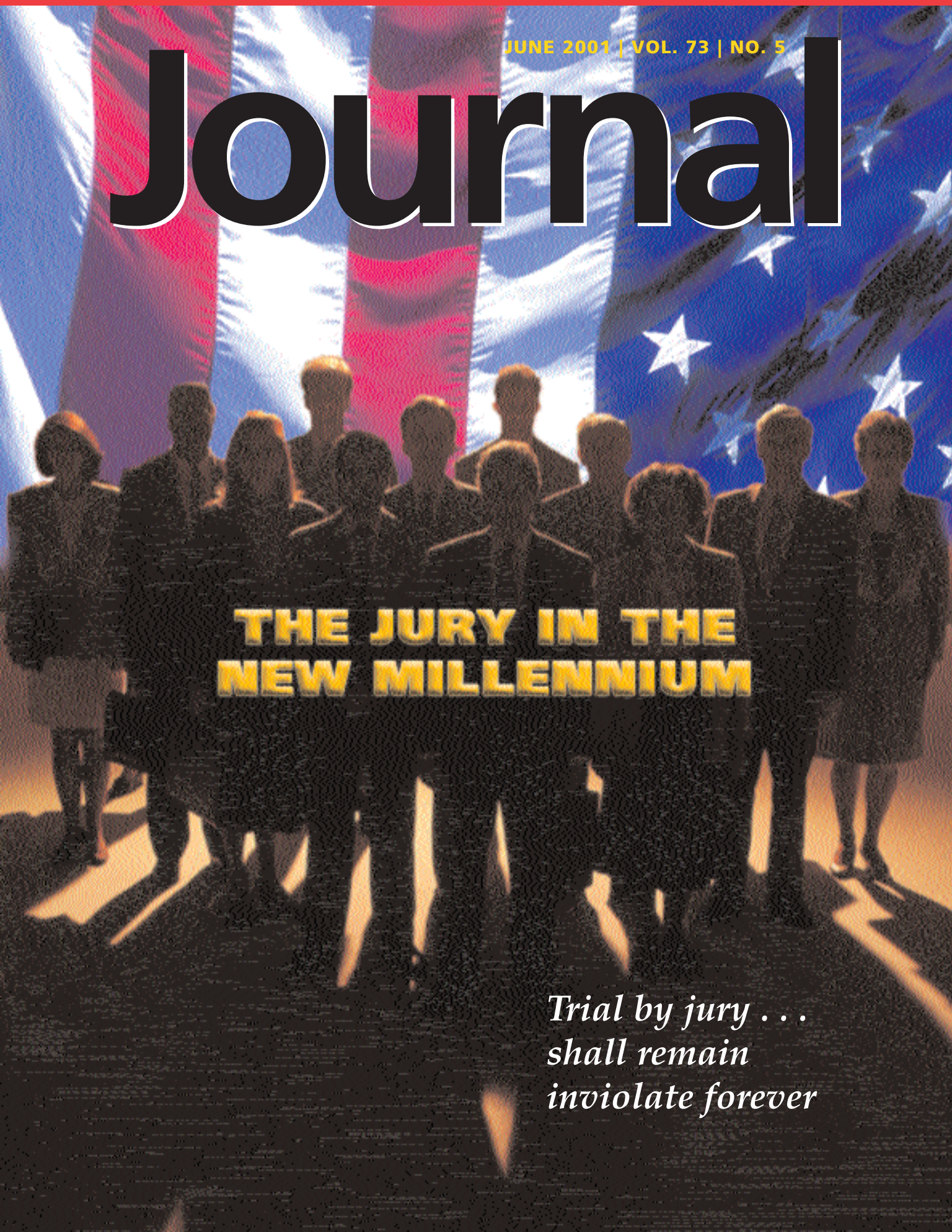
NEW YORK STATE BAR ASSOCIATION

JUNE 2001 | VOL. 73 | NO. 5

Journal



THE JURY IN THE NEW MILLENNIUM

Trial by jury . . . shall remain inviolate forever

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http://www.nysba.org

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The *Journal* (ISSN 1529-3769), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $12. Periodical postage paid at Albany, NY with additional entry Endicott, NY. POSTMASTER: Send address changes to: One Elk Street, Albany, NY 12207.

President's Message

STEVEN C. KRANE

Family Values

One early November afternoon, as a fledgling committee chairman, I stepped into a conference room at One Elk Street to make my first presentation to the Executive Committee of the New York State Bar Association. I had previously met only one person in the room, and had spoken on the telephone with one other. I anticipated a cold grilling at the hands of strangers. One hour later, after a probing, stimulating and—most importantly—thoroughly collegial debate, I emerged from that room with 23 new friends. They welcomed me when I arrived, treated me as an equal while I was before them, and thanked me for coming when I left. This wasn't just a case of making new friends. I had found long-lost family.

That evening I was invited to join the committee for dinner at some restaurant in downtown Albany called *Jack's*. I was greeted by President Max Pfeifer, who introduced me to Treasurer Tom Rice and other members of the group. I soon learned that it had been a very special day for the State Bar. The Nominating Committee had chosen a new president-elect, and it wasn't long before a wave of applause greeted an ebullient fellow named Pruzansky, who offered an elegant toast to his three opponents in the hard-fought race. I dined with gentlemen named Witmer and Spellman and Buzard and Standard, and had a chat with the chair of the House of Delegates, Catherine Richardson, about procedures for Saturday morning's meeting. Never had I so rapidly been made to feel at home among strangers. But then, they hardly seemed foreign. Somewhere, not far below the surface of our nascent friendship, was a deeper feeling, which I quickly identified as a feeling of family.

The next day I appeared in the Great Hall of the Bar Center before the policy-making House of Delegates for a half hour of debate, which passed in what seemed like three minutes. Civil, good-natured but intense, the discussion in the House helped that body to focus rapidly on the central issues before it. Though the determination was to "table"—more accurately, as I would later learn, to postpone—I returned to my committee with guidance and direction and the knowledge that our project needed just a little fine tuning to garner acceptance. And what of the experience? More new friends, more deep-seated, seemingly long-lost family ties.

I knew then that I wanted to return to those venues again and again. I wanted to be part of those groups. I wanted to take part in the formulation of State Bar policy. I wanted to play a role in an organization that could effect changes in law and policy. I had come home. The dozens of friends I made that first November day remain my friends to this day. Surely we have had disagreements over the past several years, some vigorous, some minor, but always at the end of the process we restored and regenerated our mutual respect, remembering that we are all family, dedicated to the betterment of the legal profession and the justice system.

Reflecting on these moments as I begin my term as your president, I am more convinced than ever that we are all bound together in the broadest sense by common roots and common goals. We have all been inculcated in the ethics and morality of the legal profession, in the responsibilities and obligations that come with our status as attorneys, and in a unified belief in the rule of law. This grounding transcends age, gender, race and ethnicity. It connects lawyers who serve private clients and those who represent the indigent. It provides commonality for those employed by a corporation, those who work for a government agency and those who serve in a judicial capacity. Upstate or downstate, urban or rural, large firm or solo practitioner, we share a collective consciousness. Nowhere is this more obvious than within our Association.

The Coming Year

In the coming year, through a variety of initiatives that I hope we can all embrace as part of our family values, I hope to instill in all of us a renewed sense of pride in our profession. Perhaps the most fundamental of these initiatives is the promotion of diversity and inclusiveness within our family. Only one percent of our members are African-American, and only 28% are women. We must continue the work of my predecessors and increase our efforts to encourage women and mem-

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bers of traditionally under-represented minorities to participate in Association activities and to assume leadership positions within the organization. In the coming year, I hope to reach out to the many minority and women's bar associations and law student groups throughout the state and invite them to join with us to help achieve our common goals as members of the legal profession. Through community outreach programs, we will seek to encourage our youth to look to law as a career regardless of gender, race or ethnicity. In the coming year, I will urge that the House of Delegates and Executive Committee be expanded to provide guaranteed levels of representation to minorities and women. I will work with section leaders and committee chairs to ensure that efforts to foster diversity are redoubled. To ensure that these efforts are carried out, one or more members of the staff will be designated to coordinate diversity efforts. All family members must be welcomed and represented at the table. The Association must strive to be a home to all.

Our family has the privilege of self-regulation. We take care of our own problems through methods that are fair and effective. Unfortunately, the workings of our attorney discipline system are hidden from the public, engendering suspicions that we sweep our problems under the rug through back room deals and slaps on wrists. Most other states have at least partially addressed this problem by opening their disciplinary processes to the public when probable cause exists to conclude that a rule of professional conduct has been violated. We will only be able to retain our right of self-regulation if we exercise it responsibly. Therefore, I intend to be an aggressive advocate for opening our attorney disciplinary process once a judge has concluded, after giving the respondent lawyer an opportunity to be heard, that there is sufficient evidence of professional misconduct to warrant the filing of formal charges. We are building support within our family for this long-overdue change in policy, and may find it necessary or desirable to make additional changes to our balkanized attorney discipline system, such as standardizing rules of procedure among grievance committees. Nevertheless, I hope that before my term as President has concluded we will see the passage of legislation achieving this goal.

Challenges Ahead

We must also take care of the family business. The economics of the practice of law have made for extraordinary challenges in the past few decades, and those challenges are only getting more difficult to overcome. During my term, we will make every effort to help our members cope with increased competition from outside the profession as well as from the oversupply of lawyers within it, to help our members become more effective providers of legal services through the use of technology, and to help young lawyers cope with the ever-increasing burdens of massive student loan debt.

To meet competition, ordinary businesses often try to develop new products and markets. We can do the same. We will convene a group of lawyers, clients and others to try to identify what consumers of legal services are going to need over the next five to ten years. Armed with those predictions, we can begin to educate our members in how to render these new services to existing clients and to new client bases. It wasn't that long ago that forward-looking lawyers observed the graying of America and developed a practice area known as "elder law." What we must determine is what will be the "elder law" of 2010? Perhaps it will have something to do with the Internet and its power to intrude into the private lives of just about every individual. We will focus on those issues in the next few months.

As much as technology affects us negatively, it is a tremendous benefit to society. Most of our members do not make as much use of technological advances as they might. We will make every effort to show them how electronics can help them do a better job for their clients, current and future.

But how can we expect young lawyers to focus on their professional development when they have, on average, nearly $100,000 in debt? Regardless of their professional goals or desires, those young lawyers are driven toward maximization of their income. They simply cannot afford to accept lower-paying jobs in public service, or government, or in positions that provide legal services to the poor. Perhaps the time has come for a global solution to this problem. We might join with other professions (our extended family) and develop a common funding mechanism for defraying the debt load of recent graduates who but for financial constraints are eager to make the sacrifices that public interest law and government service often entail. Might we soon be investing in tax-exempt bonds issued by the New York State Professional Student Loan Defrayment Authority? We will be looking into precisely that.

I have the privilege of leading our family for one short year. I cannot say for certain that we will accomplish any of the goals I have set out for us. What I do know, however, is that we have the power, by working together, to achieve much that is in the common good. And I know that I will try my hardest to draw us together, to build upon the deeply entrenched family values that we all share, and to work toward the betterment of our Association and our system of justice.

Introduction to Special Edition on Juries

Chief Judge
Judith S. Kaye

In this time of breathtaking social, scientific and technological change, the words of Article I, section 2 of the New York State Constitution seem particularly poignant. "Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever." Imagine that: "inviolate forever." Indeed, throughout the centuries our prized right to trial by jury—guaranteed by both state and federal Constitutions—has inspired passionate prose: "the cornerstone of our judicial process," "a bulwark of democracy," "courthouse democracy," "the lamp of liberty," "the voice of the people."

The importance of juries, of course, goes well beyond glorious rhetoric. Apart from their central value to litigants, jury trials touch the lives of millions of New Yorkers annually. Each year, more than 600,000 citizens serve in our courts, with more than 100,000 actually selected for jury trials. The opportunity to show New Yorkers (many of them having their first true-life encounter with the courts) a system that works well—to promote public confidence in our justice system—is obvious. It comes as no surprise that those who have served as jurors have far more faith in the court system than those who have heard of it from third-hand—often ill-informed—sources.

Our constitutional mandate, the cost of the jury system and the opportunity to promote public trust and confidence in the courts, are all good reasons for us to assure that the system functions optimally. In fact, since 1993 New York has been engaged in reform of its jury system. With the abolition of all automatic exemptions and other visible reforms aimed at improving the operation of our jury system, surely by now most New Yorkers know of this initiative.

Judge Albert
M. Rosenblatt

What may not be so well known to New Yorkers is that a majority of other states have joined us in taking a good hard look at their jury systems, with the same objectives in mind. Also less well known is that bar associations and academics throughout the nation are studying juries, hoping that twenty-first century reality will be brought more in line with eighteenth century rhetoric.

In the first such effort of its kind to capture some of this spirit and learning, the New York court system early this year joined with the National Center for State Courts and others in sponsoring a national Jury Summit. Jury gurus nationwide—indeed, worldwide—came to New York City to teach, to listen and to learn. The summit, all participants agreed, was a smashing success.

To capture the sense of the summit and nationwide thinking about juries today, we have collaborated on this Special Issue covering a range of jury-related subjects, from the summit itself to juries in movies. Within these pages you will find a fascinating array of articles about juries here and around the world. We hope that every reader will find something of interest—whether you are a lawyer picking jurors, a judge instructing them, a businessperson employing them, a world historian studying them, or any of the above who happens to be called for jury service. We've even included a collection of Jury Commissioners' most memorable excuses from jury service.

Jury reform is plainly a subject that will engage all of us for years to come. We trust this Special Issue will be of interest and use to you in continuing the dialogue.

Chief Judge Judith S. Kaye
Judge Albert M. Rosenblatt

Summit Sessions Assessed Representative Quality of Juries And Juror Communication Issues

By Chester H. Mount, Jr. and G. Thomas Munsterman

While New York originally planned for 250 people at the Jury Summit, more than 400 showed up! This was one of the finest conferences I have ever attended. The sessions were substantive and practicable. I have seldom seen a group of participants go away with such enthusiasm. If you had a team there, get ready, because they will be coming back "fired up" and ready to make jury reforms in your state! I encourage you to get out in front of this activity.

Those were the words of Dave Byers, Arizona's state court administrator and president of the Conference of State Court Administrators, reacting to New York's first-of-its-kind national Jury Summit held January 31 through February 3 in New York City. Representatives from 43 states and 16 federal courts attended, and the view was unanimous: a Broadway hit! Today, there is unquestionably tremendous interest in jury reform—31 states have undertaken jury improvement efforts within the last few years.

A recent national survey looking into public trust and confidence in the court system found that nearly 80% of those surveyed said the jury is the fairest way to determine guilt or innocence and 69% said that trial by jury is the most important part of the criminal justice system. Most federal judges surveyed (80%) said they would choose a jury over a judge to decide their fate.

This is no surprise. New York's system alone sends millions of jury notices each year. More than 600,000 citizens attend 20,000 jury selections. More than 100,000 jurors are selected annually to sit on 12,000 jury trials. These trials occupy the time and energy of thousands of litigants, judges, lawyers, court personnel, jurors and witnesses. The total price tag is easily in the millions of dollars. The cost of the jury system should be reason enough to justify an ongoing improvement program. The need to improve becomes compelling when you consider that the outcome of these trials can significantly alter the lives of the litigants. Given the volume, cost and impact of juries, it is easy to understand why courts throughout the country have such interest in improving the jury system.

The Jury Summit consisted of 25 sessions centering on two main themes: jury representativeness and communicating with jurors.

The Representative Jury

The U.S. Constitution requires an impartial jury, meaning a jury selected from a cross-section of the community. Presenters at the Jury Summit described three ways in which courts systems have tried to achieve this cross-section: Increase the opportunity for jury service, reduce hardship and conduct a proper jury selection.

Chester H. Mount, Jr., as the director of the Department of Court Research for the New York State Unified Court System, coordinates the state's efforts to improve the jury system. He began working with jury systems in 1975 as a member of Bird Engineering in Vienna, Va., and was an original member of the Center for Jury Studies, which eventually became part of the National Center for State Courts. He worked with state and federal courts throughout the country to implement jury system improvements and assisted in the preparation of jury system improvement articles, workshops and manuals including the *Methodology Manual for Jury Systems* (1981). He joined the Unified Court System in 1983.

G. Thomas Munsterman, director of the Center for Jury Studies, is the author of *Jury System Management* (1996), co-editor of *Jury Trial Innovations* (1997), and directed the project that produced *A Guide to Juror Usage* (1974) and the *Methodology Manual for Jury Systems* (1981). He is also the co-author of *Managing Notorious Trials* (1992, 1998). He served as a consultant to New York's Jury Project and the California Blue Ribbon Commission on Jury System Improvements. A faculty member at the National Judicial College for 12 years, he was part of a team sent to Russia in 1993 to provide technical assistance for the reintroduction of the right to trial by jury. He holds a B.S.E.E. from Northwestern University and a M.S.E. from George Washington University.

Many courts are now trying to create more inclusive source lists, the idea being that random selection from an all-inclusive list will, by definition, yield a cross-section of the community. New York, Connecticut, the District of Columbia and others have added to the traditional voter and driver lists, now using tax, welfare and unemployment lists. The most advanced courts are gathering their source lists at least once a year and relying on state-of-the-art computer software to correct addresses and eliminate duplicates.

Another way to increase the opportunity for jury service is to eliminate automatic exemptions, as many states (including New York) have successfully done. Their experience provides compelling evidence that automatic exemptions no longer have a place in today's democratic jury system.

The consensus of the participants was that the necessity of properly determining the challenges for cause is becoming more important.

Jury Summit participants also had much to say about non-response rates, which run as high as 50% to 60% in some jurisdictions. These high rates damage the integrity of the system and prevent courts from achieving such desirable goals as short and infrequent service and an inclusive jury system. The good news is that courts have found that regular and timely follow-up notices are very effective in addressing the problem.

In New York, some counties have reduced their non-response rate by two-thirds and increased the number of jurors by one-third through the use of routine follow-up notices.

We also need to learn why people do not respond. Is it, for example, a fear for their safety, ignorance about the responsibilities of jury service, or a lack of knowledge about the ease of postponing service to a more convenient date?

Reducing the burden of jury service is a second strategy for increasing the opportunity for all members of society to serve. Short terms of jury service are now the national norm with more than 40% of all U.S. citizens living in jurisdictions that use a one-day/one-trial term of service. Jury fees have risen in many jurisdictions, matching New York's and the federal fee of $40 per day. Jurisdictions are also reducing the frequency of jury service. At the suggestion of a juror, the New York Legislature recently doubled the time between jury service to eight years for any juror who has served longer than 10 days.

Courts in states such as New York, Connecticut, Colorado and Massachusetts now grant jurors the right to an automatic postponement to a date of their own choosing. Citizens in some jurisdictions can request this new date at any time via telephone (as in New York) or through the Internet.

A third area for increasing representation is the *voir dire*. The Jury Summit featured a mock jury selection patterned after a typical felony *voir dire* in New York City. Reactions varied. Some in the audience nodded in recognition at the latitude attorneys are given in questioning jurors. Others were astonished at the length of the process and the level of questioning permitted in New York. Summit participants learned of the tremendous variation in selection procedures, *voir dire* duration and number of peremptory challenges permitted in courts throughout the country. This is an area ripe for experimentation and research.

Part of the *voir dire* session was devoted to a demonstration of how difficult it is for a judge to determine a challenge for cause. Many summit participants voted to excuse a juror for cause who answered: "I *think* I can be fair," while retaining the juror who stated "I can be fair." Despite this difficulty, or perhaps because of it, the consensus of the participants was that the necessity of properly determining challenges for cause is becoming more important, particularly as some states move to limit the number of peremptory challenges. Another area ripe for research.

