REVERSIBLE-ERROR OR HARMLESS-ERROR REVIEW?: THE CONSEQUENCE OF FAILING TO POLL A CIVIL JURY AFTER FRCP RULE 48(C)

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INTRODUCTION

Imagine you have a twenty-four-year-old son who is incarcerated in a federal penitentiary for drug-related charges. Your son suffers from a well-documented mental illness and the prison officials are aware of his condition. However, as a result of the prison guards' and doctors' indifference to his serious medical and mental health needs, your son passes away while in their care. You have good reason to believe that his death was caused by the use of excessive force to subdue him after he did not receive the medical attention he required.

In an effort to hold these federal actors accountable for your son's death, and to prevent future harm to other inmates, you decide to bring a lawsuit against the prison guards and doctors. However, because the required burden of proof in criminal cases against government officials is so high, your only realistic recourse is to bring a civil lawsuit for the wrongful death of your son. Then, after investing an immense amount of time, money, and energy in your case—all the while being forced to relive the details of the tragedy—you finally have the opportunity to present your evidence to a jury.

At the conclusion of a week-long trial, the jury retires to deliberate. Six hours later, the jury sends a note to the judge, saying that they feel they cannot reach a unanimous decision. In turn, the judge gives the jury an "*Allen* charge," which makes clear, on one hand, the necessity of careful consideration by each juror of the views and opinions of fellow jurors, and, on the other hand, the importance of reaching a unanimous verdict, if possible.[1] Hours later, the jury returns a decision in favor of the prison officials. But, immediately after reading the verdict, the jury foreperson states, "A majority of this jury felt that the prison officials had a part to play in what happened to the deceased, but, based on the evidence, we could not find that the plaintiff met her burden of proof."

Because a unanimous jury verdict is necessary in this case, your attorney promptly moves for the trial court judge to conduct a poll of each

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[1] *See* Allen v. United States, 164 U.S. 492, 501–02 (1896).

individual juror to ensure that every one of them voluntarily assented to the verdict as it was read. Such a poll is expressly permitted—nay, *required*—under the Federal Rules of Civil Procedure ("FRCP") Rule 48(c), which states,

> After a verdict is returned but before the jury is discharged, the court *must* on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity or lack of assent by the number of jurors that the parties stipulated to, the court may direct the jury to deliberate further or may order a new trial.[2]

Nonetheless, the trial judge denies the motion to poll the jury and discharges the jury without conducting the poll.[3]

You are now left with two choices: one, accept the jury's decision—despite their clear indecisiveness—and the judge's error in not granting the motion, leaving you to wonder if members of the jury felt improperly coerced into reaching a unanimous verdict, or, two, appeal the case to an appellate court to review the trial judge's error. If you choose to pursue an appeal, the question then becomes: How should an appellate court handle a judge's refusal, or even neglect, to poll the jury pursuant to the mandatory rule set forth in FRCP Rule 48(c)?

Because this provision of the Federal Rules of Civil Procedure is the fruit of a recent amendment, enacted in 2009, there is relatively little case law governing how federal circuits should handle the issue on review. While there is no dispute that a civil litigant has the *right* to poll a jury,[4] the circuits disagree as to the applicable standard of review that should be applied when a trial court denies a civil litigant this right. Some circuits have suggested that denial of this right should fall under a harmless-error review standard[5] while others have alluded to creating a per se reversible-error standard when this right is denied.[6] At the state level, some state courts have likewise implemented, or suggested adopting, a per se reversible-error standard when this right is abridged.[7] Because this amendment is relatively new, and because there is so little case law on the matter, the question as to what standard of review should be applied is uncertain, and permitting circuit courts to apply varying standards could potentially result in drastically different outcomes for litigants based solely on the federal circuit they find themselves in.[8]

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2 FED. R. CIV. P. 48(c) (emphasis added).

3 This fact-pattern is based on two separate cases. *See* Verser v. Barfield, 741 F.3d 734, 737–38 (7th Cir. 2013); Wiseman v. Armstrong, 989 A.2d 1027, 1028–29 (Conn. 2010).

4 *See* Humphries v. District of Columbia, 174 U.S. 190, 194 (1899).

5 *See* Simmons v. Napier, 626 F. App'x 129, 143 (6th Cir. 2015); Ira Green, Inc. v. Military Sales & Serv. Co., 775 F.3d 12, 25 (1st Cir. 2014).

6 *See Verser*, 741 F.3d at 738–39.

7 *Wiseman*, 989 A.2d at 1048 (Rogers, C.J., dissenting); Duffy v. Vogel, 905 N.E.2d 1175, 1177 (N.Y. 2009).

8 *See Ira Green,* 775 F.3d at 25; *Verser*, 741 F.3d at 738–39.

This Comment asserts that a single, consistent standard of review should be applied to every case in which the issue arises. This would alleviate uncertainty for trial courts, appellate courts, and litigants alike. Such consistency helps promote not only justice, but also judicial economy by reducing the number of appeals taken by courts attempting to clarify the appropriate standard of review.[9] To this end, federal appellate courts should adopt a per se reversible-error standard when reviewing each trial courts' error in failing to heed this mandatory provision.[10]

Section I.A of this Comment discusses the history of the civil jury and, specifically, the history of polling the civil jury. Section I.B details the current standards of review employed by Federal Appellate courts when assessing similar trial court errors, including harmless-error review, plain-error review, and per se reversible-error review.

Section I.C provides a detailed analysis of a Supreme Court case, Federal Circuit court cases, and a state court case concerning civil jury polls, including detailed rationale as to why each court reached its particular conclusion. Lastly, Part II uses these cases and the current standards of review to explore the issues created by these incongruent standards, culminating in a suggested uniform standard of review to be used by appellate courts when reviewing a trial court's error of failing to conduct a requested poll of a civil jury.

I. BACKGROUND

In 1810, the New York Supreme Court held, evidently for the first time in a United States court, that a civil litigant had the "right" to request a poll of the jury.[11] While a jury poll is not intended to ascertain why a certain verdict was reached or to pry into a jury's intent, it does give each juror an opportunity to declare his or her judgment in open court.[12] A poll of each individual juror enables the jury to correct a flawed verdict, and ensures both that each juror approves of the verdict and that no juror has been coerced to agree to it.[13] A jury poll is the most generally recognized means of determining whether the jurors were unanimous in their decision.[14]

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9 *See* Paul Heinrich Neuhaus, *Legal Certainty Versus Equity in the Conflict of Laws*, 28 LAW & CONTEMP. PROBS. 802, 805 (1963).

10 While state courts would still be governed by their own rules of procedure, many federal rules, once established, are adopted into state procedures.

11 Root v. Sherwood, 6 Johns. 68, 69 (N.Y. Sup. Ct. 1810) (per curiam).

12 *See* Finn v. Carnegie-Illinois Steel Corp., 68 F. Supp. 423, 428 (W.D. Pa. 1946); Labar v. Koplin, 4 N.Y. 547, 551 (1851).

13 Wiseman v. Armstrong, 989 A.2d 1027, 1047 (Conn. 2010); Duffy v. Vogel, 905 N.E.2d 1175, 1178 (N.Y. 2009).

14 *See* Humphries v. District of Columbia, 174 U.S. 190, 194 (1899).

Today, however, the right to poll a jury in a civil case is not based on a statutory right or a constitutional provision.[15] Rather, the right is established solely by the Federal Rules of Civil Procedure.[16] The Supreme Court has stated, "[G]enerally the right to poll a jury exists . . . . [I]t is not a matter which is vital, is frequently not required by litigants; and while it is an undoubted right of either, it is not that which must be found in the proceedings in order to make a valid verdict."[17] Other federal courts have also concluded that jury polling is not an absolute common-law or constitutional right.[18] As such, there are no constitutional or statutory grounds that encourage courts to adopt a per se reversible-error standard for deprivation of this "right."[19] This leads one to consider how, and under what standard of review, this error should be examined.

