

Can Civility Return to the Courtroom? Will American Jurors Like It?

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I. INTRODUCTION

Imagine trials free of objections, with no interruptions for “sidebar” conferences. The spotlight focuses on the witnesses, not the attorneys, and a spirit of accommodation rather than contentiousness reigns. Such trials are not merely figments of the imagination. They occur every day in England.

In the Spring of 1994, I¹ had the opportunity to work for several months with a British barrister, Geoffrey Still, a member of Pump Court Chambers (London and Winchester). Although I did not have appearance privileges, I assisted Geoffrey in preparing and conducting criminal trials. Sometimes we prosecuted and sometimes we defended, but like most barristers, we were in trial almost every day of every week.

During our first trial, I sensed that although the substantive law and the rules of evidence were similar, the atmosphere was significantly different. It was far less combative than American trials.² The guiding principle was reasonable accommodation with opposing counsel.³ Objections were an endangered species. Heated debate was nonexistent.

I asked myself, “Why?” Some procedural rules differed from those governing the American criminal trial. For example, there was no voir dire examination; opposing counsels sat within an arm’s length of each other and were “tethered” to counsel table throughout the trial; defense counsel’s opening speech was deferred until the close of the prosecution’s case; the rare objection

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² See MICHAEL H. GRAHAM, TIGHTENING THE REINS OF JUSTICE IN AMERICA 260 (1983). “In the trial of criminal cases in America, counsel for both sides exhibit from jury selection to jury instruction, an attitude of mortal combat. Every rule of evidence is enforced to the hilt. Counsel exploit every tactical advantage, whether real or imaginary.” *Id.*

³ “[Barristers do not] seek to obtain temporary victory by unfair means: they remember that it is their duty to assist the Court in eliciting the truth.” Justice Hugh Maddox, *An Old Tradition with a New Mission: The American Inns of Court*, 54 ALA. L. REV. 381, 385 (1993). See also Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 443–44 (1992).

was handled by excusing the jury before discussing the issue; and at the end of the case the judge summed up the facts in addition to instructing the jury on the applicable law.⁴ I speculated that these procedural differences were the primary reason for the apparent decrease in combativeness.

As I participated in more trials, however, I realized that the civil atmosphere was more than the sum of the procedural variations. Civility existed because the barristers were intent on maintaining it.⁵ They did not justify combative behavior as being necessary to protect their clients' interests. They did not attempt to introduce questionable evidence because they could fashion a "good faith" argument for admission.⁶ Barristers saw themselves as filling two roles: the first as advocates for their clients, and the second as officers of the court who have a responsibility to keep the trial process free from the taint of adversarial game playing.⁷ After several trials, I realized that trying a case need not necessarily be a stressful and painful experience. Litigation can be enjoyable when one is confident opposing counsel will not resort to stratagems designed more to distort the quest for truth than to aid it. I also knew my attraction to a more user-friendly courtroom was shared by many of my

⁴ See GRAHAM, *supra* note 2, at 229, 237.

⁵ Another possible motive for maintaining an atmosphere of civility and fair play may be that barristers are constantly switching roles. Some days they are prosecuting, and some days they are defending. A barrister would be unwise to be the avenging prosecutor one week when he or she knows that next week opposing defense counsel may have the opportunity to assume the avenging role. *See id.* at 239.

⁶ *See id.* at 236.

[U]nlike the defense attorney representing the defendant in America, . . . the defense barrister [does not] consider it proper to interject irrelevant matters into the case to confuse the jury, to require witnesses testifying as to uncontested matters to appear in court, to object to break the flow of damaging testimony, to turn the trial into an accusation against the complainant or the police where not called for clearly by the evidence, or to ask the jury to try the prosecutor, the judge, or society rather than the accused. Moreover, the defense barrister does not consider it his function to attempt to convince the trier of fact that the accused must be innocent by selling himself and his relationship with the accused to the jury, to consciously build into the trial error to be argued on appeal, or to seek with great intensity a hung jury on the theory that a hung jury is, in most instances, the functional equivalent of an acquittal.

Id. See generally W.W. BOULTON, CONDUCT AND ETIQUETTE AT THE BAR (5th ed. 1971).

⁷ See GRAHAM, *supra* note 2, at 236. "The English criminal jury trial to a marvelous extent keeps its eye on the ball—the guilt or innocence of the accused. The trial unfolds as a search for truth in the same sense that a parent faced with two screaming children goes about determining who started the fight." *Id.*

American colleagues. American attorneys and judges were increasingly critical about the lack of "civility" in the American courtroom.⁸ Many believed the overly combative nature of the American trial affects the quality of justice and brings the whole legal system into disrepute.⁹

Lawyers and judges offer a variety of reasons for the decline in civility. The overabundance of attorneys is often cited as a cause for increased competitiveness and a decrease in good manners. Many attorneys point out that law is now a business driven by the "bottom line," and collegiality does not pay the rent. Furthermore, they lament that clients do not associate civility with good lawyering; bad taste, offensive conduct, and obstructive actions are "qualities" clients want to see in their advocates.¹⁰

Not all lawyers, however, bemoan the loss of civility. There are dissenting voices to the chorus calling for a return to the "good old days" of polite litigation. The dissenters suggest that the "good old days" were mostly good for the "good old boys."¹¹ For example, women and minorities have a more favorable view of the rough and tumble world of litigation. Many of them

⁸ See, e.g., Warren E. Burger, *The Necessity for Civility*, Remarks at the Opening Session of the American Law Institute, in 52 F.R.D. 211 (1971); *Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 371 (1992) [hereinafter *Interim Report*]; Catherine T  r  se Clarke, *Missed Manners in Courtroom Decorum*, 50 MD. L. REV. 945 (1991); Mark Curriden, *Blowing Smoke*, 81 A.B.A. J., Oct. 1995, at 56; Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975); Arthur Garwin, *Disorder in the Court*, 81 A.B.A. J., June 1995, at 101; Geoffrey Hazard, *Change Rules to "Civilize" the Profession*, NAT'L L.J., Apr. 17, 1989, at 13; Gideon Kanner, *Welcome Home Rambo: High-Minded Ethics and Low-Down Tactics in the Courts*, 25 LOY. L.A. L. REV. 81 (1991); William A. Martin, *Collegiality: You Mean I Have to Act Like a Human Being???*, 20 ARK. L. REV. 166 (1986).

⁹ See *Interim Report*, *supra* note 8, at 375; *The Trouble with Lawyers* (ABC television broadcast, Jan. 2, 1996).

¹⁰ See *Interim Report*, *supra* note 8, at 393.

¹¹ See Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 672 (1994) (arguing that "[t]he rules promulgated by the 'best men of the bar' are predictably elitist . . . reflect[ing] the biased assumption that ethical problems in the bar were coming from new entrants, 'shysters,' ambulance chasers, and members of the lower classes who were stigmatized as immoral mostly because of their ethnic background"); see also Andrew R. Herron, Comment, *Collegiality, Justice, and the Public Image: Why One Lawyer's Pleasure is Another's Poison*, 44 U. MIAMI L. REV. 807, 833 (1990) (arguing that "a serious image problem might also develop from the so-called 'old boy' network, if the public were to perceive overly collegial lawyers as colluding and thereby undermining litigants' rights").

believe a little bit of incivility is required to break into the "closed shop,"¹² and the change in courtroom manners reflects a change in the distribution of rights and powers in our society.¹³ They suggest that the lawyer's duty to zealously represent the client should always trump professional courtesy.¹⁴ These dissenters would consider a return to the British model of conducting trials a reversal of the American Revolution and the reimposition of a hide-bound class system.¹⁵

While the debate over the need for civility and the societal costs of imposing a civil regime has raged, empirical studies of whether a more civil atmosphere in the courtroom would appeal to American jurors are nonexistent. No one has tested, for example, how the typical American jury would react to the presumably more civil British trial process.¹⁶

Would more civility influence jury verdicts? Would civility bore American jurors who expect the courtroom scene to resemble the "Shoot-out at the O.K. Corral?" Would jurors interpret an advocate's civility as lack of faith in the case? These are important questions that need to be addressed before there is any hope for a civility sea-change. Lawyers will not surrender what they perceive to be effective,¹⁷ though uncivil, trial techniques in return for winning

¹² See Mashburn, *supra* note 11, at 691-92 (citing a survey which showed that women and minorities have a more favorable opinion of the legal profession than do college-educated white males with above average salaries).

¹³ See *id.*; see also Herron, *supra* note 11, at 814-18.

¹⁴ See Herron, *supra* note 11, at 832 (arguing that "because professional courtesy can have the effect of undermining legal rights, litigants are better served where collegiality is not available to foil the integrity and honor of loyal representation").

¹⁵ See Mashburn, *supra* note 11, at 695.

A deference-based civility code is essentially aristocratic in nature because it embodies the upper class's ideal of polite deference to one's civil and political superiors. Patrician notions of civility are "rooted" in conventions of polite intercourse and automatic deference associated with the dominance of a patrician elite in English civil society. It is hardly coincidental that calls for civility resonate with comparisons to a British system perceived to be a model of decorum and restraint. These favorable comparisons are ironic because the British system is so bounded by the class origins of its distinctions among lawyers and the notoriously exclusionary practices of the Inns of Court.

Id.

¹⁶ See Van Kessel, *supra* note 3, at 506.

¹⁷ Many advocates for civility would argue that "take no prisoners" tactics are not successful. See Robert N. Saylor, *Rambo Litigation: Why Hardball Tactics Don't Work*, 74 A.B.A. J., Mar. 1988, at 78 (1988).

fewer jury verdicts.¹⁸ Our study, described below, attempts to answer those questions. The study also tries to measure juror reaction to specific procedural aspects of the British trial that appear to foster a more civil atmosphere.

II. DESCRIPTION OF THE STUDY

Three video tape versions of a trial were created which were shown to jury-eligible adults selected from three different groups: community college students, university students, and members of the general public.¹⁹ The hypothetical case used for the trial was developed from a hypothetical case used in prior jury studies, *State v. Tyler*, involving allegations of rape at a campus fraternity party.²⁰ The witnesses in the trial included: (1) the alleged victim, (2) the defendant, (3) a fraternity brother who observed some of the interaction between the alleged victim and the defendant, and (4) a medical doctor from the local rape crisis center.²¹ Both sides agreed that sexual intercourse occurred. The critical issue in the case was consent. The defendant claimed, and the complainant denied, that there was consensual sex.²²

The "British version" of the trial was filmed first.²³ The roles of counsel were played by British barristers, and the judge was a British High Court

¹⁸ See Mashburn, *supra* note 11, at 686.

¹⁹ Most of the participants were compensated for time spent viewing the tapes and completing the questionnaire. Psychology students received classroom credit for their participation.

The Montgomery County Common Pleas Court provided a printout of its jury pool list. A random group from this list was solicited to participate in the study. In addition to the official jury pool, other members of the general public were recruited through churches and other charitable organizations. Each participant could either keep the stipend or donate it to the charitable organization.

²⁰ The case materials for *State v. Tyler* were used in previous jury studies by Professor Steven Penrod of the University of Nebraska. The case was developed by Professor Brian Cutler from Florida International University and Professor Daniel Linz from the University of California at Santa Barbara.

²¹ The witness roles for all three trials were played by four actors from the University of Dayton Drama Department.

²² This case was selected for two basic reasons. First, the decisive issue is simple, and its resolution is based on answering the question, "Who do you believe?" Second, although the issue is simple, emotional elements are present which could potentially affect jurors' perceptions of the facts, elements which both the prosecutor and defense counsel could exploit.

²³ All three trials were filmed in color by a professional film maker, Allen Hueth, who used four cameras, primarily focused on the attorneys, the witnesses, and the judge.

