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Of Mushrooms and Nullifiers: Rules of Evidence and the American Jury

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OF MUSHROOMS AND NULLIFIERS: RULES OF EVIDENCE AND THE AMERICAN JURY

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I. INTRODUCTION

America presently has a strikingly elaborate evidentiary system. The Federal Rules of Evidence, the single most influential evidentiary code in the United States, is organized into eleven articles containing sixty separate rules. Most of these rules have a variety of subparts, for example the two core hearsay requirements (Federal Rules 803 and 804) have, between them, twenty-eight hearsay exceptions. Each rule and subpart is subject to ongoing judicial interpretation and is likely to have hundreds, if not thousands, of potentially authoritative judicial explications. It has often been remarked that this enormous volume of evidentiary prescriptions is one of the key differences between the American and Continental evidentiary approaches. While scholars have appropriately cautioned that this contrast may be overstated,[1] it should not be doubted that formal evidentiary requirements are a central facet of American trial regulation. The evidence rules are particularly important because they have generally adopted a "prophylactic orientation"[2] that may prevent a very substantial amount of information from being heard at trial.

Since the late nineteenth century, it has been a theme among common law evidence scholars that the elaborate exclusionary evidence scheme is the product of Anglo-American commitment to trial by jury.[3] This was perhaps most famously stated by James B. Thayer, who in 1898, in his enormously influential *A Treatise on Evidence at Common Law*, declared that evidence law was "the child of the jury system."[4] This claim is open to doubt in light of findings that British jury trials during the seventeenth and much of the

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1. MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 8-10 (1997).

2. *Id*. at 12.

3. Not all evidence scholars agree that the jury was the progenitor of the rules of evidence. *See, e.g.*, Edmund Morgan, *The Jury and the Exclusionary Rules of Evidence*, 4 U. CHI. L. REV. 247 (1937) (focusing on adversary process rather than jury trial).

4. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 266 (1898).

eighteenth centuries utilized few evidentiary restrictions.[5] Be that as it may, the bulk of America's elaborate evidentiary code is today maintained and defended as a means of "protecting" lay jurors from evidence that, in one way or another, is claimed to pose a threat to appropriate jury decision-making.[6]

Mirjan Damaška has recently argued that American evidence law has come "adrift."[7] By this he means that the institutions which produced it, including jury trial, climactic continuous trial confrontations undertaken without elaborate discovery or other pretrial preparation (hence likely to yield significant evidentiary surprises at trial) and two-party, zero-sum adversary proceedings are all in decline. The ultimate effect of this decline is to undermine the foundations upon which the elaborate exclusionary evidence structure rests. According to Damaška, what will replace the present rules structure is hard to determine, but is likely to be more accommodating to the increased flow of evidence generated by technical and scientific processes.[8] Although it is not the major thrust of his book, Damaška has set forth a general sketch of what he thinks the future may hold for the rules of evidence. As he puts it:

> Evidentiary rules will gradually cease to be designed with an eye to lawyer-dominated jury trials and then applied, mutatis mutandis, across the board. Of dubious propriety even under current conditions, this approach will become plainly obsolete with the growing differentiation of the legal process. Alternative shaping centers of evidence law are bound to emerge and over-shadow jury trials as the matrix of the fact-finding style. As arrangements tailored to jury trials are dethroned from their exalted position, common law evidence as we now know it is likely to be confined to a narrower sphere, perhaps serious criminal cases, or even completely discarded. The most obvious candidate for rejection is the current law's striking emphasis on the screening of information to be submitted to triers of fact. This rejection alone will entail far-reaching consequences. With the abandonment of the prophylactic orientation, for example, witnesses will obtain greater freedom to relate what they know. This will greatly reduce the need to accord counsel the presently available powers to exercise tight editorial control over their testimony. Even the most visible and widely known characteristic of the Anglo-American fact-finding method faces an uncertain future.[9]

5. *See* Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497 (1990); John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168 (1996).

6. DAMAŠKA *supra* note 1, at 28-30.

7. *Id*. *passim*.

8. *Id*. at 143.

9. *Id*. at 149 (citations omitted).

Damaška's hypothesis that there will be a shift *away* from jury trials as the "matrix" of evidence rule-making may, over the long haul, prove accurate but, for the moment, evidentiary change *within* the context of jury trials remains a lively and contested battleground in American law. Indeed, a desire to regulate what juries consider has been responsible for the development of some of the most significant recent changes in that law. Much of the new law has followed the pre-existing trend to circumscribe evidentiary presentations and has relied upon several well worn prophylactic tools including judicial pre-screening of proffered testimony and blindfolds to keep from the jury salient pieces of information about the parties or the consequences of the litigation. After exploring recent examples of the ongoing effort to keep certain sorts of materials from the jury, a nascent counter-trend will be examined – one that is exerting pressure for the loosening of evidentiary strictures in jury trials.

