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## Two Weeks at the Old Bailey: Jury Lessons from England

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## TWO WEEKS AT THE OLD BAILEY: JURY LESSONS FROM ENGLAND

NANCY S. MARDER\*

### INTRODUCTION

As deeply-rooted as the jury is in the United States, it is not beyond improvement. There is no better starting place for ideas than England, which provided the model for our jury system. To learn firsthand about current jury practices in England, I spent two weeks observing criminal jury trials at the Old Bailey in London.<sup>1</sup> My goal was to examine jury practices at the Old Bailey and to consider which ones could work well in the United States.<sup>2</sup> I observed some jury practices that I thought we should adopt immediately, and others that would work well in the long run but that might take awhile to gain acceptance. I also observed some jury practices that we share with England and that we need to implement more extensively, as well as some jury practices that we should eschew.

The Old Bailey, which is also known as the Central Criminal Court for the City of London, hears serious criminal cases,<sup>3</sup> and there were many criminal jury trials that took place during my two weeks of observation. I was extremely fortunate to work with His Honour Judge Brian Barker QC, who is the Common Serjeant of London and Deputy Senior Judge at the

\* Professor of Law and Director of the Jury Center, Chicago-Kent College of Law. I thank Jeremy Eden for his comments on an early draft and Brian Langs for his editing suggestions on a later draft of this Article. I appreciate the herculean efforts of Brian Langs and the *Chicago-Kent Law Review* to produce this symposium. As always, I am grateful to Lucy Moss for her library assistance and wish her well in her retirement, after more than twenty years of service at Chicago-Kent College of Law.

1. I spent from December 7–December 22, 2010 observing jury trials and other court proceedings at the Old Bailey. I took copious notes during this time period and it is from these notes that my descriptions of jury practices at the Old Bailey will be drawn. See Notes from the Old Bailey (Dec. 7–Dec. 22, 2010) [hereinafter Notes from the Old Bailey] (unpublished notes on file with author).

2. I will not make recommendations about which American jury practices could work well in the English jury system because my expertise is with the American, rather than the English, jury system.

3. The magistrates' courts hear the least serious criminal cases and the Crown Courts hear the most serious criminal cases. There is a middle category of offenses that are "triable either way" and can be heard either in Crown Court or in the magistrates' courts. Sally Lloyd-Bostock & Cheryl Thomas, *The Continuing Decline of the English Jury*, in *WORLD JURY SYSTEMS* 53, 62 (Neil Vidmar ed., 2000). Although the Old Bailey is a Crown Court, it is never referred to as a Crown Court. Rather, its official title is "The Central Criminal Court," but it is known as "The Old Bailey," and that is how I will refer to it throughout this Article.

Old Bailey. He is the second-highest ranking judge at the Old Bailey. Judge Barker arranged for me to sit in the courtroom during jury trials and other court proceedings, which meant that I could take notes. I could not have taken notes while sitting in the public gallery.<sup>4</sup> When Judge Barker did not have a jury trial in his courtroom, he arranged for me to observe jury trials in other courtrooms. Judge Barker spent an extraordinary amount of time talking with me and answering my questions. His colleagues also spent time with me explaining their practices. In addition, I spoke with barristers (lawyers who appear in court on behalf of clients, in contrast to solicitors who counsel clients before any courtroom proceedings) and magistrates (laypersons who sit in panels of three in a magistrates' court and hear cases involving petty crimes). Although my days were spent observing courtroom proceedings, any two-week period can only provide a snapshot view of what takes place at the Old Bailey. The recommendations that I offer are based on my firsthand observations and interviews. I was an outsider, and yet I was given an insider's access to the workings of the Old Bailey. From this unique vantage point, I offer my impressions, though they are no substitute for a comparative empirical study, which still remains to be done.

This Article proceeds in three parts. Part I examines jury practices that I observed at the Old Bailey that we should adopt in American courtrooms. For example, the English practice of providing jurors with a jury bundle could easily be implemented in the United States and would be of great value to American jurors, just as it is to English jurors. Other practices, such as the elimination of peremptory challenges, work well in England and could work well in the United States, though there would be some initial resistance, and thus, such practices should be adopted over time.

Part II considers practices found in both English and American jury systems that need to be embraced more readily by courts in both countries. For example, both systems try to provide tools that help jurors to perform their job more effectively. These tools, such as permitting jurors to take notes, to ask questions, and to consult a written copy of the instructions, need to be adopted more widely by American courts. American courts need to encourage these practices, and not merely tolerate them.

Finally, Part III explores practices that are readily found at the Old Bailey, and are widely accepted there, but should not be adopted in the United States. These practices, such as seating the defendant in the dock,

4. The few times that I sat in the public galleries, I was told by the officer at the door who saw my legal pad that I could not take notes. When another person in the public gallery did take notes, her notes were confiscated afterward.

would put the defendant and jurors at a disadvantage. Similarly, the practice of permitting a majority verdict in a criminal case is not one that should be adopted in the United States. These practices work well in England, but are likely to do more harm than good in the United States.

## I. ENGLISH JURY PRACTICES TO ADOPT

Jury practices in another country can suggest new ways to conduct jury trials in one's own country. The jury practices in England can show us that our own practices are not inevitable. They also can suggest where improvements can be easily made in our own system. We can try practices that work well elsewhere and that seem likely to fit well in our own jury system. One such improvement is to provide jurors with a "jury bundle," as is the practice in English criminal jury trials.

### A. *Practices To Implement Immediately*

#### 1. The Jury Bundle

One of the jury practices used at the Old Bailey that should be adopted by American courts is to provide jurors with what the English call a "jury bundle." This is a compendium of exhibits that serves as an essential resource for English jurors. The jury bundle is a binder that is given to jurors at the start of the trial, and can be supplemented throughout the trial. It provides jurors with copies of all of the exhibits. There is a jury bundle for every two jurors. In cases that have a lot of documentary evidence, the prosecution sometimes provides jurors with post-its and highlighter pens so that they can easily find documents and underline points that they want to return to during their deliberations.<sup>5</sup>

The documents contained in a jury bundle vary from trial to trial, but there are some items that are typically included. One item is a copy of the indictment. Another item is any admissions (stipulations). The bundle also contains photos and maps. Typically, there will be photos of the crime scene, photos captured by Closed Circuit Television (CCTV) cameras, showing where the defendant was at or right before the crime, and possibly photos of the victim or a computer-generated diagram of the injuries suffered by the victim. Oftentimes, there are maps that show the route taken by a defendant or defendants from where they were last seen by CCTV

5. *R v. Ilene* (Old Bailey, London, Dec. 2010) is an example of a case in which the prosecutor provided jurors with highlighters and post-its. Although these are small, inexpensive items, they can be a tremendous aid to jurors.

cameras to where the crime was committed. Another typical item is a record of cell-phone calls. Typically, these records will show the telephone numbers that the defendants called before the crime occurred, a lack of calls during the commission of the crime, and then resumption of calls after the crime had been completed. Often, there are charts showing the cell-phone sites that the defendants' cell-phones used, though these records only show that the defendants were in areas which placed them near the scene of the crime. These records do not indicate where precisely defendants were when the cell-phone calls were made.

The jury bundle is tailored to the evidence in a particular case. For example, in *R v. Ilene*,<sup>6</sup> in which the defendant was charged with six counts of submitting false Value Added Tax (V.A.T.) claims, the jury bundle contained copies of all of the false invoices created by the defendant to look like genuine invoices.<sup>7</sup> The defendant submitted these invoices to the Revenue and Custom Board in order to claim repayment of excess V.A.T. that he said he had paid in the course of establishing and running his own consulting business. The jury bundle also included e-mails that the defendant had sent to various officials asking where his repayment was, forms he had completed and signed in order to claim his repayment, and transcripts of several interviews that he had with various officials who had investigated his claims. The interviews were played in court and jurors were able to listen to the interviews and read the transcripts at the same time. Given the poor quality of the recorded interviews, the transcripts contained in the jury bundle were indispensable.

The jury bundle in *R v. Ilene* consisted of hundreds of pages of documents and was an invaluable tool to jurors. The jurors were able to take notes in the margins, to mark documents in any way that was useful to them, and to have all of the documents at their fingertips. The prosecution was able to direct jurors to the appropriate page in the jury bundle any time a document was referenced. The prosecution also directed witnesses (including the defendant) to particular pages in the jury bundle so that they could explain to the jury what the document was. The jury bundle kept jurors focused on the relevant documents; it allowed them to keep all of the documents together; and it allowed them to listen to the testimony and follow it in written or visual form. This mode of presentation does not require any technology and is low-cost and user-friendly. It allows jurors to stay focused on the evidence, to record their thoughts or questions as they oc-

6. *R v. Ilene* (Old Bailey, London, Dec. 2010).

7. The description of this jury trial comes from my personal observations. See Notes from the Old Bailey, *supra* note 1.

cur, and to share them with the other jurors when they retire to the jury room to deliberate.

The jury bundle was particularly useful in *Ilene* when witnesses, such as Mr. Ilene, testified at great length, and the jurors could easily lose their focus. Instead, the prosecution was able to ask jurors to turn to a particular page in the jury bundle and to have the witness explain what the jurors saw before them.

The jury bundle also allowed jurors both to see and to hear what was being discussed in the courtroom. As a number of educators have observed, people have different styles of learning. Some people learn best by listening to a lecture and others learn best by reading the material, but using both modes can reinforce the lesson and allow the barristers to reach a broader range of learning styles.<sup>8</sup> The jury bundle allows jurors who learn best by reading to learn according to their preferred style; it also enables the material to be presented both in written and oral forms. Finally, the jury bundle conveys the message to jurors that they have a serious job before them, and the jury bundle is designed to help them perform that job.

The jury bundle is a tool that could easily be introduced into American courtrooms and could aid American jurors just as it now aids English jurors. Even if the jury bundle did not contain all of the exhibits at the start of the trial because each side would have to ask the court to enter their respective submissions as exhibits and to label them accordingly, as long as jurors were given a copy of each of these exhibits, and each was on three-holed paper so that it could be added to the binder, in the end jurors would have a jury bundle just as their English counterparts now have. Moreover, in many American courtrooms, exhibits are entered into evidence through motions made prior to trial.<sup>9</sup> In such courtrooms, the jury bundle could be prepared prior to trial and could be ready for jurors as soon as they were impaneled, just as it is at the Old Bailey.

8. See, e.g., Vicki L. Smith, *How Jurors Make Decisions: The Value of Trial Innovations*, in *JURY TRIAL INNOVATIONS* 9, 16 (G. Thomas Munsterman et al. eds., 2d ed. 2006) ("In addition, material is better remembered when it is presented in several different forms than in a single form."); Mark Hansen, *Learn How They Learn: Knowing Modes of Adult Education Helps Lawyers Create Successful Presentations*, A.B.A. J., Aug. 2003, at 26.

9. See, e.g., FED. R. CRIM. P. 12(b)(4)(A) & (B); *JURY TRIAL INNOVATIONS*, *supra* note 8, at 92 ("Exhibits and depositions admitted at pretrial are deemed admitted from the time that trial commences. . . . This technique avoids the risk of confusing or boring jurors with lengthy presentations of foundational evidence . . ."). Judges also use local rules and the inherent power of the court to encourage parties to file their motions in limine before trial. For example, in federal court in the Northern District of Illinois, judges typically rely on Local Rule 16.1 in civil cases and Local Crim. R. 16.1 in criminal cases. I am grateful to my colleague, Douglas Godfrey, for bringing this point to my attention.

In American courts today, jurors do not receive a jury bundle. In some courtrooms, they might receive a notebook whose contents can vary.<sup>10</sup> But a jury notebook, as minimal as it currently is in the few American courtrooms that provide one, is usually left to the discretion of the judge<sup>11</sup> and reserved for complex or lengthy trials.<sup>12</sup> In contrast, at the Old Bailey, it is the accepted practice for the prosecution to provide a jury bundle to every jury (one jury bundle per two jurors).

The jury bundle contains all of the exhibits that will be introduced during the trial. Currently, in American courtrooms, when an exhibit is introduced during the trial, it might be passed around from juror to juror or it might be flashed on a screen. Jurors have a fleeting opportunity to glance at it. In contrast, a jury bundle contains all of the exhibits and allows jurors to view them for as much or as little time as they need. If American jurors want to see an exhibit during their deliberations, they have to send a note to the judge requesting the exhibit. This step becomes unnecessary when jurors already have everything in their jury bundle.

A jury bundle is a low-cost, low-tech way to provide jurors with all of the documents that will be presented as evidence during the trial. It allows them to view these documents as they listen to live testimony and to review them during their deliberations. This tool is one that prosecutors could put together for jurors; defense attorneys could add to if they offered any exhibits; and the judge could hear any objections before it went to the jury. A jury bundle would assist jurors in their comprehension of the case. The jury bundle is an example of a tool used in another country that could easily be introduced into the American jury system and would benefit jurors enormously.

10. See, e.g., AM. B. ASS'N/BROOKINGS, CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM 19 (1992) [hereinafter CHARTING A FUTURE] ("Some participants urged that jurors be provided at the outset of a trial with notebooks containing copies of exhibits; others agreed that notebooks would be useful but strongly argued that they be made available only after the trial when the jurors will have been able to place the exhibits in context."). Arizona is one of the few states that provides notebooks to jurors. See ARIZ. R. CIV. P. 47(g) (1996) (authorizing the use of juror notebooks and describing their contents).

11. See JURY TRIAL INNOVATIONS, *supra* note 8, at 102 ("[T]he judge and trial attorneys jointly decide whether juror notebooks would assist the jurors.").

12. The American Bar Association recommended that judges provide notebooks to jurors in "appropriate cases." AM. B. ASS'N, PRINCIPLES FOR JURIES & JURY TRIALS 91 (2005) [hereinafter PRINCIPLES] ("Jurors should, in appropriate cases, be supplied with identical trial notebooks which may include such items as the court's preliminary instructions, selected exhibits which have been ruled admissible, stipulations of the parties and other relevant materials not subject to genuine dispute."); see JURY TRIAL INNOVATIONS, *supra* note 8, at 102 (suggesting the use of notebooks "in a complex case or in a case in which a protracted trial is anticipated").

## 2. Brief, Understandable Jury Instructions

Another improvement that American lawyers and judges would agree with, at least in theory if not in practice, is that jury instructions should be brief, straightforward, and easy for jurors to understand, as they are at the Old Bailey. At the Old Bailey, after the prosecution has presented its case-in-chief, and the defense has presented its case, the barristers make their closing speeches, and the judge then sums up the evidence and gives “directions” (instructions) on the law to the jurors. The judge’s instructions, delivered in the context of the summing up of the evidence, tend to be short and to the point.<sup>13</sup> The instructions tend to be delivered in a fairly straightforward manner and in language that a juror can understand.<sup>14</sup> In large and serious cases, judges at the Old Bailey usually give jurors a written copy of the instructions, which they can then take into the jury room and refer to during their deliberations.

Judges at the Old Bailey, like judges in American courts, draft their instructions before the end of the trial. Some of their instructions are instructions that they have given before and that they give at the end of every trial, so they will use the instructions that they have used in the past. Other instructions are required because of the type of case, and so judges will turn to “specimen directions,” prepared by the Judicial Studies Board,<sup>15</sup> which provide guidance for particular instructions. However, the instructions contained in the *Specimen Directions Book*<sup>16</sup> tend to be more for guidance than for quotation, so judges will make the suggested points in their own words. One difference, then, between the judges’ instructions at the Old Bailey and judges’ instructions in American courts, especially in those state courts where judges rely on approved pattern instructions, is that Old Bailey judges do not use boilerplate language that has been drafted by a committee. Another difference is that they do not provide as many instructions as their American counterparts. There are particular matters of law that they need to instruct the jury on in a particular case, and they do so without all

13. Admittedly, this claim is based just on my observations of several jury trials during a two-week time period. However, I am unaware of any empirical studies that have compared American and English jury instructions. Until such empirical studies are done, I will rely on my observations, even though they are necessarily impressionistic.

