ROGERS, C. J., with whom KATZ, J., joins, dissenting. I agree with the conclusion in part I of the majority opinion that Practice Book § 16-32 clearly imposes a mandatory obligation on the trial court to poll the jury upon the timely request of either party. I respectfully dissent, however, from the conclusion in part II of the majority opinion that the trial court's refusal to poll the jury upon the timely request of the plaintiff, Elaine Wiseman,[1] is amenable to harmless error analysis. I disagree because there is no way to meaningfully assess the results of a poll that was not taken. Moreover, by requiring the plaintiff to prove the harm that the trial court might have revealed had it complied with a mandatory rule, we diminish the impact of our holding that Practice Book § 16-32 is mandatory and undermine the ideal of fairness in our trial process.

In general, jury polls are a simple and important means of reinforcing confidence in a jury's verdict by confirming, in open court, that each individual juror assents to the verdict.[2] A typical jury poll should occupy no more of the trial court's time than the minute or two it takes the court to ask the jurors individually whether each one agrees with the verdict. See *Duffy* v. *Vogel*, 12 N.Y.3d 169, 180, 905 N.E.2d 1175, 878 N.Y.S.2d 246 (2009) (Smith, J., dissenting) (noting jury polls are "short and simple"). Thus, 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.

In *State* v. *Pare*, 253 Conn. 611, 637, 755 A.2d 180 (2000), this court held that, in a criminal case, a trial court's refusal to honor a timely request to poll the jury is not amenable to harmless error. See id., 639 ("in light of the weighty interest protected by a jury poll, and the impracticality of gauging the results of a poll not taken, we conclude that a violation of a party's timely polling request requires automatic reversal of the judgment"). We based our decision in *Pare* on two considerations: (1) the nature of the interests implicated by the trial court's refusal to poll the jury; and (2) the impracticality of gauging the results of a poll not taken. Id.

In reaching its conclusion that the refusal to poll a jury in a civil case should not result in an automatic reversal, the majority considered a number of factors beyond the primary considerations underlying our decision in *Pare*. The majority fails, however, to acknowledge that many of those additional factors apply equally in both the criminal and civil contexts.

First, the majority notes that the right to a jury poll in a civil case is not based on a statutory right or constitutional provision. No statute or constitutional provi-

sion establishes a right to a jury poll in the criminal context, either. In both contexts, the right to poll the jury is established by a rule of practice. See Practice Book §§ 16-32 and 42-31.

Second, the majority notes that jury polling rights are not so vital or necessary as to be a required element in a civil trial. Again, this is also true in the criminal context. Whether in a civil or criminal case, a party must request a jury poll, and a party can waive the right to a jury poll by failing to make a timely request. See *State* v. *Pare*, supra, 253 Conn. 627 ("[f]ailure to make a timely demand or request for a poll, where there has been reasonable opportunity to do so, operates as a waiver of the right"); see also 75B Am. Jur. 2d 320, Trial § 1528 (2007) ("[t]he right to poll may be waived by failure to exercise it at the proper time"). Thus, there is no independent obligation on the court in either a civil or a criminal case to poll the jury in the absence of a timely request.

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. Indeed, in *Pare*, this court specifically recognized that jury polls rarely uncover a lack of unanimity. See *State* v. *Pare*, supra, 253 Conn. 639 ("rarely does an individual poll reveal that a juror assented to a verdict despite reservation").

Although all three factors weigh against the utility or importance of jury polls in both the criminal and civil contexts, none of these factors precluded this court from concluding, in the criminal context, that "a violation of a party's timely polling request requires automatic reversal of the judgment." Id. The majority simply identifies these factors without addressing why, although the factors are present in a criminal context, they should lead to a contrary result when this court is faced with a refusal to poll in the civil context.

The majority also emphasizes the strong presumption of regularity that "attaches to every step of a civil proceeding, including jury deliberations . . . ." (Internal quotation marks omitted.) Because the very purpose of a jury poll is to uncover an undisclosed irregularity in a jury's verdict, however, the fact that Practice Book § 16-32 gives the parties to a civil action an absolute right to poll the jury is a strong indication that jury polls serve as an exception to the general presumption of regularity. Thus, any presumption of regularity should not weigh heavily in our consideration of whether the violation of a mandatory rule should be subject to harmless error review.[3]

Because it is clear that the general concerns relating to the utility, effectiveness or importance of jury polls apply equally in both civil and criminal cases, the only

meaningful distinction between this case and *Pare* lies in the scope of the interests jeopardized by the denial of a request to poll in a criminal case as compared to the interests jeopardized in a civil case.