Summit attendees readily agreed that courts should do more to protect the privacy concerns of jurors—especially during *voir dire*. But how? The session on juror privacy involved a spirited discussion of techniques for protecting juror privacy without violating litigant rights to a fair trial or public access to the judiciary. A new paper prepared by the National Center for State Courts, "Making the Case for Juror Privacy: A New Framework for Court Policies and Procedures," will soon be available.

Communicating with Jurors

The "Communicating with Jurors" theme touched on a wide array of ideas for more actively encouraging the attention of jurors.

The petit jury has traditionally been passive: Jurors listened quietly, neither asking questions nor taking notes. Many judges and researchers now say that jurors should play a more active role during the trial.

The summit heard from judges across the country who now permit jurors to submit questions and take notes, and allow attorneys to make opening statements to the entire panel during *voir dire*. One judge noted that

these opening statements reduced jurors' requests to be excused. Some judges are trying such techniques as pre-instructing the jury before the evidence is presented, permitting the attorneys to give interim commentary throughout the trial and permitting jurors to discuss the evidence during the trial.

Jury trial innovations appear to be *the* emerging topic in the area of jury improvements. Many regard these "new" techniques as simple common sense. In response to a question about whether jurors should be permitted to take notes or submit questions, one judge replied: "Can anyone here imagine conducting a bench trial without taking notes or asking a single question?"

A video, "Order in the Classroom," provided a brief and entertaining depiction of how a college class might be taught if conducted under the traditional rules of a jury trial. This film could forever change how viewers perceive the role of the jury. An excellent primer on all aspects of the subject is *Jury Trial Innovations*, a book published by the National Center for State Courts.

Judges' instructions also came under scrutiny. Jurors can get lost when instructions are long or complicated. The inability in some states like New York to provide a written copy of the instructions to jurors in most cases makes matters even worse. The old assumption that jurors always understand instructions has been toppled by empirical research. Panelists discussed ways to clarify the language of jury instructions and described how some states are enlisting the help of language experts to improve instructions.

As evidence and jury instructions become increasingly complex, judges are recognizing the need for advising jurors about how to deliberate. Panelists focused on several techniques for assisting jurors in their deliberations, including a brochure developed by the American Judicature Society.

The Jury Summit provided attendees with a wealth of examples of educational materials for jurors and students. Many courts now view the jury notice, orientation film, juror handbook, telephone information system, Web site and information brochures as part of an overall juror communication package. New York is among the leaders in this area with its publication, *Jury Pool News* and a new juror Web site, www.nyjuror.com. The National Center for State Courts has developed a site that lists jury Web sites around the country, www.ncsconline.org.

During the session on public education, a sixth grade teacher from Washington, D.C., gave practical and compelling reasons for educating students about the courts through the use of mock trials:

> The better we educate the students, the more information they'll take home to the parents. Too many of the young people that we teach will end up going through the court system. Some will be lucky enough to be just jurors. Others will be in trouble and see the courts as the bad guys but they don't have to be if we educate them now.

This teacher was heartened to learn of the experience and resources of the New York State Bar Association in this area.

Additional Topics Discussed

Panel discussions were also held on press communication with jurors, automation systems, current research projects, cyber-juries, jury systems around the world, jurors with disabilities and jury issues in notorious trials and death penalty cases.

Work is underway on what is intended to be a legacy of the Jury Summit, a National Jury Web Site where jury professionals can continue to share ideas. The Jury Summit Web site, www.JurySummit.com, has further information.

The summit ended with a session entitled "Chief's Roundup." Chief justices and leading court administrators from around the nation discussed their plans for jury improvement. Even though this was Saturday morning, the session was packed. Chief Judge Judith Kaye of New York captured the spirit of the event when she noted that "each of our states will serve as a laboratory for the nation."

Innovative Comprehension Initiatives Have Enhanced Ability of Jurors To Make Fair Decisions

BY GREGORY P. JOSEPH

During the past 50 years, jury trials have been characterized by increasing complexity while being transformed by new causes of action and novel fields of expertise. By the late 1970s and into the 1980s, this led to vociferous complaints that some cases were simply too complicated for jurors to decide on the merits. A constitutional assault on the use of juries in complex cases followed, and failed.

This anti-jury sentiment has since become more muted. One explanation for this development lies in the response from judges and lawyers around the nation who have developed innovative techniques to enhance juror comprehension. With these aids, jurors are better equipped to decide even the most complicated types of cases.

Many of these innovative jury trial techniques are captured in the American Bar Association's Civil Trial Practice Standards ("ABA Standards") that were adopted in late 1998. The standards draw on judicial experience around the nation and provide an insight into jury trial innovations nationally. Their objective is to standardize and promote the use of juror-comprehension initiatives by providing guidelines for their use. (The standards, with official commentary, can be found at <http://www.abanet.org/litigation/litnews/practice/home.html>.)

It is important for New York practitioners to recognize that some of the innovations discussed in this article have already been approved for use in New York State, while others are under consideration. Equally important for New York practitioners is the fact that jury-comprehension reform efforts are widely supported by judges and lawyers in this state. A statistically valid survey, taken by the Office of Court Administration in late 1998 of more than 5,000 New York lawyers and judges who had been summoned for jury service found widespread support for many of the innovations discussed in this article.[1]

Juror Notetaking

One of the earliest, and now most prevalent, juror-comprehension initiatives was to permit notetaking by jurors. As articulated by ABA Standard 3, the court "should ordinarily permit jurors to take notes during the proceedings and use them during deliberations." According to the Federal Judicial Center, "[p]ermitting jurors to take notes, once discouraged, has now become widely accepted."[2]

The rationale for juror notetaking is straightforward: "There is abundant evidence that individuals tend to be better able to recall events and testimony if they have taken notes at the time; the very process of writing things down helps to encode the events in one's memory."[3] Notetaking is permitted only after appropriate cautionary instructions—emphasizing that jurors must still pay attention to what is happening in the courtroom and observe witnesses carefully to assess their credibility.

Juror notetaking was endorsed by the New York Court of Appeals in *People v. Hues*.[4] Further, in 1999, Jonathan Lippman, the New York chief administrative judge, promulgated 22 N.Y.C.R.R. § 220.10, which permits jury notetaking in all civil and criminal cases in which the court determines that notetaking would be helpful to the jury, given the likely length, complexity and nature of the case. Jurors may refer to their notes during the proceedings and deliberations.[5]

Juror Notebooks

Another relatively widespread juror-comprehension initiative involves providing jurors with notebooks that contain exhibits, stipulations and other materials. Jurors

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are then able to follow along and review the materials as they are referred to in the course of the proceedings. Only materials that have specifically been approved by the judge may be included in jury notebooks.

Ordinarily, notebooks are distributed at or near the outset of trial for convenient reference throughout the trial. The court may determine that distribution of any notebook should follow the introduction of exhibits or salient testimony. Different notebooks may be furnished for use with different witnesses, such as experts. The court may permit the parties to supplement the notebooks with materials that the court rules admissible or includible later in the trial.

In the 1998 OCA Survey, more than 80% of the 5,200 responding New York lawyers who had served as jurors supported the practice, in complex cases, of distributing to jurors notebooks containing exhibits admitted in evidence and not subject to dispute.

ABA Standard 2 notes that the court is vested with broad discretion in deciding what may be furnished to the jury in notebooks, including such items as photographs of parties, witnesses or exhibits; curricula vitae of experts; lists or seating charts identifying attorneys and their respective clients; lists or indices of admitted exhibits; glossaries; and chronologies or timelines. This approach has been codified in New York in 22 N.Y.C.R.R. § 220.12, under which the use of such notebooks is permitted at the discretion of the trial judge, in cases of appropriate complexity.

Juror Questions for Witnesses

One of the most controversial jury trial initiatives, in use in many other courts around the nation, is to permit jurors to submit questions for witnesses.

Questions are generally received in writing and reviewed by the judge, who then consults with counsel and decides whether the question is appropriate and, if so, whether it ought to be asked at that time—of the witness then on the stand—or should be deferred until later. Cautionary instructions are given, the court stressing that questions should be reserved for important points only; the sole purpose must be to clarify the testimony, not to comment on it or express any opinion; jurors are not to argue with the witness; and jurors are to remember that they are not advocates but must remain neutral fact-finders.

Permitting juror questions is not inconsistent with the fundamental premise of our adversary trial system that questioning remains primarily the province of counsel, not jurors. Rather, it arises simply out of the recurrent teaching of pertinent social science—that, with appropriate safeguards, juror questioning can materially advance the pursuit of truth, particularly when a jury is confronted with a complex case, complicated evidence or unclear testimony.[6]

Juror questioning of witnesses is now permitted in New York at the judge's discretion and on consent of the parties.[7] This issue has also been formally referred to the Unified Court System's Advisory Committee on Civil Practice for further review.

Instructions and Verdict Forms

Jury instructions and verdict forms have been the focus of several related jury initiatives. Comprehensibility of instructions has been one major area of effort. The need is apparent, if jurors are to apply the law to the facts. As an ABA study found, "The frustrations expressed by jurors during deliberations indicate a need to improve the clarity (and thereby the efficacy) of jury instructions."[8]

More than 86% of lawyer-respondents expressed the view that, in complex trials, special verdict forms tailored to the issues in the case should be provided to jurors for use in deliberations.

In addition, providing each juror with a copy of the instructions and the verdict form has proved invaluable in complicated cases.[9] It is not seriously subject to dispute that the availability of the charge in the jury room "is almost certain to assist the jury in arriving at an informed verdict while reducing the need to send questions to the judge and to have parts of the charge re-read."[10] The purpose of providing all jurors with a copy of the verdict form is also to assist them with their deliberations, and it makes it easier for each juror—especially if a special verdict is involved—to answer questions if the jury is polled at the end of the case. Note that the instructions and verdict form may be included within juror notebooks, if those are provided to the jury.

In the 1998 survey by New York's OCA, more than 86% of the lawyer-respondents expressed the view that, in complex trials, special verdict forms tailored to the issues in the case should be provided to jurors for use during deliberations.[11]

In New York, 22 N.Y.C.R.R. § 220.11 allows distribution of a copy of the judge's charge to the jury in civil cases, if the judge determines that having the charge would expedite, or assist in, deliberations. The Unified Court System also has proposed legislation that would permit this practice in criminal cases.

Many courts have found that juror comprehension is also elevated through the use of preliminary instruc-

tions at the outset of trial that not only cover the jury's role and trial procedures but also summarize the issues in dispute, basic legal principles, and trial procedures. In the 1998 OCA survey, respondents overwhelmingly (88.8%) supported the notion that, before opening statements, the court should give preliminary instructions that explain not only the jury's role and trial procedures but also the issues in dispute and basic, relevant legal principles.[12]

Interim Statements and Arguments

Permitting counsel to address the jury to comment at various points in the trial on the evidence in long or complex cases—or cases dealing with particularly complicated evidence or issues—has become increasingly common since then District Judge Pierre Leval introduced the technique in General William Westmoreland's defamation action against CBS in the mid-1980s.[13]

The technique rests on the sound notion that juror comprehension may substantially be advanced by affording counsel the opportunity to summarize and place in context evidence that has been, or is to be, presented.[14] This practice has been endorsed for use in New York[15] and is not inconsistent with existing rules.

Courtroom Technology

One of the most visible initiatives to enhance juror comprehension involves the use of courtroom technology to facilitate the use of demonstrative evidence. A prime example can be found at the Supreme Court, New York County, which has a courtroom equipped with video monitors in the jury box and the full panoply of devices set to display and facilitate the use of modern visual evidence. Counsel are then in a position to summarize voluminous, complicated or other information that cannot conveniently be examined in court in the form of a chart, diagram, graph or other demonstrative evidence—and the evidence is readily viewable by the jurors.[16]

Other Initiatives

Many other juror initiatives are in use around the nation:

- Arizona allows jurors in civil cases to discuss the evidence prior to deliberation.
- In cases of appropriate complexity, judges in many jurisdictions exercise their discretion to alter the traditional order of trial if doing so will enhance jury comprehension without unfair advantage to either side. This

may include issuing final instructions on the law before summations, or permitting additional argument if the jury reports that it has reached an impasse.

• Where a great deal of videotaped testimony must be presented, many judges permit the parties to edit and present the videotaped testimony by subject matter. The testimony of a single witness or of multiple witnesses relating to designated subject matter may be combined into a single presentation.

Conclusion

The lesson from courts around the nation is that the jury trial—the pride of the American system of justice—is flexible and resilient. It is, by use of modest innovation, capable of addressing the complexities of contemporary litigation. Critics of the jury trial have questioned the ability of jurors to decide complex cases fairly. The juror comprehension initiatives discussed in this article—and other techniques being developed across the United States—provide jurors with the tools they need to make fair decisions in all cases.

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1. *See* Committee of Lawyers to Enhance the Jury Process, Report to the Chief Judge and Chief Administrative Judge at § IV(A) (January 1999).
2. Federal Judicial Center, Manual for Complex Litigation 3d § 22.42 (1995).
3. ABA Section of Litigation/Brookings Institution, Charting a Future for the Civil Jury System 18 (1992).
4. 92 N.Y.2d 413 (1998).
5. *See generally* New York State Unified Court System, Continuing Jury Reform in New York State: January 2001 Report, Jan. 2001, at 33 (hereinafter "Continuing Jury Reform in New York State—2001").
6. *See, e.g.*, American Judicature Society, Toward More Active Juries: Taking Notes & Asking Questions 11-14 (1991); Heuer & Penrod, *Increasing Juror Participation in Trials Through Note Taking and Question Asking*, 79 Judicature 256 (1996); Robert E. Litan, Verdict: Assessing the Civil Jury System 358-60, 390-91 (1993); ABA Standard 4.
7. *See* Continuing Jury Reform in New York State—2001 at 34.
8. ABA Section of Litigation/National Center for State Courts, Jury Trial Innovations § VI-2 (Munsterman et al. eds., 1997).
9. *See generally* ABA Standards 5-6.
10. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 585 (1990).
11. *See* Report to the Chief Judge, at 17, 21, Appendix A, Table 11.
12. *See id*.
13. *See, e.g.*, Federal Judicial Center, Manual for Complex Litigation 3d §§ 22.21, 22.34 (1995); *Consorti v. Armstrong World Indus.*, 72 F.3d 1003, 1008 (2d Cir. 1995); *ACandS, Inc. v. Godwin*, 340 Md. 334, 407-09, 667 A.2d 116, 152-53 (Md. 1995).
14. *See generally* Parker, *Streamlining Complex Cases,* 10 Rev. Litig. 547, 553-54 (1991); Leval, *From the Bench: Westmoreland v. CBS,* Litigation, Vol. 12, No. 1, at 66-67 (Fall 1985).
15. Report to the Chief Judge, at 48-49.
16. *See generally* ABA Standards 15, 23; Joseph, Modern Visual Evidence ch. 14 (Supp. 2001).

Jury Reform Has Changed *Voir Dire*, But More Exploration Is Needed Into the Types of Questions Asked

By Rosalyn Richter

***Prosecutor**: Prospective jurors, you have all been to fast food restaurants—McDonald's, Burger King, etc. You know that when you arrive, one person takes your order and typically enters the information into a computer. A second person is in the back cooking and a third person, who also is in the back, wraps up your cooked food and gives it to the first person, who originally took your order. Now, can you all agree that all three people are working together at this fast food restaurant? And, can you also agree that all three people are working together to serve you this food even though you never speak to or make physical contact with all of them?*

***Juror**: Judge, I'm confused. I thought you told us that this case involved a charge that three individuals sold drugs on a corner in New York City. Why is he talking about fast food restaurants?*

That exchange, which is based on a real case, highlights the way attorney *voir dire* is often conducted in criminal cases in New York.

The case involved three defendants charged with acting in concert to sell narcotics to an undercover police officer. As is typical in many street-level narcotics sales, one defendant received the money from the undercover police officer, then handed that money to the second defendant. The second defendant, who was holding the drugs, handed them to the first defendant, who then gave them to the undercover officer. The third defendant stood on the corner acting as a lookout. Thus, like the McDonald's employees in the prosecutor's *voir dire* example, the second and third defendants never had any direct contact with the undercover officer who was purchasing the drugs.

What is the prosecutor doing by using this analogy? Well, the objective may be to determine whether the jurors can apply the concept of "acting in concert," or it may simply be an effort to explain this somewhat complicated legal principle in plain English. The prosecutor may also be trying to avoid discussing specific legal concepts such as "acting in concert" because the trial judge usually discusses the law. It also is possible that the prosecutor is trying to plant a seed in the jurors' minds and to convey at the earliest opportunity the state's theory of the case.

The prospective juror's quizzical response shows, however, that whatever the prosecutor's purpose, the example left at least that juror wondering why questions were being asked about a fast food restaurant. And, in my experience, jurors are equally confused when attorneys try to explain "acting in concert" by using other analogies such as the relationship among the various sections in an orchestra or the importance of the field goal kicker to the work of the entire football team.

No doubt exists that major changes have been made in the *voir dire* process as a result of jury reform. A greater effort is being made to ensure that jurors' time is used efficiently and that prospective jurors understand their responsibilities. We have increased the numbers of jurors who are called and now have individuals from all walks of life in the jury pool. These changes have altered the structure of our *voir dire* and have, according to those who have served, improved the experience. But, we need to explore further the kinds of questions that are typically asked in jury selection and to discuss whether additional changes are necessary to allow more specific information about the case to be conveyed to prospective jurors.

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This article explores how some of the recent changes in New York's jury selection procedures fit into the national trend and highlights some of the additional issues that need to be addressed as part of our continuing effort to improve *voir dire*.

Recent Developments

As the result of the 1994 Report of the Chief Judge's Jury Project and the Unified Court System Report on the Civil *Voir Dire* Study, a significant effort has been made to ensure that civil jury selection is not unnecessarily long and that jurors are not subjected to repetitive questioning.

Throughout the state, a judicial hearing officer, a referee or other court official usually supervises the *voir dire*, either entirely or at least in part. The judge or other official (the "*voir dire* supervisor") now must provide the jurors with an introduction explaining the process, set time limits for counsel's *voir dire*, and resolve disputes about challenges. Written background questionnaires are being used consistently, and counsel in civil cases are required to use one of the standard methods of jury selection.[1]

These new procedures have reduced the amount of time spent on jury selection. For example, in the year 2000, the average time for civil *voir dire* in New York City was 4.9 hours per case compared with 11.9 hours in 1995. The average time for civil *voir dire* conducted throughout New York State in 2000 was 4.4 hours per case compared with 9.3 hours in 1995.

Since all occupational exemptions from jury service were eliminated in 1996, not only has the total number of jurors reporting for service increased, the expanded pool has meant that jurors do not have to serve as frequently. Previously exempt jurors whose professional experience may give them specialized knowledge about certain issues in the trial also present novel challenges for lawyers during *voir dire*. Their impact on the kinds of questions that both the court and counsel need to ask is considered later in this article.

Also in 1996, N.Y. Civil Practice Law and Rules 4109 (hereinafter "CPLR") was amended to reduce the number of peremptory challenges in civil cases to a combined total of three per side, plus one peremptory challenge for every two alternate jurors. CPLR 4109 also provides that before the examination of jurors begins, the court may, in its discretion, grant an equal number of additional peremptory challenges to each side.

Although the Jury Project report also recommended a reduction in the number of peremptory challenges in criminal cases (see CPL § 270.25(2) for the current number of peremptory challenges, which vary with the seriousness of the crimes charged), no change has yet occurred. Finally, although CPLR 4108 permits "consent challenges" in civil cases, some counties nevertheless require counsel to raise their cause objections with the *voir dire* supervisor rather than just "consenting" to the juror's release.

Jury selection has also been changed, especially in criminal cases, by recent case law clarifying the standard for a cause challenge. In *People v. Johnson*,[2] the Court of Appeals addressed the question of whether a juror who responds, as jurors often do, that he or she will "try to be impartial" or "might" find it difficult to be open-minded about a critical issue should be excused for cause. The Court held that such statements do not constitute an unequivocal assurance that the juror can set aside any bias and therefore the juror should be struck for cause.

