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THE COMMUNITARIAN FUNCTION OF COURT-MARTIAL MEMBERS

A Thesis Presented to
The Judge Advocate General's School
United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

By Major Robin L. Johnson
United States Army

45th JUDGE ADVOCATE OFFICER GRADUATE COURSE
April 1997

THE COMMUNITARIAN FUNCTION* OF COURT-MARTIAL MEMBERS

Major Robin L. Johnson**

* The term "communitarian function" of the jury, and the inspiration for this paper, comes from George C. Harris' article, *The Communitarian Function of the Criminal Jury Trial and the Rights of the Accused*, 74 NEB. L. REV. 804 (1995).

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THE COMMUNITARIAN FUNCTION OF COURTS-MARTIAL MEMBERS

ABSTRACT: The Sixth Amendment to the Constitution guarantees the right to an impartial jury in all criminal prosecutions. In 1930, the Supreme Court held a defendant in a criminal case could waive his right to a jury trial with the consent of the government and the approval of the court. Federal Rule of Criminal Procedure 23 codified this holding.

By requiring the government consent to a waiver of trial by jury, the Supreme Court implicitly recognized a state or public interest in jury trials in criminal cases, distinct from the interests of the defendant. Over time, the Court, and lower courts, have variously articulated the bases and nature of the public interests in jury trials. These interests have been called the "communitarian functions" of jury trials. These functions include providing for community participation in the criminal justice system, ensuring accurate fact-finding, educating the citizenry, providing for a community affirmation of the system, and providing a vehicle for the vindication of community standards and values.

These communitarian functions of trials by jury apply equally to trials by courts-martial composed of members. Unlike the Federal rule, which gives the government a voice in the determination whether to forego a jury trial, the Uniform Code of Military Justice (UCMJ) and the Rules for Courts-Martial (RCM) and caselaw interpreting and implementing the UCMJ, afford the government is silenced in the fundamental decision of trial forum.

I suggest the government's voice should be heard on the fundamental issue of whether the community will have the important opportunity to participate in the administration of the military justice system as members of courts-martial. To realize this voice, I propose a change to Article 16 of the UCMJ and RCM 903, implementing that UCMJ provision, that will require the convening authority's consent to waiver of a trial by court-martial members.

THE COMMUNITARIAN FUNCTION OF COURTS-MARTIAL MEMBERS

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I. INTRODUCTION.

> The discipline and reputation of the Army are deeply involved in the manner in which military courts are conducted and justice administered. The duties, therefore, that devolve on officers appointed to sit as members of courts-martial are of the utmost grave and important character. That these duties may be discharged with justice and propriety it is incumbent on all officers to apply themselves diligently to the acquirement of a competent knowledge of military law, to make themselves perfectly acquainted with all orders and regulations, and with the practice of military courts.[1]

"There is a grave danger that the line Army will lose respect for the system if it becomes an arcane tool of the legal profession."[2]

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[1] Army Regulations, 1835, Article XXXV, para. 1, *reprinted in* LOUIS F. ALYEA, MILITARY JUSTICE UNDER THE 1948 AMENDED ARTICLES OF WAR, xv (Oceana Publications, 1949).

[2] This is an anonymous quotation from a general court-martial convening authority's response to a survey distributed by Major James Kevin Lovejoy in connection with his thesis [hereinafter, Lovejoy Survey], which was ultimately published as *Abolition of Court Member Sentencing in the Military*, 142 MIL. L. REV. 1 (1994) [hereinafter, Lovejoy]. Among others, surveys were distributed to, and responses received from, general court-martial convening authorities and attendees of the Senior Officer Legal Orientation Course. The survey and the responses focused on the impact of member versus judge alone sentencing, but many of the opinions expressed apply to courts-martial forums generally. Copies of the survey and responses are on file in the library of The Judge Advocate General's School, United States Army.

As early as 1835, trials by courts-martial composed of members were recognized as serving a valuable function in the military society. Commanders today recognize the value of trials by court-martial members as serving a valuable function in today's Army. However, as a result of the declining number of courts-martial, and the fact that approximately two-thirds of all general courts-martial are tried by military judge alone without members,[3] commanders and soldiers are becoming increasingly removed from the administration of the military justice system. In addition, many commanders believe that military judges are "insulated" from and out of touch with the community in which they serve.[4] A criminal justice system should reflect the community standards as to what behavior should be punished and deterred, and the punishments appropriate as sanction for that behavior.[5] The best way to achieve that goal is to permit community

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[3] The number of general courts-martial tried and the number of those cases tried before military judge alone are as follows (reported in fiscal years):

FY	General Courts-Martial	Judge Alone	Percent Tried by Judge Alone
1992	1168	782	66.6%
1993	915	598	65.3%
1994	843	544	64.5%
1995	825	545	66.0%
1996	792	518	65.3%

United States Army Legal Services Agency (USALSA) Report, THE ARMY LAWYER, March 1997, at 24. Similar statistics were compiled by Major Lovejoy, *Court Member Sentencing supra* note 2 at app. A:

Year	General Courts-Martial	Judge Alone	Percent Tried by Judge Alone
1988	1629	1103	67.0%
1989	1585	1011	63.8%
1990	1451	995	68.6%
1991	1173	782	67.5%
1992	1168	782	66.6%

[4] *See infra* notes 376 and 377.

[5] General William C. Westmoreland and Major General George S. Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J.L. & PUB. POL'Y. 1, 3 (1980) [hereinafter, Westmoreland and Prugh].

participation in the process, and the most effective, and possibly the only, method to achieve this is by trial by members.

Service on a jury in the civilian world or as a member of a court-martial in the military is an invaluable, and likely the only, opportunity for many to participate in the criminal justice system.[6] Under the *Federal Rules of Criminal Procedure*, in order for the defendant to waive his right to a jury trial, thereby exempting community participation from his particular case, the government must consent and the judge must approve the waiver.[7] Under the military rules, an accused can waive his right to a trial by members with only the approval of the military judge; the government, the representative of the community in the proceeding, has no voice in the matter.[8]

This paper will propose a change to the Uniform Code of Military Justice (UCMJ) and the relevant Rule for Court-Martial (RCM) that will bring the military procedure in line with the Federal process. I begin by examining the Federal rule and its relation to the constitutional right to trial by jury. I will then examine the historical and current purposes and function of the jury. Finally, I will examine the military rule

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[6] ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA, 285 (Henry Reeve, trans., Phillips Bradley, ed., Vintage Books 12th ed. 1990) (1838).

[7] FED. R. CRIM. P. 23(a).

[8] UCMJ art. 16 (1983); MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 903 (1984) [hereinafter MCM].

regarding trials by judge alone, and, after an application of the recognized purposes of juries to courts-martial, propose a change to the UCMJ that will further these purposes.

II. FEDERAL RULE OF CRIMINAL PROCEDURE 23.

Approximately 150 years after the ratification of the Sixth Amendment right to trial by jury in "all criminal prosecutions", the Supreme Court in 1930 held that a defendant in a criminal case could waive the right to a jury trial.[9] Not only did it take 150 years for the Supreme Court to permit this waiver, it was not permitted unconditionally. In order to effect a waiver, the Court, in *United States v. Patton*,[10] held that the government counsel must consent and the trial court must approve the waiver.[11] The conditions placed on the effectiveness of a request for waiver could be a result of the importance the jury holds in our judicial process (as will be discussed below).

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[9] Patton v. United States, 281 U.S. 276 (1930). In *Patton*, the defendants were charged with conspiracy to bribe Federal prohibition agents. They consented to continuing their trial after one of the twelve jurors withdrew due to illness. On appeal, they asserted that a jury of fewer than twelve violated their Sixth Amendment right to a trial by jury. The Court held that one accused of a serious crime could voluntarily waive the right to a trial by jury with the consent of the government counsel and approval of the court.

The Court's decision in *Patton* was based on the Sixth Amendment's guarantee to a trial by jury in all criminal prosecutions. At least one commentator has contended that under Article III of the Constitution, a defendant should not be able to waive a jury trial under any circumstances. Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131 (1991). Professor Amar points to the language of Article III, section 2, cl. 3, that states " The Trials of all Crimes, except in Cases of Impeachment, shall be by Jury. . ." He asserts that this mandate is not usurped by the subsequent amendment. He argues (and contends the legislative history of the Constitution and the Bill of Rights support his argument) that the purpose of the Sixth Amendment jury language was to ensure an impartial jury *of the state and district wherein the crime was committed* - that the purpose of the Sixth Amendment was to protect vicarage, not forum. He contends that only such a reading avoids creating a conflict between the mandate ("shall") of Article III and the subsequent construction of the Sixth Amendment that permits waiver of the rights contained therein (venue, speedy trial, confrontation, etc.). *Id.* at 1196-1197.

[10] 281 U.S. 276 (1930).

[11] *Id.* at 312.

Federal Rule of Criminal Procedure 23 codified the holding in *Patton* in 1946.[12] The constitutionality of Rule 23 was upheld in *Singer v. United States.*[13] Mr. Singer was charged and convicted of several Federal mail fraud violations. On appeal, he asserted that the Constitution gave the defendants in criminal cases the right to waive a jury trial whenever they believed a waiver to be in their best interests, regardless of government consent and the court approval.[14] He grounded his assertion on three bases: first, he argued that because the right to a jury is for the protection of the defendant, the defendant can necessarily waive it; second, that because a defendant can waive other constitutionally protected rights without government consent, he should similarly be able to waive the right to a jury without government consent; and finally, that the constitutional right to a fair trial gives the defendant the right to waive a jury trial if he believes it necessary to protect himself against potential jury prejudice.[15] The Court rejected all the defendant's arguments.

First, the Court examined the history of the Sixth Amendment and found that the right to a jury was intended as a protection for the defendant and that at the time of its

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[12] FED. R. CRIM. P. 23(a) reads "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."

[13] 380 U.S. 24 (1965).

[14] *Id.* at 25.

[15] *Id.* at 26.

framing, there was no general recognition of a right to be tried by judge alone.[16] The Court then found that, contrary to the defendant's assertions, the guarantee by the Constitution of some rights does not ordinarily guarantee the converse of those rights.[17] The Court held that "the ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite."[18] The Court analogized the right to a jury trial to the right to a public trial, which has never been held to equate to a right to a private trial, and to the right to confront the witnesses against an accused, which has never been seriously contended to equate to a right to compel the government to try its case by stipulation.[19]

The Court then addressed the defendant's contention that compelling him to be tried by a jury violated his right to a fair trial and his right to due process. First, the Court recognized that the Constitution established the adversarial process as the proper mode to

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[16] *Id.* at 31.

[17] *Id.* at 34.

[18] *Id.*

[19] *Singer*, 380 U.S. at 35. *But see* Old Chief v. United States, 65 U.S.L.W. 4049 (1997), in which the Court, split 5-4, held that the government could be required to stipulate to the defendant's prior felony conviction in a subsequent case in which the defendant was charged with violating a Federal statute prohibiting possession of a firearm by anyone with a prior felony conviction. In that case, the prosecutor introduced the judgment record for the prior conviction that contained the name and nature of the prior offense (assault causing severe bodily harm). The defendant attempted to stipulate to the fact of the conviction to avoid informing the jury of the nature of the prior offense. The Supreme Court held that the trial court abused its discretion in rejecting the defendant's offer to stipulate and admitting the full judgment record on the grounds that the judgment record unfairly prejudiced the defendant and that it could have "lured the jury into a sequence of bad character reasoning" in violation of Federal Rule of Evidence 403. *Id.* at ____. In a strongly worded dissent, Justice O'Connor cited the language in *Singer* and concluded that even if a defendant should make a tactical decision not to contest an element of an offense, the government would still bear the burden of proving that element beyond a reasonable doubt. Therefore, she reasoned, the government must be accorded "substantial leeway to submit evidence of its choosing to prove its case." *Id.* at ____ (O'Connor, J., dissenting).

determine the guilt of one accused of a criminal offense and that the government has a legitimate interest in cases being tried in a manner most likely to produce fair results.[20] There are safeguards built into our adversarial system that can shield a defendant from jury prejudice, such as the ability to voir dire and challenge venirepersons and the ability to change the venue of the trial.[21] The Court acknowledged that there may be some cases in which the passion and prejudice of public feeling may render obtaining an impartial jury impossible or unlikely, but that the defendant in *Singer* had failed to show such impossibility or unlikelihood.[22]

The Court in *Singer* thus left open whether, under some circumstances, the government's refusal to consent to a waiver would result in a defendant's losing his right to trial by an impartial jury. Since the decision in *Singer*, many courts have addressed the issue of whether, in specific cases, challenges to the government's refusal to consent to a judge alone trial have risen to constitutional magnitude.[23] Only in a handful of cases have courts found grounds asserted by defendants sufficient to mandate a non-jury trial over the objection of the government. These grounds include (1) the denial of a judge

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[20] *Singer*, 380 U.S. at 36.

[21] *Id.* at 35-36.

[22] *Id.* at 37-38.

[23] The United States District Court of New Jersey summarized many cases addressing this issue in its opinion in *United States v. Braunstein*, 474 F. Supp. 1, 15-17 (D.N.J. 1978).

alone trial interferes with a constitutionally protected right;[24] (2) the case is so complex that a jury would be unable to provide a fair trial;[25] and (3) there is such potential prejudice against a given defendant that he will not receive a fair trial by jury.[26]

A. *Interference with a Constitutional Right.*

In *United States v. Lewis*,[27] the District Court held that the defendants' free exercise of religion guaranteed by the First Amendment was impermissibly infringed upon by the government's refusal to consent to waiver of a jury trial. The defendants' religious beliefs forbade them from submitting to the judgment of lay people. As a result they either had to violate their religious convictions and submit to trial by jury or forfeit other constitutional rights by pleading guilty or by refusing to participate in their trial.[28] The District Court held that the government may interfere with the free exercise of religion without running afoul of the First Amendment if there is a compelling governmental interest in doing so.[29] It then held the government's interest in community

[24] United States v. Lewis, 638 F. Supp. 573 (W.D. Mich. 1986).

[25] United States v. Panteleakis, 422 F. Supp. 247 (D.R.I. 1976); United States v. Braunstein, 474 F. Supp. 1 (D.N.J. 1978).

[26] United States v. Harris, 314 F. Supp. 437 (D.Minn. 1970).

[27] 638 F. Supp. 573 (W.D. Mich. 1986).

[28] *Id.* at 575.

[29] *Id.* at 578, citing *United States v. Lee*, 455 U.S. 252, 257-258 (1982).

input into criminal prosecutions through trial by jury to be legitimate and important.[30] However, the court found that even though the government's interest in a jury trial was legitimate and important, it was not an overriding or compelling interest sufficient to justify burdening the defendants' First Amendment religious freedoms.[31]

In *United States v. Moon*,[32] the government's failure to consent to a waiver of a jury trial was challenged as a violation of the constitutionally protected right of free speech. In that case, the defendant requested a judge alone trial and the government counsel opposed the request. Prior to trial, the defendant had made a public speech in which he alleged his prosecution was based on his race and his status as the head of the Unification Church. The government counsel believed his speech, and subsequent full page advertisement in the *New York Times*, challenged the "integrity and motives" of the prosecution.[33] The prosecutor argued that based on the defendant's public allegations, a single fact-finder would be placed in an "untenable position" and that there was an overriding public interest in a jury trial to ensure the fact, and the appearance, of a fair

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[30] *Id.* at 580. The *Lewis* court recognized the government interests in trials by jury that were argued by the prosecution in that case. The prosecution argued the government had an interest in a fair and impartial judicial system, both in practice and appearance, and that as litigant in the case, the government possessed a compelling interest in a full, fair, and public trial. *Id.* at 579. The *Lewis* court also held "a jury trial is the most just form of adjudication in criminal prosecutions." *Id.* at 580, citing *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

[31] *Id.* at 580-581.

[32] 718 F.2d. 1210 (1983).

[33] *Id.* at 1217.

trial.[34] The defense contended that the government was "punishing" the defendant for exercising his right to free speech by depriving him of the benefit of a non-jury trial based on his exercise of that right.[35] The Circuit Court held that the defendant had failed to present any facts that the prosecutor acted to "punish" the defendant for his speech and held that the defendant's First Amendment right to free speech was not impeded and that a bench trial was not warranted in his case.[36]

It is not often that trial by jury, the constitutionally preferred method of trial, will conflict with other enumerated rights protected by the Constitution. More often, a waiver of a jury trial will be pressed as necessary to prevent a violation of the more inexact rights of due process or to a fair trial.

B. *Complexity of the Case.*

Some defendants have argued that due to the complexities of their particularly cases, a jury of lay persons would be unable to understand the evidence and issues and would, therefore, be incompetent to provide a fair trial.[37] The leading cases in this area

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[34] *Id.*

[35] *Id.*

[36] *Id.* at 1218. The Circuit Court cited *Perry v. Sindermann*, 408 U.S. 593 (1972), in which the Supreme Court held that there must be evidence of a "genuine dispute" of whether the state has taken action against an individual as a reprisal for the exercise of a constitutionally protected right to give rise to a constitutional analysis. *Sindermann*, 408 U.S. at 598.

[37] *Supra* note 25.

are *United States v. Panteleakis*[38] and *United States v. Braunstein.*[39] Both these cases involved multiple defendants and multiple Medicaid, tax fraud, and conspiracy, (*Braunstein*) and Medicare (*Panteleakis*) charges. In *Panteleakis*, the District Court held that although the facts of a case may be complex, mere complexity alone is not sufficient grounds to "circumvent a jury trial."[40] That court went on to find, however, that the facts of that case warranted a bench trial because there were multiple defendants and multiple counts in the indictment that presented complicated issues of law and accounting; that some evidence would be admissible against one defendant but not another and a jury was likely to be confused by and unable to apply these evidentiary rulings; that a jury trial would likely double the length of the trial, working undue hardship on the defendants; and that there was substantial prejudicial pretrial publicity in the case that would make impaneling an impartial jury impossible.[41] On these grounds, the *Panteleakis* court held the defendants could not receive a fair trial from a jury and that a bench trial over the government's objection was required.