II. HEIGHTENED PROPHYLAXIS

Although Damaška does not note heightened prophylaxis as a step in the process leading to the decline of the jury as common law decision maker, it fits comfortably within his analytical scheme. By ever more tightly regulating what the jury sees and hears, jury trials can be effectively marginalized. Eventually, if such a process is continued, the jury will see and hear so little and trials before it will be so rule-encumbered that jury proceedings will become prohibitively unattractive. While rules drafters and courts have not articulated such an agenda, they have, in recent years, pursued a course that points in that direction. Although the trend toward tighter regulation is not new, it has taken on added momentum in the last decade. This may be seen in the way America's federal courts have come to treat expert testimony, as well as the way both legislatures and courts have employed blindfolds to hide from jurors salient information about the consequences (in terms of civil or criminal liability) that may arise because of jury decisions.

A. Expert Evidence

In 1993, the United States Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals, Inc*.[10] That case involved the question whether Bendectin, a drug prescribed to treat morning sickness during pregnancy, caused birth defects among children whose mothers had used it. Despite the fact that the defendant who manufactured the drug had done woefully inadequate testing, it came to appear over the course of protracted mass tort litigation and intensive epidemiological study that Bendectin did not have a demonstrable teratogenic effect. In light of this scientific development, the question arose whether

10. 509 U.S. 579 (1993).

plaintiffs in cases like *Daubert* could prove a cause of action. In an effort to do so, plaintiffs offered experts who through reinterpretation of a long series of epidemiological studies and reliance on other data including animal testing and chemical structure comparison analysis, sought to demonstrate that it was still arguable that Bendectin caused birth defects. In the *Daubert* case, the Court of Appeals for the Ninth Circuit found that this sort of expert evidence was not generally accepted and, therefore, should not be relied upon. The Circuit Court barred the plaintiff from proceeding to trial.

The Supreme Court accepted *Daubert* for review and declared that federal judges had a responsibility to serve as "gatekeepers" regarding scientific evidence.[11] What this meant was that trial judges were expected to pre-screen scientific expert testimony. Only if the evidence were found "both relevant and reliable" was it to be presented to a jury (something of a shift from the general acceptance standard used by the Ninth Circuit).[12] *Daubert* has led federal judges to "flex their gatekeeper muscles to exclude vast quantities of plaintiffs' proposed expert causation opinion evidence in products liability cases,"[13] as well as limited expert evidence in other settings.[14] The usual consequence of such rejection is that the case does not get to the jury but is dismissed on a motion for summary judgment before trial.

In a 1997 opinion in a case entitled, *General Electric Co. v. Joiner*,[15] the Supreme Court declared that *Daubert* gatekeeping decisions were not to be overturned by appellate courts unless the trial judge had clearly abused her discretion. The abuse of discretion standard is one that can rarely be met by appellants. Hence, the Supreme Court gave trial judges a relatively free hand in pre-screening various sorts of expert evidence. Moreover, in March of 1999, the Supreme Court extended *Daubert*'s reach beyond expert *scientific* testimony to *all* sorts of expert presentations.[16] The net result of this activity has been that before a plaintiff can get to a jury in federal court with a case relying on expert evidence, he or she is likely to have to persuade the trial judge of the reliability, not just of the expert's methodology, but of the expert's specific testimony in the pending case. This has meant that a vast body of

11. *Id.* at 592-95.

12. *Id*. at 589.

13. Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges Are Using Their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 DEPAUL L. REV. 335, 341 (1999).

14. *See* Joseph Sanders, *Scientifically Complex Cases, Trial by Jury, and the Erosion of Adversarial Processes*, 48 DEPAUL L. REV. 355, 369 (1998) ("courts . . . are less willing to admit marginal expert testimony than they were pre Daubert.").

15. 522 U.S. 136 (1997).

16. *See* Kuhmo Tire Co. v. Carmichael, 526 U.S. 137 (1999).

factual questions, some of them very close indeed, have been wrestled from the jury and given to the trial judge.

The prophylactic effect may be dramatic and was clearly intended. As Justice Breyer said in his concurrence in *Joiner* with respect to the sorts of chemical compounds there facing challenge:

> [M]odern life, including good health as well as economic well-being, depends upon the use of artificial or manufactured substances, such as chemicals. And it may, therefore, prove particularly important to see judges fulfill their *Daubert* gatekeeping function, so that they help assure that the powerful engine of tort liability, which can generate strong financial incentives to reduce, or to eliminate, production, points towards the right substances and does not destroy the wrong ones.[17]

Judges are, in essence, being empowered to make sure only the "right" defendants are sued. This means that cases raising doubts, even close cases, are likely to be rejected – a substantial tightening of pre-trial evidentiary screening. It also means that over the course of time, courts working on questions about the same product will create a body of *evidence* law that fixes which sorts of claims are deemed provable and which are not as well as the exact content of the proof required.[18] If a plaintiff challenges the "wrong" product or offers anything less than the required proof, he will not get to the jury.

B. Blindfolding Jurors to the Consequences of Their Decisions

It is an oft repeated *bon mot* among lawyers that jurors should be treated like mushrooms – kept in the dark and fed an ample supply of horse manure. If the state of affairs described in this witticism has any reality, it is in part because, in certain circumstances, American evidence law purposely tries to blindfold jurors with respect to information about the consequences following from certain of the factual decisions they reach.

Writing in the 1950s, the eminent scholar Leon Green, described what he perceived to be an alarming new trend in the law of the State of Texas, the interposition of "restrictions designed to prevent the jury from understanding and considering the full scope of the issues they must decide."[19] As may be surmised from the tenor of Professor Green's description, he was opposed to blindfolding. In discussing it, Green concentrated on the then expanding

17. 522 U.S. at 148-49.

