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U.S. Jury Reform: The Active Jury and the Adversarial Ideal

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U.S. JURY REFORM: THE ACTIVE JURY AND THE ADVERSARIAL IDEAL

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In many countries, lay people participate as decision makers in legal cases. Some countries include their citizens in the justice system as lay judges[1] or jurors, [2] who assess cases independently. The legal systems of other nations combine lay and law-trained judges who decide cases together in mixed tribunals.[3] Whatever the approach, a number of justifications for lay participation in the law have been advanced. Advocates claim many salutary effects: It improves decision making, reduces the effect of biased or corrupt judges, keeps the legal system in touch with community values, represents the diversity of citizen perspectives and experiences, and enhances the legal system's overall legitimacy.[4]

The International Conference on Lay Participation in the Criminal Trial in the 21st Century provided useful contrasts among different methods of incorporating lay voices into criminal justice systems worldwide. Systems with inquisitorial methods are more likely to employ mixed courts, whereas adversarial systems more often use juries. Research presented at the

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1. Shari S. Diamond, *Revising Images of Public Punitiveness: Sentencing by Lay and Professional Magistrates,* 15 LAW & SOC. INQUIRY 191 (1990); Michael Zander, *England and Wales Report*, 72 INT'L. REV. PENAL L. 121, 122 (2001).

2. WORLD JURY SYSTEMS (Neil Vidmar ed., 2000); Stephen C. Thaman, *Europe's New Jury Systems: The Cases of Spain and Russia,* 62 LAW & CONTEMP. PROBS. 261 (1999); Neil Vidmar, *Foreword*, 62 LAW & CONTEMP. PROBS. 1 (1999).

3. SANJA K. IVKOVICH, LAY PARTICIPATION IN CRIMINAL TRIALS: THE CASE OF CROATIA (1999).

4. VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY (1986); IVKOVICH, *supra* note 3.

Conference showed that lay judges are often marginalized when they decide cases together with professional judges.[5] This occurs despite the fact that in many mixed tribunals, lay judges outnumber professional judges and theoretically could dominate the decisions. The mingling of lay and law-trained judges within a single decision-making body operates to reverse the direction of the dominance. The minority of professional judges trumps the majority of lay judges by virtue of the professional judges' greater experience and legal expertise. This limits the impact of lay perspectives on legal outcomes in mixed tribunals.

By contrast, the jury system insulates lay decisionmakers from judges during the deliberation process, and provides greater potential for lay input to determine legal outcomes. However, the jury has been the subject of sharp attack on grounds of its supposed incompetence and bias.[6] Some critics argue that the complexity of today's criminal and civil disputes is high and that a group of randomly chosen citizens is unlikely to fully understand the evidentiary and legal issues in such cases. Other opponents of jury trial claim that racist and other biases regularly infect jury verdicts. Further criticism comes from business leaders who argue that the irrationality and unpredictability of civil jury verdicts and awards undermine business and industry.[7]

These and other criticisms of the American jury trial have stimulated a widespread movement for jury reform. Reforms have included changing jury selection procedures so that a broader and more representative group serves on juries, and changing trial practice to promote the jury's ability to comprehend the evidence.[8]

5. IVKOVIĆ, *supra* note 3, at 522-25; Stefan Machura, *Interaction Between Lay Assessors and Professional Judges in German Mixed Courts*, 72 INT'L REV. PENAL L. 451 (2001).

6. WILLIAM L. DWYER, IN THE HANDS OF THE PEOPLE 1-6 (2002); Peter Duff & Mark Findlay, *The Politics of Jury Reform*, *in* THE JURY UNDER ATTACK 209 (Mark Findlay & Peter Duff eds.,1988).

7. For summaries of critiques, compare, STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM (1995), with Valerie P. Hans & Andrea J. Appel, *The Jury on Trial*, *in* A HANDBOOK OF JURY RESEARCH § 3-1 (Walter F. Abbott & John Batt eds., 1999).