14. Whether jurors do understand the instructions is another question. According to one study, English jurors say that they understand the instructions, but further testing suggests that they do not understand them fully. See Cheryl Thomas, *Are Juries Fair?* 36–37 (Ministry of Justice Research Series 1/10, Feb. 17, 2010), available at <http://www.justice.gov.uk/publications/research.htm> (“So while over half the jurors at Winchester (68%) perceived the judge’s directions as easy to understand, only a minority fully understood the directions in terms used by the judge.”).

15. Lloyd-Bostock & Thomas, *supra* note 3, at 82.

16. SPECIMEN DIRECTIONS BOOK (Ministry of Justice ed., 2010).



of the boilerplate instructions that are typical in an American judge's final instructions to the jury. Finally, an Old Bailey judge's instructions are delivered in the context of his summing up of the evidence, so in that sense the instructions are connected to the facts, whereas American judges give their instructions without reference to the facts and so their instructions are more general and abstract than those of an Old Bailey judge.

Even if American judges do not revive the practice of summing up the evidence in a case, though I think they should,<sup>17</sup> there are other ways in which American judges can borrow from Old Bailey judges and make jury instructions more understandable. Two lessons emerge. One lesson is that American judges should be more restrained in the number of instructions that they offer to jurors as part of their final instructions, and the other lesson is that judges or jury instruction committees should try to make jury instructions more straightforward and conversational whenever possible.

One way American judges can make the final instructions shorter is by giving more of their instructions as they become relevant during the trial, rather than waiting until the end of the trial and including them in their final instructions. For example, if a police officer has testified during an American trial, the judge will instruct the jury that the police officer's testimony is entitled to no more and no less weight than any other witness.<sup>18</sup> However, rather than the judge giving that instruction at the close of the trial—long after the police officer has testified—the judge could give that instruction immediately before the police officer testifies.<sup>19</sup> In this way, the jurors will listen to the police officer's testimony, knowing that the police officer is to be judged like any other witness. In addition, the judge should not have to repeat that instruction at the close of the trial. Repetition of the instruction would not add any new information and would only add to the length of the judge's final instructions. If this instruction were provided during the trial, then the final instruction would not be as lengthy. To the extent that instructions are given at relevant points throughout the trial, rather than at the end, jurors are more likely to understand what they see and hear during the trial, and they will not be overwhelmed by a litany of instructions at the end of the trial. In addition, if the judge explains the law

17. See *infra* Part I.B.3.

18. See, e.g., 1 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS: CRIMINAL § 7-61 (2005) (Law Enforcement Witness).

19. See, e.g., PRINCIPLES, *supra* note 12 at 92 (princ. 13.D.2) ("When necessary to the jurors' proper understanding of the proceedings, the court may intervene during the taking of evidence to instruct on a principle of law or the applicability of the evidence to the issues."); *id.* at 98-99 ("Subsection D.2 deals with those occasions on which an instruction, to be most effective, should be given during the trial itself, and should not be delayed until the conclusion of the evidence.")

to jurors through instructions during the trial, then jurors will have a framework in which to place the rest of the trial.<sup>20</sup>

As to American judges adopting a more straightforward, conversational tone in their final instructions, this seems unlikely unless judges are willing to deviate from the language of the pattern instructions. American judges seem unlikely to do so because they worry that they would open themselves up to appeal and reversal any time they try an innovation on their own.<sup>21</sup> In light of this constraint, it is up to the jury instruction committees that draft the pattern instructions to strive for a more straightforward, conversational tone in their instructions. One way to achieve this is for these committees to have their instructions rewritten in plain language by a professional linguist before the instructions are adopted.<sup>22</sup> Another way is for these committees to test their instructions prior to adopting them by using laypersons who could identify which words or phrases are not readily understood by people who lack training in the law.<sup>23</sup> Yet another option is for the committees to offer points to be covered by the pattern instruction rather than the exact language that is to be uttered verbatim, though this option seems unlikely to garner support. Admittedly, this last option would have judges drafting their own instructions, though based on the points suggested by the pattern instructions, and while this might lead to more understandable instructions, it might also lead to more appeals and reversals. Although states recognize the importance of having understandable jury instructions, they are not always sure which route to take. One state, Louisiana, recently established a Committee to Study Plain Civil Jury

20. See Gregory E. Mize & Paula Hannaford-Agor, *Jury Trial Innovations Across America: How We Are Teaching and Learning from Each Other*, 1 J. CT. INNOVATION 189, 215 (2008) (describing the technique of instructing jurors about the substantive law during the trial and noting that this technique is "growing in prevalence").

21. For example, former Federal District Court Judge Stanley Sporkin, when asked by an audience member at a conference why he did not try new jury practices in his own courtroom, responded: "I am a coward. I just follow what everybody else does. . . . I think that, before I become a pioneer, I would need a consensus of the judges to do it. It is just the way it is done in our courthouse." *Panel Two: Current Judicial Practice, Legal Issues and Existing Remedies*, 40 AM. U.L. REV. 573, 594 (1991). When Judge Sporkin was asked at a later conference why he did not break with past practice and improve the jury instructions he used, he looked over at then Chief Judge Abner Mikva of the United States Court of Appeals for the District of Columbia, and explained: "[Chief Judge Mikva] would overturn me." Fred H. Cate & Newton N. Minow, *Communicating with Juries*, 68 IND. L.J. 1101, 1111 (1993).

22. Delaware's civil jury instruction committee sent its instructions to a professional linguist who made suggestions to improve the instructions, which were then reviewed by the committee to ensure that the instructions were still accurate. California and Vermont made use of a professional linguist as well. See JURY TRIAL INNOVATIONS, *supra* note 8, at 147-48.

23. See Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 489 (2006) [hereinafter Marder, *Jury Instructions*]; Nancy S. Marder, *Instructing the Jury*, in OXFORD HANDBOOK ON LANGUAGE AND LAW—(Lawrence Solan & Peter M. Tiersma eds., forthcoming).

Instructions.<sup>24</sup> The committee, consisting of five members of the bench and bar, will make recommendations for the Louisiana Supreme Court's consideration.<sup>25</sup> This is an important first step because plain language instructions are usually created only when there is leadership from the Chief Justice.<sup>26</sup>

Although the English system of having a book that offers guidance but not verbatim instructions might not be the preferred solution for American judges who worry about reversals, the fact that English judges are able to give shorter instructions that are more straightforward and conversational in tone than those of their American counterparts suggests that it can be done. There have been myriad empirical studies over the years finding that American jurors do not understand jury instructions very well.<sup>27</sup> It is reassuring to know that instructions have been made more understandable in other countries, such as England,<sup>28</sup> and that there are several different routes for American judges to take that will bring them closer to achieving this goal.

### 3. Substantive Jury Orientation Videos

The jury orientation video entitled *Your Role as a Juror*<sup>29</sup> is provided by Her Majesty's Service, and is, in my view, more substantive than most jury orientation videos provided by American courts. The twenty-minute video is available online so that jurors can watch it in advance of their jury service, and it is also shown to prospective jurors when they arrive at the Jury Lounge of the Old Bailey.<sup>30</sup>

The video provides practical information that prospective jurors are likely to find useful, such as who can serve on a jury and what a juror

24. Louisiana Supreme Court, Press Release (Jan. 6, 2011), at [http://www.lasc.org/press\\_room/press\\_releases/2011/2011-01.asp](http://www.lasc.org/press_room/press_releases/2011/2011-01.asp).

25. *Id.*

26. See Marder, *Jury Instructions*, *supra* note 23, at 482–86 (describing the roles of the Chief Justices in Arizona, New York, and California in bringing about jury reform in their respective states).

27. *Id.* at 455–75 (summarizing empirical studies showing jurors' difficulties in comprehending jury instructions and offering four theories to explain why jury instructions have been so resistant to change).

28. In one 1993 Crown Court Study, jurors were asked whether they found the instructions understandable, and more than ninety percent had responded that they had found the instructions “not very difficult” or “not difficult at all,” but of course, it is difficult to make a self-assessment about comprehension. See Lloyd-Bostock & Thomas, *supra* note 3, at 83. A more recent study indicates that jurors say that they understand the instructions even when they do not fully understand them. See Thomas, *supra* note 14, at vi, 35–37.

29. *Your Role as a Juror*, available at <http://moj.coionline.tv/videos/jurorvideo/video> (last visited Jan. 1, 2011). The discussion that follows is based on my viewing of this video.

30. I am grateful to Cheryl Thomas for making me aware of this practice.

should do if he or she has trouble reading, writing, or understanding English. The video instructs jurors to bring their jury summons and to arrive on time. Perhaps most important, the video tells jurors that jury service usually lasts ten working days, and that if a trial is going to last longer, the court will give jurors an estimate of the length of time.

Beyond the nuts and bolts of jury service, the video offers instruction on who is located where in the courtroom. Prospective jurors learn that there are a number of people in the courtroom, including a judge, a clerk, an usher, a prosecutor, and the defense, who is seated closest to the jury. All of these people wear gowns<sup>31</sup> and wigs, except for the usher who wears a gown but no wig. Jurors also learn that the defendant will be seated in the dock, that witnesses will speak from the witness stand and may sometimes be protected by a screen, and that there is also an area for the press and the public.

The jury orientation video also offers instruction on jury selection, the trial, and the verdict. As to jury selection, prospective jurors are told that the clerk will select twelve names at random and jurors are to answer “yes” when they hear their name called. They are also told that they can be challenged, and if they are, they should not take it personally. If they are not challenged, they will eventually take an oath and can either swear on a holy book or can simply affirm. The video also explains the various stages of the trial, from the clerk’s reading of the charges against the defendant to the prosecution’s “evidence-in-chief” and the case for the defense to the “closing speeches” of the prosecution and defense and the “summing up” by the judge.

The jury orientation video also explains to the jurors that their job will be to reach a verdict, and that they will choose a foreperson who will announce the jury’s verdict, once the jurors have reached agreement. The foreperson will stand up and answer the questions read by the clerk as to whether the defendant is “guilty” or “not guilty” on each of the counts. Jurors learn that the verdict is supposed to be unanimous, but that the court can accept a less-than-unanimous verdict. Jurors are also told that they are to base their verdict only on what they have heard and seen in the courtroom, and they are not to discuss the case with anyone other than fellow jurors and only during the deliberations. They are also told that they cannot disclose their deliberations even after they have completed them.

31. Judges put on their “robes,” which include “the appropriate jacket plus wing collar, bands, gown and wig. ‘The gown’ refers to the individual garment which varies in style according to rank.” E-mail from Judge Barker, to author (Apr. 3, 2011, 14:24 CST) (on file with author).

There are a number of features that are very helpful about this jury orientation video, and courts in the United States would do well to emulate it. First, it is available online so that prospective jurors who are anxious about their jury service can view it in advance and assuage their fears. Second, it answers practical questions that jurors are likely to have—from who can serve to how long their jury service will last to how they are reimbursed for their service. Third, it provides a blueprint for who is in the courtroom, where they are located, and what role they play. Fourth, it explains jury selection and what the prospective jurors must do during the process. Fifth, it gives a thumbnail sketch of the trial so that jurors will be familiar with the stages and can gauge where they are during the trial. Sixth, the video explains to jurors their role in reaching a verdict and the tasks that the foreperson must perform. Finally, the video tells jurors whom to turn to if they have questions about whether they can serve, what to do if they have a scheduling problem, or how to ask a question of the judge.

This video provides English jurors with far more substantive information than most American jurors receive, and it begins their education at a much earlier point in the process. In state courts in the United States, each state can decide whether to put its jury orientation video online. For example, in Illinois, where there are twenty-two judicial districts, only one has put its jury orientation video online.<sup>32</sup> At least this one jury orientation video does provide both practical and substantive information about being a juror.<sup>33</sup> Even if each judicial district in each state continues to produce its own video, each would do well to make it available online and to have it address the practicalities and fundamentals of jury service. At the very least, the video should explain jury selection, the stages of the trial, and the roles and responsibilities of the jury in reaching a verdict.

#### 4. Civility in the Courtroom

Another lesson that the Old Bailey teaches is the importance of civility in the courtroom: Everyone, including the barristers, acts with respect toward each other, the judge, and the jurors. The language of the courtroom reinforces this lesson. Barristers refer to each other as “my learned friend” and to the judge at the Old Bailey as “My Lord.”<sup>34</sup>

32. See Jury Center at Chicago-Kent, Juror Website Project, forthcoming at <http://www.kentlaw.edu/jurycenter/> (coding sheets on file with author).

33. See [http://www.19thcircuitcourt.state.il.us/services/Pages/jury\\_home.aspx](http://www.19thcircuitcourt.state.il.us/services/Pages/jury_home.aspx) (providing juror orientation video as part of the information available to jurors).

34. Crown Court judges are referred to as “Your Honour,” whereas Old Bailey, High Court, and Appeal Judges are referred to as “My Lord.” E-mail from Judge Barker, *supra* note 31.

Perhaps the donning of gowns and wigs helps create this atmosphere of formality and civility. When one puts on a wig and gown, one leaves aside the frenetic activity of everyday life and enters the solemn atmosphere of the courtroom. In a sense, the wig and gown mark membership in a learned, professional community. When one puts on the special attire, one assumes a particular role. Although the prosecution, defense, and judge play different roles in the courtroom, they are all part of the same community, and membership in this community requires respect for fellow members.

What is striking, at least from an American perspective, is that the barristers on opposing sides treat each other with such civility, at least compared to opposing counsel in an American courtroom. Part of the explanation might be the gowns and wigs, and another part might be that a barrister can represent a defendant in one case and the government in another, so the battle lines are not as clearly drawn as they are in the United States. Unlike in the United States, where a lawyer is usually a defense lawyer or a prosecutor, in England, a barrister belongs to a chambers that can take on defense and prosecution cases. In addition, the legal profession in England is divided into solicitors, who meet with clients and provide them with legal advice, and barristers, who present their case in court. Thus, the community of barristers is small; they know each other and need to get along because they will run into each other day after day in court.

The presentations by the barristers at the Old Bailey are much more restrained than those of their counterparts in the United States. In the two weeks that I observed jury trials at the Old Bailey, there was only one time that a barrister made an objection.<sup>35</sup> Although American lawyers are unlikely to give up their right to make objections because they see it as part of their zealous representation of their client, perhaps there are some lessons that can be drawn from the English model.

To begin with, the more restrained style of English barristers, which many American lawyers reject, is likely to have some support from American jurors. American jurors see through lawyers' antics, even though lawyers think that they do not. In general, American jurors are guided by their commonsense and are not swayed by flashy performances.<sup>36</sup> They recognize lawyers' performances for what they are and try not to hold it against

35. See Notes from the Old Bailey, *supra* note 1.

36. See, e.g., Natasha Korecki et al., *Juror: Blagojevich 'Lucky' He Wasn't Convicted on More Counts*, CHI. SUN-TIMES, Aug. 18, 2010, available at <http://www.suntimes.com/news/metro/blagojevich/2613462.juror-says-rod-was-lucky> (“[Juror Cynthia Parker] described defense attorney Sam Adam Jr. as ‘a showman’ but said his theatrical style was not to her taste and that she wouldn’t hire him if she was in trouble with the law.”).

the lawyers' clients. A recent example is the histrionics of former Illinois Governor Rod Blagojevich's lawyers in the first trial, especially the junior member of the father-son defense team who was known for his over-the-top arguments and flamboyant style.<sup>37</sup>

Although American lawyers are unlikely to wear wigs, there is something restraining about the English attire of wigs and gowns. Whereas American lawyers can use their dress to send a message to the jury, such as an African-American lawyer wearing kente clothe as part of his attire when representing an African-American criminal defendant before a largely African-American jury,<sup>38</sup> what would happen if lawyers, like judges, had to wear a gown? Would they be more restrained and civil in their behavior toward each other and to everyone else in the courtroom? Other professions have a uniform, such as doctors in white coats or religious leaders in robes or collars. The attire sets up an expectation that this person will act in a professional and decorous manner. Perhaps American lawyers should join judges in wearing black gowns when they appear in court, encouraging civility in the courtroom.