A jury's fundamental role in a trial creates difficulties in appellate review of trial court error. Because we hold the jury's participation in the resolution of disputes in such high esteem, an appellate court must consider the effect that a trial court's error had on the jury or its verdict.[20] The protections our legal system gives the fact-finder's autonomy has created the standards of review we have today, which leads to the question: How should an appellate court treat error at the trial level? More specifically, how should an appellate court treat a trial court's error of denying a litigant's timely request to poll a civil jury?

There are a broad range of approaches an appellate court may take when reviewing error at the trial level. One option is a rigid protection of parties' rights: An appellate court may decide that *any* error warrants reversal.[21] This view represents a rigid adherence to the principle of equity and to the sanctity of the jury's role in deciding disputes.[22] In contrast, an appellate court may place emphasis on concerns about efficiency and practicality, and decide that only egregious violations or errors that clearly influence the jury, should be disturbed.[23] These differing views demonstrate the difficulty in evaluating an

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15 *See, e.g.*, Ira Green, Inc. v. Military Sales & Serv. Co., 775 F.3d 12, 25 (1st Cir. 2014).

16 FED. R. CIV. P. 48(c).

17 *Humphries*, 174 U.S. at 194.

18 *See* Cabberiza v. Moore, 217 F.3d 1329, 1336 (11th Cir. 2000); Jaca Hernandez v. Delgado, 375 F.2d 584, 585 (1st Cir. 1967).

19 *See* Wiseman v. Armstrong, 989 A.2d 1027, 1036 (Conn. 2010).

20 *See* Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501 (1959) (quoting Dimick v. Schiedt, 293 U.S. 474, 486 (1935)) ("Maintenance 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.").

21 Violations of constitutional rights are usually thought of in relation to criminal trials. However, there are constitutional rights protecting civil litigants as well. *See, e.g.*, U.S. CONST. amend. VII (establishing the right to jury trial in the civil context).

22 *See* Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 FORDHAM L. REV. 2027, 2032–34 (2008).

23 *See id.* at 2035–37.

error's impact on a proceeding. The standard for a violation of a constitutional right in a criminal trial has been resolved,[24] and will not be addressed in this Comment. However, the federal circuits have developed their own standards for judging nonconstitutional error in civil trials.[25] This issue will be discussed in more depth in Section I.B of this Comment.

A. *History of the Civil Jury and the Jury Poll*

The right to a trial by jury is one of the oldest personal rights claimed by English-speaking people.[26] It was given to the people of England by the Magna Carta and was included in the United States Constitution, which preserves the right to a trial by jury in a civil case when the value in controversy is more than $20.00.[27] Today, the essential elements of a trial by jury in the federal context are as follows: (1) "A jury must begin with at least 6 and no more than 12 members"; (2) the trial must be in the presence and under the supervision of a judge; (3) "[u]nless the parties stipulate otherwise, the verdict must be unanimous"; and (4) "the court must on a party's request, or may on its own, poll the jurors individually."[28]

The adoption of the rule regarding a mandatory jury poll was included in a 2009 amendment to the Federal Rules of Civil Procedure.[29] While a litigant's right to poll a civil jury is not one guaranteed by the Constitution, the

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24 *See* Chapman v. California, 386 U.S. 18, 24 (1967) (stating that a constitutional error is harmless when it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained").

25 The circuits have developed several standards for evaluating non-constitutional errors. For example, with respect to criminal proceedings, the First, Second, Fourth, and Fifth Circuits have all, at various times, used a "fair assurance" standard. *See, e.g.*, United States v. Ivezaj, 568 F.3d 88, 98 (2d Cir. 2009) (citing United States v. Garcia, 291 F.3d 127, 143 (2d Cir. 2002)); United States v. Wood, 924 F.2d 399, 402 (1st Cir. 1991) (citing Kotteakos v. United States, 328 U.S. 750, 765 (1946)); United States v. Bernal, 814 F.2d 175, 185 (5th Cir. 1987); United States v. Nyman, 649 F.2d 208, 211–12 (4th Cir. 1980) (citing *Kotteakos*, 328 U.S. at 765). However, the Fifth, Seventh, and Tenth Circuits have used a higher "slight effect" or "very slight effect" standard. *See, e.g.*, United States v. Sands, 899 F.2d 912, 916 (10th Cir. 1990) (citing Sumrall v. United States, 360 F.2d 311, 314 (10th Cir. 1966)); United States v. Hays, 872 F.2d 582, 588 (5th Cir. 1989) (citing *Kotteakos*, 328 U.S. at 765); United States v. Shackleford, 738 F.2d 776, 783 (7th Cir. 1984) (citing United States v. Shepherd, 576 F.2d 719, 723–24 (7th Cir. 1978)).

26 *See, e.g.*, Magna Carta ch. 39, *reprinted in* WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 375 (2d ed. 1914) (providing that no man would be put in prison, killed, or exiled unless there was a "lawful judgment of his peers or [and] by the law of the land").

27 U.S. CONST. amend. VII; Magna Carta ch. 39, *supra* note 26, at 375.

28 FED. R. CIV. P. 48.

29 *See id.* at 48(c).

Supreme Court has stated that it is, nevertheless, a civil litigant's *right*.[30] The Court opined that "[t]here are many rights belonging to litigants—rights which a court may not properly deny, and yet which if denied do not . . . render the proceedings absolutely null and void."[31] As such, a trial judge's denial of a litigant's request to poll a civil jury is treated as an error to be corrected "solely by direct proceedings in review,"[32] or, in other words, by the appropriate appellate court.

1. The Purpose and Importance of Polling the Jury

In 1810, the Supreme Court of New York stated, "There is no verdict of any force but a public verdict, given openly in court; until it is received and recorded . . . the jury ha[s] a right to alter it . . . ."[33] Authorities agree that only a verdict announced orally in court—and properly recorded—may constitute a jury's official verdict.[34] For example, in *Scott v. Scott*,[35] the Pennsylvania Supreme Court held that judgment could not be entered where, upon polling the jury, eleven jurors supported the verdict and one juror dissented.[36] Similarly, in *Lawrence v. Stearns*,[37] the Massachusetts Supreme court stated that "if any one juror shall then express his dissent, and persist in it, the verdict cannot be recorded."[38]

The purpose of polling a jury is "to ascertain for a certainty that each of the jurors approves of the verdict as returned; that no one has been coerced or induced to sign a verdict to which he does not fully assent."[39] "[A] jury poll is meant to ensure jurors' accountability for the verdict, 'creating individual responsibility' and ferreting out any dissent that, for whatever reason, was not reflected in the verdict as announced."[40] Conducting a jury poll allows each person to speak for himself "to discover unexpressed dissent, not to reconfirm dissent that is already apparent."[41]

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30 Humphries v. District of Columbia, 174 U.S. 190, 194 (1899).

31 *Id.*

32 *Id.* at 195.

33 Root v. Sherwood, 6 Johns. 68, 69 (N.Y. Sup. Ct. 1810) (per curiam).

34 *See, e.g.*, Mattice v. Md. Cas. Co., 5 F.2d 233, 233 (W.D. Wash. 1925); Kramer v. Kister, 40 A. 1008, 1009 (Pa. 1898).

35 2 A. 531 (Pa. 1885).

36 *Id.* at 532.

37 28 Mass. (11 Pick.) 501 (1831).

38 *Id.* at 502.

39 Humphries v. District of Columbia, 174 U.S. 190, 194 (1899).

40 Verser v. Barfield, 741 F.3d 734, 738 (7th Cir. 2013) (quoting United States v. Shepherd, 576 F.2d 719, 725 (7th Cir. 1978)).

41 *Id.* at 743.