Justice.²⁴ The second trial was the “American version.” An experienced American prosecutor and defense attorney acted as counsel, and a Federal District Court Judge for the Southern District of Ohio presided.²⁵ The third trial was conducted by the same American participants, but they did it “British style.” This third version was used as a control to detect reactions to the British and American styles that might be based on the different personalities, or accents, of the British and American participants. In none of the three versions was a verbatim script provided to the attorneys, judges, or witnesses. They all received a common set of facts, but were instructed to play the roles as they would in a real case. Although this flexibility lent variety in the way questions were asked, witnesses were coached to provide the same facts in all three versions.²⁶ Thus, all three trials produced consistent facts and appeared authentic.²⁷

Seven specific variations between the American version and the British version were included in the scripts. These particular procedural and stylistic differences were selected because the British variants appear to produce a more

²⁴ Guy Boney and Geoffrey Still from Pump Court Chambers played prosecutor and defense counsel, respectively. Between them, Mr. Boney and Mr. Still have more than 50 years of litigating experience. Sir Charles Mantell acted as judge. Justice Mantell is the presiding judge for the Western District of England. After Justice Mantell’s visit to Dayton, Ohio, he returned to England and presided at the trial of Rosemary West. The West case was the British equivalent to the O.J. Simpson case. It involved the murder and torture of ten young women. He completed the case in a month.

Justice Mantell, Mr. Boney, and Mr. Still have our sincere gratitude for their willingness to travel to Dayton and devote countless hours preparing for the trial.

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Special thanks to Dennis Turner’s wife, Kathleen Turner, who first suggested comparing the British trial with the American trial.

²⁵ We would also like to thank Judge Walter Rice, James Cole, who was the prosecutor, and Dennis Lieberman, who was the defense counsel. Without them this study would not have been possible. Not only did they try the “American version” of the case, they also tried the case “British style.” Moreover, Judge Rice and his staff graciously permitted us to turn his courtroom into a production studio for three days.

²⁶ We believe that many of the video trials used in previous jury studies appear stilted because the participants were following a verbatim script. Furthermore, since our study focused more on stylistic variations, it was less important that the exact same questions be asked in exactly the same order.

²⁷ Many of the participants who viewed the trials were surprised to learn that they were not videotapes of actual cases.

courteous atmosphere by either creating deterrents to uncivil behavior or providing incentives for civil conduct.

First, opening statements by the barrister representing the defendant in the British trial was deferred until the close of the prosecution's case-in-chief. The American defense counsel gave his opening statement immediately following the prosecution's opening statement.²⁸

Second, an obviously leading question was asked in the British trial. Defense counsel did not object. Instead, the matter was handled by counsel leaning toward the prosecuting barrister and quietly pointing out the leading nature of the question. The prosecuting attorney immediately altered the form of the question. In the American trial, defense counsel made an objection to the leading question and the judge sustained it.²⁹

Third, in the British trial, barristers were not free to move around the courtroom, but remained at their respective counsel tables, standing only when speaking at small podiums on their tables. In the American version, counsel could use the large podium in the center of the courtroom or roam the courtroom.³⁰

²⁸ Although this is a fundamental difference between the British and the American criminal trial, it is not clear how this difference might impact the civility question. The variation was included as part of the study, however, because barristers' defense strategies are so closely linked to the delayed opening speech that to change the procedure would have fundamentally changed the dynamics of the British version.

One can only speculate, but the delayed opening might have a positive impact on civility by avoiding the game playing that occurs when defense counsel gives an opening that tries to keep all options open, including the option of putting the defendant on the stand. Room for that maneuver is unnecessary after the prosecution has put on its case.

²⁹ The resolving of objections as to the form of questions and other relatively minor evidentiary issues by the barristers without requiring the intervention of the judge reinforces the impression of civility in the British courtroom. Since most of the objections made during the course of a trial relate to the form of the question, jurors are not treated to the litanies of objections that can create a confrontational atmosphere. Furthermore, the culture which assumes that barristers should settle such minor matters (or be chastised by an irritated judge) develops a spirit of cooperation and accommodation between the barristers that often carries over into other aspects of the trial. See EDWARD J. IMWINKLEREID, *EVIDENTIARY FOUNDATIONS* 14 (3d ed. 1995).

³⁰ The British limitation on the movement of barristers is conducive to civil behavior because it de-emphasizes the role of the advocate and limits the barrister's opportunity for theatrics. The focus of all direct and cross examinations is switched from the barrister to the witnesses because it is difficult for a juror to focus on both the witness and the barrister at the same time. In fact, a juror can switch his or her attention from witness to barrister, and visa versa, only by turning the head. It would be an unusual juror who would not soon tire of watching the barrister lob a question, pivot to see the witness return a response, only to turn back to the barrister for the service of the next question. See Jeffrey S. Wolfe, *The Effect of*

Fourth, a formal objection was made on a serious evidentiary issue (character evidence) to the judge in the British trial. After the barrister declared he had a point of law to raise, the jury was excused while the matter was discussed and decided. (This was done by creating a brief blank section in the tape.) On the same issue in the American trial, the matter was handled in front of the jury.³¹

Fifth, during the British trial, the judge questioned one of the witnesses; the American judge did not ask any questions of witnesses.³²

Sixth, in the British case, two questions, one by the prosecutor and one by defense counsel, were asked which could ultimately lead to the admission of irrelevant evidence. Before objection was made by opposing counsel, the judge interrupted the question and asked counsel to move on to another question. In the American case, opposing counsel objected after the question was asked, stated grounds for his objection, and the judge sustained the objection.³³

Seventh, the judge in the British trial summed up the facts and instructed the jury on the law. In the American rendition, the judge only instructed the jury on the applicable law.³⁴

Location in the Courtroom on Jury Perception of Lawyer Performance, 21 PEPP. L. REV. 731 (1994) [hereinafter, Wolfe, *Effect of Location*]; Jeffrey S. Wolfe, *Toward a Unified Theory of Courtroom Design Criteria: The Effect of Courtroom Design on Adversarial Interaction*, 18 AM. J. TRIAL ADVOC. 593, 606 (1995) [hereinafter, Wolfe, *Toward a Unified Theory*].

³¹ The British approach promotes civility because it acts as a strong deterrent to casual objections cluttering up the trial. Counsel will not risk irritating the jury by forcing them to retire and then return 10 minutes later only to be excused after 15 minutes for another objection. Only serious substantive objections are made in open court. This procedure also eliminates the opportunity for "speaking objections," in which counsel uses the objection as another tool to influence the jury.

³² Questioning by the British judge has the effect of enhancing civility because it engages the judge as a neutral participant in the search for truth. Important issues will be addressed regardless of the questioning strategies of the barristers. Barristers have less incentive to dodge or obfuscate significant facts. See John C. Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987, 989 (1990).

³³ Civility is reinforced by the British judge being proactive in controlling the admission of evidence. Judicial activism reduces the need for counsel to object and for opposing counsel to debate the objection. There is less opportunity for counsel to use the objection to make points with the jury. Also, opposing counsel avoids the problem of appearing, to the jury, like a roadblock to the truth by keeping out what may be "relevant" evidence. See Daniel Linz & Steven Penrod, *Increasing Attorney Persuasiveness in the Courtroom*, 8 LAW & PSYCHOL. REV. 1, 14 (1984); see also Van Kessel, *supra* note 3, at 429.

³⁴ The judge's summation of the facts promotes civility because it de-emphasizes the importance of counsel's final argument and serves as a deterrent to theatrical displays designed to distract and obscure rather than help the jury determine the truth. See *id.* at 434; see also *Rules of Conduct for Counsel and Judges: A Panel Discussion on English and*

In addition to the specific variations built into the scripts listed above, the British trial differed from the American trial in other ways. The British barristers maintained a more detached demeanor than their American cousins. The British prosecutor gave no hint that he had any personal stake in securing a conviction, or that he was society's avenging angel. British defense counsel did not suggest that the whole justice system would be undermined by a guilty verdict. Polite treatment of witnesses was the norm.

The American attorneys during the American version were more intense and less concerned with witnesses' feelings. Nevertheless, they were moderate in their behavior, with no displays of anger or moral outrage. The American version probably represented a typical criminal trial before a judge who runs a fairly tight ship.³⁵

The questionnaire used in the study consisted of more than fifty questions. The majority of the questions were designed to elicit attitudinal responses to stylistic differences between the British and American versions. They required the participants to rate the effectiveness of opening statements, closing arguments, and witness examinations. The participants were also asked to judge if the attorneys were strong advocates for their clients, and to assess the overall civility level of the trials.

The remainder of the questions focused on specific procedural differences between the British and the American trials. For example, participants who watched the British trial were asked to compare the procedure they observed with the procedure used in an American trial and to indicate which they would prefer.

Perhaps one of the most important questions on the survey required the participant to find the defendant guilty or not guilty.³⁶ Each participant had to make this determination without consulting with other participants.³⁷

American Practices, 7 GEO. J. LEGAL ETHICS 865, 879-87 (1994) [hereinafter *Rules of Conduct*].

³⁵ It was tempting to stage a rowdy version of an American trial. To compare the British trial with an O.J. Simpson kind of case, however, though entertaining, would not lead to credible conclusions. For example, there were thousands of objections and hundreds of sidebar conferences in the Simpson trial, as contrasted with British criminal trials in which barristers often make no objections. See *O.J. Trivia, Here's All You Need to Know About the Trial*, NAT'L L.J., Oct. 16, 1995, at A5.

³⁶ This question was the first question asked after the typical demographic questions. It was designed to elicit the participants' visceral reaction to the trial before responses to later questions colored their judgment.

³⁷ The study was not designed to evaluate the jury's deliberative process. The purpose was to gauge the typical American juror's reaction to the British criminal trial. We assume that after deliberation jurors may change their initial positions with respect to guilt or

III. RESULTS

A total of 219 subjects completed the study. Of these, seventy-eight viewed the American trial version, eighty the British trial version, and sixty-one the British trial version with the American attorneys. These 219 subjects were drawn from four populations. The first sample came from a local midwestern community college and consisted of fifty-eight introductory psychology students. The second and third samples were from the local private university, and consisted of twenty-four students from introductory psychology classes and thirty-one students from criminal justice classes. The final sample came from the community, and consisted of 106 persons from the Montgomery County jury pool, churches, and other local groups. The overall demographic information for the subjects (age, sex, race, political affiliation and orientation, education, and occupation) is summarized in Table 1. There were no differences across samples in any of the results, and thus the samples were collapsed for purposes of analysis. In addition, none of the demographic variables was significantly related to the verdict.

A. *Verdict*

A chi-square analysis was performed on the relationship between type of trial and verdict. These results are summarized in Table 2; as can be seen, while the overall verdict pattern was fairly evenly split (53.4% Guilty, 46.6% Not Guilty), the pattern varied by type of trial. With the American attorneys, regardless of whether the trial was done in American or British style, the verdict pattern was essentially identical. With the British attorneys, subjects voted predominantly for Guilty.

B. *Perception of Trial and Participants*

Subjects were asked, on a seven-point scale ranging from "strongly agree" to "strongly disagree" (1-7), to rate the perceived fairness and civility in tone and atmosphere of the trial, as well as whether there were too many interruptions and objections during the trial. Ratings were analyzed using a one-way analysis of variance procedure. Individual mean differences between

innocence, but we do not believe such a change would reflect a change in attitude about the stylistic and procedural differences between the British and American versions.

For a more detailed description of the results, see Solomon Fulero & Dennis Turner, *Using British Trial Procedures in American Cases: A More Civil Trial?* (unpublished manuscript on file with the authors).

groups were also analyzed using the Tukey HSD procedure.³⁸ These results are summarized in Table 3. Results indicate that subjects did not differ across type of trial in their ratings of the fairness of the trial, but that they did find the British-style trials, using both the British and the American attorneys, to be more civil and to have fewer interruptions and objections than the American-style trial. There were no significant differences in perception of the primary cause of the objections across trial type (*i.e.*, prosecutor, defense attorney, or both).

