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JURY REFORM AT THE END OF THE CENTURY: REAL AGREEMENT, REAL CHANGES

Phoebe C. Ellsworth*

INTRODUCTION

Complaints about the jury system and calls for its reform are nothing new—they have probably existed as long as the jury system itself. Warren Burger called for the reform of the civil jury in 1971¹; in 1905 William Howard Taft decried the contemporary tendency “to exalt the jury’s power beyond anything which is wise or prudent”² Judges complain to judges, lawyers complain to lawyers, legal academics write articles about the jury for other legal academics, social scientists report their research on juries to other social scientists, and the jurors themselves go home and express their exasperation to their families. Any of them may try to tell their stories to the public, and journalists fan the flames of discontent.

The *University of Michigan Journal of Law Reform* Symposium, “Jury Reform: Making Juries Work,” was unusual and particularly valuable in that it brought together these disparate students and critics—judges, lawyers, legal academics, social scientists, and even an experienced and thoughtful juror—to share their knowledge and concerns, thus managing to achieve that diversity of perspectives that many believe is one of the major advantages of the jury itself.

A second unusual and valuable feature of the Symposium was a shift in emphasis from a concern with documenting, analyzing, and bemoaning the failures of the American jury to a concern with devising, implementing, and testing solutions. More remarkable yet, there was a heartening convergence in the views of participants whose intellectual backgrounds and practical experience were very different. Although there was some disagreement about the particular nature of the problems in the jury system and their

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1. See generally Warren A. Berger, *The State of the Federal Judiciary—1971*, 57 ABA J. 855 (1971).

2. William H. Taft, *The Administration of Criminal Law*, 15 YALE L.J. 1, 14 (1905).

seriousness, similar suggestions for reform were proposed by judges, lawyers, scholars, and jurors. And many of the reforms were not merely empty wishes; the Symposium also included preliminary reports of attempts to implement these suggestions.

I. THE RECENT RISE IN INTEREST IN JURY REFORM

Before 1970, social science exploration of the jury consisted of a scattering of small isolated studies and one monumental research initiative which culminated in 1966 with the publication of Kalven and Zeisel's *The American Jury*.³ This study recruited more than 500 judges who reported on jury verdicts in more than 3500 trials from all regions of the United States. The authors found that the jury verdicts matched the verdicts the judge would have given 78% of the time (both for civil and criminal cases) and, in a ringing endorsement of the American jury system, concluded that there was no substantial evidence that juries were incompetent to perform their task.⁴ In 1968, in the case of *Duncan v. Louisiana*,⁵ the Supreme Court extended to the States the right to jury trial in criminal cases.⁶ This decision paved the way for a series of decisions about what the right to a jury trial actually implied, including decisions regarding which common characteristics of juries—representativeness, unanimity, twelve members—were essential to the definition of a jury, and which were not.

Although there was hardly any research on jury decision making at the time, and none that addressed the particular questions raised in the cases before the court, the Supreme Court based its decisions in part on empirical assumptions about the relation of these characteristics to the quality of the jury's decision making. For example, in *Williams v. Florida*,⁷ the first of these cases, the Court considered the issue of the constitutionality of reducing the number of jurors from twelve to six. In deciding that six-member juries were constitutional, the Court made the empirical claim that "the reliability of the jury as a factfinder hardly seems likely to be a function of its size."⁸

3. See generally HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966).

4. See *id.*

5. 391 U.S. 145 (1968).

6. See *id.* at 157-58.

7. 399 U.S. 78 (1970).

8. *Id.* at 100-01.

Social scientists were appalled that the Court could draw such far-reaching conclusions about jury behavior without any evidence whatsoever, and thus the *Duncan* decision and its progeny also ushered in a period of intense activity by social scientists who felt that the Court's empirical claims should be tested empirically. Research on juries, initially inspired by dissatisfaction with the Court's decisions on jury size and unanimity,⁹ took on a life of its own and became a flourishing field, slowly building up a body of reliable knowledge about how juries function, what they do well and what they do badly, how they respond to evidence and to extra-evidentiary information, and how certain procedural variations impair or enhance their ability to perform their task.¹⁰ From Kalven and Zeisel's original research¹¹ to the present, most social scientists have agreed that juries are competent fact-finders, and that jury deliberations tend to identify and correct *errors of fact* and to result in an *understanding of the facts* that is more complete and more accurate than that of any individual member.¹² Whether this competence extends to very complex technical evidence is still an open question.

