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# Innovations for Improving Courtroom Communications and Views from Appellate Courts

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## Panel Two: Innovations for Improving Courtroom Communications and Views from Appellate Courts

PANELISTS: THE HONORABLE B. MICHAEL DANN, Judge, Superior Court of Arizona for Maricopa County  
THE HONORABLE JAMES D. HEIPLE, Justice, Supreme Court of Illinois  
MICHAEL J. SAKS, Professor of Law and Psychology, University of Iowa  
THE HONORABLE PATRICIA MCGOWAN WALD, Judge, United States Court of Appeals for the District of Columbia

MODERATOR: PETER DAVID BLANCK, Professor of Law, University of Iowa College of Law; Senior Fellow, The Annenberg Washington Program

MR. BLANCK. Let us begin our second panel. I am sure that we all found our first panel very interesting and stimulating, with many issues for further discussion. I might mention that my article, which will appear in the *Indiana Law Journal* as a result of this conference, will reflect an empirical study in Iowa on some fifty trials observed in their entirety.<sup>1</sup> In that study, we are particularly interested in the strength and complexity of the evidence and the interpersonal behavior of the judge in each case. We explore not only the judges' behavior in that study, but also the witnesses' and experts' behaviors. The Iowa Study is an effort to fill in some of the holes that the Stanford Study discussed in Panel One just began to address.

Now, I thought I would start this second panel discussion with Judge Dann, joining us from Arizona, who has recently finished a thesis in the area of educating and communicating with juries.<sup>2</sup> I will put the first question to him.

In your experience, Judge Dann, what sort of innovations of soft or hard technologies have you tried, and how effective have you found them to be in terms of enhancing juror comprehension and reducing bias in the courtroom?

JUDGE DANN: Well, Peter, I think of soft technology in terms of examining how we communicate interpersonally with the jurors, lawyers, judges, witnesses, and so forth. The hard technology is, of course, the exhibits and everything else that technology and science is serving up that might serve also

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1. Peter D. Blanck, *Calibrating the Scales of Justice: Studying Judges' Behavior in Bench Trials*, 68 IND. L.J. 1119 (1993).

2. An updated and edited version of the thesis is published at B. Michael Dann, "Learning Lessons" and "Speaking Rights": *Creating Educated and Democratic Juries*, 68 IND. L.J. 1229 (1993).

to communicate or illustrate information for the jury I am sure we will hear a lot about that today

My greatest interest is studying the trial process, the classic adversarial model, and thinking about ways to modify it to include more of an educational objective. I would start by taking a look at what many of the social scientists are presenting, their findings and conclusions. I would borrow from the educational psychologists' accepted principles of effective communication necessary for learning. I find that our present and past—indeed, centuries old—model of trial has not changed all that much over those several hundred years. The pretrial has changed. The trial process itself has not. The jurors are suffering as a result of it, as the studies show<sup>3</sup> I assume, then, that the verdicts and their accuracy are also suffering. The institution of the jury is weakened.

But based on all that, the literature and what many judges are doing suggests some innovative techniques to make the trial more of a learning experience for jurors. By introducing two-way interactive communication into the courtroom, a principle that underlies effective teaching in the classroom, jurors will become more actively involved in the process. A number of these techniques have been tried by many judges and have been suggested by the literature.<sup>4</sup>

Much of what I have done is to collect the work of others, up through 1991, with the hope that judges and lawyers will take advantage of this accumulated literature and wisdom and begin to change their ways. Frankly, I think that much of the problem has to do with the common denominator shared by lawyers and judges: their legal education. Their legal education inhibits them, I believe, from being more open-minded to the findings of social scientists. It ties them to the past, to the model of the jury we inherited from England, and invests them in the current adversarial model for trial.

Lawyers and judges are very hesitant to modify that current model—the game theory that prevails at many trials. They are unwilling to modify it substantially to take into account the needs of jurors. So much of what we have talked about this morning, and maybe for the rest of the day, will have some implications for legal education as well. Legal education does sharpen the mind, no question about it, but it does so by narrowing the mind in many respects.

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3. *Id.* at 1230 & n.5.

4. *See, e.g.*, CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM: REPORT FROM AN AMERICAN BAR ASSOCIATION/BROOKINGS SYMPOSIUM (1992); AMERICAN JUDICATURE SOC'Y, TOWARD MORE ACTIVE JURIES: TAKING NOTES AND ASKING QUESTIONS (1991).

Here are some specific ideas for allowing jurors to be more actively involved in the trial process that are being stressed today: case-specific juror orientation;<sup>5</sup> mini-opening statements before jury selection;<sup>6</sup> meaningful preliminary jury instructions;<sup>7</sup> the importance of a juror notebook in a complex case;<sup>8</sup> six or eight different types of things or information that could go into a juror's notebook in a complex case;<sup>9</sup> and permitting note taking by jurors.<sup>10</sup>

Another factor in jury education is the importance of document control. The major sources of juror confusion and lack of comprehension are the number and nature of exhibits, the failure of lawyers and judges to point out which exhibits are important and which are not, and how the jury is expected to retrieve them during deliberations if they are not given a system for document control during deliberations. Two additional factors are: (1) permitting questions of witnesses by jurors, which is being done by some judges, but not enough, and (2) permitting interim summaries.<sup>11</sup> The *Westmoreland v. CBS* trial, mentioned earlier,<sup>12</sup> is an example of where some of these approaches have been used.