Although the *Johnson* decision, in many ways, essentially restates the well-established proposition that potential jurors cannot serve if they openly express doubts about their impartiality, it also is significant because it clarifies the kind of language that is now necessary to "rehabilitate" such a juror. Before *Johnson*, attorneys would often persist in questioning such jurors only to have prospects ultimately reiterate that they will "try" to keep an open mind or that they "would like to think" they could be fair, "but can't guarantee anything." Now, counsel who are familiar with the opinion often move on to other issues once it becomes apparent that a particular juror cannot offer an unequivocal declaration that biases can be set aside.

Practice in Other States—What Can We Learn?

New York is not alone in its efforts to reduce the amount of time spent on jury selection and ensure that jurors are not subjected to repetitive examination. Most states have established procedures for judicial supervision of *voir dire*, and like New York, many states set time limits for attorney *voir dire*.

At the recent national jury summit, to my surprise, I learned that some courts, among them the federal courts in New York, do not allow lawyers to question jurors at all. Other states limit individual *voir dire* by counsel and require that questions be addressed to the entire panel. Some states do not allow attorneys to ask jurors to "promise" anything, including a promise that they can acquit the defendant in a criminal trial if the prosecution fails to prove its case. Finally, some states restrict counsel to questions that are designed to elicit factual and background information, precluding attorneys from asking jurors questions about their views of issues that may be raised in the trial.

Although some states may be more restrictive than New York in terms of the kinds of questions attorneys may ask, several have developed interesting innova-

tions that are not yet widely used in New York. In complex cases or cases with a significant number of witnesses, attorneys are permitted to give a brief, factual "mini-opening statement" to the prospective jurors before *voir dire*. This mini-opening helps put the jury selection in context and gives the jurors an understanding of why counsel may be asking questions about certain issues. Some judges who allow attorneys to give such mini-openings also believe that the technique grabs the jurors' interest, making it more likely that the jurors will actually want to serve.

Judges in New York have significant discretion to control the scope of *voir dire*, and mini-openings may well be something that, even under current law, could be allowed in both civil and criminal cases. Some question exists whether this procedure would work, at least in a criminal case, if defense counsel, who has no obligation to make an opening statement after jury selection, was not willing to make such a mini-opening. Other questions have been raised regarding how the court would avoid repetition of the mini-opening in the standard opening statement given after jury selection, or whether such mini-openings could legally replace the opening statement. Overall, the positive experience reported by judges who allow such mini-openings suggests that these legal and logistical questions warrant further exploration.

Some states allow judges, in *voir dire*, to give the jury detailed legal definitions, including informing the jury in criminal cases of the basic elements of the charged crimes. Although judges in criminal cases in New York are required to briefly outline the nature of the case,[3] there is no provision explicitly allowing the judge, in either a criminal or civil case, to give detailed legal instructions on the issues in the case as part of *voir dire*. Although not prohibited by statute, in criminal trials, the jury generally is not even read specific definitions of legal terms such as "acting in concert."

Such detailed instructions could be problematic if, for instance, significant changes in the legal definitions given at the start of the case were necessary as a result of evidence that came out during the trial. Nevertheless, this dilemma occurs because judges do not always submit all of the charges to the jury or may modify instructions given during the course of the trial. It may be that, in criminal cases, a statutory change might be needed before judges could give the kinds of detailed instructions allowed in other states. If our goal is to select informed jurors and to avoid unnecessary confusion, then such a change should be given serious consideration.

At the national jury summit, I presided over a mock jury selection in a date rape case. During the *voir dire*, which contained questions typically asked by New York lawyers trying such cases, both lawyers explored the ju-

rors' attitudes toward sex crimes in cases where the defendant and the alleged victim knew each other. Although the attorneys might have quickly gotten to the heart of their concerns by asking, "Do you believe that someone can rape a person they are dating?" they were not so quick to do so. Rather, before the attorneys began their *voir dire*, they took a minute or so to give what might be described as "introductory remarks." Since both attorneys wanted to do this, there was, of course, no objection, and since the remarks were brief and ultimately led to a relevant question, I did not intervene. The prosecutor, in her introductory comments, first acknowledged that some jurors might think that there was a difference between raping a stranger and raping someone on a date or a husband raping a wife, but then she emphasized that rape was a serious crime regardless of who the victim was. After her comments, she asked the jurors if they could follow this basic principle, if they had any biases about date rape and other questions that were entirely appropriate. The defense lawyer, in some of her introductory comments, focused on the reasons why a victim might bring a false rape charge, suggesting that sometimes people tell one lie and then can't find a way out of a situation they created. Then, of course, defense counsel began to ask standard and permissible questions about whether the jurors understood that an accusation was not the same as proof after trial. The attorneys' prefatory comments before some of their questions drew some heated remarks from the judges in attendance, who thought that counsel should be restricted to eliciting information from the jurors and not "preaching" to them. These comments, which primarily came from judges who preside in jurisdictions that significantly restrict lawyer *voir dire*, led me to review the applicable New York law on the subject.

There is ample case law in New York prohibiting the use of hypotheticals in *voir dire*, especially those with facts that are similar to the case on trial.[4] There also are numerous decisions proscribing counsel from asking prospective jurors about their attitudes or knowledge of matters of law.[5] In my experience, however, attorneys routinely ask such questions while emphasizing, of course, that the legal instruction will ultimately come from the judge. Although, for all practical purposes, these prohibitions may often be overlooked, they nevertheless raise significant questions about the jury selection process. Often, we are choosing jurors without giving them much information about the case, and we expect them to tell us, based on a "Cliffs Notes" version of the evidence, whether they can be impartial. Perhaps the time has come to revisit these restrictions as part of our overall efforts to ensure that jurors get the information they need to perform their important role adequately.

The presence of so many attorneys and judges in the jury pool raises additional issues about the kinds of questions that are typically asked. Counsel who have not altered their *voir dire* to reflect the inclusion of attorneys in jury selection often are in the somewhat incongruous position of creating confusing analogies, such as the McDonald's one, and then asking lawyers who know the correct legal definitions whether they understand the analogies. Again, more discussion is needed about the prospect of giving jurors legal definitions, especially since some of their fellow jurors are likely to be attorneys who already know the legal concepts as the result of their own practice.

The jury summit raised one last question about *voir dire* that has not, in my opinion, been fully and openly explored. What is the true purpose of the process and do we all have the same goals? No doubt exists that everyone wants jurors who are fair, responsible, attentive and give serious attention to the trial evidence. But there may be other goals that are not necessarily shared equally by the judge and attorneys. Many jury commentators and litigators acknowledge that *voir dire*, when done effectively, can persuade prospective jurors of counsel's position even before the first witness is called. Others admit that *voir dire* can be used to develop a rapport with particular jurors who then may be more amenable to counsel's point of view.[6] Interestingly, there has been little discussion of the jurors' goals during the *voir dire* process and whether we should be alleviating some of the frustrations they feel when they are not given much information about the case. As we go forward in this brave new world of juror reform, we need to keep an open mind about these issues and look at what changes might be made to meet everyone's goals in this process.

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1. The rules for these methods, such as White's Rules, the Struck Method or, in some jurisdictions, a modification of the Struck Method, can be found in the Uniform Rules for the New York State Trial Courts § 202.33, Appendix E.
2. 94 N.Y.2d 600, 709 N.Y.S.2d 134 (2000).
3. N.Y. Criminal Procedure Law § 270.15(1)(b).
4. *See, e.g.*, *People v. Boulware*, 29 N.Y.2d 135, 324 N.Y.S.2d 30 (1971); *People v. Davis*, 248 A.D.2d 281, 670 N.Y.S.2d 76 (1st Dep't 1998); *People v. Garrett*, 285 A.D. 1088, 140 N.Y.S.2d 28 (2d Dep't 1955).
5. *See, e.g.*, *Boulware*, 29 N.Y.2d at 135; *People v. Rodriguez*, 240 A.D.2d 683, 659 N.Y.S.2d 495 (2d Dep't 1997); *People v. Corbett*, 68 A.D.2d 772, 418 N.Y.S.2d 699 (4th Dep't 1979).
6. *See, e.g.*, Thomas Liotti & Ann Cole, *Voir Dire: Making the Most of 15 Minutes*, N.Y.L.J., June 22, 2000, p. 1; Gillian Drake, *DeSelecting Jurors Like the Pros*, 34 Md. B. J. 18 (2001); Lisa A. Blue, *Identifying and Addressing Juror Bias/Voir Dire*, A.T.L.A. Winter Convention Materials (Feb. 2001).

Review of Jury Systems Abroad Can Provide Helpful Insights Into American Practices

By Neil Vidmar

Did you know that:

- Countries in Africa, Asia, and South America have jury systems—in fact that, worldwide, at least 52 countries have a jury system?
- In Canada and England jurors who disclose the content of the jury deliberations can be fined thousands of dollars and sentenced to up to six months in jail?
- Most countries do not allow the defense in a criminal trial to make an opening statement?
- In England and Wales the criminal jury is chosen without peremptory challenges or challenges for cause?
- In Canada two jurors rather than the judge have sole responsibility to decide whether a prospective juror is impartial?
- In Brazil jurors vote on the verdict without deliberating?

Did you also know that:

- In England and Wales the criminal jury may render a legal verdict by 10 of the 12 jurors?
- Only the United States and two provinces of Canada still use civil juries to any degree?
- In Spain and Russia, the victim of a crime, or the victim's family, may have their own lawyer make an independent submission to the jury?
- In most countries the media may be charged with contempt of court for publishing information that might prejudice the jurors?

The jury is an English invention. In addition to its American colonies, England exported the jury to much of the rest of its global empire. Countries outside the Empire, enamored of the form of justice that England's juries could provide, developed their own jury systems. In each setting adjustments were made to accommodate particular needs or ways of legal thinking.

Much can be learned about the American jury by comparing it with jury systems that have evolved in other countries. The history of how these systems developed and survive today is fascinating. So is the fact that many additional countries had juries and then abandoned them.

The English Jury Spread Around the World

As in North America, when England began its expansion of empire into the rest of the world, English colonists insisted on their right to jury trial.

Sierra Leone, settled by freed slaves, was England's oldest African colony and it adopted the jury in 1799. Other African colonies also developed jury systems, although in some places jury trial was reserved only for the colonists. Natives were tried by a judge and lay assessors. In Africa the jury was used in the colonies of the Gold Coast, Lagos, Nigeria, Kenya, Southern Rhodesia, Zanzibar, the Cape, Natal, the Orange Free State, South West Africa and elsewhere.

The laws of the British East Company in 1670 provided jury trials for Englishmen, and after India became an independent nation in 1949 the jury was retained in the High Courts for a brief period. The jury was also used in Singapore, Hong Kong, Malaysia, Ceylon, Aden and Brunei. Territories in the Caribbean and South America that were under English control also had trial by jury.

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Basic concepts of evidence and procedural justice developed hand in hand with the English jury, and these ideas influenced French philosophers such as Voltaire and Diderot. As a consequence, a French version of the jury was built into the Napoleonic Code and introduced to conquered parts of Europe. Other countries adopted the jury by imitation.

During the nineteenth and twentieth centuries juries existed in Austria, Belgium, Switzerland, Russia, Sardinia, Poland, Czechoslovakia, Greece, Portugal, Spain, Serbia, Italy, Romania, Denmark, Norway and elsewhere. Spanish-speaking countries in South America provided for limited jury systems. Brazil also produced a jury system, and it has been in continuous operation since 1822.

The English Jury in Decline?

Many English scholars have argued that, despite being the intellectual mother of all of these jury systems, the English jury and some of the procedural justice elements it epitomized are in decline. The scholars produce some pretty strong arguments. Because the legal foundation of the English jury is not enshrined in a written constitution, it is vulnerable to changes by Parliament.

Basic concepts of evidence and procedural justice developed hand in hand with the English jury, and these ideas influenced French philosophers such as Voltaire and Diderot.

The civil jury is extinct in England and Wales except for defamation and a few other disputes. Major changes with regard to the criminal jury began with the 1967 Criminal Justice Act in which the unanimity requirement was dropped for all jury trials. The jurors are told to try to reach unanimity, but if they have not reached a decision after a couple of hours the judge can call them back and instruct them that a majority of 10 is sufficient. Eligibility to serve on juries was drastically expanded with the 1974 Juries Act, but with the consequence that critics have charged that juries lack intellectual competence and are biased against the prosecution.

In England and Wales there are three categories of offenses: summary offenses tried in magistrate's court without a jury, indictable offenses that carry the right to jury trial, and "either-way" offenses, which give the Crown prosecutor the right to proceed by indictment or summary trial. Over the past several decades Parliament has passed legislation categorizing many indictable offenses as either-way offenses, thus removing the automatic right to a jury of one's peers. Other offenses, including some categories of theft, have been redefined to make them summary offenses triable only in magistrate's court.

In 1986, the Rothskill Commission recommended that complex fraud trials be tried by a judge and two lay experts rather than a jury. The recommendation was never implemented, but in 1966 it was raised again when, after a seven-month trial, Kevin and Ian Maxwell, the sons of media magnate Robert Maxwell who owned the *New York Post* and many other businesses, were found not guilty of fraudulently converting millions of pounds from a pension plan controlled by the Maxwells. Some legal commentators believe advocates of a "serious fraud" exception need only the right case to lobby Parliament for their cause.

In 1988, England abolished peremptory challenges, a change that has been commented upon favorably in this country by judges and legal scholars who believe that the goals of eliminating racial and gender exclusions under *Batson v. Kentucky*[1] and its progeny can be met as long as peremptory challenges exist. The *Batson* issues are serious ones, but facile comparisons with England are misleading. England, for all intents and purposes, also does not allow any challenges for cause: the first 12 jurors randomly called are seated as the jury, except that the prosecution retains a "stand-by" privilege allowing a juror to be excluded for, among other things, political views that are antithetical to the Crown's interests. Moreover, police vetting of jury lists for the Crown occurs and has been deemed permissible. There are no data on how frequently "stand-bys" are actually used, but in law and in practice the Crown retains a functional form of peremptory challenge that is not enjoyed by the defense.

While Scotland and the Republic of Ireland have followed England's lead in abolishing peremptory challenges, Canada, Australia, New Zealand and many other jury countries have retained peremptory challenges without serious controversy.

There are further considerations in making comparisons with England. England places emphasis on fair trial over free speech. Unlike the United States, media are barred from, and can be prosecuted for, publishing prejudicial material before or during a trial, or even after a trial if that information is judged to potentially interfere with future legal proceedings. To take the O.J. Simpson trial as an example, the media would likely have been slapped with contempt citations within 24 hours of dissemination of any of the content of the preliminary hearings or the commentary and reporting that accompanied every phase of the trial. Moreover, because ju-

rors in England are forbidden from ever disclosing the content of jury deliberations, England's courts do not have to worry about the corrupting problem of a juror attempting to serve in an infamous trial with the goal of selling a story to the *National Inquirer* for a six-figure sum. In addition, England, along with European and other progressive countries, has abolished the death penalty and does not have to worry about death qualification.

Constraints on the media have occasionally failed in England. In several exceptional but important cases, a judge has decided that pretrial publicity has irremediably tainted public opinion and ordered a permanent stay of proceedings against criminal defendants. This would be unacceptable in the United States.

In the *Maxwell* fraud case, the media constraints failed, in part, because media outlets were legally free to discuss the details and heap contumely upon Robert Maxwell who, being deceased, was not on trial. By implication, the media transferred his alleged misdeeds to his sons. The missing pension funds and the Maxwell brothers' alleged responsibility were also discussed in Parliament, with pejorative statements about the defendants. The media faced no constraints in reporting those proceedings. As a result of the pervasive and continuing news coverage, survey data showed there was no place in England and Wales without strong prejudices against the Maxwell brothers. In response, Mr. Justice Phillips, the trial judge, permitted a lengthy pretrial questionnaire to be given to potential jurors. Then, with prosecution and defense lawyers participating, he questioned them individually in chambers. Except for the difference that it did not take place in an open courtroom, the procedure bore a striking similarity to jury selection for notorious trials in many of our federal and state courts.

The Canadian Middle Road

Canada has attempted to find a middle ground between the United States and England. The right to jury trial is guaranteed in its 1982 Charter of Rights and Freedoms. However, like England, Canada recognizes indictable, non-indictable and either-way offenses. Non-indictable, or summary offenses, can carry a jail term of up to two years and are not eligible for jury trial.

The case of *R. v. Bernardo*, labeled by some as Canada's "crime of the century," occurred at the same time as the O.J. Simpson criminal trial. It provides an instructive contrast with the United States. Against the backdrop of a series of rapes by the "Scarborough Rapist," two teenage women were reported missing in 1991 and 1992. Their mutilated and sexually violated bodies were eventually found. Police were stymied until Paul Bernardo, age 29, severely beat his 23-year-old wife, Karla Homulka. In the police investigation that followed, Karla confessed that she had taken part in the sexual enslavement of the missing teenagers but insisted that Bernardo alone had killed them. She eventually implicated Bernardo and herself in a number of other sexual crimes, including the drugging of her younger sister for sexual purposes. That act resulted in the sister's accidental death, which, before Karla's confession, had been ascribed to unexplained natural causes. Homulka further shocked police by reporting that she and Bernardo had videotaped the sexual acts with their victims, including her sister.

After several searches of the couple's Ontario home, police could not find the videotapes and entered into a highly controversial plea bargain with Homulka involving two 12-year sentences for manslaughter, contingent on her testifying against her husband. At a plea and sentencing hearing, the trial judge allowed Canadian newspaper reporters to be present but forbid them from publishing any details until after Bernardo's trial.

Despite the reporting ban, public rumors about the crime were intense. American media in nearby Buffalo and elsewhere obtained and published some of the forbidden information. Curious Canadians easily had access to the American reports. The Canadian media could and did publish many details about the litigation, protests by victim's rights groups and other matters associated with the case, thereby keeping the matter in front of the public. Anonymous flyers giving erroneous details about the crimes were handed out on Toronto's street corners. Not surprisingly, an opinion poll found that large numbers of Canadians reported that they had learned details about the case. In the meantime, police had finally obtained the missing videotapes of the crimes.

When the trial began in Toronto in May 1995, media trucks surrounded the courthouse. The judge summoned 980 prospective jurors to the nearby Royal York Hotel and explained that the trial would last approximately four months and involve very explicit photographs and videotapes of sexual acts. Over the next three days, jurors were randomly called one by one and asked as many as eight questions in what is called a "challenge for cause." The questions required only yes or no answers. The two most important questions were: "Have you formed an opinion about the guilt or innocence of the accused, Paul Bernardo?" and, "If you have formed an opinion, are you able to set aside that opinion and decide this case only on the evidence that you hear in the courtroom and the judge's directions on the law?"

A total of 225 persons were questioned before the jury was seated. The judge then admonished the jurors that they should not talk about the case with anyone and sent them home with instructions to return in two

weeks for the start of evidence. During the lengthy trial, the jurors went home each evening, despite the media representatives amassed outside and inside the court. They were not sequestered until deliberations began.

But this description leaves out an interesting detail—the process by which the jurors were chosen. In Canada the judge does not determine the merits of a challenge for cause. Rather, two triers have sole responsibility for determining whether a juror is "impartial between the Queen and the accused." For the selection of the first juror, two persons are randomly chosen from the jury pool and sworn as the triers. Another randomly called member of the jury pool becomes the first prospective juror and answers the questions put by the defense or prosecution counsel. The triers deliberate—as a sort of mini-jury—and decide whether that person is impartial. If the answer is yes, that juror replaces one of the triers. The new juror and the remaining trier decide on the impartiality of the next juror. Once a second juror is seated, the remaining trier is excused. Jurors 1 and 2 become the triers for juror 3; then jurors 2 and 3 become triers until juror 4 is seated. Jurors 3 and 4 become triers for 5, and the rotating replacement process continues until 12 jurors are seated. The process is complicated because, even if the triers decide a juror is impartial, the Crown prosecutor or the defendant can exercise one of their limited number of peremptory challenges. Blackstone's *Commentaries on the Laws of England* (1769) described the same jury selection procedure in England. It is available in Australia today but rarely used. Research by my colleague, Nancy King, has uncovered the fact that "triers" were used in the states of New York, Nevada, Minnesota, Oregon, Utah and California until near the end of the nineteenth century.

