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# Empowering the Active Jury: A Genuine Tort Reform

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# Empowering the Active Jury: A Genuine Tort Reform

Valerie P. Hans\*

## INTRODUCTION

The rallying cry of “tort reform” is frequently associated with changes to the civil justice system that restrict the civil jury or avoid it altogether. For example, recent proposals would remove medical malpractice cases from the jury, substituting health courts staffed with specially trained judges who would decide the cases.<sup>1</sup> Tort reformers have praised United States Supreme Court rulings that have led to greater judicial control over the evidence, especially scientific evidence, which juries hear.<sup>2</sup> Other reformers advocate bifurcation of trials to avoid the possibility of jurors being so negatively influenced by testimony about damages that it affects their liability judgments.<sup>3</sup> Caps or limitations on damage awards that juries reach have been hotly contested yet are now a reality in many states.<sup>4</sup>

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1. Philip G. Peters, Jr., *Health Courts?*, 88 B.U. L. REV. 227 (2008) (describing and criticizing the proposals); Philip G. Peters, Jr., *Doctors and Juries*, 105 MICH. L. REV. 1453 (2007) (describing proposals).

2. The trilogy of cases that led to an enhanced gatekeeper role for federal judges is *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

3. See Stephan Landsman et al., *Be Careful What You Wish for: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 WIS. L. REV. 297, 300-01 (1998) (reviewing arguments of those who support bifurcation).

4. For a review of the literature, see Catherine M. Sharkey, *Unintended*

Reforms that allow cases to bypass the jury or restrict what it can hear are necessary, some claim, because juries are prone to take psychological shortcuts, to rely on heuristics, and to be overly influenced by their emotions and biases.<sup>5</sup> The tort system aims to compensate fairly and equitably those who are injured by others, and to do so in an efficient manner.<sup>6</sup> Some have argued that the irrationality and unpredictability of jury decisions undermines the tort system's ability to achieve efficient, consistent, and fair justice.<sup>7</sup>

Concerns about incompetence and bias on the part of juries have led to evidentiary and procedural rules that limit what juries can hear and do. But some of these rules have had a paradoxical effect, making it more difficult to cope with complex civil trials. As one observer writing about very complex antitrust trials puts it:

The difference in the capacity of judges and juries to properly decide the monster case stems not from differences in native ability, but from the system itself. Our present trial system imposes a host of procedural restraints upon the jury and denies it the use of aids in the fact-finding process that no judge would do without.<sup>8</sup>

This article argues in favor of a diametrically opposed type of tort reform, one that expands—rather than restricts—the scope of jury decision making. This article advocates the widespread implementation of active jury reforms. Active jury reforms are trial innovations that encourage jurors' vigorous participation in their decision making. These reforms include prosaic changes

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*Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391 (2005).

5. See ATRA, <http://www.atra.org> (last visited Jan. 10, 2008) for claims about the limitations of civil juries.

6. JAMES A. HENDERSON ET AL., *THE TORTS PROCESS* (2007).

7. Steven P. Hantler et al., *Moving Toward the Fully Informed Jury*, 3 GEO. J.L. & PUB. POL'Y 21,22 (2005) (arguing that the jury system in tort cases is "riddled with contradictions, and undermined by current court practices and some rules of evidence."). For an alternative view, see CARL T. BOGUS, *WHY LAWSUITS ARE GOOD FOR AMERICA: Disciplined Democracy, Big Business, and the Common Law* (2001).

8. 3 ANTITRUST COUNSELING AND LITIGATION TECHNIQUES § 25.03 (J. von Kalinowski ed., 1997).

such as permitting juror note taking, as well as more controversial ones such as allowing juror questions and authorizing juror discussions during the trial. Active juror reforms are consistent with providing jurors with more context and information to aid in their decision making. This article argues that such reforms will improve the quality of jury decision making in tort cases, which in turn should promote the ability of the tort jury to fulfill its multiple functions. Hence, the introduction of active jury techniques constitutes genuine tort reform.

Part I makes the case that restrictions of the civil jury in tort cases are generally unnecessary. This section draws on contemporary empirical work on civil jury decision making to support the claim that civil juries, including tort juries, most often decide cases in line with the strength of the evidence at trial, and in line with judicial assessments. Part II describes the history of active jury reforms, and provides evidence of their current use in American trial courts. Part III summarizes research findings about the effects of these reforms on the functioning of the civil jury and offers evidence of judges' and jurors' support for active jury reforms. Part IV concludes with the recommendation that judges, lawyers, and policymakers expand, not constrict, the tort jury's role by promoting active jury reforms in tort trials.

#### PART I: THE CASE AGAINST RESTRICTING AND LIMITING TORT JURIES

Actions to limit the tort jury rest in part on the belief that such restrictions are necessary because of actual or potential flaws in jury decision making in tort cases. The jury provides an opportunity to incorporate community sentiment into the civil justice system.<sup>9</sup> Community or individual biases could pose a particularly acute problem in tort cases. The tort system may be especially responsive to community sentiment because of the open-ended and context-dependent nature of central tort concepts, including proximate cause, duty of care, and reasonableness.<sup>10</sup>

To evaluate the claims of flawed decision making by tort

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9. NEAL FEIGENSON, *LEGAL BLAME* (2000); NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES* (2007).

10. *TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION, AND CONSUMER WELFARE* 81 (Peter Schuck ed., 1991).

juries, we can take advantage of over fifty years of research evidence about the performance of the civil jury.<sup>11</sup> Researchers have used a host of different methods to subject jury decision making to the microscope lens, including comparison of jury verdicts with judicial evaluations, analysis of verdict patterns and trends, questionnaires and interviews with jurors and other trial participants, and mock jury studies.<sup>12</sup> Like all scientific methods, each approach to studying the jury possesses strengths and limitations.<sup>13</sup> Yet, if one views all of the evidence gathered through diverse methodologies collectively, the scholarly work shows that juries, in general, and civil juries, in particular, perform reasonably well in understanding trial evidence, and in using it to reach their verdicts.<sup>14</sup>

Researchers have surveyed judges, asking them to provide the jury verdicts in cases over which they have presided along with their own assessments of the case.<sup>15</sup> Analyzing the factors that contribute to jury verdicts, researchers have discovered that evidentiary strength, whether it is rated by judges or by jurors, is by far the most important factor explaining the trial's outcome.<sup>16</sup> Furthermore, research projects regularly find that judges agree

11. See VIDMAR & HANS, *supra* note 9, at 147-64 (surveying jury research on decision making).

12. Valerie P. Hans & Stephanie Albertson, *Empirical Research and Civil Jury Reform*, 78 NOTRE DAME L. REV. 1497, 1500-03 (2003) (describing research approaches to studying the jury).

13. *Id.*

14. VIDMAR & HANS, *supra* note 9, at 339-41 (concluding on the basis of scientific research that juries are generally competent as fact finders); Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849 (1998) (summarizing empirical research on juries and concluding that civil juries are generally competent).

15. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966); Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven & Zeisel's The American Jury*, 2 J. EMPIRICAL LEGAL STUD. 171 (2005); Valerie P. Hans et al., *The Hung Jury: The American Jury's Insights and Contemporary Understanding*, 39 CRIM. L. BULL. 33 (2003); Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 LAW & HUM. BEHAV. 29, 48 tbl.13 (1994).

16. KALVEN & ZEISEL, *supra* note 15; Eisenberg et al., *supra* note 15 (examining the impact of evidentiary strength on jury verdicts); Steven P. Garvey et al., *Juror First Votes in Criminal Trials*, 1 J. EMPIRICAL LEGAL STUD. 371 (2004).

with the vast majority of jury verdicts and would have reached the same conclusion had they decided the cases.<sup>17</sup> The pattern of substantial judge-jury agreement has been documented in both criminal and civil jury trials.<sup>18</sup> The earliest and largest study, conducted in the 1950s, found that judges agreed with jury verdicts in 78% of the trials over which they presided; remarkably, the agreement rate was the same for both criminal and civil trials.<sup>19</sup> Research conducted since that time has confirmed the substantial agreement rate in criminal and civil trials.<sup>20</sup> Along with research collaborators from the National Center for State Courts, I conducted a study of 155 Arizona civil jury trials that found judicial ratings of the trial evidence to be consistent with jury verdicts in the vast majority of cases.<sup>21</sup> Diamond et al. conducted another study in Arizona and found that judges agreed with the jury verdicts in 77% of the forty-six trials in their study.<sup>22</sup> A national study of juror note taking and question asking found 63% agreement between judge and jury in sixty-seven civil jury trials.<sup>23</sup>

Furthermore, it is notable that these agreement rates of judge and jury are comparable in both easy and complex trials. If juries did not understand the evidence in complicated trials, one would expect to see higher rates of disagreement with the legal expert—the judge—in complex trials. Therefore, difficulty in evidence comprehension does not appear to be a major cause of judge-jury

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17. See sources cited, *supra* note 15.