Of course, there is a whole body of studies that has been published about the final instructions of law, their content and style, that has been around for some time.<sup>13</sup> Still, lawyers, judges, and bar committees fail to take it into account when preparing even current, so-called modern sets of pattern jury instructions.

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5. E.g., ARTHUR AUSTIN, *COMPLEX LITIGATION CONFRONTS THE JURY SYSTEM* 101 (1984); David Strawn & G. Thomas Munsterman, *Helping Juries Handle Complex Cases*, 65 *JUDICATURE* 444, 446-47 (1982).

6. E.g., Strawn & Munsterman, *supra* note 5, at 446-47.

7. E.g., SPECIAL COMM. ON JURY COMPREHENSION, AM. BAR ASS'N, *JURY COMPREHENSION IN COMPLEX CASES* 614-17 (1989) [hereinafter *JURY COMPREHENSION*]; VALERIE HANS & NEIL VIDMAR, *JUDGING THE JURY* 122-23 (1986).

8. E.g., *JURY COMPREHENSION*, *supra* note 7, at 36-37; AUSTIN, *supra* note 5, at 100.

9. E.g., AUSTIN, *supra* note 5, at 100.

10. E.g., AMERICAN JUDICATURE SOC'Y, *supra* note 4, at 14; *JURY COMPREHENSION*, *supra* note 7, at 602-06; HANS & VIDMAR, *supra* note 7, at 123.

11. See William Schwarzer, *Reforming Jury Trials*, 1990 U. CHI. LEGAL F. 119, 144-45; Patrick Higginbotham, *Juries and the Complex Case: Observations about the Current Debate*, in *THE AMERICAN CIVIL JURY: FINAL REPORT OF THE 1986 CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES* 69, 77 (The Roscoe Pound American Trial Lawyers Foundation 1987).

12. *Communicating with Juries, Panel One: Judge-Jury Communications: Improving Communications and Understanding Bias*, *The Annenberg Washington Program Conference, April 10, 1992*, 68 *IND. L.J.* 1037, 1058 (1993) (comment by audience member).

13. E.g., JEROME FRANK, *COURTS ON TRIAL* 149-50 (1949); *JURY COMPREHENSION*, *supra* note 7, at 24-57; Walter Steele & Elizabeth Thornburg, *Jury Instruction: A Persistent Failure to Communicate*, 74 *JUDICATURE* 249 (1991).

The timing of final instructions is also important. Some judges, for example, prefer giving final instructions before the closing argument of counsel rather than after. In tradition, indeed, some rules may call for final instructions to be read by the trial judge after counsel argue their cases. Studies show that giving those instructions before argument and providing written copies for the jurors aids comprehension.<sup>14</sup>

At the end of the reading and giving of the instructions, judges should consider asking the jurors before they retire if they have any questions concerning what they just heard and read. When I ran that suggestion by a group of trial judges in Arizona, they almost hooted me out of the room. They were concerned about taking questions on a spontaneous basis—afraid, I think, of slipping, of being embarrassed in front of the jury, or, perhaps mostly, of appellate reversal.

Two suggestions I wrote about have not been talked about very much—except for the first one, which Judge Schwarzer has written about quite a bit.<sup>15</sup> First, I suggest instructing jurors at the beginning of trial that they don't need to keep their mouths shut during the trial; that they can talk to each other about the evidence as it comes in—the exhibits, the testimony, and so forth—within limits and in a structured way, but so long as they do not make up their minds about the ultimate issues—who should win, guilt or innocence—and so long as they do not talk to anyone other than fellow jurors about the evidence.

Jurors have a natural desire to talk to someone about the case as it is unfolding in front of them. There is a suggestion, which needs to be documented through studies, that comprehension will improve if they can talk to each other during the trial.

Second, I suggest a solution to the problem of the jury at an impasse. We are familiar with the contents of the first note we receive from a jury when they do not think they can reach a verdict in the case. Sometimes they ask for help and sometimes they do not. One of the problems is that they do not even know that they can ask for help. But how do we respond to those first notes? Typically we bring the jury in and read them this ritual: "Hold to your conviction but share, be willing to listen, change your position if you are convinced but only if you are convinced. It is important that you reach a verdict, but I do not mean to force a verdict. Go back and deliberate."

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14. JURY COMPREHENSION, *supra* note 7, at 51-52, 622-26; Committee on Federal Courts of the N.Y. State Bar Ass'n, *Improving Jury Comprehension in Complex Civil Litigation*, 62 ST. JOHN'S L. REV. 549, 565 (1988).

15. Schwarzer, *supra* note 11, at 142.

My suggestion is that we should have an interactive communication process at that point. We should instruct the jurors, in writing, orally, or both, that if they are having a problem reaching a verdict, they should write down the issues dividing them, which could be further addressed by the judge or the lawyers.

This has been tried recently in Phoenix in two major cases, a homicide case and a sexual assault case. In both cases, the juries still deadlocked and mistrials resulted, but my point is that we could save a lot of time, trouble, expense, and anguish by keeping the dialogue going from the outset of the trial right to the verdict.

