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“Learning Lessons” and “Speaking Rights”: Creating Educated and Democratic Juries

THE HONORABLE B. MICHAEL DANN*

Jurors are rarely brilliant and rarely stupid, but they are treated as both at once.¹

[A] growing body of research [demonstrates] that courts are ignorant of social science, may be hostile to using it as a basis for legal policy, and prefer to base laws on expediency, precedent, and intuition.²

The field cannot well be seen from within the field.³

INTRODUCTION

Appraisals of trial by jury have almost always produced mixed results. On the one hand, there has been strong sentiment toward, if not reverence for, the *institution* of the jury and its place in the democratic firmament. We see no serious effort to abolish trial by jury or even to restrict the right in complex civil cases.⁴

However, concerns and complaints about *jury trials*, and how such trials impact and empower juries in deciding cases, continue to abound. Most critics focus on juror competence, doubting the ability of the average juror to understand, remember, and integrate all the information (evidence and law) given to them in modern-day litigation. Recently, criticism over the way jurors are treated during trials and deliberations has seemed to reach a crescendo, spawning numerous studies and prompting many calls for changes

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1. William W. Schwarzer, *Reforming Jury Trials*, 1990 U. CHI. LEGAL F. 119, 137 (quoting Warren K. Urbom, *Toward Better Treatment of Jurors By Judges*, 61 NEB. L. REV. 409, 425 (1982)), reprinted in 132 F.R.D. 575, 590 (1991).

2. J. Alexander Tanford, *Law Reform by Courts, Legislatures, and Commissions Following Empirical Research on Jury Instructions*, 25 LAW & SOC'Y REV. 155, 166 (1991).

3. RALPH W. EMERSON, *Circles*, in ESSAYS & LECTURES 403, 409 (Joel Porte ed., 1983).

4. For a history of the debate of the so-called “complex case” exception to the Seventh Amendment, see ARTHUR D. AUSTIN, *COMPLEX LITIGATION CONFRONTS THE JURY SYSTEM* 3-7 (1984). For recent calls for the elimination of juries in some complex cases, see Steven J. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190 (1990); Joseph C. Wilkinson, Jr. et al., *A Bicentennial Transition: Modern Alternatives to Seventh Amendment Jury Trial in Complex Cases*, 37 KAN. L. REV. 61 (1988). See generally Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727 (1991).

in the traditional jury trial format.⁵ Judges, lawyers, law teachers, social scientists, jurors themselves, and others have called for an end to the traditional passive role of the juror and urged the utilization of several techniques intended to create more juror participation in trials. Critics claim that these changes will enhance the educational atmosphere in trials and will better enable jurors to comprehend and justly resolve disputes. Many complain that the problem is not with juries but with jury trials and the adversarial process.⁶ Jurors must be allowed greater roles in trials if juries are to remain up to the task of resolving today's disputes and if the institution of trial by jury is to retain its vitality

The aim of this Article is to add to these many discussions in at least four ways. First, I demonstrate how and why the role of the jury changed over time from one of active participation to one of passivity today. These changes occurred primarily because of the gradual seizure of power and control over the trial by lawyers and judges and the simultaneous development of the adversarial trial. The retention of juror passivity is now thought to be essential to the preservation of the adversarial trial in its present form. Thus, implementation of many of the suggestions commentators have made to improve the jury trial process would be seen as "threatening" the current balance of power that judges and lawyers have over the trial itself, a disquieting prospect to many judges and lawyers. This power and control is jealously guarded, in large part, due to the inherent distrust of juries harbored by many lawyers and judges. However, the jury, a key democratic institution, could in fact be strengthened by a reallocation of such power and control.

Second, I demonstrate that modern social science research and commonly accepted principles of psychology and education have exploded traditional legal assumptions and myths about juror behavior in general and learning and decision making by juries in particular. These research findings and accepted classroom techniques should cause those of us involved in trial work—judges, lawyers, and court administrators—to reexamine how we conduct jury trials,

5. Recent influential works and studies include: *Jury Comprehension in Complex Cases*, 1989 A.B.A. LITIG. SEC. REP. [hereinafter A.B.A. REPORT]; AMERICAN JUDICATURE SOC'Y, TOWARD MORE ACTIVE JURIES: TAKING NOTES & ASKING QUESTIONS (1991); AUSTIN, *supra* note 4; JOHN GUNTHER, THE JURY IN AMERICA (1988); SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL. PSYCHOLOGICAL PERSPECTIVES (1988); MOLLY SELVIN & LARRY PICUS, THE DEBATE OVER JURY PERFORMANCE (Rand Institute for Civil Justice 1987); Friedland, *supra* note 4; Symposium, *The Role of the Jury in Civil Dispute Resolution*, 1990 U. CHI. LEGAL F 1 (see especially Schwarzer, *supra* note 1).

6. E.g., KASSIN & WRIGHTSMAN, *supra* note 5, at 215-16; SELVIN & PICUS, *supra* note 5, at 45-46 & n.7; Mark A. Frankel, *A Trial Judge's Perspective on Providing Tools for Rational Jury Decisionmaking*, 85 NW. U. L. REV. 221 (1990); Arthur D. Austin, *Why Jurors Don't Heed the Trial*, NAT'L L.J., Aug. 12, 1985, at 15.

with a view to improving the educational component of trials and the quality of verdicts.

Next, I briefly survey the most commonly suggested techniques for improving juror participation at trial. After noting the social science data and legal arguments regarding each one, I assess their value in terms of their potential for enhancing the educational objective of the trial and a democratic courtroom.

Finally, I propose and discuss two techniques that have received only modest or, in one instance, no attention in the otherwise nearly exhaustive literature on this subject. Both ideas deserve and require further evaluation, such as field testing where results can be quantified and compared to control groups. Both procedures hold much promise: (1) permitting jurors to discuss the evidence as it is received, but only among themselves and after being instructed to withhold any decision on the outcome; and (2) asking jurors who are at an impasse and heading toward deadlock whether court or counsel can be of help to them in reaching a verdict by addressing issues of fact or law that divide them. These procedures have the potential for increasing juror understanding and recollection of evidence and, in the latter case, avoiding needless and costly mistrials due to juries that hang. If we give jurors an opportunity to ask for and receive help, they might be able to conclude such cases accurately and fairly

I. FROM ACTIVE TO PASSIVE: A PRODUCT OF THE STRUGGLE FOR CONTROL OF THE TRIAL

Early English juries were extremely active in the trial process. The gradual transformation in the jury's role was due in large part to a struggle for power and control over the trial that was successfully waged by lawyers and judges. The resulting model for American juries, and one that by and large is still followed today, severely compromises the jury's ability to understand the evidence and law and to render an accurate verdict. Although these restrictions also denigrate the jury as a democratic institution—because they help perpetuate the near complete control by lawyers and judges thought necessary to sustain the present adversarial trial system—change remains difficult.

A. The Early Jury

The jury had its origin not in England, but on the Continent. Frankish royalty relied upon local members of the community to respond to summonses to appear before the king to report on local conditions. Called the *inquisitio*,

citizens participated by informing, not deciding. It was this active model for the jury that was exported to England as a result of the Norman Conquest.⁷

The earliest English juries bore a striking resemblance to their counterpart, the *inquisitio*, at least in terms of composition and activism. Beginning with the reign of William the Conqueror, and for hundreds of years thereafter, juries consisted of neighbors summoned by the sheriff to settle a dispute, not by judgment, but by "declar[ing] the truth" on the basis of their own knowledge.⁸ Referred to as "the country,"⁹ these jurors were "integrated into the fabric of the proceedings."¹⁰ Beginning with the sheriff's call,¹¹ those summoned were expected to investigate the facts if they did not know them; indeed, talking with the parties and among themselves about the case prior to trial was commonplace for jurors.¹²

By the late thirteenth century, this form of jury trial had reached its apex.¹³ At about this same time, the requirement that the juror have prior firsthand knowledge of the case began to be relaxed. Juries began to receive evidence in court and to consider statements in the pleadings and of counsel while retaining the ability to ask questions of the witnesses.¹⁴ As time passed, jurors came to rely more and more upon trial testimony and other evidence, and by the sixteenth century use of sworn witnesses was the norm.¹⁵ A century or two later, jurors were considered strictly judges of the facts, not witnesses.¹⁶ Nevertheless, jurors continued to ask questions of

7. 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 312 (1903); 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW 140-42 (2d ed. 1898) (noting that Englishmen have a "disinclination to admit that this 'palladium of our liberties' is in its origin not English but Frankish, not popular but royal").

8. BLACKSTONE'S COMMENTARIES ON THE LAW 673-77 (Bernard C. Gavit ed., 1941) [hereinafter BLACKSTONE]; 1 POLLOCK & MAITLAND, *supra* note 7, at 138-43.

9. BLACKSTONE, *supra* note 8, at 673 (discussing trial *per pais*, or by "the country"); 2 POLLOCK & MAITLAND, *supra* note 7, at 623 (explaining that, by bringing a question before a jury, the parties agreed to "be bound by a verdict of the country").

10. Austin, *supra* note 6, at 18.

11. BLACKSTONE, *supra* note 8, at 674; 2 POLLOCK & MAITLAND, *supra* note 7, at 621 (noting that the sheriff was directed to summon those "through whom the truth of the matter may be best known").

12. BLACKSTONE, *supra* note 8, at 677; 2 POLLOCK & MAITLAND, *supra* note 7, at 624-27 (stating that the call was received well before trial so jurors would have time to "certify themselves" of the facts).

13. 2 POLLOCK & MAITLAND, *supra* note 7, at 620, 641.

14. *Id.* at 628; HOLDSWORTH, *supra* note 7, at 334.

15. HOLDSWORTH, *supra* note 7, at 334 (stating that sworn testimony was general practice in the 16th century); THEODORE F. PLUCKNETT, A CONCISE HISTORY OF COMMON LAW 129-30 (Little, Brown, 5th ed. 1956) (1929) (discussing the nature of jury examination).

16. HOLDSWORTH, *supra* note 7, at 336; Joseph M. Hassett, *A Jury's Pre-trial Knowledge in Historical Perspective*, 43 LAW & CONTEMP. PROBS. 155, 158-60 (1980); *cf.* FED. R. EVID. 606(a) (prohibiting modern jurors from being witnesses in case).

witnesses without the permission of the court. In fact, juror questions could not be prohibited by the judge, given the jurors' oath to get at the truth.¹⁷

Early juries exercised considerable clout in England, the Magna Carta having enshrined the right to trial by jury in civil and criminal cases.¹⁸ Lacking in rules of evidence and other directions from the judge, the jury's rationale was inscrutable. Its verdict was virtually unreviewable, and compared to the judgment of the Divine.¹⁹ It is against this tradition of powerful and active juries that the legal and judicial professions began to assert themselves and to impose legal constraints upon powerful and traditionally active juries.

B. The Struggle for Control Over Trials in England

Advocates trained in law did not appear at trials in any great numbers until the fourteenth century, well after jury trials had become commonplace.²⁰ Nor did rules of evidence, directions from the court, or other positive legislation exist to constrain medieval juries.²¹ The slow, evolutionary change of jurors from witnesses of the facts to judges of the facts²² reduced juror activism.²³ While the emerging trial bar may have had a helping hand in this evolution, the bench imposed the first known overt restriction upon juries—the writ of attain. If the judge disagreed strongly enough with a jury's returned verdict, the judge could use a writ of attain. The jury would be imprisoned, and the verdict vacated, on the theory that the jurors perjured themselves in their capacities as witnesses.²⁴ As intended, the inhibiting effect upon juries was direct and substantial. As the role of the jury changed, however, this severe

17. DANIEL ROLLINS, *THE ENGLISHMAN'S RIGHT: A DIALOGUE IN RELATION TO TRIAL BY JURY* 19-20 (1883).

18. *Id.* at 13.

19. HOLDSWORTH, *supra* note 7, at 317 (noting that the jury verdict "inherited the inscrutability of the judgments of God").

20. Morris S. Arnold, *Law and Fact in the Medieval Jury Trial: Out of Sight, Out of Mind*, 18 AM. J.L. HIST. 267, 274 (1974).

21. *Id.* at 275, 279.

22. See *supra* notes 11-16 and accompanying text; see also Murray Levine et al., *The Impact of Rules of Jury Deliberation on Group Decision Processes*, in PERSPECTIVES IN LAW AND PSYCHOLOGY: THE TRIAL PROCESS 263, 264 (Bruce D. Sales ed., 1981) (discussing the change from decisions based on personal knowledge to evidence presented); JOHN PROFFATT, A TREATISE ON TRIAL BY JURY § 34, at 50-51 (1876) (discussing jurors as judges of the facts). Other reasons for this shift in roles remain obscure. "Demographic changes and resulting logistical limitations were also thought to play a role." Lisa M. Harms, Comment, *The Questioning of Witnesses by Jurors*, 27 AM. U. L. REV. 127, 138 (1977) (stating that juries could only consider in-court evidence).

23. Austin, *supra* note 6, at 18.

24. HOLDSWORTH, *supra* note 7, at 337-41; William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731, 733-34 (1981); Harms, *supra* note 22, at 138.

and controversial remedy was used less and less until it was finally abolished in 1670 in *Bushell's Case*.²⁵

Although the procedure of attainr was important in that it marked the first major effort at asserting legal control over juries, its use cannot account solely for the change in the role of jurors. The abolition of attainr, which was replaced by the motion for new trial as a means of providing judicial oversight of the jury's verdict, is thought to have substantially reduced juror activism.²⁶ The trend toward hearing most, and soon all, of the evidence in court was accelerated since the judge could only compare the verdict to the evidence if the judge had heard the evidence in court.²⁷

However, it was the emergence of a professional trial bar, and what followed in the way of rules and procedures for trials, that had the greatest impact on the future role of juries. By mid-sixteenth century, an "elite lawyer class arose, jealous of its prerogatives and insistent on preserving for itself the function of law making and law finding."²⁸ During this time, lawyers' guilds were at their strongest, and "the struggle for control over the jury came to a head."²⁹ Numerous controls over the jury's relative autonomy and activism were put in place by the architects and stewards of an emerging adversary system. Rules of evidence emerged as a way of limiting and controlling the information available to the jury and how it was received. Thus, jurors became dependent on others for facts, "modern courts hav[ing] learned the method of evidence."³⁰ As the methods of jury selection were refined,³¹ the practice of challenging jurors for cause arose.³² Case-specific legal instructions and other directions from the judge became commonplace,³³ along with

25. 124 Eng. Rep. 1006 (C.P. 1670); see HOLDSWORTH, *supra* note 7, at 340-41, 345-46.

26. Jeffrey S. Berkowitz, Note, *Breaking the Silence: Should Jurors be Allowed to Question Witnesses During Trial?*, 44 VAND. L. REV. 117, 123-24 (1991); Harms, *supra* note 22, at 138-39.

27. HOLDSWORTH, *supra* note 7, at 341-42; Schwarzer, *supra* note 24, at 733-34 (discussing jury decisions based on trial evidence rather than personal experience); Harms, *supra* note 22, at 138 (discussing jury consideration of only evidence presented before judge).

28. Arnold, *supra* note 20, at 279.

29. *Id.*

30. MELVILLE M. BIGELOW, PAPERS ON THE LEGAL HISTORY OF GOVERNMENT 183 (1920). Much of the supply of facts which the old jury had to draw upon has been put out of court, and confusion has been added to much that has been kept. It comes to this: the old jury had a complete supply of material not properly prepared; the modern jury has an incomplete supply of material properly prepared.

Id. "[R]ules of evidence represent the most careful attempt to control the processes of communication to be found outside a laboratory." Edward W. Cleary, *Evidence as a Problem in Communicating*, 5 VAND. L. REV. 277, 282 (1952).

31. See HOLDSWORTH, *supra* note 7, at 336 (discussing increased organization in the trial system).

32. *Id.* at 336-37.