According to the majority, our decision in *Pare* was based on concern for the fundamental constitutional rights of criminal defendants. I would note, however, that if the concern in *Pare* was solely the criminal defendant's fundamental constitutional rights, we would not have held that "a trial court is required to conduct an individual poll of the jury pursuant to a timely request by *either party*." (Emphasis added.) *State* v. *Pare*, supra, 253 Conn. 625; id., 639 ("a violation of a *party's* timely polling request requires automatic reversal" [emphasis added]). A fair reading of *Pare* suggests that our conclusion that certain interests are substantial enough to establish an absolute right to poll the jury—the violation of which requires automatic reversal—was based on the interests of both the criminal defendant and the interests of the state.

Additionally, as the facts of this case demonstrate, civil actions frequently involve extremely important interests. The plaintiff has brought a wrongful death action pursuant to § 1983 of title 42 of the United States Code. See 42 U.S.C. § 1983 ("[e]very person who, under color of [law] . . . custom, or usage, of any [s]tate . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the [c]onstitution and laws, shall be liable to the party injured in an action at law"); see also *Wyatt* v. *Cole*, 504 U.S. 158, 161, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992) ("[t]he purpose of § 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"). Specifically, the plaintiff has alleged that her son's death resulted from the state's violation of his eighth and fourteenth amendment rights under the United States constitution to be free from the use of excessive physical force and to adequate medical and mental health care while in state custody.[4]

Even if the plaintiff's claim did not implicate constitutional rights, all parties to a civil action, like criminal defendants, enjoy a right to a unanimous verdict. See Practice Book § 16-30; *McNamee* v. *Woodbury Congregation of Jehovah's Witnesses*, 194 Conn. 645, 647, 484 A.2d 940 (1984) ("[i]n this state it is required that jury verdicts be unanimous, requiring each juror to decide the case individually after impartial consideration of the evidence"); see also *Ragusa* v. *Lau*, 119 N.J. 276, 283, 575 A.2d 8 (1990) ("The parties in civil cases, like those in criminal cases, have an interest in determining each juror's position concerning the verdict. If that were not so, the [r]ule [of practice pertaining to jury polls] would not provide for a poll in civil cases."). The history

of that right has deep roots in the common law as well as constitutional underpinnings. See *State* v. *Gannon*, 75 Conn. 206, 226–33, 52 A. 727 (1902) (chronicling history and essential features of right to trial by jury in Connecticut). As the majority acknowledges, by "[p]roviding parties with the opportunity to confirm the unanimity of the verdict [the right to poll in a civil case] perpetuates justice, ensures transparency and creates consistency in the rules of practice." In essence, the right to poll enhances confidence in the fairness of our system of justice. The interest in enhancing confidence in our courts extends equally to the criminal and civil contexts, and while the right to poll is not of constitutional magnitude, it serves to protect a fundamental interest of our judiciary. See *State* v. *Coleman*, 242 Conn. 523, 541, 700 A.2d 14 (1997) ("[a]n important function of this court is to ensure public confidence in the integrity of the judicial system").

The majority also minimizes the extent to which *Pare* considered the impracticality of subjecting a trial court's refusal to poll the jury to harmless error analysis. In light of this impracticality, by subjecting a trial court's refusal to poll the jury to harmless error analysis, we effectively allow a trial court to violate the rule with impunity. The conclusion that Practice Book § 16-32 is mandatory serves little purpose if a violation of the rule carries no consequences. The denial of a request to poll will only harm the requesting party if the jury's verdict is the result of coercion or lacks unanimity. Cf. 8 J. Wigmore, Evidence (McNaughton Rev. 1961) § 2355, p. 717 ("[t]he very purpose of [the jury poll] is to afford an opportunity for free expression unhampered by the fears or the errors which may have attended the private proceedings"). 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.[5] Furthermore, in order to assess whether the denial of a request to poll a jury is harmful, the reviewing court can only speculate as to whether each individual juror voluntarily assented to the verdict. See *Duffy* v. *Vogel*, supra, 12 N.Y.3d 177 ("[h]armless error analysis in this context would amount to no more than a speculative exercise"); *Sandford* v. *Chevrolet Division of General Motors*, 292 Or. 590, 614, 642 P.2d 624 (1982) ("it was impossible to say that the failure correctly to poll the divided jury was harmless error"). Accordingly, I dissent not because I believe that a failure to poll the jury always causes harm, as the plaintiff contends, but, because it is impossible to meaningfully analyze *whether* a given refusal to poll was harmful or not. See *State* v. *Pare*, supra, 253 Conn. 637 ("[w]e disagree with the state's contention that polling violations are amenable to harmless error analysis"); cf. R. Traynor, The Riddle of Harmless Error (1970), pp. 64–73 (discussing many errors that cannot

be held harmless because their effect, if any, on verdict cannot possibly be determined).