8. A number of excellent articles and books summarize the case for jury reform. The best compendium of innovations is found in JURY TRIAL INNOVATIONS (G. Thomas Munsterman et al. eds., 1997). *See also* G. Thomas Munsterman & Paula L. Hannaford, *Reshaping the Bedrock of Democracy: American Jury Reform During the Last 30 Years*, 36 JUDGES' J. 5, 5-7 (1997). Several recent issues of law related journals have also focused on jury reform. *See, e.g.*, Phoebe C. Ellsworth, *Jury Reform at the End of the Century: Real Agreement, Real Changes*, 32 U. MICH. J.L. REFORM 213 (1999) (introduction to a special issue of the journal on jury reform); Nancy J. King, *Jury Research and Reform: An Introduction*, 79 JUDICATURE 214 (1996) (introduction to a special issue of the journal on jury research and reform). An interesting perspective on jury reform is provided by Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441 (1997).

This Article focuses on jury reforms that encourage a more active approach in jury decision-making. An intriguing aspect of contemporary U.S. jury reform is that several reforms appear to move the jury away from strict adversarial practice and toward adoption of some features of the inquisitorial approach.[9] The Article draws on the comparative information provided by the Conference to speculate about how contemporary jury reforms may modify the adversarial ideal of the neutral, passive jury. The Article focuses on two specific reforms that provide the strongest challenge to the traditional model of the passive jury, allowing jurors to ask questions of witnesses and permitting jurors to discuss evidence during the trial.

The Adversary Ideal

In the formal model of the adversary system, adversary attorneys present their facts to a neutral, passive decisionmaker. Rules of evidence determine the content and process of the factual presentation. The decisionmaker absorbs the full presentations of both sides; applies the relevant legal rules, and waits until the end of the trial to make a judgment. The passivity of the decisionmaker is emphasized, as evidence scholar Mirjan Damaška observes: "While evidence is being adduced, [jurors] sit silent, cast—one might say—into the role of potted courtroom plants."[10] The adversary approach may be differentiated from an inquisitorial system, such as that employed in many European countries, in which decisionmakers are permitted a more active role in the development of evidence. Under the French inquisitorial system, for example, the examining magistrate may order tests, call parties to testify, and question witnesses.

A central assumption of the adversary system is that the passivity of the decisionmaker is essential in promoting his or her neutrality:

> The adversary system relies on a neutral and passive decision maker [who] is expected to refrain from making any judgments until the conclusion of the contest and is prohibited from becoming actively involved in the gathering of evidence . . . . Adversary theory suggests that if the decisionmaker strays from the passive role, he runs a serious risk of prematurely committing himself to one or another version of the facts and of failing to appreciate the value of all of the evidence.[11]

Requiring the neutrality of the factfinder and limiting the development of evidence in a case to the adversaries are thus central characteristics of the

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

10. MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 90 (1997).

11. STEPHAN LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE 2-3 (1984).

adversary approach. These features are said to encourage the view that the decision-making process has been fair and just.[12] Empirical studies of relative preferences for adversary and non-adversary methods find that adversary approaches are often judged to be fairer than other dispute resolution methods.[13] Thus, the theoretical benefits of decisionmaker passivity include greater neutrality and the avoidance of prejudgment on the part of the decisionmaker and enhanced perception of justice on the part of the litigants to a dispute.

The Adversarial Model in Practice

In practice, the adversary system's idealized features are not completely realized. Regular interactions among members of the courtroom workgroup encourage cooperation and information sharing among judge, prosecutor, and defense attorney.[14] Legal opinions pertaining to the judicial role within an adversary system conclude that a judge is not required to sit there like a doorstop. In the Watergate burglary trial of the 1970s, made famous because it eventually led to Richard Nixon's resignation as President of the United States, the presiding Judge John Sirica became convinced that the Watergate burglars were covering up to protect others and that the adversarial questioning was insufficient. During the trial, he himself asked a substantial number of questions of the witnesses involved in the offense. The Watergate burglars were convicted by the jury, and one of the grounds of the appeal was that Judge Sirica had overstepped the bounds of his role as judge by questioning witnesses extensively. The appellate court upheld the conviction, however, observing that even extensive questioning was consistent with the judicial role with an adversary system.[15]