18. This has already occurred in the toxic tort area where things like the number of epidemiological studies required, their level of statistical certainty and a host of other considerations have been specified in judicial evidentiary rulings. *See* Sanders, *supra* note 14, at 369-72.

19. Leon Green, *Blindfolding the Jury*, 33 TEX. L. REV. 157, 157 (1954).

doctrine that no mention ought to be made during trial of the fact that a defendant possessed liability insurance. In the typical case, the existence of insurance coverage meant that the insurance company, not the named defendant, was the real party in interest. Yet, the law insisted that the insurance provider not be identified. In this way, it was hoped that jurors could be prevented from awarding excessive damages linked to the wealth ("deep pockets") of the insurance company.[20] In support of such a rule, it was argued that the identity of the true defendant was "not relevant to any issue in the case."[21]

Green took strong exception to these arguments. He suggested that there was little proof that jurors unfairly taxed insurance companies and absolutely no ground to impugn "the integrity of juries."[22] Moreover, he cited a substantial number of situations in which insurance coverage would be relevant to the decision maker including its possible influence on the tenor of a party's testimony as well as the impact of insurance company employee initiatives or advice on the conduct and perceptions of both parties and witnesses. According to Green, the insurance blindfold also had the baleful effect of hiding from jurors the fact that a powerful and effective litigant was directing the defense case. Despite this sharp criticism, the insurance blindfold remains firmly in place in many American jury trials and is incorporated (albeit in somewhat restricted form) in Rule 411 of the Federal Rules of Evidence.

As Professors Shari Diamond and Jonathan Casper have pointed out, blindfolding is a strategy designed to control juror behavior by keeping specific information from them at trial.[23] It is, according to Diamond and Casper, a "crude" tool that relies on a simplistic model of jury behavior.[24] It assumes that jurors are little more than passive recorders of the evidence presented who do not think about what they are being told, do not seek to integrate it with what they know from their life experiences and make no effort to consider the consequences or implications of the conclusions they reach during trial. This crude picture ignores the persuasive body of social science research that suggests jurors are active information processors who work diligently to integrate the proof and their life experiences into a narrative that explains and resolves the case before them in light of the legal categories presented for decision.[25] Whether it is a sound or foolish approach, American

20. *Id*. at 160.

21. *Id*.

22. *Id*. at 161.

23. Shari Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOC'Y REV. 513 (1992).

24. *Id*. at 515-16, 523.

25. *Id*. at 516-17.

legislatures and courts have demonstrated a keen interest in blindfolding in recent years.

(1) Legislative Blindfolding to the Consequences of Allocations of Fault in Comparative Negligence Cases

Throughout much of the nineteenth and early twentieth centuries, American courts recognized contributory negligence as an absolute defense in any negligence case.[26] In other words, no matter now unreasonable the defendant's behavior, the plaintiff could not recover a single penny if he or she had contributed in any degree to the injury suffered. This harsh rule was slowly dismantled over the course of the last ninety years and replaced by a doctrine of comparative negligence pursuant to which the jury is asked to assess the percentage of fault attributable to each party's conduct. Under such a scheme, if the plaintiff is twenty percent at fault, he is allowed to recover eighty percent of his damages. All possible allocations, ranging from a high of one hundred percent to the smallest fraction of one percent, lead to an award of damages.

Some jurisdictions found this rule too liberal and sought to impose a regime of "modified" comparative negligence in which a plaintiff is barred from recovery if she or he is found fifty (or, in some states, fifty-one) percent responsible. From the 1930s to the early 1970s, all the states that adopted modified comparative fault rules blindfolded jurors to the consequences of the rule in use.[27] In other words, jurors were not to be told that the plaintiff would receive no award if found fifty (or fifty-one) percent responsible. The apparent goal was to keep jurors from manipulating percentage findings to reflect their sympathy for a needy but legally undeserving plaintiff.

A number of states found that jurors were confused by the implications of the modified comparative negligence rule. Jurors often followed the natural tendency in close cases, where mathematical precision is impossible, to "split the difference" with a fifty/fifty award. What they did not realize was that such a decision meant no recovery for the plaintiff. In several jurisdictions, this led to a disproportionate number of defendant victories in close cases. In response, some states decided to remove the blindfold and candidly inform jurors of the consequences of the allocation of percentages of fault. As the 1970s wore on, something of a consensus seemed to evolve that blindfolding was inappropriate and jurors should be informed of the ultimate consequences of their apportionment decisions. State after state either enacted a "sunshine"

26. For a brief description of this doctrine and its history, see Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 605-10 (1993).

