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Recent Evaluative Research on Jury Trial Innovations

B. Michael Dann and Valerie P. Hans

During the past decade, state jury reform commissions, many individual federal and state judges, and jury scholars have advocated the adoption of a variety of innovative trial procedures to assist jurors in trials. These include reforms as prosaic as allowing juror note taking and furnishing jurors with copies of written instructions, through more controversial changes, such as allowing jurors to ask questions of witnesses or permitting them to discuss the case together during breaks in the trial. Accounts of the nature and purpose of the innovations and the pace of change are found in this issue of *Court Review*¹ and elsewhere.² These innovations are now catalogued in convenient form, accompanied by practical guidance for judges.³

Many jury trial reforms reflect growing awareness of best practices in education and communication as well as research documenting that jurors take an active rather than a passive approach to their decision-making task.⁴ Traditional adversary jury trial procedures often appear to assume that jurors are blank slates, who will passively wait until the end of the trial and the start of jury deliberations to form opinions about the evidence. However, we now know that jurors quite actively engage in evidence evaluation, developing their opinions as the trial progresses. It makes sense to revise trial procedures so they take advantage of jurors' decision-making tendencies and strengths.⁵

Although reform groups have endorsed many of these innovations, until recently there was only modest evidence about their impact in the courtroom. Now, substantial research on the effects of most of the reforms on juror comprehension and juror satisfaction with the trial has been completed and reported. Data are now available to judges and others seeking reliable empirical support for the changes to the traditional jury trial.

This article will describe the methods used to study juries and jury trials and present recent data now available for each of the major proposed innovations. We also draw on new findings from our own recent research testing the comparative advantages of jury innovations for understanding complex scientific evidence.

METHODS USED TO STUDY JURY INNOVATIONS

Researchers have taken a variety of approaches in studying the effects of jury innovations. Some involve using the scientific method of experimentation.⁶

Mock Jury Experiments: Many jury researchers, particularly psychologists, use mock jury experiments to test the impact of an innovation. The experimental approach has been used in many scientific studies. Participants are asked to assume the role of jurors, hear trial evidence, and reach a verdict in a mock trial. To examine the effects of a specific trial reform such as jury note taking, some participants are randomly assigned to take notes and others are not. The performance and decisions of the people taking notes are compared to the participants in the control group to assess the impact of note taking. Most mock jury experiments take place in university research laboratories.

Field Experiments: Field experiments take advantage of the scientific power of random assignment. But instead of using people from the community or even college students and asking them to assume a hypothetical role, the field experiment takes place in the

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1. E.g., Gregory E. Mize & Christopher J. Connelly, *Jury Trial Innovations—Charting a Rising Tide*, Spring 2004 *COURT REVIEW* at 4. See also G. Thomas Munsterman, *A Brief History of State Jury Reform Efforts*, 79 *JUDICATURE* 216 (1996).
2. Phoebe C. Ellsworth, *Jury Reform at the End of the Century: Real Agreement, Real Changes*, 32 *U. MICH. J. L. REFORM* 213 (1999).
3. G. THOMAS MUNSTERMAN, PAULA L. HANNAFORD, & G. MARC WHITEHEAD eds., *JURY TRIAL INNOVATIONS* (National Center for State Courts 1997). A helpful guidebook for court leaders wishing to

pursue jury trial reforms is also available. See *ENHANCING THE JURY SYSTEM: A GUIDEBOOK FOR JURY REFORM* (American Judicature Society 1999).

4. B. Michael Dann, "Learning Lessons" and "Speaking Rights": *Creating Educated and Democratic Juries*, 68 *IND. L.J.* 1229 (1993); Valerie P. Hans, *U.S. Jury Reform: The Active Jury and the Adversarial Ideal*, 21 *ST. LOUIS L. REV.* 85 (2002).
5. Vicki L. Smith, *How Jurors Make Decisions: The Value of Trial Innovations*, in *JURY TRIAL INNOVATIONS* (1997), *supra* note 3, at 5.
6. Robert MacCoun, *Inside the Black Box: What Empirical Research Tells Us About Decisionmaking by Civil Juries*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* (Litan, ed., Brookings Institution/American Bar Association 1993) at 137, 140-47. MacCoun also discusses archival analyses, in which researchers analyze jury cases and their outcomes for patterns, but that has not been employed much in studies of the impact of jury innovations.

real world. To test a jury innovation, actual jury trials are randomly assigned to be conducted with a particular innovation or not. Just as with mock jury experiments, jurors in the experimental and control conditions are compared to determine the impact of the jury innovation.