The *Braunstein* court was more pointed in its finding that a jury was so inferior to the judge that only a bench trial would protect the defendants' right to a fair trial in that

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[38] 422 F. Supp. 247 (D.R.I. 1976).

[39] 474 F. Supp. 1 (D.N.J. 1978).

[40] *Panteleakis*, 422 F. Supp. at 249.

[41] *Id.*

case. That court was "convinced that a jury of laymen could not be expected to master the intricacies and complications of fact and law sufficiently to provide a fair trial,"[42] and held that the court itself "regularly masters the intricacies of complex statutes, regulations and contracts whose only resemblance to the national language is that the words are English words" and that "(the court) as a law giver and a fact finder, (was fully able) to perform the process of applying specific rules of accounting to specific facts."[43] Accordingly , the court held a waiver of a jury trial without the government's consent was mandated.

The defendant Reverend Moon also raised the issue of the complexity of the issues in his case as a basis to waive a jury trial.[44] Although his case involved two defendants and multiple charges of conspiracy, income tax evasion, obstruction of justice, submission of false statements, and perjury,[45] took six weeks to try,[46] and involved the introduction of hundreds of exhibits,[47] the Circuit Court held that the jury's task was not beyond its capacity and that the defendant received a fair trial.[48]

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[42] *Braunstein*, 474 F. Supp. at 14. The charges in Braunstein involved Medicaid fraud which meant that both Federal and state laws were involved as well as different accounting procedures for the state and Federal offenses. The case also involved income tax charges that would require the use of additional accounting experts and principles. There were also five defendants charged in the case, approximately 40 government witnesses, and a large volume of exhibits that included complicated cost studies and income tax returns.

[43] *Id.* at 18.

[44] *Moon*, 718 F.2d at 1218, note 1.

[45] *Id.* at 1216.

[46] *Id.* at 1218, note 1.

[47] *Id.*

The lack of cases that have found the complexity of the law and facts mandate a non-jury trial is an indication of the courts' confidence in the abilities of jurors and recognition of the importance of trials by jury to the administration of justice.

C. *Undue Prejudice to the Defendant.*

More frequently, the grounds for waiving a jury trial without the government's consent have been based on allegations that the defendant is subject to undue prejudice, either because of extensive adverse pretrial publicity or because there is some evidence that will be revealed at trial that will render the jury impermissibly biased against the defendant. In the *Moon* case the defendant contended that the public animosity against him and his church would render a fair trial impossible.[49] The Court summarily dismissed this contention by stating that this alleged biased could be resolved through voir dire, and noted that the record indicated that the jury selection process in the case did, in fact, result in a fair and unbiased jury.[50] A similar result was reached in *Thwing v. South Dakota*,[51] in which the Circuit Court held that the defendant failed to demonstrate

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[48] *Id.* at 1216.

[49] *Moon*, 718 F.2d at 1218.

[50] *Id.* The Circuit Court further noted that the jury selection in the case took seven days and involved the interrogation of 63 out of 200 venirepersons for the panel and another 17 for the six alternate positions.

[51] 470 F.2d 351 (8th Cir. 1972), *cert. denied*, 411 U.S. 973 (1973).

actual prejudice based on pretrial publicity.[52] The Circuit Court held that in some cases pretrial publicity is so pervasive that due process may require the judge to take corrective action to ensure a fair trial, but that a request for a bench trial based on adverse pretrial publicity does not automatically convert a guarantee of a fair trial into a right to a non-jury trial.[53]

In other cases in which defendants have challenged the government's failure to consent to waiver of a jury trial based on the alleged inability to impanel an unbiased jury because of undue prejudice to the defendant, the courts have been equally unwilling to mandate bench trials. For example, in *United States v. Ceja*,[54] the defendant contended that the district court erred in refusing to grant his request for a trial by judge alone, to which the government refused to consent.[55] Mr. Ceja, of Cuban nationality, based his request for waiver on the basis that the he would not receive a fair trial from the members of the impaneled jury who were of Puerto Rican nationality because of alleged Puerto Rican prejudice against Cubans.[56] In affirming Mr. Ceja's conviction, the Circuit Court

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[52] *Id.* at 353. The Circuit Court noted that the issue had been "exhaustively reviewed" by the district court and the South Dakota state courts and no prejudice was found.

[53] *Id.*

[54] 451 F.2d 399 (1st Cir. 1971).

[55] *Id.* at 400.

[56] *Id.*

reiterated the holding in *Singer* that trial by jury is the normal and preferred method of trial[57] and that there are adequate procedural safeguards in place to ensure fair trials.[58]

The courts have come to similar resolutions in cases in which defendants have alleged that evidence anticipated to come out during trial will cause the jury to be biased against the defendant and therefore are entitled to non-jury trials. For example, in *United States v. Kramer*,[59] a co-defendant wanted to waive a jury trial because he feared the potential effect that disclosure of a prior murder conviction would have on the jury if he chose to testify.[60] The Circuit Court found that this hypothetical prejudice did not rise to a level of a "compelling reason" to grant the waiver without the government's consent.[61] The District Court in *United States v. Harris*[62] adopted the "compelling reason" standard of *Kramer* to deny a request for a waiver of a jury without the government's consent in that case. In *Harris*, the defendant was charged with bank robbery and intended to raise an insanity defense, a question of fact for the factfinder.[63] The defendant requested to waive a jury trial because he believed that if he presented an insanity defense, the jury

[57] *Id.* at 402, referring to *Singer v. United States*, 380 U.S. 24 (1965).

[58] *Id.*

[59] 355 F.2d 891 (7th Cir. 1966).

[60] *Id.* at 899.

[61] *Id.*

[62] 314 F. Supp. 437 (D.Minn 1970).

[63] *Id.* at 439.

would learn of his long criminal record, his 20-year drug addition, a prior conviction for manslaughter, and the fact that the defendant was wanted in several other states for bank robbery.[64] The District Court found that voir dire and instructions to the jury could cure any undue prejudice disclosure of the defendant's past might have on the jury and, relying on *Kramer*, found that the defendant did not demonstrate a compelling reason to grant the waiver over the government's objection.[65] As that court stated, "(t)he court has great confidence in the integrity, good judgment and common sense of jurors and their ability to winnow truth from the chaff and not to be misled by claimed prejudicial facts."[66]

Not surprisingly, there are few reported cases dealing with waivers of jury trials based on the inability to obtain a fair trial from a jury; the inability to obtain a fair trial is more appropriately a basis for dismissal, not a change in forum.[67]

A criticism of the government consent requirement has been that it denies a defendant a "fundamental" right that hinders his ability to secure a fair trial.[68] This

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[64] *Id.* at 437.

[65] *Id.* at 439.

[66] *Id.*

[67] Jon Fieldman, *Comment: Singer v. United States and the Misapprehended Source of the Nonconsensual Bench Trial*, 51 U. Chi. L. Rev. 222, 223 (1984) [hereinafter, Fieldman].

[68] Susan Bandes, *Taking Some Rights Too Seriously: The State's Right to a Fair Trial*, 60 S. CAL. L. REV. 1019 (1987) [hereinafter, Bandes]; Fred Anthony DeCicco, Note: *Waiver of Jury Trials in Federal Criminal Cases: A Reassessment of the "Prosecutorial Veto"*, 51 FORDHAM L. R.. 1091, 1095 (1983) [hereinafter, DeCicco].

criticism fails because it fails to distinguish a defendant's right to an impartial jury under the Sixth Amendment from the defendant's due process right to a fair and impartial trial.[69] The Sixth Amendment's guarantee of an impartial jury cannot be fulfilled by a trial by judge alone, therefore the Sixth Amendment cannot be the source of judge alone trials.[70] Therefore, one must look to the due process clause as the source for judge alone trials.[71] Critics also tend to take the erroneous position that the state has no right or interest in a trial by jury,[72] assume that the prosecutorial "veto" is absolute,[73] or argue that the prosecutor will exercise his veto in a manner that is inconsistent with the public interest.[74]

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[69] Fieldman, *supra* note 67 at 226, citing, *inter alia*, *United States v. Agurs*, 427 U.S. 97, 107 (1976), in which the Court held that a defendant is guaranteed a fair trial by the Fifth Amendment Due Process Clause.

[70] *Id.*

[71] *Id.*

[72] Bandes, *supra* note 68 at 1022-1025. Professor Bandes' position on this issue is "the Constitution makes no mention of the state's right to a fair or impartial trial. " Id. at 1023. She contends that those courts that have articulated such a state interest have done so on "unsupported assumptions."

[73] DeCicco, *supra* note 68 at 1103. Mr. DeCicco states "although the prosecutor may have a legitimate interest in having cases tried before a jury, this interest does not justify granting him an absolute veto power." This ignores the fact that courts have not read Rule 23 to be an absolute veto power, see *supra* notes 23 through 66 and accompanying text.

[74] *Id.* at 1105-1106. Mr. DeCicco contends that prosecutors' objections to bench trials will delay the disposition of cases and increase the costs of trials. He believes juries are "expensive, cumbersome, and time-wasting institutions." *Id.* at note 89, quoting Donnelly, *The Defendant's Right to Waive Jury Trial in Criminal Cases*, 9 U. FLA. L. REV. 247, 248 (1956).

One attack on the requirement of prosecutorial consent is based on the mistaken notion that the state does not have an interest in criminal cases being tried before a jury.[75] The public interest, represented by the state in a criminal trial, will be discussed at length in Part III of this paper. An aspect of this argument deserving comment here is derived from the contention that the state's interest in a fair trial is solely derived from the defendant's interest in a fair one. If one accepts that the accused's interests are the state's only interests (which I do not), the issue then becomes whether, in an adversarial system, the government can represent the rights of the defendant.[76] Interestingly, from a military practitioner's point of view, a case relied upon to make this argument deals with the issue of bifurcated trials in capital cases. In *Lockhart v. McCree*,[77] the Court addressed the constitutionality of the result of the interaction between the Arkansas statute that provided for a bifurcated trial[78] in capital cases and its previous holding in *Witherspoon v. Illinois*,[79] which permitted the challenge for cause of prospective jurors in

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[75] *Supra* note 72.

[76] Bandes, *supra* note 68 at 1032.

[77] 476 U.S. 162 (1986). Professor Bandes relied on *Lockhart* to make this argument in her article. S*upra* note 68 at 1033.

[78] In *Lockhart*, the majority opinion refers to trials in which the guilt phase and the sentence phase are separated as "bifurcated trials." The majority uses the term "unitary trials" to refer to those in which the same jury determines guilt and sentence. The dissenting opinion is less clear in its use of these terms.

[79] 391 U.S. 510 (1968). In *Witherspoon*, the Court overturned a state sentence to death of a defendant at whose trial the government had excluded all venirepersons who expressed any scruples against the death penalty. The Court held that that practice violated the defendant's constitutional rights by creating a "tribunal organized to return a verdict of death." *Witherspoon*, 391 U.S. at 521. In a footnote in that opinion, the Court stated that the only prospective jurors who could be excluded were those who could not put aside their personal beliefs regarding the death penalty and perform their duties as jurors in accordance with the law, as instructed by the judge, and their oaths as jurors. *Id.* at 522-523, note 21.

capital cases who could not, under any circumstances, vote for the imposition of the death penalty.[80] In *Lockhart*, the defendant contended that in dismissing the "Witherspoon-excludables" from the guilt phase of his trial he was denied his right to an impartial jury selected from a representative cross section of the community.[81] The court rejected this contention and held that the defendant had received a fair trial from an impartial jury.[82] The Court reiterated its definition of an impartial jury as consisting of nothing more that "jurors who will conscientiously apply the law and find the facts."[83]

One commentator has argued *Lockhart* stands for the proposition that the government cannot constitutionally represent the rights and interests of the accused.[84] This argument is based on language in the majority opinion in which the Court acknowledges the State's argument that in a system of unitary juries, there is the possibility that, during the sentence phase, a defendant may derive some benefit from a jury's "residual guilt" about the evidence presented during the guilt phase.[85] This language cannot seriously be stretched into a holding that the government is fulfilling some paternalistic act of protection of the defendant through a unitary bifurcated trial. It

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[80] *Lockhart*, 476 U.S. at 166.

[81] *Id.* at 167.

[82] *Id.* at 177.

[83] *Id.* at 178, quoting *Wainwright v. Witt*, 469 U.S. 412, 423 (1965).

[84] Bandes, *supra* note 68 at 1033.

[85] *Id.*, citing *Lockhart*, 476 U.S. at 181.

is one step closer to the absurd to then use this language as the basis of an argument that the Court in *Lockhart* was balancing the interest of the state in a unitary trial against the rights of the defendant to an impartial jury and that the state interest prevailed at the expense of the accused's right to a fair trial by an impartial jury.[86] In fact, the requirement for government consent to a bench trial is based on the fact that the government has an interest in having cases tried before "the tribunal the Constitution regards as the most likely to produce a fair result."[87]

The second attack on the government consent condition for waiver is that it "reduces the defendant's ability to waive his right to a jury trial."[88] This presupposes first that the *ability* to waive a jury trial equates to a *right* to waive a jury trial, and second, that waiving a jury trial may be necessary to ensure a fair trial. Both of these presuppositions are erroneous. First, as has been discussed, the Supreme Court has repeatedly held that "(t)he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite."[89]

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[86] Yet this is the argument made by Professor Bandes, *id.*, relying on Justice Marshall's dissent in the case. Justice Marshall's dissent is premised on his belief, rejected by the majority, that venireperons who are not Witherspoon excludables are more likely to acquit than those who are and their exclusion from the guilt phase of the trial deprives the defendant of "better odds against conviction." *Lockhart*, 476 U.S. at 205 (Marshall, J. dissenting), quoting Finch & Ferraro, *The Empirical Challenge to Death Qualified Juries: On Further Examination*, 65 NEB. L. REV. 21, 69 (1986). Justice Marshall seems to be implying that the defendant not only has the right to an impartial jury, but to a jury that is partial toward acquittal.

[87] *Singer*, 380 U.S. at 36.

[88] DeCicco, *supra* note 68 at 1101.

[89] *Singer*, 380 U.S. at 34-35 (holding the conditional ability to waive a jury does not create the right to a bench trial). The *Singer* Court cited a number of cases with similar holdings regarding other procedural rights of a defendant discussed *supra*, note 19 and accompanying text.

Furthermore, the second assumption, that a bench trial may be necessary to obtain a fair trial is likewise mistaken.[90] First, it ignores a defendant's absolute right to a trial by an impartial jury and that upon a showing that an impartial jury cannot be had, the remedy is dismissal.[91] It also fails to recognize several measures available to the defendant and the trial judge to ensure a fair trial, short of dismissing the jury. These include continuance, jury sequestration, change of venue, severance of multiple defendants' trials, closure, restraining orders, and voir dire.[92] The use of some of these remedies implicate other constitutionally protected rights that must be considered contemporaneously with the public interest in a jury trial.[93]

The analysis begins with the fundamental right to trial by an impartial jury. These remedial measures are exercised to ensure trial by an impartial jury. The impact these measures have on other constitutional protections, such as speedy trial or free speech, has been held to be of lesser consequence when compared to the significance, both to the defendant and the community, of a jury trial. I will first examine the effect

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[90] See *supra* notes 38 through 66 and accompanying text for a discussion of some of the issues raised by defendants challenging Rule 23 on the basis that a bench trial is necessary to obtain a fair trial.

[91] Fieldman, *supra* note 67 at 223.

[92] *Id.* at 232-234, footnotes omitted.

[93] An issue raised by the use of some these remedies concerns what independent interest the public has in the rights these remedies affect. For example, the public arguably has an interest in a speedy trial. This leads to the question of which trumps: the public interest in a jury trial or the public interest in a speedy trial. An intriguing question but one that is beyond the scope of this paper.

some of these measures have on other constitutional protections. The significance of the public interests in trials by jury will be discussed in Part III of this paper.

Continuances may be ordered when pretrial publicity is so prejudicial that there is a reasonable likelihood of an unfair trial.[94] Rather than forego a trial by jury to avoid this prejudice, a continuance may be granted so that "in the course of time the fires of prejudice will cool.[95] Continuances are recognized both by caselaw[96] and statute[97] as a valid remedial measure in cases of extensive inflammatory pretrial publicity. In the *Sheppard* case, the Court held that when pretrial publicity has created such prejudice against an accused that there is a reasonable likelihood that an impartial jury cannot be impaneled, the judge should continue the case until the risk of prejudice has abated or transfer the case to a location that has not been the target of the prejudicial publicity.[98] However, the appropriateness of a continuance, for any reason, must be considered in

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[94] Sheppard v. Maxwell, 394 U.S. 333, 363 (1966).

[95] Groppi v. Wisconsin, 400 U.S. 505, 510 (1971).

[96] *Sheppard*, 394 U.S. at 363.

[97] Speedy Trial Act, 18 U.S.C. section 3161 (1984). Section 3161(h)(8) reads:

> (h) The following periods of delay shall be excluded in computing the time within which an information or indictment must be filed, or in computing the time within which the trial of any such offense must commence: . . .
>
> (8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

[98] *Sheppard*, 384 U.S. at 363.

light of the defendant's right to a speedy trial as guaranteed by the Sixth Amendment.[99] The Supreme Court has held that to determine whether a defendant's right to a speedy trial has been violated, one must consider the length of the delay, the reason for the delay, whether the defendant asserted his right to a speedy trial, and the degree of prejudice to the defendant.[100]

The use of these factors to determine if the right to a speedy trial has been infringed upon is evidence that the Court recognizes the constitutional mandate to a "speedy trial" is, in fact, an imprecise and relative concept. This stands in stark contrast to the right to an impartial jury. Certainly, no one would argue that the burden on the government in a given case to ensure an impartial jury should be weighed against the magnitude of harm to the defendant if that burden is not met to determine if the defendant's right to an impartial jury was fulfilled. How could such burdens and harms be quantified and weighed? There can be no relativity in the impartiality of the jury; no one would argue that a small degree of partiality is acceptable under any circumstances, or that the reason for the partiality is relevant to the determination of whether the right to a trial by an impartial jury has been violated.[101]

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[99] U.S. CONST. amend. VI. "In all criminal cases, the accused shall enjoy the right to a speedy and public trial . . . " The Speedy Trial Act, 18 U.S.C. section 3161 provides statutory timelines to the rather amorphous requirement of a "speedy trial."

