THE POSITIVE AND NORMATIVE PUZZLE OF DECISION RULES FOR JURIES: THE EXAMPLE OF DECISION RULES FOR CIVIL LITIGATION IN STATE COURTS

*Warren F. Schwartz**

I. INTRODUCTION

All of the decision rules for juries in state courts, deciding civil cases, are what may be characterized as "two way" rules. Whatever consensus is required to secure a favorable verdict applies to all parties to the litigation. The governing decision rule varies from 2/3 in three states,[1] to a supermajority of 5/6[2] or 3/4[3] in a majority of states, to unanimity in a minority of states.[4] Thus, in the usual twelve person jury, in the various states, from eight to twelve jurors must concur for a verdict to be returned. If neither side is supported by a sufficient number of jurors to satisfy the decision rule, the jury "hangs": No verdict is rendered and the case may be retried one or more times.

This paper addresses two interrelated questions: 1) What is the normative theory that does (or should) determine the choice of a decision rule; and 2) How do jurors behave when their sincere individual preferences are so divided that the decision rule cannot be satisfied if each juror votes in accordance with her view as to what outcome is the correct one?

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* Emeritus Professor of Law, Georgetown University Law Center. I wish to acknowledge my great intellectual debt to Edward P. Schwartz, my son and sometimes collaborator. The theory employed in this paper was developed in a series of articles we co-authored, analyzing decision-making by juries in criminal cases. Since he was my mentor in social choice theory, I cannot entirely absolve him from responsibility for any errors I make in this paper. The papers are: *And So Say Some of Us . . . What to Do When Jurors Disagree*, 9 S. CAL. INTERDISC. L.J. 429 (2000); *The Challenge of Peremptory Challenges*, 12 J.L. ECON. & ORG. 325 (1996); *Deciding Who Decides Who Dies: Capital Punishment as a Social Choice Problem*, 1 LEGAL THEORY 113 (1995); *Decisionmaking by Juries Under Unanimity and Supermajority Voting Rules*, 80 GEO. L.J. 775 (1992).

1. ME. REV. STAT. ANN. tit. 14, § 1354 (2005); MO. CONST. art. I, § 22(a) (applying only to courts not of record); MONT. CODE ANN. § 25-7-403 (2005).

2. *See, e.g.*, MASS. GEN. LAWS ch. 234, § 34A (2005).

3. *See, e.g.*, ARIZ. R. CIV. P. 49(a).

4. *See, e.g.*, IOWA CODE ANN. § 1.931(1) (West 2005). However, if the jury has deliberated for at least six hours, a verdict "may be rendered by all jurors, excepting one of the jurors." *Id.*

II. MAJORITIES, MINORITIES AND THE POWER TO PREVENT THE OTHER PARTY FROM WINNING

The basic structure of prevailing decision rules is difficult to explain. On first impression, the purpose of a decision rule would appear to be to distribute power between majority and minority factions. The more demanding the decision rule, the smaller the minority must be in order to prevent the majority from prevailing. The most demanding rule, unanimity, permits a single juror to block all of the remaining jurors from rendering a verdict. A simple majority rule, not employed in any state, would preclude a minority of any size from preventing the majority from prevailing.[5]

This scheme embodies two interrelated normative puzzles: 1) What is the theory which determines how large a minority should be to be assigned influence in the decision-making process; and 2) If a minority is sufficiently large, should it be empowered to prevail or only to prevent the other party from prevailing?

The actual outcome in the states, with respect to civil litigation, is uniformly to answer the second question by conferring only the power to block the other side from prevailing. The answer to the first question is unclear. The actual choice is to empower a minority as small as one, a minority of 3 or 4 and, rarely, a minority of at least 5.

III. THE POWER TO BLOCK OR THE POWER TO PREVAIL

In civil litigation, if the power to prevail were conferred on a minority faction, it would be necessary to decide which side would have the burden of satisfying the decision rule or having the other party prevail. Although, in general, the attitude in civil litigation is thought to be essentially neutral, various provisions do confer procedural advantages on one side or the other. Burden of proof, presumptions and obligations to reimburse a winning plaintiff's litigation costs are all means of favoring one side or the other. However, empowering a party with only minority support to prevail would represent an unprecedented and extreme deviation from a posture of neutrality. I cannot imagine a class of cases in which such a course would be desirable. Nor do I believe that any legislature would empower a minority of jurors to return a verdict. It seems inescapable, then, that if minority sentiment on the

5. For some reason that historians have been unable to unearth, the Anglo-American jury has an even number of members: traditionally twelve, sometimes six. A simple majority decision cannot be used for a decision-making body with an even number of members. The size of the jury could, of course, be changed to an uneven number. No state employs a decision rule requiring the concurrence of seven of twelve jurors.

jury is to be assigned influence in the decision-making process, it must be done by a means other than empowering the minority to prevail.