Empirical research on the jury also suggests that jury decision-making is a more active process than presumed by the idealized adversary model. The assumptions that jurors are initially neutral and remain so until the end of the trial, and that they passively receive evidence presented by the adversaries, are not borne out. Research in social cognition and decision-making indicates that jurors, like the rest of us, take an active approach to their decision-making

12. *Id.* at 3; E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975).

13. LIND & TYLER, *supra* note 12, at 7-40, (especially Chapter 2).

14. JAMES EISENSTEIN & HERBERT JACOB, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS (1991).

15. JOHN J. SIRICA, TO SET THE RECORD STRAIGHT: THE BREAK-IN, THE TAPES, THE CONSPIRATORS, THE PARDON (1979).

task.[16] The story model of jury decision-making, proposed and confirmed by Pennington and Hastie,[17] posits that jurors come to trial with preconceptions and knowledge that help to shape their interpretation of evidence. From the very beginning of the trial, jurors process information and evidence, weaving evidence into a compelling narrative or "story."[18] Jurors tend to fill in evidentiary gaps and resolve inconsistencies in line with the overall story they are creating. Indeed, they may reject contradictory information. This explanation-based approach to decision-making occurs throughout the trial.[19]

At least some jurors consult with their fellow jurors or outsiders during the trial, casting further doubt on the presumption of juror passivity within an adversary system. How frequently this occurs is not known. Loftus and Leber estimated that about ten percent of jurors engaged in prohibited discussions.[20] A study of Arizona civil jurors found that a significant minority of jurors admitted talking about the case to one another or to friends and family during the trial.[21]

The Active Jury as the Basis for Reform

In an influential law review article, B. Michael Dann, then an Arizona state trial judge, drew on the empirical research on jury decision-making to call for trial practice reforms that took advantage of the active decision-making

16. SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION (2d ed. 1991); Reid Hastie, *The Role of "Stories" in Civil Jury Judgments,* 32 U. MICH. J.L. REFORM 227 (1999) [hereinafter Hastie, *The Role of Stories*]; Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making,* 51 J. PERSONALITY & SOC. PSYCHOL. 242 (1986) [hereinafter Pennington & Hastie, *Evidence Evaluation*]; Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making,* 62 J. PERSONALITY & SOC. PSYCHOL. 189 (1992) [hereinafter Pennington & Hastie, *Explaining the Evidence*]; Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making, in* INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 192 (Reid Hastie ed., 1993) [hereinafter Pennington & Hastie, *The Story Model*].

17. Pennington & Hastie, *Explaining the Evidence*, *supra* note 16; Pennington & Hastie, *The Story Model; supra* note 16; Hastie, *The Role of Stories, supra* note 16.

18. Pennington & Hastie, *Explaining the Evidence*, *supra* note 16; Pennington & Hastie, *The Story Model; supra* note 16; Hastie, *The Role of Stories, supra* note 16.

19. Hastie, *The Role of Stories*, *supra* note 16.

20. Elizabeth F. Loftus & Douglas Leber, *Do Jurors Talk?* 22 TRIAL 59 (1986).

21. 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) [hereinafter Hannaford, Hans, and Munsterman, *Permitting Jury Discussions*]; 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. REFORM 349 (1999) [hereinafter Hans, Hannaford, & Munsterman, *The Arizona Jury Reform*].

approach of jurors.[22] He pointed out that current adversary trial practice presumes and reinforces juror passivity. Jurors are not permitted to ask questions and in some jurisdictions they are not even allowed to take notes. They are instructed to refrain from speaking with one another and with outsiders for the duration of the trial. They are instructed to hold off reaching a conclusion until the final deliberations.