[100] Barker v. Wingo, 407 U.S. 514, 529-530 (1972).

A change in venue, transfer of a case out of the state or district where the crime was committed, is also a remedial measure to protect the due process right of a fair trial.[102] Like continuances, changes of venue are statutorily authorized[103] and although may seemingly violate the Sixth Amendment,[104] they have been sanctioned by the Supreme Court.[105] At least one court has found that a change of venue is a "greater" remedy than a continuance;[106] although it did not state its basis for such a relativity judgment.

Closure is an extreme and rarely used measure to combat prejudice that may arise from pretrial publicity.[107] It is most commonly used during pretrial proceedings when a

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[101] Mr. Fieldman succinctly and convincingly puts this idea of an impartial jury being a relative right to rest in his article, *supra* note 67 at 238-239.

[102] *Sheppard*, 384 U.S. at 363; Rideau v. Louisiana, 373 U.S. 723, 726 (1963).

[103] FED. R. CRIM. P. 21(a) (1996). Rule 21(a) reads

> (a) For Prejudice in the District. The court upon motion of the defendant shall transfer the proceeding as to the defendant to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

[104] The Sixth Amendment reads, in part, " . . . the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . "

[105] Platt v. Minnesota Mining and Manufacturing Co., 376 U.S. 240 (1965).

[106] United States v. Chapin, 515 F.2d 1274, 1286 (D.C. Cir. 1975). In denying a change of venue, the court commented that the defendant "never requested that the court consider the *lesser* remedy of granting a continuance to allow publicity to die down . . ." *Id.* (emphasis added). The court did not indicate how it came to the determination of relative importance.

[107] For example, when the government attempts to close a hearing or a portion of the trial on the merits, the state must show that the closure is necessitated by a compelling governmental interest and that the closure is narrowly drawn to serve that interest. Globe Newspaper Co. v. Superior Court for the County of Norfolk, 457 U.S. 596, 607 (1982).

party moves to close the proceeding to prevent adverse publicity arising from that proceeding.[108] In *Gannett v. DePasquale*,[109] a suppression hearing was closed on the defendants' motion because they feared the public prejudice that could result if the evidence revealed at the hearing (primarily their admissions in connection with some of the charges) was made public. The Court affirmed the closure, holding that the trial judge used closure as an appropriate protective measure to minimize the prejudicial pretrial publicity that may have resulted in impermissibly tainted potential jurors.[110]

The final measure that may be employed to protect a defendant from an impermissibly tainted jury that has constitutional implications is the use of prior restraining orders to prevent media presentation of some or all of the criminal trial. These too are extremely rare because of the important constitutional rights involved.[111] In *Nebraska Press Assn.*, the state prosecutor and the defendant requested an order restricting the media from publishing accounts of any testimony heard or evidence adduced during pretrial hearings in an attempt to prevent prejudice in the community that would render the impaneling of an impartial jury impossible.[112] The restraining order that reached the Supreme Court was specific in what it restrained and expired upon the

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[108] Fieldman, *supra* note 67 at 233.

[109] 443 U.S. 368 (1979).

[110] *Id.* at 378-379.

[111] Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976).

[112] *Id.* at 542.

impaneling of the jury.[113] The Court was required to address the potential conflicts between the First Amendment guarantee of freedom of the press and the Sixth Amendment right to an impartial jury raised by the issuance of that prior restraining order.[114] The Court held that because prior restraints on the press are the most serious and least tolerable infringement of the First Amendment, any prior restraint on them would be viewed with a heavy presumption of constitutionality against them.[115] The standard for determining whether a restraining order can survive in cases in which the right to a fair and impartial jury is at issue was best stated by Justice Powell in his concurring opinion. To sustain such an order, there must be a showing that (1) there is a clear threat to the fairness of the trial; (2) such a threat is caused by the publicity to be restrained; and (3) there are no lesser restrictive alternatives available.[116] Further, even if this showing can be made, a restrain may not be issued if it will not cure the threat.[117] If the publicity has already threatened the impartiality of the prospective jurors or there are unrestrained sources beyond the scope of the order, the restraint should not be

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[113] Id. at 545-546. The order that was issued by the trial judge was the subject of a motion to intervene by the petitioners in the state District Court, which modified the order issued by the trial judge. That order was the subject of a writ of mandamus, a stay, and an expedited appeal to the Nebraska Supreme Court, which in turn issued the order that became the subject of Supreme Court review. *Id.* at 542-546.

[114] *Id.* at 547.

[115] *Id.* at 558.

[116] *Id.* at 571 (Powell, J. concurring).

[117] *Id.*

ordered.[118] Of those alternatives suggested by the Court,[119] certainly the waiving of a trial by jury is not among them.

In many of these decisions, courts have acknowledged the existence of public interests in jury trials. The next portion of this paper will explore more thoroughly the community interests in trials by jury.

III. PUBLIC INTEREST IN TRIALS BY JURY.

In the first Supreme Court case that held a defendant could waive his right to a jury, the Court noted the importance of jury trials to the American judicial process. In *Patton*,[120] the Supreme Court recognized not only the importance of the right to the defendant, as is its historical basis, but its importance to the process.

Mr. Justice Sutherland, writing for the Court, framed the issue in *Patton* as "[i]s the effect of the constitutional provisions in respect of trial by jury to establish a tribunal as a part of the frame of government, or only to guarantee to the accused the right to such

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[118] *Id.* at 562.

[119] The Court would consider a change of venue, continuance, voir dire, instructions to the jury, and sequestration as appropriate alternatives to restraining orders. *Nebraska Press Assn.*, 427 U.S. at 563-564.

[120] 281 U.S. 276 (1930).

a trial?"[121] In its holding, the Court responded to this either-or proposition by answering "yes." After an examination of the common law understanding of trial by jury and the history of the Sixth Amendment, the Court held that the Sixth Amendment right to a jury was, in fact, a right of the defendant intended for his protection and therefore waivable by the defendant. However, the Court went on to find that the "maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our tradition"[122] that before any waiver can be effective, the government counsel must consent and the court must approve such a waiver.[123]

In *Patton*, the Court addressed the primary objections to a defendant's waiver of a jury trial.[124] One objection that the Court addressed was that permitting one accused of a serious crime to waive trial by jury was contrary to public policy.[125] The leading case cited by the Court supporting the position that public policy could not tolerate such a waiver was a New York state case decided in 1858.[126] In *Cancemi v. People*,[127] the issue

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[121] *Id.* at 293.

[122] *Id.* at 312.

[123] *Id.*

[124] The first objection raised by the defendant was that waiver of a jury trial deprived Federal courts of jurisdiction in criminal cases. This objection was based on the contention that a Federal district court cannot proceed except with a jury because the defendant in a criminal case is entitled to a jury trial by the terms of the Constitution. This contention was rejected by the Court, which found that neither article 3, section 2 of the Constitution nor section 9 of the Judiciary Act of 1789, which contain mandatory language concerning trial by jury, stymied competence of a Federal court to hear a case in which both parties agreed to waive a trial by jury. *Patton*, 281 U.S. at 298-302.

[125] *Id.* at 302.

[126] *Id.*

arose when a juror in a criminal trial was withdrawn after the trial had begun. The accused was subsequently convicted by the remaining eleven jurors. The New York appellate court reversed the guilty verdict and held "the ancient and invaluable institution of trial by jury" cannot be corrupted by trial by a jury of less than twelve.[128] It found that should the withdrawal of one juror be tolerated, nothing would prevent the elimination of the other eleven, and the resulting jury-less trial would be a "highly dangerous innovation."[129] The New York court intended to protect the state's and public's interests in protecting the rights of their citizens.[130] The *Cancemi* court did not find that the public had an interest in a trial by jury separate from the defendant's interest and the preservation of the defendant's liberties.

The *Patton* court rejected the *Cancemi* court's holding that public policy prevented a defendant from waiving his right to a trial by jury. Although the Court held that a defendant did have the power to waive a jury trial, it went on to hold that this power was not absolute. The Court recognized that trial by jury was the normal and preferable mode of resolving criminal cases and is such an important part of our judicial tradition that it must be fastidiously protected.[131] As a result of this recognition of the

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[127] 18 N.Y. 128 (1858).

[128] *Patton*, 281 U.S. at 303, quoting *Cancemi*, 18 N.Y. at 137-138.

[129] *Id.*, quoting *Cancemi*, 18 N.Y. at 137-138.

[130] *Id.* at 302, quoting *Cancemi*, 18 N.Y. at 137.

[131] *Id.* at 312.

jury's importance, the Court held that the government counsel must consent and the trial court must approve a waiver of the jury before such a waiver can be effective.[132] It further cautioned the trial courts to grant such waivers with sound discretion and not as a matter of rote, but rather to recognize that criminal trials by the bench are departures from the norm.[133] So while holding the right to a jury trial belong to one accused of an offense, the *Patton* Court acknowledged some public interest of the American judicial system in the maintenance of criminal trials by jury.

In *Duncan v. Louisiana*,[134] the Supreme Court further articulated the importance of trial by jury in the American system of justice. Mr. Duncan was prosecuted by the state and convicted of simple battery. He was not afforded a jury trial for the offense, classified by the state as a misdemeanor. His conviction was affirmed by the state on appeal and was heard on a grant of *certiorari* by the United States Supreme Court. The Court held that because the maximum penalty for the offense under Louisiana law was two years in prison, the offense was a "serious crime" and Mr. Duncan was entitled to a trial by jury under the mandates of the Sixth and Fourteenth Amendments. The Court first found that the right to a jury trial was afforded to criminal defendants to prevent oppression of those accused of the criminal offenses by the tyranny of the government.[135]

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[132] *Id.*

[133] *Id.*

[134] Duncan v. Louisiana, 391 U.S. 145 (1968).

[135] *Id.* at 155.

Not only were the Framers of the Constitution concerned about unchecked power of the king, according to the Court, they were equally concerned about the granting powers of life and liberty of an accused to one judge or a group of judges.[136] The Court went on to recognize the Framers' concerns about the ramifications of "corrupt or overzealous prosecutors" and "compliant, biased or eccentric judges" on the judicial system.[137] These concerns resulted in the requirement of community participation through the institution of the jury in determining criminal guilt of one accused of a serious crime.[138]

Finally, the *Duncan* Court, in one sentence, made a compelling argument for trials by jury: the Court recognized that when juries return results that may be contrary to the results that may be reached by judges in the same cases, it is because the juries are "serving some of the very purposes for which they were created and for which they are now employed."[139] In this one, unelaborated statement, certainly the Court did not mean to imply that in those cases in which juries and judges may differ, it because the judges are compliant, biased, or eccentric or that the prosecutors are corrupt or overzealous. Indeed, the Court made clear that its finding that the Sixth Amendment right to a jury trial applies to the states can not be read to be challenging the integrity of the trials by

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[136] *Id.* at 156.

[137] *Id.*

[138] *Id.*

[139] *Id.* at 157, citing H. Kalven, Jr. and H. Zeisel, THE AMERICAN JURY (1966).

judges without juries.[140] Rather, it is more likely recognition by the Court that juries have purposes in addition to the historic objective of solely protecting a defendant from the tyranny of the king.

Mr. Justice Harlan, in his dissent,[141] wrote strongly of the requirement and function of the jury in the American judicial process. He recognized the importance of juries to give citizens the opportunity to participate in the criminal justice process, and thereby increasing public respect for the law and presumably the justice system.[142] He went on to note that the jury also served to relieve judges of the burden of imposing justice and allowed the public to share in this responsibility.[143]

Mr. Justice Harlan's proposition that the community has a protectable interest in participating in criminal trials was furthered in *Gannett Co. v. DePasquale*.[144] In *Gannett* the issue was whether the public had an enforceable right, aside from any rights of the defendant, in a public trial.[145] The Court in that case acknowledged a common law

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[140] *Duncan*, 391 U.S. at 157-158 and accompanying notes.

[141] Mr. Justice Harlan dissented, joined by Mr. Justice Stewart, because he did not agree that the Constitution prohibits Louisiana from trying cases of simple battery by judge alone. *Duncan* 391 U.S. at 172.

[142] *Id.* at 187, footnote omitted.

[143] *Id.*

[144] 443 U.S. 368 (1978). In *Gannett*, two defendants in a criminal case requested the public and press be excluded from a hearing to argue the suppression of their allegedly involuntarily obtained confessions. The trial judge granted the request and Gannett Co. objected to the closure order. The case worked its way up the New York state appellate channels and arrived at the U.S. Supreme Court on *certiorari*.

[145] *Id.* at 382-383.

right of the public to attend criminal trials, but distinguished this from a constitutional right. It held that the Constitution did not, and was not intended to, incorporate into it all the common law rights as they were understood at the time of its drafting.[146] In acknowledging a public interest in a public trial, the Court cited *Patton* as holding that the public has an interest in trial by jury, distinct from the defendant's constitutionally protected right.[147]

In *Powers v. Ohio*,[148] the Supreme Court went back to the holdings in *Duncan* regarding the public interest in trial by jury to support the finding that "(t)he opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system."[149] In *Powers*, a white defendant objected to the prosecution's use of peremptory challenges to remove black venirepersons from his jury. Although the Court rejected the defendant's claims that were based on *Batson v. Kentucky*,[150] the Court held that the defendant had standing to object to race-based challenges on behalf of the venirepersons based on the Equal Protection Clause of the Fourteenth Amendment. The Court held that the Equal

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[146] *Id.* at 385-387.

[147] *Id.* at 383.

[148] 499 U.S. 400 (1990).

[149] *Id.* at 406, citing *Duncan v. Louisiana*, 391 U.S. 145, 147-158 (1968).

[150] 476 U.S. 79 (1986). In *Batson*, a black defendant objected to the State's use of peremptory challenges to strike black venirepersons from his jury. The Court held that the defendant had an equal protection right of his own to not have members of his race excluded from his jury based on their race.

Protection Clause gives each citizen the right not to be excluded from jury service based on the individual's race.[151] Unlike *Batson*, in which the Court upheld the *defendant's* equal protection rights in not having members of the defendant's own race excluded from the jury, the *Powers* recognized the potential *venirepersons'* right not to be excluded from jury service based on their race. The *Powers* court recognized a constitutional right of members of the public, at least, eligible venirepersons, in jury service, separate and distinct from the accused's sixth amendment right to a jury trial. The Court found that second to voting, service on a jury is the citizen's most important opportunity to participate in our democratic government.[152]

Awarding an accused *carte blanche* to waive a jury not only defeats the public interest in jury trials as discussed in *Patton*, *Duncan*, and *Gannett*, it robs citizens - potential venirepersons - of an opportunity to participate in an important governmental function as stated by the *Powers* Court. These decisions recognize protectable interests of the public that I believe behooves a re-examination of the historical purpose of trials by jury and an inquiry into their purpose today.

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[151] *Powers*, 499 U.S. at 409.

[152] *Id.* at 407.

Under the common law, the primary purpose of trial by jury was to protect persons accused of offenses from the tyranny of the king.[153] However, as the Court in *Duncan* stated: "It can hardly be gainsaid, however, that the principal original virtue of the jury trial - the limitations a jury imposes on a tyrannous judiciary - has largely disappeared. . . Judges enforce laws enacted by democratic decision, not by legal fiat."[154] Clearly, the "tyranny of the king" or fear of an oppressive sovereign is no longer an overriding concern of the judicial system. In American government, great pains were taken to separate the "king" (the President) from the judiciary,[155] and in fact, most judges at all levels of government are either popularly elected, or appointed by elected officials and protected by some form of tenure. The cases discussed above clearly indicate a move away from viewing trial by jury as merely a protection of an accused from an overpowering and oppressive sovereign and toward a view of trial by jury as serving as an opportunity for public involvement in, and a protection of, the democratic process of law. I suggest this shift is reasonable and appropriate.

As previously discussed, the Court in *Patton*, *Duncan*, and *Powers* recognized the community interest in jury trials. Obviously, the public interest in trials by jury does not rise to a constitutionally protected interest. However, these decisions and their progeny

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[153] See LLOYD E. MOORE, THE JURY, TOOLS OF KINGS, PALLADIUM OF LIBERTY, Chap. V, for an interesting discussion of the evolution of the common law jury trial from its provision in the Magna Carta.

[154] *Duncan*, 391 U.S. at 188.

[155] U.S. CONST. arts. II and III.

recognize that trial by jury is the preferred mode of trial in the American justice system[156] and all recognize an interest of the community in participation in criminal trials through jury service.

Given community interest in participation, what *purpose* does this participation serve? In the *Lewis* case,[157] a Federal district court, citing *Gannett* and *Patton*, found that the government had "a compelling interest in a full, fair, and public trial" [158] and a derivative cognizable interest in a trial by jury. The *Lewis* court found that trials by jury served the important function of providing the community with a significant opportunity to express its collective "pressures and passions"[159] regarding perceived outrageous government conduct, or on the other hand, outrageous criminal misconduct.[160]

This social catharsis function of jury trials can be viewed as one aspect of what has been termed the "communitarian function" of jury trials.[161] This communitarian

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[156] *Patton*, 281 U.S. at 263 ("Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses."); *Duncan*, 391 U.S. at 155 ("The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered."); and *Gannett*, 443 U.S. at 383 (". . . the great public interest in jury trials as the preferred mode of fact-finding in criminal cases . . .").

[157] 638 F. Supp. 573 (W.D. Mich 1986). *See supra* notes 27 through 31 and accompanying text for a discussion of the case.

[158] *Id.* at 579.

[159] *Lewis*, 638 F. Supp. at 580.