IV. THE POWER OF THE MINORITY TO PREVENT THE MAJORITY FROM PREVAILING

Current legal rules provide no answer to the question of what result should be reached when neither side commands the support required to satisfy the decision rule. If the jury hangs (a possibility under all existing decision rules) it is as if nothing has been decided. The only way an authoritative outcome can be achieved is if the decision rule *is* satisfied in a subsequent trial. But, if the first jury hangs, there is a strong likelihood that subsequent juries will also hang. Moreover, it is possible that the first jury, which hangs truly represents "a fair cross section of the population,"[6] and the second jury, which does render a verdict, is biased in one direction or the other as the result of a sampling error. Put more generally, when a jury hangs, this may be a true indication that it is very uncertain as to what is the "correct" outcome.

I confidently conjecture that there are a substantial number of cases in which, if each juror voted sincerely, based on her belief as to what the correct outcome was, the result would be that the jury would hang and could not return a verdict. In many of these cases, however, rather than hanging, the jury returns a compromise verdict. The formal requirement for a compromise verdict is that a sufficient number of jurors to satisfy the decision rule prefer the outcome to hanging. Viewed from this perspective, the decision rule defines the minimum size of a minority faction that a majority faction must induce to support a particular outcome in order for a verdict to be rendered. The compromise outcome will not be the one most preferred by either the majority or minority faction. However, both majority and minority prefer the compromise outcome to failing to reach a verdict.

This analysis brings us to the heart of the matter. Do we want a jury substantially divided as to what outcome should be reached to hang or fashion a compromise verdict? As far as I am aware, no court or legislature has articulated a position as to whether jury compromise is a good or bad thing. It certainly reduces the instances of juries hanging. But the result is not necessarily the one most favored either by the majority or minority. Compromise, moreover, requires some jurors to vote contrary to their true belief with respect to various issues in the case.

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6. *See, e.g.*, DEL. CODE ANN. tit. 10, § 4501 (2005).

To illuminate this difficult issue I pose the following hypothetical: Suppose that the decision rule requires the concurrence of nine jurors. Eight jurors believe that the defendant should be held liable. Four jurors believe that the defendant should not be held liable. Consequently, if all jurors vote sincerely, a verdict cannot be rendered.

Assume further, however, that the eight jurors who favor imposing liability wish to award higher damages than do the four jurors who oppose imposing liability. Both majority and minority may, however, prefer to avoid hanging by imposing liability and awarding damages smaller than those preferred by the majority but larger than those preferred by the minority. For this compromise to be implemented, members of the minority faction must vote insincerely to impose liability and award damages larger than they believe should be awarded and the majority faction must vote insincerely to award damages smaller than they believe should be awarded.

V. TO COMPROMISE OR NOT TO COMPROMISE

It is not clear the extent to which the variety of decision rules reflects a difference in attitude toward compromise verdicts. It is true that all changes in decision rules have been in the direction of less demanding rules, most significantly the abandonment of unanimity. It is also true that the more demanding the decision rule, the more often that compromise will be required for a verdict to be rendered. Thus, the direction of legislative change should result in fewer compromise verdicts.

On the other hand, several states have retained the unanimity rule and others a rule requiring a majority of ten. The use of a unanimity rule or a demanding supermajority rule does appear designed to assign influence to minority sentiment. The crucial question, which remains unclear, is whether that influence is intended to be exercised by a minority that uses its power to block the majority in order to force a compromise outcome. This analysis takes us to the heart of the matter. Is there something to be said for compromise verdicts beyond their practical value in reducing the number of instances in which a jury fails to render a verdict?

The case for the compromise verdict, ultimately, must rest on the belief that minority sentiment should have some influence on the outcome. As discussed above, that influence cannot consist of the minority being empowered to prevail. In fact, the minority does sometimes exercise influence under current law by threatening to prevent the majority from rendering a verdict.

This may be justified as a very crude way to divide power between the majority and minority. Perhaps, however, it is better than a less demanding rule (a simple majority is the least demanding rule) which empowers a majority completely to disregard substantial minority sentiment. There are, after all, "close" cases with respect to which reasonable persons can disagree as to what outcome is the "correct" one. Indeed, it may be that there is no "correct" outcome but only different assessments of essentially indeterminate legal or factual issues. It is certainly true that there are many cases in which verdicts either imposing liability or exonerating the defendant would be affirmed on appeal. Similarly, a wide range of damage awards would be accepted by appellate courts.

If you will, the apparent assumption of the legal system is that outcomes are either correct or incorrect. When, however, there is substantial disagreement among members of the jury, there is a significant possibility that the outcome favored by the minority is "correct" or that the "correct" result is indeterminate.

Admittedly, awarding smaller damages when a minority believes that the defendant should not be held liable represents a substantial departure from prevailing legal tradition. However, that is what, in fact, is probably often happening under current rules. It is a substantially imperfect response to the uncertainties which plague the litigation process. I can only wonder whether it is better than frequent hung juries, reflecting sincere disagreement among the members of the jury or empowering majorities to disregard the views of substantial minorities.