2. Method of Polling the Jury

The method of polling a jury is almost entirely within the judge's discretion.[42] Typically, the judge or his clerk will poll each juror individually by asking if he or she agrees with the verdict as it was read by the jury foreperson; this is the preferred method.[43] However, there have been cases in which the judge has asked the jury, collectively, whether they agree to the verdict as it was read; and the reviewing courts deemed these polls proper and not an abuse of the trial judge's discretion.[44]

One exception to this general rule of deferring to the judge's discretion is the prohibition of a judge asking about the precise numerical division of a jury while the jury is still deliberating.[45] The Supreme Court held in *Brasfield v. United States*[46] that it was reversible error for a judge to ask the foreman for the numerical division of the jury.[47] In his majority opinion in *Brasfield*, Justice Stone stated, "[w]e deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as grounds for reversal. . . . Its effect upon a divided jury . . . is coercive. . . . Such a practice, which is never useful and is generally harmful, is not to be sanctioned."[48]

B. *Standards of Review Used When Assessing Trial Court Error*

There are a number of different standards under which an appellate court can review trial court errors. As a general rule, federal courts of appeal will not review trial errors unless the appellant has brought the error to the attention of the trial court.[49] The purpose of this rule is to give a trial court the opportunity to correct its own errors and prevent the need for an appeal.[50] Courts are also concerned with the unfairness that would occur if a party were

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42 *See, e.g.*, United States v. Sturman, 49 F.3d 1275, 1282 (7th Cir. 1995) (citing *Shepherd*, 576 F.2d at 722 n.1); Virgin Islands v. Hercules, 875 F.2d 414, 418 (3d Cir. 1989) (citing *Shepherd*, 576 F.2d at 722 n.1); United States v. Aimone, 715 F.2d 822, 832–33 (3d Cir. 1983) (citing *Shepherd*, 576 F.2d at 722 n.1).

43 *See* United States v. Miller, 59 F.3d 417, 420–21 (3d Cir. 1995).

44 *See, e.g.*, Posey v. United States, 416 F.2d 545, 554 (5th Cir. 1969) (saying that each juror had a chance to renounce his or her decision). *But see* Turner v. Kelly, 262 F.2d 207, 210–11 (4th Cir. 1958) ("[I]ndividual polling would appear to be consonant with the etymological derivation of the term.").

45 *See* Brasfield v. United States, 272 U.S. 448, 449–50 (1926) (reviewing a case where the trial judge had asked the foreman about the numerical division of the jury during deliberation).

46 272 U.S. 448 (1926).

47 *Id.*

48 *Id.* at 450.

49 *See* FED. R. CIV. P. 46; Page v. Schweiker, 786 F.2d 150, 153 (3d Cir. 1986) (quoting Patterson v. Cuyler, 729 F.2d 925, 929 (3d Cir. 1984)); Stone v. Morris, 546 F.2d 730, 736 (7th Cir. 1976).

50 *See Stone*, 546 F.2d at 736 (citing Ries v. Lynskey, 452 F.2d 172, 179 (7th Cir. 1971)).

permitted to set aside a judgment on the basis of an error that was never raised at trial.[51]

However, there are exceptions to this "preservation of error" rule, including the plain-error doctrine and the per se reversible-error standard. Under these doctrines, courts will consider particularly egregious errors affecting the fundamental fairness of the proceeding, even if the appellant made no objection at trial.[52] Both the plain-error rule and the per se reversible-error standard are judge-made exceptions "designed to mitigate the harshness of the general rules for preserving error."[53] This Comment will discuss the oft-used harmless-error review standard, the lesser-used plain-error review standard, and the per se reversible-error review standard.

1. Harmless Error

Harmless error is defined by 28 U.S.C. § 2111 and FRCP Rule 61 as an error, defect, or anything done or omitted by the court that does not affect any party's "substantial rights."[54] In civil litigation, there is sparse Supreme Court precedent defining how the "affects substantial rights" test should be applied.[55] However, in *Kotteakos v. United States*,[56] the Supreme Court provided useful guidance regarding the proper application of 28 U.S.C. § 2111[57] and FRCP Rule 61.[58] While *Kotteakos* was a criminal rather than civil case, the Court provided guidance as to how the harmless-error statute should be applied in the criminal and civil contexts when assessing nonconstitutional errors.[59]

In *Kotteakos*, it was uncontested that the trial judge had erred in instructing the jury regarding the type of conspiracy the defendants could be

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51 *See Page*, 786 F.2d at 153 (quoting *Patterson*, 729 F.2d at 929).

52 *See* FED. R. CIV. P. 51(d)(2) (applying the substantial-rights standard to unpreserved claims of instructional error in civil jury trials).

53 Barry Sullivan et al., *Preserving Error in Civil Cases: Some Fundamental Principles*, 32 TRIAL LAW. GUIDE 1, 16 (1988).

54 *See* 28 U.S.C. § 2111 (2018); FED. R. CIV. P. 61.

55 *See* HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL STANDARDS OF REVIEW: REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS 112 (3d ed. 2018).

56 328 U.S. 750 (1946).

57 The statute states, "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111 (2012).

58 The rule states,

> Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

FED. R. CIV. P. 61.

59 *See Kotteakos*, 328 U.S. at 757 n.9.

convicted of.[60] The only question before the Supreme Court was whether that error affected the defendants' substantial rights under the harmless-error rule of 28 U.S.C. § 391 (the precursor to the current harmless-error rule, now codified at 28 U.S.C. § 2111).[61]

The Court began its analysis with a description of the function of the harmless error statute in both criminal and civil cases.[62] "The general object" of the statute, the Court said, was "[t]o substitute judgement for automatic application of rules" and, in particular, technical rules that resulted in regular reversals of trial court verdicts.[63] The Court laid out three factors to be considered when evaluating the effect an error had on a proceeding, namely: "[1] the character of the proceeding, [2] what is at stake upon its outcome, and [3] the relation of the error asserted to casting the balance for decision on the case as a whole."[64] The Court placed emphasis on evaluating the error in the context of the record as a whole, leaving much to the judgement of appellate judges.[65] Importantly, even constitutional errors can be considered harmless, depending on the context.[66] If an error is found to have affected a party's substantial right, then the appellate court will reverse the trial court's decision and, typically, remand the case for a new trial.[67]

2. Plain Error

As with harmless-error analysis, when conducting plain error review, a court must consider if the error affected the substantial rights of a party.[68] The seminal Supreme Court opinion describing plain-error review is *United States v. Olano*.[69] The *Olano* Court held that an appellate court may correct an unpreserved error when the error (1) is "plain"; (2) affects the complaining party's substantial rights; and (3) "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[70] "A plain error is often said to be so obvious and substantial that failure to correct it would infringe a party's

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60 *Id.* at 755–56.

61 *Id.* at 752, 757; *see also* O'Neal v. McAninch, 513 U.S. 432, 441 (1995) (citing *Kotteakos*, 328 U.S. at 757) ("In *Kotteakos*, the Court interpreted the then-existing harmless-error statue, 28 U.S.C. § 391, now codified with minor change at 28 U.S.C. § 2111.").

62 *Kotteakos*, 328 U.S. at 758–63.

63 *Id.* at 759–60.

64 *Id.* at 762.

65 *See id.* at 764.

66 *See* Arizona v. Fulminante, 499 U.S. 279, 306–08 (1991).

67 *See* Stephen A. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 1008–09 (1973).

68 FED. R. CIV. P. 51(d)(2).

69 507 U.S. 725 (1993).

70 *Id.* at 732 (quotation omitted).

due-process rights and damage the integrity of the judicial process."[71] Such a clear error, which adversely affects a party's substantial rights, may be reviewed by an appellate court "even if the claim of error was not properly preserved" due to the significance of the error.[72] While this case again arises in the criminal context, it is well-accepted that plain error review is generally available for claims of error affecting substantial rights in civil cases, too.[73] However, the Supreme Court has cautioned that the plain-error exception should be "used sparingly."[74] As a result, courts rarely find plain error in civil cases.[75]

3. Per Se Reversible Error

Some circuit courts have formulated the "per se reversible error" standard, applying it to certain errors deemed to always have a harmful effect on a party's substantial rights, and thus do not need to undergo the harmless-error or plain-error analysis.[76] Examples of such error often involve improper jury influence, such as allowing improper evidence at trial or providing the jury with faulty instructions.[77] Notably, a court's failure to poll a jury upon a party's request in the criminal context has been deemed per se reversible error.[78] So, too, has a judge's act of attempting to reveal the numerical division of the jury.[79] While this standard of review is infrequently applied to civil cases, it does have a place in civil appellate review, and the rationale for its application has been long recognized in our court system.[80] Although this per se reversible-error doctrine has been applied to a number of different issues

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71 *Plain Error*, BLACK'S LAW DICTIONARY (11th ed. 2019). The Federal Rules of Criminal Procedure define plain error as an error "that affects substantial rights," and further states that a plain error "may be considered" by an appellate court "even though it was not brought to the [trial] court's attention." FED. R. CRIM. P. 52(b). In other words, "[a] court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved." FED. R. EVID. 103(e).