27. The following discussion draws heavily on Martin A. Kotler, *Reappraising the Jury's Role as Finder of Fact*, 20 GA. L. REV. 123 (1985).

provision or judicially embraced it. In most cases, the motive seemed to be to insure well-formed decision-making by jurors who had all the factual and legal information before them and had not been tricked or inadvertently led to render decisions they thought were improper. The trend progressed so far by the middle 1980s that it seemed as if this sort of civil blindfolding might become a thing of the past.[28]

That trend was halted in 1995 when the State of Illinois became the first state in more than twenty years to mandate a comparative negligence blindfold. The blindfold law came about as part of an omnibus tort reform package that sought to radically reorient Illinois tort law in favor of defendants. The law was the product of a hasty and lobbyist-inspired legislative session and was eventually invalidated by the Illinois Supreme Court.[29] The Illinois blindfold legislation experience appears to present a revealing facet of the recent hyper-prophylaxis approach to evidence. Born out of a seeming distrust of jurors and a desire to help tort defendants, the Illinois legislation seemed to embrace the blindfolding strategy as a means of neutralizing active well-informed jury deliberations. In so doing, it sought to manipulate and marginalize jurors – serving the ultimate agenda described by Damaška.

(2) Judicial Blindfolding to the Consequences of a Not Guilty by Reason of Insanity Verdict

The same approach seems to have been adopted by the Supreme Court of the United States in its 1994 decision in *Shannon v. United States*[30] with respect to the question whether jurors should be blindfolded to the consequences of a finding that a criminal defendant is not guilty by reason of insanity (NGI). In 1958, the United States Court of Appeals for the District of Columbia decided *Lyles v. United States*.[31] In that case, the trial judge had informed the jury that a recently passed statute (applicable only in the District of Columbia) required that if a defendant were found NGI, he or she would be confined to a hospital for the mentally ill. Although there was much division in the appellate court, it was decided that such an instruction was proper and should be given unless the defendant requested otherwise. Judge Prettyman, with the approval of a majority of his colleagues, declared, "We think the jury has a right to know the meaning of this possible verdict as accurately as it

28. Kotler wrote his article to decry this outcome and emphasize its implications in the criminal sentencing context. *Id.*

29. *See* Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997).

30. 512 U.S. 573 (1994).

31. 254 F.2d 725 (D.C. Cir. 1957).

knows by common knowledge the meaning of the other two possible verdicts [guilty and not guilty]."[32]

In 1984, Congress enacted the Insanity Defense Reform Act[33] which mandated that something like the District of Columbia insanity confinement procedure be made available when relevant in federal criminal proceedings throughout the United States. In 1990, Terry Lee Shannon, a felon with significant mental problems,[34] was stopped by a police officer in Tupelo, Mississippi. Rather than accompany the officer to a police station as requested, Shannon crossed a street, pulled a gun from his coat and shot himself in the chest. Shannon survived this apparent suicide attempt and was prosecuted under a federal statute that makes it a crime for a felon to be in unlawful possession of a firearm. Shannon's counsel requested that the jury be instructed about the consequences of an NGI verdict. This request was denied by the District Court, a decision affirmed by the Fifth Circuit Court of Appeals.

Noting the conflict with the decision in the *Lyles* cases, the Supreme Court agreed to review Shannon's conviction. Writing for a seven member majority, Justice Thomas upheld jury blindfolding and rejected the precedent established in *Lyles*. Thomas began by noting that it was "well established" that when jurors have no sentencing function they should not be allowed or encouraged "to consider the consequences of their verdicts."[35] This prophylactic rule reflected the "basic division of labor" between judge and jury in which "[t]he jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty . . . [while] [t]he judge, by contrast, imposes sentence on the defendant after the jury has arrived at a guilty verdict."[36] On this reading of the functions of the judge and jury, the latter has no business worrying about sentence at all, it is "irrelevant to the jury's task."[37] Divulging sentence consequences to jurors is inappropriate and serves no purpose other than to invite "them to ponder matters that are not within their province."[38]

Shannon's counsel pressed the argument, accepted in *Lyles*, that it is important to insure that jurors have an accurate understanding of the consequences of an NGI verdict so that they can properly discharge their decision-making function. Justice Thomas rejected this contention. Juror

32. *Id*. at 728.

33. 18 U.S.C. §§ 17, 4241-47 (1988).

34. For a description of the experts' assessment of Shannon's mental problems, see Randi Ellias, *Supreme Court Review: Should Courts Instruct Juries as to the Consequences to a Defendant of a "Not Guilty by Reason of Insanity" Verdict?*, 85 J. CRIM. L. & CRIMINOLOGY 1062, 1071-72 n.96 (1995).

35. 512 U.S. at 579.

36. *Id*.

37. *Id*.

38. *Id*.

understanding of the NGI verdict was not important according to Thomas. The jury had been instructed "to apply the law . . . regardless of the consequence"[39] and the Supreme Court was willing to assume (whether the assumption was accurate or not) that the jurors would follow that instruction. The court hence embraced the theory of a passive jury that could and indeed should, be treated like so many mushrooms. The court seemed to go even further and endorse not only NGI blindfolding, but a firm rule against informing jurors of any sentence. As Justice Thomas put it:

> Shannon offers us no principled way to limit the availability of instructions detailing the consequences of a verdict to cases in which an NGI defense is raised. Jurors may be as unfamiliar with other aspects of the criminal sentencing process as they are with NGI verdicts. But, as a general matter, jurors are not informed of mandatory minimum or maximum sentences, nor are they instructed regarding probation, parole, or the sentencing range accompanying a lesser included offense.[40]

