not put a defendant in jeopardy twice for the same offense. The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal.") (citation omitted).

¹¹³ *United States v. Sanford*, 429 U.S. 14, 15-16 (1976); *see, e.g., United States v. Brown*, 426 F.3d 32 (1st Cir. 2005); *Rhodes v. State*, 624 S.E.2d 268 (Ga. Ct. App. 2005); *Commonwealth v. Medina*, 835 N.E.2d 300 (Mass. App. Ct. 2005); *In re Candelario*, 118 P.3d 349, 352 (Wash. Ct. App. 2005); *Meyers v. State*, 124 P.3d 710 (Wyo. 2005).

¹¹⁴ *McIntosh*, 380 F.3d at 553.

¹¹⁵ *See id.* at 557.

¹¹⁶ *Sanford*, 429 U.S. at 15-16.

to reach unanimity can cause a defendant to face prosecution on the same charge.¹¹⁷

B. HOW A COURT-MARTIAL REACHES ITS VERDICT

In the general court-martial, by contrast, the military judge instructs the members (jurors) in much more detail concerning how to proceed during their closed session of deliberations so as to reach a verdict.¹¹⁸ First, the military judge instructs the members that their “deliberation should include a full and free discussion of all the evidence that has been presented.”¹¹⁹ She next instructs them that “[after the members] have completed [their] discussion, then voting on [the] findings [the military term for the verdict on a particular allegation] *must be accomplished by secret, written ballot*, and all members of the court are required to vote.”¹²⁰ This military requirement that the jurors officially determine the actual verdict by casting individual written ballots, the contents of which are kept secret from the other jurors, has no counterpart in present civilian practice.¹²¹

Since no member may abstain from the vote on the findings, and since the judge instructs the members that “if there is reasonable doubt as to the guilt of the accused, that doubt must be resolved in favor of the accused and he must be acquitted,”¹²² this instruction clearly establishes that any member not satisfied of guilt beyond a reasonable doubt is duty-bound to vote “not guilty” on that particular charge.

The military judge also specifically instructs the jury on how to count the votes.¹²³ While the state criminal jury elects a jury foreman, the

¹¹⁷ *Washington v. Sobina*, 387 F. Supp. 2d 460, 469 (E.D. Pa. 2005) (holding that the double jeopardy doctrine is not violated by four trials on the same charge, where the first trial ended in a mistrial, and the second and third trials resulted in a hung jury as to certain counts; each retrial was legally appropriate, and none was the result of misconduct by the government).

¹¹⁸ The UCMJ requires that the military judge instruct the members on these key matters of procedure in deliberating and in voting upon the verdict. UCMJ art. 51(c), 10 U.S.C. § 851(c) (2000); MCM, *supra* note 15, R.C.M. 920(e)(6).

¹¹⁹ MILITARY JUDGES’ BENCHBOOK, *supra* note 66, ¶ 2-5-14.

¹²⁰ *Id.* (emphasis added).

¹²¹ See *supra* text accompanying notes 105-109 (discussing state court instructions on how jurors are to reach verdict).

¹²² MILITARY JUDGES’ BENCHBOOK, *supra* note 66, ¶ 2-5-12.

¹²³ The members of the court-martial are instructed at the very beginning of each trial that the instructions of the military judge must be obeyed. *Id.* ¶ 2-5 (“Members of the court, . . . [m]y duty as military judge is to ensure this trial is conducted in a fair, orderly and impartial manner according to the law. I preside over open sessions, rule upon objections, and instruct you on the law applicable to this case. *You are required to follow my*

president of the military jury panel is the senior member by rank.¹²⁴ The judge instructs the members that after each member writes out a vote with regard to a particular allegation, “[t]he junior member [of the jury] will collect and count the votes [, and the] count will then be checked by the president, who will immediately announce the result of the ballot to the members.”¹²⁵ In this manner, the individual jurors do not divulge their final votes to each other or to anyone else.¹²⁶

Military jury practice requires that at least two-thirds of the members of the panel vote guilty in order to render a verdict of guilty on a particular offense.¹²⁷ The military judge calculates the specific number of “guilty” votes required for conviction, depending on the total number of jurors on that particular court-martial panel (two-thirds of the number of members on that court-martial, rounded up to the next whole number).¹²⁸ Then, before sending the jurors into closed deliberations, the military judge instructs

instructions on the law . . .”). The military judge’s instructions are not guidelines or suggestions; they carry exactly the same weight with the military juror that the charge by a state trial judge carries with the civilian juror. See MCM, *supra* note 15, R.C.M. 801(a) (providing that the military judge is the presiding officer of the court-martial, controls the proceedings, rules on all questions of law, and instructs the members on all questions of law and procedure); *id.* R.C.M. 502(a)(2) (requiring that the members of the court-martial determine the verdict and any sentence “based on the evidence and in accordance with the instructions of the military judge”).

¹²⁴ MCM, *supra* note 15, R.C.M. 502(b)(1).

¹²⁵ MILITARY JUDGES’ BENCHBOOK, *supra* note 66, ¶ 2-5-14.

¹²⁶ Having the secret ballots physically collected by the *junior* juror helps to preserve the secrecy of each juror’s vote, and especially helps to ensure that the jurors are not pressured by concern that the more senior members of the panel will know how any individual juror voted. See *United States v. Harris*, 30 M.J. 1150, 1151 (A.C.M.R. 1990); *United States v. Kendrick*, 29 M.J. 792, 793-94 (A.C.M.R. 1989) (junior member of panel must collect written ballots). Additionally, having the votes contained in those written secret ballots actually *counted* by the junior member of the jury adds a measure of verification of the voting result when the president of the panel announces it to all of the jurors. See *United States v. Truitt*, 32 M.J. 1010, 1011 (A.C.M.R. 1991) (“[Historically] the mechanism for insulating junior members from the opinions of their seniors was retained by requiring that the junior member collect the ballots. If the junior member collects the ballots, the senior member is less likely to see how each member voted; but if the senior member collects the ballots, then he can readily identify each member’s ballot, raising the possibility that the junior members will defer to the senior member’s opinion. . . . [T]he requirement for the junior member to count the votes [is intended to be] a vote verification procedure.”).

¹²⁷ UCMJ art. 52(a)(2), 10 U.S.C. § 852(a)(2) (2000); *United States v. Shroeder*, 27 M.J. 87, 90-91 (C.A.A.F. 1988) (aside from capital cases, a two-thirds vote of court members is sufficient to convict the accused of murder, even though a three-fourths majority of members is necessary to impose a sentence of ten years or more). The military defendant is entitled to a separate finding, or verdict, as to each offense charged. See *United States v. Timmerman*, 28 M.J. 531, 536 (A.F. Ct. Crim. App. 1989).

¹²⁸ MILITARY JUDGES’ BENCHBOOK, *supra* note 66, ¶ 2-5-14.

them that if the balloting shows the required number of guilty votes, “then that will result in a guilty finding for that offense. If fewer than [two-thirds of the members] vote for a finding of guilty, then [the] ballot [will result] in a finding of not guilty.”¹²⁹ In other words, the default position for the military jury is a verdict of acquittal, which automatically results from any situation except where the individual, secret, written votes of two-thirds or more of the jurors are that the soldier defendant is guilty of the particular offense. This automatic “not guilty” verdict, arising whenever the vote is insufficient to convict, eliminates any possibility of a hung jury as to guilt or innocence.¹³⁰

C. THE ADVANTAGE OF USING THE COURT-MARTIAL’S NON-UNANIMOUS VERDICT WITH ITS DEFAULT ACQUITTAL PROVISION

Military verdict procedures allow a guilty verdict by the concurrence of a substantial majority of the jurors but automatically provide for acquittal when an insufficient number of jurors (less than a super-majority) are not convinced of guilt beyond a reasonable doubt.¹³¹ These features result in a reliable guilty or not guilty verdict and enhance trial efficiency at the same time. Similarly, using a twelve-person jury, a state could improve its jury process in both reliability and finality by setting the required threshold for conviction at eight of twelve (66.6%), nine of twelve (75%), ten of twelve (83%), or even eleven of twelve jurors (92%), combined with the provision that the defendant is to be acquitted of the offense unless the specified super-majority of jurors agree on guilt. Adoption of the military procedure for jury verdicts, incorporating these two complementary features, would provide an effective alternative to the unanimous verdict approach now used by most states.