Non-Experimental Studies. Many states have tested the effects of jury reforms in systematic ways, although these studies do not include random assignment and experimentation. Our article describes *state pilot programs* and other efforts to assess trial participants' views and reactions to new jury trial procedures. One common approach is to *survey or interview* trial participants, including jurors, following a trial, collecting their perceptions about jury innovations used during the trial. So, for example, in a trial in which a judge permitted jurors to ask questions, the judge, the lawyers, and the jurors might all be surveyed about what they thought about the reform and how it affected the jury's work.

Each of these methods has characteristic strengths and limitations. Interviews and surveys rely on trial participants being able to report accurately how an innovation affected them. Mock jury experiments can present a more controlled environment, but participants are not really deciding someone's fate. Field experiments appear to be an ideal marriage of scientific power and the reality of jury decision making, but they are rare. Some judges are reluctant to use random assignment with actual jury trials. Pilot programs could reflect the unique situation of particular jurisdictions. Thus, it is necessary to employ all of these divergent approaches to studying the effects of jury reforms, looking for a convergence of findings. Below we describe how research using these methods has discovered valuable information about the operation and impact of jury trial innovations.

RECENT EMPIRICAL EVALUATIONS OF JURY TRIAL INNOVATIONS

Eight innovations have attracted the most attention of jury researchers and state reform groups: juror note taking, questions from jurors intended for witnesses, discussions of the evidence by jurors during civil trials, pre-instructing jurors on the applicable law, providing jurors with juror notebooks, instructing the jury before closing arguments, providing each juror with a copy of the instructions, and offering suggestions regarding jury deliberations.

NOTE TAKING

In some states, judges are required to inform jurors that they may take notes if they desire and to furnish jurors with the nec-

essary materials. Trial judges in most other state and federal courtrooms may permit juror note taking, or not, at the judge's discretion. More are doing so, but many still do not.

Research on juror note taking has been undertaken both with mock juries in controlled settings and actual juries in field experiments. Both lines of research find no evidence of any risk to juror note taking. The field studies show widespread support among trial participants for permitting jurors to take notes. Jurors themselves routinely report that note taking is helpful. Some studies show significant improvement in juror comprehension and memory.

Researchers Lynne ForsterLee and Irwin Horowitz conducted a series of mock trials of complex tort cases using jury-eligible adults.⁷ They report that experience with note taking improved jurors' performances at several levels, including memory and understanding of the evidence and overall satisfaction with the trial process.

We found that note-taking juries were able to better organize and construct the evidence and, importantly, this in turn led to improved and more efficient (focused on the evidence) deliberations. . . . Note-taking juries believed they were more efficient, and they expressed greater satisfaction with the trial process as compared to their non note-taking jury counterparts. Lastly, note-taking juries were more likely to recognize case-related facts and reject "lures" (statements that were not actually in the trial) than were non note-taking juries.⁸

In another mock jury experiment involving 128 college students, Rosenhan and his colleagues also found statistically significant evidence that note taking increased recall of trial information and enriched note takers' subjective experiences.⁹ Note takers had better recall of the trial evidence than non-note takers. Compared to non-note takers, note takers rated themselves as more attentive, more involved in the trial, and more able to keep up with the proceedings.

Most recently, in a research project funded by the National Institute of Justice, the authors of this article conducted a series of 60 mock jury trials to test the effects of four jury trial reforms on juror understanding of contested DNA presentations.¹⁰ Of the 400 jurors instructed they could take notes during trials of an armed robbery case, fully 89% responded that notes helped them remember or understand the evidence. As expected, there was an "education effect"; those jurors with

[N]ote takers rated themselves as more attentive, more involved in the trial, and more able to keep up with the proceedings.

7. Lynne ForsterLee & Irwin Horowitz, *The Effects of Jury-Aid Innovations on Juror Performance in Complex Civil Trials*, 86 JUDICATURE 184 (2003).

8. *Id.*, at 188-89.

9. David L. Rosenhan, Sara L. Eisner, & Robert J. Robinson,

Notetaking Can Aid Juror Recall, 18 L. & HUM. BEHAV. 53 (1994).

10. B. Michael Dann, Valerie P. Hans, & David H. Kaye, *Testing the Effects of Selected Jury Trial Innovations on Juror Comprehension of Contested mtDNA Evidence* (Final Technical Report to National Institute of Justice, Washington, D.C. 2004).