The net result of *Shannon* was wholesale adoption of the idea that jurors should almost never be informed about the consequences of findings of guilt or NGI in the criminal cases before them. Jurors are conceptualized as a passive instrument of fact finding. Their confusion or misimpressions about legal consequences are of no significance. The sentence, like the existence of insurance, is to be treated as "irrelevant" evidence. As Professor Green points out, such an assumption is, as a practical matter, misguided. Police officers, prosecutors, witnesses and defendants are all dramatically influenced by possible sentence. Moreover, as Diamond and Casper have pointed out, the underlying assumption of jury passivity is subject to the strongest challenge on psychological grounds. The Supreme Court swept all that aside in its efforts to insure control of the jury by means of a prophylactic blindfold. The result, again, was the manipulation and marginalization of the jury. The marginalization, as suggested by *Shannon* has been extended to the question of sentence in virtually all criminal cases. Despite a long history of Anglo-American criminal jury trials in which jurors were clearly aware of sentencing consequences and constructed their decisions so as to manipulate those consequences,[41] the Supreme Court thought an absolute blindfold appropriate. This notwithstanding the existence of mandatory sentencing mechanisms that remove all discretion from the judge and thereby deny her any real role in sentencing.

39. *Id*. at 585.

40. *Id*. at 586-87 (citations omitted).

41. *See* Colleen Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 782-84 (1993) ("To be sure, the eighteenth-century English jury often found facts against the weight of the evidence to mitigate harsh sanctions.").

III. A COUNTER TREND: ENCOURAGEMENT OF AN ACTIVE AND ENGAGED JURY

Were the prophylactic trend the only thing affecting evidence law, America would be well on its way to strangling the jury trial and realizing Damaška's vision of a juryless process governed by evidence rules that take no account of the peculiarities of lay decision making. But expansion of the arid evidentiary exercises that hem in an increasingly passive group of laymen is not the only development in American evidence law. In fact, the American jury may be undergoing something of a renaissance. In at least ten states, there have been serious studies of the way jury trials are managed and might be improved.[42] Among those ten, Arizona, Colorado, the District of Columbia, New York, California and Texas (the last three being the most populous states in America) have converted their studies into specific reforms or, at a minimum, integrated reform proposals.

The leader in this effort and the model for reform has been Arizona. In 1993, its Supreme Court called for a comprehensive review of jury service and practice. The result was a report entitled, *Jurors: The Power of 12*.[43] It generated a list of fifty-five recommendations for the improvement of jury trials (attached as Appendix I). These were embraced by the Arizona Supreme Court and many were immediately adopted. The fifty-five proposals have served as a template for reform in other states, and helped inspire the American Bar Association Litigation Section, the National Center for State Courts and the State Justice Institute (three of the most prominent of America's legal organizations) to produce a manual entitled *Jury Trial Innovations*.[44] This manual, among other things, explores the changes proposed or adopted in Arizona with an eye to encouraging judges working elsewhere to use them when possible. The manual has been distributed to all federal judges and is in the process of being disseminated in state courts.

The basic thrust of all this material is the empowerment of the jury, recognition of its active (rather than passive) nature, and alteration of those rules and practices that stand in the way of effective jury trials. A cursory examination of three of the fifty-five Arizona proposals should make this point clear. Number thirty-one on the Arizona list recommends that courts "Ensure Note-taking by Jurors in Civil Cases." This proposal grew out of a series of social science studies that championed a more active role for jurors in the trial

42. *See* AMERICAN JUDICATURE SOCIETY, ENHANCING THE JURY SYSTEM – A GUIDEBOOK FOR JURY REFORM COMMISSIONERS (1999).

43. ARIZONA SUPREME COURT COMMITTEE ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12 (1993).

44. NATIONAL CENTER FOR STATE COURTS, JURY TRIAL INNOVATIONS (G. Thomas Munsterman et al. eds., 1997).

of lawsuits.[45] Jurors who take written notes are likely to become more actively involved in processing the evidence they hear.[46] Research demonstrates that note-taking also aids memory and heightens participation in deliberations.[47] Thus do jurors become more deeply engaged in each step of the fact gathering and decision making process.

This first step toward greater activity is succeeded on the Arizona list by Number thirty-four, which instructs courts to "Allow Jurors to Ask Questions." Here, the passive jury model is set aside in favor of direct juror inquiry. Jurors are treated as trial participants whose questions must be addressed. Jury questioning will, inevitably, stretch the rules of evidence as lay decision makers, untutored in the niceties of prophylactic rules push for the information that will help them understand the case. While it is not likely that the established rules will fall before an onslaught of juror questions, principles like those embodied in the relevancy rule will be stretched. This loosening was identified as the natural and anticipated direction of developments by the Arizona committee with its proposal Number forty-one which directs judges: "Do Not Instruct Juries on Jury Nullification; However, the Rules of Evidence Ought to be Expanded in Recognition of the Jury's Power to Nullify."