1. Super-majority Verdicts and Constitutional Norms

The constitutional requirement of due process does not require that state criminal trials employ the unanimous verdict, as long as a super-majority verdict is used only in connection with a jury composed of twelve (or more) jurors. The Supreme Court squarely addressed this question with decisions in 1972 and 1979.

¹²⁹ *Id.* The judge also instructs the members that, in the event they find the defendant not guilty of the charged offense, they must proceed to a new vote or votes by similar secret balloting procedures to determine if the defendant will be found guilty of any lesser included offense that the judge has instructed them to consider. *Id.*

¹³⁰ 2 GILLIGAN & LEDERER, *supra* note 4, § 22-42.00.

¹³¹ *See supra* text accompanying notes 128-129.

In the 1972 companion cases of *Johnson v. Louisiana*¹³² and *Apodaca v. Oregon*,¹³³ defendants challenged convictions rendered by twelve-person juries under the laws of the two states that permitted a guilty verdict in felony trials without the unanimous agreement of the jurors. Johnson was convicted of robbery by a nine-to-three vote in a Louisiana trial,¹³⁴ and Apodaca, Cooper, and Madden were convicted of assault with a deadly weapon, burglary, and grand larceny in separate Oregon trials by votes of eleven-to-one, ten-to-two, and eleven-to-one, respectively.¹³⁵ The defendants argued that the Sixth Amendment right to jury trial in criminal cases applied to state criminal trials by virtue of the Due Process Clause of the Fourteenth Amendment, and that, accordingly, their guilty verdicts based on non-unanimous jury votes were unconstitutional.¹³⁶

The Court split five to four in its decision to affirm all of the challenged convictions in each case. In the Oregon cases, where the verdicts were eleven-to-one and ten-to-two, four justices expressed the opinion that the Sixth Amendment does not require unanimous verdicts by juries of twelve, without distinguishing between state and federal criminal trials.¹³⁷ Justice Powell joined their votes to affirm the state convictions on the basis that, while the Sixth Amendment requires unanimity in federal criminal verdicts, the Fourteenth Amendment does not compel the states to use unanimous verdicts.¹³⁸ In the Louisiana decision, five justices joined the opinion of the Court that a nine-to-three verdict, because it had been reached by "a substantial majority of the jury,"¹³⁹ did not deprive the defendant of due process of law.¹⁴⁰ Four justices dissented from both decisions, expressing the view that non-unanimous verdicts in state or federal trials violated the due process rights of the defendants.¹⁴¹

The Court clearly held in 1979 that the precedent for states to use substantial majority votes for criminal verdicts in felony cases did not apply

¹³² 406 U.S. 356 (1972).

¹³³ 406 U.S. 404 (1972) (plurality opinion).

¹³⁴ *Johnson*, 406 U.S. at 358.

¹³⁵ *Apodaca*, 406 U.S. at 405-06 (plurality opinion).

¹³⁶ *Johnson*, 406 U.S. at 357-58; *Apodaca*, 406 U.S. at 406 (plurality opinion).

¹³⁷ *Apodaca*, 406 U.S. at 411 (plurality opinion). To the extent that the plurality opinion seemed to address federal jury trials as well as the state trials under consideration, it clearly was dicta.

¹³⁸ See *Johnson*, 406 U.S. at 370-71 (Powell, J., concurring in *Johnson*, and concurring in the judgment in *Apodaca*).

¹³⁹ *Id.* at 362.

¹⁴⁰ *Id.* at 365.

¹⁴¹ See *id.* at 397-99 (Stewart, J., joined by Brennan and Marshall, JJ., dissenting); *id.* at 388 (Douglas, J., joined by Brennan and Marshall, JJ., dissenting).

to six-person juries. In *Burch v. Louisiana*, all nine justices agreed that non-unanimous guilty verdicts reached in state trials for non-petty offenses deprived the accused of due process when those trials were conducted with only six jurors.¹⁴² (Although the Court declined to rule on the legitimacy of non-unanimous verdicts reached by juries of between seven and eleven persons,¹⁴³ no state's criminal procedures have yet raised this issue.)

After these decisions, the principle that a state may permit felony trial verdicts based on the agreement of a substantial majority of a twelve person jury, consistent with the federal constitutional requirement to afford due process in state criminal trials, remains sound.

2. Addressing Concerns About Non-unanimous Verdicts

Of course, concluding that non-unanimous verdicts of twelve-person juries in state felony trials meet constitutional norms of due process under the Fourteenth Amendment does not establish that such verdicts are preferable to the unanimous verdicts currently used in the overwhelming majority of criminal jury trials. Supporters of the jury unanimity requirement generally argue for its retention on several policy grounds, claiming that only unanimous verdicts will assure legitimacy of the verdict, guarantee thorough deliberations, and protect unpopular minorities.¹⁴⁴

The notion that the public views unanimous verdicts as more legitimate proceeds from the premise that public confidence that guilt is established beyond a reasonable doubt results only when every juror is convinced of the defendant's guilt.¹⁴⁵ The argument is that the unanimous verdict more reliably protects the innocent from wrongful conviction by erecting an extremely high hurdle for a guilty verdict, and that this increased reliability is the sine qua non of public respect for jury verdicts.¹⁴⁶

¹⁴² See *Burch v. Louisiana*, 441 U.S. 130, 138-39 (1979) (opinion joined by six justices, with the three dissenters agreeing that a six-person state jury must be unanimous to provide due process for a non-petty offense conviction).

¹⁴³ *Id.* at 138 n.11.

¹⁴⁴ Shari Seidman Diamond, Mary R. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201, 204 (2006); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1264 (2000); James Kachmar, Comment, *Silencing the Minority: Permitting Nonunanimous Jury Verdicts in Criminal Trials*, 28 PAC. L.J. 273, 302-03 (1996); see JEFFREY ABRAMSON, *WE, THE JURY* 182-85 (paperback ed. 2000).

¹⁴⁵ See *Johnson*, 406 U.S. at 388-89 (Douglas, J., dissenting).

¹⁴⁶ See ABRAMSON, *supra* note 144, at 190-91; Stephan Landsman, *12-Member Juries and Unanimous Verdicts: A Debate*, 88 JUDICATURE 301, 303 (2005) (arguing that "the unanimity-of-decision rule . . . enhance[s] the likelihood of accuracy while at the same time promoting diversity and legitimacy").

For unanimity supporters, the common thread in their concerns seems to be the assumption that allowing a super-majority to reach a guilty verdict would make convictions easier for the prosecution. If that assumption were accurate, one would expect that the armed forces would have a sharply higher court-martial conviction rate than the state criminal systems, where the conviction rates of the forty-eight states that require unanimous verdicts would heavily influence any aggregate data. In fact, some data suggest that conviction rates for contested trials before civilian juries and before general courts-martial are about the same.¹⁴⁷ (Of course, conviction rates in a particular jurisdiction are affected by many other variables, including the degree to which pre-trial screening has already eliminated cases where the evidence shows innocence or even substantial weakness of the prosecution's evidence; however, if that variable has any pertinent tendency to skew the comparison, the rigorous screening of most military felony cases before referral to a court-martial ought to *raise* the military conviction rate.¹⁴⁸) In any event, there is little empirical basis to assume that the military approach (allowing a super-majority of the jurors to convict) has seriously disadvantaged the defendant, especially since the court-martial practice results in an acquittal whenever the jury does not convict by secret vote of the jurors. Accordingly, we ought to take a closer look at the claimed virtues of unanimity.