The practice of permitting juror questions of witnesses . . . is growing and is increasingly authorized by court rule or case law.

more formal education were more likely to take notes. Juror satisfaction with verdicts was higher among note takers. Mock jurors were very supportive of allowing juror note taking during actual trials; 89% indicated they favored jury note taking. Jurors' responses to objective knowledge questions about

the DNA evidence did not establish that note taking alone produced significantly better comprehension compared to a control group, though. There was some evidence that when note taking is combined with another innovation, such as jury notebooks or DNA checklists, performance was enhanced.

Juror note taking has also been studied in field settings. A yearlong pilot program in Massachusetts tested a number of innovations in civil and criminal trials.¹¹ Data were collected from 1,590 participants. Almost all of the jurors (96%) responded that note taking was somewhat to very helpful. There was a general consensus among participating judges that jurors in all Massachusetts trials ought to be able to take notes.

Ohio's Jury Service Task Force conducted a pilot study involving 31 counties, 49 judges, and 1,420 jurors from civil and criminal trials.¹² Ninety-eight percent of the pilot program judges who were surveyed about their experiences supported note taking. The 289 attorneys polled agreed, adding there were no significant negatives. A solid majority of the jurors found note taking helpful.

A similar pilot project in Tennessee undertaken as part of that state's jury reform effort surveyed judges and jurors from 45 trials.¹³ All of the participating judges supported note taking by jurors. Eighty percent of jurors said their notes were helpful during jury deliberations.

One of the most ambitious projects was a set of two field experiments in which jury trials were randomly assigned to different jury innovations or a control group.¹⁴ Jury note taking and juror questions were the innovations studied. The investigators, jury researchers Larry Heuer and Steven Penrod, compared juries that were allowed or not allowed to take notes, but found no strong effects either for or against note taking. Two-thirds of the jurors took notes, and they were somewhat more satisfied with the trial than other jurors, but there was no clear evidence that their memory for trial facts was superior because they had taken notes. On the other hand, the experiment did not bear out the disadvantages of note tak-

ing advanced by opponents of the innovation. Note taking was not a distraction. The notes were generally accurate, did not favor one side over the other, did not give note takers an unfair advantage over non-note takers during deliberations, and did not extend deliberations.

In sum, the recent research on juror note taking demonstrates that jurors believe the innovation enhances memory and understanding of the evidence, that judges and jurors strongly support the procedure, and that scant evidence exists of significant downsides to the innovation. There is some modest objective evidence that jury note taking significantly improves recall or comprehension.

ALLOWING JURORS TO ASK QUESTIONS AT TRIAL

The practice of permitting juror questions of witnesses (submitted to the judge in writing for screening) is growing and is increasingly authorized by court rule or case law. A 2004 decision of the Supreme Court of Vermont observed that the vast majority of states and all ten federal circuits that have considered the issue permit juror questions of witnesses in criminal cases at the discretion of the trial judge.¹⁵ Still, jurors are not permitted to submit their questions in a high percentage of today's courtrooms.

Like note taking, permitting jurors to put questions to the witnesses has received substantial attention from researchers.

In their 1997 article reporting on their field study of actual trials in which note taking and juror questions were tested, Heuer and Penrod concluded that juror questions enhanced juror satisfaction with the trial process and jurors' confidence that they had enough information to decide the case, and that the process created some useful feedback for the attorneys.¹⁶ Nevertheless, there was insufficient evidence to support the claims that the process will uncover important evidence or lead to greater overall juror satisfaction with the trial. Conversely, the data did not bear out the concerns that permitting juror questions would be unduly disruptive, would prolong the trial, would unfairly surprise the lawyers, would burden the judge or staff, or that jurors' questions would be inappropriate.

In an extensive study involving juror questions in 239 criminal trials in Colorado, researchers administered questionnaires to the judges, attorneys, and jurors who participated. They concluded: "Overall, the results reveal that juror questioning has little negative impact on trial proceedings and may, in fact, improve courtroom dynamics."¹⁷ Regarding the oft-heard complaint that juror questions will help the prosecution meet its burden of proof, only 16% of judges and 23% of attorneys felt that jurors' questions assisted in meeting the burden

11. Paula L. Hannaford & G. Thomas Munsterman, Final Report for the Massachusetts Project on Innovative Jury Trial Practices (National Center for Citizen Participation in the Administration of Justice 2001).
12. James Frank & Tamara Madensen, Survey to Assess and Improve Jury Service in Ohio, Appendix B to Report and Recommendations of the Supreme Court of Ohio Task Force on Jury Service (2004).
13. Neil P. Cohen & Daniel R. Cohen, *Jury Reform in Tennessee*, 34

MEMPHIS L. REV. 1 (2003).