72 FED. R. EVID. 103(e).

73 *See, e.g.*, FED. R. CIV. P. 51(d)(2) (applying the substantial-rights standard to unpreserved claims of instructional error in civil jury trials); *Olano*, 507 U.S. at 736 (citing Connor v. Finch, 431 U.S. 407, 421 n.19 (1977) (cited in support of the proposition that plain-error review is available for civil claims)).

74 *See* United States v. Young, 470 U.S. 1, 15 (1985) (citing United States v. Frady, 456 U.S. 152, 163 n.14 (1982)).

75 *See* Morris v. Getscher, 708 F.2d 1306, 1309 (8th Cir. 1983) (citing Rowe Int'l, Inc. v. J-B Enters., Inc., 647 F.2d 830, 835 (8th Cir. 1981)).

76 *See, e.g.*, Virgin Islands v. Hercules, 875 F.2d 414, 419 (3d Cir. 1989).

77 *See, e.g.*, United States v. Zuniga, 6 F.3d 569, 571 (9th Cir. 1993) (involving faulty instructions).

78 United States v. F.J. Vollmer & Co., 1 F.3d 1511, 1522 (7th Cir. 1993) (citing *Hercules*, 875 F.2d at 418).

79 Brasfield v. United States, 272 U.S. 448, 449–50 (1926) (holding that it was per se reversible error where the trial judge had asked the foreman about the numerical division of the jury during deliberation).

80 *See, e.g.*, *Hercules*, 875 F.2d at 419.

arising in trials, one thing is clear: Improper jury influence lies at the heart of its rationale.

C. *Cases Regarding Trial Court Judges' Refusal to Poll Civil Juries*

Both before and after the 2009 amendment to the Rule of Civil Procedure, there has been little case law addressing a trial court judge's refusal to poll civil juries. However, following the 2009 amendment, the case law has been somewhat more congruent given that the *right* to request a civil jury poll is now settled law. The question circuit courts face today, and the source of disagreement among the circuits, is the appropriate standard of review that should be applied when this right is abridged.

1. The Supreme Court

There have been few Supreme Court cases about polling a civil jury. The most recent is *Humphries v. District of Columbia*,[81] a case that predates the 2009 amendment to the Civil Rules of Procedures by over a century. In *Humphries*, the District of Columbia Court of Appeals initially overturned a jury verdict as an "absolute nullity" because one of the jurors, who was bedridden, failed to participate in a requested jury poll.[82] In reversing the Court of Appeals, the Supreme Court noted that the right to poll a jury in a civil trial exists "to ascertain for a certainty that each of the jurors approves of the verdict" and to show "that no one has been coerced or induced to sign a verdict to which he does not fully assent."[83] The Court ultimately held, however, that the failure to conduct a jury poll does not necessarily render a verdict null; accordingly, the Court reinstated the overturned jury verdict.[84]

2. The Federal Circuit Courts

Following the ruling in *Humphries*, federal courts were given broad discretion on whether to grant a motion for a requested jury poll; as a result, some courts granted jury polls frequently, while others granted them sparingly.[85] Further uncertainty existed as to whether a party could demand a poll of the jury in a civil action as a matter of right or "whether that decision [was] commended to the discretion of the district court upon a motion by

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81 174 U.S. 190 (1899).

82 *Id.* at 192–93.

83 *Id.* at 194.

84 *Id.* at 195–96.

85 *See* Audette v. Isaksen Fishing Corp., 789 F.2d 956, 959 (1st Cir. 1986); Turner v. Kelly, 262 F.2d 207, 210–11 (4th Cir. 1958).

counsel."[86] This uncertainty was resolved in 2009, when FRCP Rule 48(c) was added. The new provision was modeled after "Criminal Rule 31(d) with minor revisions to reflect Civil Rules Style and the parties' opportunity to stipulate to a nonunanimous verdict."[87] Although this rule on its face seems to solve the uncertainty that existed after the Supreme Court's decision in *Humphries*, the federal circuit courts have disagreed as to how this rule should apply to trial courts, which refuse to follow the rule in jury trials.[88]

To illustrate, in *Verser v. Barfield*,[89] the Seventh Circuit alluded to adopting a per se reversible-error standard in the context of a judge's failure to poll a civil jury under the same rationale that requires reversal when a judge fails to poll a *criminal* jury, given the nearly identical language of Civil Rule 48(c) to Federal Rule of Criminal Procedure 31(d).[90] In that case, an inmate brought a civil action against prison officials who allegedly beat him while in prison.[91] Upon returning a verdict in favor of the defendants, the jury foreperson made a statement indicating that a majority of the jury felt that the defendants "all had a part to play in what happened to Verser . . . ."[92] However, Mr. Verser "did not hear this statement . . . because at the close of evidence the district court had excluded him not just from the courtroom but also from all contact with the proceedings, in order to return him to the Illinois Department of Corrections."[93] The court reversed the case because Mr. Verser, a pro se litigant, was excluded from the proceedings and could not ask for a poll.[94]

In reaching this decision, the *Verser* court relied on a similar holding in a criminal case.[95] While the question as to the appropriate standard of review to be applied if either party *had* requested a poll was not relevant, the court unequivocally declared that *if* a poll had been requested and denied, the appropriate remedy would have been reversal. The *Verser* court held that "[t]here is no doubt that a district court's refusal, or even neglect, to conduct a jury poll upon a timely request is ground for a new trial. Indeed, failure to conduct a properly requested poll is a serious error ordinarily requiring reversal."[96] The *Verser* court further held that "decisions applying Criminal Rule 31(d) are fully applicable to its civil analogue," FRCP Rule 48(c).[97] In reaching this conclusion, the court emphasized that the civil rule was "self-

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86 *See Audette*, 789 F.2d at 959 (quoting Kazan v. Wolinski, 721 F.2d 911, 916 n.5 (3d Cir. 1983)).

87 *See* FED. R. CIV. P. 48(c) advisory committee's note to 2009 amendment.

88 *See* Ira Green, Inc. v. Military Sales & Serv. Co., 775 F.3d 12, 25 (1st Cir. 2014).

89 741 F.3d 734 (7th Cir. 2013).

90 *Id.* at 738–39.

91 *Id.* at 736.

92 *Id.* (internal quotations omitted).

93 *Id.*

94 *Id.* at 736–37.

95 *Verser*, 741 F.3d at 738–39 (citing United States v. Randle, 966 F.2d 1209, 1214 (7th Cir. 1992)).

96 *Id.* at 738 (citing United States v. F.J. Vollmer & Co., 1 F.3d 1511, 1522 (7th Cir. 1993)).