The proposition that the unanimous verdict has unique legitimacy is not self-evident. Our society rarely requires any deliberative body to agree unanimously in order to adopt a weighty proposal, much less to reach *any* conclusive decision to adopt or defeat the proposal.¹⁴⁹ For example,

¹⁴⁷ One commentator compared data from civilian and military trials in 2001 as follows:

[The] conviction rate for general courts-martial is actually slightly lower than for felonies in federal district courts or in the seventy-five largest metropolitan areas of the United States. The overall conviction rate for general courts-martial in fiscal year 2001 was 95% (1675 convictions out of 1756 total cases in the services combined). This figure was obtained by adding together the total reported general court-martial convictions from the Army, Navy (including the Marines), Air Force, and Coast Guard and dividing by the total reported number of general courts-martial held. In the federal system, the conviction rate for felonies (including guilty pleas) that were not dismissed was 98.37% percent [sic]. This figure was obtained by dividing the total number of convictions in the federal system in fiscal year 2001 (68,156) by the total number of cases that were not dismissed (69,283). In the seventy-five largest metropolitan areas, the felony conviction rate was about 95%.

Behan, *supra* note 41, at 302 n.573 (citations omitted).

¹⁴⁸ See BAILEY, *supra* note 20, at 35 ("In my opinion, the single greatest attribute of the military system is its painstakingly careful pretrial screening procedure—which does, in fact, eliminate most innocent men from ever going to a full-fledged court-martial.")

¹⁴⁹ See Amar, *supra* note 96, at 1189 ("[M]ost of our analogies [of decision-making] tug toward majority rule—legislatures generally use it; voters abide by it; appellate benches follow it."). For example, when the Senate exercises its constitutional responsibility to

Americans have not generally questioned the legitimacy of the constitutional amendments affording women or eighteen-year olds the right to vote on the grounds that our federal Constitution was amended with the assent of only three-quarters of the several state legislatures, rather than by all fifty states.¹⁵⁰

When a deliberative body of individuals must agree on some crucial matter, the democratic tradition typically entrusts such a decision to the collective wisdom of the body by specifying some level of assent to adopt a proposition; a failure to reach that degree of assent does not deadlock any decision, but is itself a conclusive *rejection* of that proposition.¹⁵¹ Although only two states presently allow felony verdicts by super-majority vote of jurors, many states do permit super-majority verdicts in civil trials and for less serious criminal cases, apparently without loss of public acceptance of the legitimacy of the results of such trials.¹⁵²

Our society follows the majority approach even when the decision involved is one that has critical consequences for the personal liberties of individual citizens, such as whether to adopt legislation that will impose

“advise and consent” to the nomination of a new justice for the Supreme Court, unanimous agreement among the members of its Judiciary Committee or in the Senate itself is not required for decision. *See* U.S. CONST. art. I, § 8, cl. 10. Likewise, even the crucial question of whether the nation will declare a state of war does not require the assent of every member of the Congress. *See id.*

¹⁵⁰ *Id.* art. V.

¹⁵¹ While Article I does not expressly state that each chamber of Congress normally acts by majority vote, several specific provisions clearly imply that the Senate and the House of Representatives ordinarily act by majority vote of the legislators in each chamber, rather than by unanimous consent of each chamber. First, the Vice-President has a vote only when the members of the Senate “be equally divided.” *Id.* art. I, § 3, cl. 4. A vice-presidential vote when the senators are equally divided would be superfluous if the Senate could only make decisions by unanimous assent. Second, a substantial minority may require that each chamber record the “yeas and nays of the members . . . on any question.” *Id.* art. I, § 5, cl. 3. Third, the power of Congress to override a presidential veto of a bill by two-thirds vote in each chamber would have little meaning if bills could not be initially enacted except with unanimous consent within each chamber. *See id.* art. I, § 7, cl. 2. Finally, a chamber may expel one of its members with the concurrence of two-thirds of its members. *Id.* art. I, § 5, cl. 2.

¹⁵² Criticizing a proposed ABA standard that would call for all serious criminal cases to use the unanimous verdict, the director of the American Judicature Society’s National Jury Center argued, “Proponents of the unanimity requirement argue that it is necessary to confer legitimacy on verdicts. The acceptance by the public, bench, and bar of super-majority verdicts in many jurisdictions shows that legitimacy is not compromised by less-than-unanimous verdicts. ABA Principle 4 is a solution in search of a problem.” David McCord, *Juries Should Not Be Required to Have 12 Members or to Render Unanimous Verdicts*, 88 JUDICATURE 301, 305 (2005).

criminal sanctions for engaging in certain proscribed conduct.¹⁵³ Appellate courts do not continue to deliberate in appeals of criminal convictions until their judges unanimously agree on whether to affirm or reverse the conviction. Even cases involving the death penalty are affirmed by appellate courts by majority votes; appellate practice does not require that all appellate judges agree to uphold a particular defendant's death sentence. Likewise, Professor Amar has pointed out that when the Senate, "acting as a kind of petit jury," tries an individual such as the President on articles of impeachment, it can convict by a vote of at least two-thirds of its members; our federal Constitution does not require the unanimous agreement of all members of the Senate.¹⁵⁴

Modern American experience with courts-martial shows that we do not need unanimity in order to reliably convict a person on a criminal charge. Despite long custom, requiring all twelve jurors to agree that guilt has been established beyond any reasonable doubt is not the only way to demonstrate a sufficiently convincing consensus of the community so as to provide reliability and legitimacy for that critical decision. The traditional requirement of unanimity, instead of celebrating the triumph of collegiality, places inordinate power in any single juror to thwart the consensus of the vast majority of the jurors acting as a body.¹⁵⁵ In short, the single-minded pursuit of absolute agreement may well lead to a perversion of the truth-seeking goal.

Let us suppose that in a particular trial, the jurors' careful, deliberate, collegial examination of the evidence eventually results in every single juror being fully comfortable with the same outcome, not from desire to please the other jurors or simply to end the debate and go home, but rather because each is convinced of the propriety of the decision to acquit or to convict the defendant based on the weight of the evidence under the law. Such an outcome is the ideal embodiment of the jury acting as the collective conscience of the community. In such a situation, however, the legal *requirement* that the verdict can only be reached with such unanimity is completely moot, because, *ex hypothesi*, this jury reached its verdict not under the compulsion of such a rule, but without regard to that rule.

Now suppose, instead, that all of the jurors in a given trial have deliberated patiently and in good faith, carefully discussing all of the

¹⁵³ Neither Congress nor a state legislature is constitutionally limited in its power to enact new penal code provisions by any requirement that all of the legislators agree.

¹⁵⁴ See Amar, *supra* note 96, at 1189-90.

¹⁵⁵ *Cf. id.* at 1190 ("[If] everyone now gets to serve on a jury, and we eliminate all the old undemocratic barriers, preserving unanimity might also be undemocratic, for it would create an extreme minority veto unknown to the Founders.").

evidence and what it does or does not prove. All viewpoints have been aired and considered. One juror, or perhaps a small minority of the jurors, disagrees with the emerging majority viewpoint. Despite good faith on both sides, no agreement is reached. State law blocks any decision without unanimity. The pressure on the holdout juror(s) to conform to the majority position in such a situation is clearly enormous, not necessarily because of the others' disapproval of the dissenting viewpoint (i.e., both sides may recognize that the evidence makes for a very close question), but instead precisely because the very existence of any dissent completely deadlocks the body. Each juror knows that the deliberative task simply cannot result in *any* decision until every juror agrees in the same manner (acquit, convict, or convict on a particular lesser charge). Again, supposing that all of the merits have been thoroughly vetted, common experience suggests that the personal evaluations of the individual jurors may well remain divergent over such a subjective question as guilt.