14. Steven Penrod & Larry Heuer, *Tweaking Commonsense: Assessing Aids to Jury Decision Making*, 3 PSYCHOL. PUB. POL'Y. & L. 259 (1997).
15. *State v. Doleszny*, 844 A.2d 773 (Vt. 2004).
16. Penrod & Heuer, *supra* note 14.
17. Mary Dodge, Should Jurors Ask Questions in Criminal Cases? A Report to the Colorado Supreme Court's Jury System Committee (2002).

of proof. Almost three-fourths of both groups answered “No” or “No Opinion” to the question. Almost 80% of judges favored jury questioning in criminal cases. Prosecutors and defense counsel were divided: 90% of prosecutors favored allowing jury questions; only 30% of defenders did so. Note, however, that opposition to the procedure decreased by 50% among defense counsel after their experience in the pilot program.

A 1999 pilot project in Los Angeles County Superior Court in which judges experimented with a number of jury innovations reported that 92% of the jurors told they could ask questions had very positive opinions about the procedure.¹⁸ The overwhelming majority of jurors felt that being allowed to put their questions to witnesses improved their role as decision makers and made them feel more involved in the trial. Ninety-three percent of the judges said the process did not unduly prolong trials.

Following the Massachusetts pilot of juror questions, 96% of the judges who received juror questions thought the procedure was helpful and worthwhile.

Over 88% of the Ohio judges who participated in its pilot program testing the procedure approved of allowing jurors to ask questions.¹⁹ None of the purported risks of allowing jurors to put questions materialized. Over three-fourths of surveyed jurors reported that question asking helped them remain attentive, and 63% said that the answers to their questions aided their decision making.

After a six-month pilot program of allowing juror questions in New Jersey civil trials, the committee recommended that the New Jersey Supreme Court approve the procedure by rule, concluding:

No study of actual trials can measure the results against the theory in any scientifically reliable way. However, the questionnaires completed by the jurors, judges, and attorneys gave us significant information—including the fact that out of 127 trials conducted by 11 judges in as many counties, no one suggested that the process had an unfair effect on the outcome of the trial. . . . It is our perception that there need be no tension between the goal of a trial as a search for justice, and the method of the adversarial process.²⁰

The participating New Jersey judges, who received a median number of nine questions per trial (77% of which were put to a witness), unanimously favored the procedure, as did the overwhelming number of jurors. Trials were lengthened by 30 minutes, but jurors reported that answers to their questions shortened the time required for deliberations. Almost 60% of

the pilot project attorneys also supported adoption of the eventual rule.

The Tennessee pilot program of allowing juror questions in trials reported similar juror support for the procedure—89%.²¹

In our mock jury experiment, 160 of the 480 mock jurors were instructed they could submit written questions to the expert DNA witnesses.²² A total of 49 relevant questions (average of 2.45 per trial) were received and answered. Most questions sought further explanations or elaborations of technical DNA evidence presented by the expert witnesses. Jurors who had taken more science and mathematics courses were more likely to ask questions. There was only a weak correlation between education and science or math job experience and the likelihood of asking questions. Support for the innovation among those in the question-asking conditions was very high—97%. When asked how the question procedure helped, almost 75% of jurors answered that the procedure helped them better understand the evidence. No objective differences in comprehension were found, however.

At least one other researcher has completed a study of a large number of juror questions to discover what jurors are asking.²³ Nicole Mott conducted a content analysis of 2,271 juror questions from 164 actual trials, both criminal and civil. A median number of seven questions were asked per trial. She concluded that jurors used their questions to clarify previous testimony of both lay and expert witnesses and to inquire about common practices of unfamiliar professions. Mott found that jurors exercised the privilege of asking questions in responsible ways to enhance the quality of decision making. She concluded that the process was not detrimental to the adversarial trial. These latter conclusions coincide with the earlier findings from a national study by the American Judicature Society.²⁴

Finally, this issue of *Court Review* features an article analyzing jurors’ attitudes and reactions when their questions go unanswered.²⁵

PRELIMINARY JURY INSTRUCTIONS ON THE APPLICABLE LAW

In most jurisdictions, the trial judge has the discretion to include in the court’s preliminary jury instructions at least some of the law that will govern the case. Some states now require it by court rule; many individual judges in other jurisdictions are doing so on their own. The available research focuses on the advantages to jurors who hear and read a legal “road map” they

[A]most 75% of jurors answered that the procedure helped them better understand the evidence.