18. *Id.*

19. KALVEN & ZEISEL, *supra* note 15, at 58 (3,576 criminal trials), *id.* 63 (approximately four thousand civil trials).

20. Eisenberg et al., *supra* note 15; Hans et al., *supra* note 15; Heuer & Penrod, *supra* note 15.

21. Paula L. Hannaford et al., *Permitting Jury Discussions During Trial: Impact of the Arizona Reform*, 24 LAW & HUM. BEHAV. 359, 374 (2000) (finding that judicial ratings of the evidence were in line with jury outcomes in most cases).

22. Shari Seidman Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1 (2003).

23. Heuer & Penrod, *supra* note 15, at 48 tbl.13 (in 45% of the trials, judges and juries agreed the plaintiff should win; in 18% of the cases, judges and juries agreed the defendant should win; in 18% of the trials, the judge favored a defense verdict but the jury found for the plaintiff; and in the remaining 19% of the cases, the judge preferred a plaintiff verdict but the jury found for the defendant).

disagreement.<sup>24</sup>

Nonetheless, scientific and technical evidence and expert testimony can pose difficulties for jurors.<sup>25</sup> Case studies of trials with complex expert evidence, and some experimental research, have identified problematic domains.<sup>26</sup> Statistical and economic evidence can be hard to interpret and apply.<sup>27</sup> Jurors themselves identify scientific and technical evidence as challenging.<sup>28</sup> Additionally, jurors, like the rest of us, are prone to using psychological heuristics, but judges, the alternative to the jury, also fall victim to these decision-making shortcuts.<sup>29</sup> Richard Lempert's systematic review of thirteen extremely complex trials concluded that even when juries did not completely understand all the scientific and technical details, they usually understood a sufficient amount of the testimony to engage in rational decision making.<sup>30</sup> In sum, juries are generally competent decision

24. Eisenberg et al., *supra* note 15; Hans et al., *supra* note 15; Heuer & Penrod, *supra* note 15.

25. Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 BROOK. L. REV. 1121 (2001) (summarizing research findings on juror responses to expert testimony).

26. Two case studies reached critical conclusions about jury comprehension of scientific and technical testimony: JOSEPH SANDERS, BENEDICTIN ON TRIAL 117-42 (1998); MOLLY SELVIN & LARRY PICUS, THE DEBATE OVER JURY PERFORMANCE: OBSERVATIONS FROM A RECENT ASBESTOS CASE (1987).

27. David H. Kaye et al., *Statistics in the Jury Box: How Jurors Respond to Mitochondrial DNA Match Probabilities*, 4 J. EMPIRICAL LEGAL STUD. 797 (2007); D.H. Kaye & Jonathan J. Koehler, *Can Jurors Understand Probabilistic Evidence?*, 154 J. ROYAL STAT. SOC'Y ANN. 75 (1991); Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW & SOC'Y REV. 123, 149 (1981); William C. Thompson, *Are Juries Competent to Evaluate Statistical Evidence?*, 52 LAW & CONTEMP. PROBS. 9 (1989).

28. Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727 (1991); Sanja Kutnjak Ivkovi & Valerie P. Hans, *Jurors' Evaluations of Expert Testimony: Judging the Messenger and the Message*, 28 LAW & SOC. INQUIRY 441 (2003).

29. Chris Guthrie et al., *Blinking on the Bench*, 93 CORNELL L. REV. 1 (2007) (describing model of judicial decision making); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 781 (2001) (reporting study of judicial decision making); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005) (finding that judges are susceptible to several cognitive biases that have also been found in laypersons).

30. Richard Lempert, *Civil Juries and Complex Cases: Taking Stock After*

makers. But they can do even better if we allow them active jury reforms.

## PART II: ACTIVE JURY REFORMS

Historical research on the early English jury has documented many commonplace practices that today are considered to be unusual deviations from normal trial procedure.<sup>31</sup> Jurors asked questions of witnesses and discussed points of interest with fellow jurors during the course of a trial.<sup>32</sup> However, during the seventeenth and eighteenth centuries, as the bar became increasingly professionalized and legal advocates adopted a greater role in the adversarial presentation of evidence, jurors' active participation in the trial declined.<sup>33</sup>

Although the jury system is always evolving, the introduction and adoption of active jury reforms have proceeded at a rapid pace over the last fifteen years, stimulated, in part, by an important law review article published in 1993 by B. Michael Dann, then a superior court judge in Maricopa County, Arizona.<sup>34</sup> To date, the article has been cited 109 times in judicial opinions, treatises, and law review articles. In his piece, Judge Dann drew on education and communication research as well as scholarly studies of the jury to advocate for an active decision making approach for jurors.<sup>35</sup> He pointed out a major inconsistency between the assumptions of adversary trial procedure and jury research findings. The adversary system of jury trial both presumes and reinforces juror passivity. Jurors are told to refrain from speaking with one another about the evidence and from reaching any conclusions about the evidence during the trial. They are typically not permitted to ask questions; that practice is the exclusive

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*Twelve Years, in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 181 (Robert Litan ed., 1993). Professor Lempert rated the jury verdicts as high, moderate, or low on defensibility. *Id.* at tbl. 6-1. He rated eleven of the thirteen jury verdicts as high or moderately defensible, and two as low on defensibility. *Id.*

31. VIDMAR & HANS, *supra* note 9, at 21-39.

32. *Id.* at 28, 32-33.

33. *Id.*

34. B. Michael Dann, "Learning Lessons" and "Speaking Rights": *Creating Educated and Democratic Juries*, 68 IND. L.J. 1229 (1993).

35. *Id.*



province of the adversary attorneys. Even note taking may be prohibited. Jurors must wait until the two sides present all of their evidence, and the presiding judge has given legal instructions at the end of the trial, before they may discuss the case with fellow jurors to arrive at a verdict. This passivity is supposedly essential to maintaining neutrality,<sup>36</sup> and characterizes jury decision making under an adversary system, at least in theory.

Empirical research on jury decision making paints a different picture of jury decision making in practice. Jurors, like most decision makers, adopt an active approach to their task. The preconceptions and existing knowledge they bring with them to the jury box help to shape the interpretations of the evidence presented at trial.<sup>37</sup> From the start, jurors process information and testimony with the goal of arriving at a narrative account or "story" of the case.<sup>38</sup> Jurors resolve gaps and inconsistencies in congruence with the stories they are creating to make sense of the evidence, and this sense-making process occurs throughout the trial.<sup>39</sup> Jurors then select the verdict option that provides the closest match to the stories they have developed.

Judge Dann et al. have identified a key shortcoming of the adversarial system's passive approach towards jurors. If jurors develop their narrative accounts during the evidence presentation, perhaps arriving at tentative verdict preferences, then delaying judicial instructions until the end of the evidence, and forbidding jurors to ask questions, to talk amongst themselves, or even to take notes could detract from the quality of the decision making. Instead, Dann has advocated making the courtroom more like a classroom, where jurors are able to use some of the techniques—

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36. STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* (1984). "Adversary theory suggests that if the decision maker strays from the passive role, he runs a serious risk of prematurely committing himself to one or another version of the facts and of failing to appreciate all of the evidence." *Id.* at 2-3.

37. Reid Hastie, *The Role of "Stories" in Civil Jury Judgments*, 32 U. MICH. J.L. REFORM 227 (1999) (applying story model to civil jurors); Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. PERSONALITY & SOC. PSYCHOL. 242 (1986) (demonstrating story model approach).

38. Hastie, *supra* note 37.

39. *Id.*

such as taking notes, asking questions, and participating in discussions—that students regularly employ to master complex material.<sup>40</sup> Permitting jurors to take notes, ask questions, and discuss the case early on facilitates their decision making, capitalizing on jurors' tendency to engage actively in the task.

Many recommendations earnestly offered in law review articles get little hearing outside the academy. Judge Dann avoided that fate when Arizona Supreme Court Chief Justice Stanley Feldman appointed him to chair an influential committee, the Arizona Supreme Court Committee on More Effective Use of Juries.<sup>41</sup> The committee forum provided a welcome opportunity to debate ideas about jury procedures and jury reforms with a broad and diverse group of people.

The committee was charged with undertaking a comprehensive evaluation of Arizona's jury system and making recommendations for reform to improve the use and functioning of juries.<sup>42</sup> Committee members included judges, prosecutors, defense lawyers, civil litigators, and professors.<sup>43</sup> In Judge Dann's view, the most important members of the committee were five former jurors who kept them honest and regularly informed the rest of the well-credentialed committee about the jurors' perspective on jury service.<sup>44</sup> As he subsequently wrote:

The inclusion of five jurors with recent experience in lengthy trials of complex cases was the most important organizational decision made, and it greatly influenced how the committee went about its work and arrived at the ultimate recommendations. The jurors convinced the committee of the wisdom of looking at the trial through

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40. Dann, *supra* note 34.