In such a situation of rational disagreement, which is all too plausible,¹⁵⁶ the typical state's prohibition against any verdict without unanimity leaves the jury with only a few choices, all undesirable: (1) to grind on in an attempt to get the minority to yield despite its conscientious misgivings; (2) to let the majority acquiesce to the minority or compromise on some lesser charge, despite the majority's own conscientious belief in the correct outcome;¹⁵⁷ or (3) to ask the judge to declare a deadlock. Either of the first two paths requires some jurors to violate their oath to decide the case based upon their conscientious evaluation of the evidence under the governing law. In other words, any juror who, in good conscience, remains unconvinced of the other bloc's position must nonetheless capitulate to that position or simply continue to obstruct any conclusive resolution of the trial, the latter choice pointing toward an eventual mistrial by deadlock.

Because the jurors may have taken either of the first two courses, the unanimous verdict in a particular trial does *not* necessarily signify that every juror agreed to the verdict because of the weight of the evidence; instead, some perhaps only acquiesced to it out of weariness after inconclusive deliberations, or some may have simply been unable to

¹⁵⁶ One observer concludes that many nominally "unanimous" verdicts are "'watered down' due to compromises necessary to bring a recalcitrant juror or two on-board." McCord, *supra* note 152, at 305. And the unanimous verdict may be the result of peer pressure overcoming the dissenter's will, rather than the true consensus building its supporters claim. See ABRAMSON, *supra* note 144, at 197.

¹⁵⁷ One study of trials where unanimous verdicts were required suggested that unanimity may sometimes cause jurors "to behave more expediently, returning a compromised verdict that splits the difference between jury factions and has no rational basis. To the extent that this happens, unanimity does not promote truth." ABRAMSON, *supra* note 144, at 203.

withstand the pressures exerted by the rest of the jurors. There is ample anecdotal evidence that internal coercion underlies some supposedly unanimous verdicts,¹⁵⁸ and some research suggests that this problem is

¹⁵⁸ The prevailing rule in both federal and state courts is that new trials are not granted when a juror alleges irregularities that are internal or intrinsic to the deliberative process, while relief may be granted upon satisfactory evidence of “extrinsic influences” upon the jurors, such as bribery coming from outside the jury. *Compare Tanner v. United States*, 483 U.S. 107, 115-16, 119 (1987) (ruling that the trial judge properly refused to investigate alleged drug and alcohol use by jurors “partying” during deliberations because “possible internal abnormalities in a jury will not be inquired into”) (citation omitted), *with Remmer v. United States*, 347 U.S. 227, 229 (1954) (concluding that a juror’s report of attempted bribe during trial was properly investigated because the “integrity of jury proceedings must not be jeopardized by unauthorized invasions”).

Thus, a juror’s post-verdict contention that her assent to the verdict was caused by coercive or intimidating pressure exerted by other jurors during deliberations is generally categorized as internal and is not considered a basis on which to grant a new trial or other relief. *See, e.g., United States v. Roach*, 164 F.3d 403, 412-13 (8th Cir. 1998) (finding that the trial court did not abuse discretion by refusing to order a new trial for three Native Americans despite a Native American juror’s affidavit stating that she had been unwilling to convict the defendants but changed her vote to guilty only because the other jurors, all white but one, had pressured her to do so with threats and accusations that she was a racist); *People v. Reid*, 583 N.E.2d 1, 1, 4 (Ill. App. Ct. 1991) (holding that the trial court properly ruled that verdict could not be impeached by a juror’s post-verdict assertion that while sequestered overnight, in middle of deliberations where that juror was the “lone holdout” juror, he received an anonymous telephone call at his hotel room from a person he believed to be one of the other jurors, who remarked, “you son of a bitch, we’ll get you for that,” and then hung up); *Oxtoby v. McGowan*, 447 A.2d 860, 869-70 (Md. 1982) (ruling that the trial judge did not abuse discretion by denying a new trial where a juror’s affidavit stated that she had assented to the verdict only because other jurors verbally abused her during deliberations); *State v. Hage*, 853 P.2d 1251, 1256-57 (Mont. 1993) (deciding that the trial court properly refused to order a new trial based upon the assertion that a juror felt pressured by other jurors to decide the case, because the assertion was one of internal influence upon the jury); *People v. Anderson*, 671 N.Y.S.2d 149, 150 (N.Y. App. Div. 1998) (concluding that the trial court properly refused to set aside a verdict where the defendant attempted to show that some jurors pressured and prevailed upon two other jurors in order to prevent further deliberations); *Cavalier Metal Corp. v. Johnson Metal Controls*, 124 S.W.3d 122, 127-30 (Tenn. Ct. App. 2003) (finding that courts should not make post-verdict inquiry into intrinsic influences on jurors such as “intimidation or harassment” of one juror by another). *But see People v. Collins*, 730 P.2d 293, 301-02 (Colo. 1986) (deciding that the trial court properly considered a juror’s affidavit suggesting that coercive tactics were employed against her to force her to give a verdict against her will but found no coercion was used by other jurors); *Lee v. United States*, 471 A.2d 683, 684-86 (D.C. 1984) (affirming a ruling against new trial where the trial court privately interviewed jurors who alleged they were coerced by other jurors but then found no extraneous influences had improperly influenced the verdict).

These cases, however, demonstrate that the courts are reluctant to pierce the confidentiality of jury deliberations and also that the courts, quite understandably, are hesitant to undermine verdict finality by post-verdict inquiry into the internal pressures or thought processes that result in the jurors’ collective decisions. However, these cases all provide evidence that the so-called “unanimity” of criminal verdicts sometimes is a

widespread.¹⁵⁹ (As will be discussed, this aspect of the decision process also suggests the importance of the military requirement that the jurors use a secret ballot to reach the verdict.¹⁶⁰)

We can see that the unanimous verdict requirement is not necessarily synonymous with reliability by posing a very different scenario. Imagine another trial in which the jury has engaged in careful, deliberate, collegial examination of all evidence. In this situation, further suppose that one juror (or some tiny fraction of the jurors), because of an irrational consideration, continues to disagree with all of the others about the correct answer to the culpability question.¹⁶¹ For example, eleven jurors may propose to acquit the defendant, an illegal alien, of burglary because they find insufficient evidence of his guilt, but one obstinate juror blocks that verdict, arguing out of nativist bigotry that the defendant's status as an illegal alien, by itself, justifies a guilty verdict. In such a situation, requiring unanimity does not promote justice; the bigot successfully prevents the acquittal that the defendant deserves.¹⁶²

A separate argument traditionally offered in support of the unanimous verdict requirement is that it is necessary to promote the thorough deliberations that ensure that the jurors in the majority will both carefully listen to and consider the views of every juror, even those in the minority.¹⁶³ It is true that, when unanimity is required, the bloc of jurors who favor a certain verdict are compelled to continue their efforts to bring all other

euphemism for coerced acquiescence by jurors holding the minority view of the evidence.

¹⁵⁹ See ABRAMSON, *supra* note 144, at 197 (discussing data showing the widespread occurrence of splits among jurors that were eventually overcome by intimidation, as opposed to persuasion, or would-be holdouts). Such data suggests that the supposedly unanimous verdict may often be the result of peer pressure overcoming the dissenter(s), rather than the true consensus building its supporters claim.

¹⁶⁰ See discussion *infra* Section III.D.

¹⁶¹ See Amar, *supra* note 96, at 1191 (“[U]nanimity cannot guarantee *mutual* tolerance—what about the eccentric holdout who refuses to listen to, or even try to persuade, others (‘you can’t make me, so there!’).”). The federal capital trial of self-proclaimed terrorist Zacarias Moussaoui provided a recent example of the power of a lone holdout juror refusing even to discuss why he felt the death penalty to be inappropriate, repeatedly deadlocking the jury at eleven-to-one on the death penalty, so that the jury eventually recommended only a life sentence for Moussaoui. See Timothy Dwyer, *One Juror Between Terrorist And Death: Moussaoui Foreman Recalls Frustration*, WASH. POST, May 12, 2006, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/11/AR2006051101884.html?sub=new>.