18. Jacqueline A. Connor, *Los Angeles Trial Courts Test Jury Innovations*, 67 DEF. COUNSEL J. 186 (2000).

19. Frank & Madensen, *supra* note 12.

20. Report on Pilot Project Allowing Juror Questions 2 (New Jersey Supreme Court’s Civil Practice Committee 2001)

21. Cohen & Cohen *supra* note 13.

22. Dann *et al.*, *supra*, note 10.

23. Nicole L. Mott, *The Current Debate on Juror Questions: “To Ask or Not to Ask, That Is the Question,”* 78 CHI. KENT L. REV. 1099 (2003).

24. TOWARD MORE ACTIVE JURIES: TAKING NOTES AND ASKING QUESTIONS (American Judicature Society 1991).

25. Shari Seidman Diamond, Mary R. Rose, and Beth Murphy, *Jurors’ Unanswered Questions*, Spring 2004 COURT REVIEW at 20.

Three-fourths of the trial judges reported that substantive preliminary instructions helped jurors to follow the evidence.

will be expected to follow at the outset of the case instead of having to wait until the conclusion of trial, when legal instructions are traditionally given.

In their work involving mock jury trials of complex tort cases, ForsterLee and Horowitz demonstrated that pre-instructed jurors scored significantly better on recall

and comprehension measures.²⁶ They concluded: “[S]ubstantive pre-instruction provided jurors with a framework, or schema, that enabled them to organize the trial facts according to legal guidelines as they were being presented. The advantage of substantive pre-instruction was apparent.” The authors added, “[J]urors made better decisions when they had a coherent framework to organize the initial processing and subsequent recall of the trial evidence.” Combining note taking and pre-instruction on at least some of the law the jury will be expected to enhance juror cognition still further.

In the Tennessee pilot project testing various reform proposals, some of the juries in the 45 trials received substantive preliminary instructions.²⁷ Almost all the juror participants (98%) found the early instructions helpful; 81% reported they were “very helpful.” Attorneys in the same cases were “virtually unanimous” that they considered the preliminary instructions on the law helpful.

The pilot study in Los Angeles County Superior Court also tested substantive preliminary instructions.²⁸ Ninety-eight percent of the 200 reporting jurors gave a “very positive” rating to the procedure, adding that the law provided in advance of evidence enabled them to focus better during the trial and enhanced their comprehension of the evidence.

In Ohio, where preliminary instructions on the law were given to some of the juries in that state’s study, 75% of the judges agreed that they helped jurors follow the evidence; only 7% disagreed.²⁹

Finally, in the Massachusetts jury project, 94% of the jurors who participated in the trials where substantive preliminary instructions were given said they were somewhat to very helpful.³⁰ The vast majority of attorneys agreed that the preliminary instructions provided jurors with a better understanding of the legal issues and facilitated better juror focus during trial. Three-fourths of the trial judges reported that substantive preliminary instructions helped jurors to follow the evidence.

JUROR NOTEBOOKS IN LENGTHY AND COMPLEX TRIALS

Given recent anecdotal reports from judges and attorneys and a recent spate of journal articles on the technique, providing jurors with individual multipurpose notebooks for their use during the trial and their deliberations appears to be becoming more popular, especially in complex cases and lengthy trials.³¹

Research regarding the value of juror notebooks was extremely limited until recently. As their use has increased, so has the empirical data.

In her research on jury trial complexity, Nicole Mott asked jurors who had used notebooks about their experiences.³² In addition to noting the utility of having copies of the important documents in evidence and a seating chart of trial principals, jurors expressed concerns that the tendency to place too much information in the notebooks can make them impractical to use if not overwhelming.

In the authors’ research testing the effects of four jury trial innovations on juror recall and understanding of contested DNA evidence, multipurpose notebooks were provided to jurors in 20 of the 60 mock trials.³³ The notebooks contained a glossary of DNA terms, a checklist tailored to the DNA evidence, a list of witnesses in the case, copies of the experts’ slides and blank paper for note taking. Ninety-two percent of the jurors supplied notebooks reported that they used them to review the contents; 90% found them somewhat or extremely helpful. When asked how the notebooks helped, 79% of jurors reported that the notebooks’ contents enhanced their understanding and recall of the evidence. Fully 93% of the jurors favored the use of notebooks in trials. Jurors who were provided with notebooks scored significantly higher on the Juror Comprehension Scale than those not supplied with notebooks. Further, those supplied with the notebook and instructed they could take notes during trial outperformed those only permitted to take notes.