Prosecutors and defense attorneys in each of the trial types were rated on a series of scales measuring dimensions such as their perceived likability, knowledgeable, persuasiveness, and overall effectiveness. In addition, the perceived effectiveness of their questioning of each witness and of their opening and closing arguments was measured. Subjects' perceptions of the fairness, authoritative, knowledgeable, likability, and overall effectiveness of the judge in each of the trial types were also measured. Each of these variables was measured on seven-point scales. These results are also summarized in Table 3. There are few differences in perceptions of the prosecutors and defense attorneys across groups. However, it can be seen that subjects clearly rated the British prosecutor as having more effectively questioned the doctor and the defendant, as having made a more effective closing argument, and as being more effective overall than the prosecutor in the American and British-style American versions. Finally, perceptions of the judge on all five variables (fairness, authoritative, knowledgeable, likability, and overall effectiveness) were more favorable in the two British versions than in the American version.

C. Opinions on Trial Variations

Subjects were asked their opinions regarding each of the trial variations employed in the study. Questions explored the placement of the opening statement, the use of discussions between the attorneys as opposed to objections, the movement of the attorneys as opposed to standing in one place, the excusing of the jury after raising points of law as opposed to objections being made and argued in open court, the role of the judge in asking questions of witnesses, judicial intervention on evidentiary matters in the absence of

³⁸ The Tukey HSD (honestly significant difference) test is a statistical method for making pairwise comparisons between groups. Pairwise comparison involves making all possible comparisons between groups by looking at one pair group at a time. For example, if there are three groups labeled A, B, and C, then comparisons are made between groups A and B, groups A and C, and groups B and C. Group A will not be compared with the combination of groups B and C.

objections, and summary of the evidence by the judge. Subjects watching the two British versions were asked if they preferred the variations they saw, and were also asked about their perception of bias in the summary, as well as whether they believed it had affected their verdict. Subjects watching the American version were reminded of what had transpired in the version they saw, told of the proposed alternative, and asked if they preferred what they had experienced. These results are summarized in Table 4. As can be seen, subjects watching all versions expressed a preference for the American-style variations over those in the British-style trials, with the exception of a preference for the British-style ability of the judge to question witnesses.

IV. DISCUSSION

A. *Differences in Verdicts*

One of the most important questions addressed by this study was whether an increase in courtroom civility alters jury verdicts. At first glance, Table 2 suggests that the more civil British trial leads to more guilty verdicts than the American trial. The conviction rate is seventy-one percent for the British prosecuting barrister in the British version and only forty-five percent for the American prosecutor in the American version.³⁹ This apparent variation, however, must be evaluated in the context of the specific responses in Table 3 concerning the effectiveness of the prosecutor. It is clear that, although the American prosecutor received positive ratings, the jurors believed the British prosecuting barrister was significantly better than his American counterpart. He was rated as more effective in his questioning of witnesses and his final argument, and jurors thought he was considerably better with respect to his overall performance.

The jurors' perceptions of the prosecutors were quite different than their perceptions of the defense counsels. In all three trials (Table 3), jurors rated counsels for the defense as essentially equal in ability for all phases of the trial from opening statement to closing argument. No variation in verdicts can be attributed to differences between defense counsels.

A comparison of the data in Table 3, column 1 (the American trial), with the data in column 3 (the British trial, using the same American attorneys who conducted the American trial) explains why the verdicts varied between the American trial and the British trial with the barristers. When these two versions of the trial are compared, it is apparent that there is no significant variation in

³⁹ If an American prosecutor could "boast" of only a 45% conviction rate, it is highly unlikely that the prosecutor would ever be re-elected to the office. See Van Kessel, *supra* note 3, at 442.

the verdicts (Table 2). The forty-five percent conviction rate in the American trial is mirrored by the forty-four percent conviction rate in the British trial with American attorneys.⁴⁰ Furthermore, the jurors judged the performances of prosecutors and defense counsels in both versions as essentially equal (Table 3). In not one category, from opening statement to closing argument, did the jurors perceive the prosecutor to be significantly better or worse in the American or British version. The same phenomenon occurred with respect to the defense counsel (Table 3). The jurors perceived the ability of the defense counsel in the American trial and the ability of the American defense counsel in the British trial to be equal.⁴¹

Therefore, it can safely be concluded that the reason more jurors returned guilty verdicts in the British barrister trial than in the American version was due only to the prosecuting barrister's more persuasive performance. The variation was not caused by the British trial's more civil atmosphere. If increased civility *had* been a factor, there would have been significant differences between the percentage of guilty verdicts in the American trial and the percentage of guilty verdicts in the British trial using American attorneys.

B. *Differences in Civility*

Perhaps the most important request in the questionnaire asked the jurors to respond to the statement, "Overall, the trial was civil in tone and atmosphere" (Table 3). The jurors who viewed either the British trial with barristers, or the British trial with American attorneys, concluded that the trials were civil in tone. In fact, the responses to the civility question for both versions of the trial were almost identical—3.16 and 3.24. In contrast, the jurors who viewed the American trial rated it significantly less civil in tone—4.41.

It should be noted, however, that the jurors who saw the American version did not consider that version to be uncivil. This result was not unexpected.⁴² The American version was designed from the beginning to be an example of a

⁴⁰ In the summer of 1995, Dennis Turner traveled back to Winchester, England, and showed the American version of the trial to a group of British citizens. They also completed the same questionnaire used in the study. Although the group was too small to constitute a valid sample, it is interesting to note that the group split 50-50 between guilty and not guilty verdicts.

⁴¹ This result was expected to some extent because the prosecutor and defense counsel were played by the same attorneys in both versions. Nevertheless, the similar ratings are significant in one sense. They reinforce the conclusion that trying a case in a more civil manner does not reduce one's effectiveness.

⁴² The British group who viewed the American tape in the summer of 1995 also agreed that the tone of the American trial was not uncivil.

courteous American trial.⁴³ The fact that the jurors found all three trials to be equally fair (Table 3) demonstrates that the American trial's atmosphere was not particularly contentious. The response to the question about too many objections (Table 3) also reinforces the conclusion that the American trial was moderate in tone. Jurors observing the American trial did not agree with the statement, "There were too many interruptions and objections in the trial."⁴⁴ The jurors watching the British versions disagreed more strongly with the statement.⁴⁵

Two additional observations can be made about the above results. First, the British criminal trial is more civil in its tone than the American criminal trial, and the enhanced civility is not necessarily linked to the personalities of the advocates. Although there can be no doubt that the more civil the advocates, the more civil the trial atmosphere, British trial procedures are still important in moderating uncivil conduct in the courtroom. When the American attorneys tried the case British style, the jurors perceived them as much more civil than the jurors who watched the same attorneys in the American trial (Table 3).⁴⁶

A second observation also follows from the results: American attorneys can easily adapt to the British trial practice. The American advocates trying the case according to British procedure achieved the same level of civility as British barristers who had spent twenty-five years litigating in the British courts (Table 3).⁴⁷ This transformation was accomplished with little or no prior training in British criminal procedure. The American attorneys' first exposure to the British style was when they watched the British barristers try *State v. Tyler* during the first videotaping session.

⁴³ If the degree of civility were measured on a scale from 1 to 10, with "1" representing the most civility, and assuming the O.J. Simpson trial would receive a "10," the American trial in the study would probably receive a "2."

⁴⁴ The score on this question for the American trial was 4.65, suggesting a slight disagreement with the statement.

⁴⁵ The score on this question for the British trial with barristers was 5.85, and was 5.31 for the British trial with American attorneys, thus suggesting a stronger disagreement with the statement.

⁴⁶ In the American trial the jurors found the tone slightly uncivil (4.41). In the British trial with the same American attorneys, the jurors found the tone substantially more civil (3.24).

⁴⁷ The British barristers' civility rating was 3.16 while the American attorneys, when acting like barristers, achieved a 3.24 rating.

C. Differences Between Judges

Part of the questionnaire asked jurors to provide their impressions of the judges (Table 3). The data from that series of questions displayed some unexpected variations. One would expect to see some variation between a Federal District Court Judge and a British High Court Justice with respect to how the jurors perceived the judges' fairness, appeal, and overall effectiveness. They obviously were two different people (including different accents) coming from quite different backgrounds. The variation which occurred, however, did not relate to personalities, but to whether the judges tried the case in the British style or the American style. Judge Rice and Justice Mantell received statistically equal ratings when they tried the case using British trial procedure.⁴⁸ On the other hand, the jurors who viewed Judge Rice's performance in the American trial saw him as less fair, authoritative, knowledgeable, likable, and effective than the jurors who saw him in the British version.

One could conclude from the above variations that a more civil trial also enhances the jurors' respect for the judge. There is some logic to this conclusion. Judges who let trials get out of control will probably be perceived as less authoritative and less fair. The American version of *State v. Tyler*, however, never got out of hand. Judge Rice was in total control of the proceedings at all times.

A possible explanation for different assessments of the judges could be that the British judge had more opportunities to play an active role than the American judge, including summing up the evidence for the jury.⁴⁹ The increased activity allows the jury to gain more insight into the judicial temperament, perhaps leading to a greater appreciation of the judge's role in the trial.⁵⁰

⁴⁸ Both judges were perceived as equally fair, authoritative, knowledgeable, likable, and effective.

⁴⁹ One of the British jurors who viewed the American trial commented, "The judge just sits there and doesn't do anything! What is he getting paid for?"

⁵⁰ The British judge's obligation to sum up the evidence provides an excellent opportunity to display knowledge, friendliness, and fairness. The summations are often more like a congenial chat at a neighborhood pub than an austere pronouncement from on high. One might also suggest that the British judge's summation is more comprehensible to the average juror than the stilted, boiler-plate instructions on the law often supplied by American judges. But that must be the subject for another study.

D. Differences in Procedural Variations

As mentioned above, seven specific procedural variations were scripted into the three trials, based on the premise that these variations would influence whether the atmosphere of the courtroom is more or less civil (Table 4). It was one of the ironies of this study that at the same time the American jurors were concluding that the British trial was more civil and less combative, the jurors were also registering their dislike of those aspects of the British trial that encourage the aura of civility. Only one British procedure, the questioning of witnesses by the judge, was not disfavored.⁵¹

1. Deferral of the Defense's Opening Statement

American jurors clearly preferred to hear defense counsel's opening statement immediately after the prosecutor completed his opening statement (Table 4).⁵² In their narrative responses to questions, jurors said that the prosecution had an unfair advantage when defense counsel's opening statement was deferred. The jurors knew only one side of the story at the beginning and they wanted the "whole story up front." The jurors worried about the defendant "having an uphill battle" and that a greater burden would be placed on the defendant to rebut the prosecution's case.⁵³ The fears of a tilted playing field expressed by many jurors echoes numerous empirical studies which support the same conclusion.⁵⁴

⁵¹ It should be emphasized that even with respect to this variation, the jurors did not indicate a preference for the British approach, only a neutrality.

⁵² Even the British panel of jurors who viewed the American trial in the summer of 1995 preferred that the defense's opening statement not be delayed. Furthermore, the barristers who conducted the British trial were intrigued by the idea of the defense's opening statement coming immediately after the prosecution's opening statement.

⁵³ The jurors suspected that a delayed opening statement by the defense would result in prejudice against the defendant. This prejudice, however, did not show up in the verdicts. The percentage of the jurors who found for the defendant was the same in both the American version and the British version conducted by American attorneys.

One could argue, however, that the prejudicial effect did appear in the British trial conducted by the barristers, in which jurors overwhelmingly found the defendant guilty. A very good prosecutor might receive a disproportionate boost from an effective opening that is not rebutted until much later in the trial.

⁵⁴ See generally Thomas A. Pyszczynski & Lawrence S. Wrightsman, *The Effects of Opening Statements on Mock Jurors' Verdicts in a Simulated Criminal Trial*, 11 J. APPLIED SOC. PSYCHOL. 301 (1981); Gary L. Wells et al., *The Timing of the Defense Opening Statement: Don't Wait Until the Evidence Is In*, 15 J. APPLIED SOC. PSYCHOL. 758 (1985).