In Canada, two triers have the sole responsibility for determining whether a juror is "impartial between the Queen and the accused."

Questioning of jurors about impartiality, as occurred in *Bernardo*, is more an exception than the rule in Canada. In most trials, the jurors are seated as randomly called from the assembled jury men and women, unless they are peremptorily challenged by the prosecution or defense. There is a presumption that a juror will follow her/his oath to be impartial. Both trial and appellate judges continually express concerns about "Americanizing" the Canadian jury with long pretrial questioning and the consequence, as they see it, that the juror is put on trial along with the accused.

Nevertheless, Canadian case law has evolved during the past decade to provide defendants who are members of identifiable racial or ethnic groups with the right to ask jurors if they have held racial prejudices that would prevent them from deciding the case fairly. Typically, only one or perhaps two questions are allowed, and impartiality is decided by the triers as it was in *Bernardo*.

There are important reasons why Canadians believe that questioning of jurors is not needed in routine trials and only very limited questioning is necessary in emotionally charged atmospheres of cases like *Bernardo.* Although Canada guarantees freedom of the press and speech, it puts limits on those rights. A defendant has the right to request a publication ban on the content of any preliminary inquiry. In *Bernardo*, the press could report trial evidence seen and heard by the jury, but not anything that took place outside the presence of the jury until the jury returned a verdict (there are no bench conferences; the jury retires when legal arguments are made). The videotape evidence of the rape acts was seen only by the jurors, although courtroom observers heard the audio portions. As noted earlier, jurors are not allowed to disclose the content of their deliberations.

Canada does not have to worry about attitudes toward capital punishment because the death penalty was effectively abolished in 1976 and permanently abolished for all offenses in 1988. No cameras are allowed in courtrooms. No prosecutor or defense lawyer would risk a contempt citation by the judge for holding press conferences during the trial. At the end of the trial, the judge reviews the evidence—called "summing up"—before sending the jury to deliberate. Finally, although the Canadian Charter provides a right against double jeopardy, if an appeal court concludes that a jury was misinstructed on the law, an acquittal can be sent back for retrial.

Australia and New Zealand

The jury is also an important institution in the legal cultures of Australia and New Zealand.

The Australian Constitution, partially modeled from the American Constitution, guarantees the right to jury trial for Commonwealth crimes, but it does not have a general bill of rights. Individual states or territories may also pass criminal statutes, and whether the crime is classified as indictable or not indictable affects the right to jury trial. The jury is almost always chosen without the jurors being questioned. In Tasmania, the prosecutor has no peremptory challenges, but in four states the prosecution may "stand aside" an unlimited number of jurors.

In several Australian states, the jury panel is known weeks in advance and the prosecution and defense may engage in "jury vetting," that is, background investigation, a practice that has caused criticism by academic commentators and law commissions. In some states, the jury verdict must be unanimous, but in other states a majority verdict of 10 or 11 of the 12 members is acceptable.

In both Australia and New Zealand the media may be prosecuted for publishing material that jeopardizes the fairness of a trial.

New Zealand's right to trial by jury exists by statutory and common law rather than by a written constitution. Juries are almost always seated without any pretrial questioning, but both sides have peremptory challenges.

New Zealand courts have been sensitive to the perceived legitimacy of the trial process when native Maori and other minority members—many people of Polynesian origin reside in New Zealand—are on trial. Until 1962, there was a provision for an all-Maori jury for certain types of cases. In recent years, there has been discussion of requiring a certain number of minority jurors in exceptional circumstances, but the idea has been assessed as impractical.

Debate has arisen in New Zealand regarding the abolition of juries for complex fraud trials on the ground that juries may not have the intellectual competence to deal with the matters in dispute, but so far the proposition has foundered on defining what a complex case is. A recent study by the New Zealand Law Reform Commission conducted extensive post-trial interviews with jurors in 48 criminal trials. The comprehensive findings from that study give one considerable faith in the jury system. It is especially relevant to the debate about juries and experts in the United States because the findings are consistent with American data showing that jurors do not automatically defer to experts; instead they assess the content of the testimony rather than, as critics have charged, rely on the expert's credentials.

Another study finding caused the New Zealand Parliament to provide the defense the right to make an opening statement. Until then, New Zealand followed the practice of the other Commonwealth countries, England, Canada and Australia included, which generally do not allow the defendant an opening statement.

Scotland: Fifteen and "Not Proven"

The jury in Scotland has unique characteristics. It is composed of 15 members and a majority of eight is sufficient for a conviction. A jury in Scotland has three main verdict options: guilty, not guilty and not proven. The not proven verdict has the same legal consequences as a not guilty verdict, but may leave a moral stain on the accused.

Except for a very limited number of very serious crimes such as murder and rape, which are tried under "solemn procedure," the defendant has no right to jury trial. The great majority of crimes are prosecuted under summary procedure. For crimes that can be prosecuted either way, the prosecutor alone determines the mode of trial. The independence of the prosecutor's office needs to be considered in understanding the jury system in Scotland. By historical tradition it is not accountable to the courts, the police, the victims or the accused. Recent legislative changes doubling the sentencing powers of sheriff's courts in which summary offenses are tried may decrease the number of jury trials because some cases previously tried under solemn procedure may now be tried under summary procedure.

Ireland's Lesser Reverence for Juries

The right to trial by jury was enshrined in the Republic of Ireland's 1937 Constitution. Its jury system has many similarities to that of England. While jury trial is viewed as an important right, most accused are tried by a judge sitting without a jury.

Historical reasons related to the centuries of domination of Ireland by England and the conflict in Northern Ireland have left the country with lesser reverence for the jury institution, and a number of serious crimes can be tried by special criminal courts without a jury. In Northern Ireland, the "Troubles" resulted in the non-jury Diplock Courts.

For ordinary crimes in some rural counties, there are allegations of high acquittal rates because, it is said, the jurors view many crimes short of murder as not being a very serious problem. There are no systematic statistics to support these allegations.

Other Jury Systems

Among other countries that maintain jury systems, the most striking characteristics involve size and decision rules.

Malawi requires a 12-person jury, but a majority of eight can convict. In Ghana, the jury is composed of seven persons and in most cases a majority of five is sufficient for conviction.

In Sri Lanka, murder, culpable homicide, attempted murder, rape and a few other offenses are tried with a seven-member jury that must get agreement from five.

In the Caribbean, many countries require 12 persons, but a majority ranging between eight and 10 jurors may return a valid verdict.

Uniquely, Brazilian jurors do not deliberate; instead they vote by secret ballot. A conviction requires a guilty verdict by four of its seven members.

In Denmark, juries are composed of 12 persons that sit with three judges. The jury alone decides guilt. Eight must favor a guilty verdict, but they do not need to give reasons. If the verdict is guilty, the jury sits with the three judges to decide punishment. Each juror has one vote on punishment, but each judge has four, thus providing parity between judges and jurors in a total of 24 votes.

In Austria, the eight jurors sit with three presiding judges but the jurors alone decide guilt. If the verdict is guilty, the jurors and the three judges collectively decide on punishment.

Jury systems must be understood in their particular legal and cultural context. Caution must be used in generalizing from one system to another.

Jury Systems That Did Not Survive

Estimating from rough historical data, it appears that at one time or another there were perhaps another 25 jury systems around the world. Why did some of them not survive? There is no single answer.

Northern Rhodesia abandoned the jury as a vestige of colonialist oppression and an institution incompatible with the socialist principles of the new Zimbabwe.

In South Africa, juries composed of all white members resulted in horrific injustices to Africans. As a result, talk about reviving the jury system has met strong opposition.

In some countries and territories, the jury existed simultaneously with indigenous laws. When the English left, indigenous law took over. Serious problems arise when societies have deep ethnic and racial divisions, as would have been the case in India and is the case today in some Caribbean communities that have nevertheless maintained jury systems.

In some instances, as in Portugal, the rise of dictatorship was associated with the demise of the jury system.

In many of the countries of Europe, well-established inquisitorial modes of procedure were incompatible with the jury. Indeed, Stephen Thaman, author of a chapter in *World Jury Systems* that deals with the new jury systems in Spain and Russia, has voiced concern that the jury may not survive because of the difficulties of grafting it onto primarily inquisitorial modes of criminal procedure. He adds the thought that when professional members of a court are responsible for investigating crimes and developing the evidence for trial, they become reluctant to have their work overturned by a committee of amateurs called a jury. Jury systems are perceived as costly in terms of money and time and occasionally lost prosecutions. This has played an important part in the England's jury debate. While the jury is not going to be abandoned in England, some scholars also ascribe the erosion of the right to jury trial there to professional aggrandizement by the judiciary and by judicial and legislative action based on anecdote rather than a realistic appraisal of the claimed problem.

Learning from Comparative Studies

Knowledge about other juries is interesting in its own right but the knowledge also helps us to reflect on our own system. We may glean ideas about how adjustments can be made to the American jury, but jury systems must be understood in their particular legal and cultural context. Caution must be used in generalizing from one system to another.

At the same time, I have been excited after examining recent studies undertaken by law reform commissions in both Australia and New Zealand. Those studies have produced data largely consistent with American research showing that both civil and criminal juries undertake their task seriously and perform competently. Juries remain important institutions in many countries, and the more we learn about them the more we may understand the role that they play in democratic societies.

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1. 476 U.S. 79 (1986).

Membership Totals

New Regular Members 1/1/01 - 5/31/01	3,949
New Law Student Members 1/1/01 - 5/31/01	554
Total Regular Members as of 5/31/01	57,979
Total Law Student Members as of 5/31/01	4,153
Total Membership as of 5/31/01	62,132

Pattern Instructions for Jurors In Criminal Cases Seek to Explain Fundamental Legal Principles

BY STEVEN W. FISHER

In 1975, the Office of Court Administration formed the Committee on Criminal Jury Instructions. Its mission was to prepare pattern jury instructions for use in criminal cases.

Chaired by Justice Lyman H. Smith, the committee published three full volumes of jury instructions. Two contained model charges for virtually every substantive crime then defined in New York's Penal Law. The third contained charges of general applicability, covering everything from welcoming remarks for prospective jurors at *voir dire* to final instructions for trial juries explaining fundamental legal principles and rules applicable to criminal cases generally. The committee's work was widely praised, although some found the charges needlessly repetitive. The pattern instructions, periodically updated, were used throughout the state.

In 1992, the Office of Court Administration reactivated the committee and asked me to co-chair it along with County Court Judge Patricia D. Marks. Among those invited to serve were several distinguished members of the prior Committee, including its vice chair, Justice Thomas M. Stark, former Surrogate Nathan R. Sobel, Justice Peter J. McQuillan, and Michael F. McEneney, Esq., the Director of Operational Services for O.C.A. New members included the author of the Practice Commentaries to the Penal Law, Justice William C. Donnino, and Joseph P. McCarthy, the supervising judge of the Criminal Courts of the Eighth Judicial District.

The new committee was asked to update existing charges and to draft pattern instructions for newly defined crimes. We were also asked to make the new instructions more understandable to jurors.

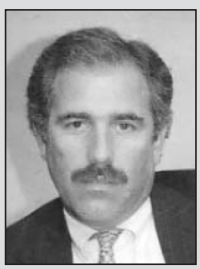
The committee has now revised or drafted pattern instructions for all commonly charged substantive crimes and most others defined in the Penal Law, superseding all charges on substantive crimes produced by the original committee. We have recently turned our attention to charges of general applicability, completing and distributing new instructions on, among other things, the presumption of innocence, the burden of proof, and the requirement of proof beyond a reasonable doubt.

Making Instructions Understandable

Our experience has taught us that updating jury instructions is easy; making them more understandable is not.

In an apparent effort to make the jury pool more inclusive, language skill requirements for jurors have been relaxed. Until 1996, jurors had to be "able to read and write the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification questionnaire, and be able to speak the English language in an understandable manner."[1] Now, however, to qualify as a juror, a person need only be able to "understand and communicate in the English language."[2] Moreover, venires increasingly include prospective jurors for whom English is a second language. The need for clear and understandable jury instructions, therefore, has never been greater.

Making criminal jury instructions more understandable involves more than the careful choice of language. This is so because New York remains one of the very few states[3] that still prohibits giving a written copy of the court's instructions to the jury, even if the jury requests it, unless the parties consent. Interpreting statutes that limit what jurors can take with them when they retire to deliberate[4] and what can be provided to them when they request further information or instructions,[5] our Court of Appeals has held that, absent the defendant's consent, it is reversible error for a court "to supply a jury



STEVEN W. FISHER is administrative judge, 11th Judicial District, New York State Supreme Court, Queens County. He is co-chair of the New York State Committee on Criminal Jury Instructions, and also serves on the Capital Cases Judicial Resource Committee and the CPL Advisory Committee. He was formerly a judge in the Criminal Court of the City of New York. He is a graduate of Queens College and received his J.D. from Brooklyn Law School.

with any written material containing statutory elements or terms of the charged offenses . . . [or] on its own initiative to distribute written excerpts of its charge to the jury over defendant's objection."[6]

As a result, in criminal cases in New York, the only way jurors learn the law they are sworn to apply is by listening as a judge speaks it. Studies have shown, however, that jurors often do not understand, remember, or follow a trial judge's instructions after an oral presentation, especially when the instructions are lengthy or complex.[7]

Debate in the jury room should be about whether the evidence establishes the elements, and not about what those elements are.

Recognizing that juror comprehension diminishes as the overall length of an oral charge grows, the committee has made every reasonable effort to shorten instructions. We were careful to adopt a format that makes charges for crimes and defined terms more concise. For example, the Penal Law defines the *mens rea* term "intentionally" by providing: "A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct."[8] The committee's charge format simply says that "intent means conscious objective or purpose." And the committee's recently distributed charge on the presumption of innocence, the burden of proof, and the requirement of proof beyond a reasonable doubt is more than two hundred words shorter than the charge it replaced.

Nevertheless, the committee remains of the view that, in order to enhance juror comprehension, New York law should be changed to permit jurors to receive a written copy of the court's charge, to read along as the judge delivers it, and to take it with them when they retire to deliberate. At the very least, jurors should be provided with a written list of the elements of each charge submitted.

The debate in the jury room should be about whether the evidence establishes the elements, and not about what those elements are.

Statutory Language

But neither providing written instructions nor keeping oral instructions brief is the entire answer. The use of simple and direct language is equally important. Here, however, the burden falls as much on the legislature that defines the crimes as on the committee that drafts the instructions.

When formulating charges for substantive crimes, the committee is obliged to track precisely the language of the defining statute in order to avoid having the jury convict the defendant of something the legislature has not declared to be a crime. But, because of the way statutes are sometimes written, that can lead to instructions that are difficult for jurors to understand.

For example, showing increased concern over domestic violence, the legislature has prescribed serious criminal penalties for violations of orders of protection. But its efforts have not always seemed consistent with the need for juror comprehension.

In 1996, the legislature enacted a provision that added the following to the definition of the crime of criminal contempt in the first degree:

> A person is guilty of criminal contempt in the first degree when . . . in violation of a duly served order of protection, or such order of which the defendant has actual knowledge because he or she was present in court when such order was issued, or an order of protection issued by a court of competent jurisdiction in this or another state, territorial or tribal jurisdiction, he or she . . . intentionally places or attempts to place a person for whose protection such order was issued in reasonable fear of physical injury, serious physical injury or death by repeatedly following such person or engaging in a course of conduct or repeatedly committing acts over a period of time.[9]

This is not a definition likely to be well understood by a layperson, especially one who must simply listen as the statute is recited.

It would seem reasonable, therefore, to ask the legislature to give additional thought to juror comprehension when it decides to criminalize conduct, and to frame defining statutes in a way that makes them more understandable to lay jurors.

The committee kept juror comprehension firmly in mind when it drafted a revised instruction on the presumption of innocence, the burden of proof, and the requirement of proof beyond a reasonable doubt, carefully considering the views expressed and studies reported in several important articles on language and juror comprehension.[10] We believe that, as a result, we were able to produce a charge that is not only substantially shorter than its predecessor but is more understandable and better focused on the critical issue of the nature and quality of proof necessary to support a guilty verdict.

In any event, it is a fundamental assumption of our system of trial by jury that, after the presentation of evidence and argument by counsel, the jury will apply the law to the facts to reach a proper and reasoned verdict. This, in turn, assumes that the jurors will understand

the law as it is explained to them by the court. Without clear and concise legal instructions, a jury cannot hope to achieve such an understanding and will be left to determine the law for itself.

To avoid that result, the Committee on Criminal Jury Instructions continues to have as its principal objective the production of jury charges that correctly and concisely state the law in a way that lay jurors can understand. Little is more important to the success of our criminal justice system.

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1. *See* N.Y. Judiciary Law § 510 former subdivision 5 (hereinafter "Jud. Law").
2. *See* Jud. Law § 510(4) as amended by 1995 N.Y. Laws ch. 86, § 3.
3. *See, e.g.*, Annotation, *Propriety and Prejudicial Effect of Sending Written Instructions with Retiring Jury in Criminal Case*, 91 A.L.R. 3d 382 (1979).
4. N.Y. Criminal Procedure Law § 310.02 (hereinafter "CPL").
5. CPL § 310.30.
6. *People v. Martell*, 91 N.Y.2d 782, 785-86, 676 N.Y.S.2d 115 (1998).
7. *See, e.g.*, Susan R. Schwaiger, Note, *The Submission of Written Instructions and Statutory Language to New York Criminal Juries*, 56 Brook. L. Rev. 1353, 1359-60 (1991).
8. N.Y. Penal Law § 15.05(1).
9. Penal Law § 215.51(b)(ii).
10. *See, e.g.*, Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt about Reasonable Doubt*, 78 Tex. L. Rev. 105 (1999); Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 Hofstra L. Rev. 37 (1993).

Turning the Tables

The Commissioner of Jurors Takes on a New Role

BY NORMAN GOODMAN

After serving for many years as the commissioner of jurors in New York County, overseeing jury procedures but never directly participating as a juror, one day I was unexpectedly called to serve. A summons over my own signature was returnable in Supreme Court, Criminal Branch, at 100 Centre Street, where my own staff managed the assembly room. I reported for service, as instructed, and my education as a prospective juror began.

Along with all those reporting for service that morning, I watched an informative and interesting jury-orientation film and listened to a follow-up introduction delivered in person by Juanita Bing Newton, then the administrative judge of the Criminal Branch. (After taking note of my presence in the jury assemblage, Judge Newton did her best to conceal her delight at my obvious discomfort.) After some time, including a break for lunch, I was called for a panel to sit for *voir dire*, awakening me to a problem I had often observed but never experienced in my position as commissioner: the sense of frustration that a "wait" can instill in a juror.

Waiting to Serve

But if waiting to be called for jury selection appears to be unproductive, it most assuredly is not. It affords the court system an opportunity to provide prospective jurors with an orientation to the business of serving on a jury and to educate them about the complexity of the process. In addition, while jurors wait to serve, the case they will hear does not.

The movement of a criminal case from initiation to trial depends on countless variables, including "prisoner production" and transportation from Riker's Island, plea conferences, hearings on motions, the availability of witnesses, and the trial readiness of the district attorney and the defense counsel. By necessity, all of these preparations take place behind closed doors and ensure that the case, when it is ready to be heard by a jury, will be handled properly and without prejudice.