33. See Schwarzer, *supra* note 24, at 733-34.

the device of discharging deadlocked juries.³⁴ Appellate review was added, the effect of which was to further control jury action.³⁵

C. "Coming to America"

Vestiges of English juror activism in the fact-finding process were thought to last until the early eighteenth century.³⁶ Thus, the jury model available to the colonies was one based on almost total jury passivity. No later than the early seventeenth century, at about the time King James provided for trial by jury in his first instructions to the Colony of Virginia,³⁷ the process of jury transformation was thought complete. No longer active witnesses to the facts, jurors had become passive judges of what evidence the parties chose to present and which proof the law of evidence allowed.³⁸ This transition, from the role of an active fact finder "integrated into the fabric of the proceeding" to that of a "passive fact finder" required to passively listen to and choose between the parties' evidence, has been characterized as ironic³⁹ and illogical.⁴⁰

Many of the customs and practices surrounding English jury trials at the time of colonization were eventually inherited by the new nation and enshrined as interpretive materials to the Sixth and Seventh Amendments' guarantees of trial by jury.⁴¹ Our centuries-old inheritance continues to influence, if not control, current judicial customs and rituals concerning jury trials.⁴² To this inheritance the legal system has added an "elaborate set of rules designed to regulate the traffic of information in the courtroom."⁴³ These customs, rituals, and rules combine to produce a well-orchestrated jury trial, but one of questionable efficacy given that they support a model of the

34. See HOLDSWORTH, *supra* note 7, at 347.

35. See Schwarzer, *supra* note 24, at 733-34.

36. Hassett, *supra* note 16, at 163.

37. LLOYD E. MOORE, *THE JURY: TOOL OF KINGS, "PALLADIUM OF LIBERTY"* 97-101 (2d ed. 1988).

38. PROFFATT, *supra* note 22, 50-51; HOLDSWORTH, *supra* note 7, at 334-36; PLUCKNETT, *supra* note 15, at 130.

39. Austin, *supra* note 6, at 18.

40. Berkowitz, *supra* note 26, at 123-24.

41. See *Tull v. United States*, 481 U.S. 412, 417 (1987); *Gannett Co. v. De Pasquale*, 443 U.S. 368, 384-87 (1979).

42. KASSIN & WRIGHTSMAN, *supra* note 5, at 215-16; SELVIN & PICUS, *supra* note 5, at 63; Roger W. Kirst, *Finding a Role for the Civil Jury in Modern Litigation*, 69 *JUDICATURE* 333, 333-34 (1986); Schwarzer, *supra* note 1, at 145-46; David U. Strawn & G. Thomas Buchanan, *Jury Confusion: A Threat to Justice*, 59 *JUDICATURE* 478, 483 (1976).

43. KASSIN & WRIGHTSMAN, *supra* note 5, at 65.

jury that is excessively passive.⁴⁴ As will be demonstrated at greater length below,⁴⁵ enforced passivity interferes with learning and reduces opportunities for jurors, individually and collectively, to perform to their potential as community representatives and decision makers in trials of criminal and civil cases.⁴⁶

D. Resistance to Change

Despite overwhelming evidence from social science research⁴⁷ and accepted truths about the educational process,⁴⁸ the legal establishment remains largely resistant to proposals that would modify the present trial model to allow for more juror participation in general and improved communications with jurors in particular.⁴⁹ Indeed, there are even reported instances of courts moving in directions contraindicated by the empirical data.⁵⁰

Without identifying all the reasons why the legal establishment is often resistant to change,⁵¹ it appears that (1) the investment that lawyers and judges have in the historical (and now current) model of the adversarial jury trial and (2) the inherent distrust of juries that is a part of that model are the main causes for resisting suggestions to expand the role and power of the jury. The fear of losing total control over the trial and fact-finding processes

44. *Id.* at 131, 215-16. The problem of juror understanding is further compounded by the tendency of judges, lawyers, and expert witnesses to "speak an esoteric and mysterious language in front of a passive audience." AUSTIN, *supra* note 4, at 100.

45. See *infra* notes 78-103 and accompanying text.

46. See AUSTIN, *supra* note 4, at 100-04; KASSIN & WRIGHTSMAN, *supra* note 5, at 131, 215-16.

47. See *infra* notes 83-103 and accompanying text.

48. See *infra* text accompanying notes 108-12.

49. See *infra* text accompanying notes 83-103. As an example, the American Bar Association's 1992 draft of *Standards for Trial by Jury* contains only modest proposals for enhancing the jury's role at trial—juror note-taking, the furnishing of written copies of instructions, and permission for the judge to instruct prior to closing arguments. STANDARDS FOR TRIAL BY JURY §§ 15-3.2, 15-3.2(a), (b) & (f) (Am. Bar Ass'n Working Draft 1992).

50. Tanford, *supra* note 2, at 166.

51. Among the reasons that have been offered are the following: the inherent conservatism of the profession, Schwarzer, *supra* note 1, at 120; an attitude of "ownership" of the adversary process and of possession of all information necessary to carry out that stewardship; the results of legal education; the deeply ingrained notion that any change in the law requires precedent; a strong preference for the certainty of the *status quo* over an uncertain future; and the tendency of lawyers and judges to take a "risk-averse" position in order to avoid reversals. It has also been postulated that many lawyers and judges do not trust jurors enough to concede to them this additional power. Frankel, *supra* note 6, at 223; Friedland, *supra* note 4, at 208-09.

prompts too many lawyers and judges to reject even the most modest of proposals.⁵² Whether or not the result is intended, a principal effect of failing to communicate more effectively with jurors is the disempowerment of the jury, not only in a particular case but also as an institution.

It is natural that the "owners" of, and participants in, the current adversary system would become defensive upon learning of repeated claims that the lack of juror comprehension is caused, in large part, by the adversary system itself. But that is what judges and lawyers are hearing.⁵³ Given the level and nature of the resistance to changing the system, what is needed, according to some, is a major attitude change within the legal profession—one that breaks with the "Law and Nostalgia" movement and refuses to be controlled by the past;⁵⁴ one that is willing to weigh the value to be gained by relinquishing some forms of control over the trial process to the jury;⁵⁵ and one that gives

52. While *trial* procedures have not significantly changed in the last 100 years, reform efforts have been "lavished" upon *pretrial* procedures during the past three decades. See David U. Strawn & G. Thomas Munsterman, *Helping Juries Handle Complex Cases*, 65 JUDICATURE 444, 444 (1982), reprinted in *IN THE JURY BOX* 181, 186 (Lawrence S. Wrightsman et al. eds., 1987). This phenomenon is entirely consistent with my thesis. Reforming trial procedures in the ways suggested here and elsewhere would require lawyers and judges to share power and control with jurors, who are not "players" in the adversarial trial process. These reforms result in a net loss of power and control to the legal profession. However, no such loss is experienced in reforming pretrial procedures since power and control is simply reallocated among the players themselves; none is lost to "outsiders." Therefore, one would expect the players' resistance to change to be lower and their motivation to improve their own lot to be higher.

53. See AUSTIN, *supra* note 4, at 100-04; KASSIN & WRIGHTSMAN, *supra* note 5, at 131, 215-16; SELVIN & PICUS, *supra* note 5, at 45-46 & n.7; Strawn & Munsterman, *supra* note 52, at 447, reprinted in *IN THE JURY BOX*, *supra* note 52, at 186; Cecil et al., *supra* note 4, at 755; Frankel, *supra* note 6, at 222; Schwarzer, *supra* note 1, at 119-20; Austin, *supra* note 6, at 18.

Interestingly, a recent monumental work in this area concluded that jurors are often confused about the evidence, law, and procedure for evaluating and deciding the case. Fourteen separate changes or additions to jury trial procedure are recommended, all without criticizing the adversary system by name. See A.B.A. REPORT, *supra* note 5. However, given the nature and number of suggested changes, there was no need to make explicit that which was clearly implicit. The study was commissioned and underwritten by the ABA Litigation Section.

54. Kirst, *supra* note 42, at 333-34.

[There is] a common assumption that any change in the role of the jury has to satisfy a historical test rigidly bound to pre-1791 practice. Such an assumption is disastrous if the jury's role is to keep pace with changes outside the civil courtroom. . . . Historicism must be avoided if the courts are to be free to experiment to find the correct role for the jury in modern litigation.

Id., see also Schwarzer, *supra* note 1, at 145-46. Thus, the history of the jury does not serve as a useful guide for current policy. Marianne Constable, *What Books About Juries Reveal About Social Science and Law*, 16 LAW & SOC. INQUIRY 353, 363, 370 (1991). Apropos of the need to be open to the possibility of breaking with the past, especially when considering changes in the systems for delivery of justice, former Chief Justice Warren Burger encouraged judges to "stretch the mind" when considering new ideas and to avoid thinking that because "we've always done it that way," improvement is foreclosed. Remarks at Dedication of Arizona Courts Building (Jan. 29, 1991) (copy on file with the *Indiana Law Journal*).

55. See Schwarzer, *supra* note 1, at 120.

proper weight to the trial's educational objective.⁵⁶ "The traditional advocacy mentality is inconsistent with comprehension. Trial lawyers must first accept the necessity of replacing the adversarial priority with the educational objective, and, secondly, must adopt procedures that bring the jury into the trial as active participants in education."⁵⁷ By rising above perceived self-interest and realizing that a strengthened jury enhances the judicial system as a whole,⁵⁸ the legal profession contributes to an important democratic institution and helps ensure its place in our system of justice.⁵⁹

II. "LEARNING LESSONS" FROM SOCIAL SCIENTISTS AND EDUCATORS⁶⁰

[T]he mental life plays too important a role in court procedure to reject the advice of those who devote their work to the study of these functions.⁶¹

Although social scientists began offering their services to courts almost one hundred years ago, their efforts did not bear much, if any, fruit. Influential contemporary legal commentators criticized social scientists for their failure to support their claims with hard empirical data.⁶² What may have been true then about the lack of relevant and reliable research concerning jurors and trials, however, is no longer the case. The 1966 University of Chicago Jury Project, the landmark work of Professors Kalven and Zeisel,⁶³ inspired and set the standard for almost three decades of work by social scientists and others who have subjected the trial process to close examination.⁶⁴

56. AUSTIN, *supra* note 4, at 100-01.

57. *Id.* at 101; *see also* Cecil et al., *supra* note 4, at 764-65 (suggesting that many of the jury's problems may be attributable to limitations placed on the "decision-making environment" by the adversary system).

58. Walter W. Steele & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 74 JUDICATURE 249, 254 (1991).

59. Friedland, *supra* note 4, at 207-08; Strawn & Munsterman, *supra* note 52, at 447, *reprinted in* IN THE JURY BOX, *supra* note 52, at 186; *see* Barry Gewen, *Democracy in the Courtroom*, NEW LEADER, Sept. 8, 1986, at 15, 15.

60. The term "learning lessons" is borrowed from HUGH MEHAN, *LEARNING LESSONS: SOCIAL ORGANIZATION IN THE CLASSROOM* (1979).

61. HUGO MUNSTERBERG, *ON THE WITNESS STAND* 117 (1908).

62. *See, e.g.*, John H. Wigmore, *Professor Muensterberg and the Psychology of Testimony*, 3 U. ILL. L. REV. 399 (1909).

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

64. This work is said both to have sparked "the modern field of jury studies" and to have "deeply influenced contemporary understanding of the jury as an institution." Valerie P. Hans & Neil Vidmar, *The American Jury at Twenty-Five Years*, 16 LAW & SOC. INQUIRY 323, 323 (1991). Replication of the

In recent years, the jury trial and juror behavior have been scientifically examined with a great variety of concerns in mind.⁶⁵ Most of the published works deal with the question of juror competence and proposals to improve it. Of these studies, the great majority focus upon the active-passive juror dichotomy and the consequences of each model upon juror comprehension. This latter research is the principal concern of this Part.

A. *The Irrational Legal Model of the Juror*

Applying a strictly legal analysis, the law's "ideal juror" is a creation of laws, procedures, rules of evidence, legal instructions, admonitions, and the like. However, much of that legal underpinning is based on assumptions or

Kalven and Zeisel work is needed, given the intervening changes in the American jury, such as greater representativeness of the community, smaller juries, increases in the amount of technical and complex evidence, societal changes (for example, civil rights, feminism, and crime), and the increased controversy surrounding the civil jury. *Id.* at 347-49. For another call to validate these earlier findings through future research, see Peter D. Blanck, *What Empirical Research Tells Us: Studying Judges' and Juries' Behavior*, 40 AM. U. L. REV. 775, 800 (1991) (arguing that future study of the jury is made all the more necessary by "the dramatic changes that have occurred with regard to the function, composition, and role of the jury over the last several decades").

Since publication of *The American Jury*, a variety of traditional and nontraditional data-gathering techniques have been employed by social scientists and others studying cognitive processing by jurors. See, e.g., A.B.A. REPORT, *supra* note 5, at 2-4 (studying alternate juries in four complex cases; post-trial interviews of actual jurors, judges, and attorneys; and written jury questionnaires); GUNTHER, *supra* note 5, at 68-69 (recounting an experiment that allowed jurors to question witnesses and take notes); SELVIN & PICUS, *supra* note 5 (discussing a case study of a complex asbestos trial); Austin, *supra* note 6 (discussing the Cleveland Jury Project, a study of two juries in a complex antitrust case); Leonard B. Sand & Steven A. Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423 (1985) (reporting experiments followed by surveys of participating attorneys and judges); Lawrence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 153, 161 (1982) (discussing a study of questions asked by deliberating juries and surveys of judges and jurors); Strawn & Buchanan, *supra* note 42, at 480 (reporting an experiment involving 116 members of a jury pool); *The View from the Jury Box*, NAT'L L.J., Feb. 22, 1993, at S1 (surveying 783 jurors, almost two-thirds of which were jurors in criminal cases). Complaints were common among researchers about the almost uniform opposition of judges and lawyers to allowing observation of deliberating juries in actual cases.

65. See JOHN M. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE (1990) (studying the effects of manner of expression by witness upon decision maker); Raymond W. Buchanan et al., *Legal Communication: An Investigation of Juror Comprehension of Pattern Instructions*, 26 COMM. Q. 31 (1978); John M. Conley et al., *The Power of Language: Presentational Style in the Courtroom*, 1978 DUKE L.J. 1375 (studying the effects upon jurors of witnesses' testimonial styles); Saul M. Kassir, *The American Jury: Handicapped in the Pursuit of Justice*, 51 OHIO ST. L.J. 687 (1990) (reporting the effects on a jury of nonevidentiary social influences); Saul M. Kassir et al., *The Dynamite Charge: Effects on the Perceptions and Deliberation Behavior of Mock Jurors*, 14 LAW & HUM. BEHAV. 537 (1990); Gary L. Wells et al., *The Timing of the Defense Opening Statement: Don't Wait Until the Evidence Is in*, 15 J. APPLIED SOC. PSYCHOL. 758 (1985); Lori B. Andrews, *Exhibit A: Language*, PSYCHOL. TODAY, Feb. 1984, at 28 (explaining how juror perceptions may be influenced by language styles).

wishful thinking about human nature, customs and rituals of long standing, and expectations and beliefs about the present adversary system. The legal juror model would be rational if it could be validated empirically. However, this has not been done—the law has been slow to embrace empirical validation. Professor Cleary, a leading authority on the law of evidence, put it well:

In science a theory possesses a recognized provisional and tool-like character. If the empirical data collected do not support the theory, the theory is discarded. Since the law never collects any empirical data, it is spared the embarrassment of having ever to discard a theory on that basis.⁶⁶

Table 1 below lists the attributes of the idealized juror contemplated by the legal system:

TABLE 1. *The "Legal Model" of the Juror*

-
1. Passive—acted upon⁶⁷
 2. Merely observes⁶⁸
 3. Empty vessel to be filled⁶⁹
 4. Object of one-way, linear communication⁷⁰
 5. Complete and accurate recorder of information⁷¹
 6. Suspends judgment on evidence and issues until end of case⁷²
 7. Does not give feedback until verdict⁷³
 8. Exercises "recall readiness" regarding final instructions⁷⁴
 9. Considers all evidence⁷⁵
 10. Well-served by adversarial system⁷⁶
 11. Effective representative of community; role enhances participative democracy⁷⁷
-

66. Cleary, *supra* note 30, at 278.

67. PAULA DiPERNA, JURIES ON TRIAL. FACES OF AMERICAN JUSTICE 236-37 (1984); GUNTHER, *supra* note 5, at 47; KASSIN & WRIGHTSMAN, *supra* note 5, at 131; Friedland, *supra* note 4, at 198.

68. Friedland, *supra* note 4, at 198.

69. DiPERNA, *supra* note 67, at 236.

70. Robert F. Forston, *Sense and Non-Sense: Jury Trial Communication*, 1975 B.Y.U. L. REV. 601, 628; Austin, *supra* note 6, at 15.

71. See Donald E. Vinson, *Litigation: An Introduction to the Application of Behavioral Science*, 15 CONN. L. REV. 767, 775 (1983).

72. REID HASTIE ET AL., INSIDE THE JURY 18-19 (1983); IRWIN A. HOROWITZ & THOMAS E. WILLING, THE PSYCHOLOGY OF LAW: INTEGRATIONS AND APPLICATIONS 209-10 (1984).

73. See Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273, 278 (1989).

74. LAWRENCE S. WRIGHTSMAN, PSYCHOLOGY AND THE LEGAL SYSTEM 285-86 (2d ed. 1987).

75. HASTIE ET AL., *supra* note 72, at 22; WRIGHTSMAN, *supra* note 74, at 277-83.

76. AUSTIN, *supra* note 4, at 100-01; SELVIN & PICUS, *supra* note 5, at 45-46.

77. See Friedland, *supra* note 4, at 207-08.

No research-based support can be found for this model in social science, legal, or political science literature. To the contrary, all of the studies are critical of this idealized picture, claiming that its assumptions are contradicted by accepted psychological and educational truths and by empirical data.⁷⁸

The reported research demonstrates that the consequences of following this accepted model are relatively disastrous for individual jurors. For example, juror confusion reportedly runs high,⁷⁹ opportunities for learning are negatively affected,⁸⁰ and jurors frequently lose interest and become distracted and bored.⁸¹ In the absence of juror feedback at trial, court and counsel remain unaware of whether jurors have been confused by the evidence, whether they need additional information, and whether they are even pursuing the right issues.⁸²

B. The Reality-Based Behavioral Model of the Juror

[E]valuating how juries actually function is a strictly empirical matter. We search for answers not in abstract legal theory and not in trial stories told by judges, lawyers, and journalists, but in the results of systematic research.⁸³

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 paint a far different picture of jurors and advocate a far different model for the jury than the one now followed in most courtrooms in this country. They all agree on one thing: jurors must be permitted to become more active in the trial.⁸⁴ By "active," most mean involving jurors in the fact-finding process through such devices as questions

78. See sources cited *infra* notes 79-98; CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM: REPORT FROM AN AMERICAN BAR ASSOCIATION/BROOKINGS SYMPOSIUM 16 (1992) [hereinafter SYMPOSIUM REPORT].