41. Ariz. Sup. Ct. Admin. Order No. 93-20 (1993), <http://www.supreme.state.az.us/jury/Jury/ao9320.htm>; Committee on More Effective Use of Juries Membership List, <http://www.supreme.state.az.us/jury/Jury/jury1c.htm> [hereinafter Membership List] (last visited Feb. 26, 2008).

42. ARIZ. SUP. CT. COMM. ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12 (1994), <http://www.supreme.state.az.us/jury/Jury/jury.htm> [hereinafter THE POWER OF 12].

43. See Membership List, *supra* note 41.

44. B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280 (1996).

jurors' eyes in addition to those of a judge or of a lawyer.<sup>45</sup>

After thirty-one meetings, the committee produced its final report, which contained fifty-five recommendations to improve the Arizona jury system, including reforms to enhance public awareness, juror summonses, jury selection methods, and jury trial procedures.<sup>46</sup> The report also proposed a Juror's Bill of Rights "listing the more important rights and expectations of jurors, both those presently existing and those created as a result of this report, [which] should be promulgated to aid in educating all concerned and to better assure that the rights are observed."<sup>47</sup> The Arizona legislature subsequently adopted many of the jury innovations recommended by the jury reform committee.<sup>48</sup> They included the active jury reforms of note taking, question asking, and juror discussions during civil trials.<sup>49</sup>

Two other notable developments occurred around the same time as these revolutionary events in Arizona. Stimulated by similar impulses in other jurisdictions, and encouraged by Arizona's example, many other states began to take a systematic look at modernizing their jury systems. The Arizona report served as a valuable resource and springboard for these jury reform efforts nationwide. When I served on Delaware's Task Force on the More Effective Use of Juries, for example, our task force used Arizona's recommendations as a starting point for discussion about potential jury innovations in Delaware.<sup>50</sup>

A second important and related development was an acceleration of systematic empirical evaluation of proposed jury innovations. The policy context stimulated a substantial amount

45. *Id.* at 281.

46. The Committee's full set of recommendations may be found at <http://www.supreme.state.az.us/jury/Jury/jury1e.htm> (last visited Jan. 10, 2008).

47. See Juror's Bill of Rights proposal, <http://www.supreme.state.az.us/jury/Jury/jury1g2.htm#G> (last visited Jan. 10, 2008).

48. Dann & Logan, *supra* note 44; Diamond et al, *supra* note 22, at 4.

49. *Id.* Arizona continues to make it a priority to improve its jury system. See, e.g., ARIZ. SUP. CT., STRATEGIC AGENDA FOR ARIZONA'S COURTS 2005-2010: GOOD TO GREAT 15 (2005), <http://www.supreme.state.az.us/media/archive/2005/StrategicAgenda.pdf> (recommending further improvements that "provide a convenient, respectful and meaningful experience for jurors").

50. DEL. SUPER. CT., REPORT OF THE TASK FORCE ON THE MORE EFFECTIVE USE OF JURIES (1998), <http://www.dsba.org/AssocPubs/tfrep.htm>.

of research. As judges, lawyers, and jury administrators reviewed jury trial practices, they asked a host of questions about their effectiveness and impact. A number of state commissions sponsored empirical studies of their jury systems to address questions. Arizona, itself, led the way. In two evaluation projects—one that I participated in with colleagues from the National Center for State Courts, and the other undertaken by jury researchers Shari Diamond and Neil Vidmar—the Arizona courts permitted random assignment of actual civil jury trials to experimental and control conditions.<sup>51</sup> Furthermore, in the Diamond and Vidmar project, under carefully controlled conditions designed to protect juror confidentiality, the researchers were allowed to videotape jury discussions and deliberations.<sup>52</sup>

The combined efforts of jury commission members and researchers bore fruit. In 2005, the American Bar Association endorsed and published Principles for Juries and Jury Trials (“Principles”), a set of guiding ideals for the conduct of jury trials.<sup>53</sup> The Principles support a number of active jury reforms. To promote juror understanding of the facts and the law, the Principles recommend jury trial innovations including juror note taking, the use of jury notebooks containing useful exhibits and other material in appropriate cases, the consideration of juror questions, and the option of allowing jurors to discuss evidence as the case proceeds rather than waiting for the final deliberations.<sup>54</sup> Thus, in a little over a decade, with progressive leadership from the judiciary, the bar, academic scholars, and state jury commissions, the national debate over jury trial practice progressed from early suggestions for active jury reforms to

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51. Diamond et al., *supra* note 22; Hannaford et al., *supra* note 21; Valerie P. Hans et al., *The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges, and Jurors*, 32 U. MICH. J.L. REFORM 349 (1999).

52. Diamond et al., *supra* note 22.

53. ABA, PRINCIPLES FOR JURIES & JURY TRIALS (2005). True to form, Judge Dann served on the committee that drafted the Principles. For a compendium of jury innovations, see JURY TRIAL INNOVATIONS (G. Thomas Munsterman et al., eds., 2nd ed. 2006).

54. ABA, *supra* note 53, at 91-105 (recommending specific jury innovations to promote juror understanding).

American Bar Association endorsement.

*Current Employment of Active Jury Reforms*

Active jury reforms have enjoyed significant attention in recent years. The most comprehensive data about their employment come from a recent nationwide survey of judges and lawyers by the National Center for State Courts (NCSC), which asked for information about courtroom use of jury innovations.<sup>55</sup> A total of 4,336 judges and 7,209 attorneys from all fifty states, Puerto Rico, and the District of Columbia responded to the survey.<sup>56</sup> The researchers employed multiple and diverse outreach efforts to solicit input from a substantial number of judges and attorneys, so the exact representativeness of the survey respondents could not be determined.<sup>57</sup> Nonetheless, the survey provides the most extensive collection of information about the employment of jury trial innovations to date.

Note taking appears to be routine in the solid majority of civil trials, as shown in Figure 1 *infra*.<sup>58</sup> Respondents reported that

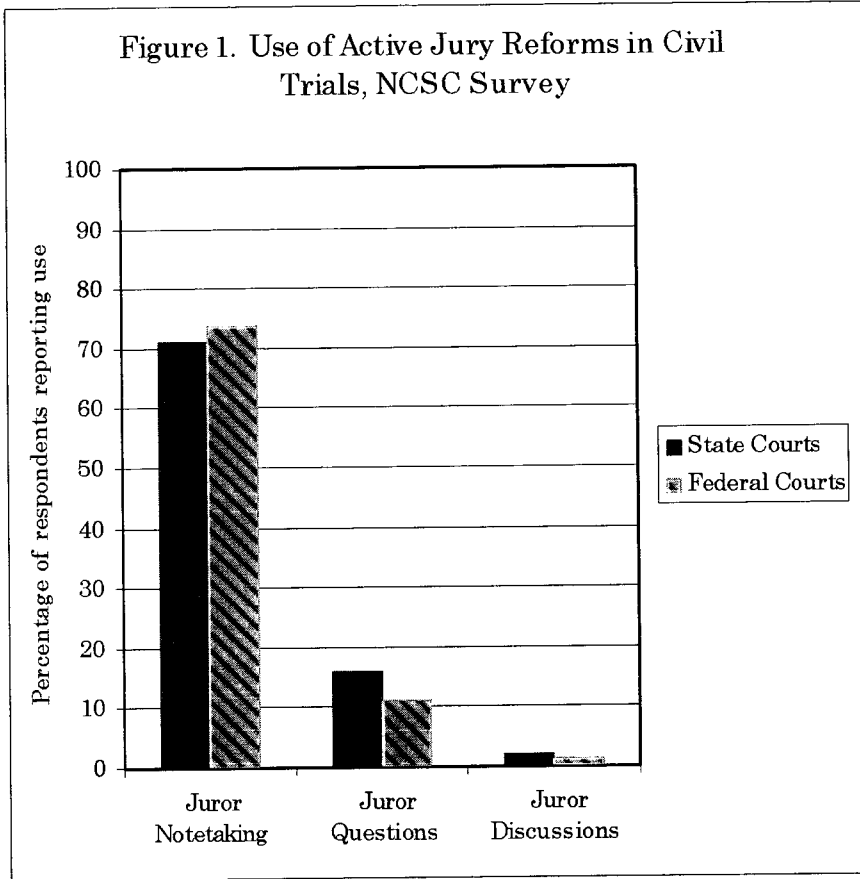
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55. GREGORY E. MIZE ET AL., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT (2007).

56. In addition, 207 survey participants had different jobs or did not indicate their job status. *Id.* at 4.

57. *Id.* at 3-5.