MR. BLANCK. We have been working also with Judge Hershfang, who is here today from Boston, on the issue of juror comprehension. After the Stanford Study, we started discussions about developing standardized, as well as particularized, instruction videotapes for jurors. Instead of the judges pulling a particular section out of the instruction book, they would pick, for example, section 006 to 012 on the videotape and play that. This might further inform the jury and alleviate some of the nonverbal biases that otherwise might come across.

Well, Judge Dann's comments are very informative. I thought we would get the appellate court judges, Judge Wald and Justice Heiple, involved a little bit at this point. Judge Wald, are we talking about an issue here that has impact for what you do on a daily basis?

JUDGE WALD: Well, we do hear criminal appeals on a daily basis in the D.C. Circuit. The number of criminal appeals, where jury trials are typically featured more prominently than in civil cases, has gone up from something like four percent to eighteen percent of our docket in a couple of years. But in a little unscientific survey in preparation for this panel, I looked over the last twenty-five or thirty criminal cases that we have had on review and found that in only two of those cases was error in the trial court's instructions to the jury used as a ground for review.

Of course, that is only the D.C. Circuit, which may be totally different from other courts, both state and federal. But if in fact these results turn out to be at all typical, I might suggest that the trial courts' fears of appellate reversal might be one of those self-fulfilling prophecies that we heard so much about earlier on.

My impression in our court certainly is that we are very reluctant to overturn a jury verdict on the grounds of some, even a conceded, error in the instruction, and we are perhaps even more reluctant to overturn a jury verdict on the ground of alleged bias on the part of the trial court.

I just pulled out one of these two cases that involved jury instructions;<sup>16</sup> this was a case in which I sat on the panel, written about a month ago by Judge Buckley, whose last year's law clerk is here. In that particular case, the trial judge, without question, had made an error in the jury instruction. He had told the jury in a drug case that if they found that the defendant "knew or had cause to know" that the drugs were going to be sold for distribution, et cetera, then they could find him guilty

In this particular statute, there was no question that "had cause to know" was wrong. There was an absolute necessity for scienter, and it was so alleged in the indictment. And so, there you did have an error. Nonetheless, the panel on review unanimously found that no miscarriage of justice had resulted. Their opinion said, "In deciding whether jury instructions are plainly erroneous, we consider the evidence introduced at trial, the arguments of counsel, and the content of the entire jury instruction."<sup>17</sup>

Here there was substantial evidence of the defendant's actual knowledge. The opinion cites the closing argument of both the defense counsel and the prosecution to show that they honed in very specifically on the evidence or lack thereof of actual knowledge. Finally, it said that although the district court erred in instructing the jury, it mitigated the effects by reading the indictment to the jury, which contained the proper requirement, and by allowing them to take a copy of it to the jury room during deliberations.<sup>18</sup>

All of that goes to show you that, at least in our court, there is, for all the reasons that we heard before, a reluctance on the part of our appellate court to pull any one small error out and say, "Ah ha, that is it." Therefore, we do not see many successful appeals on instructions. We occasionally see bias of a trial judge alleged, but it has been rare; I cannot think of any example where it has been successful in the thirteen years that I have been on the appellate court.

Now, with that, I would like to make a couple of points. Our standard in appeal is whether error is harmless. I do not know that we appellate judges have any clue as to what kind of error affects or does not affect a juror. We know the verbal jargon. We know how to say, "Surely, in the context of all the other evidence, et cetera, et cetera, et cetera, this could not have influenced a reasonable jury." But we do not know what kinds of things that happen in a trial court actually affect jurors.

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16. *United States v. Chan Chun-Yin*, 958 F.2d 440 (D.C. Cir. 1992).

17. *Id.* at 444.

18. *Id.*

Now that would be a very interesting subject of research and something that we might well benefit from. Most appellate judges, as we have talked about, are not educated in what empirical research there is as to what affects jurors.

The other thing that dawned on me is that we are coming now into an age of an evolving standard for "cameras in the courtroom." I have been around when some proposals and experiments with videotaped trials have gone up on appeal. I wonder if a lot of the subtle forms of communicating the judge's feelings will not be much more exposed in a videotaped trial. Certainly, when we get the bare record on the written page, we do not have any clue. It does not say that the judge raised her eyebrows, but in the videotape it may well be. The videotape may also turn out to be an educative device, too, because judges can look at their own videotape performances and perhaps get some clues from them.

MR. BLANCK. Well, let us go to the videotape, as a New York sportscaster says, and Justice Heiple. You recently authored an opinion with regard to the "day in the life" videos, in terms of their admissibility in the courtroom, at least in Illinois. I would be interested in knowing your thoughts about that and generally your thoughts about what has been going on so far.

JUSTICE HEIPLE: Well, let me say first of all that I am not sure I should be here. I have been at this business for thirty-five years now and have pretty well divided my time between trial work and appellate work. I do not have any settled conclusions on much of this whole area, except in a couple of ways.

I have over my lifetime of practice developed a growing dissatisfaction and disrespect for the jury system as such. So I am not going to really directly answer your question, but I will get into it. From my perspective, the jury trial serves criminal defense lawyers and plaintiffs' personal injury lawyers, and it has a purpose so far as they are concerned. Beyond that I am very skeptical of the value of juries and probably, if it were up to me, would abolish juries in civil cases.