79. A.B.A. REPORT, *supra* note 5, at 4; SELVIN & PICUS, *supra* note 5, at 45-46; Austin, *supra* note 6, at 15, 18-19.

80. A.B.A. REPORT, *supra* note 5; Friedland, *supra* note 4, at 208-09.

81. A.B.A. REPORT, *supra* note 5, at 24-57; see also Friedland, *supra* note 4, at 211 (discussing how to get juries more interested and focused on the trial).

82. Harms, *supra* note 22, at 130-31. I suppose this is self-evident—if you don't ask the question, you never know what the answer might have been.

83. KASSIN & WRIGHTSMAN, *supra* note 5, at 5.

84. GUNTHER, *supra* note 5, at 68; HOROWITZ & WILLGING, *supra* note 72, at 210-11; KASSIN & WRIGHTSMAN, *supra* note 5, at 131; Forston, *supra* note 70, at 628-31; Friedland, *supra* note 4, at 204-20; Austin, *supra* note 6, at 18-19.

by jurors of witnesses (asked through the judge),⁸⁵ note-taking,⁸⁶ substantive preliminary instructions,⁸⁷ and allowing jurors to have a copy of the legal instructions.⁸⁸ Contrary to the passive juror model, where the juror is expected simply to store information as it comes in, remain open-minded, and refrain from making judgments about the evidence until deliberations commence, research shows that jurors do and should be expected to actively process information during the trial.⁸⁹ Research also shows that jurors are likely to mold information into a plausible "story" or "schema" based on their prior experiences.⁹⁰ The rate of pre-deliberation judgments or decisions by jurors is high.⁹¹ The active juror model contemplates juror interaction with

85. AMERICAN JUDICATURE SOC'Y, *supra* note 5; GUNTHER, *supra* note 5, at 68-69; Frankel, *supra* note 6, at 222-23; Larry Heuer & Steven Penrod, *Increasing Jurors' Participation in Trials: A Field Experiment with Jury Notetaking and Question Asking*, 12 LAW & HUM. BEHAV. 231, 251-57 (1988); Schwarzer, *supra* note 1, at 139-42.

86. A.B.A. REPORT, *supra* note 5, at 34-37; GUNTHER, *supra* note 5, at 68-69; KASSIN & WRIGHTSMAN, *supra* note 5, at 128-29; AMERICAN JUDICATURE SOC'Y, *supra* note 5; Sand & Reiss, *supra* note 64.

87. A.B.A. REPORT, *supra* note 5, at 49-51; VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 122-23 (1986); Saul M. Kassir & Lawrence S. Wrightsman, *On the Requirements of Proof—The Timing of Judicial Instruction and Mock Juror Verdicts*, in IN THE JURY BOX, *supra* note 52, at 143; Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 LAW & HUM. BEHAV. 163 (1977); E. Barret Prettyman, *Jury Instructions—First or Last?*, 46 A.B.A. J. 1066 (1960).

88. A.B.A. REPORT, *supra* note 5, at 51-52; Committee on Fed. Courts, New York State Bar Ass'n, *Improving Jury Comprehension in Complex Civil Litigation*, 62 ST. JOHN'S L. REV. 549, 565 (1988) [hereinafter *N.Y. State Bar Report*].

89. HASTIE ET AL., *supra* note 72, at 18-24; HOROWITZ & WILLGING, *supra* note 72, at 209-10 ("The psychological literature demonstrates that jurors could not be expected to follow the legal model of information processing. Information is misplaced, misconstrued, embellished, and reorganized. Jurors will be active participants in the process of listening to evidence.")

The ideal juror is characterized as a relatively passive record-keeper during the trial who encodes the events of the trial verbatim. Actual juror performance may deviate from this ideal through mechanisms of selective attention, forgetting, inferential embellishment, and reorganization. There is always extensive cognitive activity by the perceiver in comprehension and memory tasks.

HASTIE ET AL., *supra* note 72, at 18-19 (citations omitted).

90. "One of the techniques jurors seem to use is organizing [their thoughts about the evidence] into stories that they present during the deliberation among the jurors. These stories [are] usually derived from personal experience and 'common sense' " HOROWITZ & WILLGING, *supra* note 72, at 210; see also HASTIE ET AL., *supra* note 72, at 18-24. "The Story Model provides a complete psychological account of cognitive processing in juror decisionmaking, and it receives support from jury research, political science analysis, jurors' accounts of their experiences during trials, and other work." *Id.* at 23 (citations omitted). See generally James A. Holstein, *Jurors' Interpretations and Jury Decision Making*, 9 LAW & HUM. BEHAV. 83 (1985) (examining how jurors schematize information); Moore, *supra* note 73, at 273 (noting the effect of this phenomenon on practicing lawyers).

91. WRIGHTSMAN, *supra* note 74, at 286. Research shows that despite cautionary instructions, jurors "often form very definite opinions" about guilt or innocence before the evidence is concluded. *Id.* "Virtually all models of jury decisionmaking assume that individual jurors have reached initial pre-deliberation verdict decisions at the start of deliberations. Thus, the input at the beginning of the jury task is a set of jurors with verdict preferences." HASTIE ET AL., *supra* note 72, at 24. "One of the earliest

the judge, attorneys, and others from the time the jurors first report for duty through the post-trial debriefing.⁹²

Contrary to the negative findings resulting from following the "passive juror" model,⁹³ studies abound documenting the benefits of permitting more juror participation in the trial process as suggested by the "behavioral" or "active juror" paradigm. For example, the active juror is more likely to have an effective and satisfactory learning experience, and less likely to be confused or not to remember the evidence or the law.⁹⁴ If forms of feedback are allowed, court and counsel are more likely to learn of confusion, ambiguities, or omissions in the evidence or instructions before it is too late.⁹⁵ Next, surveys show that the more active jurors are at trial, the more attention they will pay to the proceedings.⁹⁶ Juror satisfaction with the entire trial experience is also enhanced by increased participation in the trial.⁹⁷ Last, but not least, the institution of the jury is said to be strengthened by measures that afford jurors more of an opportunity to participate actively at trial and to accept the corresponding responsibility.⁹⁸ To some, the issue is trust. "One inference drawn from these restrictions [of the current system] (which render the jury totally passive) is that the jury may be entrusted with

findings in mock jury research was that despite judges' instructions to the contrary, many jurors form tentative verdict preferences early in the trial." Robert J. MacCoun, *Experimental Research on Jury Decision-Making*, 30 JURIMETRICS J. 223, 225 (1990); see also Forston, *supra* note 70, at 612 (noting that jurors frequently vote according to their predeliberation decisions); Moore, *supra* note 73, at 274 (asserting that jurors make predeliberation decisions in a "highly idiosyncratic" way); Litigation Sciences, *Affective and Cognitive Jurors*, TRIAL, Dec. 1982, at 92.

92. AUSTIN, *supra* note 4, at 102. "Circular or two-way communication, that is, allowing jurors to ask questions throughout the trial (including orientation), will improve the accuracy of transmission." *Id.* at 102 (citation omitted). Forston, *supra* note 70, at 628-31 (arguing that jurors ought to have the right to ask questions of judge, lawyers, and witnesses about the evidence or law); Moore, *supra* note 73, at 278 (noting that verbal feedback involving jurors would more nearly "accommodate the jurors' cognitive filters," that is, frames of reference).

93. See *supra* notes 78-82 and accompanying text.

94. A.B.A. REPORT, *supra* note 5; HANS & VIDMAR, *supra* note 87, at 120-24; SELVIN & PICUS, *supra* note 5, at 63 n.13; Forston, *supra* note 70, at 628-31; Friedland, *supra* note 4, at 209 (noting that "active learners are more effective than passive ones"). "Experiments have demonstrated with consistency that the accuracy of information transferred by two-way communication far exceeds the accuracy of information passed by one-way communication." Forston, *supra* note 70, at 629; see also Strawn & Munsterman, *supra* note 52 (presenting proposals for a more active jury).

95. AUSTIN, *supra* note 4, at 102-03; Forston, *supra* note 70, at 631; Harms, *supra* note 22, at 130-31.

96. AUSTIN, *supra* note 4, at 102; Friedland, *supra* note 4, at 211; see also A.B.A. REPORT, *supra* note 5, at 35-36.

97. Forston, *supra* note 70, at 629; Heuer & Penrod, *supra* note 85, at 233-34, 237; see also A.B.A. REPORT, *supra* note 5, at 35-36.

98. Friedland, *supra* note 4, at 206-09.

the responsibility to decide important matters, but not how to define the parameters of the decisionmaking process itself.⁹⁹

Some, including judges, say that trial lawyers and judges are "invested" in the customs and rituals that severely limit juror participation in the trial.¹⁰⁰ In light of considerable empirical data showing that trials "leave jurors floundering"¹⁰¹ and that "pervasive confusion" results,¹⁰² judges and lawyers must act with open minds in the broader public interest to address this critical public policy question.¹⁰³

C. What Do Professional Educators Say?

The analogy between the courtroom and the classroom is not a complete one by any means. However, there are enough parallels to justify a comparison. For one, the emphasis in the classroom is plainly upon learning. So it is, or, as we have seen, should be, in the courtroom for jurors. In both instances, education takes place in a group setting. Similarly, attendance is compulsory for both students (at least in kindergarten through grade twelve) and jurors. The aim of the teacher is to impart knowledge and understanding; likewise with trial lawyers and judges.¹⁰⁴ Classroom lessons and trials share the same structure, which consists of three main components: opening (orientation), instructional (task conduct), and closing.¹⁰⁵ Following lessons, specific tasks are assigned for completion (tests or reaching a verdict).

What is the principal difference? During all three phases of classroom lessons, interaction or the exchange of information is encouraged, if not compelled.¹⁰⁶ Not so in the courtroom, where jurors are acted upon and are expected, if not required, to remain passive.¹⁰⁷ The positive correlation between classroom interaction and effective learning has been an accepted truth for some time,¹⁰⁸ having found its origins in the work and findings of

99. *Id.* at 208.

100. *See, e.g.,* Schwarzer, *supra* note 1, at 133-34.

101. *Id.* at 120.

102. Forston, *supra* note 70, at 606.

103. MacCoun, *supra* note 91, at 231.

104. *See* SYMPOSIUM REPORT, *supra* note 78, at 16.

105. JUDITH W LINDFORS, CHILDREN'S LANGUAGE AND LEARNING 286-91 (1980); MEHAN, *supra* note 60, at 35-49.

106. SARA DELAMONT, INTERACTION IN THE CLASSROOM (John Eggleston ed., 2d ed. 1983); LINDFORS, *supra* note 105, at 245-47, 270-71, 291-92; MEHAN, *supra* note 60, at 79-80, 139-60.

107. *See supra* notes 67-77 and accompanying text.

108. DELAMONT, *supra* note 106, at 17; PHILIP GAMMAGE, TEACHER AND PUPIL. SOME SOCIO-PSYCHOLOGICAL ASPECTS 32-34 (1971); LINDFORS, *supra* note 105, at 286-91; MEHAN, *supra* note 60, at 36-41.

social and educational psychologists in the mid-1900s.¹⁰⁹ Since the view that students are only “passive receivers” has been rejected,¹¹⁰ interaction has become the accepted means of ensuring that students understand what is being communicated to them. Interaction should evoke questions, focus attention, motivate students, assist recall, and allow students to benefit from the exposure to others’ views.¹¹¹ Among other things, student-initiated interactions (questions or comments) are thought to serve important ends—for example, eliciting information, providing information, and giving teachers direction.¹¹²

Educators also attach significance to context, control, and democracy when discussing communication in the classroom. In deciding on the optimum form and amount of interaction or language use for a given situation, the social context and the function are considered.¹¹³ Thus, what is expected in a classroom would probably not be appropriate in a worship service.¹¹⁴ Arguably, the jury trial falls somewhere in between these two examples, but somewhere closer to the classroom model given similar learning objectives and task performance demands. Whether one is discussing classrooms or courtrooms, considerations of control bear upon the questions of whether, when, and how to provide for interaction. Control in an authoritarian sense can be achieved by strictly limiting feedback, as is done, for example, in military courtrooms. On the other hand, effective and appropriate classroom and courtroom control can be achieved, if not enhanced, without sacrificing efficiency, by a careful blending and balancing of the considerations of control and freedom of expression.¹¹⁵ Concerns about context and control lead inevitably to a choice between communication styles—authoritarian or democratic. Given the educational context, and without discounting control where control is genuinely needed, educators have chosen the “democratic

109. DELAMONT, *supra* note 106, at 18.

110. DOUGLAS BARNES, FROM COMMUNICATION TO CURRICULUM 18 (1992); GERALD M. PHILLIPS ET AL., COMMUNICATION IN EDUCATION 103 (1974). “[A] learning student will want to do something about what he is learning. He will not want to sit passively and receive information. He will want to take an active part in acquiring it.” *Id.*

111. DELAMONT, *supra* note 106, at 18-19; CAROL EDELSKY ET AL., WHOLE LANGUAGE: WHAT’S THE DIFFERENCE? 23-26 (1991); GAMMAGE, *supra* note 108, at 32-38; LINDFORS, *supra* note 105, at 245-47, 270-71.

112. MEHAN, *supra* note 60, at 79-80.

113. BARNES, *supra* note 110, at 31-33; GAMMAGE, *supra* note 108, at 32-34.

114. BARNES, *supra* note 110, at 32.

115. For a discussion of the classroom model, see DELAMONT, *supra* note 106, at 17; GAMMAGE, *supra* note 108, at 32-36. For a discussion of the courtroom model, see Friedland, *supra* note 4, at 206-09; Strawn & Munsterman, *supra* note 52, at 447, reprinted in IN THE JURY BOX, *supra* note 52, at 185-86; Gewen, *supra* note 59, at 15.

classroom"¹¹⁶ with a few explicit, and many implicit, "speaking rights" for students. These "rights" are accompanied by "rules for getting the floor."¹¹⁷

We need "democratic courtrooms" where jurors enjoy explicit "speaking rights" regulated by rules and procedures necessary to ensure a fair trial.¹¹⁸ There are important lessons to be learned from our brothers and sisters whose lifework has been devoted to improving learning.

D Juror Models Contrasted

Although Table 1 listed the characteristics of the passive juror depicted by the Legal Model,¹¹⁹ a comparative summary with the research-based and classroom-tested profile of the juror presented by the Behavioral-Educational Model is beneficial. The contrasts are numerous and striking.

TABLE 2: *The Juror Models Compared*

<i>Legal Model</i>	<i>Behavioral-Educational Model</i>
1. Passive—acted upon	1. Active—takes responsibility for one's part in the learning
2. Merely observes	2. Actively participates
3. Empty vessel to be filled	3. Possesses existing frames of reference
4. Object of one-way, linear communication	4. Participant in interactive process
5. Complete and accurate recorder of information	5. Selective and otherwise imperfect recall of evidence
6. Suspends judgment until end of case regarding: <ol style="list-style-type: none"> a. evaluation of evidence 	6. Actively processes information as received: <ol style="list-style-type: none"> a. evaluates, classifies, etc., evidence

116. DELAMONT, *supra* note 106, at 17; GAMMAGE, *supra* note 108, at 33-36.

117. COURTNEY B. CAZDEN, CLASSROOM DISCOURSE 54 (1988); MEHAN, *supra* note 60, at 139-60, 190-98.

118. Professor Friedland put it well: "[T]he responsibility [for deciding the case] should be complemented by a corollary predicate freedom of the jury to have some input, albeit regulated, into deciding what information is necessary for the jury to resolve relevant issues." Friedland, *supra* note 4, at 209.

119. See *infra* text accompanying notes 67-77.

TABLE 2: *The Juror Models Compared* (cont'd)

b. decision on the issues	b. frequently makes decisions prior to deliberations
7 Does not give feedback until verdict	7. Continuous feedback during trial and deliberations
8. Because of "recall readiness," substantive jury instructions are best given at end of case	8. "Cognitive filters" used during trial; instructions should also come at beginning of trial
9. Takes into account all evidence	9. Selects evidence that best fits frame of reference or tentative verdict choice; forgets some, confused by other
10. Well-served by adversarial system	10. Frustrated and confused by adversary system, which interferes with learning
11. Effective representative of community; role enhances participative democracy	11. Loss of sense of power and control; reduced satisfaction; importance of jury denigrated

With this frame of reference in mind, the most commonly suggested devices for improving jury competence in general, and juror participation in the trial in particular, are discussed and analyzed below

III. PERMITTING GREATER JUROR PARTICIPATION IN THE TRIAL

This Part is intended as more of a listing and summary of the published works and suggestions of others than as an analysis. While my own thoughts are added in some places, the works of others speak for themselves. Time and space constraints permit only an attempt to collect the very recent work, conducted mostly by social scientists. Ten techniques or procedures, all of which are thought to enhance juror participation and comprehension, are presented in their order of occurrence at trial, not necessarily in the order of their importance or merit.