58. *Id.* at 31 tbl.24; Nicole Waters, personal communication (Feb. 27, 2008) (providing separate percentages for jurors' ability to take notes in civil trials).



jurors could take notes in 71.2% of state court civil trials and 73.5% of federal civil trials; the percentages were slightly lower in criminal trials.<sup>59</sup> Combining civil and criminal trials for analysis, the NCSC researchers found that a jury trial's complexity relates to the likelihood of jurors being allowed to take notes. In more complex trials, jurors were significantly more likely to be permitted to take notes and were more apt to be given writing materials.<sup>60</sup> There is important regional variation, apparently related to the combined effects of legal rules, local legal culture, judicial preferences, and court traditions. For example, Arizona,

59. MIZE ET AL., *supra* note 55, at 31 tbl.24.

60. *Id.* at 31, 32 n.56.

Colorado, Indiana, and Wyoming require by law that jurors be permitted to take notes; the survey data confirm very high levels of opportunity for juror note taking in these states.<sup>61</sup>

Nonetheless, it would be a mistake to say that “allowing note taking by jurors is nearly universal,” as one Los Angeles attorney recently concluded.<sup>62</sup> Note taking is substantially less common in a significant minority of states. At the start of the NCSC survey, Pennsylvania forbade note taking in criminal trials; it adopted a temporary rule, later made permanent, allowing it in civil trials.<sup>63</sup> Currently, note taking is also permitted in Pennsylvania criminal trials under a temporary rule.<sup>64</sup> Survey respondents from Pennsylvania reported that jurors were allowed to take notes in less than half the trials.<sup>65</sup> The NCSC survey found a total of fourteen states in which juror note taking was reportedly permitted in less than half of the trials; eight of these states were in the mid-Atlantic or New England, reflecting some regional patterns.<sup>66</sup>

As Figure 1, *supra*, illustrates, two other active jury reforms—question asking and trial discussions—were employed

61. ARIZ. R. CIV. P. 39(p); ARIZ. R. CRIM. P. 18.6(d); COLO. R. CIV. P. 47(t); COLO. R. CRIM. P. 16(f); IND. JURY R. 20; WYO. R. CIV. P. 39.1(a); WYO. R. CRIM. P. 24.1(a). See MIZE ET AL., *supra* note 55, at 32 (reporting that, in states requiring juror note taking, jurors were permitted to take notes in 97% of civil trials and 95% of criminal trials).

62. Dick Dahl, *California Launches New Jury Innovations*, LAWYERSUSA, Feb. 12, 2007, available at <http://www.lawyersweeklyusa.com/subscriber/archives.cfm?page=usa/07/212072.htm>. During the survey period, even in California (one of the states with a high rate of permitting juror note taking), jurors were reportedly allowed to take notes in 91.5% of trials. MIZE ET AL., *supra* note 55. That number should move upward as California in 2007 passed a law requiring that judges permit note taking and provide jurors with note taking materials. Dahl, *supra*.

63. Until 2005, Pennsylvania Rule of Criminal Procedure 644 forbade juror note taking in Pennsylvania state criminal trials. Rule 223.2 temporarily permitted note taking in civil jury trials, for the purpose of determining whether note taking in civil cases is beneficial to the justice system. PA. R. CIV. P. 223.2 The temporary civil rule was made permanent before its expiration on August 8, 2005.

64. Jury note taking is presently allowed in Pennsylvania criminal trials under a temporary rule that is due to expire on July 31, 2008.

65. MIZE ET AL., *supra* note 55, at 74 (finding that Pennsylvania respondents reported that 46% of jurors were permitted to take notes).

66. *Id.* at 31, 74.

much less often, according to the NCSC survey results.<sup>67</sup> Whether jurors should be permitted to ask questions of trial witnesses remains controversial, and jurisdictions varied quite a bit in their treatment of this innovation. Jurors were allowed to ask questions in 14% of criminal trials and 16% of civil trials in state courts, and in 11% of both criminal and civil federal jury trials.<sup>68</sup>

As with note taking, the likelihood of juror questions was influenced by legal rules, regional variation, and trial complexity.<sup>69</sup> Four states—Arizona, Colorado, Indiana, and Wyoming—specifically mandate juror questions in civil trials.<sup>70</sup> At least ten states forbid juror questions in civil trials.<sup>71</sup> The remainder leaves it up to the discretion of the judge.<sup>72</sup> There is a slightly greater tendency to permit juror questions—whether by rule or by judicial discretion—in civil trials than criminal trials,<sup>73</sup> but what is surprising is the overlap rather than the divergence. The NCSC survey found that jurors reportedly could ask questions in 15.6% of civil trials and 14.5% of criminal trials.<sup>74</sup> Federal judges were significantly less likely to allow juror questions than state trial court judges.<sup>75</sup> The complexity of the law and the evidence in the jury trial was also important; in 17% of the most

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67. *Id.* at 31, 33-35.

68. *Id.* at 31.

69. *Id.* at 31, 34.

70. ARIZ. R. CIV. P. 39(b)(10); COLO. R. CIV. P. 47(u); IND. JURY R. 20; WYO. R. CIV. P. 39.4. Wyoming does not require juror questions in criminal trials; but the other three states do. See MIZE ET AL., *supra* note 55, at 34.

71. *Minnesota v. Costello*, 646 N.W.2d 204 (Minn. 2002); *Nebraska v. Zima*, 468 N.W.2d 377 (Neb. 1991); *Morrison v. Texas*, 845 S.W.2d 882 (Tex. Crim. App. 1992). The NCSC Survey reported that other states also forbid juror questions in civil trials, but did not provide statutory support: “[t]he Statewide Surveys for Georgia, Louisiana, Maine, Michigan, North Carolina, Oklahoma, and South Carolina did not report the legal authority for this prohibition, and NCSC staff were unable to locate the source of prohibition in the relevant state statutes, court rules, and case law.” MIZE ET AL., *supra* note 55, at 34 n.68.

72. MIZE ET AL., *supra* note 55, at 34.

73. *Id.* The difference in likelihood of juror questions, although small, is statistically significant. One of the co-authors of the NCSC survey, however, cautions that the difference could be due to other factors, including jurisdictional variation. Paula Hannaford-Agor, Personal communication, (Nov. 13, 2007).

74. MIZE ET AL., *supra* note 55, at 34.

75. *Id.*



complex cases, jurors were able to ask questions, compared to 12% of the least complex cases.<sup>76</sup>

The final active jury reform considered in depth here, discussion among jurors during the trial, was least common, the NCSC survey found.<sup>77</sup> Most states forbid jurors to discuss the evidence among themselves until the final deliberations.<sup>78</sup> Arizona, Colorado, and Indiana, however, explicitly permit the practice of juror discussions during civil trials.<sup>79</sup> Because of current prohibitions against such discussions, it is not surprising that jurors were allowed to discuss evidence during trial in just 2.2% of state civil jury cases and 1.3% of federal civil jury cases nationwide.<sup>80</sup> What is startling is that about one-third of the trials in which jurors were reportedly allowed to discuss the evidence occurred in jurisdictions that do not explicitly approve the practice; in fact, some discussion took place in states that specifically forbid it.<sup>81</sup> One may surmise that judges obtained the consent of counsel to allow jury trial discussions in these locales.

Even when trial discussions are legal, scheduling or other factors may work against them. In an experimental study of Arizona civil jury trials in which jurors in half the cases were allowed to discuss the trial evidence as the case proceeded, jurors in approximately one-third of the cases reported that they did not engage in discussions.<sup>82</sup> Most of the juries who reportedly chose not to discuss the case served in relatively short trials in which the evidence was not particularly complex and there was little opportunity for trial discussions.<sup>83</sup> This result converges with the NCSC survey findings that trial innovations are more likely to be permitted in complex trials.<sup>84</sup>

For these three active jury reforms, one observes a range of

76. *Id.*

77. *Id.* at 34-35.

78. Hans et al., *supra* note 51, at 352-60 (reviewing judicial decisions forbidding the practice).

79. ARIZ. R. CIV. P. 39(f); COLO. JURY INSTRUCTIONS §§ 1:4, 1:8; IND. JURY R. 20(8).

80. MIZE ET AL., *supra* note 55, at 35.

81. *Id.*

82. Hans et al., *supra* note 51, at 370; Hannaford et al., *supra* note 51, at 368-69.

83. Hannaford et al., *supra* note 51, at 368-69.

84. *See supra* text accompanying note 76.

use. Note taking is used extensively (although not ubiquitously); juror questions are allowed in about one in seven trials; and trial discussions are employed infrequently. Clear regional and jurisdictional variations are apparent, with some states at the forefront in requiring judges to employ the practices in their courtrooms, other states allowing judges substantial latitude to do so, and still other states reluctant to permit even willing judges to allow these active jury trial practices in their courtrooms. Variability arising from judicial and attorney experimentation also seems evident.