2. Resolution of Minor Evidentiary Issues Without Objections

The British approach to handling many less serious objections by permitting, or even encouraging, barristers to remonstrate quietly to each other rather than make a formal objection in open court was also not favored by American jurors (Table 4). Jurors gave two recurring reasons for their coolness: (1) their desire to know what evidence was objectionable, and why; and (2) their belief that it is the judge's responsibility to decide what evidence is admissible and what is not.⁵⁵

Although many jurors looked with disfavor on the resolution of minor evidentiary issues by attorneys without judicial intervention, their rationales do not support their conclusions. In American trials, jurors learn very little about the nature of objections that are directed to the form of the question. Often, only "Objection!" is uttered, which conveys no meaning to the jury. Furthermore, knowing the nature of an objection is totally unnecessary to the jurors' fact-finding function. Finally, it is a misconception to believe the judge needs, or wants, to insert herself in every trivial disagreement which arises between counsel.⁵⁶ Therefore, this British procedural variation could be encouraged in American trials with little risk of jury alienation. It is simply a case of "what the jurors don't know cannot alienate them." Jurors would not hear the attorneys make objections, so the jurors would be unaware that they were being spared exposure to technical legal maneuvering.⁵⁷

⁵⁵ Another possible reason that jurors do not like the tête-à-têtes between counsel is their belief that an adversary system means confrontation. They do not fancy advocates being too chummy.

⁵⁶ Efficiency might be another possible reason, not suggested by the jurors, for requiring attorneys to address all objections to the judge. A one-word objection with an immediate ruling by the court may take less time than whispered exchanges between counsel. On the other hand, encouraging counsel to be cooperative on minor issues may foster cooperation in other matters which would enhance trial efficiencies and would certainly make the trial appear less contentious.

⁵⁷ This approach to minor objections may in the long run reduce the number of trivial objections. See Steven Lubet, *Objecting*, 16 AM. J. TRIAL ADVOC. 213, 220 (1992).

What goes around comes around. The constant invocation of petty objections has a way of spiraling out of control. Counsel who objects at every turn will eventually find his own examinations punctuated by the intercessions of the opposing lawyer. Interchanges with the intent to get back at opposing counsel are not beneficial and can only detract from the dignity and value of the adversary system.

Id.

3. *Conducting the Case from Counsel Table*

Although the jurors preferred to allow attorneys the freedom to go on “walk-about” (Table 4), their preference was less pronounced. Many of the written responses reflected some ambivalence. A common response was, “It doesn’t matter whether they move or not.” Those jurors who expressed stronger views responded with the observation that attorneys should be free to conduct the case their way and that attorneys are more convincing when they are more active. A typical juror who strongly preferred the British approach commented, “The court is not a stage for lawyers to act and influence a decision with a play or performance.”

The more benign reactions of the jurors to limiting advocates’ freedom of movement suggest that the adoption of this British variation would not alienate jurors. In fact, once again, they may not even be aware of the limitation. The restriction would likely have an impact on the persuasive ability of the advocates,⁵⁸ but the effect would be equally shared by the prosecution and the defense. The limitation would certainly improve the decorum of the courtroom by curbing the opportunity to engage in theatric displays.⁵⁹

4. *Excusing the Jury While Serious Objections Are Argued to the Court*

The fourth British variation tested in the study concerned the handling of objections. When a serious evidentiary objection is made during a British criminal trial,⁶⁰ the jury is excused while the barristers argue their “point of law.” This particular British approach was one of the least appreciated by the jurors (Table 4). Most of the written comments made by the jurors who

⁵⁸ A recent study demonstrated that the lawyer’s location in the courtroom does affect the jury’s perception of the advocate’s performance. The closer the advocate is to the jury, the more the advocate’s verbal and nonverbal communication are enhanced. See Wolfe, *Effect of Location*, *supra* note 30, at 731. Wolfe also points out that advocates make use of the opportunity for movement to put on theatric displays and use movement to raise witness anxiety levels. See *id.* at 736–37.

The question that must be answered is whether the opportunity for theatrics is more important to a trial than improving civility. There is an obvious relationship between the combative nature of “trial by actors” and a decreasing level of civility. After all, “it is a cliché among trial lawyers that good trial work is good theater.” Janeen Kerper, *Stanislavsky in the Courtroom*, 10 LITIG., Summer 1984, at 8.

⁵⁹ One juror, reacting to the British version of the trial, eloquently commented, “I was struck by the calmness of the procedure and the clarity of the speakers. No theatrics, no bombast, no caviling. Dignified, rational, linear. I could follow things easily and never felt confused or annoyed.”

⁶⁰ This is a very rare occurrence.

disfavored it were similar. For example, jurors commented: "Any objection made should be known[;] no information placed before the court should be excused from the jury," and "Once again—we (the jury) were kept in the dark as to pertinent information to the trial."⁶¹ One of the few jurors who strongly preferred the British way said, "Fewer interruptions would ensue. Only really important points would be raised."

Jurors who disliked the British technique of excusing the jury before discussing serious objections gave the same rationale as the jurors who disfavored the British way of handling minor objections—jurors should be able to hear everything that goes on in the courtroom. This rationale, however, is seriously flawed. It assumes that the purpose of the American criminal trial is to expose jurors to every bit of evidence relating to the case. In fact, the American trial is designed to shelter jurors from all kinds of evidence the judge views as improper for jury consideration.⁶² Furthermore, contrary to the jurors' conjectures, the American procedure for dealing with serious objections provides the jurors with no more information than the British procedure. Jurors may be permitted to remain in the courtroom, but watching moving lips at a "side-bar" conference is no more informative for jurors than spending time in the jury room "cooling their heels."⁶³ The dislike of the British approach expressed in the survey may reflect the same frustration jurors feel about stopping the trial for side-bar conferences in American trials.⁶⁴ Consequently, an adoption by American courts of the British procedure for handling objections would probably not annoy jurors more than the American approach.

⁶¹ Surprisingly, some of the British jurors who viewed the tape had similar opinions: "I think that juries should know what is going on. Being sent out means that they miss material that would help them in the verdict."

⁶² One of the purposes behind all the rules of evidence is to filter out inappropriate evidence because we don't trust juries. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE 1* (1995). For example, Federal Rule of Evidence 103(c) addresses this point: "In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury." FED. R. EVID. 103(c).

⁶³ In the jury room, at least, jurors could have a bit of tea and attend to other matters.

⁶⁴ The questionnaire did not ask the jurors who viewed the American version of the trial to provide their reactions to the interruptions of the trial for side-bar conferences. This question probably should have been included on the questionnaire.

Furthermore, the phrasing of the question with respect to the jurors' reactions to the British procedure may have implied that the American approach is more open than it actually is. It said, "The usual method is that the attorney would raise an objection, which would be discussed and ruled upon by the judge in open court." The jurors could reasonably infer that the discussion, not just the judge's ruling, would occur in open court.

Furthermore, whatever annoyance jurors felt would not affect verdicts (Table 2).

The fact that jurors are frustrated with being excused while objections are discussed actually supports the argument for adopting the British approach—if the goal is to enhance the level of civility in the courtroom.⁶⁵ Advocates are always concerned about displeasing jurors. They will think twice before interjecting marginal objections if one of the consequences of objecting is that the jury blames them for delaying the trial and keeping the jury in the dark.⁶⁶ Frivolous objections would become extinct.⁶⁷ A significant reduction in the number of objections, and the wrangling which often follows them, would certainly improve the decorum of the courtroom.

5. *Questioning of Witnesses by the Judge*

Of the seven specific procedural differences tested in the study, the judge's questioning of witnesses was the only British procedure which did not produce a negative response from the jurors. They were essentially neutral (approximately 4.0). The written comments support the ambiguity suggested by the numerical results. The jurors who were strongly skeptical about judicial intervention believed that "the defense and prosecution should ask questions." Also, they were concerned about judicial bias, observing that, "the judge should be unbiased—even though he means well."⁶⁸ The jurors who were

⁶⁵ See JAMES W. JEANS, SR., TRIAL ADVOCACY § 16.8 (2d ed. 1993).

In the free wheeling system of American advocacy the objection has assumed a role far greater than that which it plays in the English system. For our well behaved barrister brethren an objection is a finely honed instrument utilized for the sole purpose of excising from the fact finder's attention those bits of information which fall beyond the pale of proper evidence. Consequently the barristers employ its use with a great deal of restraint.

Id.

⁶⁶ See *id.* at §§ 16–17; ROGER HAYDOCK & JOHN SONSTENG, TRIAL 153 (1991).

⁶⁷ A whole list of objections now used in the American courtroom would be curbed. Such objections might include those used to (1) break the rhythm of an opponent who is "on a roll"; (2) instruct a witness; (3) instruct the jury; and (4) express outrage. See *e.g.*, JEANS, *supra* note 65, at § 16.13–.15; see also THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 287 (1980).

⁶⁸ See Reitz, *supra* note 32, at 996.

It is difficult to know how much influence by a judge can be tolerated without impairing the jury's function. Although we have tended to proscribe judicial activism during jury

strongly favorable to the idea of the judge asking questions echoed a theme mentioned in response to previous questions, that “any information that may make an impact on the case should be brought out.”

Although the average of the responses indicates an ambivalence about judicial questioning, the adoption of this aspect of British procedure may not be entirely without repercussions. The jurors’ responses tended to be polarized, either very strongly against or strongly in favor. Therefore, a judge who exercises his or her option to question witnesses may be enhancing the atmosphere of civility in the courtroom, but may also be alienating a significant group of jurors.⁶⁹

The advantage of a proactive, questioning judge, however, is also apparent. Advocates have less motivation to use combative and deceptive techniques.⁷⁰ For example, a lawyer would hesitate to employ a “smoke and mirrors” defense if there were a very real prospect that the judge would be the one who “cleared the air.” The possibility of opposing counsel “clearing the air” might well be regarded by the defense as an acceptable risk. The jury could consider the opponent’s effort at clarification suspiciously, as just a comparable attempt to sow a different brand of confusion. The deterrent effect would be limited. There would be deterrence, however, if the judge were asking the clarifying questions. The jury would assume the judge had an altruistic motive of helping them understand the facts. Moreover, the jury would be likely to castigate the advocate who introduced evidence which was so confusing the judge had to descend from on high to clarify it.⁷¹

6. *Exclusion of Evidence on the Judge’s Own Motion*

Once again, the jurors did not favor the British method of controlling the trial through the judge’s interruption of an attorney’s question and direction to the attorney to move on to another area of inquiry (Table 4). The written comments to this question were reprises of now common themes—advocate control, potential judicial bias, and the juror’s desire to hear every bit of evidence. Two typical reactions were: “The judge should remain neutral and should not make his own determination on what should be presented,” and “If

trials in order to prevent undue influence on the jury, we may be underrating the ordinary juror’s ability to exercise independent judgment despite judicial influence.

Id.

⁶⁹ Our study does imply, however, that jury discomfort with judicial questioning will not affect the verdict.

⁷⁰ See Reitz, *supra* note 32, at 993.

⁷¹ See GRAHAM, *supra* note 2, at 238.

there was a prior similar case, the jury should know.” Other jurors were less concerned about the judge’s intervention: “If the evidence should not be allowed, it shouldn’t matter if the attorney objects or not, the judge should stop it.”

As mentioned above, a juror’s desire to know everything about a case will not be gratified by limiting the judge’s power to exclude evidence in the absence of an objection. Inadmissible evidence will be admitted only *if* no one objects, an unlikely prospect in an American trial, where the air is usually permeated with objections.⁷²

The other concerns expressed by the jurors, however, cannot be easily disregarded. Who should have primary, or even exclusive, control over the offering of evidence is a fundamental concept that underlies any dispute resolution system.⁷³ If American jurors are averse to more judicial prerogatives, such as being more proactive in the exclusion of evidence, then adoption of this particular British approach could negatively affect the jurors’ impressions of the fairness of the trial. It might also affect the verdict if the jury believes the judge was lending aid and comfort to one of the parties.