Judge Dann pointed out the critical problem. If jurors begin developing narratives of the evidence and verdict preferences near the beginning of the trial, then these trial procedures could undermine the jury's ability to make accurate and fair decisions. Delaying the presentation of critical information until the end of the trial, or withholding opportunities to raise questions or to discuss the case with other jurors are counterproductive. Dann recommended making the courtroom more like a classroom, adopting techniques that have been shown in educational contexts to improve the ability to comprehend and apply complex information.[23]

Dann was an early and eloquent voice for jury reforms encouraging a more active approach to decision-making. However, he has now been joined by many scholars and policymakers who favor a participatory approach.[24] Surveying jury reform efforts in many states, one can observe that the active juror model has caught on.[25]

Question Asking by Jurors: The Ultimate Departure from Passivity

One of the most controversial reforms advocated by a number of scholars and judges is to allow jurors to ask questions of witnesses. A major contrast

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

23. *Id.*

24. *See, e.g.*, Stephen A. Saltzburg, *Improving the Quality of Jury Decisionmaking*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 341 (Robert E. Litan ed., 1993); H. Lee Sarokin & G. Thomas Munsterman, *Recent Innovations in Civil Jury Trial Procedures*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 378 (Robert E. Litan ed., 1993).

25. Some of the specific state reports include the following: COUNCIL FOR COURT EXCELLENCE, JURIES FOR THE YEAR 2000 AND BEYOND: PROPOSALS TO IMPROVE THE JURY SYSTEMS IN WASHINGTON D.C. *at* http://www.courtexcellence.org/publications/reports.shtml#dec2000 (1998); DELAWARE SUPERIOR COURT: REPORT OF THE TASK FORCE ON THE MORE EFFECTIVE USE OF JURIES, *at* http://www.dsba.org/tfrep.htm (1998); JURORS: THE POWER OF TWELVE: REPORT OF THE ARIZONA SUPREME COURT COMMITTEE ON MORE EFFECTIVE USE OF JURIES (1994); THE JURY PROJECT, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (Mar. 31, 1994); WITH RESPECT TO THE JURY: A PROPOSAL FOR JURY REFORM: REPORT OF THE SUPREME COURT COMMITTEE ON THE EFFECTIVE AND EFFICIENT USE OF JURIES IN COLORADO *at* http://www.courts.state.co.us/supct/committees/juryref/juryref.htm (1997). For summaries of state reforms see G. Thomas Munsterman, *A Brief History of State Jury Reform Efforts*, 79 JUDICATURE 216 (1996).

between adversarial and inquisitorial systems is the extent to which the decisionmaker is involved in the development of evidence. In the adversary system, that job is exclusively that of the adversaries, while in the inquisitorial system, decisionmakers take a more active approach. Allowing jurors to ask questions of witnesses thus has the potential to shift adversary trial procedure toward its inquisitorial cousin.

The recommended implementation of juror questions in United States courtrooms, however, includes a number of protections for the parties. For instance, the American Judicature Society crafted procedures for juror question-asking that include tight judicial control over juror question-asking and full opportunity for each of the parties to make motions to exclude questions.[26] Nevertheless, some commentators point out that it undermines the exclusive right of the adversaries to determine what evidence should be presented to the decisionmaker at the trial, and has the potential to disrupt the trial.[27] It is noteworthy that in surveys with judges, attorneys, and jurors, attorneys are the most negative about the reform.[28]

Empirical studies of juror question-asking have examined the impact of allowing jurors to ask questions. The most extensive research has been conducted by jury researchers Larry Heuer and Steven D. Penrod. In a series of articles, they describe two field experiments they conducted on juror question-asking.[29] One study was conducted in the state of Wisconsin, while the other drew on a national sample of judges and trials. Both included random assignment of trials. In half the trials, jurors were allowed to ask questions during the trial, while in the other half they were not permitted to ask questions. Judges who agreed to take part received instructions about which procedure to implement in their next jury trial. Jurors in trials that had been randomly assigned to allow juror questions were instructed by the judge that they had the opportunity to ask questions of witnesses. They were further told: "Because that is the primary responsibility of the counsel, you are not

26. AMERICAN JUDICATURE SOCIETY, TOWARD MORE ACTIVE JURIES: TAKING NOTES AND ASKING QUESTIONS (1991).

27. For a discussion of criticisms of juror questions *see* William W. Schwarzer, *Reforming Jury Trials,* 1990 U. CHI. LEGAL F. 119, 139-42 (1990).