Before a judge enters the courtroom at the Old Bailey, there is a knock on the door and the judge is announced. Everyone in the courtroom rises, and bows slightly. The judge then takes his seat and everyone in the courtroom sits down. A similar practice occurs in American courtrooms, though without the bowing. The practice reminds all who are present that the judge is to be treated with respect. At the U.S. Supreme Court, the Justices have a custom of shaking hands with each other before conferences

37. See, e.g., Jeff Coen & Bob Sexter, *Now, the Main Event: By-the-Book Prosecutor, Fiery Defense Lawyer To Square Off*, CHI. TRIB., June 8, 2010, at 1 ("Blagojevich's side, as presented by the often volcanic lawyer Sam Adam Jr., might resemble a passionate plea from a televangelist as much as a legal presentation."); *id.* at 8 ("Adam will open for Blagojevich's defense, and his statement promises to be delivered with all the calm of a gospel preacher in full fire and brimstone fury."); Phil Rosenthal, *In Reality, This Show Had Lots of Scripting: Blagojevich Trial May Be Over, But What's Next Is Anyone's Guess*, CHI. TRIB., Aug. 18, 2010, at C23 ("But Blagojevich], his lawyers and PR pals treated [the trial] all along as a TV game show. . . . By the end, it wasn't mere grandstanding. They were playing to rooftops well beyond the bleachers."); Bob Sexter & Jeff Coen, *Loose Lips Raising Eyebrows*, CHI. TRIB., June 17, 2010, at 6 (describing former Illinois Governor Blagojevich's defense team as "schooled in the razzle-dazzle legal style of Chicago's Criminal Court's Building . . . [where] showmanship is the norm"); Bob Sexter & Jeff Coen, *Corrupt Plotter or Honest Man?*, CHI. TRIB., June 9, 2010, at 1, 4 ("[Sam] Adam [Jr.] moved about the room like a preacher, sometimes whispering just feet from the jury and sometimes shouting and waving his hands.").

38. See, e.g., Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 685 (1995) (discussing the incident in which John T. Harvey, III, was told by the trial judge not to wear kente cloth because it was an attempt to "send[] a hidden message to the jury") (footnote omitted).

and before they take the bench.<sup>39</sup> This practice reminds them that they are colleagues even if they take very different positions on the cases that they hear.<sup>40</sup> Although bowing is unlikely to be widely embraced, bowing suggests that some ritual—perhaps hand-shaking before the court session begins—could be a powerful reminder to lawyers that they are part of the same profession and need to treat each other and the other participants in the courtroom with respect and civility. Not only would lawyers benefit from treating each other this way, but jurors would as well. Lawyers' displays of histrionics and rudeness are distracting, and while jurors can usually overlook them and decide the case without being swayed by them, they make the jurors' task more difficult to perform.<sup>41</sup>

### B. Practices To Implement Over Time

There are some jury practices at the Old Bailey that are unlikely to gain immediate acceptance in American courtrooms, yet these practices are worth considering and working toward over time. One practice is having jury selection without peremptory challenges. Another practice is protecting jurors' privacy after a verdict has been reached, and yet another is permitting judges to provide a summing up of the evidence along with their instructions on the law. What the Old Bailey experience shows is that these practices work—at least in some countries like England—and that there are advantages to these practices. It would be a struggle to persuade American judges and lawyers to try these practices, even if only on an interim basis. Yet, if judges and lawyers had experience with these practices they might prefer them. The English jury model suggests that these practices are worth trying because of the advantages, even if the initial response in the United States is likely to be one of resistance.

#### 1. Selecting Juries Without Peremptory Challenges

To an American observer, jury selection at the Old Bailey is a marvel to behold because there are no peremptory challenges. This is true whether the case involves a defendant who is a member of a minority group, as it

39. 2 DAVID G. SAVAGE, *GUIDE TO THE U.S. SUPREME COURT* 861 (4th ed. 2004) (“Both in and out of Court the justices seek to present an image of formality and courtesy. Before they go into the courtroom and at the beginning of their private conferences, the justices shake hands with each other.”).

40. *Id.* (“This practice began in the late nineteenth century when Chief Justice Fuller decided that it was a good idea to remind the justices that differences of opinion did not preclude overall harmony of purpose.”).

41. *See, e.g.,* Korecki, *supra* note 36 (describing the juror on the Blagojevich trial who was put off by the defense attorney's showmanship but claimed she was able to perform her duty nonetheless).



did in *R v. Ilene*,<sup>42</sup> or whether the case was sparked by homophobia, as it was in *R v. Alexander & Thomas*.<sup>43</sup> If either case were tried in the United States, the jury selection would be a lengthy process. At the Old Bailey, however, jury selection took remarkably little time.

In *R v. Ilene*, jury selection proceeded as it does in every case at the Old Bailey. The clerk randomly selected twelve names, and as each juror's name was called, he or she answered "yes," and then took a seat in the jury box.<sup>44</sup> No juror requested to be excused. The judge asked if any juror worked for Customs and Revenue because the case involved Customs and Revenue.<sup>45</sup> No juror did. The judge asked if any juror knew any of the barristers. No juror did. Each juror then proceeded to read an oath or affirmation (using the holy book of his or her choice). When one juror said that he could not read the oath because he had trouble reading, the judge suggested that this was probably not the best trial for that juror because it involved a lot of written documents.<sup>46</sup> Another juror was called and sworn in instead.

Thus, the jury was seated in just a few minutes. There were no excuses, and there were no requests to remove any jurors. The jury appeared more diverse than many juries that go through a lengthy jury selection in the United States because the selection was truly random and not skewed by the exercise of peremptory challenges. There were five men and seven women on the jury, and seven whites, four blacks, and one South Asian.<sup>47</sup>

What was striking, at least to an American, is how little was known about each juror. The only information available was what could be discerned from the juror's appearance (gender, race, and possibly age). The juror's name was spoken only when the clerk called the juror to be seated in the jury box. In addition, jurors revealed some information about their religion when they read their oath or affirmation. Most jurors' choice of holy book was the Bible, suggesting that they were Christian. One juror requested the Koran, suggesting that he was Muslim. And two jurors requested the affirmation, suggesting that they did not observe a religion.

Other than the above information, nothing else was known about these jurors, and yet, the absence of information raised no qualms in any of the

42. *R v. Ilene* (Old Bailey, London, Dec. 2010).

43. *R v. Alexander & Thomas* (Old Bailey, London, Dec. 2010).

44. See Notes from the Old Bailey, *supra* note 1; see also Your Role as a Juror, *supra* note 29.

45. If the case had relied on police witnesses, then prospective jurors would have been asked if any were police officers or in law enforcement. See Notes from the Old Bailey, *supra* note 1 (discussion with Judge Barker).

46. See *id.*

47. See *id.*

participants at the trial. All that was needed were twelve impartial jurors. It was assumed that all jurors would play their proper role and put aside any prejudices they might hold. There was no need to inquire further as to whether they would do this. This was their role and they were expected to do it. The process was very dignified, and of course, extremely efficient.

It is hard to convince American lawyers and judges, steeped in the tradition of peremptory challenges,<sup>48</sup> that jurors can perform their role as impartial decision-makers without having been subjected to the scrutiny of voir dire and the winnowing of peremptory challenges. Yet, there is little research that supports the view that the exercise of the peremptory is necessary to produce an impartial jury.<sup>49</sup> At best, we rely on the tradition of the peremptory and the lawyers' anecdotal evidence that they can distinguish between partial and impartial jurors to justify the practice. But England had the peremptory and eliminated it,<sup>50</sup> and does not seem any worse off for having eliminated it. If anything, the elimination of the peremptory shows a respect for jurors; it is assumed that they will perform their service impartially. In addition, by assuming that all jurors will serve unless there is some very particular reason why they cannot, even the jurors do not try to get out of their jury service.<sup>51</sup> They are called to the jury box, and they serve. There are no intrusive questions on the part of lawyers, and there are

48. For example, the Court in *Swain v. Alabama* described the peremptory challenge as "one of the most important of the rights secured to the accused," 380 U.S. 202, 219 (1965) (quoting *Pointer v. United States*, 151 U.S. 396, 408 (1894)), and praised it for its "very old credentials" and for "its actual use and operation in this country." *Id.* at 212.

49. In fact, lawyers try to use their peremptory challenges to create a jury that is "sympathetic" to their client rather than a jury that is "impartial." See, e.g., SAUL KASSIN & LAWRENCE WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL* 50 (1988) ("[I]t is no secret that [trial lawyers] strive to obtain not an impartial panel, but a sympathetic one."); JAMES P. LEVINE, *JURIES AND POLITICS* 51 (1992) ("The use of peremptory challenges is supposed to eliminate people who are biased and leave a batch of open-minded jurors. But lawyers use their prerogatives to try to accomplish just the opposite—a jury packed with sympathizers or at least devoid of antagonists."); Barbara A. Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 *STAN. L. REV.* 545, 551 (1975) ("Of course, neither litigant is trying to choose 'impartial' jurors, but rather to eliminate those who are sympathetic to the other side, hopefully leaving only those biased for him.").

50. As a result of the Criminal Justice Act of 1988, which took effect on January 5, 1989, criminal defendants in England no longer exercise peremptory challenges, and the Crown does not generally exercise stand-bys (in which the Crown can reserve judgment on a prospective juror until all other prospective jurors are considered), except in limited circumstances. See *Criminal Justice Act, 1988*, ch. 33, § 118(1) (Eng.).

51. Jurors at the Old Bailey probably accept their jury duty with greater willingness than American jurors because they will be paid 250 pounds per week, and the expectation is that jury service lasts for no more than ten days. If a trial is anticipated to last longer, jurors need to be given that information and asked if they can serve for an extended period of time.

no self-serving excuses on the part of jurors. There is an expectation that jurors will be impartial, and jurors try to live up to that expectation.<sup>52</sup>

There are a number of advantages to eliminating the peremptory challenge, as I have identified in earlier work.<sup>53</sup> Most important, lawyers, even though constrained by *Batson v. Kentucky*<sup>54</sup> and its progeny,<sup>55</sup> still manage to remove prospective jurors because of their race, gender, or ethnicity, and thus, the petit jury is less diverse than it would otherwise be, particularly in death penalty cases.<sup>56</sup> Lawyers have learned how to work around *Batson*, and if they are challenged on the exercise of a particular peremptory, they know how to give race- or gender-neutral reasons. In addition, the process of questioning jurors is intrusive, and it is unclear that lawyers can use the information to discern which jurors are impartial and which ones are not. In practice, lawyers strive for sympathetic jurors, not for impartial jurors.<sup>57</sup> To remove unsympathetic jurors, they rely on stereotypes, which might be conscious or subconscious. Justice Marshall identified this problem in his concurrence in *Batson v. Kentucky*,<sup>58</sup> and called for the elimination of peremptory challenges.<sup>59</sup> There is much to be said for his solution. He rec-

52. As one barrister explained: "I happen to take the view that whatever one's personal prejudices, the chances are that a juror called to jury service and knowing the weight of responsibility upon him will do his utmost to discard prejudice." VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 49 (1986) (quoting Valerie P. Hans, unpublished data (1983)). This view was echoed by judges and barristers whom I spoke to when I conducted my research at the Old Bailey. See Notes from the Old Bailey, *supra* note 1.

53. See NANCY S. MARDER, *THE JURY PROCESS* 97 (2005); Nancy S. Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 *FORDHAM L. REV.* 1683, 1715–17 (2006) [hereinafter Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*]; Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 *TEX. L. REV.* 1041, 1103–11 (1995) [hereinafter Marder, *Beyond Gender*].

54. 476 U.S. 79 (1986) (holding that a prosecutor's use of a peremptory challenge based on race violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution).

55. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (holding that gender-based peremptory challenges violate the Equal Protection Clause of the Fourteenth Amendment); *Georgia v. McCollum*, 505 U.S. 42 (1992) (extending *Batson* to defense attorneys); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (holding that race-based peremptory challenges exercised in a civil case violate the Equal Protection Clause of the Fourteenth Amendment); *Powers v. Ohio*, 499 U.S. 400 (1991) (holding that a *Batson* challenge can be made based on any race or ethnicity).

56. See Equal Just. Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* 5 (2010) ("Racially biased use of peremptory strikes and illegal racial discrimination in jury selection remains widespread, particularly in serious criminal cases and capital cases.").

57. See *supra* note 49 (describing lawyers' search for sympathetic, rather than impartial, jurors).

58. 476 U.S. at 102, 106 (Marshall, J., concurring) ("A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically.").

59. *Id.* at 107–08 ("We can maintain that balance, not by permitting both prosecutor and defendant to engage in racial discrimination in jury selection, but by banning the use of peremptory challenges by prosecutors and by allowing the States to eliminate the defendant's peremptories as well.").

ognized that peremptories would continue to be used as a basis for excluding African-Americans from the jury,<sup>60</sup> and he was right.<sup>61</sup>

The elimination of peremptories in the English jury system suggests that jury selection can be conducted without them. Although there is no guarantee that the elimination of peremptories would work given our history and heterogeneity, it is an experiment whose time has come. The English model of jury selection provides a good example of how jury selection can work without peremptory challenges. Moreover, both systems share the same goals. Both strive to seat impartial jurors and a jury drawn from a fair cross section of the community.<sup>62</sup> According to the 1965 Report of the Departmental Committee on Jury Service in the United Kingdom, “[a] jury should represent a cross-section drawn at random from the community, and should be the means of bringing to bear on the issues the corporate good sense of that community.”<sup>63</sup> Although it is hard to know whether American jurors are more or less impartial than English jurors, American juries seem to be less diverse than English ones, though this is based just on two weeks of observation and is in need of empirical study. What we do know is that the American system of jury selection is lengthy, intrusive, and leads to disingenuous reasons on the part of lawyers.

Without peremptory challenges, other adjustments in the American jury selection might need to be made. One adjustment could be the slight expansion of for cause challenges.<sup>64</sup> But even with the expansion of for cause challenges, at least a reason would need to be given in open court and the judge would need to decide whether the reason met the threshold of a for cause challenge. And even with the elimination of peremptory challenges, some voir dire could be undertaken so that there is a basis for for

60. *Id.* at 106 (“Even if all parties approach the Court’s mandate with the best of intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet.”).

61. Other Justices, such as Justice Breyer, have come close to agreeing with Justice Marshall. See *Miller-El v. Dretke*, 545 U.S. 231, 234–45 (2005) (Breyer, J., concurring) (suggesting a reconsideration of *Batson* and the peremptory challenge system as a whole). Justice Stevens did not join Justice Breyer’s concurrence in *Miller-El*, but in other writing he has suggested that citizens should not be denied the opportunity to serve on a jury unless there is an acceptable reason for such a denial: “A challenge for cause provides such a reason; a peremptory challenge does not.” John Paul Stevens, *Foreword*, 78 CHI.-KENT L. REV. 907, 907–08 (2003).

62. One of the reasons that the English eliminated peremptories and limited standbys was so that the jury would reflect more closely the heterogeneity of English society. See John F. McEldowney, “Stand by for the Crown”: An Historical Analysis, 1979 CRIM. L. REV. 272, 282.

63. Laura K. Donohue, *Terrorism and Trial by Jury: The Vices and Virtues of British and American Criminal Law*, 59 STAN. L. REV. 1321, 1345 (2007) (quoting the 1965 Report of the Departmental Committee on Jury Service).