With respect to this variation, perception may be more important than the reality. In the American trial, the judge normally waits until a lawyer objects before excluding evidence, but that procedure provides no more protection against a biased judge than the British procedure. There are many opportunities for an American judge to put a thumb on the scales of justice, if so inclined.⁷⁴ Nevertheless, one should be cautious about changing a tradition which would cause jurors to question the integrity of the trial.

On the other hand, a proactive judge can reinforce the civility of the trial by short-stopping in-court arguments of counsel over the admission of evidence.⁷⁵ Proponents will be reluctant to offer questionable evidence if they know judges may intervene immediately, even before the foundational questions are posed. The opponents of the evidence are relieved of playing the

⁷² See Van Kessel, *supra* note 3, at 464.

⁷³ See Stephen A. Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1, 13–14 (1978).

⁷⁴ See Patrick E. Longan, *Civil Trial Reform and the Appearance of Fairness*, 79 MARQ. L. REV. 295, 315–16 (1995); Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 80; Rochelle L. Shoretz, *Let the Record Show: Modifying Appellate Review Procedures for Errors of Prejudicial Nonverbal Communication by Trial Judges*, 95 COLUM. L. REV. 1273, 1282–83 (1995).

⁷⁵ See Van Kessel, *supra* note 3, at 437 (arguing that “[t]his greater contentiousness of American trial lawyers finds its roots in a number of factors, including the passive role of our judges and the correlative control of lawyers in criminal trials”).

“bad guy” roles (for example the lawyer trying to “hide” relevant evidence) in front of the jury.⁷⁶

Not appearing as the “bad guy” is particularly important during opening statements and closing arguments.⁷⁷ Generally, it is unwise to object to an opponent’s opening or close even when opposing counsel’s comments are clearly inappropriate.⁷⁸ A judge exercising more proactive control during openings and closings, however, could enhance the civil atmosphere of the trial by curbing the more obvious abuses, without the jury labeling opposing counsel as an obstructionist.⁷⁹

7. *Summing Up of the Case by the Judge*

At the close of a British criminal trial the judge summarizes both the facts and the law for the jury. Of all the variations tested in this study, this variation is probably the most significant.⁸⁰ It is also a variation which did not find favor with the American jurors (Table 4). Moreover, those who disagreed with the British approach were strongly opposed. A few of the written comments were:

⁷⁶ Of course, the proactive judge can only be effective if she is thoroughly knowledgeable about the case and can anticipate when counsel is crossing into forbidden evidentiary territory. Much of this prior knowledge can come only from a complete case file and effective pretrial hearings. These prerequisites exist in England because the trial judge has a file which includes all the prosecution’s evidence and often much of the defendant’s.

⁷⁷ Advocates are probably the most tempted during these phases of the trial to use uncivil strategies. Their comments are the least fettered by the Rules of Evidence. Moreover, the “contest” is directly between the advocates and most resembles face-to-face combat. Frustration levels also rise because one advocate must listen to the other advocate stretch the limits of “fair comment” without having an effective way to resist the onslaught, except by adopting comparable tactics when positions are reversed.

⁷⁸ See HAYDOCK & SONSTENG, *supra* note 66, at 331; PETER MURRAY, BASIC TRIAL ADVOCACY 233 (1995); J. ALEXANDER TANFORD, THE TRIAL PROCESS: LAW, TACTICS AND ETHICS 173, 405 (1993).

⁷⁹ In an informal March 1996 survey conducted by the Karl D. Kessler Inn of Court in Montgomery County, Ohio, common pleas judges were asked to list their “pet peeves” with respect to closing arguments. The most often cited peeves were: misquoting testimony, screaming, and repetition. All those “pet peeves” could be eliminated if American judges acted more like their British cousins and curbed the abuses without waiting for an objection.

In the same survey, the judges indicated that they allow attorneys substantial latitude in closing arguments and discourage objections, thus suggesting that it is their reluctance to supervise closing arguments that gives rise to their “pet peeves.” Materials from Karl D. Kessler Inn of Court (Mar. 25, 1996) (on file with the Dayton Bar Association).

⁸⁰ See Jack B. Weinstein, *The Power and Duty of Federal Judges to Marshall and Comment on the Evidence in Jury Trials and Some Suggestions on Charging Juries*, 118 F.R.D. 161 (1988); see also *Rules of Conduct*, *supra* note 34, at 879–87.

“The judge being an authority figure may sway a person one way or another,” “Closing arguments should be left to the attorneys,”⁸¹ and “He should just shutup.”⁸² Two jurors who appreciated the judge’s summing up of the evidence said: “Judges are intelligent; jurors can see them as safe and neutral, someone they know they can believe,” and “The jury forgets things and the judge reminded them.”

The jurors’ strong preference that the judge *not* sum up the evidence might have been stronger had the jurors also concluded that the summing up by the judge in *State v. Tyler* was actually biased (Table 4).⁸³ The jurors viewed the summation as neutral in tone. Were it otherwise, one would expect their suspicion of judicial activism would have been even more aroused.⁸⁴

The adoption by American courts of this British approach may be the most problematic. Not only may American jurors suspect judges of trying to influence the jury’s fact-finding process, the reality may be that judges *will* try to use the power of factual summation to influence the jury.⁸⁵

⁸¹ Some of the British jurors who viewed the American version of the trial had similar thoughts about the wisdom of the judge summing up the evidence: “The judge’s view of the evidence is not in point as far as the jury is concerned.”

It was also interesting that Justice Mantell, the High Court Justice, expressed reservations about the practice of judges summing up the facts of the case. He observed that, although summations are supposed to be neutral, judges, without much difficulty, can color them to favor one side or the other. He also pointed out that having to sum up is a great burden on the judge, requiring the judge to keep copious notes during the trial and write an extensive summation. Then, there is the challenge of orally presenting it to the jury in an interesting way that does not suggest how the judge believes the case should be decided.

⁸² Some of the jurors’ dissatisfaction with the judge’s summing up may stem from the nature of the case. The issues were simple and straight forward, and were tried in less than two hours. Jurors saw little need for the judge to summarize the evidence. It was fresh in their minds. They were eager to decide the case and go home. This perspective was reflected in some comments which labeled the summation “a waste of time.”

⁸³ The rating scale on the questionnaire for this question was different than the scale for most other questions. It asked the jurors to respond to the following statement: “In this case, I felt that the judge’s summary statement was:”. The possible responses ranged from “1” (biased toward the prosecution) to “7” (biased toward the defense). The neutral ranking was “4.”

⁸⁴ The jurors also strongly disagreed with the statement, “The summary statement affected my verdict.” Of course, one should not be surprised by these results. If jurors saw the summation as neutral, it is unlikely it would have swayed their verdicts. On the other hand, if the jurors saw the summation as biased, it is doubtful that they would admit to having their verdicts influenced by the tainted summation.

⁸⁵ There may be a mitigating factor, however. Because some of the jurors objected to the judge’s summation, and because they believed it was unnecessary and a waste of time, these same jurors may have been more favorably disposed if the case had been complex and

Unfortunately, the judge's power to sum up might be one of the most effective means for improving civility in the courtroom.⁸⁶ A lawyer's appeal to jurors' emotions during closing argument would be diluted by the judge taking additional time for the summing up between the lawyer's closing remarks and jury deliberation. It is the judge's calm summation that is left "ringing in the jurors' ears."⁸⁷ Furthermore, attempts to sidetrack the jury with respect to the critical issues in the case would be thwarted by the judge's clarification of important facts. If an advocate does venture during closing to take the jury on a frolic and a detour, the effort may backfire when the judge's summation points out the correct route.⁸⁸

8. *The Question Not Asked*

It is probably common in empirical studies that after the data is collected and analyzed the researchers wish they had asked one more question. That is certainly the case with this study. After digesting the responses to the above seven questions, we wish jurors had been asked to rank their reactions to the following statement: "The atmosphere of a typical American criminal trial is uncivil." The jurors' response to this question would have helped to resolve the dilemma caused by the study's finding that jurors perceive the British trial as more civil, but at the same time do not like some of the British procedural devices that create a more civil atmosphere. If jurors had concluded that the American criminal trial is "fine" the way it is, then reformers intent on civilizing the American trial would be wise to pause and reconsider their quest.

lengthy. An unbiased summation of the important facts might have been viewed by these jurors as helpful.

⁸⁶ See GRAHAM, *supra* note 2, at 273. "Where used properly, counsel is greatly encouraged to restrict his advocacy to matters relating to the crucial issues for the jury to decide. The court can deal with attempts to distort, distract, or confuse fairly in its charge to the jury." *Id.*

⁸⁷ See Van Kessel, *supra* note 3, at 487.

The strong comment and summation powers of English judges are used to balance the defense barrister's opportunity to give the closing argument to which the prosecution cannot respond. In this country, with our toleration of unrestrained advocacy on the part of the lawyers, the accused has little protection against the aggressive and emotional prosecutor during the final and unanswerable argument.

Id.

In the British criminal trial, the prosecuting barrister does not have a right of rebuttal during final argument. Defense counsel has the last word.

⁸⁸ See *id.* at 434.

If, however, jurors believed the typical American trial is too combative, there would be more motivation to bring about civilizing changes in the system. There would be hope that resistance by jurors to British civilizing techniques could be reduced as the American public became more familiar with those techniques. In the absence of the unasked question, however, we can only assume that the American public would prefer a more polite criminal trial.⁸⁹

In light of the extensive exposure Americans get to criminal trials on television, it is not surprising that American jurors in the study were more comfortable with the American way of trying cases, and were skeptical of other approaches.⁹⁰ Litigation is a large part of television entertainment, including many shows devoted to capturing the action of the courtroom. There is also a steady diet of actual trials on television.⁹¹ All this exposure builds a cultural bias toward the American way of conducting criminal trials—the lawyers thrust and parry while judges referee. Therefore, it is reasonable to assume that many of the jurors who indicated a preference for the American approach were reflecting this understandable cultural bias,⁹² as well as their concern about the unknown. This cultural bias may be an obstacle to modifying the American criminal trial, but it is not necessarily a roadblock. Despite the jurors' discomfort with the British way of proceeding, they still felt the trial was as fairly tried as the American version (Table 3). They also viewed the judge in the British versions as fairer. Thus the jurors' disfavor of specific procedures is not so ingrained that jurors are incapable of putting aside their preconceptions and evaluating the procedural differences on their merits. Otherwise, the jurors in the study would have found the American trial superior in all respects, especially with regard to the perceived fairness of the process. The jurors did not reach such a conclusion, so one can infer that American jurors do not consider the British trial as inherently unfair, only different. As that difference is understood, American jurors' resistance to change may ebb.

⁸⁹ It has been our assumption all along that there is a common desire for reducing the combativeness of the American trial. There has certainly been frequent commentary by lawyers and judges about the lack of civility. *See supra* note 8. The mass media has also reported the public's negative reaction to the belligerent way some high profile cases have been tried.

⁹⁰ *See* Wolfgang Zeidler, *Court Practice and Procedure Under Strain: A Comparison*, 8 ADEL. L. REV. 150, 156 (1982).

⁹¹ *See* Nancy Rutter, *Lex Populi: Daytime Television Has Discovered the Law*, CAL. LAW., May 1991, at 22.

⁹² *See* Van Kessel, *supra* note 3, at 505. "A fundamental aspect of our individualism that stands in the way of reforms embracing nonadversary approaches is our antipathy toward authority: in particular, our fear and distrust of governmental power." *Id.*

V. BUMPS ON THE ROAD TO CIVILITY

The primary purpose of this Article was to present the results of our study to determine how American jurors would react to the perceived greater civility of the British criminal trial. Our intention was not to provide an extensive analysis of the specific American trial procedures that would need to be modified in order to make the American trial more like the British model. Neither was it our aim to discuss all the possible roadblocks to change posed by existing statutes, rules, and constitutions. Nevertheless, it would be foolish to completely ignore those important considerations. Therefore, this Part will attempt to summarize the modifications of American procedure which would be required to make the American criminal trial more civil, like the British trial.⁹³ Furthermore, we will briefly address the trial bar's likely opposition as well as other legal obstacles to enacting those modifications.