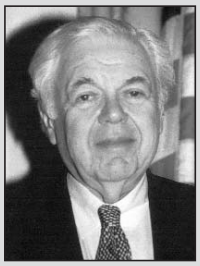
After orientation, when the juror is called into the courtroom, he or she becomes a member of a large panel of perhaps 40 or 50 jurors awaiting initial instructions of the judge presiding in the case. In my case, 24 jurors were initially called to take their places in the "box." During the judge's orientation, jurors were instructed about the difference between facts and law and, thus, learned to distinguish between their own role as triers of fact from that of the judge who interprets the law. During the ensuing *voir dire* by the assistant district attorney and defense counsel, prospective jurors got a chance to get to know the lawyers and to have the lawyers become acquainted with them.

Juror Variety

Among other questions, the lawyers asked about the jurors' occupations, and I was impressed by the unusual variety present in the box—among them a lawyer, physician, policeman, high-school teacher, university professor, professional stand-up comedian, secretary and journalist. That there was such a diverse representation of professional backgrounds is in part due to the work I and others did to implement the repeal of all occupational exemptions from jury service. The *voir dire* questioning, I might add, that elicited this and other information was conducted without stepping on anyone's toes or violating anyone's right to privacy. The day ended with instructions to return at 10 a.m. the next morning.

Selected as a Juror

When I returned, I was shocked when told by the clerk that I had been found acceptable by both sides and was to be seated as a juror. Since I was a court administrator, I didn't have any trouble imagining why the People saw me as a fair juror, but I continued to wonder about defense counsel. In the end, however, I came to see, in the fact of the unknowns that make the process of *voir dire* so crucial, that it was pointless for anyone to second-guess the likelihood of being selected as a juror.



NORMAN GOODMAN is commissioner of jurors for New York County. He is a graduate of New York University and received his J.D. from New York University School of Law.

During a break in the trial called at the lawyers' request, the jury was ushered into the deliberating room under strict instructions from the judge not to discuss the testimony. There we were the 12 jurors and four alternates—all assiduously reading newspapers, novels, magazines, and, in at least one case, knitting, all conspicuously avoiding the potential for conversation. No one who has not served on a jury can know what a temptation it is to discuss the case and what control it takes not to. My fellow jurors finally confided their own similar struggles, and we talked of this for some time. But if our urge to discuss the testimony we had just heard was strong, our respect for the system that enjoined us not to was stronger still, and we never said a word about it.

An Ongoing Education

After closing arguments by the attorneys, the judge delivered his instructions to the jurors, charging them, in my case, from the witness box, something that I had never seen in all my years of practicing law and administering the jury system. As a juror, this gesture made me feel a more intimate relationship with the judge, and having the judge physically closer to the jury helped me understand the details of the charge. Even at the end of the trial, the jury's education was ongoing.

After the verdict, I wrote to my follow jurors to congratulate them on performing a diligent, industrious, and valuable service for the courts and for the community, and I invited them to drop in at my office for a chat at their convenience. The three or four who did were clearly impressed by the jury system and visibly affected by the experience. Regardless of their background, they looked on their time as jurors as privately enlightening and publicly essential, coming away from it all with an enhanced sense of what it means to be a New Yorker.

Juror Excuses Heard Around the State

Over the years, commissioners of jurors have heard members of jury pools express a wide range of "reasons" why they could not serve as jurors.

The following is a compendium of memorable, and frequently creative, explanations the commissioners have heard.

Montgomery County

A woman asked to be excused because her 17-year-old cat had cancer and she had to give him medication every two hours to keep him comfortable. I have two cats and was, therefore, very sympathetic. Needless to say, I did postpone her for six months.

Jefferson County

One lady asked to be excused because she couldn't afford to pay $40 per day. When we explained that she would *receive* $40 per day, she was happy to serve.

A man said he couldn't possibly do jury duty, because he was vital to the day-to-day operations of his company—and besides, he had already paid for a cruise that same week and couldn't get his money back.

Kings County

"I used to be a felon."

One prospective juror came in wearing pajamas and said that she had 13 children and did not have time to get dressed.

Another prospect explained that he had undergone surgery on his hands and now limped as a result.

Warren County

"My dog is in heat and needs me."

Elderly twin women claimed that they could not be separated—they went everywhere together.

Man asked for a year off because he was stacking wood and burying Mother. I said to him, "If I call you the same time next year, you'll still be stacking wood won't you?" "Yes," he said, "but I shouldn't be burying Mom."

Nassau County

A physician came up to our counter in the front of our Central Jury Room and stated that he could not serve as a juror because he did not speak English. I (the Commissioner) said: "Doctor, if you do not speak English, how do you speak to your patients?" He replied in a very heavy accent, "all my patients are of my nationality and we all talk in our native language" I thought for a moment and said, "Doctor, how do you give orders to your medical staff—you know, your nurse and your receptionist?" He replied, again in a very heavy accent: "All my employees are of my nationality and we speak in our native language." I scratched my head and thought for a moment. I finally said, "Doctor, how do you fill out the insurance forms?" He stared at me for a moment, and without saying a word, turned around and sat down in the auditorium with the rest of the jurors.

Erie County

"I'm 86 years old and deaf as a doornail."

"I never tell the truth."

A man said he had been convicted of grand larceny for unlawful possession of a canoe. "A canoe?" he was asked. "Yes," he replied, "a canoe."

"I can't get around. Old age is no picnic."

View from the Jury Box

The System Is Not Perfect, But It's Doing Pretty Well

By Claire P. Gutekunst

Having served as a juror on two criminal cases in the last five years, I am pleased to report that in my experience the system basically works and justice is done. The system is not perfect—I suggest below some changes to decrease delay and increase jurors' knowledge about the case and the process—but it's doing pretty well.

Serving on a jury was interesting and provided insights useful to my practice. I recommend it to all lawyers and judges.

As a member of the New York State Bar Association Ad Hoc Committee on the Jury System, I have heard trial lawyers complain that the jury reforms in the last eight years have tilted the system too far in favor of jurors, to the detriment of litigants and counsel. From my juror's eye view, addressing the concerns of jurors—especially by reducing the real or perceived waste of jurors' time and providing them a sense of participation in and knowledge about the process—serves the interests of all parties. If jurors are contented and engaged, the outcome is more likely to be based on the facts and the law, which is, after all, the goal of the process.

Reflections on Deliberations

Witnesses' Recollections Deliberating on a jury put to rest for me a common concern of lawyers that if their witnesses don't all tell exactly the same story, the jury will disbelieve them. To the contrary, the jurors with whom I served found witnesses more credible because their recollections of events weren't exactly the same.

The jurors recognized that minor variations in recollection are normal, especially given the passage of time between the event and the trial. They felt the testimony sounded less rehearsed, and thus more believable, because of the variations.

The trial lawyer can also help make variations understandable. For example, the principal defense in the second case was that the police had arrested the wrong man for an alleged sale of drugs observed by an undercover officer, based on the discrepancy between the officer's testimony that the perpetrator's shirt was gray and the arrest photo showing the defendant in a white shirt. The assistant district attorney rebutted the defense in closing in a way we could easily grasp. She pointed to the corner of the courtroom ceiling and noted that although the walls were both white, the wall on one side looked gray because of a shadow from the light.

Jurors' Life Experiences The common view that who the jurors are may affect the outcome was borne out, particularly in the felony murder case on which I first sat. The defendant admittedly had hijacked a car with a young woman in it and had hit and killed a pedestrian while trying to get away. The key issue was whether he had the requisite intent to steal the car, because he allegedly had suffered a seizure and head trauma the previous day and had taken crack cocaine.

Eleven jurors quickly agreed that he was at least guilty of manslaughter. The lone holdout, an unemployed immigrant who lived in a high drug use area, said he believed the defendant did not intend to steal the car. A former nurse on the jury attempted to convince him to change his mind by talking about her experience with drug users. He rejected her arguments because he had frequently seen heroin users who did things they later had no recollection of doing.

I had avoided trying to sway other jurors until it became clear that a hung jury was likely. I then used persuasive reasoning and a methodical examination of the key evidence—a videotape of the defendant talking to

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police officers shortly after his arrest—to convince the holdout that the tape repeatedly demonstrated that the defendant was coherent and in control of his faculties and provided no evidence that he did not know what he was doing.

After more than 13 hours of deliberations, the holdout changed his mind, and we returned a guilty verdict. The backgrounds of the jurors clearly influenced the process and the ultimate outcome.

Sitting in the jury box and deliberating in the jury room is the best CLE available for trial lawyers, and I commend it.

Suggestions

Two axioms underlie my suggestions: (1) time is money and (2) knowledge is power.

Frustration with Delays By far the most prevalent complaint among the jurors with whom I served was that there were repeated and apparently (because nobody informed us otherwise) unnecessary delays that drastically reduced the amount of time we spent *in* the courtroom and increased the time spent waiting *outside* in the hall or the jury room. The jurors grew increasingly disgruntled and frustrated, and their willingness to devote their full energies and attention to the proceedings diminished as the delays increased.

Judges and attorneys should try their utmost to be on time to start the trial each day and to limit breaks to the announced length. When delay in starting or continuing the trial is unavoidable, the judge should ask a court officer to inform the jury that there has been an unavoidable delay, to apologize and to give as good an estimate as possible of when the proceedings will begin again. This would help defuse the jurors' resentment that their valuable time is being wasted and would reduce the sense of powerlessness that comes from lack of any control over one's time and lack of any knowledge of what is happening.

These simple steps would not compromise any party's interest or consume significant judicial resources and would improve both public perception of our judicial system and the fairness of the outcome in a given case. A contented juror who feels that he or she knows what is going on and that his or her time is being put to good use is more likely to give full attention in the courtroom and to deliberate fully to reach a fair verdict.

Eliminate Sequestration The felony murder case on which I sat illustrates that mandatory sequestration is a great source of frustration to jurors, does not serve the parties or the interests of justice, and should be abolished except in the rare case that is highly publicized.

We got the case on a Thursday afternoon and, deadlocked at 10:00 p.m., 12 extremely unhappy jurors were bused to a hotel near Kennedy Airport (a practice that has since been abolished). We all felt our valuable time was being wasted and, especially the four jurors with young children at home, viewed sequestration as an unnecessary imposition on our personal lives.

The practical impact was that by Friday afternoon several of the jurors (who had been sitting against the wall with folded arms and scowls as three of us tried to convince the holdout to change his mind) announced that they would not continue to deliberate into the weekend. Fortunately the holdout was convinced late that afternoon, or justice would have been denied.

Conclusion

Sitting in the jury box and deliberating in the jury room is the best CLE available for trial lawyers and judges, and I commend it. You won't get credits (other than the gratitude of the Chief Judge and the rest of the court system), but it's free and will provide invaluable insights that will help you better represent your clients in court and serve the public interest when presiding over trials.

Is Plain English the Answer To the Needs of Jurors?

BY LEON D. LAZER

As Chief Justice Rehnquist noted in a recent capital case, "A jury is presumed to follow [the judge's] instructions. Similarly, a jury is presumed to understand a judge's answer to its question."[1] These presumptions, combined with rules that prohibit impeachment of juries, make it virtually impossible to overthrow a jury verdict on the ground of jury confusion or lack of comprehension. Whether in federal or state courts, reversals on the basis of comprehensibility criteria are just about nonexistent.

By and large, lawyers and judges do not accord significant weight to comprehensibility issues. Lawyers focus on the slant of the charge, while judges concentrate on legal correctness to avoid reversals. Nevertheless, a multitude of studies spanning more than a quarter century suggest that there is substantial doubt about the competence of jurors to understand, remember and integrate the evidence and the law as it is thrust upon them in modern-day trials. Proposals for solution to, or better perhaps, alleviation of the problem, have evolved from emphasis on improved linguistics to more radical measures to transform the current state of juror passivity to one of juror activity.

Ancient Antecedents

The problems have rather ancient antecedents. In the early days of English law, juries had broad powers of investigation and inquiry, even to the point of speaking to each other and to witnesses out of court before trial. Beginning in the sixteenth century, powerful lawyer guilds sought to control juries, in part by limiting what they could do and what they could hear in the way of evidence.

At the birth of our republic, juries still had broad powers over issues of law and fact. As Chief Justice Jay declared to a jury in *Georgia v Brailsford*[2] in 1794, "You have nevertheless the right to take upon yourself to judge of both and to determine the law as well as the fact in controversy." It was not until Justice Harlan's lengthy opinion in *Sparf v. United States*[3] a full century later that the Supreme Court finally bedded whatever issue of division still remained by holding that in criminal cases the rule was the same as on the civil side: it was the duty of the jury to receive the law from the court and to apply it as given by the court.

When the need to deliver correct instructions on the law coalesced with advancing methods of recording trials, the result was an increasing number of reversals based on erroneous charges and the emergence of the pattern jury movement. By dint of the labors of then New York Supreme Court Justice Bernard S. Meyer and his Pattern Jury Instructions Committee, New York received its first volume of Pattern Jury Instructions in 1965; Criminal Jury Instructions followed. The emphasis, of course, was on legal correctness. In this respect, pattern jury instructions have achieved remarkable success. The PJI Committee is aware of only three reversals based on challenges to the correctness of its charges during the 36 years of its existence.

A Foreign Tongue

Although the comprehensibility of jury instructions is much the focus of current discussion, as early as 1930 Jerome Frank observed that "everyone who stops to see and think knows that these words might as well have been spoken in a foreign language."[4] It took until the mid-1970s, however, for comprehensibility to draw attention. A number of studies concluded that jurors had considerable misapprehension about the meaning of instructions.

The now-famous study by Robert and Veda Charrow[5] reached the conclusion that standard jury instructions were not well understood and that the fault lay largely with certain linguistic "constructions," the alter-

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ation of which would dramatically improve comprehension. The Charrows' list of offending "constructions" included nominalizations (nouns constructed from verbs); "as to" phrases; misplaced phrases in sentences (mostly prepositional); difficult lexical terms (*e.g.*, "imputed"); multiple negatives; passive mode in subordinate clauses; word lists (*e.g.*, "give, bequeath and devise"); discourse structure (organization); and embeddings (numerous subordinate clauses in a sentence).

The original studies were conducted largely with volunteers and prospective jurors, but the Forston study[6] used experienced jurors. The techniques applied were audio recordings of charges, videotapes of brief trials, pattern instructions and questionnaires. A few examples of the findings in these and other studies are illustrative.

No study, and apparently no case, has yet established that linguistic misunderstanding of correct charges has actually affected the quality of justice.

Disturbing Findings

Forston found that 86% of criminal jurors were unable to respond accurately when asked what constituted proof of guilt; less than half correctly answered questions on proximate cause. Strawn and Buchanan[7] found that 43% of the volunteer jurors believed that circumstantial evidence was of no value, while half did not understand that the defendant did not have to provide evidence of innocence.

Amiram Elwork, James Alfini and Bruce Sales[8] found that 51% of answers by jurors in a hypothetical murder case were correct, although some panels were only 40% correct on other questions.

Testing their jurors with rewritten instructions, the studies demonstrated that understanding could be substantially improved. Other studies in Arizona, California, Michigan, Nevada and Wyoming, with real jurors, have found significant deficiencies in juror understanding. The title of a 1998 article in the *Vermont Bar Journal,* "It's Unanimous: Jurors Don't Understand Instructions,"[9] undoubtedly was an overstatement—but there are serious shortcomings.

Nevertheless, no study, and apparently no case, has yet established that linguistic misunderstanding of correct charges has actually affected the quality of justice. The few reversals seems to have been based on ambiguity. Interestingly, the remarkable recent Wyoming study,[10] in which half of the District and County judges participated, revealed that while all of the participating judges believed their instructions were understood, they would have found differently than the juries did in half of the civil cases. Professor Bradley Saxton, who supervised the study, concluded that some of the particular issues on which the questionnaires revealed incorrect answers may have been material to the verdicts they reached.

Juror Inattention

Significantly, 36% of the lawyers who participated in the Wyoming study thought that the instructions were not presented in an animated fashion and 25% thought that even when the instructions were animated the jury was inattentive. That inattentiveness or lack of interest—the "eyes glaze over" syndrome—is attributed by some to the passive role our juries play in the current trial model. In its approach, the "jury reform" movement views difficult linguistics as only a part of a much larger comprehension problem deriving from jury passivity that results in loss of interest, distraction and boredom.[11]

One writer has asserted that "our legal system pays lip service to the notion that the jury is the trier of fact and therefore functions as a kind of expert in its own domain. However, we do not treat jurors as experts. If we did, we would accord them much greater freedom in certain areas. We would permit their notetaking and question-asking and we would provide them instructions that are not so arcane and convoluted as to be unreadable by most people."[12] The oft-replayed videotape analog is the class that lasts several weeks during which the students listen to concepts foreign to their experience, are not permitted to take notes or ask questions, and then are given a written examination.

Engaging the Jury

The jury reform movement that argues for increased juror participation and activity is a rather recent creature. It has resulted in the creation of commissions, studies and reforms in a number of states. New York has been active. Chief Judge Kaye and Chief Administrative Judge Lippman appointed a committee of lawyers and judges to make recommendations that would enhance the jury process. Among the many committee recommendations were interim summations and instructions, juror notebooks, juror notetaking and furnishing copies of the instructions during deliberation.[13]

Very few states have proceeded beyond the study and recommendation stage. Arizona has, by rule, enacted far-reaching changes on the theory that "active learners make better learners." The Arizona changes include juror questions of witnesses, juror discussion of evidence during the trial, judges' dialogue with jurors

on impasse, permitting summations to follow the charge, giving guidance during deliberations, and juror notebooks and notetaking.[14] Colorado and Utah have also implemented rule changes. Other changes recommended by some commentators include use of illustrations during the instructions and—heaven forfend—having the judge descend to the podium to give the instructions.

While the rule changes have not incurred much resistance in Arizona, retired Arizona Judge B. Michael Dann, a major player in the reforms, is pessimistic about the chances for widespread dramatic alteration of the conventional trial model. Resistance to proposals for greater juror participation and improved communication with jurors, he believes, derives from the investment that lawyers and judges have in the historical and current model of the adversarial jury trial and the inherent distrust of juries that is part of the model.[15] In an era where even the idea of juror notetaking and juror questions often inspires vigorous objection, the prospect of significant change in the current model remains doubtful.

Slow Process of Change

So where are we? If the mass of social science evidence is to be believed, juror comprehension of judicial instructions leaves much to be desired. There also is evidence that language change can have a positive effect on comprehension, but whether language change, standing alone, can substantially alleviate the problem is now questioned.

Although activating our now-passive juries may make some of us feel better because it democratizes the process, whether it will actually increase understanding of instructions and better the quality of justice is a theory that has yet to be proved. In any event, we must await the results in the few places where substantial change has taken place. Considering where the nation is more than a quarter century after the first linguistically oriented comprehensibility studies occurred, these mills grind slowly.

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1. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (citations omitted).
2. 3 U.S. 1, 4 (1794).
3. 156 U.S. 51 (1895).
4. Jerome Frank, Law and the Modern Mind (Peter Smith ed., 1970).
5. Robert P. Charrow & Veda Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306 (1979).
6. Robert F. Forston, *Sense and Non-Sense: Jury Trial Communication*, 1975 BYU L. Rev. 601 (1975).
7. David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 Judicature 478 (1976).
8. A. Elwork, et al., Making Jury Instructions Understandable (Michie 1982).
9. Ann Saxman, *It's Unanimous: Jurors Don't Understand Instructions*, 24 Vt. B. J. 55 (1998).
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11. B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 Ind. L. J. 1229 (1993).
12. Bethany K. Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 Tenn. L. Rev. 701 (2000).
13. Report to the Chief Judge and Chief Administrative Judge (January 1999).
14. B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 Judicature 280 (1996).
15. *See* note 11, *supra*.

Magic in the Movies

Do Courtroom Scenes Have Real-Life Parallels?