¹⁶² See Amar, *supra* note 96, at 1190 n.46 (“Civil libertarians may well wonder whether jury unanimity should be necessary to *acquit* a criminal defendant. If so, the consequence is that the prosecutor needs only one sympathetic juror to hang a jury and inflict another trial on defendant.”).

¹⁶³ See ABRAMSON, *supra* note 144, at 191-94.

jurors on board with them in order to prevail. This *may* cause that bloc to carefully engage the concerns of those jurors who hold a different viewpoint, by a constructive and rational dialogue that attempts to reach complete consensus.¹⁶⁴ (However, there is some evidence that in reality, more often the minority position is simply overpowered by intimidation, a concern that the court-martial's secret voting practice addresses quite effectively.¹⁶⁵) Promoters of unanimity argue that permitting non-unanimous verdicts will allow the majority bloc to simply ignore the viewpoint of those few jurors who are not convinced of guilt, once the majority bloc perceives it has achieved an apparent majority position.¹⁶⁶ In other words, unanimity proponents fear that once a sizeable group of jurors senses (by a straw vote or other informal expression of individual positions) that it has accumulated sufficient power to convict, that bloc will simply stifle any further debate and terminate the collegial deliberative process, ending the "rough-and-tumble of the jury room [that sometimes allows a forceful dissident minority] to reverse completely [the initial majority's] perception of guilt or innocence."¹⁶⁷ They argue that the unanimity requirement acts as an "automatic check against hasty fact-finding [because it places on all jurors] the duty to hear out fully the dissenters."¹⁶⁸

This argument has several weaknesses. First, it overlooks the very real possibility that the unanimity requirement allows for precisely the opposite scenario: that one determined juror, irrationally convinced of innocence, can ignore any further debate or appeal to reason,¹⁶⁹ thus deadlocking the decision or worse, stalemating the majority jurors until they capitulate and "unanimously" vote not guilty.

In such a situation, the unanimity requirement for criminal conviction might be supported by the familiar maxim that it is better to let many guilty

¹⁶⁴ *See id.*

¹⁶⁵ *See id.* at 197 (discussing data showing the widespread phenomena of intimidation within unanimous juries). Note that the unique military practice of secret balloting by jurors as they reach a verdict provides an important structural protection against such intimidation. *See* discussion *infra* Section III.D.

¹⁶⁶ Kachmar, *supra* note 144, at 274.

¹⁶⁷ *Johnson v. Louisiana*, 406 U.S. 356, 389 (1972) (Douglas, J., dissenting); *see* Taylor-Thompson, *supra* note 144, at 1264.

¹⁶⁸ *Johnson*, 406 U.S. at 389 (Douglas, J., dissenting).

¹⁶⁹ *See* Amar, *supra* note 96, at 1191. One reported instance of exactly such a refusal to deliberate is provided by the prominent capital case involving terrorist Zacarias Moussaoui. After the jury recommended a life sentence rather than the death penalty, the jury foreman explained that the single holdout juror refused even to discuss why he or she believed the death penalty to be inappropriate, repeatedly deadlocking the jury at eleven-to-one on the death penalty. *See* Dwyer, *supra* note 161, at A1.

people go free than to convict one innocent person.¹⁷⁰ In the context of how a jury arrives at its verdict, we ought not to accept that postulate so readily. If the stakes were limited to a communal act of moral classification of conduct, that maxim might be defensible. However, the felony criminal trial is not simply an effort by the community to label the criminal with a mark of community opprobrium (the conviction). Instead, the felony trial has a significantly more weighty objective; it exists to determine whether an accused has engaged in such seriously criminal behavior that society ought to impose a penalty, or sentence, either to directly prevent further crime by the same criminal (i.e., by restraint of his liberty) or to serve as an example for others contemplating such crimes (by general deterrence). No such decision made by any group of jurors, unanimously or by majority consensus, is infallible. Recognizing that, because of human frailty, either form of decision (unanimous or super-majority verdict) can result in the erroneous acquittal of a culpable person or the erroneous conviction of an innocent person, the community ought to choose the mode that is less likely to result in error. In other words, we ought to allow for a verdict of guilt based on an overwhelming consensus of the jurors, even if some tiny fraction of the jury does not agree. Likewise, we ought to provide that when the same substantial fraction of the jury is not convinced of guilt beyond any reasonable doubt, the jury must return a verdict acquitting the defendant outright, as the military jury practice requires.

There is another weakness in the oft-stated concern about the majority cutting off useful discussion, refusing to listen to the minority's views once the majority senses that it holds enough votes to dictate the verdict. That argument is plausible only if one accepts two very doubtful propositions.

First, it supposes that the jurors in the majority bloc (or most of them) are persons wholly indifferent to the viewpoint of others, or in other words, that they not only have reached a decision with which they are comfortable,

¹⁷⁰ “[T]he law holds that it is better that ten guilty persons escape than that one innocent suffer.” *Coffin v. United States*, 156 U.S. 432, 456 (1895) (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES 27); see also *Furman v. Georgia*, 408 U.S. 238, 367 n.158 (1972) (Marshall, J., concurring) (“We believe that it is better for ten guilty people to be set free than for one innocent man to be unjustly imprisoned.” (quoting William O. Douglas, *Foreword*, in JEROME FRANK & BARBARA FRANK, NOT GUILTY 11-12 (1957))).

This dubious value judgment is also a foundation for the exclusionary rule. That rule is justified on the notion that if police have gathered evidence by some conduct evaluated later as unlawful, then to exclude that evidence (despite its reliable, or even dispositive, inculpatory value) and to let the defendant avoid the murder conviction he deserves is preferable to letting the police officer “get away with” his own misconduct. See *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting) (“I think it a less evil that some criminals should escape than that the government should play an ignoble part.”).

but they are unwilling even to reexamine that position at the request of the minority. Second, it presumes that those jurors are not only close-minded and inflexible, but moreover, that they are willing to defy the specific instructions of the judge that the jurors must engage in a full and free discussion that allows all viewpoints to be aired before a vote is taken on the verdict. If, however, these pessimistic assumptions about human nature are accurate, then even more fundamental presumptions about the jury process would be left in disarray (not least, the oft-stated presumption that jurors will follow the instructions of the trial judge about the law).¹⁷¹

A more reasonable assumption is that the typical juror is a citizen who will exercise the important trust placed in her as a representative of the community, and who will act conscientiously and consistently as charged by the trial judge and as she would want to be judged by others. Since our very reliance on the jury presupposes that the citizen juror will carefully try to follow the law,¹⁷² we ought to trust that most jurors will take the time to listen in good faith to the reasoning of all of the other jurors, conscientiously evaluating all aspects of the evidence presented in the context of the applicable law, before deciding the case.

In fact, the Supreme Court has relied upon precisely this reasonable expectation about juror behavior,¹⁷³ and that reasoning was borne out by a

¹⁷¹ Our entire jury practice relies upon a host of such presumptions, such as: (1) that the individual juror will agree with or vote for a guilty verdict only if convinced beyond reasonable doubt; (2) that prospective jurors will conscientiously answer questions about disqualifying matters in voir dire; (3) that jurors will heed the trial judge's admonition that they must not consider any testimony that has been stricken from the record when they nonetheless have already heard such testimony; and, not least, (4) that the jurors will not hold it against the accused that he declined to testify in his own defense. *Cf. Amar, supra* note 96, at 1191 n.22 ("[I]f someone is intelligent and well-informed, should we not at least consider using the scalpel of strict instructions—'you must base your verdict only on the evidence admitted in this trial'—rather than the sledgehammer of exclusion? A judge with comparable knowledge is not disqualified here. Why do we trust judges so much and jurors so little?").