Far more significant than the specific evidentiary impact of these Arizona reforms is the change they signal in the conceptualization of the jury. The prophylactic rules are premised on an ignorant and vulnerable jury in need of protection from proof. Such a body is nothing more than a passive recording device that can be switched on and off or told what to think. Such a jury can never be more than a marginal player, a weak-minded decision maker from whom difficult evidence and ultimate consequences should be hidden. Such a jury cannot be trusted with any information that might provoke it to transgress the judicially-defined limits of the division of labor. The Arizona proposals see a very different sort of jury. One that is active, thoughtful and capable of understanding the case before it. It is an insightful body that should be encouraged to follow all the evidence, ask questions to augment the evidence and, more generally, participate. In the presence of such a jury, evidence rules must be flexible, allowing the admission of more information than would traditionally have been permitted.

The Arizona program does not require the abandonment of the rules of evidence but does challenge the prophylactic or marginalizing foundation on which they are built. This challenge arises at the same time as scholarly empirical examination is starting to raise serious questions about a number of

45. *See* Larry Heuer & Steven Penrod, *Increasing Juror Participation in Trials Through Notetaking and Question Asking*, 79 JUDICATURE 256 (1996).

46. *Id*. at 258.

47. *Id*.

classic prophylactic rules. Perhaps chief among these is the hearsay rule. Preliminary research suggests that jurors handle at least some sorts of hearsay with thoughtfulness and care.[48] If these preliminary findings are borne out by further research, there may be good reason to dismantle the elaborate hearsay edifice while still relying on juries to adjudicate cases. Although the course of future developments if far from clear, there is some indication that the rules of evidence will be relaxed, not because jurors have been banished, but because of the realization that many such rules do not serve the central objectives of a system constitutionally committed to adjudication by lay jurors.

IV. HOW SHOULD WE REACT TO THESE COMPETING TRENDS IN EVIDENCE LAW?

Courts follow a more than century old tradition when they invoke prophylactic strategies. In doing so, they claim to be insuring the probity of the adjudicatory process. Despite the sanction of history (albeit "recent") and the rhetoric of probity, the prophylactic approach, most particularly the employment of blindfolds, deserves to be rejected in most settings. At the outset, it should be noted that blindfolding often poses a series of practical problems. Blindfolding may lead jurors to make decisions that do not reflect their real assessment of the case before them. Such was apparently the situation in the majority of jurisdictions that had adopted both a modified comparative negligence scheme (fifty percent liability bars recovery) and a blindfold regarding the scheme's operation. Most states in these circumstances shifted from a blindfold to a "sunshine" rule to insure that jurors understood the consequences or their choice of liability percentage. The obvious concern was split-the-difference decisions that *inadvertently* deprived plaintiffs of all recovery. Blindfolds often pose similar risks by denying jurors crucial information about the real import of the choices they are asked to make, leaving them to stumble around in the dark and frequently producing unintended and unjust results.

48. *See* Margaret Bull Kovera, Roger C. Park & Steven D. Penrod, *Jurors' Perception of Eyewitness and Hearsay Evidence*, 76 MINN. L. REV. 703 (1992); Stephan Landsman & Richard F. Rakos, *Research Essay: A Preliminary Emperical Inquiry Concerning the Prohibition of Hearsay Evidence in American Courts*, 15 LAW & PSYCHOL. REV. 65 (1991); Peter Miene, Roger C. Park & Engene Borgida, *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 MINN. L. REV. 683 (1992); Angela Paglia & Regina A. Schuller, *Jurors' Use of Hearsay Evidence. The Effect of Type and Timing of Instructions*, 22 LAW & HUM. BEHAV. 501 (1998); Richard F. Rakos & Stephan Landsman, *Researching the Hearsay Rule: Emerging Findings, General Issues, and Future Directions*, 76 MINN. L. REV. 655 (1992); Regina A. Schuller, *Expert Evidence and Hearsay: The Influence of "Second-Hand" Information on Jurors' Decisions*, 19 LAW & HUM. BEHAV. 345 (1995).

Blindfolds are an imperfect tool at best. Quite frequently, some number of jurors will have personal information regarding an embargoed subject, whether it is a rule concerning monetary recovery or one constraining criminal sentencing options. Unfortunately, there is no guarantee that this information is accurate. Despite its unreliability, however, it is likely to be pressed into service because of its salience to the task at hand and the legitimate desire of jurors to get as much information as possible about the nature of what they have been asked to do. If the personal information is accurate, the blindfold is likely to be defeated as jurors use what they know. If the information is erroneous, it is likely to skew trial results. As Diamond and Casper have put it:

> Blindfolding is unlikely to achieve its purposes when juries hold strong expectations about the information they are given . . . . [I]f most jurors believe that defendants in automobile cases have substantial liability coverage, not telling them that the insured defendant has such coverage does not eliminate a possible deep-pocket effect. By the same token, if the defendant actually has little or no insurance, a blindfolded jury operating under a presumption that the defendant *is* insured may award more than true compensation because it incorrectly assumes a deep pocket will pay.[49]

By refusing to reveal the true state of affairs, courts relying on blindfolds frequently open the door to distortion and mistake.