BY PATRICIA D. MARKS

As the 100 prospective jurors walked into my courtroom for the next trial, my mind wandered: Does real life imitate film? Are there jurors anxious to find the excuse that will get them off of jury duty as Dennis Quaid did in *Suspect* (that was, until he learned the defense attorney was Cher)? Will a single mom like Valerie Alston in *Trial by Jury* come into the courthouse worried about the danger to her and her son if she serves on a jury? Is there a Pauly Shore in *Jury Duty* angling to escape jury duty on a short trial in favor of a notorious case where the jury is sequestered throughout the trial? Is there someone looking for romance, like Dennis Morgan and Ginger Rogers found in *Perfect Strangers?* Is there a Henry Fonda here about to re-enact *Twelve Angry Men* and turn the tide of jury deliberations?

The entertainment industry has long had a fascination with the law and courtroom drama. A search on the Internet readily discloses hundreds of movies with courtroom themes. The growth of television shows depicting courtroom scenes is extraordinary—*Judge Judy, Judge Joe Brown* and *The People's Court* are flanked by *The Practice, Law and Order* and *Ally McBeal* to name a few. Those depictions, of course, include jurors from time to time, but this article looks at juries and jurors as they are depicted in the movies and suggests that in some way the fictional portrayals may or may not influence the way real jurors look at their role in the system.

Rush to Judgment

The *Oxbow Incident* looks at the earliest form of juries. When a frontier town in Nevada is shocked by news that a respected rancher is murdered, the townspeople decide to take the law into their own hands. The legendary posse served as judge, jury and executioner. If the posse had waited, the members would have learned that the rancher had been injured but did not die and that the sheriff had jailed the persons responsible for the shooting. The film clearly serves as a reminder to viewers that a rush to judgment without all the facts can produce great tragedy. It also demonstrates the importance of a unanimous verdict.

An excerpt from a letter written by one of the persons lynched sums it up nicely:

"A man can't just take the law into his own hands and hang people without hurting everybody in the world. Law is a lot more than words you put into a book, or judges or lawyers or sheriffs you hire to carry it out. It's everything people ever have found out about justice and what's right and wrong." Law is sometimes about juries—12 people coming together and doing their best to make the right decision. The task of a juror is never an easy one.

Prospects for Romance

Perfect Strangers starring Ginger Rogers and Dennis Morgan brings together two strangers who fall in love while being sequestered during a murder trial. Ginger Rogers is divorced. Dennis Morgan is married. Their romance certainly affects their view of the murder case in which the accused is a married man in love with someone else. It is hard to say if jurors will be more willing to serve on a jury after watching this movie in hopes of meeting a Dennis Morgan or Ginger Rogers. Sequestration in a hotel accepting state rates is not as glamorous as the movies portray.

We have to wonder if in real life the romance of jury duty or the promise of entertainment affected the couple who married after they met during jury duty. There was the juror who was delayed by a judge so that a court security officer could propose to her. So jury and romance do have some basis in fact, not just fiction.

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In the movie *Suspect,* Dennis Quaid enters the courthouse and asks the first person he sees, a court deputy, the best way to get off of jury duty. She declines to give him any ideas and he winds up in a courtroom where he meets Cher, an overwrought defense attorney. Suddenly the idea of jury duty is more appealing. He goes beyond the juror role and becomes so engrossed in the trial that he turns into an investigator who works to prove the innocence of the defendant. As his relationship with the defense attorney becomes closer, the story departs reality—but it provides good entertainment.

Jurors are known to ask court staff for a good excuse to get out of jury duty. Often jurors change their view after serving and deliberating on a jury. Juror-attorney relationships during trial are, in my experience, pure fiction.

In the movies you know a good or bad juror when you see one—even if you do not ask a single question. Spencer Tracy tried to excuse a juror without asking a single question in *Inherit the Wind*, the movie version of the Scopes monkey trial, but the judge (portrayed by Harry Morgan) would not let him. The jury selection scenes depict the exercise of both excuses for cause and peremptory challenges. I for one cannot imagine a lawyer who would decline to question a juror, or a judge who would object to a lawyer who chose to be silent.

What is unique in* Twelve Angry Men *is the way the characters of each of the 12 jurors—all male—are developed and their approaches to the deliberations.

The *Rainmaker* plays on the less pleasant image of lawyers and offensive trial tactics, including eavesdropping, phone bugging and disagreeable confrontational tactics. When Jon Voight challenges a potential juror (portrayed by Randy Travis) as untruthful, the juror leaps over the bar and engages in fisticuffs with the lawyer. While the scene is entertaining, there are no reported incidents of a physical confrontation between a lawyer and a juror. However, a recent trial ended in a hung jury when the deliberations became heated and resulted in a physical altercation between jurors.

What discussion of movies and jurors would be complete without a look at *My Cousin Vinny?* Who can forget the glazed-over look on the face of the jurors as Lane Smith (the prosecutor) explains to the jurors that "verdict" means truth as it originates from "old England and our little old ancestors"? Remember the timid female juror who stated that the penalty should be decided by the crime victim's family until the prosecutor explained the facts as "defendants are charged with robbery of a convenience store and in a cowardly fashion, shot the clerk in the back" and the juror blurted out, "Fry him"? She actually continued to serve on the jury. Then Austin Pendleton as the co-counsel with Joe Pesci conducts the opening statement with an extraordinary stammer and he steadies himself on a juror's shoulder as he struggles to get the words out. I am happy to report no real-life comparison for *My Cousin Vinny*.

A Place to Sleep

Pauly Shore was truly amusing in *Jury Duty* as he went from trial to trial seeking the one that would provide him with a place to sleep. He pulled a fake prosthesis from his arm in jury selection for a medical malpractice case involving an orthopedic surgeon. He feigned recognition of a defendant during an embezzlement trial, and finally he posed as the perfect juror in the trial of a homicidal maniac so he could be selected and sequestered for a lengthy period of time.

Pauly Shore is not unique in his clever excuses to be disqualified from jury duty. Throughout New York State there are reports of the tactics employed by jurors to get excused. A news anchor arrived for jury duty in New York City wearing a NYPD t-shirt and carrying a beach chair and portable radio. Another juror reported that he could not come to court because "my summons was taken by aliens." Excuses vary, from "my cat just had kittens and I have to stay home with them for six weeks" to the man in the process of becoming a woman who wanted to know whether he should dress for court as a man or as a woman. In another case involving a defendant charged with driving while intoxicated, a mistrial was called during jury selection when a juror told the court that he and the accused used to drink together.

Valerie Alston portrays a juror in *Trial by Jury.* She endures the rigors of *voir dire* and is retained as a juror in a murder trial even though she describes the defendant as Mafia-related and known as "the Big Spaghetti-o." In an assault trial in upstate New York, a juror who described the defendant as a "Mafia hit man" but assured the court that she would try to set aside her preconceived notions and be fair, did not fare as well. She was not selected as a juror. The case was ultimately reversed because the trial court denied an application for a challenge for cause.[1]

Character Development

I have saved the best for last. Who can forget Henry Fonda's memorable portrayal of a juror in *Twelve Angry Men*? Of course, the accuracy and completeness of the evidence are subject to some challenge, but who would

quibble with a jury being told to "separate facts from fancy" or with the simplified reasonable doubt charge: "If there is a reasonable doubt of guilt you must acquit the defendant. If there is no reasonable doubt you must find the defendant guilty." In fact there are jurisdictions that recommend such a simplified charge.

What is unique in *Twelve Angry Men* is the way the characters of each of the 12 jurors—all male—are developed and their approaches to the deliberations. The accountant was quite reluctant to give an opinion and preferred the comfort of his numbers. The successful businessman, on the surface, was a self-assured juror who made reasonable and logical arguments, but as time went on he began to unravel and show signs of instability. The juror who openly voted guilty because of the defendant's background was the most troublesome. The immigrant watchmaker was provoked to anger by the indifference of another juror. It is remarkable that this film can succeed in providing an intelligent plot and developing 12 distinct and interesting characters. It succeeds in reminding us of the uniqueness of each juror in a real trial and how each personality contributes to the ultimate verdict.

The initial vote is 11 to one to convict but as the discussion progresses it is apparent that the reasons for the votes are not what they should be. One juror votes to convict because his anger toward his son gets in the way of an objective view of the guilt of the defendant, who is charged in the death of his father.

An experiment in the jury room influences some votes. The unique knife is not so unique after all when juror Henry Fonda produces a knife similar to the murder weapon and displays the angle of the death-producing wound. He finds the knife when he goes for a walk in the neighborhood where the defendant lives and where the crime occurred.

While experimentation is not permitted, the books are full of cases where such experimentation has occurred. During the overnight sequestration in one trial, a juror adjusted the lighting conditions and opened the curtains in her hotel room to simulate what she believed to be the conditions of the crime scene, based on the victim's testimony. She then asked another juror to walk in and out of the room, wearing clothing similar in color to that worn by the attacker, so that she could determine whether the victim would have been able to make a reliable identification. The contrived experimentation was not approved by the courts and the conviction was reversed.[2]

Application of everyday experience is acceptable. When the defense counsel suggested that the jurors place the gun in the pocket of their shorts during their deliberations, the court held that jurors are not precluded from applying their everyday experiences and common sense to the issues presented in a trial.[3] Was it contrived experimentation, an application of everyday experience, or a little of both? I'll leave that to you.

As the 100 members of the group before me were reduced to 14 jurors and they prepared for deliberations, I had satisfied myself that jurors would not be influenced by the movies or television shows. And then I saw on the Internet an entry by a juror who was summoned to jury duty in California and immediately did his "homework" by watching the following videos: *Jury Duty, Trial by Jury,* and *Twelve Angry Men.*

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1. *People v. Torpey*, 63 N.Y.2d 361, 482 N.Y.S.2d 448 (1984).
2. *People v. Brown*, 48 N.Y.2d 388, 423 N.Y.S.2d 461 (1980).
3. *People v. Smith*, 59 N.Y.2d 988, 466 N.Y.S.2d 662 (1983).

Successful Innovations Will Require Citizen Education and Participation

By Julia Vitullo-Martin

In many ways, jury reform is a matter of restoration—restoring the illustrious idea of the democratic jury, reviving regard for deliberations by the people, re-establishing civility and efficiency to the courts, reconstructing the physical plant. In other ways, reform means considering new ideas and breaking with the past—re-thinking, for example, the ways that jurors receive information and deliberate.

But whether we're talking about restoring stature to the jury or setting the jury on a new course, this much is clear: Any important innovation will need the assent and cooperation of the American public, a public known for its skepticism about authority and its reluctance to think well of governmental innovation. Innovation in jury service will require that thought be given to discussing the ideas with the citizenry.

Citizen education campaigns have been successful in other areas of public policy, most notably in public health. Many Americans have been persuaded over the last few decades to modify their behavior by smoking less or not at all, eating less fat, drinking less coffee, wearing seat belts, and agreeing to a non-drinking designated driver for leaving parties and bars. Quite a revolution.

The jury process lacks conclusive data and its message is complex. Although the jury is deeply ingrained in American political culture, it is often misunderstood and misjudged by both the press and by the public—even though it is the public's institution. Yet most citizens who actually serve on juries speak favorably of their experience. As Tom Munsterman, director of the Center for Jury Studies at the National Center for State Courts, says, "Jury service is like motherhood. Americans are overwhelmingly for it." And they have been "for it" for as long as statistical jury studies have been conducted, beginning with the national study undertaken in the 1950s by University of Chicago law professors Harry Kalven and Hans Zeisel.

Nonetheless, several realities of life in American courts can impede juror satisfaction. First, 40% to 50% of citizens summoned to service never get selected. Some are happy about this. Many are not. Second, the most satisfied jurors are those who have reached what they regard as a just verdict. But some 25% to 40% of all cases for which juries are impaneled get settled out of court. Perhaps even worse, some 5% to 10% of juries that have sat through the entire case become "hung" during deliberations and are unable to reach a verdict.

The complexity of the American jury will have to be considered in any public education campaign. I would like to see any approach to the American public begin with serious treatment of a few innovative ideas before launching a traditional public relations approach. Public relations is important, but it should follow, not drive, the ideas. Let's begin with who owns the jury.

Whose Jury Is It Anyway?

The answer is clear: It is the people's jury, and communication with the public should keep that in mind. The reality that citizens are often reluctant to serve does not change this basic fact. The jury belongs to the people every bit as much as elections do. Any message to the public should be personal: jury service is *our* means to guarantee *our* system and ultimately *our* freedoms.

The framers of the Constitution saw the jury as both a needed protection for individual rights and a means of ensuring communal support for law and justice. Just as elections are the central mechanism by which the people participate in the legislative and executive branches, so juries are the central means by which the people participate in the judiciary. Professor Akhil Amar of Yale Law

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School calls the jury the lower branch of the judiciary. Even more important, the jury trial is the nation's chief means of ensuring that the morals and standards of the community will be heeded in judicial proceedings.

This does not mean that the framers viewed the people romantically. Second only to their fear of the unbridled power of an oppressive state was their fear of what James Madison called the majority faction, and Alexander Hamilton called the mob. They set up their immensely elaborate governmental structure, with its famous checks and balances, to contain both the power of the state and the power of the people. Do matters sometimes stall in the courts? Do juries slow down proceedings? Do juries often counter what the government, in the form of the prosecutor, desires and thinks is right? Yes, of course. That was the intention.

The jury trial is the nation's chief means of ensuring that the morals and standards of the community will be heeded in judicial proceedings.

This message that it is the people's jury, and that the jury safeguards every citizen's person and property, should be at the forefront of discussions with the public.

What About the "Bad" Jury?

There are two rough categories of "bad" juries: truly bad juries that are not properly selected, and juries that appear to take the law into their own hands.

Among the truly bad juries, the most familiar are the Southern white juries that have purposely excluded blacks. Usually these juries have been inappropriately or unconstitutionally selected, with substantial parts of the community eliminated before or during jury selection. They work within a highly deficient justice system that often includes incompetent or malevolent prosecutors and judges. Even the defense attorneys are sometimes culpable. In such systems, the locally formed jury is unlikely to rise above a justice system intent on pressing the full judicial power of the state in favor of one side. Nor would the usual proposed solution—abolish the jury and turn the trial over to a judge—be of any use in such circumstances.

The second kind of "bad" jury, however, is exemplified by the O.J. Simpson jury, frequently cited as an example of how far the jury has fallen into uselessness, even perniciousness. Here, the argument goes, a clearly guilty but famous and attractive African-American male was declared not guilty by a predominantly black jury that deliberately nullified the law. Others cite the original Rodney King trial as a corollary in which an all-white jury irresponsibly acquitted white police officers of assault against a black man.

The surprising thing is not that juries have sometimes failed. The real surprise is that juries have often broken from their constraints and brought in verdicts—sometimes in immensely difficult times—that rise above local pressures and prejudices. The conviction in the 1960s of the murderers of several civil rights workers is a modern example. From the Kalven and Zeisel study forward, most studies of how jurors think and deliberate have concluded that, on balance, they do very well indeed. The "balance" part is important, because deliberation is a collaborative process that requires negotiation, modification and adjustment.

A study published in 1994 by three developmental psychologists at Columbia University concluded that jurors think in different ways. Some jurors identify "a single, certain truth, rather than weighing alternatives whose truth can never be known with certainty." This approach can undermine the jury. Society is willing, the authors argued, to "entrust an individual's fate to the collective reasoning of peers" because of its "faith in the power and ultimate triumph of reason."

Thus the authors argued that courts should consider systematic juror education to introduce all jurors to critical thinking and reasoning before hearing a case. Nonetheless, the study suggested that the structure of the jury system counters the weak thinking of some jurors by exposing them to the reasoning of others under the mandate of producing a verdict together. The one demographic factor that seemed to correlate with strong reasoning was level of education. The more education, the better the reasoning.

People "Too Important" to Serve

In the very early days of the Citizens Jury Project's Ombud Service, set up in 1995 in New York State Supreme Court by the Vera Institute of Justice, an elegant woman approached and asked to speak to me alone. "I don't belong here," she said. She had handed me her summons showing her 10021 address, so I knew she was a resident of New York and properly called on that score. "Are you not a citizen?" I asked. That wasn't the problem. "I don't belong here with these people," she said. This was the first of many such objections we received in the year before the state Legislature eliminated all occupational exemptions.

The requirement that everyone serve is starting to have substantive effects. Now that highly educated, financially successful, influential New Yorkers serve, they

are pressuring the courts to reconsider procedures that some argue infantilize jurors—such as bans on juror notetaking, questioning, internal discussions prior to formal deliberations, even taking the judge's charge into the deliberation room with them.

They also demand clean courthouses, courteous civil servants and technologically equipped assembly rooms so they can continue working while serving. Jurors have long wanted these courtesies, but only recently have large numbers of jurors with access to top officials served. (And, of course, some of the complaining jurors are the top officials themselves.)

The jury is to the judiciary what elections are to the legislative and executive branches.

Because New York State had the highest number of legislatively mandated exemptions in the nation, it probably has experienced the most dramatic results from its everybody-serves policy. All states should consider following suit. The jury is the people's participation in the judiciary. That means the jury is to the judiciary what elections are to the legislative and executive branches.

People "Too Important" to Vote

The idea of anyone making this argument is laughable. Indeed, important people—particularly government officials—like to be photographed entering or exiting the polling booth. Respect for the democratic process that is encapsulated in voting is deeply, and rightly, ingrained in our culture. Respect for the democratic process ingrained in jury service is more tentative, in part because of the inappropriate disdain that some citizens have shown it.

Thinking about juries in relation to elections—and urging the citizenry to do the same—can be useful on both theoretical and practical grounds. Both forms of democratic participation are episodic. We vote every few years; we are called to jury service even less often. Both systems—elections, including federal elections, and juries, excluding federal juries—are administered at the state and county level. This means that any problems have to be solved by the officials of 50 states and some 3,050 counties. Reform in either system generally comes via traumatic wake-up calls, such as the one provoked by the recent presidential election. Generally we have to be shocked into paying attention and fixing our democracy.

American elections at all levels have been chaotic for years, as illustrated by sloppily run polling places, surly election officials, excessively long lines, old and broken-down machines, missing or damaged ballots, and occasional old-fashioned fraud. Twenty years ago, the American jury, which is also an episodic experience that is usually administered by county governments, was also a mess. The jury summonses, drawn up by counties just as ballots often are, were often badly designed and frequently illegible. The technology used to determine juror lists was primitive, full of duplications and errors. Most of these messes have been cleaned up in New York, as well as in Arizona, New Mexico, Massachusetts, Michigan, Washington, D.C., and many other jurisdictions.

The impetus for reform was often citizen unhappiness. States that conducted public hearings on jury service were often shocked by the public's antagonism. That antagonism has been turned around in many states, and one result is a reinvigorated and newly efficient jury system. Thus, discussions initiated by judicial officers with the public can be undertaken from a position of strength—and confidence in accomplishments well done.

"Jury Pride"

After the Jury Summit, the American Judicature Society (AJS) convened a group of 20 conference participants to discuss (1) what could be done about the high rate of jury service no-shows in many jurisdictions, rates high enough to jeopardize some trials and cause serious delays in many others; (2) what is known in the research field about jury happiness or unhappiness; and (3) what could be done to improve citizen satisfaction with juries. AJS had a particular strategy in mind—a national effort on jury pride.

This initiative would be part of a proposed Jury Center headquartered at AJS, whose fundamental mission is to strengthen the American justice system. The Jury Center would focus on jury pride while addressing the concerns of the judiciary, academics, attorneys, the courts, civic organizations and the general public on issues about the justice system.