The majority concludes that the trial court's failure to poll the jury was harmless because "there is no evidence suggesting that the jury was in any way divided." Thus, the majority suggests that a requesting party might show harm by pointing to evidence of juror confusion or protracted deliberations. In *Pare*, however, this court rejected the contention that a reviewing court can assess the harm of a failure to poll by looking for outward manifestations of a lack of unanimity.[6] See *State* v. *Pare*, supra, 253 Conn. 637 (rejecting state's argument that "in the absence of any indication of dissent, the jury's affirmative responses as a body provides a sufficient guarantee of unanimity to render the lack of individual interrogation harmless"); see also *Judson* v. *Brown*, 98 Conn. App. 381, 383, 908 A.2d 1142 (2006) ("[t]he length of time that a jury deliberates has no bearing on nor does it directly correlate to the strength or correctness of its conclusions or the validity of its verdict" [internal quotation marks omitted]).

Jury polls, moreover, verify not only that a verdict is unanimous, but also that it is free from coercion. See *State* v. *Allen*, 289 Conn. 550, 572, 958 A.2d 1214 (2008) ("[p]olling enables the court to ascertain with certainty that a unanimous verdict has in fact been recorded and that no juror has been coerced or induced to agree to a verdict to which he [or she] has not fully assented" [internal quotation marks omitted]); see also *United States* v. *Gambino*, 951 F.2d 498, 502 (2d Cir. 1991) ("[t]he purpose of a jury poll is to test the uncoerced unanimity of the verdict by requiring each juror to answer for himself, thus creating individual responsibility, eliminating any uncertainty as to the verdict announced by the foreman" [internal quotation marks omitted]), cert. denied sub nom. *D'Amico* v. *United States*, 504 U.S. 918, 112 S. Ct. 1962, 118 L. Ed. 2d 563 (1992). Because we 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.[7] See *Tanner* v. *United States*, 483 U.S. 107, 127, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987) ("long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry"). The fact remains that the best method for uncovering juror coercion is to ask each juror, in the presence of the court, the parties and counsel, to confirm their assent to the verdict. See *State* v. *Milton*, 178 N.J. 421, 433, 840 A.2d 835 (2004) ("the juror's concurrence with the verdict at the time of the poll is at least as important as the juror's agreement in the jury room").

By applying harmless error review in this case, the majority has effectively interpreted Practice Book § 16-32 to be mandatory only when the requesting party can

demonstrate some threshold justification for conducting a jury poll. Such a rule is not consistent with the language of Practice Book § 16-32 or our conclusion that the rule is mandatory. Thus, the application of harmless error analysis in this context jeopardizes confidence in the fairness of our system.

In my view, we do not promote any notion of fairness when we allow a trial court to ignore a mandatory rule of practice, 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. Cf. S. Goldberg, "Harmless Error: Constitutional Sneak Thief," 71 J. Crim. L. & Criminology 421, 442 (1980) ("[l]awyers 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' "). For the foregoing reasons, I respectfully dissent.

[1] The plaintiff appeals in her capacity as administratrix of the estate of her deceased son, Bryant Wiseman.

[2] Although this is our first opportunity to consider whether the need for a remedy for the denial of a party's right to poll a civil jury established in Practice Book § 16-32 varies in degree from the need for a remedy for the denial of a party's right to poll a criminal jury established in Practice Book § 42-31, other courts have long recognized that, in both criminal and civil cases, jury polls are the only allowable means of ensuring that each juror assents to the verdict. See, e.g., *James* v. *State*, 55 Miss. 57, 59 (1877) ("Examining the jury by the poll is the only recognized means of ascertaining whether they were unanimous in their decision, and the right to do this must exist. It is affirmed in criminal cases, and is *equally applicable in civil cases*. In no other way can the right of parties to the concurrence of the twelve jurors be so effectually secured as by entitling them to have each juror to answer the question, 'Is this your verdict?' in the presence of the court and parties and counsel. By this means any juror who had been induced in the jury-room to yield assent to a verdict, against his conscientious convictions, may have opportunity to declare his dissent from the verdict as announced. Parties should have the means to protect themselves against the consequences of undue influences of any sort, which, employed in the privacy of the jury-room, may extort unwilling assent to a given result by some of the jury. *Less evil is likely to result from upholding the right to have the jury examined by the poll than* [*from*] *denying it. The modern relaxation of the rules as to what irregularities of the jury will vitiate a verdict makes it more important to preserve the only allowable means of ascertaining if the verdict as announced is the unanimous decision of the jury.*" [Emphasis added.]).