[160] *Id.*

[161] George C. Harris, *The Communitarian Function of the Criminal Jury Trial and the Rights of the Accused*, 74 NEB. L. REV. 804 (1995) [hereinafter, Harris].

function can be defined as the contribution of criminal jury trials to the overall welfare of the criminal justice system, and to the cohesiveness of the community at large.[162] The communitarian function of jury trials can be broken down into five related purposes:[163] (1) to serve as a vehicle for direct community participation in the democratic process of governing;[164] (2) to determine the facts of each criminal case;[165] (3) to provide education regarding the criminal justice system to the public at large;[166] (4) to provide for a ritual that preserves public faith in the administration and maintenance of justice[167] and respect for the justice system;[168] and (5) to make public value decisions that accurately reflect public values.[169]

A. *The Community Participation Function.*

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[162] *Id.* at 807.

[163] These purposes are drawn from a number of different sources (as noted) and as a result they may overlap to some degree. The arranging of the purposes into five functions is my best attempt at distinguishing the bases of functions for discussion purposes. They are not in a priority or rank order.

[164] Harris, *supra* note 161 at 804.

[165] Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1045 (1995)[hereinafter, Marder].

[166] Harris, *supra* note 161, at 804; Marder, *supra* note 165, at 1045.

[167] Harris, *supra* note 161, at 804.

[168] Mr. Justice Harlan's dissent in *Duncan*, 391 U.S. at 172.

[169] Marder, *supra* note 165, at 1045.

The first of these functions of the jury, to provide for public participation in the criminal justice system, was recognized as a valuable service as early as in the time of social historian Alexis De Tocqueville. In his frequently cited work, *Democracy in America*,[170] Tocqueville believed the jury to be a political institution above a judicial one.[171] He observed that the jury "places the real direction of society in the hands of the governed, or of a portion of the governed, and not in that of the government. . . the institution of the jury raises the people itself . . . to the bench of judges. The institution of the jury consequently invests the people . . . with the direction of society."[172] Tocqueville recognized the many benefits that derive from public participation in the judicial system, including fostering a love of independence,[173] giving people a sense of

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[170] ALEXIS DE TOCQUEVILLE, I DEMOCRACY IN AMERICA (Henry Reeve, trans., Phillips Bradley, ed., Vintage Books 12th ed. 1990) (1838). I believe summary of his career is valuable. The following facts are drawn from the Phillips Bradley edition, Appendix II, vol II: Tocqueville toured the United States in 1831 at the age of 25. Although he and his coworker, Gustave de Beaumont, were commissioned by the French government to study the American prison system, once their official mission was fulfilled, they turned to their real purpose, to study democracy as a working principle of society and government. Upon his return to France in 1832, Tocqueville entered politics and wrote. He published the first volume of DEMOCRACY IN AMERICA in 1835; volume two did not appear until 1840. Volume I of his work addresses specific aspects of government and politics in the new nation: the Constitution and the working of the Federal government. It is a true treatise: there are frequent references to statutes, legislative reports, statistical data, and commentaries, as well as references to his own observations and documents and memoranda he collected for the purpose of his analysis. Volume II is more of a general discussion of social, political, and economic change based on universal generalizations with America used as an avenue for examination.

[171] *Id.* at 282.

[172] *Id.* at 282-283.

[173] *Id.* at 284.

responsibility for their actions and their responsibility to society,[174] and giving the citizens a sense of duty and respect for their government.[175]

In *Taylor v. Louisiana*,[176] the Supreme Court recognized the importance of public participation in the criminal justice system.[177] The Court found that public participation in the administration of criminal justice was an important aspect of civic responsibility.[178] The Court also found that community participation was critical to enhancing the public confidence in the system and that the systematic exclusion of an identifiable group from service shook that confidence.[179]

As earlier noted, the Court in *Powers* also recognized the value of trials by jury as an opportunity for public participation in the criminal justice system. In that case, Justice Kennedy observed "(t)he opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system."[180] Public participation is valuable because it facilitates the

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[174] *Id.* at 285.

[175] *Id.*

[176] 419 U.S. 522 (1975). Mr. Taylor challenged the state petit jury selection process which systematically excluded women from service as a violation of his Sixth Amendment right to an impartial jury trial.

[177] *Id.* at 530.

[178] *Id.*

[179] *Id.*

[180] *Supra*, note 149.

other functions; community participation permits community determination of the facts, education of the public, ritual affirmation of the system, and community determination and maintenance of societal values. But public participation itself has inherent value. In *Balzac v. Porto Rico*,[181] the Court held that "(t)he jury system postulates a conscious duty of participation in the machinery of justice . . . One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse."[182] Citizens' participation, or possible participation as venirepersons, gives them a sense of ownership of the criminal justice system and reinforces the reality of a "government of the people, by the people, for the people."[183] Further, community participation in the criminal justice system acts as a check on the power of a judge over the life and liberty of citizens.[184] Although this primarily serves to protect individual defendants in criminal cases, it also protects all citizens from results that do not reflect community standards and values reached by judges who do not necessarily represent the conscience of the community.[185]

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[181] 258 U.S. 298 (1922). One of the issues in *Balzac* was whether the Sixth Amendment right to a jury trial applied to those criminal prosecutions occurring in a territory belonging to the United States but which had not been incorporated into the Union at the time of the trial. The Court held that it did not.

[182] *Id.* at 310.

[183] ABRAHAM LINCOLN, THE GETTSYBURG ADDRESS (1863), *reprinted in* GEOFFREY C. WARD ET AL., THE CIVIL WAR: AN ILLUSTRATED HISTORY, 262 (Alfred A. Knopf. Inc. 1990).

[184] *Duncan*, 391 U.S. at 156.

[185] Marder, *supra* note 165 at 1056. Professor Marder cites, as examples, the areas of police brutality, prison conditions, sexual harassment and rape as areas in which the conscience of the community factors into the result of the case.

B. *The Fact-finding Function.*

The second aspect of the communitarian function of the jury is that of fact-finding. The importance of this function has long been recognized. In a case that addressed the role of the jury in civil trials, the Supreme Court held "(m)aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."[186] The fact-finding function of a trial is enhanced by the presence of a jury for two primary reasons: First, unlike cases tried before judges alone, trials by jury benefit from the jurors' collective recollection of the evidence presented at trial, and from the discussion and deliberation of a group of individuals seeking the truth.[187] Second, jury trials can be viewed as superior to judge alone trials because the finders of fact in a jury trial have the advantage of studying the evidence from different perspectives and of bringing different frameworks of analysis to evaluation of the evidence.[188]

[186] *Dimick v. Schiedt*, 283 U.S. 474, 486 (1935).

[187] Marder, *supra* note 165 at 1068-1069.

[188] *Id.* at 1069-1070.

Studies have shown that group decisions are generally superior to decisions made by one fact-finder.[189] "Group decisions, reached through cooperative deliberation, are significantly superior to decisions made by individual members working alone because group discussions stimulate more careful thinking, . . . lead to the consideration of a wide range of ideas, and . . . provoke more objective and critical testing of conclusions."[190] The benefits of group fact-finding have been accepted by the Supreme Court. In *Ballew v. Georgia*,[191] the issue before the Court was whether a five-person jury in a misdemeanor prosecution was constitutionally permissible. While, the Court easily disposed of the magic number of twelve jurors as anything more than "historical accident,"[192] the Court struggled with determining a constitutionally acceptable minimum number of jurors.[193] In holding that five jurors were too few to meet constitutional muster,[194] the Court relied heavily on sociological studies and reports to determine at what point a jury was too small to accomplish effective deliberations and

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[189] Marder, *supra* note 165 at 1069. Professor Marder concludes that group decisions, reached through cooperation and full and careful deliberation are superior to decisions made by individuals relying upon their own memories and functioning within their own prejudices and mindsets. *Id.* at 1068-1070. She bases her conclusion of numerous sociological and psychological reports and studies cited in footnotes 112-115 of her well-researched article.

[190] *Id.* at note 112, quoting Dean C. Barnlund, *A Comparative Study of Individual, Majority, and Group Judgment*, 58 J. ABNORMAL & SOC. PSYCHOL. 55, 59-60 (1959).

[191] 435 U.S. 223 (1978).

[192] *Id.* at 229, citing *Williams v. Florida*, 399 U.S. 78 (1970).

[193] *Id.* at 231.

[194] *Id.* at 245. In *Williams*, the Court held that a six person jury did not violate the defendant's Sixth Amendment rights. 399 U.S. at 103. Interestingly, the *Williams* court, a mere eight years before the *Ballew* decision, found that the accuracy of the jury as a fact-finder was not related to its size. 399 U.S. at 100-101.

accurate findings of fact.[195] The Court accepted studies that found group decisionmaking was better than individual decisionmaking, because of the benefit of many individuals sharing their collective memory of the facts and a group's ability to counterbalance each others' biases, resulting in more objective results.[196]

Group decisionmaking has an added benefit in the context of a jury trial that relates back to the first function, that of affording the community a chance to participate in the criminal justice system. Very often the facts that must be determined by the jury are the "facts" of the community standard or the community values; that is, the community standards or values often determine the criminality of the conduct on trial.[197] For example, in *Ballew*, the defendant was charged with distribution of obscene materials in violation of a state statute.[198] The contemporary standards of the community was a fact that had to be decided to determine whether the materials distributed were obscene. Because the size of the jury was at issue in the case, the Court did not address specifically the added value of a jury over a judge alone determination of the community standard. However, the Court did find that reduction in the size of the jury may prevent juries from

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[195] The Court in *Ballew* cites no fewer than 7 studies and countless law-related articles addressing the sociological and psychological effects of group decision making.

[196] *Ballew*, 435 U.S. at 232-233.

[197] The General Articles of the UCMJ, for example, include as element of the offenses that "the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces." MCM, *supra* note 8 , pt. IV, para. 60-113, (1984)[hereinafter MCM]. As will be contended, this is a community standard issue best resolved by the members of the community.

[198] *Id.* at 225.

accurately representing the standards of the community.[199] In any case, members of the community engaged in discussion and deliberation are more likely to accurately settle the community standard than a judge deciding a case alone from the bench.

As valuable as juries are to the fact-finding function of trials, their fact-finding abilities could be improved by adopting some practical procedures. At least one commentator has noted that the accuracy of civilian fact-finders could be enhanced by allowing the jurors to take notes during the trial (both during the presentation of the evidence and instructions) and allowing them to refer to the notes during deliberations, and by permitting the jurors to ask questions during the course of the trial.[200] Finally, juror accuracy would be increased by ensuring instructions are clear and understandable and provided in writing for the jurors to refer to during deliberations.[201] All of these procedures would increase jury accuracy.[202]

The second advantage a jury brings to the fact-finding function is that of providing different perspectives and frameworks of analysis to the fact-finding process.

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[199] *Id.* at 239.

[200] Marder, *supra* note 165 at 1070.

[201] *Id.*

[202] Of course, these options are available to court-martial members. MCM, *supra* note 8, R.C.M. 920(d) ("Written copies of the instructions . . . may also be given to the members for their use during deliberations."); MCM, *supra* note 8 R.C.M. 921(b) (". . . members may take with them in deliberations their notes, if any . . . and any written instructions. . . "); MCM, *supra* note 8, MIL. R. EVID. 614(b) ("The military judge or members may interrogate witnesses, whether called by the military judge, the members, or a party. . . ").

The more diverse the jury, the greater the number of points of view will be contributed to the deliberations.[203] The importance of bringing different perspectives representing a cross section of the community to the fact-finding body was recognized by the Court in *Peters v. Kiff*,[204] a case in which a white defendant challenged the systematic exclusion of blacks from jury service. Justice Marshall, in the plurality opinion, wrote

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.[205]

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[203] Marder, *supra* note 165 at 1070-1073.

[204] 407 U.S. 493 (1972). In *Peters*, a white defendant challenged the systematic exclusion of blacks from grand and petit juries as deprivations of his rights under the Due Process and Equal Protection Clauses of the Constitution. The Court reversed Mr. Peters' conviction; a plurality holding that the systematic exclusion of blacks from the grand and petit juries violated these constitutional protections. The remainder of the majority would hold that the practice violated the 1875 Civil Rights Act, prohibiting the disqualification of otherwise eligible persons from service as grand or petit jurors based on race, color, or previous condition of servitude, and reverse the conviction on statutory grounds.

[205] *Id.* at 503-504.

The *Peters* case dealt with racial exclusions from jury service; the same concerns regarding the loss of diverse perspectives was expressed in regards to gender in *Taylor*.[206] The Court in *Taylor* alludes to the importance of the diversity of perspectives represented on a jury to the fact-finding process when it states

> The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.[207]

If we accept, as the Court has, that the inclusion of differing perspectives of different members of the community enhances the accuracy of the fact-finder, then we must accede to the proposition that accuracy of a judge, confined by his own biases and unquestioned, is inferior to that of a jury.

C. *Public Education About the Criminal Justice System.*

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[206] *Taylor*, 419 U.S. at 531-533.

[207] *Id.* at 531-532.

The third aspect of the communitarian function of the jury is to serve as a means to educate the public about the criminal justice system.[208] One commentator asserts that the education function of the jury was recognized by the Framers of the Constitution who understood it to be a method to educate the citizenry about their civic rights and responsibilities.[209] Professor Amar contends that the Framers intended the jury to be an intermediate association between the sovereign and the people, not only to protect a defendant from the oppression of the crown, but also to be a social institution with its object being to "educate and socialize its members into virtuous thinking and conduct."[210]

The value of the jury as a school for the education of the citizenry was recognized by Tocqueville as well. Tocqueville stated

> It (the jury) may be regarded as a gratuitous public school, ever open, in which every juror learns his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes practically acquainted with the laws, which are brought within the reach of his capacity by the efforts of the bar, the

[208] Harris, *supra* note 161 at 807, 809 ; Marder, *supra* note 165 at 1045, 1083-1084.

[209] Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131, 1166 (1991), citing Lerner, *The Supreme Court as a Republican Schoolmaster*, 1967 SUP. CT. REV. 127. Professor Amar contends "(c)hurches stress religious and moral virtues; militias struck a proper balance between civilian and martial virtues; and juries instilled republic legal and political virtues." *Id.*

> advice of the judge, and even the passion of the parties. I think that the practical intelligence and political good sense of the Americans are mainly attributable to the long use that they have made of the jury in civil causes.[211]

He went on to state ". . . the jury, which is also the most energetic means of making the people rule, it is also the most efficacious means of teaching it how to rule well."[212]

The Supreme Court affirmed Tocqeville's observation of the value of the jury to educate the public in *Powers* and adopted the language, "I look upon it (service on the jury) as one of the most efficious means for the education of the public which society can employ."[213]

Professor Lieber, in his work, *On Civil Liberty and Self-Government*,[214] recognized many values of the jury, apart from its object of protecting a defendant from

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[210] *Id.*

[211] I DEMOCRACY IN AMERICA, *supra* note 170 at 285.

[212] *Id.* at 287.

[213] *Powers*, 499 U.S. at 407, quoting ALEXIS DE TOCQUEVILLE, I DEMOCRACY IN AMERICA 334-337 (Schocken 1st ed. 1961).

[214] FRANCIS LIEBER, L.L.D., CIVIL LIBERTY AND SELF-GOVERNMENT (Theodore D. Woolsey ed., J.B. Lippincott Company, 3d ed. 1891).

an overreaching government.[215] In his words, the jury "teaches law and liberty, order and rights, justice and government, and carries this knowledge over the land; it is the greatest practical school of free citizenship."[216] He recognized the important role service on a jury plays in educating the community about the criminal justice system and the increased esteem the system attains through this education of the people.

D. *The Ritual Affirmation Function.*

The ritual function of the jury is premised on the notion that a ritual affirmation promotes public acceptance of the criminal justice system that is necessary in a democratic society and critical for the acceptance of governmental authority.[217] This is related to the social catharsis benefit of trial by jury. By allowing the public to participate in the administration of justice, the public is permitted an expression of the community judgment of those acts that violate community standards. This ritual affirmation function was acknowledged as an important and legitimate governmental interest by the District Court in *Lewis*,[218] which held that "jury trials in criminal cases allow peaceful expression of community outrage at arbitrary government or vicious

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[215] *Id.* at Chapter XX, 232-246. The jury's advantages as viewed by Professor Lieber include making the administration of justice a matter of the people, binding the citizen with increased public spirit to the government, placing increased responsibility upon the citizen that legitimately strengthens the government, and it is an aspect of the representative government that affirmatively strengthens a love of the law. *Id.* at 235-237.

[216] *Id.* at 236 (footnote omitted).

[217] Harris, *supra* note 161, at 809.

[218] 638 F. Supp. 573 (W.D. Mich. 1986).

criminal acts."[219] Not only does trial by jury permit the community to express its convictions about a particular case, it reaffirms the democratic principle of government by the people by providing a direct avenue of community participation in the democratic process.[220]

A troublesome aspect of this ritual affirmation/social catharsis concept is the phenomenon of jury nullification. Jury nullification occurs when a jury finds an accused technically guilty of an offense but deliberately returns an acquittal.[221] This most commonly happens in cases involving violations of laws the jury believes to be unfair or in those cases involving what the jury believes to be the unfair application of otherwise fair laws.[222] In the first situation, the jury nullifies because it believes that the laws are no longer in line with community values.[223] This is harmful to the justice system for two reasons: first, nullification under these circumstances results in unenforced laws, which likely results in a common cynicism about the law.[224] Second, it encourages the citizenry

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[219] *Id.* at 580.

[220] Harris, *supra* note 161 at 809.

[221] Michael J. Saks, *Blaming the Jury*, 75 GEO. L.J. 693, 703 (1986) (reviewing VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY (1986)) [hereinafter, Saks].

[222] Andrew D. Leipold, *Rethinking Jury Nullification*, 82. VA. L. REV. 253, 297, 302 (1996).

[223] *Id.* at 298.