I now turn to describing empirical research findings that provide evidence of the impact of these three jury innovations.

### PART III. EMPIRICAL EVIDENCE ABOUT ACTIVE JURY REFORMS

#### *Research on Juror Note Taking*

Early opposition to juror note taking rested on beliefs about its potential for distraction as well as its potential for deleterious effects on jury deliberation.<sup>85</sup> First, some feared that note taking might distract jurors from their prime job of observing a witness's demeanor for the purposes of credibility assessment. If jurors expend cognitive effort to take accurate notes about what is said, they might have less ability to evaluate other dimensions of the evidence. Second, the notes might be wrong, yet carry weight in the jury deliberation because they are written down. Third, jurors who take notes might be more influential in the jury deliberation, undermining the equality of the members of the jury. On the other hand, supporters advanced the theory that note taking would increase jurors' active engagement in the trial and improve jurors' comprehension and recall. Note taking might allow jurors a sense of competence and mastery over the material. Jurors' individual notes could serve as a resource during jury deliberations.

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85. See JURY TRIAL INNOVATIONS, *supra* note 53, at 126-27 (discussion of jury note taking advantages and disadvantages); ABA, *supra* note 53, at 94-95; Larry Heuer & Steven D. Penrod, *Juror Notetaking and Question Asking During Trials*, 18 LAW & HUM. BEHAV. 121 (1994); David L. Rosenhan et al., *Notetaking Can Aid Juror Recall*, 18 LAW & HUM. BEHAV. 53, 59-60 (1994) (identifying benefits of note taking).

A review of the published research on juror note taking finds, consistent with its widespread use, general support and little current opposition. Most judges and jurors who are asked about their views about jury note taking express support for the trial practice. Surveys conducted as part of jury reform pilot projects in Massachusetts, Ohio, and Tennessee found that virtually all judges and most jurors in the pilot projects supported juror note taking.<sup>86</sup> That was also true for a group of state and federal judges attending a 2007 Science for Judges Conference; fifty-seven of the sixty-four judges (89%) supported juror note taking, with fifty-two judges strongly favoring it.<sup>87</sup> Indeed, one state judge who participated in the Science for Judges Conference commented: "I have been allowing juror note taking for eight years and am a complete believer. I find it absurd that some jurors are not allowed to take notes."<sup>88</sup>

The empirical research on the effects of juror note taking, which has been conducted in controlled mock jury experiments or with actual juries, generally reinforces these positive views.<sup>89</sup> No systematic risks or harms from note taking have been discovered.<sup>90</sup> Most jurors are enthusiastic about the opportunity to take notes, and in some studies jurors express greater satisfaction when they have been able to take notes.<sup>91</sup> Finally, and most importantly, some (although not all) studies have found significant improvement in comprehension, memory, and decision

86. B. Michael Dann & Valerie P. Hans, *Recent Evaluative Research on Jury Trial Innovations*, 41 CT. REV. 12, 14 (2004) (reviewing results of pilot studies).

87. Data collected as part of the Judge MtDNA Study, Science for Judges Conference, Brooklyn Law School, Brooklyn, N.Y. (April 13-14, 2007). Judges expressed support on a ten point scale, in which one equaled "strongly oppose," and ten equaled "strongly favor." For a description of the Judge MtDNA study, see Valerie P. Hans, *Judges, Juries, and Scientific Evidence*, 16 J. LAW & POL'Y 19 (2007).

88. Written comment by state court judge, Judge MtDNA Study, Science for Judges Conference, Brooklyn Law School, Brooklyn N.Y. (April 13-14, 2007).

89. Dann & Hans, *supra* note 86, at 13-14.

90. Larry Heuer & Steven Penrod, *Increasing Juror Participation in Trials Through Note Taking and Question Asking*, 79 JUDICATURE 256, 258 (1996). [hereinafter Heuer & Penrod, *Increasing Juror Participation*]

91. *Id.*; Dann & Hans, *supra* note 86.

making.<sup>92</sup>

The strongest evidence for improvements in civil juror decision making derives from work by Lynne ForsterLee, Irwin Horowitz, and their collaborators, who conducted a series of research projects using complex tort cases.<sup>93</sup> In an initial study, mock jurors watched a two-hour videotape of a toxic tort case based on an actual trial.<sup>94</sup> The case included four plaintiffs whose injuries ranged in severity, and complex expert testimony about the effects of toxic chemical runoff from a manufacturing plant on local residents.<sup>95</sup>

There were three conditions in the experiment. One group of mock jurors was able to take notes, and these jurors had access to their notes while they made decisions about liability and damages. A second group was able to take notes, but was not permitted to use notes to make decisions. A final group serving as a control could not take notes. The results demonstrated that jurors who took notes were better able to distinguish among the plaintiffs' injuries, compared to the jurors who could not take notes. This result was the same whether or not the jury had access to notes. The liability judgments and compensatory awards revealed better calibration of the plaintiffs' injuries in the notes conditions.<sup>96</sup> In addition, jurors in the notes conditions were better able to recall probative information about the case, compared to jurors who could not take notes.<sup>97</sup> The fact that even jurors who did not have access to their notes performed better than jurors who never took notes indicates that note taking may have an important impact at

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92. See *infra* text accompanying notes 93-108.

93. Lynne ForsterLee & Irwin A. Horowitz, *The Effects of Jury-Aid Innovations on Juror Performance in Complex Civil Trials*, 86 JUDICATURE 184 (2003) (summarizing research findings on juror note taking and other juror decision making aids); Lynne ForsterLee et al., *The Cognitive Effects of Jury Aids on Decision-Making in Complex Civil Litigation*, 19 APPLIED COGNITIVE PSYCHOL. 867 (2005) (describing findings on note taking and summary statements provided to mock jurors) [hereinafter ForsterLee et al., *Cognitive Effects*].

94. Lynne ForsterLee et al., *Effects of Notetaking on Verdicts and Evidence Processing in a Civil Trial*, 18 LAW & HUM. BEHAV. 567, 570 (1994) (describing research methodology).

95. *Id.*

96. *Id.* at 573-74.

97. *Id.* at 575 tbl.3.

the encoding phase of memory.<sup>98</sup>

A follow-up study used the same trial, but allowed mock jurors to deliberate together, and varied whether the members of the mock juries could take notes or not, or could review the trial transcript or not.<sup>99</sup> As before, note takers were better able to discriminate appropriately among the differently injured plaintiffs.<sup>100</sup> Note taking juries also performed better on recognition tests of both pro-defense and pro-plaintiff trial facts.<sup>101</sup> Jurors who took notes expressed more satisfaction with the trial process and believed their juries were more efficient compared to the jurors who did not take notes.<sup>102</sup> Access to trial transcripts had some of the same positive effects, but note taking appeared to be more helpful to the jurors.<sup>103</sup>

A third study based on the same complex toxic tort trial varied whether jurors could take notes and whether they could access summary statements of the essential points made by scientific experts at trial.<sup>104</sup> In this study, the two jury aids had a synergistic effect: note-taking mock jurors who were provided with expert testimony summaries were better able to distinguish among the more and less worthy plaintiffs.<sup>105</sup> The authors explain that the two jury innovations are mutually reinforcing: "note-taking may operate to highlight crucial case-related materials and summary statements can serve to reduce the amount of evidence to be processed without probative facts or opinions."<sup>106</sup> The researchers also report that the process of note taking improves jurors' confidence, motivation, and participation.<sup>107</sup>

The ForsterLee-Horowitz work finds support in at least one other mock juror study, which discovered that note taking increased recall of trial evidence and satisfaction with the trial

98. *Id.* at 576.

99. Irwin A. Horowitz & Lynne ForsterLee, *The Effects of Note-Taking and Trial Transcript Access on Mock Jury Decisions in a Complex Civil Trial*, 25 LAW & HUM. BEHAV. 373, 379-80 (2001) (describing the study).

100. *Id.* at 383.

101. *Id.* at 385-86.

102. *Id.* at 386.

103. *Id.* at 387.

104. ForsterLee et al., *Cognitive Effects*, *supra* note 93.

105. *Id.* at 878-79.

106. *Id.* at 881.