A. Case-Specific Juror Orientation

In most jurisdictions, prospective jurors receive an initial orientation in the jury assembly room by way of a live or recorded presentation or by a written

pamphlet. This is usually all the orientation they receive prior to jury selection, whether the case is routine or complex.

Many authorities encourage that another, case-specific orientation be given in many cases, especially complex or lengthy ones, either just before jury selection or just after. Juror comprehension will be aided as jurors will be better prepared to understand the evidence.¹²⁰ Court-appointed experts, rather than counsel or their experts, should give the jurors some background, terminology, and foundation for what will come.¹²¹ At this stage, jurors ought to be encouraged to ask questions.¹²²

Giving an orientation to the entire panel before jury selection consumes some additional time, but it could make for a shorter and more meaningful voir dire, much as mini-opening statements from counsel might.¹²³ Whether given to the whole panel or just to the jurors chosen to hear the case, such a procedure holds the added advantage of responding to jurors' pre-existing "frames of reference" or "stories" that they use as cognitive filters while hearing evidence.¹²⁴

B. Mini-Opening Statements Before Voir Dire

Although imminently logical, the technique of having lawyers make brief statements about their cases to the entire jury panel prior to commencement of voir dire seems to be used rarely. Nor is it often discussed in legal literature.¹²⁵ Such a non-argumentative, informative statement would result in a better test for detecting juror bias since the prospective jurors would know more about the case. Voir dire and the reasons for asking certain questions would be clearer to more jurors, while the investment of time and expense by counsel and court would be negligible.

120. AUSTIN, *supra* note 4, at 101; Austin, *supra* note 6, at 18; Strawn & Munsterman, *supra* note 52, at 446-47; James Withrow & David Suggs, *Procedures for Improving Jury Trials of Complex Litigation*, 25 ANTITRUST BULL. 493, 506-07 (1980).

121. See sources cited *supra* note 120.

122. Austin, *supra* note 6, at 15.

123. See *infra* text accompanying notes 125-26.

124. See Kassir & Wrightsman, *supra* note 87, at 145; Moore, *supra* note 73, at 278.

125. *But see* Strawn & Munsterman, *supra* note 52, at 446-47 (recommending that the court's preliminary jury instructions also be read in conjunction with the statements of counsel), *reprinted in* IN THE JURY BOX, *supra* note 52, at 184.

C. Preliminary Jury Instructions

In most courtrooms, the pattern or scripted jury instructions given at the outset of the case deal with very elementary legal principles of general application and with various procedural or housekeeping matters. Rarely are they tailored to the individual case. According to social science and legal literature, failure to give the jury more substantive guidance at this early and critical juncture of the trial wastes a real opportunity to better inform the jury and improve the quality of the trial and verdict.¹²⁶

Studies involving actual jurors, lawyers, and judges strongly endorse case-specific, substantive preliminary instructions and cite a number of advantages such instructions provide for jurors.¹²⁷ The advantages include the following: improving jurors' recall;¹²⁸ focusing jurors' attention on the relevant issues; reducing the chances of jurors applying the wrong rule or standard to the evidence;¹²⁹ reducing the number of questions by jurors during deliberations;¹³⁰ creating more informed verdicts;¹³¹ increasing juror satisfaction;¹³² and accommodating jurors' natural tendencies to immediately process evidence when they receive it by providing relevant law that helps jurors (1) organize the evidence, (2) assess its significance, and (3) avoid premature judgments.¹³³ None of the anticipated or claimed disadvantages materialized.¹³⁴

126. See SYMPOSIUM REPORT, *supra* note 78, at 23.

127. A.B.A. REPORT, *supra* note 5, at 49-52; HANS & VIDMAR, *supra* note 87, at 122-23; Larry Heuer & Steve Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 LAW & HUM. BEHAV. 409 (1989); Sand & Reiss, *supra* note 64, at 438-42. Depending on the complexity of the legal issues in the case, a pretrial charging conference with the attorneys might be advisable. *Id.* at 442.

128. Elwork et al., *supra* note 87, at 169-71.

129. Amiram Elwork & Bruce Sales, *Jury Instructions*, in THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 281, 291 (Saul Kassir & Lawrence Wrightsman eds., 1985).

130. Sand & Reiss, *supra* note 64, at 439-42.

131. *N.Y. State Bar Report*, *supra* note 88, at 553.

132. A.B.A. REPORT, *supra* note 5, at 49-52.

133. A.B.A. REPORT, *supra* note 5, at 49-52; Elwork et al., *supra* note 87, at 171-78; *N.Y. State Bar Report*, *supra* note 88, at 553; Schwarzer, *supra* note 1, at 583-84.

134. Anticipated, but unrealized, disadvantages included: given general juror orientation, substantive preliminary instructions would not be necessary; jurors' demands upon the judge would delay trial; jurors would be encouraged to view trials from too narrow a perspective; jurors would embark on a hypothesis-confirming search; jurors would be acquittal prone, A.B.A. REPORT, *supra* note 5, at 49-52; the procedure might encourage premature decision making; and jurors might oversimplify the issues, Sand & Reiss, *supra* note 64, at 438-39.

Applicable federal rules neither require nor forbid preliminary jury instructions.¹³⁵ State rules of procedure that are modeled after the federal rules would be of the same effect. However, other state rules might require something more than pro forma preliminary instructions.¹³⁶ Experienced and respected judges and court critics strongly recommend case-specific, substantive preliminary jury instructions.¹³⁷

For many of the reasons noted below for giving jurors written copies of the final instructions before they are read by the judge,¹³⁸ a copy of the preliminary instructions should also be given to each juror before these instructions are read. Jurors should be encouraged to keep the instructions readily available if they want to consult them during the trial. Jurors should also be instructed not to let the instructions distract them in any way from what is happening in the courtroom. Finally, it should be emphasized that the instructions are only preliminary, and that at the end of the trial the final instructions and the rules of law to be applied in deciding the case will be provided to the jurors by the judge.

D Juror Notebooks

Describing jurors' notebooks as aids to recall and comprehension, the American Bar Association's report, *Jury Comprehension in Complex Cases*, recommends the creation and use of multiple-purpose jurors' notebooks, at least in complex or lengthy trials.¹³⁹ The report suggests that the contents of the notebooks include jurors' notes; a list of witnesses' names, including descriptions or photos if deemed helpful; copies of key documents; a glossary of technical terms; and, eventually, a copy of the final jury instructions.¹⁴⁰

A trial judge who has used this practice with success in complex cases suggests two additional items: a list of the parties and their attorneys; and a seating chart for the courtroom.¹⁴¹ Finally, Professor Austin recommends

135. See FED. R. CIV. P. 51 and FED. R. CRIM. P. 30; Sand & Reiss, *supra* note 64, at 438. Federal appellate courts leave the matter to the discretion of the trial judge. See, e.g., *United States v. Ruppel*, 666 F.2d 261, 274 (5th Cir. 1982).

136. See, e.g., ARIZ. R. CRIM. P. 18.6(c) ("Immediately after the jury is sworn, the court shall instruct the jury concerning its duties, its conduct, the order of proceedings, and the elementary legal principles that will govern the proceeding.")

137. JEROME FRANK, *COURTS ON TRIAL* 150 (1949); Schwarzer, *supra* note 1, at 129-31; Prettyman, *supra* note 87, at 1066.

138. See *infra* notes 204-07 and accompanying text.

139. A.B.A. REPORT, *supra* note 5, at 34-37.

140. *Id.* at 34-37, 49.

141. John V Singleton, *Jury Trial: History and Preservation*, 32 TRIAL LAW. GUIDE 273, 279 (1988).

that, after debriefing jurors following a long and complex trial, each juror be supplied with an "on-going index containing brief descriptions of the exhibits."¹⁴² This is intended for the jurors' notebooks as well.

E. Note-Taking by Jurors

Everyone else in the courtroom is allowed to make and keep notes—why not jurors? The irony represented by such a situation is probably lost on legal traditionalists, but it is not lost on social scientists and educators who have studied the effects of the practice.¹⁴³ Though gaining in popularity and use, there is still substantial resistance, notably at the federal level, to permitting jurors to take notes.¹⁴⁴

Citing several obvious advantages,¹⁴⁵ recent studies endorse note-taking as an important aid to the jury.¹⁴⁶ Surveys reveal that most jurors, judges, and lawyers favor juror note-taking.¹⁴⁷ The research and plain logic of it

142. AUSTIN, *supra* note 4, at 100 (citation omitted).

143. *E.g.*, KASSIN & WRIGHTSMAN, *supra* note 5, at 129.

There is an element of arrogance and hypocrisy to the notion that jurors would be so adversely affected by taking notes. As Judge Urbom noted, "If there are reasons for note-taking by lawyers and judges during a trial, there are at least the same reasons for note-taking by jurors." The reasons, we think, are self-evident to all of us who kept notebooks in school.

Id., see also Victor E. Flango, *Would Jurors Do a Better Job if They Could Take Notes?*, 63 JUDICATURE 436, 439 (1980).

144. KASSIN & WRIGHTSMAN, *supra* note 5, at 128 (stating that 90% of federal trial judges are thought to prohibit the practice); see also MOORE, *supra* note 37, at 177 (concluding that note-taking by jurors is too distracting, but citing no data); Prentice H. Marshall, *A View From the Bench: Practical Perspectives on Juries*, 1990 U. CHI. LEGAL F. 153 (doubting jurors' abilities to take notes and fearing that those who can might dominate others); see R.M. Weddle, Annotation, *Taking and Use of Trial Notes by Jury*, 14 A.L.R.3d 831 (1967) (citing numerous state cases that approve of juror note-taking).

145. The advantages found include the following: engagement of the jurors in the trial; increased attention of jurors; better ability of jurors to refresh memories later in the trial or during deliberations, KASSIN & WRIGHTSMAN, *supra* note 5, at 129; Sand & Reiss, *supra* note 64, at 447; Austin, *supra* note 6, at 18; a reduction in jurors' requests for court reporter readbacks, Sand & Reiss, *supra* note 64, at 450; Austin, *supra* note 6, at 18; and increased morale and satisfaction of jurors, see A.B.A. REPORT, *supra* note 5, at 34-35. Supposed disadvantages have been addressed in studies and found to be minimal or non-existent. KASSIN & WRIGHTSMAN, *supra* note 5, at 128-29; HANS & VIDMAR, *supra* note 87, at 123; A.B.A. REPORT, *supra* note 5, at 35; AMERICAN JUDICATURE SOC'Y, *supra* note 5, at 13-14.

146. A.B.A. REPORT, *supra* note 5, at 34-37; KASSIN & WRIGHTSMAN, *supra* note 5, at 436-39.

147. Heuer & Penrod, *supra* note 85 at 244-51; Sand & Reiss, *supra* note 64, at 448-49 (reporting majority of defense counsel, civil and criminal, were not in favor of the practice); see also GUINTEHER, *supra* note 5, at 295 (finding that 54% of jurors in a study who did not take notes during trial said that they would have liked to have done so). Relying on his own survey, among others, one trial judge adopted the practice, concluding that the quality of deliberations would be enhanced. See *Yeager v. Green*, 502 A.2d 980, 987-92 (D.C. Cir. 1985). It has been reported that some jurors, frustrated at not being able to take notes, do so anyway so they will not forget certain testimony. Austin, *supra* note 6, at 18; see also SYMPOSIUM REPORT, *supra* note 78, at 18 (referring to note-taking as "[p]erhaps the most widely suggested reform for enhancing juror comprehension").

appear to have convinced nearly all of the legal commentators who have recently published on the subject.¹⁴⁸ If all of this is not sufficient to convince hold-out judges and resistant litigators, nothing except a rule granting jurors the right to take notes will change their traditional, legal-cultural attitudes quickly and efficiently.¹⁴⁹

An explanatory and cautionary instruction would appear appropriate in facilitating note-taking. At the outset, jurors should be told, among other things, that those wishing to take notes may do so, but that no juror is required to take notes; that note-taking should not distract them from the court proceedings, such as watching witnesses testify; and that, in cases of conflict, their notes should not take the place of their independent memories.

F Document Control

The American Bar Association, in its 1989 report, *Jury Comprehension in Complex Cases*, found that the third most significant source of jury confusion and frustration centered on the many exhibits at trial. Specifically, many interviewed jurors complained about the sheer volume of documents. The jurors felt that many of the documents were not necessary, that the jury was not adequately informed concerning which documents were important and why, and that the jury had substantial difficulties finding particular exhibits during deliberations.¹⁵⁰ Other researchers have discovered much the same, leading one to conclude that "[w]hile document control is primarily a management burden for court and counsel, it is also a significant source of static in [juror] comprehension."¹⁵¹

Authorities also agree on the minimum elements of an effective document control program for the trial of cases involving a large number of documents: (1) the judge should direct counsel to minimize documentary evidence and, if necessary, meet with them prior to trial to ensure the direction is honored;

148. See, e.g., *N.Y. State Bar Report*, *supra* note 88, at 558-60; Schwarzer, *supra* note 1, at 138-39; Austin, *supra* note 6, at 18; John V Singleton & Miriam Kass, *Helping the Jury Understand Complex Cases*, LITIGATION, Spring 1986, at 11-12.

149. For example, Arizona has a rule allowing the practice in all criminal trials in the state:

Note Taking. The court shall instruct the jurors that they may take notes regarding the evidence presented and keep the notes for the purpose of refreshing their memory when they retire for deliberation. The court shall provide materials suitable for this purpose. After the jury has rendered its verdict, the notes shall be collected by the bailiff or clerk who shall destroy them promptly.

ARIZ. R. CRIM. P 18.6(d). The state's rules of civil procedure are modeled after the federal rules and do not refer to note-taking. Despite this omission, the practice is commonplace in civil trials in Arizona.

150. A.B.A. REPORT, *supra* note 5, at 29-31.

151. AUSTIN, *supra* note 4, at 100.

(2) at trial, counsel should be encouraged and, if necessary, ordered to distinguish critical documents for the jury; (3) each juror should have, as part of the juror's notebook, a periodically updated index to all exhibits containing brief descriptions of each; and (4) jurors should be presented with a simple system for retrieval of exhibits during deliberations.¹⁵²

G. Questioning of Witnesses By Jurors

Of the ten procedures discussed in this section, one—that jurors be permitted to ask questions of witnesses through the judge—seems to have generated the most controversy. A number of reasons probably account for this, but the fundamental reason, in my view, is that the suggestion goes to a core concern of the advocate—maintaining control over the case—and of the judge—keeping control over the trial. These concerns generate opposition by the legal fraternity, notwithstanding demonstrated benefits and available safeguards to ensure an orderly trial.

Studies verify that the advantages to jurors and the trial as a whole outweigh the feared risks, and that questioning by jurors is an important device for permitting more (and much needed) juror participation in the fact-finding process.¹⁵³ The demonstrated advantages include: giving jurors a greater sense of active participation in the search for truth;¹⁵⁴ providing an opportunity to clarify an important matter and to end or avoid confusion;¹⁵⁵ allowing jurors to pursue relevant information not solicited by the lawyers;¹⁵⁶ keeping juror attention better focused;¹⁵⁷ involving jurors in the process so that they remain more alert;¹⁵⁸ and revealing a juror's mistaken notion of fact or law,¹⁵⁹ or even juror misconduct.¹⁶⁰

Legal authorities, including many trial judges,¹⁶¹ are very supportive of the procedure.¹⁶² It goes without saying that the idea enjoys strong support

152. See A.B.A. REPORT, *supra* note 5, at 29-31; see also *supra* text accompanying note 150.

153. AMERICAN JUDICATURE SOC'Y, *supra* note 5; AUSTIN, *supra* note 4, at 102-03; KASSIN & WRIGHTSMAN, *supra* note 5, at 129-31; Heuer & Penrod, *supra* note 85, at 251-57; Sand & Reiss, *supra* note 64, at 443-44.

154. KASSIN & WRIGHTSMAN, *supra* note 5, at 130; Sand & Reiss, *supra* note 64, at 444.

155. KASSIN & WRIGHTSMAN, *supra* note 5, at 130.

156. *Id.*

157. Sand & Reiss, *supra* note 64, at 444.

158. *Id.*

159. Harms, *supra* note 22, at 130-31.

160. See Riessen v. Neville, 425 N.W.2d 665, 668-69 (Iowa Ct. App. 1988).

161. E.g., Frankel, *supra* note 6; Schwarzer, *supra* note 1, at 139-42.

162. SYMPOSIUM REPORT, *supra* note 78, at 20; Strawn & Munsterman, *supra* note 52, at 447, reprinted in IN THE JURY BOX, *supra* note 52, at 184-85; Harms, *supra* note 22; Michael A. McLaughlin, Note, *Questions to Witnesses and Notetaking by the Jury as Aids in Understanding*

among jurors, especially those who have experienced it.¹⁶³ It has also caught the attention of the popular press.¹⁶⁴ Indeed, while no court rules have been found that forbid, authorize, or regulate the procedure, none may be necessary. Some support may be found in Rule 611(a) of the Federal Rules of Evidence,¹⁶⁵ which charges the judge with the responsibility of controlling the questioning of witnesses so that, among other things, the interrogation is "effective for the ascertainment of the truth."