64. See Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, *supra* note 53, at 1715–17; Marder, *Beyond Gender*, *supra* note 53, at 1107–14.

cause challenges. Although there is very little questioning of jurors during jury selection at the Old Bailey, there might need to be more questioning during jury selection in American courts so that lawyers and clients feel comfortable with their juries, especially during a transition from a system with peremptory challenges to a system without them.

## 2. Protecting Jurors' Post-Verdict Privacy

At the Old Bailey, after the foreperson has announced the jury's verdict by indicating whether it finds the defendant guilty or not-guilty on each of the counts read by the clerk, the judge thanks the jurors for their service and dismisses them. Even after the verdict, the jurors cannot discuss their deliberations with the judge, the lawyers, the media, and academic researchers. This prohibition was established by the 1981 Contempt of Court Act.<sup>65</sup>

Under the Contempt of Court Act, jurors are not allowed to disclose anything that went on in the jury room. The Act seeks to protect the secrecy of the deliberations and the sanctity of the jury room.<sup>66</sup> One of the purposes of the Act was to make sure that jurors felt that they could speak freely in the jury room. Some members of Parliament believed that jurors would speak less candidly during deliberations if they knew that their comments could be made public after a verdict had been reached.<sup>67</sup> Other reasons for the Act included protecting jurors from outside harassment, maintaining public confidence in the jury system, and protecting the finality of the verdict.<sup>68</sup> The Act makes it a crime for anyone to ask jurors about their deliberations and for jurors to disclose any information about their deliberations.<sup>69</sup>

Although the English media covers jury verdicts, they do not attempt to interview jurors after the verdict. This means that jurors are free to return to their private lives as soon as they have reached a verdict. They are not

65. This Act provides in relevant part that "it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings." Contempt of Court Act, 1981, § 8(1) (Eng.).

66. See, e.g., Michael McConville & John Baldwin, *The Effect on the Contempt of Court Act on Research on Juries*, JUST. PEACE, Sept. 26, 1981, at 575 (suggesting that those in Parliament took the view that "the sanctity of the jury room, like the ballot box or the confessional, must remain inviolate").

67. See, e.g., Clare Dyer, *Mail Publishers Fined for Blue Arrow Jury Contempt*, GUARDIAN (London), Nov. 13, 1992, at 9 (expressing the view that secrecy was necessary so that jurors could engage in "free, uninhibited and unfettered discussion" that was "essential to the proper administration of the system of justice, which includes trial by jury") (quoting Lord Justice Beldam).

68. See Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 IOWA L. REV. 465, 539 (1997) (providing reasons for the Contempt of Court Act).

69. See *supra* note 65.

pursued by the press to explain the verdict. They do not go on television shows to be interviewed about their deliberations. There is media coverage of the case, but it does not include interviews with jurors. For example, the day after the verdict in *R v. Alexander & Thomas*, there was detailed coverage of the case in newspapers, from the more restrained coverage in *The Times*<sup>70</sup> to the more gossip-laden coverage in *The Daily Mirror*<sup>71</sup> and *The Daily Mail*.<sup>72</sup> However, none of these stories contained comments by the jurors.

In contrast, in the United States, members of the media question jurors after a verdict, particularly in a high-profile case, and many jurors are willing to give their views about what transpired in the jury room. Of course, not all jurors welcome the attention. Some seek to escape it, but find camera crews and journalists camped out on their front lawns<sup>73</sup> or even helicopters hovering over their homes.<sup>74</sup> They often succumb to the pressure and agree to be interviewed, even though they had not intended to do so initially.<sup>75</sup> Other jurors welcome the attention.<sup>76</sup> In some cases, the jurors

70. See, e.g., Steve Bird, *Drunken Beautician Guilty of Killing Gay Man in Street Attack*, *TIMES* (London), Dec. 17, 2010, at 23 (“[Ruby] Thomas, a trainee beautician, and [Joel] Alexander, a sports student, were both unanimously convicted of manslaughter after a jury deliberated for two days following a retrial at the Old Bailey.”).

71. See, e.g., *Former Public Schoolgirl Ruby Thomas Grinned as She Kicked Gay Man to Death*, *DAILY MIRROR* (London), Dec. 17, 2010, at <http://www.mirror.co.uk/news/top-stories/2010/12/17/former-public-schoolgirl-ruby-thomas> (“Boozed-up Ruby Thomas, 18, kicked and stamped on 62-year-old Ian Baynham after hurling abuse at him as he walked home from a night out with friend Philip Brown.”).

72. See, e.g., Rebecca Camber & Tamara Cohen, *Public Schoolgirl Who Turned Killer: Drunk Teen’s Homophobic Attack on Stranger in Trafalgar Square*, *DAILY MAIL* (London), Dec. 17, 2010, at 10 (“[Ruby] Thomas, now 18, was convicted of manslaughter at the Old Bailey yesterday. And the Daily Mail can now reveal that her father was convicted of manslaughter in the same court seven years earlier.”); Rebecca Camber, *From Classroom Innocence to Sleazy Poses on Facebook*, *DAILY MAIL* (London), Dec. 17, 2010, at 11 (“[A]s [Ruby Thomas] grew older, her photo album changed from showing a sweet youngster to a teenager in provocative poses that were trashy, brash and displayed an aggressive sexuality.”).

73. Judge Zagel, who presided over the first criminal trial of former Illinois Governor Rod Blagojevich, and who will preside over the second trial as well, said that he “might have a federal marshal buy no-trespassing signs and offer them to jurors to post outside their homes following a verdict in the upcoming retrial of former Gov. Rod Blagojevich.” Annie Sweeney, *Blagojevich Judge Fears Media Frenzy*, *CHI. TRIB.*, Feb. 25, at 8; see Marder, *supra* note 68, at 488–89 (providing examples of jurors who felt hounded by the press and took different approaches to escape—from boarding a plane to Jamaica to moving temporarily to a different home).

74. See, e.g., Sweeney, *supra* note 73, at 8 (“[Judge] Zagel said he was troubled by juror accounts after the first trial [of former Governor Blagojevich] that [jurors] had been hounded by reporters in the hours and days following their verdict. A helicopter hovered over one juror’s home, and another complained that the same reporter rang the doorbell every half an hour, according to the judge.”).

75. For example, the hold-out juror in the first criminal trial of former Illinois Governor Rod Blagojevich was not identified initially. It was only after the press continued to pursue her that she eventually agreed to reveal her name and to answer journalists’ questions. *Compare What Went Down; Juror Stood Fast, Held Out on Charge that Blagojevich Tried To Sell Obama’s Senate Seat*, *CHI. TRIB.* (Redeye ed.), Aug. 19, 2010, at 6 (describing the holdout only as “the lone holdout”), with *Blago Juror*

agree beforehand to respond to the media in a unified way and issue a statement from the jury or appoint a juror to speak on the jury's behalf.<sup>77</sup> In any event, jurors are left to decide how to proceed, with courts playing little or no role.

Courts in the United States offer jurors little guidance on how to handle the media. One reason could be because of our strong First Amendment tradition. Judges might be reticent to step in, believing that the media has a right to question jurors after a verdict and jurors have a right to respond. The few instances in which courts provide any restrictions on media inquiries are when jurors fear for their safety or when there is the risk of harassment,<sup>78</sup> but even then the prohibition cannot be overly broad.<sup>79</sup>

Some state and federal courts provide minimal guidance for jurors in their post-verdict interactions with the media. In some states, such as Colorado, Idaho, and Texas, judges instruct jurors after the verdict that they are free to discuss the case with whomever they want, but they are also free to decline all inquiries.<sup>80</sup> Federal courts in Louisiana and Wyoming use their

*Speaks*, CHI. TRIB. (Redeye ed.), Aug. 28, 2010, at 5 ("Who is the holdout juror . . . ? Her name is JoAnn Chiakulas . . ."), and Stacy St. Clair, *The Holdout Juror; For the 1st Time, Suburban Woman Explains Her Vote*, CHI. TRIB., Aug. 27, 2010, at 1 ("Chiakulas and two other jurors broke their silence in an interview Wednesday[, Aug. 25, 2010] and offered their account of the deliberations and the trial's aftermath.").

76. In the California criminal trial of O.J. Simpson for the murder of Nicole Brown Simpson and Ron Goldman, several of the jurors were planning to write books about their experience. See, e.g., Richard Price, *Simpson Jury May Lose Another of its Members*, L.A. TIMES, May 30, 1995, at 7A (describing juror Francine Florio-Bunten's book deal); Henry Weinstein & Tim Rutten, *The O.J. Simpson Murder Trial*, L.A. TIMES, July 14, 1995, at A31 (noting that Judge Ito suspected that juror Tracy Kennedy was planning on writing a book). One juror had already chosen the title, *Standing Alone for Nicole*, even though the trial was still ongoing. See, e.g., Price, *supra*, at 7A. Judge Ito dismissed these jurors once he became aware of their plans and that they had already formed a view about the case, in spite of his daily admonitions that they were to keep an open mind. See, e.g., Price, *supra*, at 7A; Weinstein & Rutten, *supra*, at A31.

77. For example, after a jury acquitted Damian Williams and Henry Watson of the most serious charges in the beating of truck driver Reginald Denny during the L.A. riots and convicted them on several reduced charges, the foreperson arranged a meeting with the press so that she could read a statement from the jury. See Seth Mydans, *Leader Denies Bias or Fear on Riot Jury*, N.Y. TIMES, Oct. 26, 1993, at A16. The jury's statement explained: "The verdicts were decided according to the law, not from intimidation, fear of another riot, nor were the verdicts based on black versus white." *Id.* (quoting the jury foreperson).

78. See, e.g., *United States v. Cleveland*, 1997 U.S. Dist. LEXIS 10718 (E.D. La. July 22, 1997) (prohibiting jurors from discussing their deliberations with anyone, absent a special order from the judge, in a highly publicized case involving political corruption of state officials in Louisiana), *aff'd*, 128 F.3d 267, 270 (5th Cir. 1997) (finding that the District Court's Order "was narrowly tailored to prevent a substantial threat to the administration of justice—namely, the threat presented to freedom of speech within the jury room by the possibility of post-verdict interviews").

79. See, e.g., *Cleveland*, 128 F.3d at 269 (finding that the order applied only to the jurors, not to their families, friends, or associates, and that it applied only to the deliberations, and not to other views they might have about the case).

80. See, e.g., COLO. SUPREME COURT COMM. ON CIV. JURY INSTRUCTIONS, COLORADO JURY INSTRUCTIONS 4TH § 1:18 (2010) ("You may now talk to anyone, including the attorneys and parties,

local rules and take a similar approach.<sup>81</sup> In Connecticut, there is a local rule that advises jurors that they do not have to discuss the case with anyone after the verdict.<sup>82</sup> Jurors are also told that they “may only speak or write about their own participation in the trial. [They] may not discuss the deliberations of the jury, votes of the jury, or the actions or comments of any other juror.”<sup>83</sup> Lawyers and parties are prohibited from asking jurors about the jury’s deliberations, votes, or comments of other jurors.<sup>84</sup> Finally, there is a provision that tells jurors “no person may contact, communicate with or interview any juror in any manner which subjects the juror to harassment, misrepresentation, duress or coercion.”<sup>85</sup> The Connecticut provisions afford more protection to jury deliberations and juror privacy than most other states do but they are less expansive than they once were. In the past, the Connecticut Local Rule provided: “No juror shall respond to *any* inquiry as to the deliberations or vote of the jury or of any other individual juror, except on leave of Court . . . .”<sup>86</sup>

In my view, American courts should take their lead from their English counterparts. Although the First Amendment would make a blanket ban problematic, there are good reasons for courts to give some guidance to jurors on how to respond to the media, particularly in high-profile cases. Since jurors are summoned, and do not volunteer for jury duty, courts should provide some guidance on how jurors can handle the media so that they can return to their private lives as quickly as possible. Jurors should not be left to their own devices. At the very least, they should be told, as they are in some states, that they do not have to respond to any requests for interviews or comments.<sup>87</sup>

In high-profile cases, where jurors’ names have been withheld from the press and public during the trial, they can be withheld several days after

about this case. Whether you do so is entirely up to you.”); 1 IDAHO SUPREME COURT CIVIL JURY INSTRUCTIONS COMM., IDAHO JURY INSTRUCTIONS IDJI 1.17, at 45 (2003) (“You may now discuss this case with the attorneys or with anyone else. For your guidance, I instruct you that whether you talk to the attorneys, or to anyone else, is entirely your own decision.”); TEX. R. CIV. P. 226a (“I now release you from jury duty. Now you may discuss the case with anyone. But you may also choose not to discuss the case; that is your right.”).

81. See LA. FED. LOC. CT. R. (E.D., W.D.) 47.5, (M.D.) 47.4 (“No juror has any obligation to speak to any person about any case and may refuse all interviews or comments.”); WYO. FED. LOC. CT. R. 47.2 (“No juror has any obligation to speak to any person about any case and may refuse all interviews and comments.”).

82. See CONN. FED. LOC. CT. R. 83.5(1)(b).

83. *Id.*

84. See CONN. FED. LOC. CT. R. 83.5(c).

85. CONN. FED. LOC. CT. R. 83.5(d).

86. CONN. FED. LOC. CT. R. 12(f)(1) (emphasis added).

87. See *supra* notes 80–86 and accompanying text.



the verdict so that jurors have a little time to recover from the trial and to consider how they want to respond to press inquiries. Even a brief delay would be useful for jurors because it would give them time to recover from the pressures of deliberations, and yet the delay would only be temporary.<sup>88</sup> Courts have upheld such restrictions in the past because the information is made public after only a brief delay.<sup>89</sup>

Although jurors in the United States are not offered much guidance by courts as to how to handle the media, this problem is likely to grow more pressing over time as everyone with a cell-phone and a cell-phone camera can become a citizen-journalist and reach a vast audience on the Internet. Jurors' privacy will be harder to protect. At that point, the black-or-white approach adopted in England might seem more attractive. A statute that prohibits all efforts by everyone—whether citizen-journalist or professional news reporter—from trying to find out what was said in the jury room might be the only way to protect jurors during their deliberations and after their verdict. Middle-ground positions could become ineffectual. Yet, such a prohibition is likely to run into resistance as well as to raise First Amendment questions.

Although the English blanket prohibition on post-verdict interviews with jurors is unlikely to garner much support in the United States, jurors in the United States need some assistance from courts so that they can avoid the limelight if they so choose and resume their private life as soon as possible after jury service. Without such protections, citizens might become even more reluctant than they are now to heed their jury summons.<sup>90</sup> Judge Zagel, who presided over the first criminal trial of former Illinois Governor Rod Blagojevich, noted that the news media had become “rapacious” and

88. Judge Zagel has indicated that during the retrial of former Illinois Governor Rod Blagojevich he will withhold jurors' names during the trial, and will release them eight hours after the verdict is returned. He suggested that the immediate release of jurors' names after the first trial led to incidents that could be avoided by a short delay. See Annie Sweeney, *Judge: Blagojevich Jurors To Remain Secret*, CHI. TRIB.COM, Feb. 8, 2011, available at [www.chicagotribune.com/news/local/breaking/chibrknews-judge-bлагоjevich-jurors-to-remain-secret-20110208,0,2705694.story](http://www.chicagotribune.com/news/local/breaking/chibrknews-judge-bлагоjevich-jurors-to-remain-secret-20110208,0,2705694.story).

89. See, e.g., *United States v. Doherty*, 675 F. Supp. 719, 723–24 (D. Mass. 1987) (withholding jurors' names and restricting the press from seeking interviews with jurors for a week following the verdict, in response to the jurors' request that their names and addresses not be released at all).