Now, having alienated half the audience, I will go on and answer your question. The opinion you are talking about really did not deal with admissibility so much as with the production of the video.<sup>19</sup> This came about in a case where the plaintiff's lawyer was producing a day-in-the-life film of some horribly injured person for presentation to a jury. The defense counsel moved for a protective order to permit an intrusion and an involvement into the production process. In other words, the defense lawyer wanted to be there,

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19. *Cisarik v. Palos Community Hosp.*, 579 N.E.2d 873 (Ill. 1991).



to participate as an observer, to be entitled to have copies of the tapings that were used and not used, and to be a part of the production process.

The trial court granted the protective order. Our appellate court, which is an intermediate court of appeals, modified it slightly and affirmed the order. My opinion, authored for the Illinois Supreme Court, threw out the order based on the grounds that the production of the video was a part of the lawyer's work product. It would be wrong, then, to allow an intrusion at that stage of the proceeding.

The opinion stated that the ultimate product, the day-in-the-life film, when finished, is a piece of evidence; it is a piece of demonstrative evidence in a sense like any other evidence, be it a still picture or a mock-up of a machine or model. So far as its admissibility is concerned, we felt that the judge should look at it. Is it informative? Does it aid the jury in the fact-finding process? Is it fair? We like to avoid the word prejudicial. I never have liked the word prejudicial about evidence. That is another prejudice of mine because if evidence is not prejudicial, why on earth would you want to introduce it in the first place. It is the purpose of evidence to be prejudicial, either for your client or against the other side. But is it unduly inflammatory?

So we viewed it this way. A day-in-the-life film should either come in or not come in on the basis of whether it is proper demonstrative evidence. We did not require the lawyers producing the film to furnish unused footage or meet any of the other demands made by the defense counsel. We did not think it was any of their business.

This sort of problem goes beyond the specific case and the specific trial. It is broader than this case or the production of this film. It involves the issue of to what extent litigation in the broader sense is going to involve continuous interference with the other side in preparation for trial. And that, again, is another field. But I am also of the mind, and this is a part of my prejudice, that the production inquiry phase of litigation has gone much too far.

I view that decision and the court's view as an attempt to preserve the basic adversarial nature of the trial process, to protect the lawyer in his work product, and to limit some of this continuous, unremitting fussing that is going on at the pretrial level between lawyers. Continuous discovery litigation is tying up trial and appellate courts. That decision tried to alleviate it.

MR. BLANCK. Well, I would turn now to law professor and social scientist, Professor Saks. Perhaps you will want to start with those fighting words about abolishing juries. What do you think about what has been said so far?

MR. SAKS: Well, maybe that is my cue to bring in some information from a few studies about juries. But before doing that I might say that I would not mind seeing an experiment where some jurisdictions completely abolished juries. Depending on the state's constitution, you might have to make some

changes to the judicial article and try that out. One might discover that although it is popular to say juries do not know what they are doing, and that they are dumb and all that, maybe they are a blessing. Maybe the jury serves—

JUSTICE HEIPLE: I think juries are getting noticeably dumber with each year.

MR. SAKS: Maybe you are just getting smarter each year. There are many reasons that have been suggested for why we have the jury system. Judges may beg for the jury to be brought back, if only because the jury serves as a lightning rod for decisions that the public disapproves of. They can point to the jury and say, "Well, you know, what do you expect, they are just dumb jurors. They don't understand. But they are gone now and we have a new crew in, so what can we do about it?" So it has been suggested that the jury may serve as a wonderful lightning rod to protect the judiciary

At the same time, it is interesting to ask about why we think juries get it wrong. A number of speakers have already said some very interesting things on that point. I think about my own students and wonder: if I spoke to them in an incomprehensible language, if I communicated to them in an incomprehensible way, gave them their exams, and then sat around talking to my colleagues about how the students got everything wrong, well, whose fault is that? Mine or theirs?

I will come back to instructions, but let me just take up Justice Heiple's challenge to the jury and share some information. First of all, Kalven and Zeisel conducted the classic research on juries.<sup>20</sup> They got several hundred judges to fill out questionnaires about how they would decide the case that the jury was out deliberating. About half of the cases were criminal and the other half civil. The judge had seen the same evidence. The jury comes back in, what did the jury decide?

Kalven and Zeisel found that judges and juries agreed with each other about eighty percent of the time on what the verdict ought to be.<sup>21</sup> In civil cases, with respect to liability, there was no bias on the part of one or the other.<sup>22</sup> About fifty-five percent of the time the plaintiffs won, and that was as true for judges as it was for juries.<sup>23</sup> This is, I think, a particularly interesting point that really goes to something that Steve Adler suggested.<sup>24</sup>

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20. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966).

21. *Id.* at 63-65.

22. *Id.*

23. *Id.*, see also Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1065 (1964).

24. See *Panel One*, *supra* note 12, at 1040 (comments of Steven Adler).

Kalven and Zeisel redid the analysis, dividing the cases between those that trial judges thought were difficult cases, that is, factually complicated, and those that the judges thought were relatively easy. This is, again, both for civil and criminal cases. They found that the percentage of judge-jury agreement, eighty percent, did not change.<sup>25</sup> When the cases were harder, the judge and the jury still saw the cases the same way, at about the same rate.

This suggests that the juries are hearing the evidence and understanding the facts approximately the same way as the judge does, and maybe that is what is important. The jury is getting the facts and may be deciding the case on its equities. Even if the judges are getting the facts and deciding the case on the law, they are coming out with the same answer.