The states that have investigated the effects of supplying jurors with notebooks have reported similar results.

California: Responses of 200 jurors in the Los Angeles County pilot study made clear that notebooks containing copies of key exhibits, among other things, made it easier to locate needed information during deliberations.³⁴

Ohio: Among the surveyed judges and jurors that participated in the pilot study trials where notebooks were furnished jurors, 72% of jurors found notebooks helpful and 50% “very help-

26. ForsterLee & Horowitz, *supra* note 7.

27. Cohen & Cohen, *supra* note 13. See, in addition, Neil P. Cohen, *The Timing of Jury Instructions*, 67 TENN. L. REV. 681 (2000).

28. Connor, *supra*, note 18. See also Final Report: Task Force on Jury System Improvements 68 (Judicial Council of California 2004).

29. Frank & Madensen, *supra* note 12.

30. Hannaford & Munsterman, *supra* note 11.

31. E.g., Neil P. Cohen, *Better, Happier Juries: Jury Reform in Tennessee*, 39 TENN. BAR J. 16 (2003); Peter Lauriat, *Judicial Perspectives on the Presentation of Medical Evidence*, 36 NEW ENG. L. REV. 615

(2002); Gregory P. Joseph, *Innovative Comprehension Initiatives Have Enhanced the Ability of Jurors to Make Fair Decisions*, 73 N.Y. ST. BAR J. 14 (2001); and Nancy S. Marder, *Juries and Technology: Equipping Jurors for the 21st Century*, 66 BROOK. L. REV. 1257 (2001).

32. Nicole L. Mott, *How Civil Jurors Cope with Complexity: Defining the Issues* 167, 188-89 (2000)(doctoral dissertation; copies on file with authors).

33. Dann *et al.*, *supra* note 10.

34. Connor, *supra* note 18.

ful.”³⁵ Sixty-seven percent of the judges thought the notebooks helped the parties’ presentations; 72% said the notebooks assisted jurors in understanding exhibits.

Tennessee: When 418 jurors were asked about multipurpose notebooks, 90% responded that they were useful in performing their tasks. All attorneys in the same cases, with just one exception, gave the notebook experience a positive rating.³⁶

Massachusetts: All of the judges who oversaw preparation of notebooks and furnished notebooks to jurors reported that they were helpful and worthwhile.³⁷

Thus, recent research and judicial experience with jury notebooks, particularly in complicated cases, provide support for their use.

STRUCTURED JUROR DISCUSSIONS OF EVIDENCE DURING CIVIL TRIALS

The innovation considered the most radical and controversial is the one that turns on its head the traditional rule swearing civil jurors to silence during the entire trial, no matter how long, complex, or stressful. Jurors are instructed prior to civil trials that they may discuss the evidence during the trial, but only among other jurors; only in the privacy of the jury room; only when all jurors are present to participate; and only on condition that they reserve judgments about the ultimate issues until they have heard all of the evidence, the court’s final instructions on the law, and the arguments of counsel. The reform, adopted by rule in Arizona and subjected to evaluation by independent jury experts, is being watched closely by other jurisdictions and judges who favor reform generally. The research reveals strong support by judges and jurors. Only modest evidence was found supporting the assertions of proponents that discussions will enhance juror memory and comprehension. Little evidence was cited that validates the critics’ fears that such discussions would lead to premature judgments regarding the outcomes of cases.

The first study of this innovation was by a team of researchers that included one of this article’s authors, Valerie Hans. Together with Paula Hannaford and G. Thomas Munsterman of the National Center for State Courts, Hans conducted a field experiment in Arizona to study the effects of civil jurors’ trial discussions. In approximately 160 Arizona civil jury trials in four counties, the researchers used random assignment of the cases to “Discuss” and “No Discuss” conditions. Trial participants were quite supportive of the reform.³⁸ Support for the change ran very high among judges and jurors

particularly: three-fourths or more of each group responded positively to the new procedure. Attorneys favored the new practice, but at the lower rate of 51%. Attorney support increased as they gained more experience with jurors being able to discuss the evidence during their trials.

Hannaford, Hans, and Munsterman analyzed the data collected regarding the effects of the change permitting juror discussions in civil cases.³⁹ Jurors who discussed the evidence during the trial reported that the discussions were very helpful in resolving confusion about the evidence. However, the jurors’ self-reports about how well they understood the evidence overall, and the degree that judges agreed with the jury verdicts, were not affected by the opportunity to discuss the evidence.