A. *Lawyers' and Judges' Resistance to Change*

Many American lawyers have an enormous investment in the present criminal trial system, as combative and uncivil as it may appear. Lawyers who lament the loss of collegiality rarely are referring to a decline in their own cooperativeness. It is the pugnaciousness of their opponents which has tarnished the public's perception of the criminal trial. Their own aggressiveness is nothing more than good old fashioned advocacy. Moreover, these same lawyers, for the most part, have flourished in the arena of the American courtroom.⁹⁴ Changes in the American trial which would curtail their brand of zealous advocacy would, despite the rhetoric to the contrary, be resisted.⁹⁵

Judges may also prove resistant to modifying the adversarial nature of the American trial. Although adopting certain civilizing characteristics of the British system would increase the trial judge's control over the courtroom,⁹⁶ the embracing of those features would also increase the judge's workload. The role of umpire, which calls only for making rulings when prompted by the attorneys, is less burdensome than being an attentive and proactive participant

⁹³ The focus will be on those procedural aspects of the British trial which the study specifically compared to their American analogs (Table 4).

⁹⁴ Lawyers who do not thrive in the hostile atmosphere of the courtroom tend not to engage in a legal practice which emphasizes litigation.

⁹⁵ See Van Kessel, *supra* note 3, at 501. "Lawyers have a strong interest in maintaining the present system, which allows them to be the central figures in the great drama of the criminal trial. They will not easily yield their power to influence the outcome of trials while often being regarded as heroes in doing so." *Id.*

⁹⁶ A result, one might think, that would be eagerly sought by judges.

in the proceedings. Activist judges must be thoroughly knowledgeable about the facts of the case and the applicable law in order to ensure that their energetic participation in the trial will enlighten rather than confuse jurors.⁹⁷ Faced with the prospect of having to immerse themselves in many of the cases on their overcrowded dockets, judges may opt for less courtroom control and less civility.

Finally, another structural drag on granting greater power to the trial judge is the fact that most American judges are elected.⁹⁸ Judges are not necessarily the most learned and impartial members of the legal profession. Many lawyers regard them as not much more than politicians in robes. Would members of the trial bar be willing to trust elected judges with more power in order to make the courtroom a more civil place? Many would prefer dealing with the rogue advocate than risk the influence of a more powerful rogue judge.

B. *Deferral of Defense's Opening Statement*

The timing of opening statement by the defense is often governed by statute. Some states provide that the defendant may open immediately after the prosecution's opening. Others require that the defense defer opening until the prosecution has completed its case-in-chief. Many states give the defendant the option to open immediately after the prosecution's opening or defer opening until the close of the prosecution's case-in-chief. Finally, some jurisdictions, including the federal courts, have no statute specifying when the defense opening may be given.⁹⁹ It is clear, however, that the defense does not have a constitutional right to make an opening statement immediately following the prosecution's opening statement, and the trial judge has much discretion as to the timing of opening statements.¹⁰⁰

⁹⁷ See Van Kessel, *supra* note 3, at 503; Frankel, *supra* note 8, at 1042.

⁹⁸ See Van Kessel, *supra* note 3, at 519-20.

⁹⁹ See James R. Lucas, *Opening Statement*, 13 U. HAW. L. REV. 349, 377 n.41 (1991).

¹⁰⁰ See, e.g., *U.S. v. Salovitz*, 701 F.2d 17, 18-19 (2d Cir. 1983). In *Salovitz*, the court said: "We hold, however, that a defendant's unfettered right to make an opening statement, unlike his right to a closing argument, is not one of the 'traditions of the adversary fact finding process that has been constitutionalized in the Sixth and Fourteenth Amendments.'" *Id.* (quoting *Herring v. New York*, 422 U.S. 853, 857 (1975)); see also Hugo L. Black Jr., *Opening Statement*, in *Litigation 1987*, at 712 (PLI Litig. & Admin. Practice Course Handbook Series No. 340, 1987); Lucas, *supra* note 99, at 357-58.

Although there is consensus that in the absence of a statutory mandate the judge has unfettered discretion in determining the timing of the opening statements, there is some authority that trial judges may not eliminate opening statements entirely. See, e.g., *U.S. v.*

In those states where statutory law dictates the timing of opening statements or allows the defendant to choose when to open, any attempt to adopt the British approach of delaying the defense's opening statement would require amending the statutes. No statutory amendments would be required in those jurisdictions which already delay the defense's opening until the close of the prosecution's case-in-chief, or give the trial judge complete discretion as to the timing of opening statements.

Although the statutory and constitutional barriers to change are modest, significant cultural hurdles must be cleared before courts would require defendants to defer their opening statements. The defense bar would strongly resist the modification. The common opinion among advocates is that delaying opening statement is usually a big tactical mistake.¹⁰¹ They maintain that not presenting the defendant's story as soon as possible seriously undermines the defendant's chances for an acquittal.¹⁰²

In light of the numerous, and large, hurdles in the road to adopting the British procedure of delaying the defendant's opening statement, would the benefits of adoption (increased civility) justify the effort? Probably not. It is difficult to determine if a delayed defense plays much of a role in improving the civil atmosphere of the courtroom. The impact is marginal at best. Therefore, it is unlikely that this particular British procedural device could be grafted to the American criminal trial, and would be perhaps unwise to try.

C. Resolution of Minor Evidentiary Issues Without Objections

This aspect of British courtroom practice could be adopted in American courtrooms without changing any substantive or procedural laws. There are no procedural or evidentiary rules which forbid advocates from talking with each other during a trial when the conversation occurs outside of the hearing of the judge and jury. Neither are there rules which prohibit counsel from passing written notes to each other. There are rules of professional conduct, however, which limit the extent advocates can address each other in open court. For example, "A lawyer should not engage in acrimonious conversations or

Stanfield, 521 F.2d 1122, 1125 (9th Cir. 1975); Hampton v. U.S., 269 A.2d 441, 443 (D.C. Cir. 1970).

¹⁰¹ See, e.g., HAYDOCK, *supra* note 66, at 297; JEANS, *supra* note 65, at §10.19; SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL* 106 (1988); TANFORD, *supra* note 78, at 170; Black, *supra* note 100, at 725; Tom Riley, *The Opening Statement: Winning at the Outset*, 10 AM. J. TRIAL ADVOC. 81, 86 (1987).

¹⁰² As mentioned previously, empirical studies appear to support this perception. See *supra* note 53.

exchanges involving personalities with opposing counsel. Objections, requests and observations should be addressed to the court."¹⁰³

These code provisions are meant to curb courtroom exchanges between advocates, which could easily degenerate into unseemly squabbles. Requiring counsel to address any open-court comments to the judge removes the temptation to score points by lacing one's remarks with sharp barbs aimed at opposing counsel. Encouraging counsel to speak and cooperate with each other outside the hearing of the judge and jury would not violate either the letter or the spirit of the codes of conduct.¹⁰⁴

The biggest obstacle to encouraging attorneys to resolve some evidentiary objections without seeking the intervention of the court is the American courtroom culture. It flies in the face of all our adversarial training and instincts.¹⁰⁵ We often perceive too much cooperation by opposing counsel in the courtroom as a sign of weakness, or alternatively, as a stratagem designed to lull us into a false sense of security. Even judges may take offense with attorneys engaging in tête-à-têtes at counsel table.¹⁰⁶

Attempts to adopt the British style of dealing with minor objections may be more traumatic to American attorneys than the adoption of any other British procedural device discussed in this Article.¹⁰⁷ It would require attorneys to cultivate a degree of trust in opposing lawyers that is rarely exhibited in an American courtroom. Trial advocates would have to be convinced that

¹⁰³ *American College of Trial Lawyers Code of Trial Conduct*, 156 F.R.D. 275, at 289 (1994); see also U.S. D.R. D. UTAH, GEN. R. 111; U.S. D.R. M.D. TENN., R. 12; U.S. DIST. CT. R. E.D. OKL., R. 30; U.S. BANKR. CT. R. D. WYO., R. 917; CALIFORNIA PRACTICE GUIDE, CIVIL TRIALS AND EVIDENCE § 4:210 (1995).

¹⁰⁴ Both the codes and the British approach encourage civility between the advocates. The codes encourage open-court dialogues that are less combative, and the British approach encourages cooperation between counsel, which may actually reduce the need for open-court dialogues, where there is always the temptation to engage in repartee.

¹⁰⁵ See Lubet, *supra* note 57, at 239.

No matter how foolish, trite, or easily disposed of the other side's position seems, an attorney must avoid speaking directly to opposing counsel. All arguments should be directed to the court. If, in the course of an argument, an attorney is ever tempted to turn to opposing counsel, he should remember that opposing counsel is being paid to disagree with him.

Id.; see also HAYDOCK, *supra* note 66, at 162; JEANS, *supra* note 65, at 465; TANFORD, *supra* note 78, at 190-93; D. Brooks Smith, *The Art and Etiquette of Stating Objections*, 16 PA. LAW. 18, 22 (1994).

¹⁰⁶ See Clarke, *supra* note 8, at 993.

¹⁰⁷ See *supra* note 65.

cooperation and accommodation would not make them dupes and lessen their chances for favorable verdicts. They would have to become confident that less scrupulous lawyers would not take advantage of the opportunity to raise quiet objections as a new way to disrupt the flow of an opponent's case without direct judicial supervision.

D. *Conducting the Case from Counsel Table*

American courts could literally adopt the British custom of "fixing" advocates to counsel table tomorrow. Trial judges have practically unfettered discretion in controlling where lawyers must stand or sit while examining witnesses, conducting opening statements, and making closing arguments.¹⁰⁸ Many judges already require attorneys to address the court and the jury from a podium.

The resistance to this change will come most forcefully from trial attorneys. They are well-schooled in how to position themselves in the courtroom to enhance their persuasive powers. It is an article of faith that an advocate would be foolish not to take advantage of a judge's permission to move freely during the course of a trial.¹⁰⁹

Of course, it is the connection between movement and theatrics which is also the strongest argument for adopting the British approach. The temptation to "act out" is more irresistible the more freedom an advocate is given to "stage" his interrogations of witnesses and remarks to the jury. It is all too easy to stray from intense advocacy to theatrical antics. The restricting of lawyers to counsel table, masked by a podium, would remove that temptation.¹¹⁰

¹⁰⁸ For example, Federal Rule of Evidence 611 gives the judge broad powers with respect to the mode and order of interrogation and presentation. *See* FED. R. EVID. 611; *see also* STEVEN H. GOLDBERG, *THE FIRST TRIAL: WHERE DO I SIT? WHAT DO I SAY?* 17-59 (1982); TANFORD, *supra* note 78, at 403-04; Wolfe, *Toward a Unified Theory*, *supra* note 30, at 606 n.43.

¹⁰⁹ *See, e.g.*, GOLDBERG, *supra* note 108, at 44-46; MAUET, *supra* note 67, at 97; Wolfe, *Effect of Location*, *supra* note 30, at 774-75.

¹¹⁰ One practical, logistical problem with requiring lawyers to remain at counsel table is the need for a bailiff or usher to remain in the courtroom at all times. In many American trials, the attorneys themselves have exhibits marked for identification and hand them to the witnesses. If attorneys are not free to move or approach the witness, then bailiffs must convey exhibits from counsel table to the court reporter and the witness.

E. *Excusing the Jury While Serious Objections Are Argued to the Court*

American trial judges already have complete discretion to handle objections that require counsel to elaborate the grounds for the objection.¹¹¹ The judge may permit counsel to engage in some sparring over objections within the hearing of the jury, hold “side-bar” conferences, or excuse the jury while the attorneys argue.¹¹² Therefore, an American judge could easily make it common practice to excuse the jury while attorneys argue objections, without fear of being reversed by the court of appeals.