Safeguards are necessary, of course, and readily available.¹⁶⁶ In order to implement appropriate procedural safeguards, steps that have been proposed or that otherwise come to mind may include: (1) requiring jurors' questions to be in writing and unsigned;¹⁶⁷ (2) requiring jurors' questions to be brought to the judge, who, out of the jury's presence, discusses them with the attorneys to determine if there are objections; (3) assuming the questions are

Complex Litigation, 18 NEW ENG. L. REV. 687 (1983); Michael Wolff, Comment, *Juror Questions: A Survey of Theory and Use*, 55 MO. L. REV. 817 (1990); see also *N.Y. State Bar Report*, *supra* note 88, at 558, 560-61 (stating that "neither reason nor experience requires" that jurors not be able to ask questions); Robin C. Lerner, Annotation, *Jurors Questioning Witnesses in Federal Court*, 80 A.L.R. FED. 892 (1986); Jonathan M. Purver, Annotation, *Propriety of Jurors Asking Questions in Open Court During Course of Trial*, 31 A.L.R.3d 872 (1970).

163. GUNTHER, *supra* note 5, at 68 (finding that 80% of the jurors polled wished they had been allowed to ask questions); *The View from the Jury Box*, *supra* note 64, at S15 (noting that almost one-half of the jurors surveyed favored asking questions).

164. Lis Wiehl, *After 200 Years, the Silent Juror Learns to Talk*, N.Y. TIMES, July 7, 1989, at B5. ("[T]he experiment is the latest milestone in a decade-long liberalization of the roles of judge and jury") "[J]uror's questions chip away at the trial lawyer's domination of courtroom interrogation." *Id.* (quoting David Wilkins, assistant professor at Harvard Law School).

165. I argue that since the trial judge has the responsibility for assuring that the trial is a truth-seeking process, and since the judge is in control of the trial, it cannot be an abuse of discretion to permit the persons that must find the facts to themselves ask questions in a structured and controlled way. See *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 515 (4th Cir. 1985) (noting that Rule 611(a) of the Federal Rules of Evidence provides "guidance" on the question); Lerner, *supra* note 162, at 893 (stating that Rule 611(a) of the Federal Rules of Evidence is "relevant" in deciding whether juror questions are appropriate).

166. See *State v. LeMaster*, 669 P.2d 592, 597-98 (Ariz. Ct. App. 1983) (providing appellate guidelines for juror questioning); AMERICAN JUDICATURE SOC'Y, *supra* note 5; Ellyn C. Acker, Comment, *Standardized Procedures for Juror Interrogation of Witnesses*, 1990 U. CHI. LEGAL F. 557, 572-73 (proposing model rules for inclusion in the Federal Rules of Evidence). Acker's suggested model rules call for an attorney's objection to a juror's question to be made within the juror's hearing. No other proposal on this matter agrees. Opportunity to object outside the presence of the jury ought to be provided.

In Maricopa County, Arizona, where I sit as a trial judge, the prosecutor's office has prepared for filing in selected cases a form motion seeking an order allowing jurors to ask questions in accordance with the procedure outlined in *LeMaster*. A proposed jury instruction informing the jurors of this right and of the procedures to be followed accompanies the motion. My two years' experience with the procedure suggests that prosecutors are more likely than defense counsel to favor juror questioning.

167. For a report on experience with oral juror questions, see Georgia Sargeant, *Juror Questions During Trial? The Verdict Isn't in*, TRIAL, Sept. 1989, at 14.

proper, allowing the judge, not the attorneys, to put the questions to the witness; and (4) informing the jurors that they should not attach any significance to the failure of the judge to ask a requested question since rules of law may prevent some questions from being asked.

H. Interim Summaries

The idea of permitting or directing counsel to sum up after discrete segments in a long or complex case has been analogized to a professor giving a review lecture during a course,¹⁶⁸ and to a motorist's need to consult a highway map a number of times on a long trip before reaching the destination.¹⁶⁹ Analogies aside, experts who have studied the technique,¹⁷⁰ and judges who have used it,¹⁷¹ are unanimous in their views that in many cases the procedure boosts juror comprehension. The several advantages found to result include: enhancing juror understanding of the evidence;¹⁷² assisting jurors in recalling the evidence;¹⁷³ allowing counsel to organize, clarify, emphasize, contextualize, and explain evidence;¹⁷⁴ and aiding jurors in remaining focused, which prevents jurors from making premature judgments based on only a part of the case.¹⁷⁵

The procedure lends itself to flexibility. In one lengthy, complex, and highly publicized trial, each side was allotted two hours for interim summaries between opening statements and closing arguments, to use as they saw fit. The longest summation lasted only ten minutes, the shortest about eighty seconds.¹⁷⁶ Another approach is to allocate a few minutes after pre-designated segments or days of trial. Obviously, a hybrid of these two formats could be utilized. Despite possible pitfalls,¹⁷⁷ the use of an interim summary

168. Austin, *supra* note 6, at 18.

169. Schwarzer, *supra* note 1, at 144.

170. E.g., *N.Y. State Bar Report*, *supra* note 88, at 555-58; Austin, *supra* note 6, at 18; *see also* A.B.A. REPORT, *supra* note 5, at 25-33 (discussing the impact of the quantity of evidence and the length of the trial on juror comprehension).

171. E.g., Patrick E. Higginbotham, *Juries and the Complex Case: Observations About the Current Debate*, in *THE AMERICAN CIVIL JURY* 69, 78 (The Roscoe Pound Foundation 1987); Schwarzer, *supra* note 1, at 144-45.

172. *N.Y. State Bar Report*, *supra* note 88, at 557.

173. *See* A.B.A. REPORT, *supra* note 5, at 34-37; *N.Y. State Bar Report*, *supra* note 88, at 557.

174. *See* *N.Y. State Bar Report*, *supra* note 88, at 557-58.

175. *See* KASSIN & WRIGHTSMAN, *supra* note 5, at 136-37; *N.Y. State Bar Report*, *supra* note 88, at 558.

176. *N.Y. State Bar Report*, *supra* note 88, at 557.

177. Such pitfalls include jurors focusing on what counsel say the case is about, rather than on what is actually shown by the evidence; jurors feeling that they do not have to concentrate on the testimony or exhibits because one of the lawyers will explain them; and potential abuse by some lawyers. *Id.* at 558.

in appropriate cases is highly beneficial because it "divides the task of assimilation into manageable portions."¹⁷⁸

I. Final Instructions

1. General Concerns

Complaints about jurors' difficulties in understanding and following the judge's final legal instructions have been around for some time,¹⁷⁹ and they still persist. Now, however, critics have the force of empirical research on their side, as numerous recent studies demonstrate what most of us intuit—that jurors too frequently fail to understand the instructions.¹⁸⁰ Indeed, the findings are said to confirm "a persistent failure to communicate,"¹⁸¹ resulting in "clear evidence" of confusion.¹⁸² Among the major recent findings are the following: (1) jurors frequently find instructions unclear due to their technical nature, their use of legal terms, and their lack of organization;¹⁸³ (2) the timing is poor since jurors hear most of the instructions for the first time at the end of the case;¹⁸⁴ (3) the absence of written copies for each juror contributes to confusion and poor recall;¹⁸⁵ and (4) juror confusion is exacerbated when the judge fails to provide helpful responses to jurors' questions about instructions during deliberations.¹⁸⁶

178. Higginbotham, *supra*, note 171, at 78.

179. See FRANK, *supra* note 137, at 111-14.

180. Alan Reifman et al., *Real Jurors' Understanding of the Law in Real Cases*, 16 LAW & HUM. BEHAV. 539, 547, 556 (1992) (reporting survey of former jurors that revealed that they understood instructions on substantive law less than one-half of the time); HANS & VIDMAR, *supra* note 87, at 120-22; A.B.A. REPORT, *supra* note 5, at 43-52; Severance & Loftus, *supra* note 64 (presenting the results of three studies on juror comprehension of instructions); Steele & Thornburg, *supra* note 58, at 251; Strawn & Buchanan, *supra* note 42, at 480-82.

181. Steele & Thornburg, *supra* note 58, at 249.

182. Strawn & Buchanan, *supra* note 42, at 483; see also Cecil et al., *supra* note 4, at 749 ("Indeed, if the jury has an Achilles heel, it is the comprehension of legal instructions.").

183. A.B.A. REPORT, *supra* note 5, at 43-52; see also KASSIN & WRIGHTSMAN, *supra* note 5, at 147 (discussing lawyers' and judges' views on how instructions should be worded and whether juries actually pay attention to them).

184. A.B.A. REPORT, *supra* note 5, at 49-51, 622-24; see also KASSIN & WRIGHTSMAN, *supra* note 5, at 144-46 (discussing the timing of procedural instructions and substantive instructions, arguing that some substantive instructions should be given early in the process). For a discussion of the issues concerning the timing of final instructions, see *infra* text accompanying notes 196-202. For the importance of substantive preliminary jury instructions, see *supra* notes 126-38 and accompanying text.

185. See *infra* text accompanying notes 202-07.

186. A.B.A. REPORT, *supra* note 5, at 52-53; see also Severance & Loftus, *supra* note 64, at 172-73. For a discussion of how judges respond to such questions, see *infra* text accompanying notes 212-20.

Psychologists say that these and other juror complaints are no surprise given the "eccentricities of the instruction ritual."¹⁸⁷ "The courts want juries to comply with their judges' instructions. With that reasonable assumption as a point of departure, we ask: so why do they cling to psychologically unsound methods of communication?"¹⁸⁸

2. Content and Style

The high rate of failure of jurors to fully understand the content of legal instructions is especially well-documented.¹⁸⁹ Given this abundance of research data, some experts decry the lack of movement toward more comprehensible instructions.¹⁹⁰ Students of communication science and other experts agree on the general goals for reform. First, with the juror in mind, instructions must be drafted as simply and clearly as the message content permits.¹⁹¹ Second, instructions should be as case-specific as possible, using parties' names, actual fact issues, and examples from the case.¹⁹² Third, the volume of instructions should be reduced to the absolute minimum.¹⁹³ Finally, the trial judge ought to be making some general suggestions to the jurors regarding deliberations and the group decision-making process.¹⁹⁴

187. KASSIN & WRIGHTSMAN, *supra* note 5, at 144.

188. *Id.*

189. The major studies are listed in Steele & Thornburg, *supra* note 58, at 250 nn.10-17; *see also* A.B.A. REPORT, *supra* note 5, at 43-49. *But see The View from the Jury Box, supra* note 64, at S15 (reporting that 86% of jurors found the instructions given by the judge easy to understand).

190. *See, e.g.,* Steele & Thornburg, *supra* note 58, at 251-53; Tanford, *supra* note 2, at 166. While acknowledging that the issue of juror comprehension "is not closely tied to the interests [of] the legal profession," it has been observed that lawyers and judges might be moved to action at a faster pace if low comprehension of jury instructions were made a ground of appeal. Amitam Elwork et al., *Toward Understandable Jury Instructions, in* IN THE JURY BOX, *supra* note 52, at 161, 176; *see also* SYMPOSIUM REPORT, *supra* note 78, at 24 (urging appellate court tolerance of nonpattern instructions); Mitchell v. Gonzales, 819 P.2d 872 (Cal. 1991) (relying on social science research, pattern jury instruction on proximate cause rejected as unintelligible to average juror).

191. A.B.A. REPORT, *supra* note 5, at 43-49; Schwarzer, *supra* note 24, at 743-47; Lisa Eichorn, Note, *Social Science Findings and the Jury's Ability to Disregard Evidence*, 52 LAW & CONTEMP. PROBS. 341 (1989) (stating that clearly worded instructions—containing some policy grounds for excluding evidence—would help jurors disregard the excluded material). Social scientists can contribute to the improvement of jury comprehension of instructions with specific suggestions for improvement. *See, e.g.,* Allan Lind & Anthony Partridge, *Suggestions for Improving Juror Understanding of Instructions, in* PATTERN CRIMINAL JURY INSTRUCTIONS app. A (Fed. Jud. Ctr. 1988).

192. A.B.A. REPORT, *supra* note 5, at 47-48; Schwarzer, *supra* note 24, at 744-47.

193. Schwarzer, *supra* note 24, at 747-55. The final instructions in the Rodney King state court trial consumed 78 pages of mind-numbing legalese. *People v. Powell*, No. BA-035498 (Super. Ct. Los Angeles County, Cal. 1992).

194. HASTIE ET AL., *supra* note 72, at 230; KASSIN & WRIGHTSMAN, *supra* note 5, at 143; Strawn & Munsterman, *supra* note 52, at 445-46, *reprinted in* IN THE JURY BOX, *supra* note 52, at 183.

It is quite common for joint bench-bar committees to suggest new instructions and to revise existing ones as needed. Research results strongly suggest that such committees be expanded to include or use the services of appropriate social science representatives—for example, experts in communications, psychology, and psycholinguistics, and lay persons, including former jurors.¹⁹⁵

3. The Timing of Final Instructions

By tradition or rule, final instructions almost always follow closing arguments of counsel. We are being encouraged to reconsider that ritual, and for good reason. Researchers, commentators, and judges alike contend that jury comprehension is increased if the order of these important events is reversed so that instructions precede the arguments of counsel.¹⁹⁶ Reversing the normal order of closing arguments and final instructions helps jurors integrate the evidence and the law,¹⁹⁷ enables jurors to better evaluate the arguments of counsel,¹⁹⁸ and makes it unnecessary for counsel to appear to “predict” for the jury how the judge will instruct, which allows counsel to integrate more smoothly into their arguments the actual instructions already heard by the jury.¹⁹⁹

While a change in sequence might be prohibited by rule in some states, federal rules expressly permit the judge to instruct before argument.²⁰⁰ Even where a rule declares a preference for instructing the jury following closing arguments, the sequence of events can frequently be altered either by stipulation of counsel or by order of the judge.²⁰¹

Given my experience with instructing before argument, in both criminal and civil cases, counsel are usually skeptical, if not outright resistant, to a change in sequence. However, almost all report satisfaction following trial. A concern unique to defense counsel is that the prosecutor or plaintiff's attorney will be the last person the jury hears. I inform them this will not be so, as it is not,

195. Steele & Thornburg, *supra* note 58, at 254; Austin, *supra* note 6, at 18. Prepared with the aid of an expert in communications, examples of comprehensible instructions readily adaptable to specific fact patterns are found in the Iowa Civil and Criminal Jury Instructions (1988). See IOWA STATE BAR ASS'N, IOWA CIVIL JURY INSTRUCTIONS (1988); IOWA STATE BAR ASS'N, IOWA CRIMINAL JURY INSTRUCTIONS (1988).

196. *N.Y. State Bar Report*, *supra* note 88, at 563; Schwarzer, *supra* note 1, at 131-32; Schwarzer, *supra* note 24, at 755-56; Singleton & Kass, *supra* note 148, at 59.

197. *N.Y. State Bar Report*, *supra* note 88, at 563.

198. Singleton & Kass, *supra* note 148, at 59.

199. *N.Y. State Bar Report*, *supra* note 88, at 563.

200. See FED. R. CIV. P. 51; FED. R. CRIM. P. 30.

201. See, e.g., ARIZ. R. CRIM. P. 19.1(a).

since the judge usually takes the jury back after argument for important "housekeeping" matters, such as selection and excusal of alternate jurors, discussion of the anticipated schedule for deliberations and meals, and reminders regarding exhibits and what jurors may take into the jury room. Concerned counsel seem to forget that the judge *always* gets the last word!

4. Written Copy of Final Instructions for Each Juror

To suggest, as many do, that copies of the final instructions be given to each juror, just as they are given to counsel, does not seem radical on its face. Nor are there many reversals on appeal for furnishing copies of instructions to jurors—a practice that would allow jurors to follow along as the instructions are read and then take them into deliberations.²⁰² Still, courts have been slow to adopt the practice.

The absence of a rush of judges and bar groups to embrace this seemingly innocent, yet beneficial, measure cannot be explained away due to the lack of encouragement. Two of the largest bar organizations in the country have recently recommended the practice.²⁰³ Not surprisingly, three different studies of this practice, all of which included surveys of judges, lawyers, and jurors, reported at least four distinct advantages to the practice of furnishing written copies to jurors: (1) jurors experienced less confusion about the charge;²⁰⁴ (2) jurors reported that deliberations were aided because of copied instructions;²⁰⁵ (3) jurors had fewer questions about the instructions during deliberations;²⁰⁶ and (4) jurors exhibited more confidence in their verdict.²⁰⁷ All anyone in the legal profession has to do is to try it once and ask the jurors following the verdict if the procedure was helpful to them.