[3] The majority also points to the fact that New York and Oregon are the only other states with mandatory polling provisions whose courts have found the failure to poll in a civil case to be per se reversible error. *Duffy* v. *Vogel*, supra, 12 N.Y.3d 177 ("[h]armless error analysis in this context would amount to no more than a speculative exercise, impermissibly substituting the judgments of judges for those that would have been made and disclosed by jurors had their verdict been properly pronounced in open court"); *Sandford* v. *Chevrolet Division of General Motors*, 292 Or. 590, 614, 642 P.2d 624 (1982) (impossible to determine whether failure to correctly poll jury was harmless).

Connecticut is distinguishable from many of the other states to which the majority refers. First, this court has previously held that the violation of the right to poll the jury in the criminal context is grounds for automatic reversal. See *State* v. *Pare*, supra, 253 Conn. 639. Second, one of the purposes of jury polls is to ensure unanimity, and we are among the minority of states that require verdicts in civil actions to be unanimous. See Practice Book § 16-30; *McNamee* v. *Woodbury Congregation of Jehovah's Witnesses*, 194 Conn. 645, 647, 484 A.2d 940 (1984). Third, we recognize explicitly the

absolute right to poll the jury upon request in two separate rules of practice that use virtually identical language. See Practice Book §§ 16-32 and 42-31. In short, given these unique circumstances, the majority relies on cases that are not sufficiently analogous to provide significant guidance.

[4] If there is a logical or consequential distinction between the state's interest in securing a criminal conviction and a plaintiff's interest in a § 1983 action in redressing alleged constitutional violations resulting in the death of an individual in state custody, the majority has failed to explain what that distinction might be. Moreover, even if *Pare* was based solely on the criminal defendant's interest in protecting his constitutional right to a unanimous verdict, the right to a unanimous verdict is no less important in a civil case. Indeed, the majority makes no attempt to explain why a criminal defendant's liberty interest is substantially more important than an individual's interests in remaining free from excessive physical force and receiving adequate medical care while in state custody.

[5] At least one state has accounted for the difficulty in showing what harm a refusal to poll may cause by easing the burden of proof. See *Levine* v. *Gallup Sand & Gravel Co.*, 82 N.M. 703, 704, 487 P.2d 131 (1971) ("[w]e will accept the slightest evidence of prejudice, and all doubt will be resolved in favor of the party claiming prejudice" [internal quotation marks omitted]); see also *Duffy* v. *Vogel*, supra, 12 N.Y.3d 180 (Smith, J., dissenting) (discussing 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" and considering, as precaution, "limiting the application of the harmless error doctrine to cases where there is a particularly strong reason to think the jury poll would not have changed the result").

[6] A Chip Smith instruction is given when the jury cannot reach a unanimous verdict. *State* v. *O'Neil*, 261 Conn. 49, 60, 801 A.2d 730 (2002) ("[Chip Smith instruction] makes clear the necessity, on the one hand, of unanimity among the jurors in any verdict, and on the other hand the duty of careful consideration by each juror of the views and opinions of each of his fellow jurors" [internal quotation marks omitted]). That instruction is given in both civil and criminal cases. *Tough* v. *Ives*, 162 Conn. 274, 278, 294 A.2d 67 (1972); see *Wheeler* v. *Thomas*, 67 Conn. 577, 580, 35 A. 499 (1896) (approving Chip Smith instruction in civil case). Yet, in *Pare*, we implicitly rejected the proposition that the need for such an instruction would demonstrate harm from a failure to poll the jury.

[7] The majority's harmless error analysis focuses on the absence of any indication that the jury lacked unanimity without ever addressing or considering the possibility of juror coercion. Indeed, the majority fails to acknowledge that jury polls also serve to ensure that verdicts are free from coercion.