Over the same period of time, study after study found that jurors are far less competent at *understanding the law* as presented to them in the judges' instructions, and that the deliberation process is not particularly effective in correcting *legal mistakes* or producing an accurate understanding of the law.¹³ Jurors' understanding of the law can be considerably improved, however, by rewriting the turgid, technical pattern instructions in clearer language¹⁴ and by providing the jurors with at least some instructions before the very end of the trial.¹⁵

9. See generally *Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca, Cooper, & Madden v. Oregon*, 406 U.S. 404 (1972).

10. See generally VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* (1986).

11. See generally KALVEN & ZEISEL, *supra* note 3.

12. See REID HASTIE ET AL., *INSIDE THE JURY* 230 (1983); Vicki L. Smith, *How Jurors Make Decisions: The Value of Trial Innovations*, in *JURY TRIAL INNOVATIONS* (G. Thomas Munsterman et al. eds., 1997); Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 *PSYCHOL., PUB. POL., & L.* 589 (1997); see also HANS & VIDMAR, *supra* note 10, at 118–20.

13. See HANS & VIDMAR, *supra* note 10, at 120–27; HASTIE ET AL., *supra* note 12, at 231; see also Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 *L. & CONTEMP. PROBS.* 205, 218–23 (1989). For an excellent review of these studies, see generally Lieberman & Sales, *supra* note 12.

14. See generally Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death By Revising and Testing Jury Instructions*, 79 *JUDICATURE* 224 (1996); Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or In Light of It*, 1 *L. & HUM. BEHAV.* 163 (1977).

15. See generally Vicki L. Smith, *Impact of Pretrial Instruction on Jurors' Information Processing and Decision Making*, 76 *J. APP. PSYCHOL.* 220 (1991).

Social scientists have made numerous suggestions for reform, beginning in the mid-1970's and continuing up to the present.¹⁶ Until very recently, however, these suggestions were largely ignored. In 1991, Alexander Tanford reviewed the impact of two of the most commonly proposed reforms—preinstructing the jury on substantive law and giving jurors written copies of the instructions to use during their deliberations—on state courts, legislatures, and rule-making commissions. Tanford found no evidence whatsoever for a trend towards greater use of these procedures.¹⁷ He concluded that lawmakers were unlikely to be persuaded of a need for reform on the basis of social science research. It appears not that the calls of the social scientists were considered and rejected, but rather that they were simply ignored.

Intense media coverage of a series of dramatic trials has accomplished what decades of social science research, high on responsibility but low on human interest, could not. In this Symposium issue, Professor Marder argues,¹⁸ as do Hans, Hannaford, and Munsterman,¹⁹ that public concern about juries and their shortcomings has been galvanized by a string of high publicity cases: the Menendez brothers, Lorena Bobbitt, Rodney King, O.J. Simpson, and a host of minor characters in the Simpson drama became names that evoked instant recognition and often considerable passion in many if not most Americans. The public became disturbed and often outraged about the failure of the jury system, and, as Marder documents,²⁰ calls for reform became increasingly common and increasingly urgent.

It would be a mistake, however, to conclude that the public and the media, once awakened to the need for reform, called for consideration of the social science research that had been accumulating quietly over the years. The public's view of the problems within the jury system was not the same as the social scientists' view, and the reforms they called for bore little resemblance to the recommendations of the social scientists.

16. See generally Lieberman & Sales, *supra* note 12.

17. See generally J. Alexander Tanford, *Law Reforms By Courts, Legislatures, and Commissions Following Empirical Research on Jury Instructions*, 25 L. & SOC. REV. 155 (1991).

18. See Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 U. MICH. J.L. REFORM 285 (1999).

19. See Valerie P. Hans et al., *The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges, and Jurors*, 32 U. MICH. J.L. REFORM 349 (1999).

20. Marder, *supra* note 18.

II. WHAT IS THE PROBLEM? TWO PERSPECTIVES ON THE JURY SYSTEM

In America today, public outrage is most reliably aroused by people getting better than they deserve—sometimes literally “getting away with murder,” sometimes “getting something for nothing.” Juries are reviled as incompetent or biased when they acquit “obviously guilty” defendants or when they award astronomical damages for “obviously trivial” injuries.²¹ Although the development of DNA analysis exonerated over 50 people who had been wrongfully convicted (and who were lucky enough that testable material from the crime still existed), and although over the last 20 years more than 75 people have been released from death row due to serious doubts about their guilt, these stories do not seem to provoke the same crusading passion as decisions that are regarded as too lenient.²² The juries that wrongfully convicted them are not singled out for the sort of scrutiny and criticism that were leveled at the juries in the cases of the Menendez brothers, Stacey Koon and his associates, and O.J. Simpson. Likewise, cases in which civil plaintiffs receive no damages at all do not seem to provoke much indignation.