90. See, e.g., ROBERT G. BOATRIGHT, *IMPROVING CITIZEN RESPONSE TO JURY SUMMONSES: A REPORT WITH RECOMMENDATIONS ix–x* (American Judicature Society, 1998) (identifying reasons why jury-eligible citizens did not respond to jury summonses); Susan Carol Losh et al., “Reluctant Jurors”: *What Summons Responses Reveal about Jury Duty Attitudes*, 83 JUDICATURE 304, 310 (2000) (finding that jurors who are permitted to reschedule jury duty for a more convenient time are more enthusiastic about jury duty than those who actually report for jury duty when called); Greg Moran, *When Jury Duty Calls: Counties Wrestle with High Evasion Rates*, CAL. LAW., May 2001, at 22 (describing counties in California that make failure to appear for jury duty punishable by a fine of up to \$1000 and five days in jail).

that “the dogged pursuit of jurors after a verdict will deter people from wanting to serve” as jurors.<sup>91</sup>

At the very least, state and federal courts should tell jurors that they can decline to speak to anyone, including lawyers, parties, and the press, after the verdict. States should also follow Connecticut’s lead and provide that those seeking to speak to jurors cannot harass or intimidate them. In addition, in high-profile cases where jurors’ names have been withheld throughout the trial, judges should provide a brief period, from a few days to a week, before they release the jurors’ names and addresses. In this way, jurors who have performed their duty and served in a highly-publicized, and often difficult, case can have a little time to recover from the deliberations and to consider how best to respond to media inquiries.

### 3. Permitting Judges To Provide a Summing up

After the prosecution has presented its “evidence-in-chief” and the defense has presented its case, both prosecution and defense make a “closing speech,” and then it is the judge’s task to provide a “summing up” of the case, which also includes “directions” (or jury instructions) on the law. In his summing up, the judge attempts to present a balanced picture of what each side’s evidence has been.<sup>92</sup>

The judge prepares for the summing up throughout the trial. As the trial proceeds, the judge, typing on either a lap-top or writing in an old-fashioned book, will take notes on the evidence that has been presented and the facts that each side seeks to establish. During the trial, the judge might ask a question of a witness or a barrister to make sure that he understands what has been said so that he can use it accurately in his summing up. The summing up, then, keeps the judge actively engaged in the trial; his note-taking and questions are for a purpose: they will provide the foundation for his summing up. Of course, he will still have to work on the summing up outside of the courtroom, but it allows him to explain why he needs to ask a question during the trial. His questions, though asked ostensibly so that he is accurate in his summing up, are an aid to jurors throughout the trial. The judge might explain that he needs to pose a question to clarify for his sum-

91. Sweeney, *supra* note 73, at 8.

92. See Notes from the Old Bailey, *supra* note 1. Judges in Canada also provide a “summing up,” and like their English counterparts, try “to educate the jury about matters they should consider in evaluating the witnesses and other evidence but [the summing up] does not infringe upon the jury’s discretion.” Regina Schuller & Neil Vidmar, *The Canadian Criminal Jury*, 86 CHI.-KENT L. REV. 497, 506 (2011).

ming up, but even as he does so, his questions help the jurors understand what the witness is trying to explain.

The summing up is an aid to the jurors in that the judge provides a recapitulation of the main points that each side has sought to establish. After a lengthy trial, it is useful for the jurors to hear a summary of the evidence. The summing up functions like a review session at the end of a law school course. It is not a substitute for the entire course, but it reminds the students of what was covered and presents a big-picture view of the course.

The summing up is also useful because the judge gives the instructions on the law in the context of the facts of the case. Thus, the instructions do not seem abstract, as they often do to American jurors, but rather, they are more concrete because they are in the context of the facts of the case. As linguists have noted, instructions are easier to grasp when they are specific and use the names and details of the parties and the case.<sup>93</sup> Judges at the Old Bailey are able to draft instructions that are easier to understand than those of their American counterparts because the instructions are delivered in the context of the summing up of the evidence.

In spite of the benefits of the summing up, the practice is likely to meet with initial resistance in American courtrooms today because it would be seen as the judge being overly intrusive.<sup>94</sup> As Tocqueville noted over a hundred and seventy-six years ago, Americans are deeply skeptical of centralized power and prefer that governmental power be shared.<sup>95</sup> By having the judge decide the law and the jury decide the facts—even though it was not always this way<sup>96</sup> and even though the distinction is not always clear-

93. See, e.g., Peter M. Tiersma, COMMUNICATING WITH JURIES: HOW TO DRAFT MORE UNDERSTANDABLE JURY INSTRUCTIONS 14 (2006) (“Identify the Parties Clearly and Consistently”); Joseph Kimble, *How to Mangle Court Rules and Jury Instructions*, 8 SCRIBES J. LEGAL WRITING 39, 53 (2001–2002) (“Use language that is case specific.”); Rosalind R. Greene & Jan Mills Spaeth, *Say What You Mean: Drafting Comprehensible Jury Instructions*, ARIZ. ATT’Y, Feb. 2010, at 34, 38 (“Jurors understand and remember better when attorneys identify parties and other participants clearly and consistently.”).

94. There is no legal impediment to a judge providing a summing up in federal court or some state courts. See Neil Vidmar, *A Historical and Comparative Perspective on the Common Law Jury*, in WORLD JURY SYSTEMS 1, 42 (Neil Vidmar ed., 2000) (“Although such commentary [by a judge] would be permissible in federal courts and some state courts in the United States, in practice it appears to be obsolete.”).

95. See, e.g., 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 87 (Phillips Bradley ed., Vintage Books 1945) (Francis Bowen trans., 1862) (“Time and experience, however, have convinced the Americans that . . . the division of the legislative power is still a principle of the greatest necessity.”); *id.* at 73–74 (“In no country in the world does the law hold so absolute a language as in America; and in no country is the right of applying it vested in so many hands.”); *id.* at 98 (“It is not the administrative, but the political effects of decentralization that I most admire in America.”).

96. See Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U.L. REV. 877, 911–14 (1999) (describing juries’ early role of deciding both the facts and the law, which criminal juries in some states retained until well into the nineteenth century).

cut<sup>97</sup>—the decision-making power is shared. If an American judge were to provide a summing up in which he or she summarized the evidence, this could be seen as an intrusion into the province of the jury. Even though a summing up might be an aid to jurors, and assist them in their decision-making, there would be suspicion that the judiciary is over-stepping its bounds. American judges, ever mindful of the independence of the jury, would be reluctant initially to offer a summing up to the jurors, even though this had been the practice of judges when Tocqueville visited the United States.<sup>98</sup> But just as some American courts are experimenting with having lawyers present a summary at different points throughout the trial, they could experiment with having the judge provide a summing up at the end of the trial. One jury scholar has noted that “[a]lthough such commentary [by a judge] would be permissible in federal courts and some state courts in the United States, in practice it appears to be obsolete.”<sup>99</sup> The American Bar Association’s *Principles*, though arguing against the practice, notes that the federal system permits judges to summarize and comment on the evidence.<sup>100</sup> My suggestion is that judges revive the practice or use it more frequently because it would be an aid to jurors’ memory and would improve their understanding of the instructions.

## II. SHARED JURY PRACTICES TO IMPLEMENT MORE WIDELY

Although the English jury system offers several practices not found in American courtrooms that would be an aid to American jurors, other jury practices are common to both systems. Indeed, an American feels quite at home attending a jury trial at the Old Bailey—with the exception perhaps of officials wearing wigs. For example, both jury systems try to give jurors tools so that they can perform their task to the best of their abilities, to communicate with jurors in plain language, and to treat jurors with respect. The problem, at least in the United States, is that these tools are given half-heartedly and need to become far more prevalent than they currently are.

97. See *id.* at 908–11 (describing ways in which juries’ findings of fact also entail interpretation of law).

98. Tocqueville, in describing the jury in America based on his travels in the 1830s, noted that the judge, in his summing up of the arguments to the civil jury, “points their attention to the exact question of fact that they are called upon to decide and tells them how to answer the question of law. His influence over them is almost unlimited.” TOCQUEVILLE, *supra* note 95, at 296.

99. Vidmar, *supra* note 94, at 42.

100. See PRINCIPLES, *supra* note 12, at 97 (“In the federal system, a trial judge is permitted to summarize and to comment upon the evidence and to express an opinion as to the facts of the case, provided that the judge makes it clear that the resolution of disputed facts is a matter for the jury alone.”).

## A. Giving Jurors Tools

### 1. Note-taking

With the exception of the jury bundles, which English jurors receive and American jurors do not, most of the tools given as aids to English and American jurors are the same. For example, jurors in many courts in the United States and at the Old Bailey are permitted to take notes during the trial. Although jurors at the Old Bailey might take notes in the margins of their jury bundle, and jurors in the United States might take notes on a notepad, jurors are permitted to take notes during the trial. Although this practice is not permitted in every courtroom in the United States, it is far more prevalent than in the past. As recently as the late 1980s, only about ten percent of federal court judges permitted jurors to take notes,<sup>101</sup> whereas by the late 1990s, the practice was described as “a widespread technique.”<sup>102</sup> According to one study, “more than two-thirds of both state and federal trials courts” surveyed “permitted juror note-taking” and “in the vast majority of those trials jurors were provided with writing materials.”<sup>103</sup>

The theory behind note-taking is that it is an aid to jurors during a trial, just as it is to students in a classroom.<sup>104</sup> Note-taking helps jurors to stay focused on the trial, to remember key points, particularly in lengthy trials, and to write down issues that they want to discuss with fellow jurors during deliberations.<sup>105</sup> In the United States, one early-adopter judge permitted juror note-taking in his own courtroom and recommended it to other judges because note-taking allows jurors to be active learners and to assimilate

101. Kassin and Wrightsman, writing in 1988, relied on an Administrative Office of the U.S. Courts estimate that “90 percent of the federal judges do *not* permit jurors to take notes.” KASSIN & WRIGHTSMAN, *supra* note 49, at 128. At the time, Kassin and Wrightsman asked: “So why is there so much resistance?” *Id.* at 129. Indeed, when the American Bar Association and the Brookings Institution organized a symposium on the civil jury in 1992, the report that followed described juror note-taking as “the most widely suggested reform for enhancing juror comprehension,” but observed that it was “far from universal.” CHARTING A FUTURE, *supra* note 10, at 18–19.

102. JURY TRIAL INNOVATIONS 141 (G. Thomas Munsterman et al. eds., 1997) (suggesting that “[i]n most jurisdictions, the trial judge has discretion to permit jurors to take notes” and where that discretion is not provided by statute or rule, the parties should so stipulate).

103. Mize & Hannaford-Agor, *supra* note 20, at 211.

104. A short film, entitled *Order in the Classroom*, illustrates what would happen if students were asked to learn in the same way as jurors, including the prohibition on note-taking. The students in the film look incredulous when they are told that they cannot take notes, ask questions, or even know the subject matter of the course, yet their final exam will entail reaching a unanimous group decision upon which their entire grade will be based. See Videotape: *Order in the Classroom* (Institute of the International Association of Defense Counsel (IADC) Foundation 1998).

105. See, e.g., Nancy S. Marder, *Juries and Technology: Equipping Jurors for the Twenty-First Century*, 66 BROOK. L. REV. 1257, 1277 (2001) (identifying the benefits of juror note-taking).

information more readily during the trial than if they just sat passively.<sup>106</sup> The old model of passive learning, according to which people absorb everything said at trial and can recall it at will, had been long rejected by scientists and educators, but judges had not taken account of advances in our understanding of how learning takes place and how memory works.<sup>107</sup> Today, juror note-taking in the United States is fairly “widespread,”<sup>108</sup> just as it is at the Old Bailey.<sup>109</sup>

## 2. Written Copies of Instructions

A written copy of the instructions is another tool provided to many jurors at the Old Bailey and to jurors in many courtrooms in the United States.<sup>110</sup> Although the law, as explained by the judge to the jury, might be called “directions” at the Old Bailey and “instructions” in the United States, a written copy is an aid to jurors in both jury systems. A written copy allows jurors to read the words on the page at the same time as the judge says them aloud.<sup>111</sup> When a written copy of the instructions is coupled with note-taking, it means that jurors can see the legal terms on the page, mark down which words or concepts they are unclear about, and bring their questions to their fellow jurors during deliberations.<sup>112</sup>

106. See, e.g., B. Michael Dann, “Learning Lessons” and “Speaking Rights”: *Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1246 (1992) (providing key features of active jurors, including taking responsibility for learning, participating, interacting, and processing information on an ongoing basis).

107. See *id.* at 1241 (“Relying on the evidence produced by scientific studies and having as their goals better-informed jurors and more accurate verdicts, social scientists, law professors, a few judges, and others . . . all agree on one thing: jurors must be permitted to become more active in the trial.”); Robert Buckhout, *Eyewitness Testimony*, SCI. AM., Dec. 1974, at 23, 23 (“Both sides, and usually the witness too, succumb to the fallacy that everything was recorded and can be played back later through questioning. Those of us who have done research in eyewitness identification reject that fallacy.”).

108. See, e.g., JURY TRIAL INNOVATIONS, *supra* note 8, at 126 (“Only a small handful of states expressly prohibit notetaking, and then only in criminal trials.”).

109. Notes from the Old Bailey, *supra* note 1 (conversation with Judge Barker).

110. See Mize & Hannaford-Agor, *supra* note 20, at 216 (“At least one copy of written instructions was provided to the jury in more than two-thirds of state jury trials and in nearly three-quarters of federal jury trials [in the survey].”).

111. See, e.g., Marder, *Jury Instructions*, *supra* note 23, at 499–500 (describing the benefits of providing jurors with an individual written copy of the jury instructions); Peter Tiersma, *Essay: Asking Jurors To Do the Impossible*, 5 TENN. J. L. & POL’Y 105, 124 (2009) (“The message is that if judges want jurors to remember and apply carefully formulated and complex instructions, they need to give jurors an exact copy of the text.”).

112. It would be even better if jurors could ask questions of the judge after they had listened to the instructions, but American judges are reluctant to adopt such a practice because they worry that they might give an answer that will be reversed on appeal. Nevertheless, several academics have recommended this practice. See, e.g., Marder, *Jury Instructions*, *supra* note 23, at 501–02; Tiersma, *supra* note 111, at 146–47 (“Finally, why not let jurors—after they have received their instructions or before they begin deliberations—ask the judge any questions they might have about the law governing the case or the procedures they should follow in reaching a verdict?”). Currently, jurors are able to send a note to

Jurors at the Old Bailey usually receive a written copy of the directions,<sup>113</sup> but in the United States the practice is less uniform. According to one informal survey, in thirty-seven out of fifty states and the District of Columbia (or seventy-three percent of the states and D.C.), the jury is given at least one written copy of the instructions fifty percent or more of the time.<sup>114</sup> In contrast, only sixteen states and D.C. (or thirty-one percent of the states and D.C.) provide individual written copies of the instructions fifty percent or more of the time.<sup>115</sup> In some states, a written copy is required by rule,<sup>116</sup> whereas in other states it is left to the discretion of the trial judge.<sup>117</sup>

In the United States, state and federal courts have moved in the direction of providing written copies of instructions to jurors so that they can follow the instructions as the judge reads them aloud. Those judges who have experience with the practice in their courtroom report that it helps jurors to understand the law, to adhere to the instructions more closely during deliberations, to reduce the number of questions that jurors have about the instructions during deliberations, and perhaps even to reduce the amount of time that jurors spend in their deliberations.<sup>118</sup>

the judge if the jury, as a whole, has a question about the instructions during its deliberations. When the jury does this, however, the judge typically has everyone reconvene in the courtroom and the judge rereads the relevant portion of the instructions, rather than actually answering the jury's question. *See, e.g.,* Jacqueline Connor, *Jurors Need To Have Their Own Copies of Instructions*, L.A. DAILY J., Feb. 25, 2004, at 7, 7 ("When jurors would send out questions asking about the meaning of a concept or term, the custom was always to reread the instruction, as if the jurors would understand a second recital with the renewed dulcet tones of the judicial officer."). In some instances, however, the judge simply denies the jury's request. *See, e.g.,* SCOTT E. SUNDBY, *A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY 167* (2005) ("Adding insult to injury from the jurors' perspective, judges sometimes would appear to turn a cold shoulder when the jury asked them to clarify instructions or define terms such as 'mitigating.'").