[224] *Id.* at 300.

to live with the laws as written (which are unjust or arcane), rather than to mobilize to change them.[225]

The second situation that may form the basis of jury nullification, that the jury believes the law to be applied unfairly to the defendant at hand, is even more harmful to the justice system. In this situation, the jury may acquit against the facts based on factors (for example, the race or celebrity of the defendant) that "would render a decision arbitrary or unconstitutional in any other official context."[226] Because the jury in a criminal case is not obligated to justify its actions and the aggrieved party often has no recourse,[227] nullification under these circumstances is particularly insidious.

Exploration of a solution to jury nullification, if indeed a solution is desired,[228] is beyond the scope of this paper. It may be that, as one commentator has suggested, the American justice system in some cases is caught between its commitments to trial by jury

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[225] *Id.* at 301.

[226] *Id.* at 306.

[227] *Id.* at 254.

[228] Lieutenant Commander Robert E. Korroch and Major Michael J. Davidson in their article, *Jury Nullification: A Call for Justice or an Invitation to Anarchy?*, 139 MIL. L. REV. 131 (1993), assert that jury nullification is a desirable result in some cases and further assert that the fact-finder should be advised in the instructions that it has the power to acquit when it cannot support a guilty verdict in spite of its certainty that the accused committed the charged offenses. *Id.* at 133.

and rational fact-finding,[229] and there is no remedy that does not unacceptably impede one or the other.[230]

E. *To Express Public Values.*

The final communitarian function of the jury is to make public value decisions. A jury does this in two respects: first, in those cases in which a particular public value or community standard is an element of an offense, the jury must identify that value or standard and then determine whether it was violated. This relates back to the fact-finding function discussed above.[231] As previously noted, many criminal offenses are defined by a community standard. For example, in *Ballew*, the defendant was charged with distribution of obscene material.[232] Under state law effective at the time, obscene material was defined "as a whole, *applying community standards*, its predominant appeal is to prurient interest, . . . and utterly without redeeming social value, and . . . goes

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[229] Donald A. Dripps, *People v. Simpson: Perspectives on the Implications for the Criminal Justice System: Relevant but Prejudicial Exculpatory Evidence: Rationality Versus Jury Trial and the Right to put on a Defense*, 69 S. CAL. L. REV. 1389 (1996).

[230] It is rather like the dilemma statesman David Ben-Gurion identified when the state of Israel was founded: he recognized that the three Zionist objectives - a Jewish state, a democratic state, and a state located in the historic homeland of the Jewish people - were not mutually attainable. He believed in any combination only two of the three could be were achieved. He summed up the situation, "we are being offered a chance for a Jewish state and a democratic state, but only in part of the land of Israel. We could hold out for all the land of Israel, but if we did that, we might lose everything. . . We will settle now for half a loaf, and dream about the rest later." THOMAS L. FRIEDMAN, FROM BEIRUT TO JERUSALEM 253 (Farrar Straus Giroux 1989). We may have to settle for the risk of irrational fact-finding in the form of jury nullification to maintain our commitment to trial by jury and dream about a remedy later.

[231] *See supra* notes 197 through 199 and accompanying text.

[232] *Ballew*, 435 U.S. at 225.

substantially beyond customary limits of candor . . ."[233] When the community standard is at issue, who better to resolve that issue than members of the community sitting as members of a jury?

In addition, juries not only not only decide the facts in individual cases, but also reach results that are consistent with societal standards.[234] Juries do this by applying the law as interpreted by the judge to cases before them and deciding whether the law was violated in the context of current societal circumstances.[235] "This allows the law to track change in society with an efficiency that cannot be achieved by asking legislatures to rewrite laws every few months, or even by judges, who are inclined to give more deference to the legislature than perhaps they always should. . . Thus, the jury helps bring about change that the law needs, and prevents upheavals against judicial and legislative authority."[236] In this way juries serve as political, as well as judicial, institutions by determining for the rest of society what conduct is acceptable within the prevailing

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[233] *Id.* at footnote 2, citing Georgia Code Ann. section 26-2101 (1972) (emphasis added).

[234] Marder, *supra* 165 at 1052.

[235] Saks, *supra* note 221 at 704.

[236] *Id.* (footnote omitted). Others may argue that permitting the jury to determine cases in the context of current values and standards delays legislative changes in the law because law makers can rely on the juries to "do the right thing" and fail to change the law through appropriate legislation. See Martin A. Kotler, *Reappraising the Jury's Role as Finder of Fact*, 20 GA. L. REV. 123, 166-172 (1985). This argument is related to the first troubling aspect of jury nullification discussed above. *Supra* notes 222 through 225. There is a fine line between nullification and applying the existing law to facts in the context of current societal norms and standards, however, a distinction can be made.

community values.[237] "It is here (in the jury room) that the conflict between regulation of society and its impact on organizations and individuals gets adjusted and integrated, and where competing values are balanced."[238] The jury, which embodies the community, is certainly better able to represent the values and conscience of the community than a judge sitting alone.[239]

These five related functions all advance the public interests served by jury trials. Courts-martial by members, as opposed to judge alone, serve the same interests as they are relevant in the military society. Before discussing these functions in the context of courts-martial, it would be useful to address briefly the history of military panels and the impact of the Military Justice Act of 1968 on the relationship between courts-martial and members.

IV. HISTORY OF COURT-MARTIAL MEMBERS AND THE UNIFORM CODE OF MILITARY JUSTICE.

A. *The Sixth Amendment Right to a Jury Trial and Trial by Courts-Martial.*

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[237] Marder, *supra* note 165 at 1053.

[238] *Id.* at 1054 (footnote omitted).

[239] *Id.* at 1056.

It is generally accepted that the Sixth Amendment right to a jury trial does not apply to those accused and tried before a military court-martial.[240] The Supreme Court has repeatedly held that the right to a jury trial does not apply to courts-martial,[241] generally without comment on the basis of that holding. For example, the Court in *O'Callahan v. Parker*,[242] recognized that the Fifth Amendment exempted "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger" from the requirement of indictment by a grand jury.[243] The Court included the right to trial by jury in that exemption.[244] However, the Sixth Amendment, which guarantees the right to a jury trial in all criminal prosecutions, does *not* include such language. The commentators, not the Court, have struggle to resolve this (at least academic) dilemma and have done so by looking to the legislative history and contemporaneous writings of the Framers and their observers.[245] They generally

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[240] Eugene M. Van Loan III, *The Jury, the Court-Martial, and the Constitution*, 57 Cornell L. Rev. 363 (1971-1972) [hereinafter, Van Loan]; Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 291 (1957) [hereinafter, Henderson]; Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266 (1958).

[241] Kahn v. Anderson, 255 U.S. 1, 8 (1921) (holding that someone not subject to military law cannot be tried by a court-martial without violating the rights to a jury trial and presentment or indictment by a grand jury guaranteed by article 1, section 8 of the Constitution and the Fifth Amendment); Ex Parte Quirin, 317 U.S. 1, 39 (1942) (holding that the Fifth and Sixth Amendments do not extend the right to a jury trial to trials by military commissions); Whelchel v. McDonald, 320 U.S. 122, 127 (1950) (holding the Sixth Amendment right to a jury trial does not apply to trials by court-martial or military tribunal); Toth v. Quarles, 350 U.S. 11, 16 (1955) (indicating that the Sixth Amendment right to a jury trial does not apply to trial by court-martial); O'Callahan v. Parker, 395 U.S. 258, 261 (1969) (The Court framed the issue as whether the military had jurisdiction over a soldier thus depriving him of his constitutional rights to indictment by a grand jury and trial by a petit jury).

[242] 395 U.S. 258 (1969).

[243] *Id.* at 261.

[244] *Id.*

[245] Van Loan, *supra* note 240 at 387-411; Henderson, *supra* note 240 at 303-315, 324.

conclude that the separation of the right to trial by jury from the "in the cases arising from the land or naval forces" exemption was a mere oversight on the part of the Framers.[246]

The Sixth Amendment right to a jury trial does not extend to trial by courts-martial consisting of members. Then where does trial by members originate and what is the relationship between trial by members and trial by military judge alone?

B. *Early Precedents.*

The history of courts-martial and panels has been recounted by numerous commentators.[247] The earliest military codes were administered by chief commanders through their designees.[248] The Anglo-Norman system of codes and courts in which an offender was tried by a jury of peers or military associates can be traced back to the sixteenth and seventeenth centuries.[249] This type of system was eventually adopted by

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[246] *Id.*

[247] For concise, well-researched, and well written histories see Van Loan, *supra* note 240 at 379-387; Andre M. Ferris, Comment, *Military Justice: Removing the Probability of Unfairness*, 63 U. Cin. L. Rev. 439, 442-452 (1994) [hereinafter, Ferris]; Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103, 113-125 (1992) [hereinafter, Lamb]; Jeffrey L. Harris, The Military "Jury", A Palladium of Justice - It's Creation, Constitution, and Selection, 6-8 (1984) (unpublished thesis, on file in library, The Judge Advocate General's School, United States Army).

[248] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 45 (Government Printing Office, 2d Ed., 1920) [hereinafter, WINTHROP].

[249] *Id.* at 46.

the British for its armed forces in the Mutiny Act of 1689.[250] The Mutiny Act gave the Sovereign, through legislative authority, the power to grant commissions to convene courts-martial.[251]

The American authority for courts-martial is derived from the Constitution[252] although courts-martial actually existed in America prior to the Constitution.[253] The American Articles of War of 1775 were enacted for the "due regulating and well ordering" of the armed forces raised to fight for independence.[254] The 1775 Articles of War provided for general courts-martial consisting of 13 members, all of whom were required to be commissioned officers[255] and regimental courts-martial composed of five officers, unless that number could not be conveniently assembled, in which case three officers would suffice.[256] The 1776 Articles of War that followed retained the 13 member

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[250] *Id.* at 47.

[251] *Id.*

[252] U.S. CONST. art I, section 8, cl. 14 gives Congress the authority to "make Rules for the Government and Regulation of the land and naval Forces;" U.S. CONST. art. II, section 2, cl. 1 designates the President as the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." Congress, through the Uniform Code of Military Justice, has granted the authority to convene courts-martial to various levels of command.

[253] WINTHROP, supra note 251 at 47. Courts-martial were recognized and adopted by the second Continental Congress in the Articles of War in 1775.

[254] American Articles of War of 1775, Preamble, *reprinted in* WINTHROP, *supra* note 248 at 953. The American Articles of War were adopted, with few changes, from the Massachusetts Articles of War of April 1775. *Id.* at 22.

[255] *Id.*, Section XXXIII, at 956.

[256] *Id.*, Section XXXVIII.

general court-martial and five (or three) member regimental courts.[257] The 1776 Articles also prohibited the convening authority from serving as a member of those courts-martial.[258] In 1786, the Articles of War were again revised, this time reducing the general court-martial forum from 13 to five and the regimental quorum from five to three.[259] There was no military judge or law officer authorized in these early codes, nor were there provisions for courts-martial by judge alone.

Following the ratification of the Constitution, the power to promulgate articles of war and to establish rules for the governing of the armed forces derived from the Congress' power to "make rules for the Government and the Regulation of the land and naval forces."[260] The Congress has used this authority at various times between 1806 and the present to alter the composition and jurisdiction of courts-martial, among other things.[261] It was not until 1920 Articles of War[262] that a "law member" was designated as a member of courts-martial. Under the 1920 Articles of War, the convening authority was to detail to each general court-martial a law member.[263] That officer was to be a

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[257] American Articles of War of 1776, Section XIV, art. 1 and art. 11 *reprinted in* WINTHROP, *supra* note 248 at 967-968.

[258] *Id.*

[259] American Articles of 1786, art. 1 and art. 3 *reprinted in* WINTHROP, *supra* note 248 at 972-975.

[260] U.S. CONST. art.1, section 8.

[261] See Lamb, *supra* note 247 at 116-121 for a concise and well-documented summary of the development of the Articles of War following the revolutionary war through the Second World War.

[262] The Articles of War of 1920, *reprinted in* MANUAL OF COURTS-MARTIAL, United States, app. 1 (1928).

[263] *Id.* at art. 8.

member of the Judge Advocate General's Department, unless unavailable; in that case was to be an officer of another service "specially qualified to perform the duties of law member.[264] The law member served as any other member of the court-martial, deliberating and voting, and performed the additional duties of ruling on interlocutory questions.[265]

In 1948 the Articles of War were amended and additional requirements were placed on the law member.[266] Under the amendments, the law officer was required to be "a member of the bar of Federal court or of the highest court of a State of the United States and certified by the Judge Advocate General."[267] The law member still served as any other member of the court-martial with the additional duty of ruling on interlocutory questions.[268]

C. *The 1950 Uniform Code of Military Justice.*

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[264] *Id.*

[265] *Id.* arts. 8 and 31.

[266] The Articles of War of 1920, *reprinted in* LOUIS F. ALYEA, MILITARY JUSTICE UNDER THE 1948 AMENDED ARTICLES OF WAR (1949).

[267] *Id.* art. 8 (as amended).

[268] *Id.* arts. 8 and 31 (as amended).

Shortly after the 1948 amendments to the Articles of War, Congress, in the 1949 session, sought to "unify, consolidate, revise, and codify the Articles of War, the Articles for the government of the Navy, and the disciplinary laws of the Coast Guard and to enact and establish a Uniform Code of Military Justice."[269] The resulting UCMJ provided for the detailing of a law officer to general courts-martial.[270] The law officer was appointed by the convening authority and was required to be a member of the bar of a Federal court or of the highest court of a State and certified by The Judge Advocate General of the service of which he is a member.[271] Unlike the law member of the 1920 Articles of War, the law officer did not deliberate with the members, nor did he vote with the members of the court.[272]

There was vigorous debate regarding the role of the law officer during the Congressional hearings on the UCMJ. Some Congressmen firmly believed that removal of the law officer from the deliberations and voting "cripple(d) the conduct of the court's deliberations in that the accused (lost) the important safeguard of having an informed lawyer presented during the deliberations and voting of the court . . ."[273] However, others

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[269] HOUSE COMM. ON ARMED SERVICES, UCMJ, H.R. REP. NO. 491 at 1 (1950), *reprinted in* Congressional Floor Debate of the Uniform Code of Military Justice at 1 (1949).

[270] UCMJ art. 26 (1950) (amended 1968, 1983).

[271] *Id.* art. 26(a).

[272] *Id.* art. 26(b).

[273] SENATE ARMED SERVICES COMM., UCMJ, S. 875 at _ (1950), *reprinted in* Congressional Floor Debate of the Uniform Code of Military Justice at 97 (1949).

believed that the exclusion of the law officer from the deliberation room was fairer to the accused and the court because, just as in the civilian world, a lawyer in the deliberation room may have an undue influence on the members.[274] It was generally agreed, however, that it was to the benefit of the accused to have a trained attorney at the general court-martial because it vested in a trained and experienced lawyer the authority to rule on interlocutory questions and advise the court on matters of law.[275] By removing the law officer from the deliberation room, it made him more akin to a civilian judge. This resulted in his being able to carry out his judicial functions more objectively and also resulted in his instructions to the members being part of the record and subject to review.[276]

Although the Congressional debates reflect an effort to distinguish to the law officer from a civilian judge,[277] the newly created Court of Military Appeals (CMA)[278] grasped the words of Professor Morgan,[279] who stated that "the fundamental notion was

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[274] *Id.* at 211 (statement of S. Saltonstall).

[275] Id. at 207 (statement of S. Kefauver).

[276] *Id.* at 208.

[277] SENATE COMM. ON UCMJ, S. REP. ON H.R. 4080 (1950), *reprinted in* Congressional Floor Debate of the Uniform Code of Military Justice at 123-125 (1949) (detailing the distinctions between the law officer and a civilian judge).

[278] UCMJ art. 67 (1950) (amended 1968, 1983). The Court is now called the Court of Appeals for the Armed Forces (CAAF). I will refer to the court by its name at the time of the decision under discussion.

[279] Professor E.M. Morgan served as the chairman of a committee appointed by Secretary of Defense Forestal in 1948, tasked to draft a uniform code of military justice, that, after Congressional hearings and debate, became the Uniform Code of Military Justice.

that the law officer ought to be as near like a civilian judge as it was possible under the circumstances."[280] The CMA stated its case for a civilianized judicial role of the law officer more fervently in *United States v. Keith.*[281] There the CMA held "no one . . . can doubt the strength of the Congressional resolve to break away completely from the old procedure (in which the law member deliberated and voted with the members) and insure, as far as legislatively possible, that the law officer perform in the image of a civilian judge."[282]

D. *The Military Justice Act of 1968.*

The Military Justice Act of 1968[283] continued this trend toward civilianizing the military justice system. Although commanders still controlled the military justice system to a great degree, the 1968 Act seemingly culminated a trend away from command domination of the administration of justice in the military.[284] The Act's "judicializing" of the system included the creation of the military judges[285] and the provision that created

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[280] United States v. Berry, 2 C.M.R. 141, 147 (C.M.A. 1952) (quoting House Hearings on Uniform Code of Military Justice, Committee on Armed Services, 607 (statement of Prof. Morgan)).

[281] 4 C.M.R. 85 (C.M.A. 1952).

[282] *Id.* at 88.

[283] 82 Stat. 1335 (1968).

[284] Captain John S. Cooke, *The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System*, 76 MIL. L. REV. 43, 45 (1977).

[285] UCMJ art. 26 (1968).

the option of trials by military judge alone.[286] These statutory provisions have remained substantially unchanged to the present.

Under the provisions of the Act, military judges are designated by The Judge Advocate General (TJAG) of the respective services, or their designees, not by the commanders who convene the courts.[287] In addition, military judges are responsible to their respective TJAG, or his designee, for direction and fitness ratings.[288] The intent of these provisions was to create an "independent field judiciary"[289] and give military judges functions and powers akin to those of Federal district judges.[290]

The creation of the position of military judges and the independence from the command endowed upon them by Article 26, made possible the enactment of Article 16, creating the opportunity for courts-martial to be tried by military judge alone.[291] The

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[286] UCMJ art. 16 (1968).

[287] *Id.* art. 26(c).

[288] *Id.*

[289] S. REP. NO. 1601, at 7 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4501, 4507.

[290] S. REP. NO. 1601, at 3 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4501, 4504.