The primary fear regarding disclosure of blindfold material has been that revelation will provoke jurors to misbehave, to refashion their decisions in ways that defeat the objectives of the underlying law. This may, indeed, sometimes occur. To assess the risk Diamond and Casper tested mock juror reactions to disclosure of the law in a private antitrust case. In such cases, the relevant statute mandates that the jury's award be trebled. Courts have held that jurors should be blindfolded to this fact because of fears that hearing about the trebling will lead them improperly to reduce their awards, thereby undermining the punitive objective of the law.[50] What the experimenters found was that mock jurors did reduce their awards if simply informed about the trebling requirement.[51] This effect, however, was negated if, in addition to the fact of trebling, the jurors were given a reasonably complete and candid explanation of the law's purpose.[52] At least in this experiment, candor worked as well as a blindfold while, at the same time, neutralizing the risk that jurors might choose to utilize erroneous personal information.

Not all cases can be resolved this simply. There are pieces of information that irretrievably distort juror decision making. Perhaps the most significant of

49. Diamond & Casper, *supra* note 23, at 518 (emphasis in original).

50. *See, e.g.*, Pollock & Riley, Inc. v. Pearl Brewing Co., 498 F.2d 1240 (5th Cir. 1974).

51. *See* Diamond & Casper, *supra* note 23, at 531.

52. *Id.*

these is information that an individual on trial in a criminal case has a prior criminal record. When such information is disclosed, it substantially diminishes the defendant's chance for acquittal and no form of instruction or explanation seems to help.[53] In fact, trained judges, when exposed to such information, seem to experience a virtually identical reaction.[54] In this situation, where strong and ineradicable prejudice seems unavoidable, blindfolding makes sense. Because American jury trials feature a bifurcated method of adjudication (jury and judge each handling part of the task), the jury can be reasonably effectively screened from information about criminal history, thus helping secure fairer deliberations.[55] In rare cases such as this, where there is an overwhelming consensus concerning the risk of prejudice and honest discussion seems unavailing, blindfolding may be warranted. Ironically, in this most poignant of contexts, American evidence rules have created a host of exceptions to the requirement that jurors be shielded from prior criminal history.[56]

Providing juries with full information should be recognized as more than simply a practical way to insure sound results. The shocks caused by the jury decision in the O.J. Simpson murder trial and the Rodney King beating case notwithstanding,[57] the jury is perhaps the only public institution capable of responding in a non-partisan fashion to America's most inflammatory problems. The American jury has been justly described as the "conscience of the community."[58] It is the place where ordinary citizens are called together to insure the just operation of government. It is unaffiliated with party or cause and speaks for the entire community. A part of the jury's task is to recognize and give substance to the community's values.[59] As the eminent federal judge and evidence scholar Jack Weinstein has said, "[j]urors help keep us sensitive

53. *See, e.g.*, Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide Upon Guilt*, 9 LAW & HUM. BEHAV. 37 (1985).

54. *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 124 (1966) ("although the system allows the judge this knowledge, it is not intended that he should consider it in reaching his decision. It would appear, however, the judge is sometimes not able to keep from being influenced.").

55. Criminal background may not be like auto insurance in that jurors may not have such strong expectations of its existence as to render blindfolding ineffective.

56. *See, e.g.*, FED. R. EVID. 413-15, (allowing use of evidence of similar crimes in sexual assault and child molestation cases).

57. It should be noted that the decisions in each of these cases may have been proper in light of the way the cases were tried.

58. United States v. Spock, 416 F.2d 165, 182 (1st Cir. 1969).

59. For a discussion of the jury as moral agent, see Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149 (1997).

to wrong, immoral and unjust laws."[60] In this way, the jury gives voice to our shared concerns, a vital service in fractious times.

For the jury truly to fulfill these roles, it must be treated with respect. Respect seems ever harder to secure the more jurors are consigned to the fate of mushrooms. For the jury to do its best, it must be afforded an opportunity to fully weigh the questions raised by the cases before it. Generally, when the gravest choices are to be made, American law demands that the decision maker be fully informed. This is certainly the case when patients are asked to make the most profound decisions about their lives and care. Nothing less than informed consent will be accepted.[61] The same reasoning ought to apply when we ask juries to answer the most serious legal questions. It is, after all, hard to give full credit to any law that must be hidden from public view in order to be enforced.

It is most frequently objected that candid disclosures encompassing such things as potential criminal sentence or civil consequences will lead juries to "nullify" the law, in other words, disregard its dictates and arrive at unjustified outcomes based on sympathy or prejudice. The nullification argument raises a number of questions. First, it is unclear whether the term should be applied to most cases where juries appear to thwart generally shared views of the law or the legal implications of the facts. Such cases are seldom so clear as to foreclose all questions. Often juries are doing no more than interpreting the law when they disappoint common expectations. Second, even when juries reject the clear and applicable mandate of a law, they may be fully justified. Jurors in such cases may be legitimately reacting to official misconduct, an unjust statute or a law's unfair application in a peculiar context.[62] All these seem valid juror concerns in both moral and historical terms in a system where jurors are authorized to deliver an unexplained general verdict and enjoy an unreviewable power to acquit. The Supreme Court has explicitly recognized that the criminal jury has a constitutional function beyond mere fact-finding: to serve as buffer against abuses of governmental power.[63]

Juries have, on occasion, refused to apply laws and hence deprived minority citizens of their rights. This was most glaringly the case in the American South from the end of post-Civil War Reconstruction to the height of the civil rights movement. This sort of lawlessness is deeply troubling. Judge Weinstein has argued that group process will generally serve to cancel out individual prejudice and that procedural safeguards can dampen most risks

60. Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice*, 30 AM. CRIM. L. REV. 239, 244 (1993).