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

29. Larry Heuer & Steven Penrod, *Increasing Jurors' Participation in Trials: A Field Experiment with Juror Notetaking and Question Asking*, 12 LAW & HUM. BEHAV. 231 (1988) [hereinafter Heuer & Penrod, *A Field Experiment*]; Larry Heuer & Steven Penrod, *Juror Notetaking and Question Asking During Trials: A National Field Experiment,* 18 LAW & HUM. BEHAV. 121 (1994) [hereinafter Heuer & Penrod, *Juror Notetaking*]; Larry Heuer & Steven D. Penrod, *Some Suggestions for the Critical Appraisal of a More Active Jury,* 85 NW. U. L. REV. 226 (1990) [hereinafter Heuer & Penrod, *Some Suggestions*].

encouraged to ask large numbers of questions."[30] Jurors wrote their questions down on a piece of paper, which was conveyed to the judge, who then ruled on the admissibility of each question after input by counsel.

Heuer and Penrod's research found that jurors allowed to ask questions did so, but at a modest rate. In the national survey, for example, jurors asked at least one question in fifty-one of the seventy-one trials in which they were permitted to do so, but the median number of questions per trial was two. On average, jurors asked about one question for every two hours of case presentation.[31] Lawyers objected to approximately a quarter of the questions, and the majority of their objections (approximately eighty percent) were sustained.

It's interesting to examine what kinds of issues jurors raise in their questions. In a separate study of Arizona civil juries that were allowed to ask questions, Nicole Mott coded the types and topics of their questions.[32] Jurors most frequently requested clarification of specific evidence that a witness presented during testimony.[33] A substantial number of questions were asked of expert witnesses. Jurors most often asked expert witnesses about the evidence relevant to the case before them, but they also inquired about common practices, typical situations, or the impact of preexisting conditions. Jurors occasionally asked plaintiffs or defendants to explain their actions. They inquired about financial matters, such as growth rates of money or insurance coverage. Infrequently, they asked judges to further explain legal rules.[34] Jurors asked a greater number of questions in complex cases.[35]

There is no evidence that the more active, question-asking jury departs from neutrality along with its departure from passivity. In Heuer and Penrod's national study, being allowed to ask questions did not affect jury verdicts, the rate of judicial agreement with jury verdicts, or the attorneys' and judge's satisfaction with the jury verdict.[36] One interesting effect is that jurors who were allowed to ask questions reported greater satisfaction with the attorneys' performance in the case.[37]

Based on their studies, Heuer and Penrod concluded that question asking did not appear to generate harmful consequences.[38] No detectable effects on

30. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 28, at 258.

31. Heuer & Penrod, *Juror Notetaking*, *supra* note 29, at 141.

32. Nicole L. Mott, How Civil Juries Cope with Complexity: Defining the Issues 119-20 (2001) (unpublished Ph.D. dissertation, University of Delaware) (on file with author).

33. *Id.*

34. *Id.*

35. *Id.* at 127-29.

36. *Id.* at 121.

37. *Id.* at 147.

38. Heuer & Penrod, *Increasing Juror Participation*, *supra* note 28.

jury comprehension, either positive or negative, were observed. Heuer and Penrod noted that their methodology was not well suited to assess improvements in jury comprehension. However, jurors themselves were very positive about being able to ask questions, saying they felt better informed and felt they had sufficient information to reach a sound verdict. In Heuer and Penrod's research, the judges and attorneys who had experience with juror questions reported more positive evaluations of this trial innovation, compared to judges and attorneys who had not experienced it first-hand. Judges with no experience were close to neutral about the technique, but employing the technique in a trial led them to become favorably disposed toward juror question-asking.