202. See Annotation, *Propriety and Prejudicial Effect of Sending Written Instructions with Retiring Jury in Civil Case*, 91 A.L.R.3d 336 (1979); Annotation, *Propriety and Prejudicial Effect of Sending Written Instructions with Retiring Jury in Criminal Case*, 91 A.L.R.3d 382 (1979).

A less attractive alternative would be to tape-record the reading of the instructions and send the tape and a tape player into the jury room for the jurors' use. While an audio playback would assist all jurors to some extent, especially those who might have difficulty reading the written text, this procedure poses obvious practical problems compared to each juror having his or her own copy. Moreover, the logistical problems previously associated with providing written copies to all jurors have greatly diminished thanks to the widespread use of word processors and high speed copiers.

203. A.B.A. REPORT, *supra* note 5, at 51-52, 622-26; *N.Y. State Bar Report*, *supra* note 88, at 564; see also SYMPOSIUM REPORT, *supra* note 78, at 24.

204. *N.Y. State Bar Report*, *supra* note 88, at 565; Sand & Reiss, *supra* note 64, at 455-56.

205. A.B.A. REPORT, *supra* note 5, at 51-52, 622-26.

206. *N.Y. State Bar Report*, *supra* note 88, at 565; Sand & Reiss, *supra* note 64, at 453-56.

207. See A.B.A. REPORT, *supra* note 5, at 43-49.

5. Inviting Questions By Jurors

Given the proven high rate of juror confusion regarding legal instructions,²⁰⁸ and given that a large percentage of questions from deliberating jurors deal with the law,²⁰⁹ one has to wonder why judges do not routinely *ask* jurors, immediately after reading the instructions, if anyone is confused by, or has any questions about, the instructions? Is not that the best time to answer questions and clear up any confusion that may have already manifested itself? Would not that help ensure that the jurors understand the charge and aid those who do not?

Perhaps the fear of questions being asked (and spontaneously answered by judges) at this juncture is unsettling to some. It need not be, nor does the judge have to answer immediately. A recess can be called, if necessary, to talk with the attorneys and to frame an answer. Furthermore, the fear of being reversed on appeal should not deter judges from responding to jurors' questions about the instructions. Surely, trial judges are up to the task. Besides, the benefits, real and potential, appear to outweigh the risks.²¹⁰

J. Questions and Requests from Deliberating Jurors

The failure of trial judges to be of greater assistance to jurors regarding questions during deliberations has been shown to be an additional major source of juror confusion.²¹¹ One interesting study examined all of the trials handled by nineteen judges in an urban county over a period of one year.²¹² Of the 405 total trials, ninety-nine deliberating juries, or about twenty-five percent, submitted written questions.²¹³ The researchers found that "with unexpected homogeneity (seventy percent of the time), the judges answered questions that sought clarification of instructions by simply referring the jury

208. See *supra* notes 179-88 and accompanying text.

209. See Severance & Loftus, *supra* note 64, at 166-70 (finding that almost 75% of the questions sent out by surveyed juries dealt with the instructions).

210. See Strawn & Munsterman, *supra* note 52, at 447, reprinted in *IN THE JURY BOX*, *supra* note 52, at 184-85.

211. A.B.A. REPORT, *supra* note 5, at 52-53; Forston, *supra* note 70, at 628-29; Severance & Loftus, *supra* note 64, at 172-73; see also Vincent J. O'Neill, *Famous Last Words: Responding to Requests and Questions of Deliberating Jurors in Criminal Cases*, 11 CRIM. JUS. J. 381 (1989). A principle reason for judges' reticence is fear of committing reversible error at such a sensitive stage of the trial. Severance & Loftus, *supra* note 64, at 163. Instructing juries at an impasse or at a deadlock due to division is beyond the scope of this section. However, for suggestions concerning dialogue with juries in similar straits, see *infra* notes 255-73 and accompanying text.

212. Severance & Loftus, *supra* note 64, at 164-65.

213. *Id.* at 165.

to the instructions without further comment.²¹⁴ Questions regarding evidence were similarly dispatched, the jurors being told eleven of twelve times to rely upon their memories of the evidence.²¹⁵ With admirable restraint, the researchers wondered if there was sufficient judicial "concern and responsiveness" to juror confusion,²¹⁶ and concluded that judges "may wish to evaluate their own responses to jury questions in light of these data."²¹⁷ Although these rather disturbing results vary from time to time within the same courthouse or from jurisdiction to jurisdiction, the results strongly suggest a pervasive problem, especially in light of the related findings that suggest that a lack of judicial responsiveness is a major source of juror confusion.²¹⁸

Case law allows trial judges discretion to decide how to respond to questions from a deliberating jury,²¹⁹ except where failure to respond, or to do so adequately, bears on an important matter and may prompt an erroneous verdict.²²⁰ Jurors' questions, looked on by many lawyers and judges as an inconvenience or worse, should be viewed as welcomed opportunities to learn about jurors' thinking²²¹ and to determine whether additional or corrective action is necessary to ensure juror comprehension.²²² If judges more fully and fairly respond to deliberating jurors' legitimate concerns in a manner consistent with applicable law, being careful, obviously, not to state or imply any view on the merits or to pressure the jury in any way, these occasions for dialogue will help combat juror confusion and mistaken verdicts.

IV. JUROR "SPEAKING RIGHTS" BEYOND NOTE-TAKING AND ASKING QUESTIONS

The ten procedures or techniques discussed in Part III have received considerable attention from social scientists, legal commentators, judges, bar

214. *Id.* at 172.

215. *Id.*

216. *Id.*

217. *Id.* at 173; see also A.B.A. REPORT, *supra* note 5, at 52-53; Schwarzer, *supra* note 1, at 143.

218. See sources cited *supra* note 211.

219. *E.g.*, Lundquist v. Seales, 657 P.2d 912, 914-15 (Ariz. Ct. App. 1982); Waterford v. Holloway, 491 N.E.2d 1199, 1207 (Ill. Ct. App. 1986).

220. *E.g.*, Bollenback v. United States, 326 U.S. 607 (1946); Harrington v. Beauchamp Enter., 761 P.2d 1022, 1025 (Ariz. 1988).

221. See Bernard S. Meyer & Maurice Rosenberg, *Questions Juries Ask: Untapped Springs of Insight*, 55 JUDICATURE 105 (1971) (explaining a system of monitoring jury deliberations through jury questions in order to better understand how civil juries bring community standards to bear in deciding the legal issues presented to them).

222. See Severence & Loftus, *supra* note 64, at 163.

groups, and others. Although some of these suggestions still generate debate in various quarters, none of them can be considered radical or revolutionary. Rather, one might characterize them as "mainstream" proposals that have been or ought to be implemented on a relatively broad scale in the near future. Momentum appears to be on their side.

Two additional proposals may further advance juror participation and two-way communication. Hopefully, these ideas will receive added attention and consideration in social science and legal circles and will be tested in courtrooms, jury rooms, and elsewhere, generating sufficient empirical data to support informed judgments. The first additional proposal—that of permitting jurors to discuss the evidence among themselves as the trial proceeds—has received only modest attention in recent years. It has yet to pass beyond the preliminary discussion stage to serious debate and field testing. In the interest of juror comprehension and a more democratic courtroom, it is time that it did.

The second proposal, no mention of which can be found in legal or social science literature or in published cases, is intended to provide a vehicle for judicial and attorney interaction with deliberating jurors who indicate they have reached an impasse or are having difficulties in reaching a verdict. In brief, the trial judge would offer the help of court and counsel by asking the jurors to identify and list the issues of fact or law that divide them, and that, if addressed further, might help bring about a verdict. This proposal may be viewed by many, especially some legal traditionalists, as too radical and not worthy of serious consideration. My objective is to show that it is worthy of additional study and field testing.

A. Discussions Among Jurors During Trial

1. The Traditional Rule Against Discussions Among Jurors "Defies Reason"²²³

The traditional instruction forbidding any and all discussions about the case by jurors until deliberations commence is a corollary of two assumptions or expectations: jurors' minds might become contaminated with outside information and jurors' discussions of the evidence might cause them to make premature judgments about the case.²²⁴

223. Schwarzer, *supra* note 1, at 142.

224. *Id.*, see also SYMPOSIUM REPORT, *supra* note 78, at 20.

Consistent with the "passive juror" model, jurors are expected to correctly encode and store evidence, suspending all judgment in the case until deliberations commence.²²⁵ However much we idealize the average juror in these ways, the underlying behavioral assumptions have been proven unwarranted and not based on reality. Repeated studies over the past several years reveal that the juror is not a passive and altogether accurate encoder of information who suspends judgment until the end of the case.²²⁶ One psychologist and student of juror behavior asks whether humans are even *capable* of "detached information processing"—separating the acquisition of information from its evaluation.²²⁷ In two surveys that asked jurors whether they thought their fellow jurors had discussed the case prior to deliberation, eleven percent of the jurors responded affirmatively to one survey,²²⁸ and forty-four percent to the other.²²⁹ Given that the jurors were admonished not

225. Wrightsman, *supra* note 74, at 288-89; *see also supra* notes 67-74 and accompanying text.

226. *See, e.g.*, HOROWITZ & WILLGING, *supra* note 72, at 209-10; WRIGHTSMAN, *supra* note 74, at 288-89. As concluded in HASTIE ET AL., *supra* note 72, at 24:

Virtually all models of jury decision making assume that individual jurors have reached initial pre-deliberation verdict decisions at the start of deliberation. Thus, the input at the beginning of the jury task is a set of jurors with verdict preferences. Each juror may be presumed to have completed all of the preliminary information-processing subtasks identified in the analysis of the juror's task before beginning the jury decision task.

See also Forston, *supra* note 70, at 612 (noting that the "vast majority" of jurors reach a fairly definite decision before all the evidence is in); Holstein, *supra* note 90 (stating that jurors use schema in interpreting evidence and deciding upon a verdict); MacCoun, *supra* note 91, at 225 (noting that "many" jurors form tentative verdict preferences during the trial); Moore, *supra* note 73, at 274 (finding that "jurors tended to reach a pre-deliberation verdict decision by focussing on only one or a very few items of evidence" in a mock trial experiment); Nancy Pennington & Reid Hastie, *Practical Implications of Psychological Research on Juror and Jury Decision Making*, 16 PERSONALITY & SOC. PSYCHOL. BULL. 90, 93-98 (1990); Thomas L. Grisham & Stephen F. Lawless, Note, *Jurors Judge Justice: A Survey of Criminal Jurors*, 3 N.M. L. REV. 352, 358 (1973) (finding that approximately 57% of jurors in a study made up their minds before the deliberations commenced).

227. WRIGHTSMAN, *supra* note 74, at 256. One side effect of forcing silence upon trial jurors was recently reported. Having no one to talk with about the high-profile case being tried, one juror went home each evening, soaked in a hot bath, and dictated her impressions of the trial. She later offered to sell her tapes for \$25,000. Joseph Pereira, *After Curtain Falls on Celebrated Trials, Limelight Shines on Vote-and-Tell Jurors*, WALL ST. J., Sept. 24, 1991, at B1. While this juror merely wanted to get her thoughts of the trial "off her chest," *id.* at B5, University of Michigan law professor Richard Lampert suggests that the potential for such lucrative deals may encourage a juror to render a decision based less on the evidence in the case than on "what he or she thinks might make for a more dramatic outcome." *Id.*

228. Elizabeth F. Loftus & Douglas Leber, *Do Jurors Talk?*, TRIAL, Jan. 1986, at 59, 60. This finding prompted the authors to conclude that a stronger admonition, accompanied by follow-up interrogations of the jury by the judge, were needed. *Id.* This sentiment appears to be at odds with the views of most who have published on this question. *See, e.g.*, AUSTIN, *supra* note 4, at 103-04; Austin, *supra* note 6, at 18; Friedland, *supra* note 4, at 199, 208-09; Schwarzer, *supra* note 1, at 142-43.

229. *See* Grisham & Lawless, *supra* note 226, at 358. This same survey revealed that nearly 19% of the jurors had made up their minds about guilt or innocence during the evidence phase. *See id.*, *see also The View from the Jury Box*, *supra* note 64, at S2, S11 (finding that, out of 783 responding jurors,

to discuss such matters prior to deliberation, one might assume that these results are conservative.

The researchers who have called for the modification or outright abolition of the standard proscription cite a number of expected benefits from structured juror discussions:²³⁰ (1) juror understanding of the evidence will be enhanced, given the proven benefits of interactive communication and the collective knowledge of the group;²³¹ (2) thoughts or questions that jurors have can be shared or asked on a relatively timely basis, but might be forgotten if held until deliberations;²³² (3) since many jurors form tentative verdict choices during the evidence phase, these views or biases might surface during discussions and be tested by the group's knowledge;²³³ (4) "fugitive" conversations are likely to occur anyway—these are divisive and do not have the benefit of group response;²³⁴ and (5) since jurors are going to talk about *something*, they might as well talk about matters that are relevant to their assigned task.²³⁵

Having proved the law's assumptions about juror behavior false and having cast considerable doubt on the wisdom and enforceability of this standard admonition to jurors, an important task remains for social scientists. Future research should be conducted to demonstrate the effects of an "affirmative" instruction permitting jurors, under certain restrictions, to discuss evidence during the trial.²³⁶ Among the concerns raised by the practice are whether such discussions can occur without jurors taking firm, closed-minded positions on the ultimate issue or issues in the case and whether the procedure jeopardizes the fairness of the trial in some other significant way. It is time to learn the answers to these and other pertinent questions.²³⁷

71% admitted that they began to decide the case prior to deliberations, and 43% began deciding before closing arguments).

230. *E.g.*, AUSTIN, *supra* note 4, at 103-04. "The restriction on intragroup discussion should be terminated so that jurors can discuss the details of the trial as it unfolds. Group discussion is a logical adjunct to note-taking and two-way communication." *Id.* at 103; *see also* Austin, *supra* note 6, at 18 (arguing that "group discussion would enhance the collective knowledge of the jury while reinforcing memory retention").

231. AUSTIN, *supra* note 4, at 104.

232. *Id.*

233. *Id.*

234. *Id.*

235. *See id.*

236. *See infra* text accompanying notes 252-55. For a proposed jury instruction to that effect, see *infra* text accompanying note 256.

237. *See generally* Larry Heuer & Steven D. Penrod, *Some Suggestions for the Critical Appraisal of a More Active Jury*, 85 NW. U. L. REV. 226 (1990) (calling for more vigorous experimentation with such progressive jury procedures as note-taking and the questioning of witnesses).

2. Legal Support for Juror "Speaking Rights"²³⁸

The "rules for getting the floor"²³⁹ during trial ought to be modified to permit at least limited discussions of the evidence among jurors who wish to participate, thereby establishing a form of "speaking rights"²⁴⁰ for the decision makers. Persuaded by studies of group psychology and their own experiences, legal commentators argue that the restriction on pre-deliberation discussions is anti-educational, nondemocratic, and unnecessary to ensure, at least in its present form, an orderly or otherwise fair trial.²⁴¹ For example, William Schwarzer, Director of the Federal Judicial Center,²⁴² opines that in long or complex trials, "it defies reason to expect jurors, who may be confused, troubled, and perhaps overwhelmed by the unaccustomed responsibility, not to share their concerns and look to their colleagues for help and mutual support."²⁴³ Citing numerous benefits to be gained from freeing jurors from this overly broad restriction,²⁴⁴ Judge Schwarzer asks, and then answers, the critical question:

Again, is it better to turn away from the truth or to face it? At the cost of tolerating a slight departure from the conventional deliberation process, we

238. See *supra* notes 116-18 and accompanying text.

239. *Id.*

240. *Id.*

241. *E.g.*, AUSTIN, *supra* note 4, at 103-04; Friedland, *supra* note 4, at 199, 208-09; Schwarzer, *supra* note 1, at 142-43; Austin, *supra* note 6, at 18.

242. Schwarzer sat on the United States District Court for the Northern District of California from 1976 to 1990. His insights and progressive proposals to improve jury comprehension are heavily relied upon by this writer and are cited throughout this Article.

243. Schwarzer, *supra* note 1, at 142.

244. Schwarzer notes:

Discussion among jurors may reveal areas of misunderstanding or confusion that jurors could then clarify by questioning the witnesses or the judge. It may also help ease the tension that jurors experience sitting on a long and complicated case. That such discussions may influence the views of some jurors before the trial is over is not objectionable, since any tentative opinion so formed must still stand the test of full debate among the entire jury during the deliberations. In any event, the lonely juror who, unable to talk to the others, remains confused during the trial is not likely to be an effective participant in the verdict deliberations.

Permitting jurors to talk to each other about the case during the trial may have other positive effects. There is evidence that the opinions jurors form early in the trial often become their decisions later. It is possible that a juror may be less prone to form and hold to an early opinion if he or she hears that others view the evidence differently. Discussions with other jurors may suggest to a juror different perspectives and interpretations that will lead to more thoughtful and open-minded consideration of the case. Although the benefits of relaxing the traditional rule are not provable, the rule's disadvantages seem sufficiently clear to justify jettisoning this unnatural and burdensome restriction.