The greatest impediment to adopting the British approach would be the opposition of trial lawyers, and perhaps to a lesser extent, the judges themselves. Attorneys would have to be much more careful about making objections or else risk alienating the jury.¹¹³ They would be forced to distinguish between crucial objections and insignificant objections, not always an easy analytical task. Furthermore, attorneys would fear that opposing counsel would take advantage of their hesitation to object by proffering more objectionable evidence.¹¹⁴ Judges might resist the British approach of excusing the jury while objections are argued because moving jurors in and out of the jury box would be “cumbersome and time consuming.”¹¹⁵

¹¹¹ See Lubet, *supra* note 57, at 237–38.

As an initial matter, an attorney usually argues objections from wherever he happens to be standing or sitting when the issue first arises. . . . [I]n most circumstances, it does no harm to have the discussion in the presence of the jury. Occasionally, however, the jury should not hear the content of the argument.

Id.

¹¹² For example, Federal Rules of Evidence 104 and 611 give the judge extensive powers to allow jurors to hear evidentiary arguments and preliminary hearings, or to prevent them from hearing such matters. See FED. R. EVID. 104 advisory committee’s note: “Much evidence on preliminary questions, though not relevant to jury issues, may be heard by the jury with no adverse effect. A great deal must be left to the discretion of the judge who will act as the interests of justice require.” *Id.*; see also Lubet, *supra* note 57, at 238.

¹¹³ See *supra* Part IV.D.4.

¹¹⁴ The possibility of adversaries being cut loose to offer inadmissible evidence emphasizes the need to adopt the complimentary British procedure that encourages the judge to limit objectionable evidence without first requiring counsel to object.

¹¹⁵ Lubet, *supra* note 57, at 238. Excusing the jury before arguments are presented on objections would not necessarily be inefficient. If the judge alerts counsel before the trial about the procedure that will be followed, fewer objections will be made. Fewer objections, including those requiring side-bar conferences, may actually result in a shorter, and more civil, trial.

F. Questioning of Witnesses by the Judge

It is common for judges to have the authority to question witnesses.¹¹⁶ Judges, however, must be careful when acting on this authority.¹¹⁷ When it comes to questioning witnesses, the American judge is more likely to be reticent than interrogative.¹¹⁸ Champions of the “less questioning by judges the better” school have argued that judicial questioning may create more confusion than clarity.¹¹⁹ They are also concerned that the judge may display a bias toward one party or the other by actively questioning witnesses.¹²⁰ Furthermore, judicial interrogation may dilute the adversarial strengths of both parties’ cases by undermining their trial strategies.¹²¹

Supporters of a more proactive questioning role for judges rue the tradition of American judges, who rest quietly on the sideline.¹²² Some appellate courts, especially federal ones, have not hindered trial judges who actively participate in trials by asking questions.¹²³ Trial judges may question witnesses, but they

¹¹⁶ “The court may interrogate witnesses, whether called by itself or by a party.” FED. R. EVID. 614(b). “The authority of the judge to question witnesses is also well established.” FED. R. EVID. 614 advisory committee’s note; *see also* MUELLER & KIRKPATRICK, *supra* note 62, at 544.

¹¹⁷ *See* U.S. v. Auten, 570 F.2d 1284, 1286 (5th Cir. 1978). Some state rules of evidence specifically warn judges about the limitation on their right to question witnesses. *See, e.g.*, MONT. R. EVID. 614; N.M. R. EVID. 614; WASH. R. EVID. 614.

¹¹⁸ “Moreover, experienced trial judges have championed the view that our adversarial system gives little room for trial judges’ questioning of witnesses.” U.S. v. Filani, 74 F.3d 378, 384 (2d Cir. 1996); *see also* MCCORMICK ON EVIDENCE § 8 (John William Strong ed., 4th ed. 1992).

¹¹⁹ Judge Frankel doubted the efficacy of the questioning of witnesses by judges.

His intrusions will in too many cases result from partial or skewed insights. He may expose the secrets one side chooses to keep while never becoming aware of the other’s. He runs a good chance of pursuing inspirations that better informed counsel have considered, explored, and abandoned after fuller study.

Frankel, *supra* note 8, at 1042.

¹²⁰ *See* Saltzburg, *supra* note 73, at 16–21; Peter David Blanck, et al., Note, *The Appearance of Justice: Judges’ Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89, 94 (1985).

¹²¹ *See* Saltzburg, *supra* note 73, at 55; *see also* Van Kessel, *supra* note 3, at 530.

¹²² Wigmore fumed about “the abject surrender of the trial judge’s function . . . repulsive in its misguided supineness.” 3 WIGMORE, EVIDENCE § 784, at 190 n.2 (2d ed. Chadbourne Rev. 1992).

¹²³ The Second Circuit, in *Filani*, 74 F.3d at 384–85, stated,

must avoid any appearance of partiality or hostility to one side.¹²⁴ Judges must be particularly circumspect when questioning defendants because their interrogation is more likely to be interpreted by the jury as hostility or disbelief of the defendant.¹²⁵ Nevertheless, the judge's intervention may be helpful when counsel's examination is inadequate or when witnesses are nervous, inarticulate, or less than candid.¹²⁶

The statutory law at both the state and federal level would not prevent a trial judge from questioning witnesses, although the common law in the states may be more restrictive.¹²⁷ One could anticipate, however, considerable resistance by trial attorneys to an increase in judicial questioning. Our traditional distrust of authority and our system of electing judges would cause many lawyers to recoil at the prospect of American judges assuming more active control of a trial.¹²⁸ Furthermore, what trial lawyer would ever concede that a trial judge could improve on his or her handling of a case?¹²⁹

Some judges might also resist taking on more responsibility for examining witnesses. Such duty would add to the judicial workload by requiring judges to become much more immersed in the facts of the case and compelling them to guess about possible strategies counsel might pursue.¹³⁰ Even with more study,

From our earliest days this Circuit has adopted a carefully balanced role for the trial judge. Our court has never embraced the so-called sporting theory of the common law. This extreme theory viewed litigation as a game of skill and placed the trial judge in the position of an umpire, there simply to see that the rules of the game were obeyed. See 3 WIGMORE, EVIDENCE § 784. We have rejected such a limited role because a trial judge's duty to see the law correctly administered cannot be properly discharged if the judge remains inert. See *United States v. Marzano*, 149 F.2d 923, 925 (2d Cir. 1945) (L. Hand, J.).

Instead, the trial court may actively participate and give its own impressions of the evidence or question witnesses.

Id.; see also, e.g., *U.S. v. Holmes*, 794 F.2d 345, 349 (8th Cir. 1986); *U.S. v. Jackson*, 696 F.2d 578, 593 (8th Cir. 1982); *U.S. v. Baron*, 602 F.2d 1248, 1249-50 (7th Cir. 1979).

¹²⁴ See, e.g., *Rogers v. U.S.*, 609 F.2d 1315, 1318 (9th Cir. 1979).

¹²⁵ See, e.g., *State v. Prokos*, 631 N.E.2d 684 (Ohio Ct. App. 1993) (presenting case in which the judge asked 33 questions of the defendant).

¹²⁶ See, e.g., *Jackson v. U.S.*, 329 F.2d 893 (D.C. Cir. 1964).

¹²⁷ See MUELLER & KIRKPATRICK, *supra* note 62, at 544.

¹²⁸ See Van Kessel, *supra* note 3, at 507, 533.

¹²⁹ See Reitz, *supra* note 32, at 995.

¹³⁰ See Van Kessel, *supra* note 3, at 503.

many American judges would be concerned that their active involvement might yield more smoke than light.¹³¹

Unlike the adoption of other aspects of the British system which would require cooperation on the part of American counsel,¹³² more active judicial questioning could occur if American judges decide, on an individual basis, to “just do it.” Moreover, judges could become more proactive gradually by asking only a few clarifying questions at first, thus easing themselves and lawyers into their new, more British-like roles.

G. Exclusion of Evidence on the Judge’s Own Motion

It is clear that an American judge does not need to wait for one of the lawyers to object before intervening and excluding evidence. Federal Rule of Evidence 611, and similar state rules, give the trial judge wide discretion in controlling the presentation of evidence.¹³³ The limitations on this power are basically the same as those discussed in the preceding section. Judges should not use the power to exclude evidence without objection in such a way as to suggest they favor one side over the other. The resistance on the part of American attorneys to this form of judicial activism springs from the same ground as their opposition to free questioning of witnesses by judges, their distrust of authority, and loss of control. In addition, the reasons attorneys do not object to what may be objectionable evidence are often closely tied to their overall strategy for the case, a strategy that could easily be thwarted if judges “graciously” exclude the evidence on their own motion.¹³⁴

As with questioning witnesses, American judges could act more like British judges tomorrow. They could exclude evidence without first waiting for an

¹³¹ See Frankel, *supra* note 8, at 1042.

¹³² For example, attorneys would resolve minor evidentiary issues without objection.

¹³³ See WEISSENBERGER, FEDERAL EVIDENCE, § 611.1 (2d ed. 1995).

Rule 611(a) gives the trial court authority to control the interrogation of witnesses and the presentation of evidence. In the exercise of its discretion, the trial court is guided by three generalized principles, any or all of which may serve as the basis for the court’s decision: (i) efficient ascertainment of truth; (ii) avoidance of needless consumption of time; and (iii) protection of witnesses from harassment or undue embarrassment.

Id.

¹³⁴ See Lubet, *supra* note 57, at 220.

objection and not violate any statutory or common law restrictions. The change, however, could be traumatic for trial attorneys if not done gradually.¹³⁵

H. *Summing Up of the Cases by the Judge*

The adoption of the British practice of the trial judge summing up the evidence probably faces more procedural and attitudinal roadblocks than any of the seven variations examined in this study, with the possible exception of defense counsel's deferral of the opening statement until the close of the prosecution's case-in-chief. In the federal courts, the judge ostensibly has the power to both "sum up" and "comment"¹³⁶ on the evidence, but the reality is that federal judges rarely do either.¹³⁷

In 1933, the Supreme Court, in *Quercia v. United States*,¹³⁸ established the limits for commenting on the evidence for the federal courts. The Court held that the trial judge, when charging the jury, was not limited to abstract instructions, but could comment on the evidence by emphasizing points the judge believed important, and could even express an opinion if it was made clear to the jury that it was an opinion which the jury was free to disregard.¹³⁹ The power to comment was not unlimited, however. The judge could not assume the role of a witness or distort the evidence.¹⁴⁰ Surprisingly, after this rather sweeping grant of authority, the Court then appeared to issue a stern caution about using it.

The influence of the trial judge on the jury is "necessarily and properly of great weight" and "his lightest word or intimation is received with deference, and

¹³⁵ Any judge contemplating taking a more proactive role by questioning witnesses should probably warn counsel in advance of her intent. That notice should prevent attorneys from going into cardiac arrest when the judge improves on an examination or excludes evidence without objection.

¹³⁶ There is a difference between "summing up" and "commenting" on the evidence, but the difference is more of degree than type. Summing up consists of the judge reviewing the evidence before the jury in a capsulized form; when commenting, the judge provides a more in-depth analysis, including guidance to the jury on how to evaluate credibility. See Weinstein, *supra* note 80, at 168.

¹³⁷ "In America, we have since moved away from this practice, although under our federal system judges are permitted to both summarize and comment. Very few of us accept that challenge. Instead, the charge we give to the jury is limited strictly to the law." *Rules of Conduct*, *supra* note 34, at 884; see EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS, § 8.04 (4th ed. 1992); Weinstein, *supra* note 80, at 169.

¹³⁸ 289 U.S. 466 (1933).

¹³⁹ See *id.* at 469.