A. Civil Juries

On the civil side, the public is aware of a “litigation explosion” in which irresponsible or unscrupulous people either exaggerate the seriousness of their injuries or try to pin the blame on somebody (preferably somebody rich), in an attempt to acquire as much money as possible. Lawsuits proliferate, and more and more often these undeserving people are winning huge awards from gullible juries. That, at least, is a common public perception of the problem.

Before analyzing the causes of a problem and proposing solutions, it is always important to step back and ask whether there really is a problem at all. In this Symposium issue, Chapplelear ar-

21. See generally Phoebe C. Ellsworth & A. Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, PSYCHOL., PUB. POL., & L. (forthcoming 1999) (on file with *University of Michigan Journal of Law Reform*).

22. See generally Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, L. & CONTEMP. PROBS. (forthcoming 1999) (addressing in depth the problem of erroneous convictions in capital cases) (on file with *University of Michigan Journal of Law Reform*).

gues cogently that the media have exaggerated the scope of the jury problem, if there is one, by focusing on unusual cases with fabulous awards.²³ He approaches the question more systematically, examining every case to be tried in a single Ohio courthouse over a twelve-year period.²⁴ The results of this careful scrutiny mesh nicely with what other researchers, using different methods, have found: most cases settle, most trials take less than a week, and most damage awards are modest.²⁵ Plaintiffs do not seem to be winning more often now than they used to. Punitive damages are very rare. On the whole, there is little evidence of a new and pressing need for sweeping reforms.

On the other hand, the fact that some media stories have led to exaggerated perceptions of the severity of the problem should not be taken as evidence that there is no problem at all. The fact that the decisions of civil juries are not recklessly fanatic should not reassure us that they are perfect, that there is no room for improvement. Professor Hastie's article, in this issue, suggests for example, that when setting punitive damages, most jurors consider some of the criteria that are laid out in the judge's instructions, but very few consider all of them.²⁶

Research on civil juries began somewhat more recently than research on criminal juries, and much more needs to be done before we will be in a position to make confident statements about the steps in the decision making process that jurors handle effectively and those that cause them difficulties, or to propose promising remedies in the areas where civil juries seem to have most trouble. Complex technical and statistical evidence, long multi-party trials, the influence of damage severity on judgments of liability, and the setting of compensatory and punitive damages have all been suggested as areas of possible difficulty for juries.²⁷ There is some evidence to support these suggestions, but so far it is far from conclusive. For example, there is hardly any research that actually compares judges' and juries' responses to the same trial materials;

23. See Stephen E. Chappellear, *Jury Trials in the Heartland*, 32 U. MICH. J.L. REFORM 241 (1999).

24. See *id.*

25. See generally Samuel R. Gross & Kent Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 U.C.L.A. L. REV. 1 (1996); Robert MacCoun, *Inside the Black Box: What Empirical Research Tells Us About Decisionmaking by Civil Juries*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM. (Robert E. Litan ed., 1993); Special Issue, *The Future of Punitive Damages*, 1998 WIS. L. REV. 1;

26. See Reid Hastie, *The Role of "Stories" in Civil Jury Judgments*, 32 U. MICH. J.L. REFORM 227 (1999).

27. See generally Larry Heuer & Steven D. Penrod, *Trial Complexity: A Field Investigation of its Meaning and its Effects*, 18 L. & HUM. BEHAV. 29 (1994); MacCoun, *supra* note 25.

thus we do not know which of the jury's shortcomings are also characteristic of judges. If juries are susceptible to errors of reasoning on some aspects of their task, and judges are not, the focus of reform efforts should be specifically aimed at the jury; but if judges are susceptible to the same errors as jurors, obviously a different kind of reform is needed.