61. *See, e.g.*, Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972).

62. For a discussion of the legitimacy of these jury actions, see Brown, *supra* note 59.

63. Murphy, *supra* note 41, at 770.

of unjust results.[64] These protections can be substantially enhanced if decisions requiring that jury service be open to all citizens are rigorously enforced.[65] Still, the unreviewable power of the jury does pose some risks. These, however, must be deemed to have been accepted when the framers fashioned the American Constitution and its original ten amendments.

64. Weinstein, *supra* note 60, at 245.

65. *See* Batson v. Kentucky, 476 U.S. 79 (1986).

APPENDIX I

Arizona Supreme Court Committee on More Effective Use of Juries

SUMMARY OF RECOMMENDATIONS

[From B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 282 (1996). Items in italics enacted pursuant to Arizona Supreme Court Rule Changes Effective December 1, 1995. Footnotes deleted.]

A. Public Awareness

1. Undertake Programs of Public Education About Juries and Jury Trials.

B. Summoning Jurors

2. Improve Current Juror Source Lists.
3. Use Additional Juror Source Lists.
4. Improve Jury Diversity [T]hrough "Random Stratified Selection."
5. Study Summoning Jurors on Regional Basis.
6. Striking of Grossly Unrepresentative Jury Panels.
7. Obtain More Demographic Information from Jurors.
8. Supply More Information to Persons Summoned.
9. Limit Potential Juror Report Dates.
10. Deal with Failures to Respond to Jury Summons.
11. Handling and Monitoring Requests for Deferral and for Excusal of Service.
12. Update and Expand Initial Courthouse Orientation.
13. Improve Rate of Utilization of Potential Jurors.
14. Show Appreciation to Potential Jurors Not Needed for Juries.
15. The Needs of Jurors [W]ho [A]re Disable Should [B]e Met.
16. Reform and Improve Juror Pay and Mileage.
17. *Juror-Supplied Locating Information Should Remain Confidential During Jury Selection and Thereafter*.

C. Jury Selection

18. *Encourage Mini-Opening Statements Before Voir Dire*.
19. *Allow Judges to Choose Between the "Struck" and the "Strike and Replace" Methods of Jury Selection*.
20. *Assure Lawyers the right to Voir Dire in All Cases.*
21. Judges Should Receive Training in Voir Dire.
22. *Protect Juror Privacy During Voir Dire.*

23. Continue Peremptory Strikes in Present Form and Number.
24. Vigorously Enforce *Batson* Safeguards.

D. Trial

25. *Set and Enforce Time Limits for Trials.*
26. Guidelines for Severance in Complex Cases [A]re Needed.
27. Jury Trial Time Should [B]e Maximized.
28. Trial Interruptions Should [B]e Minimized.
29. *Juror Notebooks Should [B]e Provided in Some Cases.*
30. *Expand Use of Preliminary Jury Instructions.*
31. *Ensure Notetaking by Jurors in Civil Cases.*
32. Improve Management of Trial Exhibits.
33. Deposition Summaries Should [B]e Used.
34. *Allow Jurors to Ask Questions.*
35. Educate Attorneys and Judges Concerning Interim Summaries During Trial.
36. Use Modern Information Technology More Often in Trials.
37. *Allow Jurors to Discuss the Evidence Among Themselves During the Trial.*
38. Use Only Plain English in Trials, Especially in Legal Instructions
39. Do [N]ot Keep Jurors Waiting While Instructions [A]re Settled.
40. Make Jury Instructions Understandable and Case-Specific and Give Guidance Regarding Deliberations.
41. Do [N]ot Instruct Juries on Jury Nullification; However, the Rules of Evidence Ought to [B]e Expanded in Recognition of the Jury's [P]ower to Nullify.
42. *Give Jurors Copies of the Jury Instructions.*
43. *Read the Final Instructions Before Closing Arguments of Counsel, Not After.*
44. *Alternate Jurors Should Not Be Released From Service in Criminal Case Until a Verdict [I]s Announced or the Jury [I]s Discharged.*
45 Allow All Jurors Remaining at the End of a Civil Trial to Deliberate and Vote.

E. Jury Deliberations

46. The Trial Judge Should Decide on a Schedule for Jury Deliberations and Inform Jurors in Advance.
47. Encourage Juror Questions About the Final Instructions.
48. Fully Answer Deliberating Jurors' Questions and Meet Their Requests.
49. *Offer the Assistance of the Judge and Counsel to Deliberating Jurors [W]ho Report an Impasse.*

50. When Jurors Reported to [B]e at Impasse [A]re Returned for Further Deliberation They Should Not Be Instructed Any Further.

F. Post-Verdict Stage

51. Become proactive in Detecting and Treating Juror Stress.
52. Assist Jurors in Coping with Fears of Contact or Retaliation.
53. Solicit Jurors' Reactions to their Courthouse Experience.
54. Advise Jurors Concerning Post-Verdict Conversations with the Judge, Attorneys and the Media.

G. Jurors' Bill of Rights

55. Promulgate A Proposed Bill of Rights for Arizona Jurors.