[291] UCMJ art. 16 read, in part:

The three kinds of courts-martial in each of the armed forces are -

(1) general courts-martial, consisting of . . .

(B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests in writing a court composed only of a military judge and the military judge approves; . . .

(2) special courts-martial, consisting of . . .

(C) only a military judge, if one has been detailed to the court, and the accused under the same conditions as in clause (1)(B) so requests; . . .

primary purpose of the provision for judge alone trials was to "streamline court-martial procedures in line with procedures in U.S. district courts"[292] and to effect an "appreciable reduction in both time and manpower normally expended in trials by courts-martial."[293]

Although intended to mirror Federal Rule of Criminal Procedure 23, providing for trials by judge alone,[294] Article 16 differs from the Federal rule in two notable respects. First, Article 16 provides the accused with the right to know the identity of the judge that will hear his case if he requests trial by judge alone.[295] Second, while the Federal rule requires government consent to a bench trial, Article 16 only requires a request from the accused and approval of the judge.

On the other hand, the military equivalent to government consent to trial by judge alone, consent of either the convening authority or the trial counsel, was the subject of

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[292] S. REP. NO. 1601, at 3 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4501, 4503.

[293] H.R. REP. NO. 1481 at 2 (1968).

[294] *Id.*; Hearings on H.R. 12705, to Amend Chapter 47 (UCMJ) of Title 10, U.S.C., Before the Subcomm. No. 1 of the House Comm. on Armed Services, 90th Cong., 1st Session, 8347 (1967) (Statement of MG Kenneth J. Hodson, The Judge Advocate General, Dept. of the Army).

[295] A search of the legislative history of the Military Justice Act of 1968 reveals no comment on this provision, other than a letter from Judge Homer Ferguson, U.S. Court of Military Appeals, inserted into the congressional record at the request of Congressman Philip J. Philbin. In his letter, Judge Ferguson states of the provision requiring the identification of the judge, "In many jurisdictions, it is true that some attorneys attempt deals with an assignment clerk or play with the court's docket in order to get their case heard by a judge they deem sympathetic to their cause. Such tactics appear to me to be unethical, and I am unaware of any statute which has heretofore written them into law. If a judge in the military is to have the stature which we all wish to accord him, the accused should play no part in selecting the individual who is to hear his case, beyond the normal procedure of challenge." H.R. REP. NO. 1481 at 2 (1968); Hearings on H.R. 12705, to Amend Chapter 47 (Uniform Code of Military Justice) of Title 10, U.S.C., Before the Subcomm. No. 1 of the House Comm. on Armed Services, 90th Cong., 1st Session, 8329 (1967) (Statement of Judge Ferguson).

much comment and debate. The original bill, introduced in the House on 14 March 1968 and referred to the Committee on Armed Services and reported with amendments on 27 May 1968, read, in part,

> Article 16. Courts-martial classified.
>
> The three kinds of courts-martial in each of the armed forces are-
>
> (1) general courts-martial, consisting of . . .
>
> (B) only a law officer, if before the court is assembled the accused, knowing the identity of the law officer and after consultation with defense counsel, requests in writing a court composed only of a law officer and the law officer approves *and the convening authority consents*;
>
> (2) special courts-martial, consisting of . . .
>
> (C) only a law officer, under the same conditions as those prescribed in clause (1)(B).[296]

The Senate Armed Services Committee struck the requirement for convening authority consent because that committee believed that requiring government consent presented the "possibility of undue prejudicial command influence that is not present in

[296] H.R. REP. NO. 1481 at 4 (1968) (emphasis added).

civilian life."[297] The version of Article 16 that was ultimately passed changed "law officer" to "military judge" and omitted the requirement of convening authority consent to trial by judge alone.[298] It has remained substantially unchanged.

Article 16 now reads, in part,

> The three kinds of court-martial in each of the armed forces are -
>
> (1) general courts-martial, consisting of -
>
> (B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves, . . .
>
> (2) special courts-martial, consisting of -
>
> (C) only a military judge, if one has been detailed to the court, and the accused under the same conditions as those prescribed in clause (1)(B) so requests, . . .[299]

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[297] S. REP. NO. 1601, at 4 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4501, 4505. Whether this concern is a valid one, or whether the government should have a voice in the determination to proceed by trial by judge alone will be examined in Part VI of this paper.

[298] See *supra* note 291 for the text of the relevant portion of Article 16 as it was passed in 1950. The Military Justice Act of 1983, 97 Stat. 1393 (1983)(amended, 1986) amended Article 16 to reflect that the request does not have to be in writing and may be made orally on the record. The relevant portions have remained otherwise unchanged.

[299] Military Justice Act of 1983 (amended, 1986).

E. *The Implementation of Article 16, UCMJ.*

The Senate committee report on the Military Justice Act of 1968 did not indicate that an accused's request for a trial by judge alone should be granted as a matter of rote. Rather, the report states that "the military judge, after having heard arguments from both trial counsel and defense counsel concerning the appropriateness of trial by military judge alone, will be in the best position to protect the interest of both the Government and the accused."[300]

The current provision in the *Manual for Courts-Martial* that implements Article 16 is RCM 903.[301] RCM 903 states, in part, that upon receipt of an accused's request for trial by military judge alone, the military judge will ascertain that the accused has consulted with counsel, that he knows the identity of the judge that will hear his case, and that he understands his right to trial by members.[302] The judge will then approve or disapprove the request, at his discretion.[303] RCM 903 does not require that the

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[300] S. REP. NO. 1601, at 4 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4501, 4505.

[301] MCM, *supra*, note 8, R.C.M. 903.

[302] *Id.* R.C.M. 903(c)(2)(A).

[303] *Id.* R.C.M. 903(c)(2)(B).

government be heard on the request. The discussion to the rule states the military judge should grant the request unless there is "substantial reason" to deny it.[304]

In 1975, the CMA addressed the matter of the exercise of the military judge's discretion to approve or deny the request for trial by judge alone.[305] In *Morris*, the accused requested trial by military judge alone. The CMA held that in addition to conferring a right upon the accused, Article 16 also conferred a benefit upon the government in the form of permitting the court-martial members to perform their regular duties rather than serve on the court-martial.[306] The CMA held that if the request for trial by judge alone is made after assembly of the court, the government lost some of its benefit because the members have been called. In that situation, the interests of the accused in a trial by judge alone had to be balanced against the interests in the government' loss of "contemplated benefits" before granting the request for trial by judge alone.[307] The CMA went on to hold that if the request was made prior to assembly of the court-martial, there was no need to balance the interests of the accused and the government, and the only concern of the trial judge should be whether the accused understands his right to a trial by members, and knowingly and freely waives that right.[308]

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[304] *Id.* R.C.M. 903 discussion. The analysis of RCM 903 states that this language is derived from *United States v. Butler*, 14 M.J. 72 (C.M.A. 1982), although this language cannot be found in the case.

[305] United States v. Morris, 49 C.M.R. 653 (C.M.A. 1975).

[306] *Id.* at 658.

[307] *Id.*

[308] *Id.*

In *United States v. Butler,*[309] the CMA addressed the issue of discretion in denying an accused's request for trial by military judge alone. The CMA recognized that Article 16 requires the military judge's approval before a trial by members may be waived and RCM 903 leaves this approval to the judge's discretion. It held that a denial of a request for trial by judge alone could be reviewed on the basis of an abuse of discretion. It then held that in order for appellate courts to review the trial judge's decision for an abuse of discretion, the trial judge must make the basis of the denial a matter of record.[310] The standard of review articulated by the CMA in *Butler* is only whether the military judge abused his discretion by "summarily denying (the request) for no reviewable reasons."[311]

As the dissent in *Butler* observed, the plurality fails to acknowledge that trial by jury is the preferred method of criminal trial in American jurisprudence and trial by judge alone is the historical exception, rather than the rule.[312] The dissent proposed, more consistently with historical precedent and Federal court opinions, that rather than requiring the judge to justify his denial of a request for trial by judge alone, the accused

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[309] 14 M.J. 72 (C.M.A. 1982).

[310] *Id.* at 73.

[311] *Id.*

[312] *Id.* at 77 (Cook, J., dissenting).

should be required to provide reasons why the request should be granted.[313] This procedure would permit the offering of evidence on the issue from the defense counsel and the trial counsel, and argument from both sides, thereby giving the judge adequate information to make an informed decision on the matter and create an adequate record for review.[314]

The *Manual for Courts-Martial* interprets the holding in *Butler* to be that there must be a "substantial reason" for the military judge to deny a request to waive a trial by members.[315] The CMA has been less clear in articulating a standard. For example, in *United States v. Webster*,[316] the CMA held that the trial judge erred by denying an accused request for trial by military judge alone.[317] The trial judge denied the request as untimely; he found that the request for trial by military judge alone had been made the morning of a trial which had been docketed for that day a month earlier and that the members had been called for later that afternoon.[318] The CMA found that the request

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[313] *Id.* at 79.

[314] *Id.*

[315] MCM, *supra* note 8, R.C.M. 903 discussion. The analysis to the rule indicates that this language is based on the holding in *Butler*, although the CMA in that case did not articulate a clear standard of review other than that previously discussed. *Supra*, text accompanying note 311.

[316] 24 M.J. 96 (C.M.A. 1987).

[317] *Id.* at 99. The only reported reason for the request for trial by judge alone was the notice to the defense counsel that there were changes in personnel detailed as members of the court-martial.

[318] *Id.* At trial, the trial counsel objected to the waiver of members solely on the grounds that the request was, in his view, untimely.

was, in fact, timely (before assembly of the court)[319] and held that absent that ground the record did not reflect an adequate basis for the denial of the request and the sentence was set aside.[320] *Webster* is instructive, not because the CMA established a clear standard of review (it did not), but because it clearly placed the burden on the government to establish grounds for successfully opposing a request for trial by military judge alone.

The grounds upon which a military judge can deny a request for trial by judge have proven to be difficult to meet and the standard impossible to discern.[321] *United States v. Ward*[322] is one of the few cases in which the CMA upheld a denial of a request for trial by judge alone. In that case, the military judge had presided over an earlier case in which that accused had testified in his own defense and it was the military judge's opinion that the earlier accused appeared credible.[323] The defense in Ward's trial intended to call the earlier accused as a defense witness.[324] The trial counsel then challenged the military judge based on the judge's earlier determination of the defense

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[319] *Id.*

[320] *Id.* at 100. The accused pled guilty in the case.

[321] There are relatively few reported cases dealing with this issue. As noted in the introduction to this paper and the accompanying notes, approximately two-thirds of the general courts-martial tried in the past nine years have been tried by military judge alone (*see supra* note 3); apparently, a great number of requests for trial by judge alone are granted and I have no information regarding requests which may have been denied and the denial is *not* an issue addressed on appeal and reported. I believe that if such a request were denied, however, it would be an issue ripe for appellate consideration.

[322] 3 M.J. 365 (C.M.A. 1977).

[323] *Id.* Ward also testified at the earlier trial but the military judge stated that he had not determined Ward's credibility and was not predisposed on that issue.

[324] *Id.*

witness. The judge denied the challenge and the defense then requested trial by military judge alone.[325] The military judge denied the request, stating that although he denied the trial counsel's challenge, he did not find the challenge "frivolous" and although he did not believe he held a predisposition as to the credibility of the defense witness at the time of Ward's trial, he felt that "the best interest of all parties concerned . . . would be (better served) if there was in fact, a separate fact-finder other than (himself)."[326] On appeal, the defense argued that the military judge erred in not granting the trail counsel's challenge, and that by denying the challenge the military judge created the basis for the denial of the request to be tried by judge alone.[327] The CMA did address the issue of whether the challenge should have been granted but did hold that the denial of the request for judge alone was not an abuse of the military judge's discretion.[328] Although the CMA briefly discussed the intent to model Article 16 after the Federal rule,[329] the CMA did not address the standard by which it held the military judge had not abused his discretion.

In *United States v. Sherrod*,[330] the CMA addressed the relationship between trials by members and trials by judge alone in the military justice system. In *Sherrod*, the

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[325] *Id.* at 365-366.

[326] *Id.* at 366.

[327] *Id.*

[328] *Id.* at 367.

[329] *Id.* at 366-367.

[330] 26 M.J. 30 (C.M.A. 1988).

accused unsuccessfully (at the trial level) challenged the military judge for cause.[331] Although the challenge was denied by the military judge, the accused was nonetheless so anxious to avoid a trial by members, he requested trial by judge alone.[332] The military judge denied that request as well; although he believed himself sufficiently impartial, he was concerned about the appearance of bias should he hear the case himself.[333] The CMA held that the judge should have recused himself, and it reversed on those grounds.[334] As a result, its discussion of the right to a trial by judge alone is *dicta*, but instructive. The CMA held that unlike the absolute right to a trial by members, the right to trial by judge alone is not absolute, but a right nonetheless.[335] The CMA stated that it was not its intention to elevate the right to a judge alone trial to the status of the right to a trial by members.[336] However, the CMA presumed that "in the vast majority of cases, *there will continue to be no basis* for the military judge to recuse him or herself, or *to deny a request for trial by judge alone.*"[337]

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[331] *Id.* at 31.

[332] *Id.*

[333] *Id.*

[334] *Id.* at 33.

[335] *Id.* at 32.

[336] *Id.* at 33.

[337] *Id.* (emphasis mine).

With this language the CMA, perhaps unwittingly, has stated in my opinion an untenable view of the purpose of trial by court-martial members. Trial by court-martial members is the historically and constitutionally preferred method for determining guilt.[338] Indeed, courts composed of members are not just the preferable forum, they were the *only* forum available before the Military Justice Act of 1968. However in these cases, the CMA has replaced the preference for trials by members with a preference for trials by judge alone by imposing a burden on the government to establish grounds for objecting to an accused's waiver of his right to members. This shift not only ignores the functions trials by members serve in the military community (which will be discussed in Part V of this paper), but results in creating an internal inconsistency within the UCMJ itself.

F. *Article 18, UCMJ.*

At the same time Congress provided for courts-martial by judge alone, it deprived courts-martial composed of military judges alone of jurisdiction over capital cases.[339] Article 18, UCMJ states, in part, ". . . a general court-martial (composed of military judge alone) shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a

[338] See Judge Cook's dissent in *Butler*, 14 M.J. at 74-80, discussed *supra* notes 312 through 314 and the accompanying text.

[339] UCMJ art. 18 (1968).

noncapital case."[340] Thus, the CMA interpretation of Article 16 as statutorily creating a right to a court-martial by judge alone[341] is inconsistent with Article 18 that prohibits the trial by judge alone of an accused facing the death penalty. The inconsistency is this: If Article 16 creates a right of an accused, how can one charged with a capital offense be deprived of that right? There is no evidence in the legislative history of the UCMJ that Congress intended to bestow a right for the benefit of an accused in a noncapital case and yet deprive an accused facing the death penalty of that enhanced right. One must examine the purpose of the Article 18 "no judge alone capital cases" provision and recharacterize the judge alone provision of Article 16 to resolve this apparent conflict.

Shortly before the congressional hearings concerning the 1968 Act, the Supreme Court decided *United States v. Jackson*.[342] The defendants in *Jackson* were tried for violating the Federal Kidnapping Act,[343] which provided for the death penalty "if the verdict of the jury shall so recommend."[344] The Court read this to mean that under this statute, the defendants could avoid the possibility of the death penalty by waiving their

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[340] *Id.* This portion of art. 18 is implemented by the Rules for Court-Martial as follows: "A general court-martial composed only of a military judge does not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been referred to trial as noncapital." MCM, *supra* note 8, R.C.M. 201(f)(1)(C).

[341] *Sherrod*, 26 M.J. at 32 (". . . while trial by judge alone may not be an *absolute* right, it is a right nonetheless."); United States v. Amos, 26 M.J. 806, 810 ("While an accused's right to trial by judge alone is not absolute . . . the request for such a trial forum may not be arbitrarily denied.")(cites omitted); *Morris*, 49 C.M.R. at 658 (". . . while Article 16 confers a new right upon the accused . . . ").

[342] 390 U.S. 570 (1968).

[343] 18 U.S.C. 1201 (1932) (amended 1986).

[344] *Id.* at section 1201(a).

right to a trial by jury.[345] The Court held that this impermissibly infringed on the defendants' right to a jury trial by offering defendants an unconstitutional incentive to waive that right.[346]

As a reaction to the *Jackson* case,[347] Congress enacted the provision of Article 18 preventing judge alone capital cases. Congress' intent was to "avoid the type of choice found objectionable" by the Court in *Jackson*.[348] This provision must be read in conjunction with Article 16 creating the option of judge alone trials. They can only be reconciled if one accepts the legislative history of Article 16 that demonstrates Congress' intent in providing for judge alone trials as an attempt to bring military practice more in line with Federal practice and to reduce the time and manpower involved in courts-martial.[349] There is no evidence that Congress was attempting to create a right of an accused to a trial by judge alone, but was, rather, providing only another option regarding forum.[350]

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[345] *Jackson*, 390 U.S. at 571-572.

[346] *Id.*

[347] S. REP. NO. 1601, at 4 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4501, 4505; H.R. REP. NO. 1481 at 1-2.

[348] Article 18 "would avoid this problem by in connection with the waiver of court-martial by an accused by not allowing waiver where the death penalty is possible." *Id.*

[349] S. REP. NO. 1601, at 3 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4501, 4504.

[350] *Webster*, 24 M.J. at 99. Although the CMA in *Webster* held that the military judge erred in denying the accused's request for trial by judge alone, it did not characterize the accused's harm as a lost right; rather it held that the accused lost the "benefit of a statutory option."