Here are several other points about findings on juries. More recently, Neil Vidmar conducted some research in North Carolina having to do with the awards made by juries versus the awards made by arbitrators.<sup>26</sup> He used for his research a medical malpractice case that had been decided in arbitration. To make a long story short, the juries awarded amounts no different from what the arbitrators did.<sup>27</sup>

There is a study of federal trials that, again, finds that contrary to what most people generally believe, the judges were more favorable to the plaintiffs than the juries were,<sup>28</sup> although that could be due to the mix of cases that were going to bench trials versus jury trials. I think a somewhat more telling study is one in which judges were asked to predict what the jury's damage award would be if the jury found for the plaintiff.<sup>29</sup> They predicted that the jury would come in with larger awards than the juries generally did. So the judges, who see more juries than any of the rest of us, had expectations of how the juries would behave that were different from how the juries actually did behave.

Let me give one or two more findings. We will get to why things do not go so well, and then I will end with what I hope is a provocative thought.

There has been a good bit of research on jury instructions and the fact that juries do not understand the law as given to them by the judge.<sup>30</sup> Here is one

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25. Kalven, *supra* note 23, at 1066.

26. Neil Vidmar, *The Unfair Criticisms of Medical Malpractice Juries*, 76 JUDICATURE 118 (1992).

27. *Id.* at 123.

28. Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124 (1992).

29. *California Study Measures Performance of 8- and 12-Person Juries*, NATIONAL CENTER FOR STATE COURTS: REPORT, Aug. 1990, at 1.

30. AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982); Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979); Lawrence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 L. & SOC'Y REV. 153 (1982).

example. You take a group of people, give them pattern instructions, and you take another group of people and give them no instructions. Then test their understanding of various legal concepts. What you find is that the uninstructed jurors are equally accurate or inaccurate as the instructed jurors.<sup>31</sup> If the uninstructed jurors get it right thirty-two percent of the time, they both get it right about thirty-two percent of the time.

I had thought this was breakthrough research. It really showed how professors work so hard torturing our law students to learn the law and appellate judges work very, very hard to refine the law and get it just right, and then we turn around and give it to the decision maker in a way that cancels all that out. Then I come here today only to find out that everyone already knows that, including judges, journalists, lawyers, and everybody else, not just the social scientists.

The thought I want to leave you with is that maybe this is not a bad thing. Judges are not stupid. If they have been doing it that way for hundreds of years, maybe there is a reason. And before we decide to improve the accuracy of jurors' understandings, perhaps we are keeping them from understanding for a reason. By analogy, we keep our law students mystified for a while. We say we are doing that for a reason, and maybe we really are.

MR. BLANCK. Judge Dann, is too much education a bad thing or inconsistent with the evolution of our system of justice? What do you think?

JUDGE DANN: I have not had much time to think about that one, but a couple of thoughts occur to me. If jurors come to the courtroom dumb and they remain dumb at the end of the case, then it is our fault. We are simply not doing our job.

Second, where are the jurors today? Are there jurors involved in this conference? Is there a juror, a survivor of a complex case, a member of a panel? Probably not. I doubt it. How many of you have been jurors and sat through and decided a case, civil or criminal? Hands? (Pause.) I see six or eight, but you are probably here in different capacities for different reasons, and it may or may not have occurred to you to share your experiences as a juror and whether your needs were met as a juror.

If we want to know whether a juror's needs are being met, we should ask the jurors themselves. We lawyers and judges have that opportunity every day, at least at the trial court level, but more often than not we do not take advantage of it. We will meet with them frequently, thank them personally, shake their hands, and ask if they have any questions for us about the trial. Some of their questions we cannot answer; we tell them that and send them

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31. *E.g.*, ELWORK ET AL., *supra* note 30, at 13-14.

on their way. The lawyers debrief them for their own private purposes, to hone their trial skills for the future. But seldom, it occurs to me, do we ask them, "Are your needs being met? Were your needs met in this trial, and if not, how can we meet your needs?" I think the jurors, educated or not, have a lot of wonderful things to say to us, and some of that is published in surveys and articles.

JUDGE WALD: I guess I was left a little bit up in the air by Professor Saks's final stimulating thought. First of all, I do not think judges consciously say, "Hey, we really know what is going on here in the subtle dynamics, and let us leave it the way it is." I am not sure that I know what positive value you think may be served by jurors who do not understand the law. Is it that the law is an ass and they are better off if they do not understand it?

I also would like to cover one other point, and that is that the American Bar Association has model criminal justice standards.<sup>32</sup> I sit on the committee that revises them, and we are currently revising the jury standards. That is an invitation for more experts to direct some of their thoughts about how those standards could be improved.

I also want to point out a few recommendations that the committee will make that have been discussed today. These points are draft and have not yet gone through the House of Delegates' approval procedures. The committee is going to recommend that jurors be allowed to take notes and carry those notes into the jury room with them. But at the end of the trial those notes would be collected—I guess so they will not be able to go out and give interviews on the basis of them.

Second, the committee is taking up a recommendation that has been talked about a lot today—that at the very beginning of the trial, first the judge should explain to the jurors all the rules of the game, what is going to happen, and who can communicate with whom. The committee makes a specific recommendation that the instructions should come before the closing argument, and that the jurors should be allowed to take into the jury room, if they so desire, not just a copy of the charges, indictment, and instructions, but any exhibits or writings, unless there is something inherently dangerous about letting them do that.