113. Judge Barker noted that in large, serious cases there is a recommendation that judges provide written instructions on the law. E-mail from Judge Barker, *supra* note 31.

114. I am grateful to Paula Hannaford-Agor at the National Center for State Courts (NCSC) who provided me with the results of an informal survey based on trial reports submitted by judges and lawyers for trials that occurred in 2002–2006. The results indicated the percentage of trials in which at least one written copy of the instructions was given to the jury. Those states that provided at least one written copy in fifty percent or more of trials fell into the category of providing a written copy; those that were below fifty percent fell into the category of not providing a written copy. The fifty percent cut-off is arbitrary, but I wanted to distinguish the rare instance of providing a written copy from the frequent practice.

115. *See supra* note 114 (explaining the methodology used).

116. *See, e.g.,* ILL. SUP. CT. R. 239(e) (effective 2009); IOWA R. CIV. P. 196 (1996); IOWA R. CRIM. P. 18(5)(f) (1996); TENN. R. CRIM. P. 30c (1996).

117. *See, e.g.,* Tiersma, *supra* note 111, at 123 ("Whether to provide written copies [of the instructions] is usually left to the discretion of the trial judge, and many prefer not to do so.").

118. *See, e.g.,* JURY TRIAL INNOVATIONS, *supra* note 8, at 152 (identifying benefits); Connor, *supra* note 112, at 7 (describing benefits of this "wildly successful" practice).

A number of state and federal courts have realized that it is important for each juror to have his or her own copy of the written instructions and to be able to take that copy into the jury room.<sup>119</sup> This allows each juror to focus on the law during the deliberations. It also allows each juror to be an equal in the jury room, unlike when all twelve jurors must share a single copy.<sup>120</sup> In the latter situation, the juror with the single copy can become the authority on the law, whether his or her interpretation is correct or not.<sup>121</sup> The trend in the United States is toward giving each juror an individual copy of the written instructions, but it is still not a widespread practice.

### 3. Questions to Witnesses

Another tool given to jurors at the Old Bailey and in some federal and state courts is the opportunity to submit written questions to witnesses. In the United States, this is typically done by the juror submitting a question in writing to the judge, who decides if the question can be asked of the witness, and if so, the judge asks it.<sup>122</sup> The practice is not commonplace in either American or English jury systems, at least not yet.

At the Old Bailey, jurors are permitted to submit questions to the judge who then decides whether to ask the question of a witness, but jurors are not instructed by the judge at the start of the trial that they can do this.<sup>123</sup> Thus, jurors have to be so motivated to ask their question that they do so without actually knowing that they can do so. At the Old Bailey, then, juror questions are permitted but not encouraged.

In the United States, more than half of the states and all of the federal circuits permit juror questions, but leave it to the discretion of the trial judge to decide whether jurors can submit questions in any given case.<sup>124</sup>

119. Illinois made a rule change that became effective in 2009 that requires judges to give each juror in a civil case an individual written copy of the instruction so that he or she can follow the text as the judge reads the instruction aloud. See Jerry Crimmins, *New Rule May Make Jurors' Lives Easier*, CHI. DAILY L. BULL., Oct. 30, 2009, at 3 (describing rule change).

120. See, e.g., Nancy S. Marder, *Jury Reform: The Impossible Dream?*, 5 TENN. J. L. & POL'Y 149, 161 (2009) (“[W]hoever holds the instructions becomes more of an expert than the other jurors.”).

121. *Id.*

122. For descriptions of the procedures generally followed by judges who permit jurors to submit written questions for the witnesses, see JURY TRIAL INNOVATIONS, *supra* note 8, at 128–29; Eugene A. Lucci, *The Case for Allowing Jurors To Submit Written Questions*, 89 JUDICATURE 16, 17 (2005); Hon. Warren D. Wolfson, *An Experiment in Juror Interrogation of Witnesses*, CBA REC., Feb. 1987, at 12, 14.

123. See Notes from the Old Bailey, *supra* note 1 (conversation with Judge Barker).

124. See Bruce Pfaff, John L. Stalmack & Nancy S. Marder, *The Right To Submit Questions to Witnesses*, CBA REC., May 2009, at 36, 39 (providing a survey of state court decisions and federal courts of appeals decisions indicating jurisdictions that permit juror questions).



In criminal trials, three states have rules that mandate that jurors can submit questions, and six states have case law that prohibits jurors from submitting questions.<sup>125</sup> In civil trials, six states have rules that mandate that jurors can submit questions, and ten states have case law that seems to prohibit jurors from submitting questions.<sup>126</sup> Some federal and state courts have tried the practice as a pilot program,<sup>127</sup> and some judges have adopted the practice under the inherent power of courts.<sup>128</sup> Judges and lawyers who have experience with the practice usually find it helpful, even if they had resisted the practice initially.<sup>129</sup>

Giving jurors the opportunity to ask questions, under well-controlled procedures, has several benefits. First, it allows jurors to have their questions answered so that they are no longer confused about a word that a witness has used<sup>130</sup> or a practice that a witness has described.<sup>131</sup> Relatedly, it helps them to avoid speculating as to the answer in the jury room because they are actually able to have their question answered by the witness.<sup>132</sup>

125. See Mize & Hannaford-Agor, *supra* note 20, at 214 (“The practice [of juror questions] is mandated for criminal trials in three states [Arizona, Colorado, and Indiana], prohibited by case law in [six] states [Arkansas, Georgia, Minnesota, Mississippi, Nebraska, and Texas], and left to the sound discretion of the trial court in the rest.”) (footnotes omitted).

126. See *id.* (“In civil trials, juror questions are mandated in six states [Arizona, Colorado, Florida, Indiana, Washington, and Wyoming], prohibited in ten states [Minnesota, Nebraska, Texas, and possibly Georgia, Louisiana, Maine, Michigan, North Carolina, Oklahoma, and South Carolina], and left to the discretion of the trial judge in the rest.”) (footnotes omitted).

127. Federal courts in Illinois tried the practice as a pilot program. See Am. Jury Project Comm’n, Seventh Circuit Bar Ass’n, Seventh Circuit American Jury Project Final Report 60–62 (Sept. 2008), available at <http://www.7thcircuitbar.org> (Association Projects - 7th Circuit American Jury Project Final Report). Other states have run pilot programs that have been well-received, such as New Jersey and Colorado. See, e.g., Jury Subcomm., N.J. Sup. Ct. Civ. Prac. Comm., Report on Pilot Project Allowing Juror Questions 3, available at <http://www.judiciary.state.nj.us/jurypilot/jurypilot.htm> [hereinafter Report on Pilot Project] (describing New Jersey’s pilot program); Leland Anderson, Practice Tips for Handling Juror Questions (June 2004), available at <http://www.ncsconline.org> (describing Colorado’s pilot program).

128. See Wolfson, *supra* note 122, at 13 (“I have not allowed jury questioning unless all lawyers agree in advance. I believe I have the inherent power to do it anyway, but I have not imposed the procedure on anyone.”) (citation omitted).

129. See, e.g., Nancy S. Marder, *Answering Jurors’ Questions: Next Steps in Illinois*, 41 LOY. U. CHI. L.J. 727, 746 (2010).

130. See, e.g., Lucci, *supra* note 122, at 17–18 (“Juror questioning of witnesses is especially helpful . . . when jurors misunderstand the words used by the attorney or witness, or fail to hear a word . . .”).

131. See, e.g., Nicole L. Mott, *The Current Debate on Juror Questions: “To Ask or Not To Ask, That is the Question,”* 78 CHI.-KENT L. REV. 1099, 1115–16 (2003) (“The practices of the law enforcement profession were also unknown to many jurors. For example one juror asked: ‘How are the heat sealed bags sealed? Does the officer close the bag immediately after placing items in the bag or does time [e]lapse between the time the bag is filled and when it is sealed?’”).

132. See, e.g., Rachel M. Zahorsky, *Legal Rebels: Remaking the Profession – James Holderman: Jury Duties*, A.B.A. J., Nov. 9, 2009, [http://www.legalrebels.com/profiles/james\\_holderman\\_jury\\_duties](http://www.legalrebels.com/profiles/james_holderman_jury_duties) (“And, if [jurors] are not allowed to

Second, the practice helps jurors to stay engaged in the trial process.<sup>133</sup> It allows them to get answers as soon as they become confused so that they can focus on the trial and not be distracted by what they have failed to understand. Third, it provides feedback to the lawyers so that they know when a point has not been made clearly.<sup>134</sup>

From the empirical studies that have been done thus far and judges' and lawyers' anecdotal experience, jurors do not ask many questions,<sup>135</sup> and the questions they ask are usually good ones.<sup>136</sup> The practice, while adding a little time to the trial, typically does not lengthen it by more than a half hour.<sup>137</sup> Jurors appreciate the opportunity to ask questions,<sup>138</sup> even if they do not ask many questions. It provides them with a safety net: they know they can ask questions if they become confused.

Lawyers and judges usually worry about a loss of control if jurors are permitted to ask questions,<sup>139</sup> but in practice this does not present a problem. Jurors submit their questions in writing and anonymously to the judge after a witness has testified but before that witness has stepped down. Thus, juror questions do not interrupt the flow of the trial. The judge typically reviews the question with the lawyers to see if there is any objection, and if there is none, the judge will ask the question of the witness, sometimes rephrasing it so that it is an acceptable question.<sup>140</sup> Meanwhile, the judge

ask questions, they are going to worry about it and they are going to try to come up with their own solution.”) (quoting Chief Judge James F. Holderman, Northern District of Illinois).

133. See, e.g., JURY TRIAL INNOVATIONS, *supra* note 8, at 129 (“Permitting jurors to ask questions helps keep them alert and engaged in the trial proceedings, thus increasing satisfaction with jury service.”); Anderson, *supra* note 127, at 1 (“Jurors appear to be more engaged, attentive, and empowered when allowed to ask questions at trial.”).

134. See, e.g., Lucci, *supra* note 122, at 17 (“[T]rial counsel often appreciate the opportunity to get mid-stream glimpses of how the jurors are processing the information coming into evidence and being able to shore up a point they thought they were making, and after experiencing jury questioning of witnesses first-hand, most attorneys approve of and embrace the practice . . . .”); Wolfson, *supra* note 122, at 16 (“Lawyers learn what is troubling or confusing the jury as the trial unfolds. Omissions can be corrected.”).

135. See, e.g., Mott, *supra* note 131, at 1112–13.

136. *Id.* at 1120 (noting that judges in her earlier study had described juror questions as “very reasonable”); Lucci, *supra* note 122, at 17 (finding that “the vast majority (over 90 percent) of juror questions are good questions and many are excellent”); Wolfson, *supra* note 122, at 17 (“[T]he great majority of questions were serious, to the point, and relevant . . . .”).

137. See, e.g., Report on Pilot Project, *supra* note 127, at 3 (finding that juror questions added about thirty minutes to the trial).

138. See Marder, *supra* note 129, at 740 n.63 (providing sources that indicate that jurors are grateful for the opportunity to ask questions).

139. See, e.g., Mott, *supra* note 131, at 1105 (reporting that a main concern of defense attorneys was that juror questions would “interfere[] with trial strategy and control of witnesses”).

140. See, e.g., Lucci, *supra* note 122, at 19 (noting that the judge still exercises control over juror questions by “decid[ing] whether the question should be asked, and if so, then how the question should be asked”).

will have instructed the jurors that not all questions can be asked because of certain legal rules and they should not take it personally if their question cannot be asked.<sup>141</sup> Jurors understand this and accept it.<sup>142</sup>

In sum, those courts that have permitted juror questions have found that they worked well; however, courts in the United States and England have not moved with alacrity to implement this practice. The practice is permitted, but not advertised, at the Old Bailey. The practice is permitted in some state and federal courts in the United States, but even in some courts that permit the practice, judges explain to jurors that “questions are not encouraged but are to be sparingly used.”<sup>143</sup> The courts that permit juror questions have found it to be a useful tool for jurors. It remains for this practice to be more widely recognized and embraced on both sides of the pond. Perhaps the wider acceptance of juror questions in one country will provide support for greater acceptance of this practice in the other country.

## B. *Communicating with Jurors in Plain Language*

### 1. Explaining Procedures and Avoiding Prejudice

Judges at the Old Bailey and in the United States strive to communicate with jurors in plain language that a layperson can understand. The issue has arisen with respect to jury instructions, and for the structural reasons discussed earlier,<sup>144</sup> the English judges do a better job than their American counterparts in conveying the final jury instructions in a straightforward and understandable manner.

Aside from final jury instructions, judges try to explain to jurors what is happening at different stages throughout the trial, and they try to do so in a way that jurors will understand and that will protect the rights of the defendant. Some of the trial practices and procedures can be baffling to a layperson, and judges at the Old Bailey and in American courtrooms try to give some explanation as to why they are necessary.

For example, at one trial at the Old Bailey, a witness testified from behind a screen.<sup>145</sup> The judge explained that the jurors, the judge, and the

141. See JURY TRIAL INNOVATIONS, *supra* note 8, at 260 (“The failure [of the judge] to ask a question is not a reflection on the person asking it.”).

142. See Wolfson, *supra* note 122, at 16.

143. Lucci, *supra* note 122, at 17.

144. See *supra* text accompanying notes 13–28 (describing the American reliance on committee-written pattern instructions delivered verbatim compared to the English use of a book that requires judges to write the instructions in their own words and to deliver them in the context of a summary of the evidence in the case).

145. See *R v. Smith, Mason, Saint, Williams, Lock, Forde-Morgan & Taylor* (Old Bailey, London, Dec. 2010).

barristers would be able to see the witness but that the defendants and public would not.<sup>146</sup> The screen, which is not found in an American courtroom, allows the witness, who is from the community, to feel more comfortable testifying in front of defendants and the public who are also from that community. The witness can be heard, but not seen. However, the judge has to explain the arrangement in such a way that jurors understand it but do not leap to the conclusion that the defendants are dangerous or guilty.

A similar situation arose in an American courtroom when a judge had to explain to jurors why the defendant was not present in the courtroom, and the judge had to explain it in such a way that jurors would understand the absence and not hold it against the defendant.<sup>147</sup> The defendant, a woman who was a member of a Puerto Rican nationalist organization, was charged, and eventually convicted, of participating in the bombing of a building in New York City where one person was killed.<sup>148</sup> The defendant did not want to be present at the trial.<sup>149</sup> The judge had to explain her absence to the jurors so that they would not draw any impermissible conclusions from the absence.<sup>150</sup> The judge explained that the defendant had a constitutional right not to be present<sup>151</sup> and was in another room in the courthouse where she could hear the trial. In addition, she had a person who was serving as her advisor, and who could raise issues on her behalf.<sup>152</sup>

In both cases, judges had to give jurors an explanation that they would understand and the judges had to frame it in a way that would not leave jurors feeling fear, antipathy, or prejudice toward the defendant. Both English and American jury systems entrust the judge with speaking to the jury and giving the jurors the necessary understanding so that they can perform their roles as impartially as possible.

146. *See id.*

147. *See* United States v. Torres, No. 77 Cr. 680 (S.D.N.Y. May 19, 1980) [hereinafter Trial Tr.] (Transcript of jury selection); *id.* at 38 (“In this case the defendant, at least so far, indicated she doesn’t want to participate in the trial at all.”).

148. *Id.* at 42–43.

149. *Id.* at 34, 38–43.

150. For another trial in which the defendant was absent and the judge had to explain the absence in a way that would not lead jurors to conclude that the defendant was guilty, see William Finnegan, *Doubt*, NEW YORKER, Jan. 31, 1994, at 48, 48 (“[The defendant] then, according to Judge Frederic S. Berman, who was hearing the case, exercised his ‘right to choose not to be present.’”).