107. *Id.*

process.<sup>108</sup> In addition, a realistic mock jury research project (which I conducted along with Judge Dann and other collaborators) employed a criminal trial with complex scientific testimony about mitochondrial DNA (mtDNA).<sup>109</sup> Mock juries, composed of members of a jury pool who were not needed for trial that day, assembled in groups of eight and watched a videotape of a mock criminal trial.<sup>110</sup> The study varied whether mock jurors were able to use specific trial reforms such as note taking, asking questions of experts, using notebooks containing the experts' slides and a glossary of DNA terms, and following a checklist.<sup>111</sup> The study compared jurors who could and could not employ different reforms in how well they understood the expert testimony about mtDNA.<sup>112</sup> Most jurors who were permitted to take notes did so.<sup>113</sup> Eighty-five percent of the note takers reported that taking notes helped them remember or understand the evidence in the case, and a similar number endorsed the jury note taking reform.<sup>114</sup> Comparing jurors who were permitted to engage in note taking with jurors in the control condition did not show any better performance on the juror comprehension test on the scientific evidence.<sup>115</sup> However, in a result reminiscent of the synergistic effects found by the ForsterLee-Horowitz group, there was some evidence of improved comprehension over note taking alone when note taking was combined with another jury aid, such as a jury notebook containing the experts' slides and a glossary, or a DNA checklist.<sup>116</sup>

What about real juries? The pilot studies reported earlier

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108. Rosenhan et al., *supra* note 85.

109. The study is reported in B. MICHAEL DANN ET AL., TESTING THE EFFECTS OF SELECTED JURY TRIAL INNOVATIONS ON JUROR COMPREHENSION OF CONTESTED MTDNA EVIDENCE, FINAL TECHNICAL REP. (2004), <http://www.ncjrs.gov/pdffiles1/nij/grants/211000.pdf>. The findings regarding jury innovations are summarized in B. Michael Dann et al., *Can Jury Trial Innovations Improve Juror Understanding of DNA Evidence?*, 90 JUDICATURE 152 (2007).

110. *Id.* at 152-53.

111. *Id.* at 152.

112. *Id.*

113. Dann et al., *supra* note 109, at 55.

114. *Id.* at 56 fig.6.1.

115. Dann et al., *supra* note 109, at 155.

116. *Id.*

provide some positive evidence that note taking is well-received by judges and jurors. In addition, in two field experiments sponsored by the American Judicature Society, civil and criminal jury trials were randomly assigned to different jury innovations (note taking or question asking) or to a control condition.<sup>117</sup> An initial field experiment was conducted in the state of Wisconsin, while a second project drew on a national sample. Researchers Larry Heuer and Steven Penrod compared the responses of jurors in trials in which they were or were not permitted to take notes.<sup>118</sup> Their systematic examination uncovered no negative effects of note taking; it was not a distraction.<sup>119</sup> The notes (reviewed by the researchers) were generally accurate, did not favor one side over another, and did not appear to provide an unfair advantage during deliberations.<sup>120</sup> Two-thirds of the Wisconsin jurors and 87% of the jurors in the national study took notes when given the opportunity to do so.<sup>121</sup> The Wisconsin jurors who took notes appeared to be somewhat more satisfied with the trial, although there was no difference in the national study in juror satisfaction as a result of note taking.<sup>122</sup> Heuer and Penrod wanted to examine juror comprehension and whether it was positively affected by the opportunity to take notes.<sup>123</sup> Because jurors decided different trials, however, their comprehension test was

117. The research program is described in several articles. The initial Wisconsin study is reported in Larry Heuer & Steven D. Penrod, *Increasing Jurors' Participation in Trials: A Field Experiment with Juror Notetaking and Question Asking*, 12 *LAW & HUM. BEHAV.* 231 (1988) [hereinafter Heuer & Penrod, *A Field Experiment*]. The subsequent national study is reported in Larry Heuer & Steven D. Penrod, *Juror Notetaking and Question Asking During Trials: A National Field Experiment*, 18 *LAW & HUM. BEHAV.* 121 (1994) [hereinafter Heuer & Penrod, *A National Field Experiment*]. See also Larry Heuer & Steven D. Penrod, *Some Suggestions for the Critical Appraisal of a More Active Jury*, 85 *NW. U. L. REV.* 226 (1990).

118. Heuer & Penrod, *A Field Experiment*, *supra* note 117, at 238-40; Heuer & Penrod, *A National Field Experiment*, *supra* note 117, at 127-28.

119. Heuer & Penrod, *A Field Experiment*, *supra* note 117, at 247-48; Heuer & Penrod, *A National Field Experiment*, *supra* note 117, at 137-38.

120. Heuer & Penrod, *A Field Experiment*, *supra* note 117, at 250-51.

121. *Id.* at 244 (66% of jurors allowed to take notes reported doing so); *Id.* at 136 (87% of jurors allowed to take notes reported doing so).

122. Heuer & Penrod, *A Field Experiment*, *supra* note 117, at 246 (marginally significant effect found); Heuer & Penrod, *A National Field Experiment*, *supra* note 117, at 137 (no statistically significant effect found).

123. Heuer & Penrod, *A Field Experiment*, *supra* note 117, at 245.

limited to items such as standard judicial instructions that were likely to be included in most criminal and civil trials.<sup>124</sup> Using this measure, jurors who took notes did not perform any better on a recall test than the jurors who could not take notes.<sup>125</sup>

Summarizing the empirical research on juror note taking, one can observe strong support for the reform among judges and jurors and no apparent negative effects. In some studies, note taking appears to enhance recall, evaluation, and more competent decision making, whereas other studies demonstrate no effects. There is some evidence that note taking may work best in conjunction with other jury aids, but that issue has not been extensively studied.

### *Research on Juror Questions*

Some see allowing juror questions as a broadside attack on the adversary system's twin assumptions of party control over the development of the evidence, and a neutral decision maker's passivity. These people fear that jurors who ask questions may become more like advocates for one side or another than neutral fact finders. Other potential drawbacks are that jurors may overvalue their own questions and the witness's responses, may become angry if their questions are not answered, and may disrupt the trial with excessive or inappropriate questions.<sup>126</sup> Yet because juror questions are now permitted in about one trial in seven,<sup>127</sup> and advocates press for even greater expansion of the practice, it is important to examine what we currently know about the effects of juror questions.

In contrast to the multiple mock jury studies of juror note taking, most of the empirical work on juror questions has been done in field studies and field experiments. Heuer and Penrod's important field experiments of randomly assigned jury innovations with real juries included conditions in which jurors were permitted to propose questions to witnesses.<sup>128</sup> Because

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124. Heuer & Penrod, *Increasing Juror Participation supra* note 90, at 258.

125. Heuer & Penrod, *A Field Experiment, supra* note 117, at 245.

126. JURY TRIAL INNOVATIONS, *supra* note 53, at 128-29.

127. *See supra* text accompanying notes 67-68.

128. Heuer & Penrod, *A Field Experiment, supra* note 117; Heuer &



juror questions were unusual at the time, the researchers provided a recommended procedure to the judge and offered instructions that were to be read to the jury.<sup>129</sup> In the jury questions condition, judges were asked to inform the jurors that they could submit written questions for the witnesses at the end of their testimony, and explained the procedure to do so.<sup>130</sup> Jury instructions specifically discouraged jurors from asking excessive questions: “[b]ecause [asking questions] is the primary responsibility of the counsel, you are not encouraged to ask large numbers of questions.”<sup>131</sup> Judges consulted with counsel and ruled on the admissibility of the questions before the question was posed to the witness.

In the field experiments, jurors permitted to pose questions did so at a modest rate. In the national study, jurors asked at least one question in fifty-one of the seventy-one trials in which they were permitted to do so.<sup>132</sup> The rate and overall number of questions did not seem to be excessive. For every two hours of evidence presentation, jurors asked on average one question, and the median number of questions per trial was two.<sup>133</sup>

Jurors in the field experiments supported the innovation of juror questions, reporting that they felt better informed and that they had enough information to reach a sound verdict.<sup>134</sup> They also were more satisfied with the attorneys’ performances, compared to jurors who could not ask questions.<sup>135</sup> Jurors in the national study reported that their questions helped clarify the law and the evidence.<sup>136</sup> Judges and attorneys who experienced trials with juror questions became more positive about the innovation.<sup>137</sup>

Penrod, *A National Field Experiment*, *supra* note 117.

129. Heuer & Penrod, *A Field Experiment*, *supra* note 117, at 240; Heuer & Penrod, *A National Field Experiment*, *supra* note 117, at 128-29.

130. Heuer & Penrod, *A Field Experiment*, *supra* note 117, at 240; Heuer & Penrod, *A National Field Experiment*, *supra* note 117, at 128-29.

131. Heuer & Penrod, *A National Field Experiment*, *supra* note 117, at 128-29.

132. *Id.* at 140.

133. *Id.* at 141.

134. *Id.* at 142.

135. *Id.* at 146-47.

136. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 90, at 260.

137. *Id.* at 261; Heuer & Penrod, *A Field Experiment*, *supra* note 116, at

After experience with the technique, judges moved from being generally neutral to favorable, whereas attorneys shifted from being moderately negative to more neutral about juror questions.<sup>138</sup>

As might have been expected, given the number and likely variety of juror questions, the possibility of juror questions did not significantly influence the jury verdicts, rate of judicial agreement with jury verdicts, or judicial and attorney satisfaction with jury verdicts.<sup>139</sup> Thus, the jurors' departure from passivity had no apparent effects on neutrality that could be discerned from the field experiments.