Id. at 142-43 (citation omitted).

could gain the benefit of improved comprehension by allowing jurors to talk with each other about what they hear and see as the trial progresses.²⁴⁵

He concludes by making it clear that certain parts of the current admonition should still be given:

Judges should, of course, continue to instruct jurors not to talk about the case to, or in the presence of, anyone not on the jury under any circumstances, to keep an open mind during the trial, and eventually to reach a verdict only after full discussion with all the other jurors.²⁴⁶

If the legitimate concerns sought to be addressed by the current admonition are recognized, jurors could exercise their "speaking rights" consistent with the parties' rights to a fair trial. Indeed, the quality of the whole trial, and its outcome, would likely be enhanced for everyone.

Both Professors Austin and Friedland have studied juries extensively. Professor Austin characterizes the total ban on juror discussions as "anachronis[ti]c," while Professor Friedland characterizes this ban as conducive to "deficient jury functioning."²⁴⁷ Attributing this and some other current restrictions on juror activism to paternalistic and distrustful attitudes toward jurors on the part of judges and lawyers, Professor Friedland argues that such negative attitudes are both unwise as a matter of policy and not justified by the data. He concludes that jurors themselves should be active participants in defining "the parameters of the decisionmaking process."²⁴⁸ The limitation on juror discussions should be reexamined, he says, since, although it assists in promoting appearances of juror neutrality, it interferes with learning and comprehension to too great a degree.²⁴⁹ These changes should lead to more efficient and responsible decision makers.²⁵⁰

Neither state nor federal case law precludes modifying present practice to allow jurors to discuss the evidence before deliberation. As a predicate, it should be noted that a verdict will not be disturbed where predeliberation juror discussions have been proven,²⁵¹ absent a showing that the jurors involved decided the merits prematurely or that prejudicial outside information

245. *Id.* at 142.

246. *Id.* at 143.

247. Friedland, *supra* note 4, at 199; Austin, *supra* note 6, at 18.

248. Friedland, *supra* note 4, at 207-08; *see also* Schwarzer, *supra* note 1, at 143 ("The jury's judgment of what it needs should be respected within reasonable limits.").

249. Friedland, *supra* note 4, at 199.

250. *Id.* at 206-12.

251. Problems of proof are presented by the rules of most jurisdictions. *See, e.g.*, FED. R. EVID. 606(b); *State v. Frazier*, 683 S.W.2d 346, 353 (Tenn. Crim. App. 1984).

was introduced into the decision-making process.²⁵² Second, although the cases are divided on the question of whether the trial judge commits reversible error by affirmatively instructing the jurors that they *may* discuss the evidence among themselves subject to certain conditions,²⁵³ the well-reasoned cases approve such instructions as long as the jurors are also told not to make up their minds on the merits until deliberations commence.²⁵⁴ A strong case can be made that, except in a few jurisdictions, current law does not forbid experimenting with properly drawn instructions that allow jurors to discuss the evidence among themselves before formal deliberations begin.

3. A Suggested Procedure and Jury Instruction

Given the law's legitimate concern about jurors making up their minds before hearing all the evidence, arguments of counsel, and final instructions, and given the current state of behavioral science research on the subject, a jury instruction can be framed that grants, defines, and limits juror "speaking rights." Such an instruction can also enhance jurors' participation and comprehension, and accommodate their natural need to speak about what they hear and see, while, at the same time, preserving litigants' rights to a hearing

252. *Stockton v. Virginia*, 852 F.2d 740 (4th Cir. 1988) (finding no error), *cert. denied*, 489 U.S. 1071 (1989); *People v. Gilyard*, 260 N.E.2d 364 (Ill. App. Ct. 1970) (same), *cert. denied*, 402 U.S. 911 (1971); *Copeland v. Town of Amboy*, 543 N.Y.S.2d 816 (N.Y. App. Div. 1989) (same); *Caterpillar Tractor Co. v. Hulvey*, 353 S.E.2d 747 (Va. 1987) (same). *Contra* *Lukstas v. Saint Francis Hosp.*, 583 A.2d 941 (Conn. App. Ct. 1990) (finding error where a subset of jurors deliberated case by themselves during recess). See generally Dale R. Agthe, Annotation, *Propriety and Effect of Jurors' Discussion of Evidence Among Themselves Before Final Submission of Criminal Case*, 21 A.L.R.4th 444 (1983) (collecting and analyzing cases involving discussions among jurors but not with outside parties).

253. *Meggs v. Fair*, 621 F.2d 460 (1st Cir. 1980) (upholding "affirmative" instruction); *United States v. Lemus*, 542 F.2d 222 (4th Cir. 1976) (same), *cert. denied*, 430 U.S. 947 (1977); *Wilson v. State*, 242 A.2d 194 (Md. Ct. Special App. 1968) (same), *cert. denied*, 394 U.S. 975 (1977). *But see* *Winebrenner v. United States*, 147 F.2d 322 (8th Cir.) (holding that giving an "affirmative" instruction constitutes reversible error), *cert. denied*, 325 U.S. 863 (1945); *Commonwealth v. Benjamin*, 343 N.E.2d 402 (Mass. 1976) (disapproving of similar instructions); *People v. Hunter*, 121 N.W.2d 442 (Mich. 1963) (same).

254. The trial judge's instruction permitting jury discussions in *Meggs* was remarkable for its insight and candor:

[I]'s only natural that you're going to talk about this case at recesses and probably at lunchtime, and it's perfectly all right to talk about a witness' testimony. In other words, it might be that you might ask another juror did she say that? What was your understanding of what she said[?]. That's perfectly all right.

The only thing I want to caution you on is not to come to a conclusion. Don't commit yourself one way or the other until you hear all the evidence and hear arguments and then my instructions.

Meggs, 621 F.2d at 463 (citation omitted).

by a jury that will not decide the case until it hears from both sides and the judge.

Proposed Jury Instruction: Juror Discussions

1. I want to talk with you about who you can speak with during this trial, what you can speak about, and why you should keep an open mind about both the issues in the case and about who should win or lose until the trial has ended and you have started to deliberate.

2. As you hear the evidence in the case, you may have questions you want to ask or discuss with other jurors. You may do this if you wish. For example, you may not be certain that a witness said a particular thing. You may not have understood some testimony. You may have a question about an exhibit that the jury has seen. These are the kinds of questions you may take up with each other.

3. However, I ask you to do three important things if you do discuss the evidence with each other:

a. First, do not make your minds up about any issue in the case, especially about guilt or innocence [who should win the case], until you have heard all the evidence from both sides, all the arguments of the attorneys, and the final instructions of law. Obviously, it would not be fair to the litigants if any one of you made up your mind about the case without hearing all the evidence. If you do not hear about the law that applies to the case before you make up your minds, you may make a decision that is wrong for legal reasons. You will also need to hear the attorneys summarize and argue their cases. Remember, you took an oath to decide this case on the basis of the evidence—that means *all* the evidence—and the law I will give you at the end of the case.

b. Second, I ask that you be careful not to discuss the evidence with another juror while the trial is going on in the courtroom. That may distract other jurors. Besides, all of you need to carefully listen to the evidence and observe the witnesses while they testify.

c. Third, do not discuss the evidence with another juror if any person who is not a juror is around or may hear you.

4. To conclude, I want to remind you of my earlier instruction concerning who you should not talk to about the case. It comes down to this—during the trial you may talk with each other about the evidence, following the guidelines I have just read to you. However, you may not talk to any other person about the case until your verdict has been read in court and you have been told by me that your service in this case has ended.

B. Interacting With Deliberating Jurors At or Near Impasse

1. Maximizing Chances for a Verdict at the First Trial

This proposal for interacting with jurors has received very little attention in published opinions or from legal commentators.²⁵⁵ Some judges, in an attempt to avoid a mistrial due to a deadlocked jury, have probably utilized one or more elements of this proposal in trying to discern what else could have been done to salvage a verdict in the first trial. What is suggested here, however, is a structured dialogue among the jurors, judge, and trial attorneys when deliberating jurors reach an impasse and are unable to render a verdict. At this point, I propose that the judge, with or without the consent of counsel, respond by asking the jurors to consider listing the issues or questions that continue to divide them and that, if addressed further in the courtroom, might help bring about a verdict. Upon receiving the jury's response, the judge might decide that one or more measures are called for: clarifying previous instructions or the giving of additional instructions, directing further argument by counsel on selected points, or allowing further evidence on certain discrete issues. Depending on the abilities of the jurors, judge, and lawyers to articulate the divisive issues and to frame additional helpful instructions, arguments, or other responses, and depending on how many jurors have positions on the case that are subject to modification based on new information, the technique holds significant promise both for reducing the number of mistrials due to deadlocked juries and for producing more accurate verdicts.

There is a category of cases, of course, that will result in a hung jury despite the heroic efforts of all involved. Many trial juries deadlock for no apparent reason in what appear to be cases thoroughly tried and readily susceptible of resolution—for example, there may have been an unreasonable and intransigent juror. Whatever the reason, nothing short of blatant coercion could force a verdict from some juries. However, there are a large number of cases where a declaration of mistrial quickly follows the first indication that the jury is deadlocked. The judge and one or both of the attorneys may experience substantial frustration at knowing neither what prevented a verdict nor what they might have done differently to avoid an expensive, time-consuming, and often needless new trial. These are the types of cases for

255. *But see* SYMPOSIUM REPORT, *supra* note 78, at 22-23. In an unpublished opinion, Judge Newblatt, a federal trial judge, utilized a similar procedure when he ordered reargument by counsel on discreet issues listed by a deliberating jury, all in hopes of avoiding a mistrial due to a deadlocked panel. *Withers v. Ringlein*, 745 F. Supp. 1272 (E.D. Mich. 1990).

which this proposal is especially well-suited. Instead of engaging in after-the-fact speculation about matters such as what caused the jury to hang, what one could have done earlier in the trial, or what one might do differently in the next trial, why not *ask* the jurors? At the first logical opportunity, ask them what is troubling them and then do everything reasonably possible to *respond* to their concerns and needs in the hope of helping them understand and decide the case so that a mistrial will not be necessary.

Despite suggestions to the contrary,²⁵⁶ the risk of mistrials due to deadlocked juries is intolerably high. Unfortunately, there is no data documenting the dimensions of the problem. However, even if, contrary to this writer's experience and those of many fellow trial judges, the rate of mistrial due to a deadlocked jury is relatively low, the substantial direct and indirect economic, human, and social costs involved in one trial, let alone two or more in the same case, should be avoided by following this simple, logical procedure. It has been said that the only thing worse than trying a case once is having to try it twice. To that it should be added—the only thing worse than trying a case twice because of a hung jury is doing so without taking reasonable measures at the first trial to maximize the chances of a verdict.

The state of the case law regarding the court's relationship with deliberating juries appears to allow this sort of dialogue, followed by further proceedings in open court. For example, the trial judge has discretion to reopen during deliberations for read-backs of testimony or for further instructions, argument, or evidence.²⁵⁷ Indeed, it may be an abuse of discretion to fail to reopen the trial to permit additional critical evidence potentially favorable to the accused.²⁵⁸ In one case, a new instruction given after the jury had reached a verdict was upheld where the judge had not been told what the verdict was.²⁵⁹ Of course, there are important limitations on dealings with jurors after an indication that they have reached impasse. Among other things, the court must take care not to coerce a verdict or to influence the jurors to decide a particular way.²⁶⁰

256. See, e.g., Marshall, *supra* note 144, at 156 (arguing that the risk of hung juries is "*de minimum*," relying on the fact that in 38 years on the bench, he has had only five hung juries—four criminal and one civil). But see Grisham & Lawless, *supra* note 226 (surveying 500 criminal jurors in New Mexico 20 years ago and finding that as many as one-third of the juries reached impasse).

257. See, e.g., United States v. Burger, 419 F.2d 1293 (5th Cir. 1969); Fernandez v. United States, 329 F.2d 899 (9th Cir.), *cert. denied*, 379 U.S. 832 (1964); Henry v. United States, 204 F.2d 817 (6th Cir. 1953); People v. Scott, 465 N.Y.S.2d 819 (Monroe County Ct. 1983).

258. See, e.g., United States v. Bayer, 156 F.2d 964 (2d Cir. 1946), *rev'd*, 331 U.S. 785 (1947); State v. Wolf, 207 A.2d 670 (N.J. 1965).

259. State v. Govan, 744 P.2d 712 (Ariz. Ct. App. 1987).

260. See Henry, 204 F.2d 817; State v. McCutcheon, 723 P.2d 666 (Ariz. 1986); People v. Carter, 442 P.2d 353 (Cal. 1968), *overruled by* People v. Gaider, 566 P.2d 997 (Cal. 1977).

If the trial judge never knows that a deliberating jury is having difficulty in making progress toward a verdict, it seems improper for the judge to inquire whether there are areas of disagreement that warrant further proceedings. However, once the court learns that an apparent impasse may result or has been reached, it is appropriate, and wholly consistent with the public interest in avoiding another trial in the case, to give the jury the option, even if they do not solicit help, of telling the judge and lawyers which issues continue to divide them in the event further proceedings might be of assistance. It is also reasonable to assume that jurors who are unable to agree on a verdict may have some questions about the law or the evidence that, if addressed further, might change some views and even some votes. Conducting such a dialogue, if properly structured and worded,²⁶¹ does not seem coercive or suggestive of a judge's preference for a particular verdict.

2. A Case Study

The technique of interacting with deliberating jurors who are at or near impasse was recently employed in an Arizona court in an attempt to avoid hopeless deadlock. Following trial, all of the participants were interviewed by this writer to learn of their reactions and whether the procedure had merit.

State v. Knapp,²⁶² a murder case being retried for the third time in Phoenix, Arizona, in late 1991, consumed about ten weeks of trial. Closing arguments lasted one day and the final jury instructions were twenty-seven pages long. After days of deliberations, the twelve-person jury sent Judge Martone a note telling him that they were at an impasse.²⁶³ After receiving the note, Judge Martone read an ABA-approved, modified "Allen charge"²⁶⁴ to the jury, and the jury returned to its deliberations. One and one-half days later, the foreperson sent out a second note—this one an obvious plea for

261. For a suggested form of offer of assistance to the jury, see *infra* part IV.B.4.

262. CR90-08222 (Sup. Ct., Maricopa County, Ariz. filed Dec. 3, 1991). The trial was presided over by Frederick J. Martone, who has since been elevated to the Arizona Supreme Court. The defendant had spent 12 years on death row since the verdict in the first trial. A new trial was eventually ordered in a habeas corpus proceeding in the trial court. *Id.*

263. Jury Note (Message, Nov. 25, 1991), *Knapp*, CR90-08222 (copy on file with the *Indiana Law Journal*). The note stated: "We are stuck and at this point we feel it is a deadlock—Where do we go from here?" *Id.*

264. The ABA reworked the so-called "dynamite charge" approved in *Allen v. United States*, 164 U.S. 492 (1896), and recommended the use of its version when reinstructing juries thought to be at an impasse in their deliberations. See STANDARDS FOR CRIMINAL JUSTICE Standard 15.4.4(a), (b) (Am. Bar Ass'n, 2d ed. 1982). The ABA and others have viewed the older "Allen charge" as being too intrusive and coercive. *Id.*

assistance.²⁶⁵ After conferring with the attorneys, and over the strenuous objections of defense counsel,²⁶⁶ the judge responded to the jurors with a written offer of assistance by him and counsel.²⁶⁷ He asked them, if they wished, to identify and list the areas of disagreement that counsel could address further.²⁶⁸ The judge's answer emphasized his desire to assist, not to force a verdict.²⁶⁹ Two days later, the jury responded with a list of several points and concerns.²⁷⁰ The jurors were returned to the courtroom, where counsel were each allowed one hour for supplemental argument dealing solely with the matters raised by the jury's response.²⁷¹ After being invited to deliberate further, the jury was returned to the jury room. However, one

265. The note read: "Because of our situation at this point, as foreperson I am at a loss as to how to help this jury reach a decision. Could you give me some help." Jury Note (Message, Nov. 26, 1991), *Knapp*, CR90-08222 (copy on file with the *Indiana Law Journal*).

266. The attorneys were given overnight to research and consider the question. The prosecutor favored following the suggestion of the judge. For an explanation of the positions of counsel for both sides, see *infra* note 274 and accompanying text.

267. Jury Note (Reply, Nov. 26, 1991), *Knapp*, CR90-08222 (copy on file with the *Indiana Law Journal*).

268. *Id.*

269. The full text of the note to the jurors read:

The following is offered to facilitate your deliberative processes, not to force you to reach a verdict.

You may wish to identify areas of agreement and areas of disagreement. You may then wish to discuss the law and the evidence as they relate to areas of disagreement.

If you still have disagreement, you may wish to identify for the court and counsel which issues of law or fact you would like counsel to argue further to you. If you elect this option, please list in writing the issues you would like argued. We will then ask counsel to address these issues in supplementary arguments promptly.

We do not wish to force a verdict. We are merely trying to be responsive to your request for help. If it is reasonably probable that you could reach a verdict by supplemental arguments, it would be wise to give it a try.

Id.