B. Criminal Juries: Unreasonable Acquittals and "Nullifications"

On the criminal side, the concern is with the perceived leniency of juries, especially with their failure to convict "obviously guilty" defendants. Sometimes this leniency is seen as gullibility. In the first trial of Lyle Menendez, the jury was hung, with the six men favoring a verdict of murder, and the six women a verdict of manslaughter. The women were portrayed by the media as emotional creatures, moved to sympathy by irrelevant evidence.²⁸ More recently, as Marder persuasively argues in this Symposium issue, active bias has replaced gullibility as the key element in media and popular explanations of jury leniency: the issue is defined as one of jury nullification.²⁹

As Marder argues, most of what is labeled "nullification" is not really nullification at all.³⁰ True nullification occurs when the jurors understand the law they are supposed to follow, and consciously decide to disregard it. Sometimes they make this decision because they feel that the law itself is unjust; sometimes because they feel that the punishment is unjust; and sometimes because they feel that although the law and the punishment are appropriate for the general case, strict adherence to the law would be a miscarriage of justice in the particular case before them.³¹ This is the nullification of the juries who refused to enforce the Fugitive Slave law, and it is the nullification of white juries who refused to convict whites of crimes against blacks because they believed that blacks were not fully human; for good or ill, it is an intentional, and often principled decision.

28. Apparently the male jurors shared this view. See HAZEL THORNTON, *HUNG JURY: THE DIARY OF A MENENDEZ JUROR* 91 (1995).

29. See Marder, *supra* note 18.

30. See *id.*

31. See generally THOMAS ANDREW GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800* (1985).

Current outcries against jury nullification define the term more loosely, if they define it at all. They attribute to the jurors what Green calls a “dishonest partisanship”—favoring one’s own group without careful consideration of the law at all.³² Sometimes it is seen as embodying the morality of a stubborn and insular subculture (usually a minority subculture, nowadays, but sometimes, as in the Rodney King case, the white racist subculture), and sometimes it is the idiosyncratic bias of an individual holdout. It is further described as an emotional resistance to the outcome that would be inevitable under rational analysis. Principled nullification has often been viewed as a sign that the system is working well, that “natural law” prevails over black-letter law, that juries reflect community standards of justice when the law itself does not. The nullification decried by the media and the public, however, is viewed as a sign that the system is falling apart, that self-interest and bias prevail over any law.

As with the “litigation crisis,” before we rush in with reforms designed to deal with the “nullification crisis,” we should first explore whether there *is* a problem of crisis proportions, and what the nature of the problem is. The bizarre cases of O.J. Simpson and Stacy Koon and his colleagues can hardly be taken as evidence for a general trend, and in fact there is little evidence that jury acquittals are rising dramatically.³³ Vidmar and his colleagues examined rates of conviction in the Federal Courts and five state courts (LA, FL, NC, NY and TX) over periods ranging from ten to fifty years and found that conviction rates have been stable over the last ten years in state courts, while conviction rates have actually *increased* in Federal Courts over both the last ten years and the last fifty years.³⁴ The scare stories about the rising tide of nullification usually rely on a handful of apparently egregious cases. Sometimes these stories are supplemented by the statements of a couple of individual prosecutors or judges who assert that there is a nullification problem; occasionally, a highly selective set of statistics is presented as though they were representative.³⁵ In an excellent exposé, Parloff³⁶ demonstrated that all of this so-called statistical evidence could be traced to a single *Wall Street Journal* article published the day after

32. See *id.* at 28.

33. See Roger Parloff, *Race and Juries: If It Ain't Broke*, AM. L., June, 1997, at 5–7, 72–74.

34. See generally Neil Vidmar et al., *Should We Rush to Reform the Criminal Jury*, 80 JUDICATURE 286 (1997).

35. See Michael Meyers, *The Racial Divide: Color-Blinded Juries*, in RACE AND THE CRIMINAL JUSTICE SYSTEM 41–45 (G. A. Reynolds ed., 1996); see generally Abigail Thernstrom & Henry D. Fetter, *From Scottsboro to Simpson*, 122 PUB. INTEREST 17 (1996).

36. See Parloff, *supra* note 33.

the O.J. Simpson verdict.³⁷ For this and other reasons, Parloff suggested that the evidence for the “nullification crisis” is largely propaganda.

Like critics of the jury in every era, writers who are alarmed by these twin crises tend to ascribe the weaknesses of the jury system to the irrationality or prejudice of the people chosen for jury duty: too many unsuitable people are allowed on juries; too many well-qualified people are excused. At the beginning of the century William Howard Taft railed against a system that made it possible, even perhaps inevitable, “to eliminate from all panels every man of force and character and standing in the community, and to assemble a collection in the jury box of nondescripts of no character, weak and amenable to every breeze of emotion, however maudlin or irrelevant to the issue.”³⁸ At the end of the century, in an exhibition staged by a judge and a law professor, the idea that the problem with the jury system is the undesirable influence of *bad jurors* was reiterated by Judge James Rant, who bewailed the subversive influence of “the obstinate loner, the obsessive individual, the morally-challenged individual.”³⁹

Who are these obstinate, morally-challenged nondescripts who Taft and Rant rail about and who an abundance of commentators on the O.J. Simpson case have in mind?⁴⁰ Well, they are not middle-class white people. After the Simpson case, people felt more free to say what they did not quite want to say before: that Black jurors are reluctant to convict Blacks, so they nullify.⁴¹ The nullification crisis, and the litigation crisis too, are partly about race. Current publications emphasize Black bias, not white bias, although there is no evidence that one race is more scrupulous in following the law in interracial cases than the other.