97 *Id.*

consciously written to extend the right guaranteed by the criminal rule into the civil realm" and said "there is little reason to distinguish between the two contexts."[98] The *Verser* court pointed out that, like the civil rule, the right protected by the criminal rule is a substantial right, not of constitutional dimensions, but that stems from the rules of procedure.[99]

In contrast, the First Circuit opined in a later decision that, while the Seventh Circuit's position was commendable in light of the nearly identical text of the rules, the issue was "open to legitimate question."[100] In *Ira Green, Inc. v. Military Sales & Service Co*,[101] the First Circuit declined to actually resolve the issue because counsel in that case failed to renew his request for a poll, which took the case "outside the mainstream."[102] The First Circuit did, however, indicate that it felt the appropriate standard of review would be harmless-error review unless the plaintiff could demonstrate plain error.[103] The *Ira Green* court stated, in dicta, that to show plain error, the plaintiff would need to make "some showing that the verdict was rendered under circumstances indicating a possible lack of unanimity or assent."[104] In that particular case, the court reasoned that because there was "'nothing in the jurors' demeanor or behavior to suggest that any one of them did not' agree with the verdict," there was no plain error.[105] In reaching this decision, the First Circuit relied on state court decisions, interpreting similar parallel mandatory jury polling rules that concluded that a violation of the right to a jury poll requires automatic reversal in criminal cases only.[106]

3. State Court Case

In light of the limited case law, this Comment will evaluate a Connecticut supreme court case, *Wiseman v. Armstrong*,[107] which interpreted and applied a state rule of civil procedure that is nearly identical to FRCP Rule 48(c).[108] The *Wiseman* court provided detailed reasoning for its holding that

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98 *Id.*

99 *Id.*

100 Ira Green, Inc. v. Military Sales & Serv. Co., 775 F.3d 12, 25 (1st Cir. 2014).

101 775 F.3d 12 (1st Cir. 2014).

102 *Id.* at 25.

103 *Id.*

104 *Id.* at 27 (citing United States v. Lemmerer, 277 F.3d 579, 592 (1st Cir. 2002)).

105 *Id.* (quoting Ira Green, Inc. v. Military Sales & Serv. Co., No. 10–207–M, 2014 WL 12782199, at *4 (D.R.I. Jan. 15, 2014) (district court opinion)).

106 *Id.* at 25.

107 989 A.2d 1027 (Conn. 2010).

108 *Id.* at 1029 & n.3 ("[A]fter a verdict has been returned and before the jury has been discharged, the jury shall be polled at the request of any party or upon the judicial authority's own motion. The poll shall be conducted by the clerk of the court by asking each juror individually whether the verdict announced is such juror's verdict. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or it may be discharged." (quoting CONN. PRAC. BOOK § 16–32)).

harmless-error review was the appropriate standard.[109] The opinion was accompanied by an equally detailed dissent as to why a per se reversible-error rule would be more appropriate.[110] Like the federal rule, the civil rule in this case was also modeled after a parallel criminal rule.[111] While this opinion is binding only on Connecticut courts, the majority and dissenting analyses in the case are useful in shaping the argument surrounding the appropriate standard of review in both state and federal courts in this emerging area of the law.

In *Wiseman*, a mother and administratrix of the estate of her deceased son appealed from the judgment of a state trial court.[112] The suit alleged the wrongful death of her son while he was incarcerated; the mother alleged that her son's death resulted from the defendant prison officials' "indifference to the decedent's serious medical and mental health needs and the use of excessive force."[113] The jury returned a verdict for the defendants, after which the plaintiff filed a motion to request a jury poll.[114] The trial court denied the plaintiff's request and an appeal followed.[115]

On appeal, the plaintiff claimed that the trial court improperly denied her motion and, specifically, "that a failure to poll always causes harm, and therefore constitutes per se reversible error."[116] The defendants argued that the rule was discretionary and the failure to poll should be subject only to harmless-error review.[117] The court held that while the rule *did* impose a mandatory duty on the trial court to poll the jury when requested, on review the failure to poll was subject only to harmless-error review.[118] Because it did not find harm, the appeals court affirmed the judgment of the trial court.[119]

The appellate court began its analysis by using statutory interpretation to evaluate the language of the rule.[120] The court concluded that, given the use of the definitive word "shall" in the rule, the duty to poll was mandatory upon request and was a substantive right of the civil litigants.[121] The court

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109 *See id.* at 1040–42.

110 *See id.* at 1043–48 (Rogers, C.J., dissenting).

111 *Id.* at 1030 & n.4 (majority opinion); *see also id.* at 1032 n.8 ("We are mindful that § 16–32 is a rule of civil practice, while § 42–31 is a rule of criminal practice. As a result, § 42–31 necessarily incorporates and codifies substantive criminal principles that are not applicable within the civil context. Nonetheless, the substantive components of the two rules do not affect our textual analysis.").

112 *Id.* at 1028–29.

113 *Wiseman*, 989 A.2d at 1029.

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.*

119 *Wiseman*, 989 A.2d at 1029.

120 *Id.* at 1030.

121 *Id.* at 1031.

also noted that since it had previously construed identical language in the criminal context as imposing a mandatory duty to poll the jury, "it would undermine the harmony and internal consistency of the rules of practice to conclude that the same language in [the civil context] is discretionary."[122] It reasoned that this interpretation of the rule was consistent with the overarching purpose of the rules of procedure because it "advance[d] justice" by "[p]roviding parties with the opportunity to confirm the unanimity of a verdict," which in turn "perpetuates justice, ensures transparency and creates consistency in the rules."[123]

Next, the appellate court addressed "whether the trial court's failure to poll the jury in violation of the mandatory provisions" required it to reverse the judgment.[124] In determining that this error did not require reversal, the court applied the harmless-error review standard.[125] It reasoned that, because this standard had been developed in response to frustration in the backlog of errors "mounting in the trial courts," it was the appropriate standard in this case because the improper ruling concerned only a procedural matter and likely did not affect the result of the case.[126] The court said that the principles surrounding this standard of review "embody the concept of judicial economy. By requiring parties to show harm resulting from error, courts avoid the cost, delay and burden of a new trial."[127]

In addition to this economic concern, the appellate court noted that "requiring the complaining party to demonstrate harm promotes equity."[128] It stated that "[a]llowing a party to receive a new trial as a result of an error that had no effect on the fairness of the original trial would be inequitable to the opposing party."[129] The plaintiff contended that "because we cannot know the results of a poll not taken, a failure to poll is never harmless."[130] In response, the court reasoned that while it could not say with absolute certainty that the trial court's error was harmless, such a statement could never be said of any error and if this error "were given the kind of weight" the plaintiff requested, "the harmless error doctrine would not exist."[131]

The appellate court then went on to analyze the importance—or lack thereof—of a civil jury poll.[132] First, the court pointed out that the right to poll in civil cases is not based on a constitutional right; instead, it "is

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122 *Id.* at 1032.

123 *Id.* at 1032–33 (quoting CONN. PRAC. BOOK § 1–8).

124 *Id.* at 1033.

125 *Wiseman*, 989 A.2d at 1034.

126 *Id.* at 1035, 1039, 1042.

127 *Id.* at 1035.

128 *Id.*

129 *Id.*

130 *Id.* at 1041.

131 *Wiseman*, 989 A.2d at 1042 (quoting Duffy v. Vogel, 905 N.E.2d 1175, 1181 (N.Y. 2009) (Smith, J., dissenting)).

132 *Id.* at 1036–39.

established solely by the rules of practice."[133] Second, the appellate court said that "jury polling rights are not so vital or necessary as to be a required element in a trial," and as such, jury polling is not mandated; rather, courts simply give the parties the right to poll if either party makes the request.[134] Third, the appellate court reasoned that "there is a presumption of regularity in civil proceedings including jury deliberations . . . [so] a jury verdict without apparent defect should be given appropriate deference by appellate courts."[135] Fourth, the appellate court pointed out that "jury polling rarely reveals anything but unanimity among jurors," so a per se reversible-error standard is not necessary to prevent harm.[136] Lastly, the appellate court looked to other state courts with similar mandatory-polling provisions and concluded that a number of those states do not apply a per se reversible-error standard when a trial court fails to conduct a poll.[137] For these reasons, in addition to the equitable and economic rationales surrounding the standard of review, the appellate court concluded that the trial court's error should be subjected to harmless-error review rather than the more stringent per se reversible-error standard.[138]

In reaching this conclusion, the appellate court refused to apply the same standard of review that is applied when a trial judge fails to poll a jury in a criminal case.[139] Like federal courts, Connecticut courts apply a per se reversible-error standard when considering this denial of right in a criminal trial.[140] However, the appellate court reasoned that because "[c]riminal litigation . . . adjudicates guilt and liberty" it is "inherently and functionally distinct from civil litigation, which incorporates notions of equity."[141] This difference "often result[s] in the application of less stringent rules in the civil context."[142] For example, the appellate court discussed the burdens of proof required in each respective context; namely, the requirement of proof beyond a reasonable doubt to convict a defendant in a criminal case, as opposed to only a preponderance of the evidence to find in favor of a party in a civil case.[143] Due in part to these inherent differences in criminal and civil litigation, the court declined to extend its per se reversible error standard from the criminal context to the civil one.[144]

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133 *Id.* at 1036.