As for the attorneys surveyed by Heuer and Penrod, they went from being moderately negative to more neutral.[39] The fact that they remained cautious about the reform is not surprising. In a traditional adversary trial the attorneys control the questioning of witnesses themselves, subject only to judicial control. When jurors are permitted to ask questions, attorneys must cede some of the control to them as well.

Nevertheless, the advocacy of the American Judicature Society and state-based jury reform efforts have led to an expansion of the once rare use of juror questions. Jurors have been permitted to ask questions in an increasing number of jurisdictions.[40]

Jury Discussions of Evidence During the Trial

A second reform that challenges the adversary ideal of the neutral, passive jury is the reform, now permitted in only a few jurisdictions, of allowing jurors to discuss the evidence with one another during the presentation of the case. The traditional approach is for jurors to be instructed that they must not talk about the case with one another until the final deliberations, after all the evidence, arguments, and legal instructions have been presented.

Judge Dann chaired an influential committee, the Arizona Supreme Court Committee on More Effective Use of Juries, that evaluated the Arizona jury system and recommended many changes to promote a more active approach to the decision-making task of juries. The recommendations included notetaking, question asking, and allowing jurors to discuss the evidence amongst themselves during the trial. The report cited a number of positive effects of allowing jurors to discuss evidence:

a. Juror comprehension will be enhanced, given the benefits of interactive communication;

39. *Id.* at 261.

40. JURY TRIAL INNOVATIONS, *supra* note 8.

b. Questions can be asked and impressions shared on a timely basis rather than held until deliberations or forgotten;
c. A juror's tentative or preliminary judgments might surface and be tested by the group's knowledge; and
d. Divisive "fugitive" conversations and cliques might be reduced, given the opportunities for "venting" in the presence of the entire jury in the jury room.[41]

The rationale for permitting jurors to discuss evidence relies on the active juror model. If biases develop during the presentation of evidence that shape how later evidence is considered, then timely deliberation about evidence during trial could serve to correct individual errors and biases.[42]

The state of Arizona became the first jurisdiction to expressly permit jurors to discuss evidence during the trial.[43] At this time, Arizona jurors can do so only in civil trials; in criminal trials jurors must still wait until the final deliberations to discuss the case with one another. In civil cases, the trial judge instructs the jury at the beginning of the trial that jurors may discuss evidence during the trial, at recesses and breaks, only if all of them are present in the jury room. They are warned not to discuss who should win the lawsuit and admonished not to make up their minds until all of the evidence, arguments, and legal instructions are concluded.[44]

The State of Arizona is a real-world laboratory to assess the effects of the active juror model. The National Center for State Courts, with funding from the State Justice Institute, recently concluded a field experiment in Arizona that was designed to test the impact of allowing jurors to discuss evidence during the trial.[45] Following an order from the Arizona Supreme Court permitting random assignment for experimental evaluation purposes, civil cases were randomly assigned to one of two experimental conditions. In the first set of cases, jurors received the traditional admonition that they must not discuss the evidence amongst themselves before the final deliberations. In a

41. JURORS: THE POWER OF TWELVE, *supra* note 25, at 98.

42. Dann, *supra* note 22; Natasha K. LaKamp, Comment, *Deliberating Juror Predeliberation Discussions: Should California Follow the Arizona Model?* 45 UCLA L. REV. 845 (1998).