¹⁴⁰ See *id.* at 470.

may prove controlling.” This court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence “should be so given as not to mislead, and especially that it should not be one-sided”; that “deductions and theories not warranted by the evidence should be studiously avoided.”¹⁴¹

This ambiguity about the judge’s power to sum up the evidence was obvious in 1972 when the Supreme Court proposed Rule of Evidence 105. The Rule would have codified the judge’s common law power to sum up and comment on the evidence. Congress refused to adopt it.¹⁴²

The aura of uncertainty which obscures the legitimacy of judicial comment is probably one of the reasons most judges do not even attempt to sum up the evidence.¹⁴³ When in doubt, the advice is “don’t.”¹⁴⁴ Respected commentators like Stephen Saltzburg strongly oppose the judge’s use of the power to comment.¹⁴⁵ He argues that it is almost impossible for a judge to sum up or comment on the evidence without lending weight to one side or the other.¹⁴⁶ Trial judges do not relish being reversed by courts of appeal, so the risk of summing up and providing the defendant with more grist for the appellate mill is greater than the dubious benefit of helping the jury wrestle with the facts.¹⁴⁷

¹⁴¹ *Id.* at 470 (citations omitted).

¹⁴² See Saltzburg, *supra* note 73, at 23.

¹⁴³ See John W. Baker, Note, *United States v. Anton: The Rights of a Federal Judge to Comment to the Jury*, 9 *CAP. U. L. REV.* 161, 161 (1980).

[The judge’s] influence on the jury is inevitably significant[;] he must exercise care so as not to impinge upon the defendant’s constitutional right to have his guilt or innocence determined by his peers. The line of demarcation, however, between what a judge may or may not say has never been adequately established. Consequently, the modern day trial judge risks reversible error with every observation he makes.

Id. (citations omitted); see also Van Kessel, *supra* note 3, at 431.

¹⁴⁴ “[I]t is far better for the trial judge to err on the side of abstention [sic] from intervention in the case rather than on the side of active participation in it” Blumberg v. U.S., 222 F.2d 496, 501 (5th Cir. 1955).

¹⁴⁵ “The judicial powers of summation and comment interfere as much with the adversary system as they do with the right to a jury trial.” Saltzburg, *supra* note 73, at 43. “The presumption of neutrality, combined with the timing of the judge’s comments and the inability of the parties to rebut his opinions, render the judge’s summation or comment a powerful influence on the jury.” *Id.* at 44.

¹⁴⁶ See *id.* at 41–42.

¹⁴⁷ “It has been suggested that the power [to comment] is being more closely confined in recent cases and that the appellate courts look upon comments with closer scrutiny.” DEVITT, *supra* note 137, § 8.04, at 251; see also Saltzburg, *supra* note 73, at 34. “Judges who become

At the state level, the legal roadblocks to adopting the British summing up procedure are even higher. Many states prohibit both summarizing and commenting on the evidence. Other states allow judges to comment but put stringent limitations on their ability to stray from a bland recitation of uncontroverted facts and boiler-plate instructions on the law.¹⁴⁸

Most trial lawyers, and many trial judges, are likely to resist increasing the courts' power to comment with a revolutionary tenacity. There is extensive skepticism about the prospect of a judge being able to put aside her own bias in a case and provide the jury with a neutral summary of the facts.¹⁴⁹ Attorneys also would not relish the possibility of their cogent, persuasive final arguments being diluted by lengthy judicial soliloquies that attempt to sum up the evidence.¹⁵⁰ Finally, lawyers may object to the judge's description of a witness's testimony and not have effective means to challenge that perspective. There is no chance to "add just a few more words," and to object to the judge's comments in front of the jury would be risky.¹⁵¹

Judges may also believe that a truly neutral summation is not possible, and therefore would be reluctant to sum up British style. Moreover, judges might demur to the extra work required to adequately sum up.¹⁵² The British judge, for example, must be constantly attentive to the testimony and keep copious notes in order to prepare a summation.¹⁵³ It could also be a struggle, and time-consuming, for the judge to formulate a facially neutral summary of the evidence, one that does not omit important facts and establishes an impartial tone.¹⁵⁴ Finally, judges may fear that the inclusion of a judicial summation would considerably lengthen the trial. The pace of testimony would be slowed

overly aggressive in managing or directing important elements of lawsuits in their courts will be reversed on appeal." Maurice Rosenberg, *Resolving Disputes Differently: Adieu to Adversary Justice?*, 21 CREIGHTON L. REV. 801, 806 (1987-88).

¹⁴⁸ See Saltzburg, *supra* note 73, at 23; Van Kessel, *supra* note 3, at 430; Weinstein, *supra* note 80, at 168.

¹⁴⁹ See Saltzburg, *supra* note 73, at 35-36.

¹⁵⁰ See *id.* at 38.

¹⁵¹ See *id.* at 44; Van Kessel, *supra* note 3, at 524.

¹⁵² Somewhat surprisingly, Justice Mantell had mixed feelings about the efficacy of summing up the facts. He agreed that giving a proper summation was one of the most difficult duties a British judge must tackle. See *supra* note 24.

¹⁵³ See Van Kessel, *supra* note 3, at 524. See generally *Rules of Conduct*, *supra* note 34.

¹⁵⁴ One can imagine a trial judge trying to proof a draft of her summary in order to produce a neutral summation while trying to anticipate how the court of appeals will view her words with its 20/20 hindsight.

to the speed of the judge's notetaking, and additional time would be necessary for the judge to deliver her summation to the jury.¹⁵⁵

American courts face large barriers to incorporating judicial summaries of the evidence. Although federal judges presumably have the power to summarize and comment on the evidence, the limits put on the power by courts of appeal are a strong deterrent to adoption of the British approach. Most state court judges do not even have the power to sum up the evidence. Moreover, trial lawyers would be strongly opposed to judges using their summation powers even if the result were a more civil trial.¹⁵⁶

VI. CONCLUSION

The results of this study show that jurors considered a criminal trial more civil when the trial procedure included certain civilizing features that are common to the British criminal trial. The jurors also believed the British-style trial to be as fair as the American version, and the jurors' verdicts for both versions, when conducted by the same attorneys and judge, were the same. Therefore, the study demonstrated that a more civil trial does not seem to benefit either the prosecution or the defense.

Nevertheless, at the same time the jurors were concluding that the British version was more civil, and as fair as, the American trial, they also expressed a dislike for those procedural variations which actually make the British criminal trial more civil. Some of the jurors' uneasiness can be attributed to being more comfortable with familiar American trial procedures, but some of their aversion probably does stem, in part, from more fundamental philosophical principles. American jurors are suspicious of judicial authority and are skeptical of increasing the power of the judge. Additionally, many of the jurors in the study believed it is the primary function of the attorneys to orchestrate the trial and would hesitate to shift that responsibility.

In short, this study does suggest a possible procedural route for reaching the goal of a more civil criminal trial, a route that our British brethren have been navigating for years. Furthermore, American courts would not need to effect a major change in their procedural rules to explore the British road. It is only necessary to possess the resolution to try a different path. It remains to be seen, however, if the legal community's, and society's, apparent disgust with

¹⁵⁵ It is not unusual for a British judge to advise counsel at the beginning of a trial to "watch my hand," which means, "don't ask questions faster than I can take notes." See also Van Kessel, *supra* note 3, at 524.

¹⁵⁶ In jurisdictions where the judge has authority to sum up, some experimentation is possible, but it is highly probable that the summations will typically be appealed and often lead to reversals.

combative American trials is sufficient to overcome our natural reluctance to change.¹⁵⁷

¹⁵⁷ We soon hope to test the legal community's resolve in Montgomery County, Ohio. Our hope is to obtain the cooperation of judges, prosecuting attorneys, and defense attorneys in adopting some aspects of the British trial in actual criminal cases. Then we would measure juror reaction to the civilizing variations and determine what impact, if any, the variations had on verdicts.

Table 1
Demographic Characteristics of Sample (N=219)

Age	18-30	136
	31-40	27
	41-50	27
	51-60	15
	61-70	14
Sex	Male	64
	Female	155
Race	White	176
	African-American	32
	Asian	4
	Hispanic	5
	Other	2
Political Affiliation	Democrat	84
	Republican	67
	Independent	50
	Other	10
Political Orientation	Conservative	53
	Middle of the Road	107
	Liberal	52
Education	Some High School	4
	High School Graduate	14
	Some College	152
	College Graduate	17
	Some Graduate School	12
	Graduate Degree	20
Occupation	Full-time Student	105
	Employed	99
	Housewife	6
	Not employed/retired	9

Table 2
Verdict by Type of Trial

	American	British/British	British/American	Total
Guilty	35	55	27	117
Not Guilty	43	25	34	102
Total	78	80	61	219

Table 3
Mean Perceptions of Trial and Trial Participants

NOTE: Asterisk denotes mean significantly differs from others.

<i>Trial Overall</i>	American	British/British	British/American
(1 =strongly agree; 7= strongly disagree)			
Fairly tried (NS)	2.65	2.61	2.60
Civil in tone/atmosphere (F=10.66, p < .001)	4.41*	3.16	3.24
Too many interrupts/objections (F=10.79, p < .001)	4.65*	5.85	5.31
<i>Prosecutor</i>			
(1 =not at all effective; 7=very effective)			
Opening argument (NS)	4.99	5.09	4.72
Questioning victim (NS)	5.10	5.12	5.16
Questioning Bob (F=4.51, p < .01)	4.65	5.25	4.72
Questioning Doctor (F=5.55, p < .005)	4.14	4.99*	4.15
Questioning Defendant (F=5.81, p < .003)	4.84	5.62*	4.93
Closing argument (F=3.84, p < .02)	4.82	5.39*	4.80
Overall performance (F=5.98, p < .003)	4.35	5.41*	4.88
(1 = strongly agree; 7=strongly disagree)			
Prosecutor likeable (NS)	2.95	2.84	3.12
Prosecutor knowledgeable (F=5.17, p < .006)	3.25	2.58*	3.34
Prosecutor strong advocate (NS)	3.23	2.77	2.91
Prosecutor antagonistic (NS)	4.13	4.53	4.54
Prosecutor persuasive (NS)	3.69	3.19	3.74

Table 3 (cont'd)

<i>Defense Attorney</i>	American	British/British	British/American
(1=not at all effective; 7=very effective)			
Opening argument (NS)	4.55	4.46	4.51
Questioning victim (NS)	4.88	4.69	4.25
Questioning Bob (NS)	4.82	4.49	4.25
Questioning Doctor (NS)	4.68	4.79	4.26
Questioning Defendant (NS)	5.32	4.97	5.13
Closing argument (NS)	4.92	4.32	4.89
Overall performance (NS)	5.01	4.66	4.74
(1=strongly agree; 7=strongly disagree)			
Defense attorney likeable (NS)	3.87	3.90	3.84
Defense attorney knowledgeable (NS)	3.29	3.16	3.05
Defense attorney strong advocate (F=4.04, p<.02)	2.76	3.28*	2.48
Defense attorney antagonistic (NS)	3.55	3.95	3.46
Defense attorney persuasive (NS)	3.28	3.74	3.28
(1=strongly agree; 7=strongly disagree)			
<i>Judge</i>			
Judge fair (F=3.64, p<.03)	3.30*	2.65	2.84
Judge authoritative (F=4.80, p<.01)	3.59*	2.60	2.64
Judge knowledgeable (F=3.82, p<.02)	3.38*	2.70	2.68
Judge likeable (F=4.62, p<.01)	3.42*	2.88	2.72
Judge effective overall (F=3.21, p<.04)	3.27*	2.62	2.61

Table 4
Opinions on Trial Variations

Subjects in each trial version were asked whether they preferred the variation they received over the alternative variation (for discussion of variations, see text). Scale is 1-7, with 1 referring to a preference for the variation received.

NOTE: Asterisk denotes mean significantly differs from others.

	American	British/British	British/American
Placement of opening statement	2.66*	4.25	4.81
Handling of minor objections	2.49*	4.48	5.44
Movement of attorneys	2.81*	3.91	3.93
Handling of serious objections	2.77*	4.48	4.98
Questioning of witnesses by the judge (NS)	3.99	3.88	4.19
Judicial intervention to exclude evidence	3.56*	4.55	4.47
Summing up of case by the judge	3.23*	4.91	5.12
Summary statement was biased (NS)	X	3.99	4.54
Summary statement affected my verdict (NS)	X	5.44	5.05
p < .05			