As the Council for Court Excellence stated in September 1999 when it first proposed a jury pride project, no one in the judicial system had as a primary responsibility the duty of advocating on behalf of jurors or working systematically to change the negative public view of jury service to a positive one. Many parts of the judicial system—perhaps even most—have no way of knowing what is happening elsewhere. Only the most celebrated reforms come to national attention now. AJS points out that the Arizona courts invited researchers to evaluate the effects of different juror treatment techniques and, as

a direct result, garnered a deserved reputation for innovation.

Courts are, by culture and judicial temperament, isolated and careful institutions. They do not naturally take to opening their procedures to outside scrutiny. In practice, although jurors are citizens, they are also outsiders to the courts in the sense that they are not regular employees or participants.

The Agenda Ahead

All efforts to persuade citizens that the jury system is important, just and efficient should work hand in hand with efforts to make sure that it is. The New York State legislation of January 1996 that raised juror pay, modified terms of service, and eliminated professional exemptions marked the beginning of serious implementation of jury reform. If such deeply entrenched but parochial practices as the permanent qualified list, unsupervised civil *voir dire* and mandatory sequestration of jurors for all felony trials can be reformed in five short years, much more can be done.

Here are 10 recommendations for change that could make a difference:

1. Reward cheerful, efficient jury clerks. Hire, train, and promote jury clerks based on their treatment of jurors—that is, on their intelligence, productivity, patience and good temper. The assembly room clerks are the front line of the judiciary.

2. Reorient court officers to regard efficient, congenial interactions with jurors as part of their job. Court officers are the first court representatives that jurors encounter.

3. Do whatever is necessary to curb abuses of jurors by lawyers and judges. Some judges routinely abuse jurors by keeping them idle while completing unrelated court business. Others delay jury selection to obtain fresh jurors when previously excused but qualified jurors are available. Many judges keep jurors waiting in the hallways without chairs or good ventilation for hours at a time.

4. Reconsider all regulations regarding juror education and deliberation. Should jurors be permitted to take notes? Ask questions? Discuss the case with one another? Have a copy of the judge's charge with them during deliberations?

5. Monitor juror exit questionnaires for specific complaints. These questionnaires are a wealth of information. As problems are uncovered, they should be addressed.

6. Upgrade court technology and systems. Schedules for resources and personnel should be run on computer calendars so that information can be readily accessed and cross-checked.

7. Expand and upgrade state and county informational phone lines. Install sufficient lines to handle calls. Advertise 1-800-NYJUROR so that jurors understand they can reschedule their service to a convenient date.

8. Return the maintenance and capital rehabilitation of the courthouses to the state, or establish a 501-C-3 board, like that of the Metropolitan Museum of Art, to oversee the buildings. The current situation is cumbersome and wasteful, with the face of justice becoming shoddier by the day and no solution in sight.

9. Treat the courthouse as part of the community. In many towns throughout the nation the courthouse is the town's most magnificent building—centrally located, beautifully landscaped, lovingly maintained, and the center of communal activities.

10. Reassess the culture of law. This is a recommendation that emerged from the report of the Jury Project. All the improvements in jury service will count for little if the system continues to be profligate with juror time. Reforming the culture of law to make it attentive to juror needs will be the most important improvement of all.

The nation's founders envisioned the jury as a means of ensuring that the morals and standards of the community would be heeded in criminal and civil trials—and as a system of educating citizens about the law and the judiciary. Most Americans think the founders set up a pretty good system, and agree with criminal defense lawyer Barry Sheck that the jury is "the last great democratic institution in our country."

Yet as the Jury Project warned ominously in March 1994:

> If the constitutional right to trial by jury is to be held inviolate forever, members of the public must step forward in response to the summons to serve. But jurors are all too often treated, not as necessary, but as a necessary evil by the lawyers, judges, court officers and clerks who inhabit the system every day. We insiders need to put ourselves in the shoes of these outsiders, to accommodate their schedules and to treat them with the respect, consideration and courtesy they deserve. Otherwise, we will never improve the public's perception that jury service is to be avoided or evaded at all costs, and to be endured rather than enjoyed when avoidance does not work. Unless we do something to change that perception, the day will come when the inviolate right to trial by jury will be violated because there will not be enough jurors. It is that simple.

This is as good a statement as has ever been written on the crucial connection between public awareness and the operation of the courts. If we are to keep the right to trial by jury inviolate—as the Constitution charges—members of the public must serve willingly and attentively, and court officials must treat them fairly and courteously. A national project on jury pride and citizen education may help us get there.

When Employees Are Called

Rules Set Standards for Employers And Allow Delays in Some Cases

BY MARY C. MONE

Having been an employer myself for many years, I can appreciate an employer's being less than thrilled to learn that an employee has just received a jury summons. There is the inconvenience, unpredictability of the duration of service, possible need for alternative staffing arrangements and potential costs. Those are legitimate concerns, but they are also necessary consequences of a process vital to our justice system.

While the largest employers may address their concerns by issuing well-delineated, formal jury duty policies drafted by counsel, others may be unaware of what a jury summons means in the employer-employee context. An informal survey of jury commissioners and the calls received on the Juror Hotline (1-800-NYJUROR) show that many employers are unaware of their legal obligations—until they hear from a jury commissioner or trial judge.

This special issue provides a good opportunity to see how the law is being applied to common employer-employee situations, relying on the court system's published and unpublished interpretations to fill the gaps in statutory and case law.

New York Judiciary Law §§ 519 and 520 address absence from work and juror compensation. An employer notified in advance must allow employees to take time off for jury duty and may not penalize or discharge employees because of their absence from work.

The court system has interpreted "employees" to mean all employees on the payroll, but not including owners (such as partners or sole proprietors). Temporary workers paid by a "temp" agency are agency employees.

An employer is not required to pay wages during jury duty absence unless the employer has more than ten employees, in which case the employer must pay the first $40 of wages for each of the first three days of jury service that occur on a regular workday.

Why Can't My Employee Get Out of Jury Duty Like Everyone Else?

Jury duty is often compared to civic duties such as voting and military service. But voting and military service are voluntary while jury duty, like paying taxes, is mandatory. Skipping jury duty, like skipping tax obligations, can result in penalties.

All eligible citizens must serve when called—including formerly exempt individuals such as doctors, lawyers, judges, mayors and governors. Last year, more than 600,000 New Yorkers served on jury duty.

With the elimination of exemptions came a law requiring the court system to issue uniform excuse and postponement guidelines, which are now in place. Avoiding jury service, except for the first postponement, requires a demonstrable reason, and the court must follow those written guidelines in evaluating the request. Nor is it possible to avoid jury service simply by getting off the voter registration list. Voter lists are still a source, but so are driver's license, tax, unemployment and welfare lists. The court system's goal is to reach everyone.

Employees and employers alike who try to ignore a jury notice will find that the jury system computer does not easily forget them. Jury commissioners now routinely follow up recalcitrants, and those who ultimately fail to respond are subject to a fine and a civil judgment.

To balance the stricter enforcement of jury service, measures have been adopted over the past few years to help ameliorate the burden on employees, employers and their families. Jury service is shorter and less frequent than ever before, jury fees are higher, and jurors have the right to a first-time postponement to a date of their own choosing.

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Allowing the Employee Time Off for Jury Duty

Judiciary Law § 519 unambiguously prohibits an employer from penalizing or discharging an employee "on account of absence from employment by reason [of] jury service," provided the employee notifies the employer "prior to the commencement of a term of service." Because summonses are normally mailed two to three weeks before the service date, a diligent employee giving notice immediately would be giving an employer a reasonable amount of time to make accommodations. The court system's publication, *Juror's Handbook*, tells jurors to notify the employer "upon receipt of the summons."

Having a written policy about jury duty absences and compensation . . . can avoid misunderstandings and encourage cooperation between employer and employee.

Some employers have established notice procedures in employee manuals and the like—covering such matters as when, how and where to send the notice. That sort of policy can remind employees of their responsibility and assure the employer sufficient lead time to minimize inconvenience.

Advance notice is little help when a jury summons calls for the appearance of an employee of a retail shop in the Christmas season, a tax preparer in early April, a manufacturer meeting a shipping deadline or a lawyer about to begin a trial. In these situations, recent jury reforms making service more convenient for the juror also benefit the employer.

More particularly, jurors are allowed one automatic postponement for up to six months. When an employee's absence "couldn't come at a worse time," the employee can opt—by telephone—for an automatic postponement and even specify a preferred future date within the next six months.

After taking an automatic postponement, the juror will be required to appear on the adjourned date, and further postponements will be more difficult to get. Jurors requesting an additional postponement or excuse must provide medical documentation or demonstrate that jury service will cause "undue hardship or extreme inconvenience to the applicant, a person under his or her care or supervision, or the public." These guidelines assure fairness to the jurors who do serve, as well as availability of sufficient jurors to meet the court's need.

How Long Will My Employee Have to Be in Court?

It is virtually impossible to know in advance how long service may be, with the exception of grand jury service. For the 25,000 grand jurors who serve annually, the term of service is specified in advance and varies by locale.

Length of service, of course, depends on several factors, but recent jury reforms are helping to reduce the time required. In most counties, potential jurors are placed on call for one week and, once called in, are obligated to serve under the one-day/one-trial system. (If not selected for a jury or involved in *voir dire* by the end of the first day, the potential juror is excused. Otherwise, the potential juror sits through the remainder of the *voir dire*, and, if selected, until the completion of the trial.)

Whether before or during *voir dire*, the judge or attorneys typically tell jurors the estimated length of the trial. On average, civil trials range from three to five days; criminal trials from five to ten days.

Even when a juror has been selected to hear a case, all counties have call-in systems that can obviate a trip to the courthouse or minimize waiting time. Depending on geography and the nature of the job, they may also permit the juror to go to work from time to time during jury service.

Good news for the employer and employee is that jury service in a state or federal court, even if it is for only one day and the juror is not empaneled or selected, usually disqualifies the juror for service in the state courts for four years.[1] Both grand and petit jurors who serve for more than 10 days are disqualified for a minimum of eight years. Federal district courts in New York will also consider recent state jury service in determining ineligibility.

Employee Compensation During Jury Service

The state pays jurors $40 for each day of attendance in court[2], with exceptions for those who are employed.

The first exception is that it does not pay the $40 to those whose employers pay them during jury duty absence, which many do under a personnel policy, benefits plan, union contract, employment agreement or the like.

The second exception, mentioned above, is that all employers with more than ten employees are required to pay the first $40 of wages for each of the first three days of jury service that occur on regularly scheduled workdays. (The court system pays the difference up to $40 for employees who earn less than $40 a day.)

Verifying That an Employee Has Actually Served

If on the last day of service an employee requests verification of the dates and times of service to give an employer, the court staff will provide it immediately. If the employee forgets and asks later, it is likely to take longer to get the verification, so employers may want to re-

mind employees to ask for it before they leave the courthouse.

Are You Unlawfully Penalizing Employees?

Discharging an employee for absence due to jury service is, of course, expressly prohibited by law. Fortunately, few complaints about terminations have been referred to the court system and most were either resolved amicably or not substantiated.

The statute is not specific about what constitutes "penalizing" employees—beyond violation of the rules for payment of $40 by employers with more than ten employees. But the court system and jury commissioners agree that certain actions are penalties.

Compelling an employee to charge jury duty absence against vacation or personal time is a penalty, although the employee is free to choose giving up vacation and personal days over losing wages. Forcing an employee to make up "lost time" while on jury duty is a penalty. Penalties can take many other forms, such as paying wages to day shift employees on jury duty but requiring night shift workers to work after spending the day in court, changing an employee's work schedule to make jury duty fall on regular days off, and denying the employee a promotion because of time spent on jury duty.

Employees who claim they are being penalized often call the court for guidance. Once made aware of the rules, most employers will follow them. Ultimately, however, the New York State Attorney General's Office is responsible for prosecuting employers who penalize employees for jury service. A bill pending in the Assembly would add civil penalties under the Labor Law, in addition to providing a private right of action for employees to sue the employer for penalizing or discharging them for jury service.

What Can Employers Do to Help Themselves?

For employers, having a written policy about jury duty absences and compensation is helpful. It can avoid misunderstandings and encourage cooperation between employer and employee.

Unfortunately, jurors occasionally report that their employers discourage jury service by telling them to throw away the jury summons, instructing them to "get out of" jury duty by unjustifiably demanding that they get postponements, or suggesting they say something during jury selection that will disqualify them. That not only is poor citizenship (and can involve perjury), but also creates a greater likelihood that later action by the employer affecting the employee will be viewed as a penalty for jury service.

Several resources are available to help employers with questions or problems—the jury commissioners themselves, who welcome inquiries from employers; the court system's Web site for jurors, www.nyjuror.com; the *Juror's Handbook* available from the jury commissioners and at the juror's Web site. The court system also anticipates publishing a brochure for employers and employees with more detailed guidance. Finally, nothing is more informative to employers, managers and supervisors than performing their own jury service.

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1. The disqualification period for Town and Village Justice Courts is currently two years.
2. The $40 fee is not paid to any jurors in Town and Village Justice Courts, whose compensation, if any, is set by the locality. The court system has proposed legislation that would pay them, at state expense, at the same rate as jurors in all other state courts.

Educating Future Jurors

School Program Highlights Jury Service as Fundamental Right

BY GREGORY S. WILSEY AND EMIL ZULLO

Trial attorneys face the challenge of picking a jury, attempting to create a panel that will best listen to a client's case and is most likely to produce the desired verdict. But imagine having the added ability to influence how all future jurors are trained. What would you teach? What skills, attitudes, and knowledge would you instill in students, regardless of whether you are a defense, plaintiff's or prosecuting attorney?

That imaginary scenario reflects a real function of the New York State Bar Association's Law, Youth and Citizenship (LYC) Program, which works in partnership with the New York State Education Department in setting curriculum mandates and providing resources, training, and student legal learning experiences designed to teach the vital legal and citizenship knowledge and skills needed by citizen jurors. LYC's efforts have focused on providing a continuing stream of content information and training workshops on the history, purposes, and importance of juries in order to reach the widest possible audience among educators.

Teachers are the key conduit through which students' knowledge and intellectual skills regarding juries and the justice system are built, and thus their own knowledge and ability to engagingly impart content and hone skills are crucial to the competence of prospective future jurors.

The Historic Rationale

The challenge of teaching young citizens the skills and content knowledge necessary for effective service as jurors is as old as the nation itself. The prime purpose of universal public education was, and is, to prepare citizens to take up the roles, rights, and responsibilities defined by the Constitution without which no republican government could "long endure."

The Founders, while determined to erect governmental structures that would best survive the reality of human vices and avoid the twin threats of tyranny and anarchy, also thought it fundamentally necessary to increase individual virtue, which itself came from knowledge, while knowledge flowed from education.[1]

By the advent of the Constitution, Americans regarded two safeguards protecting liberty against governmental power as preeminent—the right of voting for representative legislatures and that of trial by jury. The latter right is best understood in the context of how often colonial (white) males served on juries (studies suggest dozens to hundreds of times). During that era, the juries usually decided questions of law and fact, and thus to a great degree local juries themselves served to define the actual force of colonial law.[2]

This reality is reinforced by the Founders' understanding of the people as sovereign, expressed in the Preamble to the Constitution: "We the People," and in the ratification process that rested on popularly elected ratification conventions. Thus, in both the new Constitution's basic conceptions of who was sovereign and in traditional jury practice, the people were seen as the theoretical source of ultimate power and the practical wielder of that same power when acting as jurors.

This historical reality is important, because it suggests that we too often sell the education of future jurors short when we focus on jury service as a duty, rather

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than teach jury service as a fundamental right. Indeed, one can argue that jury service, even more so than casting a ballot, is the time when citizens most act with the sovereign power that the Constitution recognizes as theirs. Thus we can better understand the Founders' determination to create a well-educated citizenry, capable of preserving the nation's liberty through their informed vigilance, ready to decide their nation's future through their ballots for representatives, and trained to be trusted with the ultimate questions of personal liberty and personal property as jurors in criminal and civil cases.

Obviously, over time we have managed to lose the immediate personal sense, universally understood in the revolutionary and new nation period, that sovereign citizens sitting as jurors are a fundamental protector of the individual's rights and a basic check on the power of government to deprive individuals of liberty and property. Instead of celebrating the right to serve as a juror, it has been redefined as a duty and too often seen as a burden. Effective education needs to address and redress this shift in focus, and thus create a more positive understanding of jury service as a right.

State Content Standards

This historical understanding is vital in thinking about how to educate young citizens for jury service. The focus of such efforts can easily be too narrowly defined, looking at the specifics of jury service itself and missing the central abilities and wider knowledge that all jurors should have.

The education of young citizens to be future competent and well-informed jurors is affected by virtually all social studies instruction. New York's Social Studies Standards, of which there are five, include one devoted to United States and New York State history and one focused on citizenship education. These are further expanded in the state's *Social Studies Resource Guide with Core Curriculum*, which provides K-12 outlines of mandated content. These standards and content form the arena where students' analytical skills are daily sharpened.

Thus social studies instruction should enable "students at all levels to use a variety of intellectual skills to master content, probe ideas and assumptions, ask and master analytical questions, take a skeptical attitude toward questionable arguments, acquire and organize information, evaluate data, draw conclusions, and view the human condition from a variety of perspectives."[3] That directive to social studies teachers is one that, when implemented day after day, builds the habits of mind that the Founders hoped for and we still desire in good jurors.

Within these broad confines, a great deal of information is imparted to deal directly with the justice system and jury service. At appropriate levels of understanding, students at the 4th, 5th, 7th/8th, 11th, and 12th grade levels get significant instruction on the history of the state; at 4th, 7th/8th, and 11th grades, the nation; and at 4th, 5th, 7th/8th, 11th, and 12th grades, the structure of government and basic democratic values and their roles, rights, and responsibilities as citizens. Specific examples include direct reference to jury service as part of effective, informed citizenship in grade 4; full exploration of the revolutionary and new nation period, including significant focus on the Constitution and Bill of Rights in grades 7 and 8; in-depth study of the Constitution and 32 required Supreme Court cases in grade 11; and a one-half year intensive study of U.S. government, including specific instruction on the details of jury service, in grade 12.

LYC Teacher Training

The maintenance and expansion of this law-related content is the vital first step, and one the Law, Youth and Citizenship Program assisted the New York State Education Department in preparing when the new standards and core curriculum were being developed (1993-99).

Ultimately, effective instruction rests on the expertise, in content and methods, of the teaching staff. While the LYC Program has provided training to thousands of teachers at our statewide conference and local workshops over the past two decades, including many sessions specifically on the justice system and jury service, a massive retirement surge is now taking place. Estimates are that 50% or more of the state's 12,000 social studies teachers will retire within the next three to five years. With them go a wealth of content mastery and effective law-related education techniques acquired over long careers.

To meet the greater needs of a younger teacher force, The New York Bar Foundation has funded, through the Law, Youth and Citizenship Program, three teacher training workshops for this summer, on Long Island, in the mid-Hudson Valley, and in Rochester. LYC hopes to reach at least 200 educators, with between 18-30 hours of intensive instruction in law-related content and methods, including a segment on the jury system. That effort is in addition to the more than 3,000 person-hours of training provided to some 500 teachers at the 2000 Statewide Conference on Law-Related Education and at the annual conference of the New York State Council for the Social Studies. Those ongoing efforts will continue, as the LYC seeks to strengthen the content knowledge of new and experienced teachers.

Print and Web Resources

Beyond direct training, it is important to provide teachers with model resources that directly help them teach about the law, the court system, and jury service. The LYC program has provided numerous publications to this end, including *Living Together Under the Law* for elementary teachers; *The Noblest Institution: Teaching About the Right to Trial by Jury in New York; The Law Studies*, "Working for Justice," on the role of the major players in the courtroom; *The Courts of New York*; and *United States Supreme Court Decisions: A Case Study Review for Teachers and Students*.