151. Trial Tr. at 34 (“The Constitution obviously gives [the defendant] the right to participate if she wishes to . . . but, she does not wish to participate . . .”).

152. *Id.* at 43 (“She has what we call an advisor . . . . He may or he may not appear as an advisor or come into the court.”).

## 2. Avoiding the Outside Influence of the Internet

Currently, at the Old Bailey and in some American courtrooms, judges are struggling with how best to convey to jurors that they cannot do independent research about the trial using the Internet or share their thoughts about the trial online. Judges in both countries are experimenting with instructing jurors about the need to refrain from such activities even though jurors might be accustomed to turning to the Internet whenever they have a question or need information in their private and professional lives.<sup>153</sup> As Judge Barker observed in the *Foreword* to this symposium, this is a pressing problem that judges in England have only begun to address, typically through more detailed instructions.<sup>154</sup> So far, American judges in federal and some state courts also have tried to give instructions that are specific so that jurors understand precisely which activities are prohibited,<sup>155</sup> they have tried to provide explanations so that jurors understand why the prohibitions are necessary;<sup>156</sup> and they have repeated the instruction throughout the trial so that jurors are reminded of their obligations even during lengthy trials.<sup>157</sup>

Although it is too early to say whether these instructions prohibiting online research and exchanges are effective, at the very least they should aid those jurors who are unaware of these prohibitions, but who are willing

153. According to one study of juries in England and Wales, “[j]urors are directed by the judge at the start of a trial not to look for any information about the case themselves.” Thomas, *supra* note 14, at 43. Judges at the Old Bailey also said that they give such an instruction at the start of the trial. See Notes from the Old Bailey, *supra* note 1. A number of states, such as Illinois, have drafted new instructions to explain to jurors that they cannot consult the Internet for questions they have about the trial and they cannot share their views about the case online. See, e.g., ILL. SUP. CT. COMM. ON PATTERN JURY INSTRUCTIONS IN CIVIL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS—CIVIL 1.01 (forthcoming 2011 ed.). The U.S. Judicial Conference published a set of Model Jury Instructions prohibiting the use of electronic technology for research or communicating about a case. The model instructions, which are available at [www.uscourts.gov/newsroom/2010/DIR10-018.pdf](http://www.uscourts.gov/newsroom/2010/DIR10-018.pdf), are intended for U.S. district court judges and tell jurors precisely what they must refrain from doing.

154. Brian Barker, *Foreword: Communication and Investigation in 2011: Can Our Jury System Cope?*, 86 CHI.-KENT L. REV. 449, 450 (2011).

155. The instruction needs to be specific so that jurors know exactly what they are prohibited from doing; if it is general, they might assume that research that they do in their everyday lives, such as a Google search, is permissible during a trial. See, e.g., Tricia R. Deleon & Janelle S. Forteza, *Is Your Jury Panel Googling During the Trial?*, *ADVOCATE*, Fall 2010, at 36, 38 (recognizing that judges need to give more specific jury instructions so that jurors know they are not permitted to look up questions about the trial on the Internet).

156. See, e.g., Susan MacPherson & Beth Bonora, *The Wired Juror Unplugged*, *TRIAL*, Nov. 2010, at 40, 42 (“Social science research on persuasion has demonstrated that compliance can be measurably increased by simply adding the word ‘because’ and some type of explanation.”).

157. See, e.g., Judge Herbert B. Dixon, Jr., *Guarding Against the Dreaded Cyberspace Mistrial and Other Internet Trial Torpedoes*, *JUDGES’ J.*, Winter 2010, at 37, 39 (noting the need for judges to “instruct[] the jurors early and often, including during orientation and *voir dire*” so that they know not to consult the Internet).

to abide by them once they are made aware of them and understand the reasons for the prohibitions.<sup>158</sup> Unfortunately, instructions alone will not change the behavior of jurors who cannot refrain from consulting the Internet because it is so ingrained in them or who are willing to question and flout the court's prohibitions.<sup>159</sup> Some judges, at least in the United States, have begun to ask jurors during voir dire whether they understand the prohibitions and whether they are willing to abide by them.<sup>160</sup> Only those jurors who agree to adhere to these prohibitions are selected for the petit jury.

Jurors' Internet research and exchanges are a problem that judges in American courtrooms and at the Old Bailey are trying to address. Solutions that work well in one jury system might work well in the other. One study in England has suggested that courts provide jurors with "written juror guidelines" that they keep with them throughout the trial and that include instructions to jurors on why they must not use the Internet to seek or share information about the trial.<sup>161</sup> This recommendation, if it is implemented successfully in England, could be one that American judges adopt to address the same problem in the United States.

### C. *Treating Jurors with Respect*

In large and small ways, judges and court personnel at the Old Bailey and in American courts try to treat jurors with respect. After all, jurors have a difficult and vital role to play in rendering judgment.<sup>162</sup> As I observed jury trials at the Old Bailey, I thought that jurors should wear gowns, just like the judge, the barristers, and the clerk, signaling their important role in the trial process. Although jurors do not wear gowns, they are accorded respect in other ways.

At the Old Bailey, for example, judges are solicitous of jurors' schedules. In one case, a juror had to pick up a child from childcare, and

158. See MacPherson & Bonora, *supra* note 156, at 42.

159. Judges also need to make it clear to jurors that violations will be punished. See, e.g., Nora Macaluso, *Jury Instructions: Ubiquity of Internet Access Raises Jury Instructions Issues for Courts*, 87 CRIM. L. REP. 895 (2010) ("'You've really got to make it crystal clear' to jurors that violations of the policy can result in punishment . . .") (quoting Prof. Ron Bretz, Thomas M. Cooley Law School).

160. Some jury consultants recommend asking jurors during voir dire whether they can abide by the court's instruction not to consult the Internet. See MacPherson & Bonora, *supra* note 156, at 42–43. One defense attorney in a high-profile case plans on asking the court to have jurors sign a questionnaire that says that they will not do online research about the trial. Ginny LaRoe, *Barry Bonds Trial May Test Tweeting Jurors*, LAW TECH. NEWS, Feb. 15, 2011, at <http://www.law.com/jsp/lawtechnologynews/PubArticleFriendlyLTN.jsp?id=12024819443>.

161. Thomas, *supra* note 14, at 50.

162. Judgment is not easy to render. Cf. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1609 (1986) ("[J]udges deal pain and death.").

could not make any other arrangement. The trial ended early that day so that the juror could pick up her child.<sup>163</sup> Similarly, when the weather was bad and jurors had to contend with unreliable public transportation, the trial ended early so that jurors could begin their long trip home.<sup>164</sup> Court sessions were planned around commitments that jurors had been unable to rearrange. Throughout the trial, the judge thanked the jurors for their hard work and their extra efforts to get to court on time in spite of the inclement weather and the transportation problems. The judge made sure that the jurors felt appreciated and that their hard work was recognized.

In American courtrooms, too, judges and court personnel try to treat jurors with respect and appreciation for their work. Many states have adopted the practice of "one day, one trial," so that if prospective jurors are not chosen for a trial on the day that they report for jury duty, they will have fulfilled their jury duty after that one day.<sup>165</sup> If they are selected for a trial, then they serve for the length of the trial. This approach has led jurors to feel that their time is being valued.

American judges, like their English counterparts, thank jurors for their service after the trial has ended. In some American courts, the judge will personally go and speak to the jurors and thank them for their hard work.<sup>166</sup> In other American courts, jurors will receive a certificate of appreciation. One American judge sends jurors a letter, letting them know what has happened to the case on appeal.<sup>167</sup> Jurors in American courts, and at the Old Bailey, are told that they are an integral part of the process, and they are invited to return to court for the sentencing, as the foreperson did in one sentencing that I observed at the Old Bailey.<sup>168</sup> The foreperson felt an obligation to be there and to represent the jury.

In some courthouses, such as those in New York State, various improvements have been made in jurors' facilities so they feel that they are being treated as human beings rather than as chattel. When Judge Judith Kaye became Chief Judge of the Court of Appeals of New York, the highest court in the state, she made a commitment to jury reform.<sup>169</sup> One of her

163. See Notes from the Old Bailey, *supra* note 1.

164. See *id.*

165. See, e.g., JURY TRIAL INNOVATIONS, *supra* note 8, at 25–26; PRINCIPLES, *supra* note 12, at 7 ("Courts should use a term of service of one day or the completion of one trial, whichever is longer.").

166. See JURY TRIAL INNOVATIONS, *supra* note 8, at 170–71.

167. See, e.g., Marder, *supra* note 105, at 1279 n. 95 (describing Judge Donald E. Shelton's practice of sending post-verdict letters to jurors).

168. See Notes from the Old Bailey, *supra* note 1 (noting that the foreperson attended the sentencing of a defendant who had been convicted of raping his step-daughter).

169. See James P. Levine & Steven Zeidman, *The Miracle of Jury Reform in New York*, 88 JUDICATURE 178, 180 (2005).

accomplishments was improving the setting in which jurors perform their work. Chief Judge Kaye made sure that jurors had basic amenities, including bathrooms that worked, vending machines that were available, and a call-in system so that jurors could see if they would be needed for jury duty that day.<sup>170</sup> Some of the structural reforms she made were the introduction of “one day, one trial,” the creation of an ombudsman who could address juror complaints, the elimination of numerous exemptions so that a larger swath of the population could serve, and limitations on attorney-conducted voir dire so that it was no longer unsupervised and interminable.<sup>171</sup> Perhaps, most important, Chief Judge Kaye persuaded the legislature to increase juror pay so that it would no longer be such a financial hardship for jurors to serve.<sup>172</sup> All of these reforms—both the nuts-and-bolts and the structural reforms—conveyed to jurors the message that their work was important and their time was valued.

Perhaps the practice that best exemplifies the way that jurors should be treated is the practice that I saw in Judge Leonard B. Sand’s courtroom in the Southern District of New York.<sup>173</sup> Every time the jury entered or left the courtroom, everyone in the courtroom—including the judge—stood up as a sign of respect. Although jurors were not given gowns to wear, they were given a sign that everyone in the courtroom respected them and the work they performed.

Given both the English and American jury systems’ shared goal of treating jurors with respect, practices that show respect to jurors should be implemented more broadly. Just as states can serve as laboratories for experimenting with new practices, as Justice Brandeis once observed,<sup>174</sup>

170. See, e.g., Jan Hoffman, *Favorable Verdict for Jury Changes; Lawyers Are Unhappy. Other Signs Are Hopeful, Too*, N.Y. TIMES, Apr. 12, 1995, at B1 (“Some deliberating rooms and juror assembly halls have comfortable new chairs, lunch tables, vending machines and work carrels; one Manhattan courthouse now has a television room.”).

171. See, e.g., Mark Hansen, *Complaining Jurors Get a Hearing*, A.B.A. J., Sept. 1995, at 24, 24 (describing several recommendations, from the 80 recommendations made by a court-appointed committee, to reform the state’s jury system, including raising juror pay, eliminating exemptions, and providing an ombudservice); Hoffman, *supra* note 170, at B1 (“Since January, [1995] when many of [Chief] Judge Kaye’s changes went into action, life for jurors has indeed become less painful. . . . In just about every county outside New York City, jurors are dismissed after one day unless they are picked for a trial.”).

172. See Carrie Mason-Draffen, *Help Wanted/Queries About Worker’s Health Out of Bounds*, NEWSDAY, Dec. 15, 1996, at F10 (“The New York State daily wage for serving [on juries] rises from the current \$15 to \$27.50 as of Feb. 15[1996] and then climbs to \$40 in 1998.”).

173. I had the privilege of serving as Judge Sand’s law clerk from 1988–1989 and observing this practice during every jury trial.

174. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”); see *Arizona v. Evans*, 514 U.S. 1, 30 (1995) (Ginsburg, J., dissenting); *Cruzan v. Director*,



many of the jury practices now found in individual English and American courtrooms have succeeded as experiments and need to be adopted more widely.

### III. ENGLISH JURY PRACTICES TO REJECT

There are a number of jury practices that work well in England and are widely accepted there, and yet, they would not work well in the United States. Even though these practices should not be adopted in the United States, they can still be useful because they require us to think about our own system and why these practices should not replace our current ones.

#### *A. Placing the Defendant in the Dock*

For an American observer, one of the most striking features of the courtrooms in the Old Bailey—both the old courtrooms and the more modern ones—is that the defendant (or defendants) is seated in “the dock.” The dock is usually in the back of the courtroom, at least in the newer courtrooms.<sup>175</sup> At the start of every court session throughout the trial, the defendant enters the dock, accompanied by a security officer. The defendant is separated from everyone else in the courtroom by a glass panel that extends the length of the dock. When there are multiple defendants, as there were in several cases that I observed, all of the defendants sat next to each other in the dock.

Judges, barristers, and security officers to whom I spoke at the Old Bailey were all at ease with having the defendant in the dock. Judges found the dock useful because otherwise they had to worry about security and whether the defendant would threaten anyone. Indeed, the glass panels were added after one such attack on Judge Ann Goddard, a female judge.<sup>176</sup> Security officers shared the judges’ concern. Without the dock, security officers thought that defendants would have to be handcuffed or shackled and that the barrier of the dock avoided these restraints. Barristers thought it was less distracting to have the defendant in the dock than at their table. If the defense needed to confer with the defendant, he or she could ask the

Mo. Dep’t of Health, 497 U.S. 261, 292 (1990); *Lackey v. Texas*, 514 U.S. 1045, 1047 (1995) (Stevens, J., respecting denial of certiorari); *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari).

175. In some of the old courtrooms, the dock is a glass-enclosed box more toward the center of the courtroom, whereas in the new courtrooms, it is a row that is glass-encased at the back of the courtroom.

176. See Notes from the Old Bailey, *supra* note 1 (discussion with Judge Barker); e-mail from Judge Barker, *supra* note 31.

judge for a few minutes and go back to the dock and talk through the glass. The glass has gaps so the defendant and barrister can confer and exchange notes.

For an American observer, however, it is jarring to see a defendant in the dock, and it is troubling in terms of the messages it could convey to a jury, or at least to an American jury unaccustomed to such a courtroom arrangement.

First, having the defendant behind a glass barrier could convey to an American jury that the defendant is dangerous and needs to be separated from everyone else. In contrast, in an American courtroom, the defendant is seated at the defense counsel's table, next to his lawyer. The defendant is usually dressed appropriately for the courtroom, and his presence next to his counsel makes him seem more like an ordinary person, and therefore, less scary to the jury. In addition, by having the defendant sit next to his counsel, each is able to talk to the other quickly and quietly whenever it is necessary. This arrangement not only helps the defense counsel to represent his client more effectively, but also reminds jurors that the defendant is a human being and is entitled to certain rights in the legal system including the right to counsel and the presumption of innocence.

Second, the jury in an American courtroom can observe the defendant throughout the trial.<sup>177</sup> The defense table is closest to the jury, just as it is at the Old Bailey, but the jury in an American courtroom can watch the defendant throughout the trial because the defendant is next to his lawyer at the defense table. His reactions and body language can be easily observed by the jury. In contrast, at the Old Bailey, the jurors look to the front of the courtroom to see the judge and the witness and look straight ahead to see the defense and prosecution. If the jurors at the Old Bailey want to observe the defendant, they have to look toward the back of the courtroom, at least in the modern courtrooms. Although they can see the defendant, he is not in their line of sight as they watch the activity at the front of the courtroom and straight ahead of them.