This interpretation, that trial by military judge alone is only another forum option and not a right of an accused, is the only interpretation consistent with Article 18 and subsequent capital case law. The CMA has repeated held in capital cases that an accused does not have a right to a trial by military judge alone.[351] In *Matthews*, the CMA held that the accused had no constitutional right to a trial by military judge alone and that Congress was permitted to make this distinction between capital and noncapital cases due to the "unique nature of capital punishment."[352] In later cases the CMA referred back to *Matthews* and its reference to the "unique nature of capital cases" and summarily upheld Article 18.[353]

By refusing to recognize an accused's right to a trial by military judge alone in a capital case, the CMA is implicitly acknowledging that the most fair system of justice is trial by members. The discussion in parts II and III of this paper demonstrates this proposition as it applies to the civilian administration of justice. The communitarian function of the jury discussed in those parts is easily translated into the military system, although there are some differences and nuances that warrant discussion.

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[351] United States v. Matthews, 16 M.J. 354, 363 (C.M.A. 1983); United States v. Loving, 41 M.J. 213, 291 (1994), *aff'd*, 64 U.S.L.W. 4390 (1996); United States v. Curtis, 44 M.J. 106, 130 (1996).

[352] *Matthews*, 16 M.J. at 363, citing *United States v. Singer*, 380 U.S. 24 (1965).

[353] *Loving*, 41 M.J. at 291 (citing *Matthews*, 16 M.J. at 363); *Curtis*, 44 M.J. at 130 (citing *Loving*, 41 M.J. at 291, and *Matthews*, 16 M.J. at 363). Other grounds that have been asserted for requiring trial by jurors in some cases is that it relieves the judges of the burden of imposing justice and permits the public to share in this responsibility. *Duncan*, 391 U.S. at 187 (Harlan, J., dissenting).

V. THE COMMUNITARIAN FUNCTION AND TRIAL BY COURTS-MARTIAL COMPOSED OF MEMBERS.

As was discussed in Part III, the five communitarian functions of the jury are (1) service as a vehicle for direct community participation in the administration of the criminal justice system; (2) fact-finding; (3) educating the community about the criminal justice system; (4) providing for a ritual that preserves faith in the administration and maintenance of justice and respect for the justice system; and (5) permitting the community to make value decisions that accurately reflect community values.[354] Not only do these functions translate easily into the military system of justice, many are enhanced by the unique nature of the military community.

A. *The Community Participation Function.*

Participation by members of the community in the criminal justice system gives the members of the community a sense of ownership of that system. This is especially important in the military community. "Military justice must as a matter of necessity encourage good order, high morale, and discipline."[355] One of the best ways to foster good order, high morale, and discipline is to permit community participation in the

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[354] These functions were discussed in detail in Part III, notes 161 through 239 and accompanying text.

[355] Ferris, *supra* note 247, note 33, quoting EDWARD M. BYRNE, MILITARY LAW, 1 (3rd ed. 1981).

system that is designed to promote those goals. The Supreme Court has held that community participation in the criminal justice system is critical to enhance community confidence in that system;[356] surely the same is true in the military community where members of the community are arguably more likely to come into contact with the justice system (as accused, witnesses, panel members, subjects of punishment pursuant to Article 15, UCMJ, or acquaintances of any of the foregoing) than their civilian counterparts.

At its heart, military life can be characterized as a life of obedience to orders and discipline.[357] Soldiers must submit to urinalysis testing, salute superior officers, and endure on the spot corrections that may result in the performance of push-ups. Every soldier knows the meaning of an Article 15. In a community in which the justice system plays such a prominent role, faith in that system is critical[358] and participation in the system is an effective method to secure that faith. One officer expressed the importance of participation in the military justice system in these words: "I believe that participation by soldiers of all ranks in every aspect of the military justice system are (sic) the source

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[356] *Taylor*, 419 U.S. at 178.

[357] General William C. Westmoreland, *Military Justice - A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5, reprinted IN FREDERIC I. LEDERER, CASES AND MATERIALS ON THE ANALYSIS OF THE MILITARY CRIMINAL LEGAL SYSTEM 318-319 (1975) [hereinafter, LEDERER].

[358] *Id.* at 322.

of its strength and fairness. If we take part of our participation away, the system begins to become 'someone else's' system."[359]

B. *The Fact-finding Function.*

Just as in the civilian arena, the fact-finding function of the court-martial can be enhanced by the presence of members. The same advantages of group decisionmaking as discussed above[360] apply to trials by members, and are heightened by military procedures. For example, unlike civilian juries whose qualification for service may be possession of a drivers license or a voter registration card, a military "juror" is chosen based on his age, education, training, experience, length of service, and judicial temperament.[361] Furthermore, the military system affords procedures that while not unique to the military system, are certainly not universally available in civilian jurisdictions: members may take notes during the presentation of evidence and rely on them during deliberations,[362] and are provided written instructions or are permitted to take notes during instructions to be used during deliberations.[363] Finally, court-martial members are permitted to question

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[359] Anonymous response, Lovejoy Survey, *supra* note 2.

[360] *Supra* notes 189 through 207 and accompanying text.

[361] UCMJ art. 25(d)(2) (1988).

[362] MCM, *supra* note 8, R.C.M. 921(b).

[363] MCM, *supra* note 8, R.C.M. 920(d) and 921(b).

witnesses and request witnesses be called.[364] All of these options enhance the court members' ability to arrive at accurate factual determinations.[365]

In addition, members bring a diversity of perspectives and frameworks of analysis not present in a judge alone trial. In addition to the diversity of the demographics of the population as a whole that is reflected in the military,[366] servicemembers also have a diversity of experience within the service that can enhance the deliberative process. An infantryman or intelligence officer or tank platoon sergeant will certainly bring perspectives and analytical frameworks to a court-martial of which a military judge may be unable to conceive. This is linked to the last function, that of providing the community the opportunity to impart upon the justice system community values, which will be discussed below.

C. *The Education Function.*

The education of the members regarding the military criminal justice system is an invaluable product of community participation. By referring to the education of court-

[364] MCM, *supra* note 8, MIL. R. EVID. 614(b).

[365] Interestingly, many officers who have sat on courts-martial and who responded to the Lovejoy Survey, *supra* note 2, commented that in their opinion member sentencing was superior to judge alone sentencing because of the advantages of group decisionmaking.

[366] The U.S. Army is, in fact, a very diverse population: 14% of the force is female; 61.8% is white; 27.0% is black; 5.3% is Hispanic; and 5.9% is "other." Of the total force, 68,850 are commissioned officers;

martial members as "training," some may then read "training" in the sense of practicing a task until it becomes a skill.[367] That reflects a misunderstanding of the educative function. The educative function, as discussed above,[368] means providing members of the community the opportunity to learn firsthand about the law and liberty and the responsibility that comes with sitting in judgment of another. As in the civilian arena, education of a juror/member benefits the community as a whole by creating an informed citizen/soldier. "Participation in the entire court-martial process . . . makes officers more sensitive to the 'rule of law' in the exercise of command authority and they carry the concept of fundamental fairness with then from the courtroom, which benefits the Army as a whole."[369] Testifying before the Advisory Commission, Lieutenant General John R. Galvin, at the time the Commanding General, VII U. S. A. Corps, stated

> Court member duty, to include the determination of an appropriate sentence by officers and, where requested, enlisted personnel, is an important duty which benefits the Army as a whole.

12,116 are warrant officers; 190,450 are noncommissioned officers; and 218,061 are junior enlisted (E-1 through E-4). *Situation Report*, SOLDIERS, Jan. 1997, at 20-21.

[367] Lovejoy, *supra* note 2 at 40. Major Lovejoy analogizes court-martial service to "live fire" exercises and "actual combat" from a "training" perspective.

[368] *Supra* notes 208 through 216 and accompanying text.

[369] I Advisory Commission to the Military Justice Act of 1983 Report at 14 [hereinafter, Commission Report]. The Advisory Commission was established pursuant to Military Justice Act of 1983 by the Secretary of Defense. Its mandate was to study and make recommendations regarding the specified matters related to the administration of military justice. One of the specified matters was whether sentencing authority should be exercised by the military judge in all cases, including those tried before members. After the examination of extensive evidence and debate, the Commission recommended to preserve the *status quo*.

> The fundamental fairness which is a characteristic of the military justice system is instilled in court members and they carry that concept with them from the courtroom.[370]

D. *The Ritual Affirmation Function.*

It is particularly important that members of the military community have faith in the justice system to which they subject themselves through voluntary service in the armed forces. When soldiers witness or learn of abuses of authority or criminal transgressions, it is important that they maintain faith that their leaders, and possibly peers, will ensure justice is done. Testifying before the Advisory Commission, Lieutenant General Walter F. Ulmer, Jr., then Commanding General, III U.S.A. Corps, opined that to remove members from the judicial process could result in "distrust in the judgment and responsibility and fairness of the military court members . . ."[371] Soldiers' confidence in a military judge is inconsequential compared to the trust they must have in their leaders and compatriots.

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[370] *Id.* at 174-175 (statement of Lieutenant General John R. Galvin, Commanding General, VII U. S. A. Corps). An anonymous convening authority, responding to the Lovejoy Survey, *supra* note 2, echoed this sentiment: "(Members tend to) spread the truth with their contemporaries after the trial about the fairness of the court-martial process and in particular the sentencing phase."

[371] Commission Report, *supra* note 369 at 260 (statement of Lieutenant General Walter F. Ulmer, Jr., Commanding General, III U. S. A. Corps).

> In the military services reliance extends universally, from the soldier, sailor, or airman walking post or reading a radar screen or standing a watch, to the unit commander ordering an operation, the senior officer designing an attack, or a supreme commander choosing a particular day and hour to launch an invasion. . . it involves ultimate reliance, the entrusting of one's life to others.[372]

Justice ensured by one's peers and associates can fulfill that role of ritual affirmation more fully than a lawyer-dominated trial by military judge alone.[373]

E. *The Expression of Community Values.*

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[372] Westmoreland and Prugh, *supra* note 5 at 46.

[373] Criticism of a perceived "lawyer-driven" military justice system and its effect on the armed forces as a whole was sharply stated by Colonel D.M. Brahms, USMC, Judge Advocate:

> We've isolated the commander. The process is one in which he simply starts a lawyers' end run. It's like pieces in a closet, remote from those who are most influenced by it, be they the fellow members of the accused or be it the man who is responsible for maintaining justice.
>
> What we have done is we have set up a ritual as only we lawyers or our fellows, the good doctors, can do; and thus we have become shaman. We don't let anyone else practice in this arena, God forbid, because they're not trained or cut into this one this one group (sic).
>
> We've made the system arcane and we've created a mythology about it that is now so entrenched that the commander gives complete deference to the lawyer. "Obviously you, as a shaman, know a great deal more than I," and "do what you will with it," forgetting that this is a system of discipline.

Commission Report, *supra* note 369 at 391 (remarks of Colonel D.M. Brahms, Staff Judge Advocate, Camp Pendleton Marine Corps Base).

The final communitarian function of the court-martial members is that of making community values determinations.[374] "The military society is best able to evaluate the element of the (alleged criminal) act, the source of military harm, and the effect on overall military discipline."[375] Commanders have expressed concern that military judges are insulated from the "line Army" and too far removed from the military society to accurately understand military standards.[376] There is also a general belief that military judges lack the operational experience to fully understand the necessary standards that must be upheld at soldier level.[377]

This function is more than merely transferable from the civilian system into the military. A jury is expected to apply the law as it is explained to them by the judge to that facts before them and decide whether the law was violated in the context of current societal circumstances, including societal values.[378] While in the military, there is a generally accepted set of values that all members of the community accept, this is decidedly not so in the civilian world.[379] It may be difficult to obtain any benefit from

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[374] *Supra* notes 232 through 239 and accompanying text.

[375] Westmoreland and Prugh, *supra* note 5 at 44.

[376] Lovejoy Survey, *supra* note 2. One commander stated, "judges are not peers (although members of the service) nor are they necessarily attuned to conditions in the unit." (Parenthetical in the original.)

[377] Responses to the Lovejoy Survey, *supra* note 2 included descriptions of the military acumen of military judges as "not attuned to conditions in the unit," "insulated from vagaries of military service in units," "not in tune with the impact of some offenses on the unit," "insulated from the military community," and "lack operational experience."

[378] *Supra* notes 234 through 239 and accompanying text.

this application of public values in the civilian system because it is extremely difficult to identify a specific "public value" in the diverse, multicultural society the United States has become. Contrast this to the generally accepted community values of the military, and the value of the military "jury" input into the values-defining function of the jury increases tremendously.

Although reasonable people may differ when articulating specific values and principles that can be projected on every individual member of the armed forces, I suggest that the heart of military values is not as malleable as the words used to express them. The essence of the Army values is stated plainly and clearly in the code of the United States Corps of Cadets: duty, honor, country.[380] The value "duty" means to perform one's duty to the best of one's ability, as if one's entire reputation depended upon the successful completion of the task or mission at hand.[381] "Honor" is the ability to distinguish right from wrong and the "courage to adhere unswervingly to the right."[382]

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[379] For an excellent study and commentary on the effects of this lack of a uniform set of "American values," see ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA (W.W. Norton & Co. 1992). Mr. Schlesinger noted that in AN AMERICA DILEMMA, written in 1944, Gunnar Myrdal identified an American "system of general ideals," these ideals being "the essential dignity and equality of all human beings, of inalienable rights to freedom, justice and opportunity." *Id.* at 27. He then contended that the current emphasis on the distinctions of each of the groups of our multicultural society (he refers to this as the "cult of ethnicity") rejects the notion of a shared national commitment to common ideals. *Id.* at 117. His concern is that "if the republic now turns away from Washington's old goal of 'one people' (and one shared system of general ideals), what is the future? - disintegration of the national community, apartheid, Balkanization, tribalization?" *Id.* at 118.

[380] BUGLE NOTES, UNITED STATES MILITARY ACADEMY 38 (72d vol. 1980).

[381] THE OFFICER'S GUIDE 238 (The Military Service Publishing Co. 23d ed. 1957) (1930).

[382] *Id.*

A man of honor does not "lie, cheat, or steal, nor does he violate moral codes."[383] Finally, the value of "country" derives from one's voluntary service to one's country. "He is a patriotic citizen who places country above self. Patriotism has this definition: The willingness to sacrifice and endure discipline for the welfare of the community."[384] Although particular standards of acceptable behavior may fluctuate over time,[385] I suggest these core values endure and are common to all members of the armed forces.

In addition, the value of members bringing the "line Army" point of view to courts-martial is particularly important in cases alleging military offenses,[386] and offenses whose elements include " that the conduct of the accused was to the prejudice of good order and discipline or was of a nature to bring discredit upon the armed forces;"[387] elements that require the evaluation of community standards. Not only do these offenses highlight the fundamental differences between the military and civilian

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[383] *Id.*

[384] *Id.* at 238-239.

[385] For example, fraternization often poses difficult questions regarding specific behavior and whether it violates service standards. In *United States v. Guagloine*, 27 M.J. 268 (C.M.A. 1988), the accused was charged with conduct unbecoming an officer based on his fraternizing with junior enlisted members of his unit. Although the accused, a first lieutenant, went to a brothel with privates in his company (where two of the soldiers engaged the services of prostitutes and one bought hashish), there was no evidence that the junior soldiers addressed the accused on terms of military equality or failed to show him proper military courtesy. The CMA held that going to brothels with junior enlisted soldiers did not constitute fraternization and overturned the accused's conviction. *Id.* at 271-272. On the other hand, in *United States v. McCreight*, 43 M.J. 483 (1996), the CAAF affirmed a conviction of fraternization based on the accused, another first lieutenant, being on a first name basis with a senior airman (E-4), and watching ballgames, dining, drinking, and gambling with the junior soldier. *Id.* at 485.

[386] Westmoreland and Prugh, *supra* note 5 at 42-44.

[387] UCMJ art. 134; MCM, *supra* note 8, pt. IV, paras. 60 through 113.

societies, and they accentuate the increased need for accurate community values decisions in military trials. In fact, the CAAF has held that all offenses under the UCMJ, including the enumerated offenses, inherently contain an element of conduct that is service discrediting or contrary to good order and discipline.[388]

There is a concern that the military justice system is becoming increasingly distanced from the military mission and society[389] and a belief that trials by military judge alone further distance the justice system from the military community.[390] In response to whether the military should eliminate all sentencing by members, one commander responded, "it (the military justice system) is a unique system which combines elements of the traditional justice system with the mechanism for maintaining military discipline. If you take out the commanders and chain of command elements, you lose the military input into the system."[391] One way to ensure that military community values and standards are applied and affirmed at courts-martial is to give the

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[388] United States v. Foster, 40 M.J. 140 (C.M.A. 1994). In *Foster*, the accused was charged with sodomy but was found guilty of indecent assault, believed by the trial court to be a lesser included offense of sodomy. The issue before the CMA was whether indecent assault was, in fact, a lesser included offense of sodomy because indecent assault contains the element "that the conduct of the accused was to the prejudice of good order and discipline or was of a nature to bring discredit upon the armed forces" and sodomy does not. In affirming the conviction, the CMA found that "the enumerated articles are rooted in the principle that such conduct *per se* is either prejudicial to good order and discipline or brings discredit upon the armed forces; those elements are implicit in the enumerated articles." *Id.* at 143.

[389] Westmoreland and Prugh, *supra* note 5 at 2-4. *See also supra* the text accompanying note 2; *supra* note 373.

[390] *Supra* note 373.

[391] Anonymous response, Lovejoy Survey, *supra* note 2.

convening authority, who is the "government" in courts-martial and who therefore represents the community, a voice in determining which cases will be tried by members of the community. The best way to give him that voice is to require his consent to the waiver of a trial by court-martial members.

VI. PROPOSED CHANGE TO ARTICLE 16, UCMJ.

The primary purpose for providing for trial by military judge alone was to reduce the time and manpower involved in courts-martial.[392] It follows that the convening authority, who is primarily responsible for these things within his command, should have the ability to require trial by members if he deems the benefits of such a forum outweigh the time and manpower saved by trial by judge alone. Therefore, I propose that Article 16 be amended to require the consent of the convening authority to waive a members trial. A proposed revision of Article 16 can be found at Appendix A. A proposed revision of RCM 903, implementing this change, can be found at Appendix B.