43. Ariz. Sup. Ct. Orders Nos. R-94-0031 & R-92-0004 (1995). *See also* Ariz. R. Civ. P. 39(f). In other jurisdictions, some judges have allowed jurors to discuss evidence during the trial in an experimental fashion with the consent of the parties. *See* Elizabeth Amon, *Shaking Up Juries, State by State,* NAT'L L.J., Feb. 14, 2000, at A14. For example, last year, Washington D.C. Superior Court Judge Gregory Mize permitted jurors in approximately twenty-five trials to hold midtrial discussions. *Id.*

44. ARIZ. R. CIV. P. 39(f).

45. Hannaford, Hans & Munsterman, *Permitting Jury* Discussions, *supra* note 21; Hans, Hannaford & Munsterman, *The Arizona Jury* Reform, *supra* note 21. I served as a consultant to that project.

second set of cases, jurors were given an instruction that followed the current Arizona rule that they could discuss the evidence amongst themselves if all were present in the jury room. These jurors received the admonition that they were to refrain from talking about what the verdict should be and from making up their minds before the end of the trial.[46] Questionnaires were distributed to judges, jurors, attorneys, and litigants, asking about a range of issues relevant to the hypothesized benefits and drawbacks of permitting jurors to discuss evidence. Judicial and attorney evaluations of the soundness of the verdicts were also solicited to assess whether allowing trial discussions led to verdicts that were questioned more frequently.

The jurors who participated in trial discussions were very positive about the reform. A total of eighty-three percent of the jurors whose juries had been permitted to discuss the evidence during trial and had engaged in at least one discussion said they felt comfortable discussing the evidence during trial. The majority reported that they found the trial discussions accurate and helpful, and that all jurors' points of view were thoroughly considered during the discussions.[47] A minority acknowledged that they felt somewhat concerned about inappropriately influencing or being influenced by the opinions of the other jurors by engaging in trial discussions. In fact, thirty percent of the juries who were instructed that they could participate in trial discussions reported that their jury had engaged in no discussions.[48] These trials tended to be shorter, however, and a shorter trial provides fewer opportunities for discussion.[49]

Judges were very enthusiastic about the reform. Three-quarters of the trial judges stated that they supported the reform, believing that trial discussions improve juror understanding of the evidence.[50] Less than a third believed that trial discussions "encourage jurors to make up their minds early on, before all the evidence and the law is presented."[51] Litigants and attorneys, however, were split in their views, with only about half of each group favoring trial discussions.[52] The adversary parties showed much greater concern about the possibility that trial discussions would encourage jurors to make up their minds prematurely.[53] However, whether a litigant was a plaintiff or a defendant, and

46. For a detailed description of the methodology of the study, see Hannaford, Hans & Munsterman, *Permitting Jury Instructions*, *supra* note 21.

47. Hans, Hannaford & Munsterman, *The Arizona Jury Reform*, *supra* note 21, at 377.

48. *Id.*

49. Hannaford, Hans & Munsterman, *Permitting Jury* Instructions, *supra* note 21.

50. Hans, Hannaford & Munsterman, *The Arizona Jury Reform*, *supra* note 21, at 376.

51. *Id*.

52. *Id.*

53. *Id.*

whether an attorney had represented the plaintiff and the defendant, made no difference in support for the reform.[54]

An analysis of jurors' reports about when they started leaning to one side or another and when they made up their minds about who should win, showed no overall effects of trial discussions in these reports.[55] There were also no overall differences in primacy or recency effects, which might have been expected if jurors who discussed the case began to make up their minds early on. Judicial agreement with the jury verdicts was similar in trials where juries had or had not been permitted to participate in trial discussions. There was no apparent impact on jury comprehension, either positive or negative, as was found in the Heuer and Penrod study on question asking.

Allowing jurors to discuss evidence during trial did have some effects.[56] Jurors who were allowed to discuss the evidence reported that they were more certain about their preferences at the start of jury deliberations. This makes sense in that these jurors had an opportunity to discuss and contrast their views of the evidence with other jurors prior to the final deliberations. There was also some evidence that permitting trial discussions encouraged more vigorous debate, in that juries who could do so reported more conflict and more difficulty reaching unanimity. This finding is at odds with psychologist Robert MacCoun's prediction that trial discussions might create more shared biases among the members of a jury.[57] More shared biases should lead to easier agreement rather than greater conflict. A second test of the effect of jury trial discussions has recently been completed. Analyses of the results of this second study should help to clarify some of the effects of the reform.[58]

Conclusion: Jury Reform within the Adversary System

54. *Id.* at 368-69.