Both *Living Together Under the Law* and *The Noblest Institution* are examples of resources that provide specific teaching strategies based on the proven, effective methods of law-related education. In these, students are given the chance to learn by doing, through class debates, moot court, mock trial, and other hands-on learning experiences. Most of these resources can also be accessed directly on the LYC portion of the NYSBA Web site at www.nysba.org/lyc/LYC.html.

Experiential Learning

A common thread throughout the training, resources, and student-centered learning activities designed by LYC is the emphasis on promoting student analysis, discussion, and decision-making within the learning context. It is crucial to engage students in modeling those very skills that they will need to use in making their own personal decisions, in analyzing political and societal news, and in making appropriate and just decisions as jurors.

One model strategy employs a combination of in-class preparatory instruction on court procedure and the role of the jury with students sitting as a model jury during actual bench trials. Obviously all parties and the judge must be in agreement to this procedure. The student jury receives instruction on the law from the judge, and then deliberates, understanding that their verdict is for their education only. A debriefing by the judge adds to the educational value of this experience. While the logistical issues to be arranged are substantial in the in-court exercise, a classroom mock trial, with students as jurors, can provide some of the same benefits. Teachers would welcome attorneys or judges willing to assist with either exercise.

The LYC's most intensive experience for future jurors is participation in the statewide High School Mock Trial Tournament. While students learn courtroom procedure and a segment of the law, they are challenged by a complex fact pattern which tests and hones their analytical skills—the same ones desired by the state's social studies mandates and expected of jurors. Students who participate in mock trial gain increased understanding and respect for the justice system; the roles of attorneys, the judge and witnesses; and are well prepared for jury service.

The challenge of citizenship education to help students grasp the importance of knowing and practicing their roles, rights, and responsibilities as citizens includes guidance on their vital roles as jurors. Attorneys can play a major part in improving the quality of students' knowledge. Some 1,500 attorneys and judges do this each year in the mock trial tournament by volunteering to share their knowledge in a classroom. Teachers have a myriad of specific civics and legal content to impart, and a "Lawyer-in-the-Classroom" visit, or a visit to a courtroom or by a judge, can leave a lasting positive impression.

The Founders and You

Our nation's Founders feared for the health of the Republic because they believed that virtue was difficult to instill while personal and societal vices were always in too great abundance. Their hope lay in educating each new generation of citizens to seek and evince character traits—honesty, trustworthiness, fairness, personal responsibility, respect for others, self-control, tolerance, and caring—that would well serve both the individual and the body politic.

The state's movement to raise the level of instruction in civility, citizenship, and character education, as directed by the Project SAVE law, is another opportunity to positively reinforce ongoing teaching which strengthens students' analytical skills and their personal citizenship attitudes, and instills the positive character traits necessary for the creation of willing, thoughtful future jurors. Creating future jurors we each would want to sit in judgment of us has never been an easy or small task. While much is being done, attorneys have a unique wealth of knowledge and practical experience that can be invaluable when shared with educators and young citizens.

Those interested in volunteering may do so directly at a local school or call the LYC Program at 518-474-1460 for information on how to get involved through the Lawyer-in-the-Classroom program or on how to receive program materials.

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1. Gordon S. Wood, The Creation of the American Republic, 1776-1787, 120 (1969).
2. Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution, 294-302 (1997).
3. New York State Department of Education, Social Studies Resource Guide with Core Curriculum, 4.

"[No] freeman shall be seized, imprisoned, or dispossessed…excepting by the judgment of his peers."

Magna Carta (1215)

The concept of a trial by jury is centuries-old. As part of LYC's educational effort, sample quotations, such as those below, have become part of the materials used by the program for teaching youth about the important role juries play in society.

"Every new tribunal, erected for the decision of facts, without the intervention of a jury . . . is a step towards establishing aristocracy, the most oppressive of absolute governments."

Sir William Blackstone (1765-1769)

"I consider trial by jury as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution."

Thomas Jefferson (1789)

"Trial by jury in civil cases is as essential to secure the liberty of the people as any one of the preexistent rights of nature."

James Madison (1789)

"The jury, which is the most energetic means of making the people rule, is also the most efficacious means of teaching it how to rule well."

Alexis de Tocqueville (1830)

". . . there can be no legal right to resist the oppressions of the government, unless there be some legal tribunal, other than the government, and wholly independent of, and above, the government, to judge between the government and those who resist its oppressions . . . ."

Lysander Spooner "An Essay on the Trial by Jury" *(1852)*

". . . [T]he institution of trial by jury especially in criminal cases has its hold upon public favor chiefly for two reasons. The individual can forfeit his liberty to say nothing of his life only at the hands of those who, unlike any official, are in no wise accountable, directly or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came. Moreover, since if they acquit their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove; and this introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions. A trial by any jury . . . preserves both these fundamental elements and a trial by a judge preserves neither . . . ."

Judge Learned Hand (1942)

"The jury has come to stand for all we mean by English justice, because so long as a case has to be scrutinized by twelve honest men [and women], defendant and plaintiff alike have a safeguard from arbitrary perversion of the law."

Sir Winston Churchill (1956)

"The purpose of a jury is to guard against the exercise of arbitrary power—to make available the common sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge."

Justice Byron White (1975)

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment V (1791), The United States Constitution

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Amendment VI (1791), The United States Constitution

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Amendment VII (1791), The United States Constitution

"The trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."

Article III, Section 2, Clause 3, The United States Constitution

"For depriving us, in many cases, of the benefits of Trial by Jury."

The Declaration of Independence (1776)

"The respective colonies are entitled to . . . the great and inestimable privilege of being tried by their peers of the vicinage."

Declaration of Rights of the First Continental Congress (1774)

Teach Your Children Well

Following is one of several lesson plans from LYC's curriculum on juries. LYC provides such teaching materials to schools in an effort to educate students on how juries function within the American legal system.

ACTIVITY III

THE JUDGE, THE LAWYER AND THE JURY

Objective:

Students will have a clearer understanding of the roles a judge, a lawyer and a jury play in our criminal justice system.

Materials:

A judge or an attorney from your community as well as the Opinion Chart.

Time:

One or two class periods.

Method:

Individual classroom work along with a guest speaker.

Procedure:

Students are given the Opinion Chart and asked to fill it in based upon their honest beliefs. Once this task is completed, the results should be tabulated on a single chart. Students should briefly discuss the rationale behind their choices before hearing from the guest speaker.

The speaker should be encouraged to comment on the results of the Opinion Chart as well as speak to the nature of the roles each plays in the criminal justice system.

The teacher may want to do the chart one day and have the guest speaker as a follow-up.

It should be noted that some statements are repeated in order for the student to be more specific about exactly whose role is supposed to perform what function.

OPINION	AGREE	DISAGREE
1. Juries should make sure that justice is accomplished.		
2. Juries should not be allowed to know anything about previous similar acts committed by a criminal defendant.		
3. Jurors should be only those who know nothing about a case other than what they learn during a trial.		
4. Juries should be allowed to disregard the judge's instruction if they want to.		
5. Juries should be allowed to ask questions at some point during the rial before they enter deliberations.		
6. Jurors should never be dismissed during voire dire unless there is a good reason for doing so (no paremptory challenges.		
7. Juries should make sure society is protected.		
8. Juries should make sure the law is upheld.		
9. A lawyer should try to win a case even if they know their client is guilty.		
10. A lawyer should protect the interest of society.		
11. A lawyer should provide legal services free of charge if a client can't pay for it.		
12. A lawyer's job is to make sure justice is done.		
13. A judge should make sure guilty people are not found innocent.		
14. A judge should make sure society is protected.		
15. A judge should change the decision of the jury if he or she believes it is in the best interest of justice.		
16. Only the judge should decide who sits on a jury.		

Patricia K. Bucklin

A Profile of our New Executive Director

The New York State Bar Association has named Patricia K. Bucklin of Slingerlands, former director of public affairs for the state Office of Court Administration, as its Executive Director. She is the first woman to hold that title and becomes only the third executive director in the NYSBA's 125-year history.

Bucklin's new position gives her overall management responsibility for staff operations at the Association's headquarters in Albany. She will be responsible for the development and execution of strategic and tactical plans designed to implement the programs and policies adopted by the House of Delegates. The 235-member House is the state bar's decision and policy-making body.

As director of public affairs for the state Office of Court Administration she advised and assisted Chief Judge Judith S. Kaye and Deputy Chief Administrative Judge Jonathan Lippman on legal and policy issues.

Bucklin was responsible for intergovernmental relations, supervised staff of the Office of Public Affairs, and exercised oversight of media relations, community outreach, education programs, and special events such as the Law Day observance.

She has been employed in various capacities by the state Office of Court Administration since 1990. She served as special counsel to the Chief Administrator, providing policy advice on a broad range of issues including the provision of pro bono legal services for the state's poor and disadvantaged.

From 1990-1998 she served as special counsel to the Chief Administrator and intergovernmental affairs counsel. As the judiciary's point person for its legislative program, she worked closely with the governor's office and legislative leaders to ensure the success of the court's legislative initiatives.

In 1987 she became first assistant counsel to the governor where she supervised the daily operations of the Governor's Counsel's Office and the workproduct of the attorneys and support staff. One of her assignments was to conduct annual background checks and financial disclosure reviews on more than 1,800 prospective gubernatorial appointees.

From 1983-1987 she was assistant counsel to former Governor Mario M. Cuomo. She began her career in 1979 at the Court of Appeals moving progressively through such positions as law assistant, chief law assistant, and finally, deputy consultation clerk to the court. In that role, she served as a confidential law assistant to the judges of the Court of Appeals in their private consultations about the disposition of appeals and motions, reviewed and summarized cases prior to oral argument and reviewed court opinions prior to court consultations and public release of decisions.

She is a magna cum laude graduate of Niagara University (1976), and earned her law degree from Syracuse University College of Law (1978) where she was editor of the Law Review. Bucklin replaces William J. Carroll, who retired after more than 27 years of service to the Association. She resides in Slingerlands with her two daughters, Kourtney (7) and Ashley (5).

Meet Your New Officers

President

Steven C. Krane, a partner in the Litigation and Dispute Resolution Department of Proskauer Rose LLP, New York City, has been named president of the New York State Bar Association (NYSBA). He was chosen by the House of Delegates, the Association's policy-making body, at the organization's 124th Annual Meeting in Manhattan last January. He assumed office on June 1, 2001, the youngest person ever to hold that post.

As president-elect, he chaired the House of Delegates and the Special Association House Committee, and co-chaired the President's Committee on Access to Justice, which was formed to help ensure that civil legal representation is available to the poor. He is chair of the Committee on Standards of Attorney Conduct and the vice-chair of the Special Committee on the Law Governing Firm Structure and Operation. He is a member of the Membership Committee, the Committee on Mass Disaster Response, the Electronic Communication Task Force and has been a member of the House of Delegates since 1996. While serving as chair of the Special Committee to Review the Code of Professional Responsibility (1995-2000), Krane shepherded major changes in the Code.

A sports law practitioner, Krane has litigated major cases for the National Hockey League, Major League Soccer and the National Basketball Association. He also regularly represents law firms and individual attorneys in disciplinary and professional liability matters.

Krane has written and lectured extensively on attorney ethics issues and, for several years, taught professional responsibility at Columbia University School of Law. A resident of Pound Ridge, Westchester County, Krane is a graduate of SUNY at Stony Brook (1978), where he was elected to Phi Beta Kappa, and earned his law degree from New York University School of Law (1981). He served as a law clerk to then New York Court of Appeals Judge Judith S. Kaye (1984-1985).

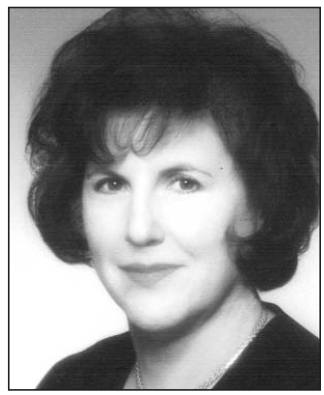
Treasurer

Frank M. Headley, Jr., a partner in the Scarsdale and Bronxville law firm of Bertine, Hufnagel, Headley, Zeltner, Drummond & Dohn, was re-elected treasurer of the New York State Bar Association (NYSBA). He began his fourth term on June 1 of this year.

A graduate of Denison University, Headley earned his law degree from Fordham Law School, where he was a member of the *Fordham Law Review*.

He has served as a NYSBA vice-president, Ninth Judicial District, and a member-at-large of the Executive Committee. Headley is a past president of the Westchester County Bar Association, Westchester County Bar Institute and Legal Aid Society of Westchester County.

President-Elect



Lorraine Power Tharp, a principal in the Albany law firm of McNamee, Lochner, Titus & Williams, P.C., has been named president-elect of the New York State Bar Association (NYSBA) as of June 1 of this year. Tharp will chair the House of Delegates and co-chair the President's Committee on Access to Justice. She becomes NYBSA president on June 1, 2002.

A graduate of Smith College, Tharp earned her law degree from Cornell Law School. She has served as a member of the state bar's Executive Committee since 1994, and served four terms as its secretary. She is a past chair of the Real Property Law Section and a past member of the Committee on Women in the Law. Tharp was the project chair of the subcommittee that drafted the NYSBA's report and model policy on sexual harassment. She also is a member of the state Continuing Legal Education Board.

Tharp joined McNamee, et al. in 1978, became one of its principals in 1981, and has served as a member of its Management Committee.

Elected to the American College of Real Estate Lawyers, Tharp has lectured and written extensively in the area of real estate law practice for such organizations as the NYSBA, National Business Institute, and New York University Real Estate Institute programs.

Tharp lives in Saratoga Springs with her husband Russell, who practices law in Glens Falls. She is active in community affairs in both Albany and Saratoga, and currently chairs the Saratoga Springs Planning Board. She also has served on the boards of directors of Equinox, Leadership Saratoga, Saratoga County Arts Council and Home Made Theater.

Secretary

A. Thomas Levin, a shareholder and director of the Mineola law firm of Meyer, Suozzi, English & Klein, P.C., has been elected secretary of the New York State Bar Association.

Levin served on the NYSBA's Executive Committee as 10th Judicial District Vice President (Suffolk and Nassau Counties), a position he held since 1998. He previously served on the committee as a member-at-large (1995-1998). Levin has served as a delegate to the House of Delegetes for more than 13 years. He currently chairs the Association's By-Laws Committee; he chaired the Task Force to study "Pay-to-Play" concerns and the New York State Conference of Bar Leaders.

The author and editor of numerous articles and publications on various legal subjects, Levin frequently lectures on such issues as professional ethics, law office management and municipal, environmental and civil rights law.

Levin graduated from Brown University and earned his J.D. and LL.M. degrees from New York University School of Law.

NYSBA**CLE** **Publications**

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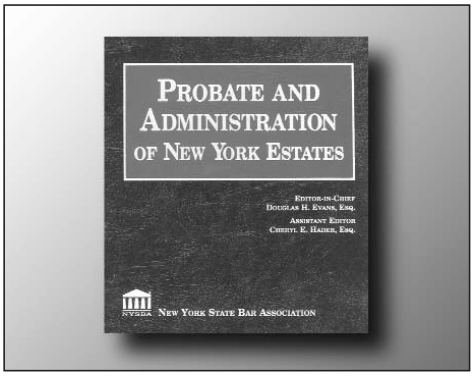

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About the 2001 Supplement

The 2001 cumulative supplement brings the extremely well-received first edition up-to-date. The chapter on the federal estate tax has been completely revised and includes a section on the new New York estate tax procedures. The other chapters have been extensively updated to reflect caselaw and statutory changes that have occurred. Future supplements will cover what are sure to be many more changes to the estate tax.

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Language Tips

By Gertrude Block*

Question: Many people refer to a large corporation or governmental agency as a plural: "I went to X Bank today and *they* told me . . ." or "The government reported today that *they* will . . ." I customarily refer to such entities as singular nouns. I once had a lengthy argument with an English solicitor on this subject. Please comment.

Answer: Attorney Laurence A. Spellman, of Sarasota, Florida, sent this question, for which, unfortunately, there's no "correct" response. Mr. Spellman's English friend is correct about English usage; Mr. Spellman is correct about American usage. In this country, entities such as committees, courts, corporations, cities, and so forth, are referred to as "it." Thus, the following are correct (emphasis added):

- The Court based *its* reaffirmation of the federal right of interstate travel upon the Commerce Clause.
- May a city limit *its* population by zoning laws?
- The jury reached *its* decision rapidly.
- The Blow Brothers Company argued that *it* was not liable for the price-fixing.

But the English regard the entities in these examples as plurals. They would say:

- Scotland *have* brought their best players to compete for the Ryder Cup.
- The USA *have* taken the lead over Europe, which *have* lost their momentum.
- The X Company announced today that *they* will merge with the Y Company.

Was it George Bernard Shaw who said, "England and America are two nations separated by a single language."? (If it wasn't, someone will surely let me know.)

Question: What's the rule for the use of *a* or *an* before an acronym? That is, should it be pronounced according to the spelling or the sound of the word it precedes? For example, it is "a MVA" (motor vehicle accident) of "an MVA"?

Answer: My thanks to Albany Attorney Paul Gillan for this question, which does have an unequivocal answer. The beginning sound of the word that follows decides the choice of *a* or *an*. Thus you would say (and write) "an MVA," but "a UF handbook."

From the Mailbag:

Cornell Professor Michael Evan Gold writes, regarding the discussions last year in "Language Tips" about suitable substitutes for the salutation "Gentlemen," that he uses "Ladies and Gentlemen," which has the virtue of saying exactly what he means and of being a familiar term. It also avoids "Dear," which he prefers to reserve for persons he cares about.

Mr. Gold has plenty of company in his preference, especially in his objection to salutations starting with "Dear." One person wrote that "Dear" should be dropped because it makes no sense, another that he has trouble using "Dear" when he does not know the addressee and even more trouble when he does! The majority of responses from readers, surprisingly, was for "Gentle People" and "Gentle Persons."

From the Mailbag II:

In response to my statement in the February 2001 "Language Tips," Albany reader Stephen L. Rockmacher asks why I wrote that "If the program were titled 'The Riddle Show' . . ." instead of "If the program was titled 'The Riddle Show' . . ."

The use of "were" instead of "was" is one of the few remainders of the subjunctive mood, which used to be much more extensive in Old and Middle English, but is seldom used in Modern English, except—as in the quotation above—in a situation contrary to fact. Modern English has three moods, indicative, imperative, and subjunctive, the indicative mood being by far the most common. It is used in most statements and questions, for example, "I'm going downtown," and "Are you going to the movies?"

The imperative mood expresses commands, directions, and requests, as in, "Stop doing that," or "Take a right turn at the traffic light and drive three blocks." The subjunctive mood expresses conditions contrary to fact. In the quotation, the program is not titled "The Riddle Show," and the subjunctive indicates that. Compare, "If I *were* able . . ." (but I am not), "If the plaintiff *were* present" (but he is not).

The subjunctive survives in Modern English in only three other constructions: in statements expressing commands, in expressions of desire, and in idioms inherited from Old and Middle English: "The school requires that the dress code *be* adhered to"; "She is eager that the facts *be* known"; and in a few idioms like "God be willing," "Come what may!" "Heaven forbid!" and "Far be it from me . . . !"

Erratum

My apology for a grammatical error in the March/April "Language Tips." I wrote: "Unfortunately, the print media now employs journalists . . ." *Media* is the plural form of *medium*, so I should have used the plural verb *employ*. My thanks to New York City Attorney Christopher R. Whent, who noted the error.

Gertrude Block is the writing specialist and a lecturer emeritus at Holland Law Center, University of Florida, Gainesville, FL 32611, and a consultant on language matters. She is the author of *Effective Legal Writing*, fifth edition (Foundation Press, July 1999), and co-author of *Judicial Opinion Writing Manual* (West Group for ABA, 1991).

The author welcomes the submission of questions to be answered in this column. Readers who do not object to their names being mentioned should state so in their letters. E-mail: Block@law.ufl.edu.