The researchers also found that jurors in the two conditions did not differ in the timing of opinion formation about outcome issues. The data belied a principal fear voiced by skeptics of the new rule, that permitting such discussions among jurors would lead to premature judgments on the merits of the case. No such pattern was detected.

The most recent field study of structured discussions of evidence by Arizona jurors, conducted by Shari Seidman Diamond and Neil Vidmar, closely examined 50 civil trials after videotaping the trials, all juror discussions during breaks in the trial, and all juror deliberations.⁴⁰ The investigators described what jurors discuss when instructed in accordance with the new rule:

During discussions jurors sought information about the testimony from one another to assist them in recalling testimony, obtain needed clarification, or provide meaning to facts. They also discussed questions that they had submitted to the court or that they planned to submit, and they talked about evidence that had not yet been presented that they would like to have. Case studies in the complex cases examining the correspondence between the trial evidence and the answers that jurors gave when their fellow jurors sought information during discussions revealed that discussion did result in more accurate understandings of trial evidence.⁴¹

The innovation considered the most radical and controversial is the one that turns on its head the traditional rule swearing civil jurors to silence during the entire trial

35. Frank & Madensen, *supra* note 12.

36. Cohen & Cohen, *supra* note 13.

37. Hannaford & Munsterman, *supra* note 11.

38. Valerie P. Hans, Paula L. Hannaford, & G. Thomas Munsterman, *The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges, and Jurors*, 32 U. MICH. J. L. REF. 349 (1999).

39. Paula L. Hannaford, Valerie P. Hans, & G. Thomas Munsterman, *Permitting Jury Discussions During Trial: Impact of the Arizona*

Reform, 24 LAW. & HUM. BEHAV. 359 (2000).

40. Shari Seidman Diamond & Neil Vidmar, *Jurors Discussions During Civil Trials: A Study of Arizona’s Rule 39(f) Innovation* (State Justice Institute/National Science Foundation 2002); also reported at Shari Seidman Diamond, Neil Vidmar, Mary Rose, Leslie Ellis, & Beth Murphy, *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1 (2003).

41. *Id.*, at iv.

Diamond and Vidmar did not find evidence that jurors allowed to discuss the evidence during trial pre-decide the merits . . . at any earlier stage than their counterparts

The authors found only modest evidence that the innovation positively affected juror comprehension or recall of the trial evidence or law. With some recommendations for procedural changes in the Arizona practice, they concluded that structured juror discussions before formal deliberations can assist juries hearing complex cases. Like the researchers who had gone to Arizona before to study the same practice, Diamond and Vidmar did not find evidence that jurors

allowed to discuss the evidence during trial pre-decide the merits of the cases they heard at any earlier stage than their counterparts repeatedly sworn to silence: “No jury arrived at a group decision on the verdict in the course of discussions.”

Some other state reform groups have taken a “wait-and-see” attitude toward this uniquely Arizona reform; others have rejected it outright. Some states have experimented with the procedure and collected and assessed the resulting data.

For example, the Massachusetts pilot program involving various trial innovations tested the juror discussion procedure as well.⁴² All of the judges that experimented with the innovation thought it was helpful. Of the jurors, 93% found the opportunity to discuss the evidence during the trials helpful. Only 2% of jurors said the opportunity the court offered them was not helpful.

FINAL INSTRUCTIONS BEFORE AND AFTER CLOSING ARGUMENTS

The advantages of giving the substantive final instructions on the law before closing arguments by counsel, rather than after, with the important procedural and “housekeeping” matters reserved until after counsel conclude, have been discussed more at length elsewhere.⁴³ Among other things, hearing the applicable law from the judge before counsel argue gives the jurors a reliable legal context to follow when they hear the attorneys sum up on the facts and the law. In addition, this procedure relieves counsel from having to “preview” the law for the jurors, sometimes a risky task that provokes objections and argument. Besides, jurors ought to hear an organized and coherent statement of the applicable legal rules from an authoritative and neutral source—the judge, not the adversaries.

Data generated by recent research demonstrate support for this modest change:

After a test of the procedure in several Tennessee trials, the participating judges unanimously endorsed instructing on the law prior to closing arguments.⁴⁴ Almost all of the attorneys (93%) approved, and 85% of jurors said it was helpful in understanding the arguments of counsel.

In a similar project in Ohio,⁴⁵ most judges (80%) and attorneys (68%) agreed that instructing on the law before closing arguments was more helpful to juries than the traditional order.