55. Hannaford, Hans & Munsterman, *Permitting Jury Discussions*, *supra* note 21. For a fuller analysis of jurors' self-reports about when they began leaning toward one side, changed their minds, and made up their minds, see Paula L. Hannaford, Valerie P. Hans, Nicole L. Mott, & G. Thomas Munsterman, *The Timing of Opinion Formation by Jurors in Civil Cases: An Empirical Examination*, 67 TENN. L. REV. 627 (2000).

56. Hannaford, Hans & Munsterman, *Permitting Jury Instructions*, *supra* note 21. A methodological problem complicated the assessment of some of the effects of the reform. Although the cases were randomly assigned to trials in which jury discussions were or were not permitted, by chance the cases with discussions were identified by the trial judge as somewhat stronger cases for the plaintiff, and also by chance the cases without discussions were more complex. *Id.*

57. ROBERT MACCOUN, IMPROVING JURY COMPREHENSION IN CRIMINAL AND CIVIL TRIALS, (RAND Institute for Civil Justice ed., 1995).

58. Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857 (2001); Valerie P. Hans, *Inside the Black Box: Comment on Diamond and Vidmar*, 87 VA. L. REV. 1917 (2001).

The two reforms discussed in this Article represent only a fraction of the proposed jury reforms that are sweeping the United States today. We are in the midst of a remarkable period in which states appear quite ready to experiment with and modify some of the traditional features of the adversary jury trial. The reforms are trumpeted as methods for improving the soundness of the jury trial, for transforming the jury into a decision-making body that can cope with the increasingly complex evidence of contemporary trials. By taking advantage of the active decision-making tendencies of jurors, they hold the promise of improving the comprehension of evidence and the quality of the legal outcome.

Is there a cost? Professor Sanders observes that many jury reforms weaken the adversaries' control over the case, whether it is by increasing the judge's role (through case management and admissibility decisions) or by increasing the jury's active participation (through notetaking and question asking).[59] He concludes that "more active judges and more active juries inevitably lead to less power in the hands of the parties and their attorneys. These responses represent a weakening of adversarialism that is more fundamental."[60] Of course, it is a diminution of adversarialism that many Americans might well favor, since there is widespread belief that the justice system is excessively adversarial.[61]

This Article raises the collateral possibility that widespread adoption of jury reforms such as question asking and trial discussions may bring the U.S. adversary system more in line with Europe's inquisitorial approach. A jury that discusses evidence as the trial goes on and that is able to question witnesses itself begins to resemble the decisionmaker in an inquisitorial system. Is there a danger that jury reforms could operate to undermine citizen input as empirical evidence shows is the case in mixed tribunals?

On the one hand, the opportunity to discuss evidence during trial preserves the jury's independence from the judge. In fact, it could operate to reinforce its independence as a decision-making body. But other jury reforms such as jury questioning provide more opportunities for the judge to influence jurors through answering their questions or responding to their doubts. As we continue to evaluate the impact of jury reforms, assessing their case-specific effects on decision-making competence and juror bias, we should bear in mind the broader function of the jury to represent the community's perspectives and

59. Sanders, *supra* note 9.

60. *Id.* at 387.

61. NATIONAL CENTER FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY *at* http://www.ncsc.dni.us/ptc/results/nms4.htm (last visited Mar. 27, 2002); Valerie P. Hans & Jonathan D. Casper, *Trial by Jury and the Legitimacy of the Courts, in* THE CRIME CONUNDRUM: ESSAYS ON CRIMINAL JUSTICE 93 (Lawrence M. Friedman & George Fisher eds., 1997).

values. Our assessment of jury reform should take into account not only the jury's performance in particular cases but also the jury's unique and crucial ability to speak with the community's voice.