134 *Id.* at 1037.

135 *Id.* at 1038.

136 *Id.*

137 *Wiseman*, 989 A.2d at 1038–39.

138 *Id.* at 1039.

139 *Id.* at 1042.

140 *See id.* at 1040 (citing State v. Pare, 755 A.2d 180, 195–96 (2000)).

141 *Id.*

142 *Id.* at 1040–41 (footnote omitted).

143 *Wiseman*, 989 A.2d at 1041 (quoting *In re* Winship, 397 U.S. 358, 371–72 (1970) (Harlan, J., concurring)).

144 *Id.*

In applying this standard of review, the appellate court sought to "determine whether the trial court's refusal to poll the jury . . . was harmless."[145] In determining that the error was harmless, the appellate court relied on the fact that the jury did not indicate any lack of unanimity in the course of their deliberations.[146] Further, the verdict form showed no sign of any inconsistency and the jury did not signify any confusion regarding the charge.[147] Despite a long and complex trial, the jury deliberated for only three hours, which, the appellate court reasoned, suggested that the deliberations were harmonious.[148] The appellate court also emphasized the importance of deferring to the trial court judge's discretion as he had the "advantage of observing the jury throughout the entire trial, including the return of its verdict."[149] As a result, the appellate court held that "the plaintiff . . . failed to show that she suffered any harm from the trial court's refusal to poll the jury" and declined to reverse the trial court's decision.[150]

The dissent argued in favor of applying a per se reversible-error standard to both the error in this case and future cases where the error occurs.[151] In support of this position, Chief Justice Rogers[152] stated that "there is no way to meaningfully assess the result of a poll that was not taken."[153] Justice Rogers further asserted that by requiring the plaintiff to prove harm resulting from the trial court's error, the court diminished the impact of its holding that the rule is *mandatory* and undermines fairness in the trial process.[154]

The dissent rebutted the majority's reliance on the "strong presumption of regularity" said to exist in civil proceedings.[155] Justice Rogers concluded that "[b]ecause the very purpose of a jury poll is to uncover an undisclosed irregularity," the fact that the rules of procedure give parties "the right to poll the jury is a strong indication that jury polls serve as an exception to the general presumption of regularity."[156] As such, Justice Rogers argued that "any presumption of regularity should not weigh heavily in . . . consideration of whether the violation of a mandatory rule should be subject to harmless error review."[157]

The dissent also pointed out that not only are jury polls an important way to reinforce confidence in a jury's verdict, but also they are simple and

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145 *Id.* at 1042.
146 *Id.*
147 *Id.*
148 *Id.*
149 *Wiseman*, 989 A.2d at 1042.
150 *Id.*
151 *See id.* at 1043 (Rogers, C.J., dissenting).
152 The dissent was joined by Justice Katz. *Id.*
153 *Id.*
154 *Id.* (emphasis added).
155 *Wiseman*, 989 A.2d at 1044.
156 *Id.*
157 *Id.*

take "no more . . . than [a] minute or two" to conduct.[158] As such, she contended, "the benefits associated with providing each party the opportunity to test a verdict for irregularities far outweigh the slight burden associated with conducting a jury poll."[159] Justice Rogers pointed out that the court's rationale for applying per se reversible error in the criminal context rests on two considerations: (1) the weighty interest protected by a jury poll; and (2) "the impracticality of gauging the results of a poll not taken."[160] By declining to extend this reasoning—which is equally applicable in civil cases—the court undermines its previous rationale.

The dissent goes on to rebut specific arguments made by the majority distinguishing civil trials from criminal trials. "First, the majority note[d] that the right to a jury poll in a civil case is not based on a . . . constitutional provision."[161] However, no "constitutional provision establishes a right to a jury poll in the criminal context, either."[162] In both circumstances, this "right" stems from the rules of procedure.[163] "Second, the majority note[d] that jury polling rights are not so vital or necessary as to be a required element in [every] civil trial. Again, this is also true in the criminal context."[164] In both contexts, a party can waive his right to a jury poll.[165] "Third, the majority notes that jury polling rarely reveals anything but unanimity among jurors. Again, there is nothing to suggest that a jury poll is more likely to reveal a lack of unanimity in the criminal context than in the civil context."[166]

The dissent acknowledged that the court's decision in the criminal context also relied on the "fundamental rights of criminal defendants"—that do not apply to civil litigants; it "note[d], however, that if the concern in [that context] was solely criminal defendants' fundamental rights," the court would not have previously held that a trial court is required to conduct a poll at the request of *either party*.[167] Such language suggests that the violation required automatic reversal "based on the interests of both the criminal defendant *and* the interests of the state."[168] Additionally, and perhaps more importantly, "civil actions frequently involve extremely important interests."[169] For example, Chief Justice Rogers pointed out that the wrongful death statute at issue in the case was in a section of the United States Code intended to deter government actors from using their authority to deprive individuals of

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158 *Id.* at 1043.
159 *Id.*
160 *Id.* at 1043–44.
161 *Wiseman*, 989 A.2d at 1044.
162 *Id.*
163 *Id.*
164 *Id.*
165 *Id.*
166 *Id.*
167 *Wiseman*, 989 A.2d at 1045.
168 *Id.* (emphasis added).
169 *Id.*

guaranteed constitutional rights (and to provide relief to victims if this deterrence fails).[170] Here, the plaintiff alleged that her son's death was caused by the state's violation of his Eighth and Fourteenth Amendment rights.[171] Such a claim, the dissent stated, deserves the same amount of deference as a criminal suit.[172]

The dissent also opined that, even if a civil claim does not implicate constitutional rights, "all parties to a civil action . . . enjoy a right to a unanimous verdict" (or an agreed upon plurality).[173] Without this right, the civil jury poll rule would not exist.[174] Justice Rogers contended that while the right to poll is not of constitutional magnitude, it serves to protect fundamental interests of the judiciary, including public confidence in the integrity of the judicial system, for example:

> [B]y subjecting a trial court's refusal to poll the jury to harmless error analysis, [the appellate court] effectively allow[s] a trial court to violate the rule with impunity. . . . The conclusion that [the rule] is mandatory serves little purpose if a violation of the rule carries no consequences. . . . By requiring the requesting party to bear the burden of proving harm, when the trial court's error itself deprives the requesting party of the means to demonstrate harm, the majority severely undercuts its conclusion that the rule is mandatory.[175]

Justice Rogers stated, "I dissent not because I believe that a failure to poll the jury always causes harm, . . . but, because it is impossible to meaningfully analyze *whether* a given refusal to poll was harmful or not."[176] Furthermore, she contended that a court cannot "assess the harm of a failure to poll by looking for outward manifestations of a lack of unanimity."[177] Not only is such a manifestation difficult to discern, but a jury poll is also intended to ensure that a verdict is free from coercion—an act that is not manifested outwardly.[178] She reasoned that "because [courts] so carefully protect jury deliberations by limiting intrusions into the secrecy of the process, it is doubtful that a party outside of the jury could ever point to evidence of juror coercion."[179] As such, "the best method for uncovering juror coercion is to

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170 *Id.* at 1045 ("The purpose of [42 U.S.C.] § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." (quoting Wyatt v. Cole, 504 U.S. 158, 161 (1992))).

171 *Id.*

172 *Id.* at 1045 n.4.

173 *Wiseman*, 989 A.2d at 1046.

174 *Id.* (quoting Ragusa v. Lau, 575 A.2d 8, 11 (1990)).