Finally, the committee will recommend, on these little side-bars when an objection is sustained or overruled, that although the judge may not want to play out the whole legal thing in front of the jurors, he or she make whatever

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32. STANDARDS FOR TRIAL BY JURY §§ 15-3.2, 15-3.6, 15-3.7 (Am. Bar Ass'n Working Draft 1992); *see also* STANDARDS RELATING TO JUROR USE AND MANAGEMENT Standard 12 (Am. Bar Ass'n 1983).

explanation is necessary so that the jury does not draw unfavorable inferences from whether the judge reversed, overruled, or sustained the lawyer's motion.

That is glacial movement, I understand, in the eyes of some of the more interesting experiments that are coming along here, but I do think it at least indicates that some of this information is getting out there to the great unwashed. It is also an invitation for the social science researchers doing some of the more interesting research to get some input before these standards are finished.

Now you can answer my question about why it may be suddenly a good thing that jurors do not understand instructions.

MR. SAKS: Let me give you a little context for this, because I tried to think about why might it be that we have been making the law incomprehensible for jurors for so long. I began by considering the research. There are several bodies of research by several different researchers who evaluated the comprehensibility of jury instructions from the viewpoint of linguists or psycholinguists.<sup>33</sup> The researchers discovered that jurors' comprehension of the law was the same whether they were instructed or not.

Other research took pattern jury instructions and rewrote those instructions so that they would not lose their legal accuracy but that would be psycholinguistically effective so people could understand them.<sup>34</sup> When the researchers used the rewritten instructions, they found that the comprehension rates rose considerably compared to where they had been.<sup>35</sup> Nevertheless, very few courts have paid much attention to this, even when they were well aware of it.

The first case I am aware of where a court took notice of this research and threw out jury instructions as being incomprehensible, and therefore judges in that state could no longer give that particular instruction, involved a causation instruction in California.<sup>36</sup> The study cited in that case was published, I believe, in 1979 by Charrow and Charrow in the *Columbia Law Review*.<sup>37</sup> In 1991, the California Supreme Court basically said, "Well, gee, they found that nobody can make any sense out of that instruction, so let's get rid of it."<sup>38</sup> This is a very rare thing for courts to do, and it is equally rare to try to improve the instructions.

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33. See ELWORK ET AL., *supra* note 30.

34. *Id.*

35. *Id.*

36. *Mitchell v. Gonzales*, 819 P.2d 872 (Cal. 1991); COMMITTEE ON STANDARD JURY INSTRUCTIONS, CIVIL, OF THE SUPERIOR COURT OF LOS ANGELES COUNTY, CALIFORNIA, CALIFORNIA JURY INSTRUCTIONS: CIVIL, BAJI No. 3.75 (Charles A. Long ed., 7th ed. 1986).

37. Charrow & Charrow, *supra* note 30.

38. *Mitchell*, 819 P.2d at 877.

I started thinking why it might be that we somehow do not really want jurors to know what the law is. I wondered what function might that serve, because we seem to be working very hard to keep jurors from understanding. I assume that the law does not do things because it is an ass or because it is stupid, but that the law has some intuition about how to put a system together even if we have not thought about it explicitly

Here is my hunch as to what might be going on. Judge Cordell gave us a big clue when she made a comment very near the end of the last panel that judges are really speaking to the appellate court, not to the jurors.<sup>39</sup> You have at least two audiences, and the audience that is taken more seriously is the appellate court. You want to keep them happy. You want to make sure that the appellate court likes the jury charges.

But I want to say that there is more to it than that. My speculation is that the real audience for instructions from the bench is the entire legal community. It is a chance to restate the instructions for the legal community, not just the appellate courts, but the lawyers and the other judges who read them. It is not usually the jurors who will be reading these instructions, it will be lawyers and trial judges in other cases. So the real, important audience for the law is the legal community. They are the ones who have to get it right.

In the federal courts, there has been a gradual dwindling of the percentage of cases that reach trial.<sup>40</sup> I think we are now down to having only about four percent of filed civil cases going to trial.<sup>41</sup> Justice Heiple's dream is coming true. Juries, to a very great extent, have been abolished. If ninety-seven to ninety-nine percent of the cases are disposed of either on motions or by negotiated settlements, what is really important is for the legal community, the real decision makers of the great majority of cases, to apply the law correctly, uniformly, and consistently.

Now, look at this small fraction of cases that do come to trial. The jury is now free to do particularized justice on the equities of each case. The judge pretends that she is instructing the jury, but she is really talking to all these other lawyers and judges. The jury, by not understanding, is liberated to decide the case on its equities. I want to suggest that this makes institutional sense because the cases that go to trial are the cases where there was considerable ambiguity in the law or the law did not fit well. If the cases are being settled rationally, the cases that go to trial are very strange birds indeed, and perhaps those are the cases that ought to be decided on their equities.

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39. See *Panel One*, *supra* note 12, at 1059 (statement of Judge LaDoris Cordell).

40. Marc Galanter, *The Life and Times of the Big Six; or, The Federal Courts Since the Good Old Days*, 1988 Wis. L. REV. 921, 947-48 & n.100.