As Cohn and Sherwood point out, Black jurors are underrepresented in jury pools, particularly in jurisdictions where most defendants are Black.⁴² There is no public outcry about this unfairness that approaches the outcry against nullification and juror

37. See Benjamin A. Holden et al., *Color-blinded? Race Seems to Play an Increasing Role in Many Jury Verdicts*, WALL ST. J., Oct. 4, 1995, at A1.

38. Taft, *supra* note 2, at 13.

39. Eugene R. Sullivan & Akhil R. Amar, *Jury Reform in America: A Return to the Old Country*, 33 AM. CRIM. L. REV. 1141, 1154 (1996) (quoting debate speech given by Rant).

40. See Marder, *supra* note 18.

41. See generally Thernstrom & Fetter, *supra* note 35; Michael D. Weiss & Karl Zinsmeister, *When Race Trumps Truth in the Courtroom*, 7 AM. ENTERPRISE 54 (1996); D. Levine, *Race Over Reason in the Jury Box*, 148 READER'S DIGEST 385 (1996); Jeffrey Rosen, *One Angry Woman*, THE NEW YORKER, Feb. 24, 1997, 1997, at 54.

42. See Avern Cohn & David R. Sherwood, *The Rise and Fall of Affirmative Action in Jury Selection*, 32 U. MICH. J.L. REFORM 323 (1999).

incompetence; for many people, I suspect, the underrepresentation of Blacks is seen as one more sign of their unfitnes. If they cannot be recruited proportionally from voter registration lists, if they do not settle down at one address and stay there, if they do not eagerly respond to a summons from the Courthouse, they probably are not people “of force and character and standing in the community” anyway.⁴³ So Cohn and Sherwood’s efforts to achieve representativeness by oversampling Blacks failed.⁴⁴ Perhaps in the future their efforts will succeed—if they sweeten the pill by referring to “neighborhood” rather than “race,” or if they emphasize the virtues of the new system they propose, which does not “subtract” but merely “recycles” the white jurors. Race is not the whole story behind the alarmist attacks on bad jurors, but it is certainly a part of it.

But, as with the “litigation crisis”, the fact that there is no nullification epidemic does not mean that there is no problem. An honest mistake is still a mistake, and erroneous verdicts are a cause for concern even if they have nothing to do with nullification.⁴⁵ Social science research provides ample evidence that the greatest weakness of juries is their lack of understanding of the law.⁴⁶ Most surprising jury decisions are not the result of a careful analysis of the law and a principled—or even an unprincipled—decision to ignore it, but of an inability to figure out what the instructions mean in the first place. Jurors work hard to understand the instructions, spending 20 percent or more of their deliberations discussing the law,⁴⁷ feel frustrated, and sometimes ask for help but rarely get it. They finally muddle through with what seems like a plausible interpretation, an interpretation that is often incorrect. This is a cause for concern.

The research, however, provides no support for the public’s perception that this failure is due to the inclusion of jurors who are biased or unfit. For decades, social scientists have tried to find characteristics of individual jurors that would predict their verdicts and their behavior in the jury room, and they have generally come up empty-handed.⁴⁸ Race, gender, income, education, occupation, and personality have all been examined and have all turned out to be practically useless in predicting how a person will behave when

43. Taft, *supra* note 2, at 13.

44. See Cohn & Sherwood, *supra* note 42.

45. See Marder, *supra* note 18.

46. See Ellsworth, *supra* note 13; HASTIE ET AL., *supra* note 13; see generally Elwork et al., *supra* note 14; Lieberman & Sales, *supra* note 12; Smith, *supra* note 12.

47. See Ellsworth, *supra* note 13, at 218; HASTIE ET AL., *supra* note 13, at 85.

48. See HANS & VIDMAR, *supra* note 10, at 131–48.

called as a juror in a particular case. There is little support for the popular notion that bad jury decisions are caused by bad jurors.