175 *Id.* (footnote omitted); *see also* Duffy v. Vogel, 905 N.E.2d 1175, 1181 (N.Y. 2009) (Smith, J., dissenting) (discussing the risk that trial judges "will be tempted to reject requests for jury polls, knowing that the harmlessness of the error will protect them from reversal").

176 *Wiseman*, 989 A.2d at 1047.

177 *Id.* (footnote omitted).

178 *Id.*

179 *Id.* (footnote omitted).

ask each juror, in the presence of the court, the parties and counsel, to confirm their assent to the verdict."[180]

II. ANALYSIS

This Part considers the advantages and disadvantages of both standards of review discussed in Part I—per se reversible-error and harmless-error review. It then recommends that a per se reversible-error standard be adopted and implemented by appellate courts when a trial court fails to poll a civil jury upon a party's request. While at this point there are very few federal cases regarding this rule of procedure, there will doubtless be more controversies in the future and, as illustrated above, the standard of review a court applies can strongly impact the outcome of a case. As such, an analysis of the rationale behind each respective standard of review will help guide courts in determining the most appropriate standard to use in future cases.

A. *Harmless-Error Review Is Not the Best Standard of Review to Apply When a Party's Request to Poll the Jury Is Denied*

This Section will first discuss the benefits of adopting a harmless-error standard of review and then will address the difficulties this standard poses. As illustrated by *Wiseman*, the two arguments that weigh heavily in favor of this standard of review are arguments about fairness and judicial economy.[181] Jury trials are time-consuming and expensive.[182] These costs are felt not only by the court system and the public—including jurors—but also by the parties litigating the case. It is unfair to require a party—especially a defendant who did not choose to involve himself in a lawsuit—to spend time, money, and energy defending himself in not one, but two, trials. Moreover, if a jury appropriately finds in favor of one party, it would be unfair to allow the losing party to escape the verdict by invoking a technical rule of procedure.

Additionally, harmless-error review is the standard of review used by appellate courts even when certain constitutional rights are abridged.[183] Arguably, this standard of review was developed precisely for evaluating the

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180 *Id.* at 1048.

181 *See id.* at 1034–36 (majority opinion).

182 *See Wiseman*, 989 A.2d at 1033 (noting that the trial "spanned . . . approximately twenty-one days and included more than eighty exhibits and testimony from more than twenty-five witnesses."); Brittany Kauffman, *Study on Estimating the Cost of Civil Litigation Provides Insight into Court Access*, INST. FOR ADVANCEMENT AM. LEGAL SYS. BLOG (Feb. 26, 2013), http://iaals.du.edu/blog/study-estimating-cost-civil-litigation-provides-insight-court-access (median costs reported for civil trials range from $43,000 to $122,000).

183 *See* Saltzburg, *supra* note 67, at 1008.

effect of technical errors of this sort.[184] In developing this standard of review, the Supreme Court wanted to ensure that men fairly convicted, or held civilly liable, could not take advantage "of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, would engender."[185] Because the source of this rule is technical and purely procedural, one could argue that harmless-error review is the appropriate standard under which to review this error.

However, the harm caused by failing to conduct a jury poll is distinguishable from the type of error normally evaluated by an appellate court when conducing harmless-error review. In most cases, the purpose of this review is to discern what effect a trial court's error had on a jury verdict. Common errors reviewed under this standard include evaluating the weight given to improperly admitted evidence or the effect improper jury instructions had on a verdict. Errors of this kind occur *before* the jury deliberates, prior to rendering a verdict. In the context of failing to conduct a jury poll, the potential harm has occurred *after* the trial is complete; there is no error during the trial that the appellate court can evaluate in order to ascertain if the error improperly influenced the jury's decision.

Because the purpose of a jury poll is to uncover potential juror coercion, the only way to discover such coercion is by asking each individual juror if he voluntarily assented to the verdict. Due to the secrecy of jury deliberations and the unique issue of jury coercion—improper influence by other jurors, as opposed to improper influence caused by a judge's error—there is no way to truly evaluate the harm caused by a failure to conduct a requested jury poll. There is no way to know the result of a poll not taken. Because there is no way for an appellate court to meaningfully evaluate the harm caused by this trial-court error, it does not fall within the normal error evaluated under this standard, and harmless-error review is an unsuitable standard for evaluating this particular error.

In addition, adopting this standard of review would require appellate courts to evaluate each individual trial court record to determine if there was any lack of unanimity among jurors in an attempt to determine whether the trial court's action was in fact harmless. Such a fact-intensive inquiry would be time-consuming and imprecise; additionally, there is dispute as to what each of these "indicators" might mean.[186] For example, some courts have held that swift jury deliberations indicate unanimity of opinion rather than the "lengthy coercion of a holdout,"[187] while others have stated that the length of deliberations has no bearing on the correctness or validity of a verdict.[188] If

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184 *See generally* Kotteakos v. United States, 328 U.S. 750, 757–58 (1946) (establishing harmless-error review).

185 *Id.* at 760.

186 *See* People v. Masajo, 49 Cal. Rptr. 2d 234, 237 (Cal. Ct. App. 1996); Judson v. Brown, 908 A.2d 1142, 1144 (Conn. App. Ct. 2006).

187 *Masajo*, 49 Cal. Rptr. at 237.

188 *Judson*, 908 A.2d at 1144.

courts had to engage in a case-by-case inquiry every time an appeal of this nature arose, just to conclude that some cases do in fact need to be reversed and re-tried, would notions of judicial economy actually be served?

Lastly, the adoption of this standard would severely undercut incentives for trial courts to follow this mandatory rule of procedure. As Justice Rogers noted in *Wiseman*, "by subjecting a trial court's refusal to poll the jury to harmless error analysis, [the court] effectively allow[s] a trial court to violate the rule with impunity."[189] A mandatory rule "serves little purpose if a violation of the rule carries no consequences."[190] Moreover, this standard of review would undermine notions of judicial fairness, integrity, and public perception of judicial proceedings. As Professor Steven H. Goldberg pointed out, one "should pause at the proposition that government can violate a basic restriction upon itself and, through a court, tell the individual who was the beneficiary of the restriction: 'no harm-no foul.'"[191] In some cases, the error may in fact be harmless, but in other cases it may not be so harmless. Why not encourage trial judges to err on the side of certainty by conducting a two-minute jury poll? Conducting a jury poll is a quick and simple way to comply with the rule and will assure both the court and the parties that the verdict is proper.

B. *Per Se Reversible Error Is the Best Standard of Review to Apply When a Party's Request to Poll the Jury Is Denied*

As illustrated by the reasons above, adopting a per se reversible-error rule would best serve the objective of FRCP Rule 48(c). Not only would the overarching purpose of the Federal Rules of Civil Procedure be promoted by use of this standard, but also this standard would provide courts with a clear directive that is simple to apply: if a trial court fails to conduct a poll upon a party's request, then the case must be reversed.

First and foremost, it is important to consider the Supreme Court's rationale in amending the Federal Rules of Civil Procedure to include this jury-polling provision: to give parties the right to *ensure that no juror was coerced into the verdict*.[192] The purpose of a jury poll is to "discover unexpressed dissent, not to reconfirm dissent that is already apparent."[193] Applying a harmless-error standard of review would undermine this purpose. When reviewing under the harmless-error standard, appellate courts review trial court

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189 Wiseman v. Armstrong, 989 A.2d 1027, 1046 (Conn. 2010) (Rogers, C.J., dissenting).

190 *Id.*

191 Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 442 (1980).

192 *See* Verser v. Barfield, 741 F.3d 734, 738 (7th Cir. 2013) (quoting Humphries v. District of Columbia, 174 U.S. 190, 194 (1899)).