41. See *id.*

And last but not least, it keeps juries unpredictable. The unpredictability of juries promotes settlements. If we had only bench trials, the lawyers would be in a better position to anticipate what is going on, and if each one mistakenly thinks that he knows how the case will be decided, they are both going to want to take that case to trial. It is possible that if we got rid of juries we would have more cases going to trial and the backlog would grow. This is all a guess, of course. It could be that we give bad instructions because we do not know any better.

JUDGE WALD: It is a nice theory, and I think in the criminal area it might have been fine five or six years ago, when only the kind of oddball cases where you really do want a community sentiment went to the jury

But throw the Federal Sentencing Guidelines<sup>42</sup> into that mix and it all changes. What you have in our particular circuit may, again, not be reflected throughout the country. The guilty pleas, which make up by far the vast majority of dispositions in criminal cases, have gone down.<sup>43</sup> The number of jury trials has gone up because defense counsel often does not perceive any particular advantage given the Sentencing Guidelines and the way plea bargaining is now done in the shadow of those Guidelines.<sup>44</sup> So an awful lot of typical non-oddball cases in the criminal area are now going to the jury

If we judges ever had that subtle notion of why we did not want to communicate to the juries, I think we have to rethink it in light of the effect of the Sentencing Guidelines on the whole mix.

MR. BLANCK: Let us open this up to the audience now

AUDIENCE MEMBER (Mr. Michael Bromwich): My name is Michael Bromwich. I have been a criminal trial lawyer for about ten years, both in New York and in the Washington, D.C., area, and I have to say that with the minor exception of note taking in a couple of cases, I have not seen any innovations by trial judges in criminal cases. I happen to think that a number of those that have been touched on here today are good. I think that allowing the lawyers during a criminal case to give mini-summations or to explain the context would be extremely helpful for jurors in understanding what is going on in the case.

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42. Under 28 U.S.C. §§ 991-998 (1988), the United States Sentencing Commission promulgates guidelines to govern sentencing in federal courts. The guidelines are binding except where departures are authorized. *See* UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL app. C (1992) (Amendments to Guidelines Manual 1988).

43. The plea rate in the United States District Court for the District of Columbia declined from 69% in 1988 to 44% in 1991. U.S. COURTS FOR THE D.C. CIRCUIT, 1991 ANNUAL REPORT 99.

44. Criminal jury panels in federal courts in the District of Columbia increased from 84 in 1987 to 545 in 1991 (30,000 petit jurors summoned in 1991.) *Id.*



I think it would be very useful for jurors who have questions for witnesses to be given a couple of minutes to write them down, submit them to the trial judge, have the trial judge screen them, and ask only those that are appropriate. But it does not happen.

What I want to ask the judges on this panel is how can we get those kinds of innovations introduced in the system? Is this something that ought to be the responsibility of the bar associations? Is it something that ought to be directly encouraged by district judges or a group of district judges? Is it something that needs to come from on high, the courts of appeals? I think it is important that we have some of these innovations introduced, but it is not happening.

JUDGE DANN: I think the responsibility is a shared one; it is not necessarily the judges, the lawyers, the supreme courts, or the bar associations. A place to start, perhaps, is to take a look at the existing bench/bar committees that are in place. Perhaps we should begin scrapping them or expanding them to include other professionals, to begin with, and former jurors from criminal and civil cases, and put a lot of these ideas out on the table. That is one way we could start.

JUDGE WALD: I am much in line with that. The so-called "red book instructions"<sup>45</sup> in the District of Columbia district court are compiled by a combination of lawyers and judges under the auspices of the District of Columbia Bar Association. It seems to me that this is the place where these innovations should originate. A judge will usually start up, insofar as I can tell from the appellate record, and say, "Well, I'm going to go with the red book instruction on this and that," and then the individual lawyers have to ask for deviations from that to take account of the particular facts in their case. That is your standard product. That is exactly where the kind of interactive dialogue that you talked about should begin.

I am a member of the ABA committee that is going to put out model standards for jurors. Some of these innovations should be preferred in communications with jurors. Mr. Bromwich expressed a little consternation at the notion that judges do not initiate these things. It is too bad that there are not more innovative judges, but I do not think that you should expect them to be the major source of innovation—they are busy people. And I think if there is a social science survey, you cannot count on judges to get the library index of 900 law reviews every month, pick out that survey, and say, "Oh, gee, that's great, I'm really going to put that into operation."

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45. CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA xiv (D.C. Bar Association 1978) ("[M]odel instructions [are] a guide to the legal principles that should be propounded in instructions to the jury, an aid in draftsmanship and a source to facilitate further research.").

I think there has to be a little more activism on the part of either the academy or the bar through judicial conferences and ABA committees to infuse some of this knowledge as it accrues into our practices.

JUDGE DANN: Some judges, Judge Cordell, for example, are innovative enough just to go ahead and try it on their own, whether it is a pilot project involving a handful of judges or just her courtroom. There are always those who try on their own, but most of us need support. We feel that we need to get permission from the litigating bar to try out some of these things in the courtroom. We also need the permission of the appellate courts.

Appellate courts need to be more supportive of innovative trial judges who try these kinds of things. Appellate courts need to develop their own standards regarding the clarity and the comprehensibility of instructions, for example, and to hold trial judges to account for giving incomprehensible jury instructions by making it a ground for reversal.

MR. BLANCK: There is a case out of New York State where an appellate court reversed the lower court's decision because the trial judge had sent in audiotaped instructions before and after closing arguments, and the appellate court found that impermissible.