¹⁷² Thus, federal and state courts recognize that while jurors have the "raw power" to ignore the court's instructions about the law, the jury has no legal authority or right to do so; the jurors' "duty is to apply the law as given to them by the court." *United States v. Sepulveda*, 15 F.3d 1161, 1190 (1st Cir. 1993); *see, e.g., United States v. Gonzalez*, 110 F.3d 936, 947-48 (2d Cir. 1997); *United States v. Hardy*, 46 M.J. 67, 74-75 (C.A.A.F. 1997); *People v. Engelman*, 49 P.3d 209, 214 (Cal. 2002); *Holden v. State*, 788 N.E.2d 1253, 1255 (Ind. 2003); *Commonwealth v. Sok*, 788 N.E.2d 941, 951 (Mass. 2003); *Hansen v. State*, 592 So. 2d 114, 140 (Miss. 1991); *State v. Jenkins*, 861 A.2d 827, 837 (N.J. 2004); *Ramos v. State*, 934 S.W.2d 358, 367 (Tex. Crim. App. 1996); *Henderson v. State*, 976 P.2d 203, 206 (Wyo. 1999).

¹⁷³ *Johnson v. Louisiana*, 406 U.S. 356, 361 (1972) ("[I]t is far more likely that a juror presenting reasoned argument in favor of acquittal would either have his arguments answered or would carry enough other jurors with him to prevent conviction. A majority

recent high profile case. Even in the emotional atmosphere of the sentence deliberations for terrorist Zacarias Moussaoui (convicted of complicity in the multiple murders caused by the September 11, 2001 destruction of the World Trade Center), there is evidence from post-trial news accounts that the majority of jurors were solicitous of the viewpoint of the minority. Though leaning toward the death penalty, the eleven jurors in the majority took several days in their deliberations, raising and analyzing possible arguments against the death penalty, so that the single juror who was blocking the death penalty would not feel isolated.¹⁷⁴

The Supreme Court's expectation that most jurors are fair-minded enough to carefully consider the views of other jurors is also borne out by my own experience with military juries. On numerous occasions, I have seen military juries stay in closed deliberations for a number of hours before reaching a verdict, even when the evidence pointing to the guilt of the accused soldier was overwhelming. Either those jurors were taking the time to deliberate conscientiously and to consider the views of each member of the jury, as my instructions had directed, or they found the closed confines of the jury room to be so fascinating in comparison to their normal duties that they were pretending to stay busy for long periods of time. (That the military juror realizes that he contributes to the *one* determination on behalf of the community of the defendant's innocence or guilt, and cannot hand that responsibility off to a subsequent jury by deadlock as in civilian practice, very likely also contributes to the gravity of the deliberations in a court-martial.¹⁷⁵)

Together with the provision for a secret vote by each juror, permitting the jury to reach its verdict by non-unanimous decision actually gives jurors with the minority viewpoint a greater incentive to continue to press their position. The one or few jurors who disagree with the emerging majority position will realize that they may well be able to change the outcome of the voting if they can manage to convince just one or two more jurors to accept their viewpoint, or to at least entertain reasonable doubt about the guilt of the accused. By contrast, if no verdict of acquittal can be reached without

will cease discussion and outvote a minority only after reasoned discussion has ceased to have persuasive effect or to serve any other purpose—when a minority, that is, continues to insist upon acquittal without having persuasive reasons in support of its position. At that juncture there is no basis for denigrating the vote of so large a majority of the jury . . .”).

¹⁷⁴ See Dwyer, *supra* note 161. According to the jury foreman, “the whole group would raise anti-death penalty issues because that way the lone dissenter would not feel isolated or ‘ganged up on.’ Deliberations continued [for another three days], but the foreman said the lone dissenter still did not raise any issues.” *Id.* Eventually, the frustrated majority voted to recommend a life sentence. *Id.*

¹⁷⁵ See discussion *infra* Section III.C.3.

unanimous agreement, a minority bloc favoring acquittal will be discouraged because it faces the much more daunting task of changing every other juror's mind in order to reach the desired outcome.¹⁷⁶

Supporters of the unanimity requirement also argue that it is necessary to protect unpopular or vulnerable minorities.¹⁷⁷ However, the Supreme Court has logically rejected the idea that every jury that is tasked to judge a person from an identifiable minority demographic category, such as a person "belonging to" some ethnic, racial, or religious minority, must necessarily include jurors identified with that minority category.¹⁷⁸ Moreover, if one accepts the underlying assumption that most "minority" jurors will act to protect others from their "own" minority group, that idea cuts both ways. In other words, it suggests that another weakness of verdicts where unanimity is required is that minority jurors may irrationally block conviction just because the defendant is from their minority group.¹⁷⁹

These cracks in the traditional assumptions about the superiority of unanimous verdicts ought to make us willing to pay closer attention to Amar's "tentative" suggestion to consider allowing super-majority verdicts but surrounding them with some safeguards.¹⁸⁰ He suggests that the danger of the hasty end to deliberations might be reduced by more thoroughly instructing the jurors about their deliberative responsibilities:

[N]onunanimous schemes can be devised to promote serious discussion. Jurors should be told that their job is to talk and listen to others with different ideas, views,

¹⁷⁶ See discussion *infra* note 199 and accompanying text.

¹⁷⁷

Nonunanimous decisionmaking in criminal trials could jeopardize the limited victories that historically excluded groups have won in cases challenging barriers to jury service. If—as is often true—the views of jurors of color and female jurors diverge from the mainstream, nonunanimous decisionmaking rules can operate to eliminate the voice of difference on the jury. Given that people of color tend to form the numerical minority on juries, the majority could ignore minority views by simply outvoting dissenters."

Taylor-Thompson, *supra* note 144, at 1264.

¹⁷⁸ See *Powers v. Ohio*, 499 U.S. 400, 404 (1991) ("Although a defendant has no right to a 'petit jury composed in whole or in part of persons of [the defendant's] own race,' he or she does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria.") (citation omitted).

¹⁷⁹ For example, some newspaper stories suggested that many Americans viewed the acquittal of O. J. Simpson by a California jury as irrational because overwhelming evidence of his guilt was demonstrated on national television. See David Robinson, Jr., *The Shift of Balance of Advantage in Criminal Litigation: The Case of Mr. Simpson*, 30 AKRON L. REV. 1, 2, 8 n.44 (referring to "[w]hat has widely been perceived as an unjust exoneration of O.J. Simpson" and citing several newspaper articles about the Simpson acquittal). The jury that acquitted Mr. Simpson, an African-American defendant, included a substantial number of African-American jurors. *Id.* at 10 n.57.

¹⁸⁰ Amar, *supra* note 96, at 1189-91.

backgrounds and so on. So too, judges can advise jurors that their early deliberations should focus on the evidence and not their tentative leanings or votes—and that no straw poll should be taken until each juror has had a chance to talk about the evidence on both sides.¹⁸¹

3. *Eliminating the Hung Jury*

Compared to military jury trials, which cannot end with the jury deadlocked on culpability, the civilian jurisdictions' emphasis on unanimity as the sine qua non of final judgment carries significant cost. Each trial that results in a deadlocked jury is a case where, by definition, the defendant's culpability has not been resolved. An election by the defendant to plead guilty eventually will resolve some cases.¹⁸² But for those cases not concluded by such a plea, the remaining alternatives (retrial or dismissal of the case) may well be unfair to the defendant and certainly are inefficient for the community.