193 *Id.* at 743.

records to evaluate the effect a given error had on a jury.[194] Because the civil rule is intended to discover *unexpressed* dissent by a juror, no such harm would be apparent within a trial court record.[195] Therefore, as Justice Rogers stated, "it is impossible to meaningfully analyze whether a given refusal to poll was harmful or not."[196] Requiring the moving party to prove harm—as under a harmless-error standard—would be blatantly unfair. The only way a party could prove such harm would be from the information ascertained by the poll itself. By refusing to conduct a poll altogether, the court deprives the litigant of her opportunity to discern whether there was in fact jury coercion—or harm—that would require a new trial. "While reversal may be a harsh result, nothing short of reversal" adequately remedies this violation.[197]

> Jury polling has never been justified on the ground that there is a high probability that it will uncover disparity between the announced verdict and what the jurors intended. Its justification rests instead upon the right of a litigant to a public verdict demonstrably that of the particular jurors chosen in the case.[198]

Second, this standard of review is appropriate because the civil rule should be interpreted in *pari passu* with its criminal counterpart and applied the same way. "The civil rule was self-consciously written to extend the right guaranteed by the criminal rule into the civil realm."[199] Furthermore, there is much to be said about the fact that this civil rule was modeled—almost identically—after a parallel criminal rule. In the words of the Seventh Circuit, "[T]here is little reason to distinguish between the two contexts."[200] It is important to keep in mind that neither right stems from the Constitution or a legislative statute; in both contexts, the right has been deemed a substantive right, stemming solely from the court-made rules of procedure. Because courts have said the criminal provision requires automatic reversal when it is abridged, the civil provision should be interpreted the same way.[201]

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194 *See* Kotteakos v. United States, 328 U.S. 750, 764 (1946).

195 *See* Duffy v. Vogel, 905 N.E.2d 1175, 1179 (N.Y. 2009) ("[T]he claim to be able reliably to distinguish in hindsight the case in which the failure to honor the entitlement [to poll] was or was not harmless is highly suspect and should not be adopted as a basis for law.").

196 Wiseman v. Armstrong, 989 A.2d 1027, 1047 (Conn. 2010) (Rogers, C.J., dissenting) (emphasis omitted); *see also* ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 64–73 (1970) (discussing many errors that cannot be deemed harmless because their effect, if any, on a verdict cannot be determined).

197 Virgin Islands v. Hercules, 875 F.2d 414, 419 (3d Cir. 1989).

198 *Duffy*, 905 N.E.2d at 1179.

199 Verser v. Barfield, 741 F.3d 734, 738 (7th Cir. 2013).

200 *Id.*

201 There is very little explanation as to why this standard of review was adopted in the criminal context. *See, e.g.*, *Hercules*, 875 F.2d at 419 (3d Cir. 1989) (stating merely that "[b]ecause we hold that a violation of Rule 31(d) is *per se* error requiring reversal, . . . the government's argument that harmless error analysis precludes reversal of the conviction, is irrelevant").

Third, this standard of review would require very few additional resources, if any, for the court and the parties involved. The typical jury poll takes two minutes (or less) and the additional burden placed on the court and the jurors is minute. Moreover, if judges are concerned that such a rule would result in an increase of cases being reversed and remanded, then judges can take it upon themselves to initiate a poll on their own discretion if there is any doubt as to a party's request (or lack of request). For example, in *Verser*, when the jury foreperson made a statement regarding the jury's doubt about the verdict, the judge could have simply conducted a poll of each individual juror on his own discretion.[202] Moreover, this standard would help to promote the perception of fairness in the judicial system. The dissent in *Wiseman* explained that an application of harmless-error review in this context undermines notions of fairness in the judicial system as a whole.[203] As Justice Rogers stated,

> [Courts] do not promote any notion of fairness when [they] allow a trial court to ignore a mandatory rule . . . thereby depriving the requesting party of the opportunity to test the validity of a verdict, and then conclude that the violation was harmless because the requesting party has not produced any evidence that the verdict was tainted.[204]

Lastly, while Rule 48(c) does not apply to state courts, many states have a similar provision in their rules of practice.[205] Like the federal circuits, these state courts have also adopted varying standards of review to evaluate the effect of denying a litigant's right to a jury poll.[206] As such, although the adoption of a uniform standard in federal system would not be binding on

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202 *Verser*, 741 F.3d at 736; *see also* FED. R. CIV. P. 48(c) (noting that a court may poll the jury "on its own").

203 *See* Wiseman v. Armstrong, 989 A.2d 1027, 1046 (Conn. 2010) (Rogers, C.J., dissenting).

204 *Id.* at 1048.

205 *See, e.g.*, CAL. CIV. PROC. CODE § 618 (West 2019); CONN. GEN. STAT. § 16–32 (2019); MONT. CODE ANN. §25-7-501(2) (2019); N.J. STAT. ANN. § 1:8-10 (2019); N.M. STAT. ANN. § 38-5-17 (2019); OR. R. CIV. P. 59(G)(3); TEX. R. CIV. P. 294; WYO. R. CIV. P. 48(c).

206 New York and Oregon use a per se reversible-error standard when a mandatory polling provision is not followed. *See* Duffy v. Vogel, 905 N.E.2d 1175, 1177 (N.Y. 2009) (applying per se reversible error); Sandford v. Chevrolet Div. of Gen. Motors, 629 P.2d 407, 412 (Or. Ct. App. 1981), *aff'd*, 642 P.2d 624 (Or. 1982) (applying per se reversible error). State courts that apply harmless-error review when similar jury-polling provisions are not followed include California, Connecticut, Missouri, Montana, and New Mexico. *See* Redo y Cia v. First Nat'l Bank of L.A., 252 P. 587, 589–90 (Cal. 1926) (holding that no prejudice resulted from error by the trial court in refusing the appellant's request for a jury poll); *Wiseman*, 989 A.2d at 1037 (declining to extend a per se reversible-error rule from the criminal context to the civil context); Walton Constr. Co. v. MGM Masonry, Inc., 199 S.W.3d 799, 806 (Mo. Ct. App. 2006) (refusing to hold that failure to poll the jury in a civil case constitutes per se reversible error and holding that reversal is not required where refusal is not prejudicial); Martello v. Darlow, 441 P.2d 175, 177 (Mont. 1968) (holding that a new trial was inappropriate because the denied request for a jury poll constituted harmless error); Levine v. Gallup Sand & Gravel Co., 487 P.2d 131, 132 (N.M. 1971) ("[T]he mere failure to poll the jury upon proper request does not in itself constitute reversible error.").

state courts, the implementation of a bright-line rule in the federal context—like a per se reversible-error standard—would provide guidance to these courts. Because the *right* to a civil jury poll is a fairly new concept in both federal and state jurisprudence, such guidance would help to unify this developing area of law.

CONCLUSION

A civil litigant's right to demand a jury poll stems from the Federal Rules of Civil Procedure. This right, like a criminal defendant's right to poll a jury, does not stem from a constitutional protection, but, rather, from a procedural rule. In both the criminal and civil context, courts have interpreted this as a substantive right. When this right is abridged in the criminal context, the remedy is reversal. Why should a civil litigant's right be construed differently? Though the rights of criminal defendants are often held to a higher standard than those of civil litigants, this rule was modeled almost identically after the criminal rule of procedure in an effort to avoid discrepancies between parallel provisions.[207] Furthermore, as illustrated throughout this Comment, civil cases often involve important issues, including the violation of constitutional rights. A jury poll is simple, fast, and it does not cost the court, the public, or the parties any additional resources. So, why not adopt a standard of review that encourages trial courts to err on the side of certainty by conducting a simple jury poll when it is requested?

This Comment recognizes the judicial economy issues implicated by a per se rule—if it existed, trial courts would be incentivized to grant requests to have the jury polled in order to avoid being reversed by an appellate court. As such, on appeal, a party would no longer have a valid argument for reversal, and there would be no additional judicial cost incurred for either an appeal or an additional trial. In other words, the deterrent effect of a per se rule would, in most circumstances, bring about the jury poll requested and alleviate the need for any further argument on the subject.[208]

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207 *See* FED. R. CIV. P. 48(c) advisory committee's note to 2009 amendment.

208 It is worth noting that the lack of uniformity within the federal court system is likely to continue unless either the Federal Rules of Civil Procedure are modified to include the applicable standard of review that applies when a trial court does not heed this mandatory provision, or the Supreme Court decides a case that establishes the appropriate standard of review.