In any event, the recommended practice calls for the judge addressing the jury after counsel finish, since there are important procedural matters remaining.⁴⁶

SUGGESTIONS FROM THE JUDGE REGARDING DELIBERATIONS

This commonsense idea springs from the simple facts that so few members of a given jury have likely served before through to verdict and most are strangers to the deliberation process. Studies on the matter demonstrate that jurors welcome and benefit from some helpful suggestions (as opposed to directions) from the judge regarding the important tasks of choosing a presiding juror and conducting of deliberations, voting, etc.⁴⁷

Again, the most recent research has been done at the behest of state jury reform committees:

In Massachusetts, 88% of jurors who received such instructions from their trial judges found them helpful.⁴⁸

Jurors in Ohio who received suggestions from the court regarding their choosing a foreperson, conducting deliberations, conducting votes, and resolving disagreements were similarly enthusiastic about receiving help. They agreed, at rates of 81% to 92%, that the suggestions were helpful.⁴⁹

Readily adaptable resources are available for judges wishing to offer such help to juries about to embark on deliberations.⁵⁰

WRITTEN COPIES OF INSTRUCTIONS FOR ALL JURORS

Finally, furnishing each juror with a copy of court’s instructions before the instructions, so jurors can follow along as they are read by the judge and have access to them during closing arguments and deliberations, is another simple, thoughtful

42. Hannaford & Munsterman, *supra* note 11.

43. MUNSTERMAN ET AL., JURY TRIAL INNOVATIONS, *supra* note 3, at 161; Cohen, *supra* note 26, at 694-95; Dann, *supra* note 4, at 1258-59.

44. Cohen & Cohen, *supra* note 13.

45. Frank & Madensen, *supra* note 12.

46. ForsterLee & Horowitz, *supra* note 7.

47. MUNSTERMAN ET AL., JURY TRIAL INNOVATIONS, *supra* note 3, at 171; Christopher N. May, “What Do We Do Now,” 28 LOYOLA L.A. L.

REV. 869 (1995); Dann, *supra* note 4.

48. Dann *et al.*, *supra* note 10.

49. Frank and Madensen, *supra* note 12.

50. Sample instructions and other helpful materials: MUNSTERMAN ET AL., JURY TRIAL INNOVATIONS, *supra* note 3, at 257; BEHIND CLOSED DOORS: A GUIDE FOR JURY DELIBERATIONS (American Judicature Society 1999) (to order free copies, go to <http://www.ajs.org/cart/storefront.asp>).

innovation. The proponents of furnishing copies to each juror contend that individual copies accommodate jurors' different learning styles, enhance comprehension, and reduce the number of questions about the instructions from deliberating jurors.⁵¹

According to recent polling of judges, attorneys, and jurors, support for individual written copies of instructions runs high.

Massachusetts: 98% of judges using the innovation found it helpful. Jurors who did not have individual copies of the instructions asked 78% more questions concerning the legal charge than jurors who were given individual copies.⁵²

California: jurors in the pilot program furnished with individual copies of the instructions sent out no questions about them during deliberations and 94% favored the practice (80% were "strongly positive").⁵³

Tennessee: Deliberating jurors made an average number of 4.78 references to their copies, and 99% found the instructions "clear," and 87% "very clear." Judges report no significant problems in preparing and furnishing each juror a copy.⁵⁴

CONCLUSION

Many years ago, United States Supreme Court Justice Louis Brandeis praised the value of experimentation: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."⁵⁵ This survey of work on innovations to the traditional jury trial underscores Justice Brandeis's point. The combined insights from pilot programs, field experiments, and laboratory research on jury trial innovations show the benefits that can derive from systematic evaluation of proposed trial reforms.

The willingness, if not the insistence, that changes in the traditional jury trial format intended to benefit the decision makers be subjected to evaluations demonstrates wisdom and confidence. Jury reforms have the best chance to succeed and become part of a new tradition if subjected to the kind of systematic studies summarized here. Today's jurors deserve no less if they are to have the tools they need to better understand and decide today's cases.



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51. MUNSTERMAN ET AL., JURY TRIAL INNOVATIONS, *supra* note 3, at 174; Dann, *supra* note 4, at 1259; ABA REPORT: JURY COMPREHENSION IN COMPLEX CASES (Lit. Sec. 1989) (jurors unanimously found copies helpful during deliberations).
52. Hannaford & Munsterman, *supra* note 11.

53. Connor, *supra* note 18.

54. Cohen & Cohen, *supra* note 13.

55. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).