If the defendant knows he is guilty of the offense, the delay involved in retrial at least postpones his day of reckoning, and if retrial is aborted by the prosecution's decision to dismiss instead of retrying the case, the defendant obtains a windfall. But in those cases where the defendant believes himself to be innocent, the unfairness lies in the significant costs of remaining in legal jeopardy for the time that retrial consumes. Not only does the accused person incur the cost of additional legal representation, he continues to suffer under the cloud of suspicion within the community and, especially if in pretrial detention, may well incur substantial opportunity costs (loss of earnings or time with family). Further, while in the crosshairs of the prosecutor, the defendant faces these many costs knowing that a second hung jury may result, which would afford the prosecutor yet another opportunity to shop—not for a more effective presentation—but instead for a more easily-convinced set of twelve jurors who will agree to convict.

From the perspective of the community, either dismissal of the case or retrial is often less than satisfactory. Dismissal of the allegations, when based not on acquittal but upon failure to reach a verdict, leaves the victims and the public generally without closure, the case permanently unresolved. If the district attorney elects to bring the case to trial in front of a new jury, that adds to the criminal case backlog. Further, unless new evidence fortuitously surfaces, the retrial will be prosecuted based on older evidence.¹⁸³ Since the prosecution likely put on its best effort to convict at

¹⁸¹ *Id.* at 1191.

¹⁸² Understandably, both the prosecution and the defendant frequently are prodded into a pretrial agreement by their failure to prevail with the first jury.

¹⁸³ Physical evidence generally does not age well; it may be lost or contaminated through

the first trial, the new set of jurors usually faces the unenviable task of grappling with a case with evidence no more compelling (and certainly more stale) than the first jury evaluated.

If deadlocked juries were exceedingly rare, none of this would be terribly important except to those persons immediately involved in the case. However, the problem of hung juries is a substantial one in the United States, both in the forty-eight states that require jury unanimity and in the two that allow super-majority verdicts. While comprehensive data is scarce,¹⁸⁴ a number of sources suggest that state hung jury rates may be as high as 6% of all criminal trials.¹⁸⁵ Considering that the number of state criminal jury trials was estimated to be “in the vicinity of 150,000” per year a decade ago,¹⁸⁶ that 6% is not a negligible figure.

Changing from unanimous to super-majority verdicts in state trials may reduce the rate of hung juries¹⁸⁷ but will not, by itself, eliminate the jury deadlock situation because the Louisiana-Oregon approach still requires a super-majority of the jurors to agree to acquit.¹⁸⁸ However, the unique approach used by the court-martial will *eliminate* the hung jury, since a not guilty verdict will result whenever there is no conviction on the

mishandling. Witnesses may die or become incapacitated, and their memories seldom improve over time.

¹⁸⁴ Researchers face substantial

[d]ifficulty in gathering data about hung juries. . . . The key problem is that a hung jury is an interim rather than a final disposition in a case. Courts typically do not report information about interim dispositions such as hung juries as a separate category for statistical reporting purposes. Court caseload statistics generally include only final dispositions such as dismissal, guilty plea, acquittal, or conviction.

Paula L. Hannaford, Valarie P. Hans & G. Thomas Munsterman, *How Much Justice Hangs in The Balance?: A New Look at Hung Jury Rates*, 83 JUDICATURE 59, 60 (1999).

¹⁸⁵ See ABRAMSON, *supra* note 144, at 198 (stating there is a “national average of 5.6 percent [hung juries] in unanimous verdict jurisdictions”); Robert Boatright & Elissa Krauss, *Jury Summit 2001*, 86 JUDICATURE 145, 150 (2002); McCord, *supra* note 152, at 305 n.7 (“[The] hung jury rate in a composite of 30 large counties in criminal cases in the late 1990s was 6.2%, but some counties had significantly higher rates, like 15% in Los Angeles County over an 18-month period.”). A detailed analysis of available state criminal trial data suggests the “conventional wisdom” that the national average for hung juries is about 6% of all jury trials is probably a safe estimate. See Hannaford, Hans & Musterman, *supra* note 184, at 61-66.

¹⁸⁶ See ABRAMSON, *supra* note 144, at 251; *cf.* Hannaford, Hans & Musterman, *supra* note 184, at 65.

¹⁸⁷ For example, a study of one county in Oregon, where verdicts by ten-to-two are permitted, see *supra* text accompanying note 104, during the period 1970 to 1972 showed a hung jury rate of about 2.5%. ABRAMSON, *supra* note 144, at 198 & n.65.

¹⁸⁸ See LA. CODE CRIM. PROC. ANN. art. 782(A) (1998); OR. REV. STAT. § 136.450 (2003).

charged offense or on any lesser-included offense.¹⁸⁹ If adopted for use in a state's criminal trials, the public would benefit from the resolution of significant numbers of cases by means of a single trial. Moreover, some defendants will receive an acquittal without unanimous agreement of the jurors, and those persons will no longer remain in the legal limbo of further jeopardy for the same charge.

In conclusion, the super-majority verdict not only provides for a reliable verdict, but if it is employed in conjunction with the military jury's approach (not guilty verdict when the number of guilty votes is short of the fraction required to convict), the procedure will enhance the finality of the trial process. Eliminating deadlocked juries will avoid both the inefficiency for the public and the unfair costs for individual defendants that result from hung juries.

D. THE ADVANTAGE OF USING THE COURT-MARTIAL'S UNIQUE SECRET WRITTEN BALLOT TO REACH A VERDICT

As previously described, the jurors on a court-martial are required to indicate their individual votes of guilty or not guilty by casting secret, written ballots.¹⁹⁰ Within American criminal systems, this practice appears to be unique. By comparison, the current state practice of open voting¹⁹¹ necessarily puts enormous psychological pressure on each juror to conform to the majority sentiment and, as will be explained here, jeopardizes the bona fide nature of the verdict as the considered consensus of all twelve jurors.

The open procedure by which the jury formally adopts its verdict under the typical state practice leaves the individual juror no privacy of position, no confidential sanctuary for the individual juror's conscience. In other words, once the deliberative process reaches a certain static state, the jury *as a body* will expect its individual members to register personal assent to or dissent from the proposed verdict openly, because the judge did not tell the jurors to do so by secret ballot.¹⁹² When the individual jurors are

¹⁸⁹ See *supra* text accompanying notes 129-131.

¹⁹⁰ See discussion *supra* text accompanying note 121-127.

¹⁹¹ See discussion *supra* Section III.A.

¹⁹² In theory, any juror could propose to her peers on the jury that the jury takes its official vote by secret ballot, because the author's research located no state pattern instruction that explicitly told the jurors they were prohibited from such an approach. However, human nature suggests that this would rarely occur in the setting of a jury of a dozen strangers; for one or a few jurors to propose a secret ballot when the presiding judge had not mentioned such a procedure would be tantamount to the troublemaker announcing that he had something to hide, because he was bucking the majority and planned to take the unpopular position.

called upon to register their official positions openly in front of all fellow jurors, they enjoy no safeguard against the peer pressure likely to be inflicted upon a lone dissenter or those in the minority bloc, especially in the vast majority of states where the verdict cannot be presented without unanimous concurrence.¹⁹³

Even in Louisiana and Oregon, where super-majority verdicts are allowed, the trial judge does not instruct the jurors to use a secret ballot to register their ultimate personal views of whether a proposed verdict of guilty or not guilty ought to be adopted. The degree of pressure on those jurors who are resisting the proposed verdict will probably be less than in a state requiring unanimity. However, even in those two states, it seems all too likely that a majority, nearing the critical fraction required to reach a verdict, may sometimes squeeze the several holdouts to get on board, not by compelling force of reason, but simply by demanding that they give up, show some loyalty to the group, and let the trial end.

The lack of any refuge behind a secret ballot intensifies the obvious pressure on the holdouts. In all likelihood, once the jury has engaged in some amount of discussion of the evidence and the issues presented, a consensus position (representing the view of some considerable bloc of jurors) is likely to emerge. When that occurs, the foreman or some other juror will ask the obvious question, "Do we all agree with X position?" or "How many of us agree with that position?" or some variant of that query. The proposed verdict may be guilt, innocence, or acquittal based on doubt, but in any case, as soon as the majority viewpoint is manifested (whether by show of hands, head nod, or verbal response), any dissenter from that position is immediately in the spotlight, and on the defensive. It will be difficult enough for the dissenter to try to persuade other jurors to join her position. With the open voting practice, any other juror who may be on the cusp to join the initial dissenter's position must register his defection from the majority bloc openly, without the cover of a secret ballot.