A number of jurisdictions, including California, Colorado, Massachusetts, New Jersey, Ohio, and Tennessee, have undertaken pilot programs to explore the feasibility of juror questions.<sup>140</sup> A survey of these efforts reports that strong majorities of judges and jurors who experienced juror questions favor the procedure.<sup>141</sup> Ohio is typical; in its pilot program, substantial majorities of jurors said that question asking helped them pay attention and that the answers aided their decision making.<sup>142</sup> More than 88% of the Ohio judges who participated in the pilot program approved of juror questions.<sup>143</sup> One caveat about the pilot programs is that judges who are most negative about jury innovations may be disinclined to participate in them, so these numbers may overstate judicial enthusiasm. That said, collectively, most of the pilot programs have not generated major trial disruptions or other serious problems with juror questions. The state and federal judges attending the 2007 Science for Judges Conference expressed moderate support: thirty-six of the sixty-four judges (56%) supported juror questions, with twenty-one

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148, 254-56.

138. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 90, at 261.

139. Heuer & Penrod, *A National Field Experiment*, *supra* note 116, at 121.

140. Dann & Hans, *supra* note 86, at 14-15 (reviewing results of pilot programs).

141. *Id.*

142. *Id.* at 15.

143. *Id.*

of the judges strongly favoring them.<sup>144</sup>

The mtDNA experiment examined juror questions in the more controlled environment of a mock jury setting.<sup>145</sup> In the experiment, jurors in the questions condition were told that they could submit written questions about the expert testimony regarding mtDNA evidence.<sup>146</sup> Jurors generated a total of forty-nine questions about the DNA expert testimony.<sup>147</sup> The relevant questions were relayed via cell phone to DNA experts who were on call during the experiment, and their verbal answers were transcribed and given to the mock jurors.<sup>148</sup> Jurors were quite positive about the opportunity to ask questions; three-quarters said it helped them better understand the evidence, and 69% of those who were permitted to ask questions supported the innovation.<sup>149</sup> Jurors with more background in science and mathematics were more apt to pose questions.<sup>150</sup> The comprehension test did not show significant differences between jurors who could and could not ask questions, perhaps because of the low number of questions and the fact that juror questions often asked about issues other than those included on the comprehension test.<sup>151</sup> Juror comprehension effects from juror questions are more precisely tested when the content of juror questions overlaps with the subject matter of the test.

Another angle on the topic of juror questions is analyzing the subject matter of the questions that jurors ask. Two research projects took this approach with questions from Arizona jury trials, where questions are more common. Nicole Mott examined 2,271 questions asked by Arizona jurors in 164 criminal and civil trials.<sup>152</sup> Analyzing and categorizing juror questions, Mott

144. Data collected as part of the Judge MtDNA Study, Science for Judges Conference, Brooklyn Law School, Brooklyn N.Y. (April 13-14, 2007). Judges expressed support on a ten point scale, in which one equaled "strongly oppose," and ten equaled "strongly favor." For a description of the Judge MtDNA study, see Hans, *supra* note 87.

145. Dann et al., *supra* note 109; Dann et al., *supra* note 109.

146. Dann et al., *supra* note 109, at 26.

147. *Id.* at 59.

148. *Id.* at 26.

149. *Id.* at 59, 61.

150. *Id.* at 59.

151. *Id.* at 67-73.

152. Nicole L. Mott, *The Current Debate on Juror Questions: "To Ask or*

observed that jurors employed questions to clarify previous testimony by lay and expert witnesses, and to ask about the typical practices within professions.<sup>153</sup> She concluded that jurors used the opportunity to ask questions in a generally responsible manner that was oriented toward improving the basis of their fact finding rather than advocating for one side or another.

Shari Diamond et al. relied on data from the Arizona experiment that permitted the recording of civil jury deliberations to investigate how jurors responded when their questions were not answered.<sup>154</sup> Diamond et al. also examined the content of juror questions using an approach similar to Mott.<sup>155</sup> In the fifty civil trials, jurors submitted a total of 829 questions. Like Mott, Diamond et al. found that jurors managed their questions in a reasonable way:

Jurors not only use questions to clarify the testimony of witnesses and to fill in gaps, but also to assist in evaluating the credibility of witnesses and the plausibility of accounts offered during trial through a process of cross-checking . . . . [T]he answers to juror questions appear to supplement and deepen juror understanding of the evidence.<sup>156</sup>

During deliberations (which were filmed as part of the research project), jurors explicitly referred to about one out of nine questions that had been asked, indicating that juror questions do not dominate the deliberation process.<sup>157</sup> Nor did jurors obsess about questions that they had asked but the judge had declined to have put to the witness.<sup>158</sup>

### *Research on Trial Discussions*

Juror discussion of evidence during trial is rare today, and

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*Not To Ask, That Is the Question,* 78 CHI.-KENT L. REV. 1099 (2003).

153. *Id.*

154. Shari Seidman Diamond et al., *Jurors' Unanswered Questions*, 41 CT. REV. 20 (2004).

155. Shari Seidman Diamond et al., *Juror Questions During Trial: A Window into Juror Thinking*, 59 VAND. L. REV. 1927 (2006).

156. *Id.* at 1931.

157. *Id.* at 1943.

158. Diamond et al., *supra* note 154.

explicitly prohibited in a number of courts in civil cases and even more in criminal cases.<sup>159</sup> Perhaps the biggest concern is that when jurors discuss the case with one another during the trial they may prematurely judge the case.<sup>160</sup> Another concern is that domineering jurors may start early on to attempt to influence other jurors. Nonetheless, a few bold states are encouraging or even requiring judges to allow jurors to discuss the case prior to the final deliberation.<sup>161</sup> Advocates of the reform are motivated by the potential benefits of allowing jurors to discuss evidence while it is still fresh in their minds. Judge Dann's jury reform committee in Arizona, for example, came down squarely in favor of this jury innovation, suggesting that it would promote juror comprehension through interactions and timely discussions with other jurors, and correct false impressions while they are still tentative and preliminary.<sup>162</sup> The committee report also predicted that the natural tendency to want to talk to one's family and friends about the case might be lessened if there is an opportunity during the trial to speak about the evidence with fellow jurors.<sup>163</sup>

The active jury model provides a theoretical framework for understanding the influence of trial discussions. If jurors develop early biases or false impressions that help to shape their interpretations of later evidence, then trial discussions in which jurors exchange views about the evidence can serve as a timely corrective.<sup>164</sup>

The rarity of this jury innovation makes it difficult to test with actual jurors, yet the Arizona judiciary's remarkable support for experimentation with jury trial innovations facilitated two comprehensive research projects, both of which involved random assignment of actual Arizona civil jury trials.<sup>165</sup>

In the first experiment testing the effects of trial discussions

159. MIZE ET AL., *supra* note 55; see also text accompanying notes 55-84.

160. JURY TRIAL INNOVATIONS, *supra* note 53, at 124-25.

161. MIZE ET AL., *supra* note 55, at 34-35.

162. THE POWER OF 12, *supra* note 42, at 98.

163. *Id.*

164. Natasha K. Lakamp, Comment, *Deliberating Juror Predeliberation Discussions: Should California Follow the Arizona Model?*, 45 UCLA L. Rev. 845 (1998).

165. Hannaford et al., *supra* note 21; Hans et al., *supra* note 51; Diamond et al., *supra* note 22.

in 160 Arizona civil jury trials, half the cases were randomly assigned to permit jurors to discuss the evidence, while the other half did not permit juror discussions.<sup>166</sup> The research team (the author, Paula Hannaford, and G. Thomas Munsterman) collected data on the views of jurors, judges, attorneys, and litigants about this unusual jury innovation.<sup>167</sup> We tested the impact of jury discussions by comparing the process and outcomes of cases in which juries had been or had not been allowed to discuss the evidence during the trial. The use of random assignment increased the scientific merit of the study.

At the time of the study, Arizona judges had already experienced several years of active jury reforms, including note taking, question asking, and trial discussions. Most proved to be enthusiastic about trial discussions. Of the forty Arizona superior court trial judges who participated in the Trial Discussions Project, twenty-nine (73%) supported the reform, five (13%) reported that they were neutral, and six (15%) opposed the reform.<sup>168</sup> Judges who believed that the opportunity for jurors to discuss evidence during the trial improved juror comprehension, and those who thought it did not encourage prejudgment, were most positive about the practice.<sup>169</sup> The Arizona judges are more enthusiastic than the Science for Judges Conference attendees, who reflect a broader swath of the judiciary: merely twenty-one of the sixty-four (33%) judges who attended the national conference supported juror discussions, with twelve judges strongly favoring them.<sup>170</sup>

Arizona jurors who experienced trial discussions were also very positive, with eight in ten supporting the reform, agreeing that “trial discussions improve juror understanding of evidence.”<sup>171</sup> As one juror observed, “[y]ou have immediate questions all the time and it certainly answers them right now

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166. Hans et al., *supra* note 51.