Third, the jury in an American courtroom sees each defendant seated next to his or her own counsel, usually at a separate table. In contrast, at the Old Bailey, all of the defendants are seated in the dock together. If one defendant looks penitent, but the other defendant does not, the penitent

177. See, e.g., Mary R. Rose et al., *Goffman on the Jury: Real Jurors' Attention to the 'Offstage' of Trials*, 34 LAW & HUM. BEHAV. 310, 322 (2010) (examining jurors' observations of parties', attorneys', and witnesses' off-stage behavior in 50 civil cases in Arizona and concluding that jurors do not rely heavily on these observations in reaching their verdict, though the authors questioned whether jurors might rely more heavily on off-stage behavior in criminal cases because criminal defendants often do not testify).

defendant might be judged by his association with the other defendant. In one case that I observed, *R v. Alexander and Thomas*, there were two defendants, a black man and a white woman, who were being tried for manslaughter.<sup>178</sup> The black man sat respectfully throughout the trial and the white woman sat impassively. The man appeared dignified, and the woman appeared indifferent. In the end, both were convicted. Although one cannot ascribe their convictions to one defendant's body language, there remains the possibility that it could affect how jurors view them (when they chance to look to the back of the courtroom and observe them).

In another case that I observed at the Old Bailey, there were seven young, black men seated together in a row in the dock.<sup>179</sup> They were on trial for the murder of another young man. They did not act with solemnity in the courtroom; instead, they looked like they were just "hanging out" together. Their body language did not indicate respect for the court proceeding, but rather indifference to it. They were dressed casually and several sat slumped in their chairs. They chatted with each other occasionally. Of course, it could be that they did not understand the proceedings or were just bored by them. But by putting all of the defendants together, they can seem disrespectful of the court in ways that they might not seem if they appear alongside their counsel. In addition, they can seem more threatening as a group or gang and lead jurors to give into their fears or stereotypes. This might be more of a concern in an American courtroom than an English one because American society is more heterogeneous than English society, and it is easier to distrust and to think the worst of someone who is different.<sup>180</sup> Also, when any of the defense needed to consult his or her client, it was typically done through the glass, which did not afford the barrister and his client with any privacy for the consultation.

Thus, having the defendant in the dock rather than next to his lawyer is one practice that is widely accepted at the Old Bailey but that should not be reintroduced into an American courtroom.<sup>181</sup> It would not benefit American jurors or defendants. American jurors are comfortable having the de-

178. *R v. Alexander and Thomas* (Old Bailey, London, Dec. 2010).

179. The case that I observed was *R v. Smith, Mason, Saint, Williams, Lock, Forde-Morgan & Taylor*, which was an ongoing jury trial of which I observed one day sitting in the public gallery and one day sitting in the courtroom. See Notes from the Old Bailey, *supra* note 1.

180. See, e.g., Neil Vidmar, *When All of Us Are Victims: Juror Prejudice and 'Terrorist' Trials*, 78 CHI.-KENT L. REV. 1143, 1152-55 (2003) (describing prejudice against groups of people, such as those of a different race, nationality, religion, or sexual orientation, as "generic prejudice," and focusing on the particular problem of Muslims charged with acts of terrorism and tried by a jury in the United States).

181. See David Tait, *Glass Cages in the Dock?: Presenting the Defendant to the Jury*, 86 CHI.-KENT L. REV. 467, 471-74 (2011) (providing a brief history of the dock in American courtrooms).

defendant appear next to his counsel and are not usually worried about having the defendant so close to them. In fact, it gives them an opportunity to observe the defendant, especially his “off-stage” performance.<sup>182</sup> The central location of the defendant in an American courtroom reminds jurors that they are deciding the defendant’s fate; they are not engaging in an academic exercise. At the same time, the defendant’s location alongside his counsel will facilitate communication with his lawyer and could have a humanizing effect in the eyes of the jurors.

This may be one instance where the English should reconsider their practice, but as Old Bailey security officers kept pointing out to me, Americans might be comfortable having the defendant appear next to counsel because they know that at least in federal courts there are federal marshals with guns waiting to respond at the first sign of danger. There are no guns in the courtrooms at the Old Bailey, and to maintain this practice and yet to provide security, the English use the barrier of the glass-empeneled dock.

### *B. Allowing Majority Verdicts*

Another English jury practice that seems unlikely to assist American jurors is the practice of accepting a “majority verdict” (or, more precisely a super-majority verdict). When a jury is impaneled at the Old Bailey, it consists of twelve jurors.<sup>183</sup> As the trial proceeds, particularly if it is a long trial, there is the chance that a juror may become ill or have a conflict that precludes that juror from continuing his or her jury service. If that situation arises, the jury can continue with fewer than twelve jurors. There are no alternate jurors,<sup>184</sup> as there are in the American jury trial.<sup>185</sup>

At the end of a trial at the Old Bailey, the jury, consisting of as few as nine or as many as twelve jurors,<sup>186</sup> is instructed by the judge that it should

182. See Rose et al., *supra* note 177, at 322 (raising the question whether jurors would rely more heavily on a defendant’s off-stage behavior in a criminal case because criminal defendants often choose not to testify).

183. See, e.g., Vidmar, *supra* note 94, at 30 (“The traditional size of the criminal jury has remained at twelve in England . . . .”); Lloyd-Bostock & Thomas, *supra* note 3, at 68 (“The number of jurors has remained at twelve . . . .”).

184. See Sally Lloyd-Bostock & Cheryl Thomas, *Decline of the “Little Parliament”: Juries and Jury Reform in England and Wales*, 62 LAW & CONTEMP. PROBS. 7, 23 (1999); Notes from the Old Bailey, *supra* note 1. Canada also follows the English practice of not having alternate jurors. See Schuller & Vidmar, *supra* note 92, at 502.

185. See, e.g., FED. R. CRIM. P. 24 (c)(1) (providing up to six alternate jurors in federal court in criminal trials).

186. Compare *supra* note 183 (describing the traditional criminal jury in England as consisting of twelve jurors), with *infra* note 190 (indicating that the criminal jury in England can contain as few as nine jurors).

reach a unanimous verdict.<sup>187</sup> After the jury has deliberated for at least two hours and has reported to the judge that it is having difficulty reaching a unanimous verdict, the judge can decide to accept a majority verdict.<sup>188</sup> With a jury of twelve jurors, the jury can convict or acquit if there is a vote of 11–1 or 10–2.<sup>189</sup> If an eleven-person jury cannot reach a unanimous verdict, a majority of 10–1 can also convict or acquit. With a ten-person jury, a majority verdict of 9–1 can also convict or acquit. However, if there is only a nine-person jury,<sup>190</sup> then all nine jurors must agree on the verdict.<sup>191</sup>

Majority verdicts and juries of fewer than twelve jurors make sense in the English system because there are no peremptory challenges and no alternate jurors, but the American system has both these practices. The American criminal jury need not go below twelve jurors, except when the parties agree or the judge finds there is good cause,<sup>192</sup> because alternate jurors are available.<sup>193</sup> If one juror becomes ill, an alternate juror can take that juror's place.<sup>194</sup> Among the advantages of a twelve-person jury are that it gives the jury a broader range of views to consider and makes it more likely that the jurors will reach a verdict that is line with the views of the larger community.<sup>195</sup> The American jury, unlike its English counterpart, need not render nonunanimous verdicts because theoretically those with extreme views have been removed in advance through for cause and peremptory challenges. The jurors who are actually seated on the jury are acceptable to both sides, and so their views should be listened to and their votes should count in the jury room.

187. See Notes from the Old Bailey, *supra* note 1 (noting that Judge Barker instructed the jury in *R v. Ilene* to “strive for a unanimous verdict on each count” and to “take as long as you need”).

188. See Vidmar, *supra* note 94, at 31; Lloyd-Bostock & Thomas, *supra* note 3, at 86.

189. See Juries Act of 1974, § 17 (Eng.).

190. See Lloyd-Bostock & Thomas, *supra* note 3, at 72 (noting that the criminal jury cannot go below nine jurors).

191. See Notes from the Old Bailey, *supra* note 1.

192. See FED. R. CRIM. P. 23(b)(2)(A) (“the jury may consist of fewer than 12 persons”); FED. R. CRIM. P. 23(b)(2)(B) (“a jury of fewer than 12 persons may return a verdict if the court finds it necessary to excuse a juror for good cause after the trial begins”); FED. R. CRIM. P. 23(b)(3) (“After the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror.”).

193. See FED. R. CRIM. P. 24(c)(1) (“The court may impanel up to 6 alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties.”).

194. See FED. R. CRIM. P. 24(c)(1) (providing up to six alternates “to replace any jurors who are unable to perform or who are disqualified from performing their duties”).

195. See, e.g., PRINCIPLES, *supra* note 12, at 16 (“In light of history and the empirical data these Principles seek to encourage a return to the twelve person jury in all non-petty criminal cases and in all civil cases wherever feasible.”); *id.* (“[L]arger juries in criminal cases are more likely to return verdicts in accord with community verdicts.”); *id.* at 17 (“Twelve person juries are significantly more likely to facilitate representation of minority voices.”).

Although two states, Louisiana and Oregon, permit a criminal jury to render a nonunanimous verdict,<sup>196</sup> all other states require unanimous verdicts in criminal jury trials,<sup>197</sup> though not all states require a twelve-person jury in criminal cases.<sup>198</sup> In federal court, in both civil and criminal cases, unanimity is also required.<sup>199</sup>

A unanimity requirement means that all twelve jurors must agree on the verdict. As a result, in the American jury system, every juror must be listened to and no juror can be ignored because all jurors' votes are needed for a verdict. The unanimity requirement can change the dynamics of jury deliberations. Consider, for example, the movie *12 Angry Men* and its portrayal, albeit fictional, of a jury deliberation.<sup>200</sup> The movie would have ended as soon as the first vote had been taken and was 11–1 for conviction. The other eleven jurors would not have had to persuade Juror #8 (Henry Fonda) if a majority verdict could be accepted. Instead, the jurors must deliberate until everyone agrees on a verdict. Even when only one or two jurors hold a different view from the others, they must be won over. The jurors must continue to deliberate until those with a different view are brought around to the group's view. If unanimity cannot be achieved, then the jury becomes a hung jury, and the prosecution can decide whether to retry the case before a new jury. If the jury does reach a unanimous verdict, then the jury speaks with one voice. A unanimous verdict can reassure the community. If twelve jurors, coming from different walks of life, can agree on a verdict, then the community might be more inclined to accept the verdict even if it does not agree with it.

Although two states do not require unanimity in criminal cases,<sup>201</sup> and occasionally states have considered switching from unanimity to majority

196. See LA. CONST. Art I, § 17(a); LA. C. CR. P. Art. 782; OR. CONST. Art. I § 11; OR. REV. STAT. § 136.450.

197. See Petition for Writ of Certiorari at 5, *Barbour v. Louisiana*, No. 10-689 (Nov. 23, 2010) (challenging a nonunanimous jury verdict in a criminal trial as a violation of the Sixth Amendment and noting that "Louisiana is one of two states that allows a person to be convicted of a felony by less than unanimous jury verdict" and that "Oregon is the other"), *cert. denied*, 79 U.S.L.W. 3468 (U.S. Feb. 22, 2011).

198. The number of jurors on a criminal jury in state court varies, but cannot go below six jurors. See *Ballew v. Georgia*, 435 U.S. 223, 232–38 (1978) (holding that a jury in a state criminal trial cannot go below six jurors).

199. See FED. R. CIV. P. 48 ("Unless the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members."); FED. R. CRIM. P. 31 (requiring unanimous verdicts).

200. *12 ANGRY MEN* (Orion-Nova Productions 1957).

201. See *supra* note 196 (identifying Louisiana and Oregon as the two states that do not require unanimity in criminal jury trials).

verdicts,<sup>202</sup> currently almost all states, and the federal courts, do require unanimity in criminal jury verdicts.<sup>203</sup> Although this requirement makes it harder to secure a conviction, it also means that prosecutors must think carefully before bringing a criminal charge in a case to which a defendant would have a right to a jury trial.<sup>204</sup> The unanimity requirement means that all of the jurors, no matter how disparate their backgrounds and experiences, must agree on the verdict.

In contrast, in a jury trial at the Old Bailey, whenever the jury consists of more than nine jurors, one or two jurors can disagree with the verdict and yet the verdict stands. The disagreement would have to run far deeper in the jury room for a hung jury to result. Thus, a majority verdict means that a jury can ignore the views of one or two jurors if they differ from the group's view. The jury can stop deliberating at an earlier point than an American jury because it does not have to secure the agreement of all the jurors. However, when the verdict is announced at the Old Bailey, the individual jurors are not polled in open court, as they are in federal court in the United States.<sup>205</sup> Instead, the foreperson responds on behalf of the jury to the clerk's questioning as to each count.<sup>206</sup> For example, in *R v. Ilene*, the clerk asked the foreperson whether the defendant was guilty or not guilty as to count one, and whether this was "the verdict of all."<sup>207</sup> The clerk continued with this questioning through all six counts.<sup>208</sup> The foreperson spoke on behalf of the jury and thus the jury spoke with one voice. However, in cases in which the court accepts a majority verdict the jury would not be speaking with one voice, as it would in an American courtroom, where the

202. For example, after the acquittal of O.J. Simpson in a California criminal jury trial, the legislature considered abandoning the unanimity requirement and allowing conviction with a vote of 11-1 or 10-2, though the measures never passed. *See, e.g.*, Assembly Const. Amend. 18, 1995 Cal. Sess. ("This measure would provide that in a criminal action in which either a felony or misdemeanor is charged, 5/6 of the jury may render a verdict, but if the death penalty is sought, only a unanimous jury may render a verdict."); Senate Const. Amend. 24, 1995 Cal. Sess. ("This measure would provide that 11/12 of the jury may render a verdict in any criminal action except an action in which the death penalty is sought or in which a defendant may be sentenced to a term of imprisonment for life without the possibility of parole."); Jan Crawford Greenburg & Ginger Orr, *Simpson Trial Yields a Verdict Against the System*, NEWS TRIB. (Tacoma, Wash.), Oct. 8, 1995, at F1 ("State legislators in California have responded to the [Simpson] trial by introducing legislation to change the jury system. . . . [One change] would do away with the requirement that juries be unanimous in their decisions.").

203. *See supra* note 196 (identifying Louisiana and Oregon); FED. R. CRIM. P. 31.

204. The Supreme Court has held that a criminal defendant has a Sixth Amendment right to a jury trial only for "serious" crimes in which the defendant can potentially be imprisoned for more than six months. *See, e.g.*, *Blanton v. City of N. Las Vegas, Nev.*, 489 U.S. 538 (1989); *United States v. Nachtigal*, 507 U.S. 1 (1993) (per curiam).

205. *See supra* note 196 (providing for polling of individual jurors).

206. *See* Notes from the Old Bailey, *supra* note 1.

207. *Id.*

208. *Id.*

verdict must be the verdict of the entire jury and each individual juror must acknowledge as much in open court.

#### CONCLUSION

The two weeks that I spent observing jury trials at the Old Bailey in London made a deep impression on me. My time there taught me that English and American jury systems have much in common, from the tools that both systems provide jurors to perform their jobs effectively to the values that both systems try to foster, such as respect for the important task performed by jurors. Both systems struggle with similar challenges and take similar approaches on a number of issues, such as how to protect jurors from outside influences such as the Internet. The solution that one system comes up with might very well be an aid to the other system if we are willing to look abroad for ideas.

My time at the Old Bailey also taught me that much can be learned from differences between the two jury systems. There are practices that American courts can borrow immediately from the Old Bailey that would help jurors perform their job more effectively, such as giving jurors a jury bundle and providing them with instructions that they can understand. There are also practices that might take awhile to introduce into the American jury system, but that would be beneficial to jurors, such as the elimination of peremptory challenges, the protection of juror privacy after a verdict, and a summing up of the evidence by the judge. There are also some practices that work well in the English jury system, but that should not be introduced into the American jury system, such as isolating the defendant in the dock and accepting a majority verdict from the jury.

Perhaps the most important lesson that I took away from this experience is that there is no one way to design a jury system and that practices that work well in one country might work well in another. We can learn much from the jury system at the Old Bailey, and we need to be open to the possibility that we can borrow practices from another country's jury system and introduce them into our own system. There is a place for new ideas and practices even in an institution as longstanding and well regarded as the American jury.