270. Jury Note (Message, Dec. 2, 1991), *Knapp*, CR90-08222 (copy on file with the *Indiana Law Journal*). The jury's response was a laundry list of the individual members' concerns, and it reflected their division over most of the basic issues in the case:

In response to your offer for assistance we have determined the following areas to be areas of disagreement. Missing evidence, unburned carpet in the doorway, the confession flash-over concept, John's character, John's inconsistencies, ability of the girls to set the fire with just matches and paper. If you believe the confession must you believe all of it? Is the confession the state's case?

Id.

271. After discussing the jury's list of issues and questions with the attorneys, Martone told the jurors:

Thank you. The lawyers will be given 1 hour per side to address these issues.

Again, we do not wish to compel you to reach a verdict. If at any time you feel no further progress can be made, please let me know.

Jury Note (Reply, Dec. 2, 1991), *Knapp*, CR90-08222 (copy on file with the *Indiana Law Journal*).

and one-half days later the jurors reported that they were hopelessly deadlocked and Judge Martone declared a mistrial.²⁷²

Within a month of the trial's end, all participants were interviewed concerning their experiences with this attempt to salvage a verdict through active dialogue among the jurors, the judge, and the lawyers. With the exception of the two defense attorneys, who experienced mixed reactions ranging from initial curiosity to eventual outright opposition, all participants were positive and recommended its use in future cases even though a verdict did not result in the *Knapp* case.

Given all of the jurors' questions, confusion, deep division, and need to make themselves heard, the twelve jurors unanimously welcomed Judge Martone's offer of assistance.²⁷³ Their initial reactions to the invitation were extremely positive, including feelings of gratitude for a welcome opportunity to receive some help. The jurors had felt desperately divided and at a dead end, but believed that Judge Martone's offer of assistance provided some hope, if not the only hope, of resolving the case with a verdict. They reported difficulties in compiling their list for the judge, due to the widely disparate concerns and areas of confusion of individual jurors, and the rancorous debate that had preceded their first report of impasse. Nevertheless, all were pleased with the invitation to talk with the judge and attorneys about the case for the first time since jury selection. Not surprisingly, the jurors reported substantial frustration relating to their perceived inability to ask questions during the trial and their unsatisfactory experience with questions earlier in deliberations.

The jurors did not share the concern of the defense lawyers—that the judge's offer for the jurors to list divisive issues would somehow intrude upon

272. *Knapp*, CR90-08222.

273. All of the jurors were eager to talk about their experiences with this dialogue and the supplemental argument by counsel. Many jurors were surprised to learn that the technique was not in common use. The jurors learned during their deliberations that this was the first known use of this procedure with an Arizona jury when one juror read and reported a newspaper article to the other jurors prior to the jury's return note listing issues for the judge. Interviews with Jurors in *Knapp*, CR90-08222 (Feb. 3, 1992) (copy on file with the *Indiana Law Journal*). As a part of this case study, the twelve jurors were all asked the following questions with appropriate follow-up:

1. What was your initial individual reaction to Judge Martone's offer?
2. Given the tight secrecy that surrounds jury deliberations, did you feel the judge was being intrusive or invading the jury's privacy?
3. How did you decide what to list in your answer to the judge? Was that a difficult process?
4. Did the supplemental closing argument of counsel meet your expectations?
5. Did the entire effort help you, other jurors or the jury as a group? Was it worthwhile, given your continued inability to reach a verdict?
6. Would you recommend its use in future cases where the jury signals that it has reached an impasse?

The prosecutor and the defense counsel for the case were interviewed as well.

the sanctity or privacy of their deliberations. No juror felt that the deliberation process or their own individual thought processes were compromised. As a matter of fact, they dismissed this suggestion with the response that sharing questions and confusion with those that could help was a natural and logical thing to do. Their reactions to the supplemental closing argument that followed were mixed. Many were pleased to find their recollections, understandings, and views in the case confirmed by counsel. Some complained that the lawyers seemed ill-prepared for additional argument. Only one juror reported a change of mind as a result of the process.

Despite their inability to achieve unanimity, all of the jurors believed that the dialogue was a positive development, that it was worth the time and trouble, and that it should be used in future cases where the jury evidences difficulties in reaching a decision. Furthermore, they were enthusiastic about this rare opportunity "to be heard from" and perplexed about why they had been forced to "sit on their hands" up to that point in the trial.

The prosecutor thought that this novel procedure was a net positive, worthy of being tried again in other cases. His initial positive reaction to the suggestion was tempered by his belief that the judge would likely be reversed on appeal. However, he saw no downside for the prosecution, since the only alternative was a mistrial due to jury deadlock. In either event, the state would be faced with a new trial. The prosecutor also felt that the technique held some hope for moving the jury one way or the other—that is, until he saw the list of issues the jurors' wished counsel had addressed. All of the attorneys felt that the jury's listed issues were so broad and numerous that the lawyers could not be of much help in only one hour of additional argument.

Although curious about the procedure from an intellectual viewpoint, the defense attorneys' reactions included apprehension over the lack of legal precedent for the technique and experimenting with it in a capital case. As advocates for their client, they argued that the procedure was coercive and an undue invasion of the jury's province, citing the rights of the jurors to decide the case for any or no reason, with the jurors' expectations that they will never be called upon to reveal any of their thoughts or thought processes to anyone outside the deliberating room. Defense counsel also preferred a hung jury, and a resulting mistrial, to risking a verdict following use of this procedure. Finally, they did not recommend its use again absent some legal authority, unless its potential for coercion was eliminated and the inquiry limited to more discrete issues.²⁷⁴

274. Ironically, one defense counsel complained that he felt like a "school teacher" while rearguing his case. The analogy is entirely apt, given the potential of this procedure for educating and assisting jurors to refocus on the task at hand. After all, one would expect a teacher to respond similarly to

The trial judge in *Knapp* strongly believed in the propriety of using this technique in the case, especially since the jurors expressly requested help. He thought he would have been upheld on appeal if a conviction had followed, since only the most tradition-bound judges would condemn the procedure. He also saw no downside, since a mistrial was the only alternative. Although an explicit request by the jury makes a stronger case for its use, Judge Martone agreed that the technique ought to be used, and upheld, in situations where the risk of jury impasse is manifest, whether or not the jurors expressly ask the judge or lawyers for help. He was not persuaded by complaints of coercion or invasion of the jury's privacy, given that he did not request or command, but rather invited the jurors to consider listing troublesome and divisive issues, and that he repeatedly stated that he did not want to force a verdict. Judge Martone said that it insulted the jurors' intelligence for counsel to suggest that the jury could be divided over nothing at all, as opposed to divisive, substantive issues capable of definition. His only reservation about reopening for further argument was that the opportunity might tempt counsel to inject material ensuring a mistrial. However, that concern was not realized in the *Knapp* case. Thus, all of the trial participants in this case, except defense counsel, thought this attempt at dialogue with a deliberating jury at apparent impasse was a positive device and a worthwhile effort to salvage a verdict by addressing jurors' questions.

3. Reopening for Further Evidence or Instructions

Responding to deliberating jurors' questions and concerns with additional argument by counsel, though objectionable to some, would seem to raise few serious legal or practical problems. The *Knapp* case illustrates this.²⁷⁵ While the judge's note to the *Knapp* jury did not foreclose juror questions about the legal instructions, it certainly was not a clear invitation to submit questions about the law.²⁷⁶ Jurors ought to be clearly informed of all appropriate options, that is, of their right to list and return questions about the evidence,

students experiencing the same difficulties with an assignment or project. Of course, the timing, content, and follow-up, among other things, may vary from the classroom to the courtroom, but the need, logic, and basic learning principles are much the same. Thus, lawyers and judges will feel more like educators as practices based upon the behavioral-educational-active model of the jury supplant the traditional legal-adversarial-passive one.

275. In another recent case where the jury was reportedly at impasse, a federal trial judge based his order for additional argument upon the "inherent powers of the Court to control argument." He also concluded that the procedure was not coercive, did not otherwise prejudice either party, and was "a particularly effective tool to avoid costly and unnecessary mistrials leading to retrials." *Withers v. Ringlein*, 745 F. Supp. 1272, 1274 (E.D. Mich. 1990).

276. For the text of the judge's note to the jury, see *supra* note 269.

the instructions, and even the deliberative or decision-making process itself.²⁷⁷ Jury responses calling for the trial judge to clarify or explain earlier instructions or to give additional appropriate instructions ought to be fully answered by the judge in the courtroom. When finished with any supplemental instructions, the judge ought to ask whether the jurors' questions were adequately addressed and whether there are any further questions.²⁷⁸ As with reopening for further argument by counsel, the giving of additional necessary instructions, as suggested by the jury's response, would seem to present a relatively low risk from a legal point of view

Why not permit additional evidence if requested by the jury? Compared to reopening for additional instructions or argument, the giving of more evidence to a deliberating jury seems to provoke more objections among trial lawyers and judges, probably because it offends more game-theory notions of trial than do the other procedures. However, cases are legion upholding a trial judge's discretion in permitting reopening for additional evidence where the relevant information was omitted through the inadvertence of one of the attorneys or of the trial judge.²⁷⁹ If we can accommodate our own needs, why not the reasonably felt needs of the jurors? The request for otherwise admissible evidence coming from the decision makers themselves seems to make an appropriate case for supplementing the evidence.²⁸⁰

Assuming, then, that the jury's request calls for additional evidence that is relevant and nonprivileged, and that obtaining and presenting such evidence would not be too problematic in terms of cost and delay, why not allow it? It goes without saying that both sides would have an opportunity to address the new material, both at the evidence phase and with reargument.²⁸¹

What have traditionally been viewed as untimely and unwelcome risky problems—questions from deliberating juries requesting or suggesting further proceedings—should, under the educational model of the trial, be thought of as opportunities to assist jurors in their frequently awesome task of reaching a verdict. When it comes to seeking information from and supplying information to deliberating juries, what is needed is a modification or "stretching" of the current adversarial model and its players.

277. For a suggested invitation to dialogue, see *infra* part IV.B.4.

278. This familiar teaching technique is especially well-suited for helping jurors understand legal instructions. See *supra* text accompanying notes 209-10.

279. See M.C. Dransfield, Annotation, *Propriety of Reopening Criminal Case in Order to Present Omitted or Overlooked Evidence, After Submission to Jury But Before Return of Verdict*, 87 A.L.R.2d 849 (1963).

280. See *Harrison v. United States*, 387 F.2d 614, 615-16 (5th Cir. 1968); *People v. Scott*, 465 N.Y.S.2d 819, 820 (Monroe County Ct. 1983).

281. See *Scott*, 465 N.Y.S.2d at 820.

4. Inviting Dialogue: A Proposed Jury Instruction

The following is suggested as an additional jury instruction, to be given after learning that the jurors are having difficulty reaching a verdict or as a response to a jury's request for help.²⁸²

This instruction is offered to help you make a decision, not to force you to reach a verdict or to suggest what your verdict should be.

It may be helpful for you to identify areas of agreement and areas of disagreement. You may then wish to discuss the law and the evidence as they relate to areas of disagreement.

If you still have disagreement, I invite you to identify for me any issues or questions about the evidence, the final instructions of law, or the deliberation process with which you would like assistance from me or counsel. If you choose this option, please list, in writing, the issues where further assistance might help bring about a verdict.

To repeat, I do not wish or intend to force a verdict. I am merely trying to answer your apparent need for help. If it might help you reach a verdict, it would be wise to give it a try.

This instruction is intended to elicit enough meaningful information about divisive issues to permit the structuring of helpful supplemental proceedings. There is nothing coercive about it.

CONCLUSION: AGENDA FOR THE FUTURE

There is much to do if American jury practices are to be brought into line with reality, if juror comprehension is to be enhanced, and if the institution of the jury is to be strengthened. Some experts fear that the prospects for real improvement are not good without major changes, especially attitudinal changes on the parts of judges and trial lawyers.²⁸³

The most frequently mentioned predicates necessary to meaningful change in jurors' roles at trial include the following:

- (1) Judges and lawyers must exhibit a greater willingness to break with the past when presented with new ideas.²⁸⁴

282. The suggested instruction is based upon the one submitted to the jurors in *Knapp*, CR90-08222 (Sup. Ct., Maricopa County, Ariz., filed Dec. 3, 1991), the text of which is found at *supra* note 269. Several stylistic changes have been made.

283. Steele & Thornburg, *supra* note 58, at 254.

284. JAMES MARSHALL, *LAW AND PSYCHOLOGY IN CONFLICT* 155, 158 (2d ed. 1980); Forston, *supra* note 70, at 637; Heuer & Penrod, *supra* note 230, at 238.

- (2) The legal profession's traditional bias against social science research and its results should be reexamined and modified, if not discarded altogether.²⁸⁵
- (3) The one-dimensional view of the trial as an adversarial contest should be substantially qualified by the need to meet educational objectives.²⁸⁶
- (4) The trial participants who are "invested" in the present system need to consider the interests and future of the justice system as a whole, as opposed to narrow self-interest.²⁸⁷
- (5) The same kind of attention that has been "lavished" on the pretrial stage should now be directed to the trial itself.²⁸⁸
- (6) Lawyers and judges should be willing to make appropriate "trade-offs" in the adversarial model in exchange for the benefits promised by these and similar proposals for greater juror participation in the trial.²⁸⁹
- (7) The legal profession must recognize the need for empirical validation of some of the proposals through social science research and evaluation and the profession must cooperate in and support these efforts.²⁹⁰
- (8) Adequate public and private funding must be allocated for the necessary research and testing and the implementation and management of needed changes.²⁹¹
- (9) Appellate courts should be more willing to support innovative trial judges by approving changes in the trial intended to enhance juror comprehension.²⁹²

285. HASTIE ET AL., *supra* note 72, 239-40.

What is required is social invention in the law based on findings of the social sciences.

In the law there is an unwillingness to experiment—sometimes for good reason, dealing as it does with life in the living—but principally, one suspects, because lawyers have intellectual and emotional investment in their fictions

MARSHALL, *supra* note 284, at 155, 158; *accord* Elwork & Sales, *supra* note 129, at 294-95; Wallace D. Loh, *The Evidence and Trial Procedure*, in *THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE*, *supra* note 130, at 36-38. For a discussion of practical suggestions for the collection and use of social science research by courts, see John Monahan & Laurens Walker, *Judicial Use of Social Science Research*, 15 *LAW & HUM. BEHAV.* 571 (1991).

286. AUSTIN, *supra* note 4, at 100-04; Schwarzer, *supra* note 1, at 135.

287. Frankel, *supra* note 6, at 222; Steele & Thornburg, *supra* note 58, at 254.

288. Strawn & Munsterman, *supra* note 52, at 444, 447, *reprinted in* *IN THE JURY BOX*, *supra* note 52, at 181, 185-86.

289. Schwarzer, *supra* note 1, at 120.

290. MARSHALL, *supra* note 284, at 155, 158; Heuer & Penrod, *supra* note 237, at 238-39. Future such study is "clearly warranted." Blanck, *supra* note 64, at 800.

291. Forston, *supra* note 70, at 637. The Federal Judicial Center, the National Center for State Courts, and the State Justice Institute are natural and logical candidates to promote and support these and other jury trial innovations.

292. Forston, *supra* note 70, at 637; Steele & Thornburg, *supra* note 58, at 253.

- (10) Appellate courts need to develop, announce, and enforce their own standards of clarity and comprehension for communicating with jurors.²⁹³
- (11) Judges and lawyers should regularly meet and talk with jurors in informal settings following trial, and they should listen to what jurors have to say about the trial process and whether jurors' needs are being met.²⁹⁴
- (12) To implement, monitor, evaluate, and subsequently modify such changes, inter-disciplinary committees or commissions need to be established in place of the traditional bench-bar committees. Appropriate social sciences as well as jurors should be represented on such committees.²⁹⁵

The aim of this last proposed change in process is not to turn over trials and trial procedures to social scientists and educators. Rather, the goal is to improve the jury trial and the results of that process. This can be accomplished by working with our counterparts in sister disciplines and utilizing their knowledge and experience as a means to these ends. Social scientists who are experts in these matters seek nothing more:

[Psychological research] cannot displace the normative judgments that are inherent in the law, but it can help make the law better informed. To paraphrase Thorstein Veblen, the outcome of psychological research should be to provoke a second question where only one question was raised before.²⁹⁶

293. Elwork et al., *supra* note 190, at 176; Steele & Thornburg, *supra* note 58, at 253. For a recent example of reliance upon empirical data to reject, on grounds of incomprehensibility, a commonly used jury instruction in negligence cases, see *Mitchell v. Gonzales*, 819 P.2d 872 (Cal. 1991). A similar approach may be taken in reversing a murder conviction, given survey results showing that 75% of the prospective jurors who read commonly used death penalty instructions exhibited misunderstanding. Arthur S. Hayes, *Jurors' Grasp of Instructions May Stir Appeal*, WALL ST. J., July 16, 1992, at B1.

294. Schwarzer, *supra* note 1, at 135.

295. Steele & Thornburg, *supra* note 58, at 254; Strawn & Munsterman, *supra* note 52, at 447, reprinted in *IN THE JURY BOX*, *supra* note 52, at 186.

296. Loh, *supra* note 285, at 38.