In contrast to the typical state practice that operates by open voting, the military jury's secret ballot increases the likelihood that, having listened to the viewpoint of all members of the jury, each juror will finally vote based on her own conscientious evaluation of the merits, and not simply respond to pressure to go along with others.¹⁹⁴ Indeed, under military law, the

¹⁹³ While the secret ballot procedure was devised to protect military jurors from the pressure of officers senior to them in rank, *see supra* note 126, a concern without direct parallel in civilian life, our common experience suggests that peer pressure, especially inflicted by a group, is a frequent and universal phenomena. *See supra* note 158 (citing numerous cases in which coercion by other jurors was alleged).

¹⁹⁴ *United States v. Martinez*, 17 M.J. 916, 919 (N-M.C.M.R. 1984) (saying that a secret

obligation of the members to use the secret written ballot to determine the verdict as to guilt or innocence for each particular charged offense is considered a substantial safeguard for the accused.¹⁹⁵ If the jury's discussions convince a military juror that the majority position is more sensible, she may join it. If not, she may continue to try to persuade some of the other jurors to adopt her viewpoint. If the psychological pressure on her to join the majority increases to an uncomfortable level, she may defuse it by decreasing the intensity of her dissenting expression or even by pretending to go along with the others, knowing that she can keep her conscience clear by ultimately voting as she believes she should, safe from the others' scrutiny.¹⁹⁶ In short, the military juror knows that in the final analysis, no one else can prove how she actually voted, since each juror casts her vote by secret written ballot. The final expression of position that decides the verdict is a private expression of conscience by each juror, made without risk of ridicule or pressure from the other jurors, and this confidentiality reduces the likelihood that any juror will be stampeded by pressure from others on the jury.¹⁹⁷

The secret ballot approach used by courts-martial does not discourage the jurors from participating in an open, collegial examination of the evidence and all issues that face the jury. Before the jury retires to deliberate, the judge instructs the military jury that its members have a duty to engage in full and free discussion of the evidence.¹⁹⁸ Depending on the complexity of the evidence, it is not unusual to see a military jury deliberate for hours, asking through the bailiff that the judge permit them to send out for a pizza so that they can continue. Sometimes, they will indicate to the military judge that they anticipate needing considerable time for their deliberations and ask to recess for a meal before continuing. In short, my experience was that the military jury very seldom rushed to quickly take a

written ballot permits a member to vote his conscience); *United States v. Chaplin*, 8 M.J. 621, 627 (N.C.M.R. 1979).

¹⁹⁵ *United States v. Boland*, 20 C.M.A. 83 (1970). Likewise, the members are required to use the secret written ballot to determine whether to adopt a proposed sentence. *United States v. Greene*, 41 M.J. 57, 58 (C.M.A. 1994). In both situations, the rationale behind the secret written ballot rule is to prevent the unlawful use of superiority in rank to influence the vote of junior members. *Id.*

¹⁹⁶ *Martinez*, 17 M.J. at 919 (noting that a secret written ballot permits a member to vote his conscience, even if he previously agreed to a contrary position during the oral deliberative process).

¹⁹⁷ *Chaplin*, 8 M.J. at 627 (finding that military law emphasizes the secret written ballot as "a proven preservative of the independence of military members as fact-finders and sentencing bodies[, with s]ecrecy insulat[ing them] from pressures, whether by seniors, juniors or peers" during and after trial).

¹⁹⁸ MILITARY JUDGES' BENCHBOOK, *supra* note 66, ¶ 2-5-14.

straw vote, determine the majority position, and then seal it with a quick secret ballot.

Coupled with a provision that *some* form of verdict (guilty or not guilty) *will* result from the collective (albeit not necessarily unanimous) decision of the jury,¹⁹⁹ the secret ballot encourages a dissenter to continue reasoning with other jurors, because a single juror's shift of position may change the verdict without the need to convert all other jurors to the same position. The secret ballot encourages jurors, even if ostensibly outnumbered in the open discussion, to continue to regard their own votes as crucial; voting in secret keeps alive the hope by the minority that vigorous advocacy of its perspective may eventually result in another juror privately changing his position, so that the final outcome can be changed. At worst, if the majority remains unmoved despite the dissenter's explanation of her reasoning, the dissenter is outvoted without having had to compromise her own conscientiously held position.

The ability of some meaningful fraction to block conviction (whether one-third, one-quarter, or one-sixth of the twelve jurors), while preserving the confidentiality of their conscientiously held view that the evidence does not adequately prove guilt, is a more meaningful safeguard against improper conviction than the unanimous verdict practice now used. One can only speculate how often a so-called "unanimous jury" decision to convict or to acquit a defendant is merely the result of nine, ten, or eleven jurors finally wearing down, but not convincing, a few holdouts or one holdout who cannot withstand the pressure to end the deliberations by agreeing. If the majority succeeds in pressuring, but never persuading, the dissenters to jettison their reservations so that the jury can reach a unanimous final decision, that outcome does not further the goals of a rational criminal justice system. By contrast, the military practice protects each juror from the dilemma where she must either compromise her personal, conscientious evaluation of the case or simply pass the buck to another set of jurors by continuing a deadlock, unable to reach unanimity. Further, when the community knows that the actual votes on the verdict were cast confidentially, it adds to the sense that the jury's verdict represents the aggregate of the conscientious views of its members and enhances the legitimacy of that verdict.

The practice of requiring the jurors to finalize their verdict by a secret ballot procedure, when used in conjunction with a procedure that allows a substantial majority of the jurors to convict but that also provides for acquittal when a significant number of jurors is not sufficiently convinced

¹⁹⁹ See *supra* notes 127-131 and accompanying text.

of guilt, will increase public confidence that the verdict was the product of conscientious evaluation of the evidence and true consensus of the jurors, rather than the result of intimidation or pressure within the jury.

IV. CONCLUSION

Overwhelmingly, state criminal systems still require the traditional unanimous verdict in order to find a defendant guilty or to exonerate him, although the Supreme Court has found no constitutional impediment to a state using a super-majority verdict by a jury consisting of twelve persons. In contrast to the typical state verdict procedure, the modern court-martial practice for the past three decades shows that reliable verdicts can be achieved by a super-majority of the jury. The traditional state process by which the jury reaches a “unanimous” verdict suffers from the real danger that such “unanimity” may actually result from psychological pressure on holdout jurors that overcomes their honest individual misgivings about the verdict, rather than by persuasion of all jurors during consensus-building deliberations. The military jury uses a unique procedure that avoids that danger; after military jurors deliberate together, the jurors cast their individual votes of guilty or not guilty using a secret written ballot to determine the members’ collective verdict. Supreme Court decisions affirming convictions reached by a super-majority of a state twelve-person jury show that the states have the constitutional latitude to adopt the military verdict approach. If the three unusual features of military jury practice (permitting a non-unanimous verdict, providing for a default acquittal, and requiring secret balloting) are adopted for use in state criminal trials, those trials are likely to achieve verdicts that more accurately reflect the conscientious views of the jurors than do the present so-called unanimous verdicts. Additionally, adoption of the court-martial verdict practice will eliminate the potential for a hung jury because a jury following the military procedure will reach a not guilty verdict for any allegation whenever the balloting by the jurors does not result in enough guilty votes to meet the requisite threshold for conviction. Such a procedure, unlike the present practice in state trials (where no verdict to acquit can be reached without unanimity), will promote the public interest in timely resolution of criminal allegations and will avoid the unfairness of continued jeopardy endured by an accused facing re-trial after jury deadlock.