The primary objections to this proposal are twofold. First, it could be argued that requiring convening authority consent to a waiver of trial by members presents the possibility of unlawful command influence over the conduct and outcome of the trial .[393]

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[392] S. REP. NO. 1601, at 3 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4501, 4504.

[393] S. REP. NO. 1601, at 4 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4501, 4505.

The second objection involves the sentencing portion of the court-martial; requiring the government consent to waiver of members would not only subject the accused to a trial on the merits by members, but also member sentencing. This will offend some who assert the military should adopt judge alone sentencing in all cases.[394] Both of these objections are unfounded.

A. *Unlawful Command Influence.*

The House apparently did not consider unlawful command influence a threat to the rights of an accused by requiring the convening authority approval to waiver of trial by members. The House version of Article 16 contained a provision requiring convening authority consent to waiving trial by members.[395] The Senate Armed Services Committee struck the requirement in its report and it was enacted without the provision.[396] Although not articulated in the legislative history the apparent basis of this concern is twofold: The first basis of concern was that the convening authority will use improper criteria to select the members and the accused would be subjected to a "hammer-inclined" panel with no

[394] Lovejoy, *supra* note 2. Commission Report, *supra* note 369 at 28-31 (Minority Report in Favor of Proposed Change to Judge Alone Sentencing.).

[395] H.R. REP. NO. 1481 at 4 (1968).

[396] *Supra* notes 296 through 299 and accompanying text.

recourse.[397] The second basis of concern was that the members will be improperly influenced by the convening authority who selected them to return particular verdicts or sentences.[398]

Changing Article 16 to require convening authority consent to waiver of a trial by members would not result in the feared "prosecutorial veto."[399] Just as under the Federal rule and the cases interpreting it, not only would a waiver require the convening authority (or government, in Federal cases) consent, it also would require the exercise of discretion by the trial court. Just as in Federal cases in which the trial judge has granted a request for waiver over the objection of the government, under my proposal, the military judge would likewise be expected to exercise discretion in considering requests for trial by judge alone.

I propose the following approach: In the first scenario, the accused requests trial by judge alone and the convening authority consents. The military judge would still be required to exercise discretion in approving the request as there may be circumstances under which the interests of justice would require trial by members. For example, there

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[397] United States v. Hilow, 32 M.J. 439, 441 (C.M.A. 1991) (The division deputy adjutant general purposely selected nominees for court-martial duty who were "commanders and supporters of a command policy of hard discipline"); *see also*, Lamb, *supra* note 247 at 143-148.

[398] United States v. Martinez, 42 M.J. 327 (1995) (A policy letter regarding DUI that suggested what the sentence in a DUI case should be constituted unlawful command influence.); see also, Martha Huntley Bower, *Unlawful Command Influence: Preserving the Delicate Balance*, 29 A.F. L. REV. 65, 70-76 (1988).

[399] DeCicco, *supra* note 68 at 1100-1102.

may be cases in which the military judge has been judicially exposed to information that the judge believes may result in an improper appearance should he grant a bench trial. Examples of circumstances that could create such an appearance include the military judge having conducted a providence inquiry and rejected a guilty plea attempted by the accused now facing trial. Although not grounds for disqualifying himself,[400] the interests of justice under these circumstances may better be served by denying the request, even though the convening authority consents.

In the second scenario, the accused requests waiver of his right to a trial by members and the convening authority does not consent. In these cases, the accused should be given the opportunity to present grounds for the requested waiver. For example, the accused may assert that the members are improperly tainted by unlawful command influence, or he may aver any of the grounds that are raised in civilian trials (extensive adverse pretrial publicity, etc.). The trial counsel would then be given the opportunity to present rebuttal, and the military judge would exercise his discretion based on the evidence and grant or deny the request.

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[400] United States v. Winter, 35 M.J. 93 (C.M.A. 1992), *cert. den.* 507 U.S. 915 (1993). In *Winter*, the accused was charged with unpremeditated murder and attempted to plead guilty to the lesser included offense of manslaughter. The military judge conducted a providence inquiry into the lesser offense and the accused failed to satisfactorily complete the inquiry. The same judge then presided at a court-martial composed of members for the charged offense. The CMA held that the judge was not disqualified from presiding at the court-martial based on the earlier unsuccessful providence inquiry.

For example, if the accused requests waiver based on allegations of unlawful command influence that prevents him from receiving a fair and impartial trial from the members and the convening authority does not consent, the following would occur:

(1) The accused would be required to present sufficient evidence "to render a reasonable conclusion"[401] of the presence of unlawful command influence *that impedes his ability to receive a fair trial from impartial and unbiased court-martial members.*

(2) The government must then show by "clear and positive evidence"[402] that the members have not been improperly influenced.

(3) After hearing the evidence, the military judge must decide whether the parties have met their burdens and rule on the request accordingly.

This analysis would be applied to the other grounds for a requested waiver as well.

B. *Impact on Sentencing.*

Such a change to Article 16 would have an effect on sentencing in the military that also warrants discussion. Without convening authority consent and in the absence of

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[401] United States v. Cruz, 20 M.J. 873, 885-886 (A.C.M.R. 1985).

[402] *Id.* at 887-888.

grounds for the military judge to grant a waiver of members over the convening authority's objection, soldiers facing trial by court-martial may not only be adjudged guilty by members in spite of their desire to be tried by judge alone, they would also be sentenced by members. Because member or juror sentencing in noncapital cases is rather unusual,[403] it merits discussion in connection with this proposal.

Member sentencing has been attacked on the grounds that sentencing an accused whom the members have determined guilty after a trial on the merits is too difficult for members because they are "untrained and inexperienced in the science of criminal sentencing."[404] The nature of this "science" is unclear; the purposes of court-martial punishment are protection of society, punishment of the wrongdoer, rehabilitation of the wrongdoer, preservation of good order and discipline, and deterrence (both specific and general).[405] Court-martial members, with sufficient evidence presented by counsel and proper instructions from the military judge, are perfectly capable of adjudging lawful and appropriate sentences. There is nothing inherently legalistic about the goals of punishment. Given all the relevant facts and careful instructions on the law, members are as capable of imposing fair and appropriate punishment as are military judges.

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[403] As of the fall of 1993, only eight states used juries in some fashion for noncapital sentencing. Lovejoy, *supra* note 2 at 3.

[404] *Id.* at 7.

[405] United States v. Ohrt, 28 M.J. 301, 305 (C.M.A. 1989).

> Military jurors come from the defendant's environment and have personal knowledge of environmental stresses on soldiers and of the need for discipline in military circumstances. In addition, any military juror who has been a commanding officer is experienced in assessing credibility, weighing evidence, and determining an appropriate punishment under provisions that give commanders authority to impose punishment for minor offenses to maintain discipline.[406]

Those officers surveyed by Major Lovejoy, almost without exception, believed themselves capable of adjudging fair sentences at courts-martial.[407] As an illustration of their capability, officers surveyed stated that the factors that they have considered or would consider in determining a fair sentence include the family background of the accused, the circumstances surrounding the offense(s), the rehabilitative potential of the accused, the accused's potential for future contributions to the Army and to society, "fairness" and "justice," the impact on the victim, deterrence, and the effect of the offense(s) on the unit and its mission.[408] This demonstrates an admirable understanding of the purposes of punishment and the factors that a judge would consider in determining an appropriate sentence in a given case. That the members do not know the

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[406] Cynthia Swarthout Conners, Comment, *The Death Penalty in Military Courts: Constitutionally Imposed?*, 30 UCLA L. REV. 366, 386 (1982).

[407] Responses of convening authorities and attendees of the Senior Officer Legal Orientation Course, Lovejoy Survey, *supra* note 2.

[408] *Id.*, survey responses of officers attending the Senior Officer Legal Orientation Course.

administrative consequences of sentences they impose (another ground of attack on member sentencing) is more a matter of what information members are given, rather than a challenge to their competence to impose punishment.[409]

The communitarian functions that are served by trials on the merits by members support member sentencing as well. The enhanced fact-finding ability of the members helps ensure an accused is fairly and appropriately punished. Member sentencing requires the contributions of all the members who bring their different perspectives and analytical frameworks to the deliberation room. The group effort also mitigates, if not obliterates, the effect of one person's emotional reaction to a particular type of offense that could result in an unfair sentence.[410] Thus, the enhanced decisionmaking ability of a group results in a more reliable sentence.

In addition, because members are closer to the accused in military and operational background than a military judge,[411] they have a better understanding of the stresses soldiers face and the effect their environment may have on them. A court member is likely to have a better understanding than a military judge of the motive of an

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[409] This is a "truth in sentencing" issue raised by Chief Judge Sullivan in his dissent in *United States v. Boone*, 42 M.J. 308, 314 (1995) and is beyond the scope of this paper.

[410] Some of the prisoners at the United States Disciplinary Barracks, Ft. Leavenworth, Kansas who responded to Major Lovejoy's survey indicated that they selected a particular forum based on their (or their defense counsel's) opinion that the military judge on their case had a preconceived notion about the relative "badness" of their offenses. Lovejoy Survey, *supra* note 2.

accused and the impact the stress of military service had on the accused that may or may not be a factor in the cause of the accused's misconduct.

Finally, a court member will undoubtedly have a better appreciation of the deterrent impact a sentence will have as well as its impact on good order and discipline in the unit.

VI. CONCLUSION

The value of court-martial members to the administration of the military justice system has been forgotten, if it was ever fully realized at all. The "military" in military justice has been increasingly diminished in the purported "evolution from discipline to justice,"[412] as if the two are incompatible.[413] I suggest that justice can best be served by

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[411] See *supra* notes 373 through 377 and accompanying text.

[412] Ferris, *supra* note 247 at 442-452. Mr. Ferris opined that the military justice system has "undergone a radical transformation, from a commander-driven tool of discipline to a modern adversarial criminal justice system." *Id.* at 452. Contrast this to the view that

> It is a mistake to talk of balancing discipline and justice - the two are inseparable. An unfair or unjust correction never promotes the development of discipline . . . all correction must be fair . . . It is not proper to say that a military court-martial has a dual function as an instrument of discipline and as an instrument of justice. It is an instrument of justice and in fulfilling this function, it will promote discipline.

THE COMMITTEE FOR EVALUATION OF THE EFFECTIVENESS OF THE ADMINISTRATION OF MILITARY JUSTICE, REPORT TO GENERAL WILLIAM C. WESTMORELAND (1971), reprinted in LEDERER, *supra* note 357 at 312.

[413] Lovejoy, *supra* note 2 at 5 (". . . the decision to eliminate court members from sentencing likely depends on one's view of the much broader issue of whether courts-martial are a system of justice owned by attorneys, or a tool of discipline owned by commanders") (footnotes omitted).

courts-martial composed of members because trials by members serve objectives that are unattainable in trials by military judges alone.

The Framers of the Constitution viewed trial by jury as such an important institution that they guaranteed it not once, but twice, in the Constitution.[414] The Supreme Court has held that "trial by jury is fundamental to the American scheme of justice."[415] The value of the jury to the individual as a protection against an oppressive government has long been recognized; its value to the community has either been ignored or lauded in dicta. The value to the community of the trial by jury must be fully recognized and then the jury can be used to its full benefit, not only to the defendant, but to society.

The benefits of trials by jury include providing the community the opportunity to participate in the administration of justice and giving members of the community increased confidence in the criminal justice system and a stake in its operation. The fact-finding mission of a trial is enhanced by the participation of the jury because of the many perspectives they bring to the deliberation room through which to evaluate the evidence. The criminal justice system also benefits from the advantages of group decisionmaking and the increased probability of the true facts being found. Trials by jury provide an

[414] U.S. CONST. art. III, section 2; U.S. CONST. amend VI.

[415] Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

opportunity for the citizenry, through participation, to learn about the criminal justice system, about their liberties and about their civic responsibilities. Through participation on a jury, the citizen not only becomes involved in the governing, but learns how to govern well.[416] Participation in the process by trial by jury also serves the public as an affirmation that we are a government of, for, and by the people. Finally, the trier of fact in a criminal case must often make decisions about public values and societal standards that impact not only a particular defendant, but society as a whole. Trials by jury give the community the opportunity to make those public values decisions.

The value of community participation in criminal trials is even greater in the military. The military justice system is an important tool for the maintenance of good order and discipline in the armed forces. Its effectiveness is greatly enhanced by participation of members of the military community in the process. Courts-martial composed of members increase soldiers' confidence in the system and thereby strengthening it effectiveness. Military juries are likely composed of the best educated and most conscientious jurors ever to return verdicts. Their ability to find the true facts and to apply the community values and standards is unparalleled. Ultimately, in a system that to be effective must deemed credible by those subject to it, participation is an important manner in which to maintain that credibility.

[416] I DEMOCRACY IN AMERICA *supra* note 170 at 286 ("The jury, which is the most energetic means of making the people rule, is also the most efficacious means of teaching it how to rule well.").

The Supreme Court affirmed the value of the jury in the *Patton* case when it held that an accused may waive his right to a jury only with the consent of the government and the approval of the court. Federal Rule of Criminal Procedure 23 codified that holding. As a result, a defendant in a Federal criminal case cannot exclude community participation in his trial without the consent of the government and the approval of the court. In light of the benefits of trials by members to the military justice system, a similar requirement should be adopted for the military.

Article 16, UCMJ, should be amended to include a requirement of convening authority consent to waive a trial by members. The convening authority, who is ultimately responsible for the good order, discipline, and morale of his command, should have a voice in whether a court-martial will be composed of members or of a military judge alone. By permitting the convening authority to assert the community interests in a jury trial, we will bring the military justice system more in line with the Federal procedure that allows for government input into the criminal justice process that reaps the greatest benefit to the community as a whole.

APPENDIX A

Recommended Change to the Uniform Code of Military Justice

(underline denotes change)

Section 816. Art. 16. Courts-martial classified

The three kinds of courts-martial in each of the armed forces are -

(1) general courts-martial, consisting of -

(A) a military judge and not less than five members; or

(B) only a military judge, if before the court is assembled the accused, requests orally on the record or in writing a court composed only of a military judge and the convening authority consents and the military judge approves;

(2) special courts-martial, consisting of -

(A) not less than three members; or

(B) a military judge and not less than three members; or

(C) only a military judge, if one has been detailed to the court, and the accused under the same conditions as those prescribed in clause (1)(B) so requests and the convening authority consents and the military judge approves; and

(3) summary courts-martial, consisting of one commissioned officer.

APPENDIX B

Proposed Change to the Rules for Courts-Martial

(underline denotes change)

Rule 903. Accused's elections on composition of court-martial

(a) *Time of elections.*

(1) *Request for enlisted members.* Before the end of the initial Article 39(a) session or, in the absence of such a session, before assembly, the military judge shall ascertain. as applicable, whether an enlisted accused elects to be tried by a court-martial including enlisted members. The military judge may, as a matter of discretion, permit the accused to defer requesting enlisted members until any time before assembly, which time may be determined by the military judge.

(2) *Request for trial by military judge alone.* Before the end of the initial Article 39(a) session, or, in the absence of such a session, before assembly, the military judge shall ascertain, as applicable, whether in a noncapital case, the accused requests trial by the military judge alone. The accused may defer requesting trial by military judge alone until any time before assembly.

(b) *Form of election.*

(1) *Request for enlisted members.* A request for the membership of the court-martial to include enlisted persons shall be in writing and signed by the accused or shall be made orally on the record.

(2) *Request for trial by military judge alone.* A request for trial by military judge alone shall be in writing and signed by the accused or shall be made orally on the record.

(c) *Action on election.*

(1) *Request for enlisted members.* Upon notice of a timely request for enlisted members by an enlisted accused, the convening authority shall detail enlisted members to the court-martial in accordance with R.C.M. 503 or prepare a detailed written statement explaining why physical conditions or military exigencies prevented this. The trial of the general issue shall not proceed until this is done.

(2) *Request for military judge alone.* Upon receipt of a timely request for trial by military judge alone the military judge shall:

(A) Ascertain whether the accused has consulted with defense counsel and has been informed of the identity of the military judge and of the right to trial by members;

(B) Ascertain whether the convening authority consents to trial by military judge alone; and

(C) Approve or disapprove the request.

(i) Approve the request if the convening authority consents to trial by military judge alone and it is in the best interest of justice.

(ii) Approve the request if the convening authority does not consent to trial by military judge alone but trial by military judge alone is in the best interest of justice.

(iii) Disapprove the request if the convening authority does not consent to trial by military judge alone and trial by military judge alone is not in the best interest of justice.

Discussion

A request for trial by military judge alone to which the convening authority consents should ordinarily be approved. However, there may be some circumstances under which the military judge, although not disqualified from presiding in the case, believes that it is not in the best interest of justice for him to approve the request. A request for trial by military judge alone to which the convening authority does not consent should ordinarily be disapproved. In such a case, the accused should be provided the opportunity to present sufficient evidence to render a reasonable conclusion that he cannot receive a fair and impartial trial from a court-martial composed of members. If the accused presents such evidence, the government should be given the opportunity to show by clear and positive evidence that members can provide a fair and impartial trial.

(3) *Other*. In the absence of a request for enlisted members or a request for trial by military judge alone, trial shall be by a court-martial composed of officers.

(d) *Right to withdraw request.*

(1) *Enlisted members*. A request for enlisted members may be withdrawn by the accused as a matter of right any time before the end of theinitial Article 39(a) session, or, in the absence of such a session, before assembly.

(2) *Military judge*. The convening authority may withdraw its consent to trial by military judge alone any time before it is approved. If the convening authority withdraws

its consent prior to approval, the military judge will disapprove the request unless disapproval is not in the best interest of justice.

(e) *Untimely requests.* Failure to request, or failure to withdraw a request for enlisted members or trial by military judge alone in a timely manner shall waive the right to submit or to withdraw such a request. However, the military judge may until the beginning of the introduction of evidence on the merits, as a matter of discretion, and in the case of a request for military judge alone, with the consent of the convening authority, approve an untimely request or withdrawal of a request.

(f) *Scope.* For the purposes of this rule, "military judge" does not include the president of a special court-martial without a military judge.