JUSTICE HEIPLE: If I may chime in on that subject: one thing to bear in mind is that trial lawyers, and it does not matter which side of the case you are on, are wary of the innovative judge. I am not talking about any of the judges here. You have to take the long view of the practice of law and the trial of cases. But we have gone through many, many innovations, maybe not in the last year or the last two years, but pattern jury instructions are an innovation in the law. There has been a tremendous leap forward in the law, both civil and criminal. We have a federal/state system with fifty states and a federal court system that permits a wide degree of innovation that you will not find in any other country in the world. Things may be going on in Iowa that are not going on in Illinois, and so forth, and we look to these things for guidance.

We do innovate. Some judges, courts, and states allow jurors to take notes. Some notes go to the jury room. Some jury instructions go with the jury, some do not. And so forth.

There are various models for comparison that do permit innovation from the reviewing court perspective.<sup>46</sup> Reviewing courts are not intolerant of innovation as such. If a trial judge does something that might be viewed as

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46. Leonard B. Sand & Steven A. Reiss, *A Report on Seven Experiments Conducted by District Court Judges in Second Circuit*, 60 N.Y.U. L. REV. 423 (1985).

innovative, but it is the right thing to do, then the chances are that the court on review will support that.

Having said that, I want to back up just a little bit because I came on pretty strong early on about my own view of juries, and I think I should say something to perhaps undergird that. My basic problem with juries comes from a lifetime of observation and experience. We talk about what we can do in the courtroom with juries, how we instruct them, the demeanor of the judge, nonverbal communications, whether the jurors understand the instructions, and so on. The battle in a lot of cases is lost or won before the trial even commences, that is, at the jury selection stage.

My basic dissatisfaction with the jury system as it currently operates is in the selection process. If we took the first twelve people out of the box, allowed a couple of peremptory strikes, perhaps, and swore the jurors in and went on with the trial, we might have a representative jury. Bear in mind that the jury was supposed to bring to the trial the experience and views of the community at large, a representative sample of the community. We are not getting that at all.

We are getting people who have never heard of the case and who have no education. If they indicate at the voir dire that they have any thoughts on any subject of any kind, they are struck. So you end up with a very low group of people. And what the lawyers on both sides are looking for are jurors who are preconditioned to agree with them, people who can be manipulated, people who already share their own prejudices, and so forth.

So I think the jury selection system is horribly flawed, and that the twelve people you put into the box and the quality of that group is far more important than anything you later tell them, nod to them, read to them, or whatever. You can affect the entire outcome of the trial right there; the lawyers know that, and they are getting away with it. I think that act has to be cleaned up if we are going to have the jury system survive.

AUDIENCE MEMBER (Mr. Bromwich): The problems you are identifying are not universal. In the Eastern District of Virginia, they pick juries in criminal cases in about twenty minutes. In fact, I represented an Iraqi national last summer. In that case, I thought because of the recent victory in Desert Storm, jury selection ought to have taken about two days, and it took twenty minutes. So your experience is not universal, and there are some courts that pick jurors quickly; sometimes too quickly.

JUSTICE HEIPLE: Sure, and that goes back to what I said. We have a federal/state system with a lot of diversity, but you have seen cases where you spend weeks picking juries.

MR. BLANCK: We have time for just a couple of more questions or comments. Professor Saks?

MR. SAKS: We call it "jury selection," but it is really jury elimination, juror exclusion. Neither side can look for the one juror it wants and get that person on. What the lawyers can look for are the ones they do not want and keep them off. If both lawyers are roughly equally competent in doing that, what they are doing is striking the jurors who will be too sympathetic to their adversaries. What you end up doing is selecting a jury that comes more from the middle of the distribution, because the law wisely uses a system of "strikes" rather than "selects."

JUDGE WALD: I have one comment on something that is not precisely what we have been talking about. It is more of an escalation of a phenomenon that has always been in the system, but we have seen a lot of it in the District of Columbia: the problem of the potentially intimidated juror. Here we get communication from someplace else. In one of the major drug trials here, we had allegations that the body language of the spectators in the courtroom toward the jurors, who come from the same communities as the spectators, were repeatedly upsetting the jurors.<sup>48</sup>

The trial judge eventually solved it in a somewhat innovative way, but only after many ups and downs between the trial court and the court of appeals. His solution was a venetian blind situation that kept the jury from being seen by the people in the courtroom. The jurors could see what was going on in the well, but they could not be seen. Predictably, his solution is the subject of an appeal. And we have had a lot of other cases where jurors are contacted at home or out in the hallways and the trial judge has to go through a little hearing as to whether or not the jury has been affected. So the life of a juror is now, at least in these drug trials, further complicated by community communications.

MR. BLANCK. In the *Gotti* case, I believe the jurors' identities were hidden.

JUDGE WALD: Yes, we have had anonymous jurors as well as sequestered jurors, and nobody, not even the judge, knows what their names are.

MR. BLANCK. To the extent that the lawyers are then not able during the trial to receive nonverbal feedback from the jurors about how well they are doing, that is an interesting twist.

The next panel will focus on specific innovations in communications in the courtroom. I thank these folks very much for participating and for allowing me to sit here and to have them respond to questions.

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48. See Patricia M. Wald, *A Report from the Front in the War on Drugs*, 7 GA. ST. U. L. REV. 1, 12 (1990).