167. Hannaford et al., *supra* note 21.

168. Hans et al., *supra* note 51, at 367.

169. *Id.*

170. Data collected as part of the Judge MtDNA Study, Science for Judges Conference, Brooklyn Law School, Brooklyn, N.Y. (Apr. 13-14, 2007). Judges expressed support on a ten point scale, in which one equaled “strongly oppose,” and ten equaled “strongly favor.” See Hans, *supra* note 87.

171. Hans et al., *supra* note 51, at 377 tbl.3.

and you don't have to feel like you're alone, there are . . . other people there too."<sup>172</sup> Although most jurors expressed favorable views of the reform, a minority thought that trial discussions encouraged jurors to make up their minds before all the evidence and the law was presented.<sup>173</sup> As one juror noted, "I think I had this strong feeling that if I talked about it a lot before all the facts were in I might get some biases . . . If you haven't said anything it's easier to change your mind."<sup>174</sup> Thus some jurors were worried about the possibility that they or others would prejudge the case if they participated in trial discussions.

In contrast to the strong support of the majority of Arizona judges and jurors, attorneys and litigants had mixed impressions. About half the attorneys voiced support for the innovation, and believed that trial discussions improved juror comprehension of the evidence, but a similar proportion thought that these discussions would encourage jurors to prejudge the case.<sup>175</sup> Those who saw the innovation as producing more positive and fewer negative effects were understandably more enthusiastic about the reform.<sup>176</sup> By rights, worries about prejudgment should be greatest for the party who presents second, but a similar proportion of plaintiff and defense attorneys expressed opposition to the reform, and no other differences in their views about the impact of trial discussions were uncovered.<sup>177</sup>

Litigants, too, were split in their views about the value and impact of trial discussions, with about half supporting the innovation.<sup>178</sup> However, experience helps; litigants whose cases had been heard by jurors allowed to discuss the evidence were more positive than litigants whose cases had been heard by jurors not allowed to discuss the evidence.<sup>179</sup> Thus, directly experiencing trials in which the innovation of trial discussions is employed appears to increase positive views and decrease worries about it.

Importantly, the experiment showed no evidence of

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172. *Id.* at 371 (reporting interview of Arizona juror).

173. *Id.* at 377 tbl.3.

174. *Id.* at 374 (reporting interview of Arizona juror).

175. *Id.* at 368, 376 tbl.1.

176. *Id.* at 368.

177. *Id.* at 368-69.

178. *Id.* at 369.

179. *Id.*

prejudgment.<sup>180</sup> Jurors did not report forming opinions earlier in the case, nor was the likelihood of a defense or plaintiff verdict causally linked to engaging in trial discussions.<sup>181</sup> Although jurors reported that the trial discussions were helpful, systematic analyses did not uncover any changes in the verdict that could be traced to participating in trial discussions.<sup>182</sup> Judicial agreement with jury verdicts was similar in cases in which jurors had or had not been able to discuss the case.<sup>183</sup> Similarly, judges' reports of their surprise and satisfaction with the jury's verdict did not differ significantly for juries who could or could not discuss the evidence during the trial.<sup>184</sup> Trial discussions also appeared to produce more robust debate; jurors who could discuss the case during the trial reported more conflict in the final deliberation.<sup>185</sup> That is counter to the idea that early discussions might lead to greater similarity of views.<sup>186</sup>

The videotaping study by Diamond et al. collected data from an additional fifty Arizona civil trials to examine the impact of trial discussions.<sup>187</sup> The project allowed a close examination of the all-important process of juror discussions. That work laid to rest some concerns that jurors permitted to discuss evidence would prematurely decide the case.<sup>188</sup> Fears that jurors would reach early conclusions in favor of plaintiffs who presented their cases first, before defendants had a chance to offer their alternative accounts, did not materialize; in fact, many juror comments during the early stages of the trial favored defendants rather than plaintiffs.<sup>189</sup> There was no obvious difference in the plaintiff win rate or damage awards for juries that could or could not discuss the evidence during the trial.<sup>190</sup> The study also identified a subset

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180. Hannaford et al., *supra* note 21, at 369-70.

181. *Id.*

182. *Id.*

183. *Id.* at 373-74.

184. *Id.* at 374.

185. *Id.* at 377.

186. *Id.* at 362-63.

187. Diamond et al., *supra* note 22, at 16-20.

188. *Id.* at 64-65 (reporting that jurors who expressed verdict preferences during trial discussions frequently changed their positions).

189. *Id.* at 48-59 (finding that juror comments during plaintiff phase of trial often favored defendants).

190. *Id.* at 62-63 (showing no differences in plaintiff verdicts as a function



of complex trials in which trial discussions produced more accurate understandings of the trial evidence.<sup>191</sup> The videotaped juror discussions did reveal, however, that sometimes jurors would discuss evidence when not all jurors were present, contrary to judicial instructions.<sup>192</sup> As a result, the researchers recommended a specific judicial instruction that stresses the need for all jurors to be present before embarking on discussions.<sup>193</sup>

#### PART IV: CONCLUSION

Taking stock of the experimental studies of jury innovations, pilot studies, and experiences in different jurisdictions, I conclude that there is sufficient evidence to support the expansion of active jury reforms. The three innovations reviewed here, juror note taking, juror questions, and trial discussions—have been extensively studied by the courts, reform commissions, and independent jury researchers. There are good theoretical reasons to believe these reforms enhance juror competence, and the collected studies indicate that each reform can provide decision making benefits. There is no evidence that active jury reforms advantage one side or another in civil trials. Although more work can and should be done, most of the feared drawbacks of the innovations have not materialized, and there is solid evidence that most jurors and judges value these additional aids to decision making.

Although the pace of adoption has been relatively swift, given that the legal system is often extraordinarily slow to change, the question arises as to whether the supporters of active jury reforms have been too timid. There are many other reforms that deserve closer scrutiny by judges, lawyers, and jury researchers.<sup>194</sup> Rather

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of trial discussions).

191. *Id.* at 75. "Jurors often used discussion to fill in the gaps in their knowledge, to review testimony and to clarify misunderstandings. They also shared differences in recall and in interpretation of the evidence. In complex cases, when factual questions arose about the evidence, discussion tended to improve the accuracy of recall." *Id.*

192. *Id.* at 28-33.

193. *Id.* at 76-77 (suggesting that instructions about proper jury trial discussions be made in written form, that judges emphasize them, and that a copy of proper procedures be posted in the jury deliberation room).

194. JURY TRIAL INNOVATIONS, *supra* note 53 (providing an excellent

than the limitations and restrictions on juries in tort cases that are envisioned by tort reformers, facilitating active decision making and taking a new look at background, contextual, and comparative information that might aid tort juries in their tasks are worthwhile to consider.

If jury innovations improve decision making, are jurisdictions that currently leave the use of active jury reforms in the hands of trial judges shortchanging their jurors and litigants? One could make a compelling argument that the two reforms that have been tested most extensively, note taking and question asking, should be required procedures rather than optional ones that are at the discretion of the individual trial judge. The jurisdictional pattern in the use of active jury reforms documented in the National Center for State Courts survey shows that jury innovations are employed at a significantly higher rate in those states that mandate them. For example, Arizona, California, and a handful of other states now require that jurors be allowed to take notes, and as a result jurors are permitted to take notes in the vast majority of trials. Once judges and lawyers try the reforms, the majority become more positive, suggesting the value of a mandate approach. States like California that have just begun to require that judges employ particular jury reforms can provide us with insights about lawyers' and judges' support and resistance.

There is sure to be continuing debate over the desirability of active jury reforms. In particular, active jury reforms can be seen as a challenge to basic assumptions of adversarial process.<sup>195</sup> In a thoughtful discussion of the challenges that scientifically complex cases pose to the adversary system, Professor Joseph Sanders observed that jury reforms which aim to enhance the jury's active participation in a complex case decrease the role of the parties. He concludes that "more active judges and more active juries inevitably lead to less power in the hands of the parties and their attorneys. These responses represent a weakening of adversarialism that is more fundamental."<sup>196</sup> Although the studies to date do not reinforce this concern, we should be mindful

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compendium).

195. Joseph Sanders, *Scientifically Complex Cases, Trial by Jury, and the Erosion of Adversarial Processes*, 48 DEPAUL L. REV. 355, 386 (1998).

196. *Id.* at 387.

of the possibility as we continue to experiment with active jury reforms in the tort system.