Social scientists therefore reject the "Bad Juror" theory as a general explanation for questionable verdicts, and prefer a "Bad System" theory, arguing that the decision making task is presented to the jury in ways that make it unnecessarily difficult to reach a well-informed, accurate decision. Some critics have argued that the experience of jurors in the courtroom is structured to frustrate understanding at every step.⁴⁹ The legal jargon of pattern instructions is obscure and unfamiliar; instructions are often communicated to the jurors solely by being read out loud by the judge; the legal framework that should help the jurors to organize the evidence appropriately is withheld from them until after they have already heard all the evidence; the evidence itself is presented in a disorganized fashion; jurors are treated like blank slates, with no preconceptions about the law; they are given little encouragement to ask questions when they are uncertain about their task or the law; and in general, they are reduced to passive non-participants throughout the trial. None of these features of the jury's task is conducive to high-quality decision making. Before deciding that jurors are governed by their hearts, we should consider the possibility that the system does very little to encourage the intelligent use of their minds.

III. REFORMS

One of the most exciting revelations of the Symposium, reflected in several of the articles in this issue, was the astonishing agreement among lawyers, social scientists, judges, and jurors about how to improve the jury system. None of the members of these constituencies subscribed to the "bad juror" theory of jury incompetence or recommended solutions geared towards weeding out inadequate jurors in favor of their better-endowed peers. Rather, they all shared the view, long advocated by social scientists, that the deficiencies in the performance of jurors reflect deficiencies in the system, and that reform efforts should involve changes in the task presented to jurors rather than changes in the people chosen to serve. Judge Dann of Arizona⁵⁰ and Judge Mize of the

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

50. See *id.*

Washington D.C. Council for Court Excellence⁵¹ described the comprehensive reforms they have initiated. Judge Dann, in his 1993 article and at the *University of Michigan Journal of Law Reform* Symposium, ridiculed the defects of the traditional legal model, which treats jurors as passive observers without preexisting ideas or frames of reference, recording a one-way stream of information like tape-recorders, and waiting until all the evidence is in and the legal categories have finally been revealed before reaching a judgment. He contrasted this model with the “behavioral-educational” model. According to this model, jurors approach the evidence and law with their own frames of reference, which they use to actively organize and evaluate the information they receive, and reforms should take advantage of these cognitive strategies by encouraging active involvement and providing jurors with more tools to help them accomplish their task. In contrast, the passivity of their role in the current system frustrates jurors; the instructions baffle them. The whole process creates obstacles to attention, understanding, and accurate application of the law.

As illustrated by the contributions of Longhofer⁵² and Phillips⁵³ to this volume, many of the proposed reforms are designed to transform jurors from passive sponges to active participants: allowing them to take notes and to ask questions, and providing them with the information they need, *when they need it*, to make the right decision. The goals are to increase attention and a sense of continuous engagement, and to reduce confusion.⁵⁴ They range from relatively uncontroversial suggestions, such as providing jurors with written copies of the instructions, to more radical reforms, such as allowing jurors to question witnesses or to discuss the case among themselves before the trial is over.

Many of these reforms were proposed by social scientists, and some of these proposals have been around for 20 years.⁵⁵ They went largely unnoticed, however, until the high-publicity trials of the late 1980's and 1990's focused public and media attention on the jury. Despite the immediate calls for reforms based on the “bad juror” model, including provisions for nonunanimous juries in criminal cases, the consensus opinion among judges, jurors, social

51. See generally COUNCIL FOR COURT EXCELLENCE DISTRICT OF COLUMBIA JURY PROJECT, JURIES FOR THE YEAR 2000 AND BEYOND: PROPOSALS TO IMPROVE THE JURY SYSTEMS IN WASHINGTON, D.C. (1998).

52. See Ronald S. Longhofer, *Jury Trial Techniques in Complex Civil Litigation*, 32 U. MICH. J.L. REFORM 335 (1999).

53. See Annie King Phillips, *Creating A Seamless Transition From Jury Box To Jury Room: Proposals For More Effective Decision Making*, 32 U. MICH. J.L. REFORM 279 (1999).

54. See Ellsworth & Reifman, *supra* note 21.

55. See, e.g., Elwork et al., *supra* note 14.

scientists, and to some extent attorneys, is solidly in favor of reforming the *system* and achieving collaboration among all four groups in designing and evaluating reforms.

Perhaps most remarkable of all, several proposals for reform include provisions for empirical research designed to evaluate the consequences of the reforms. For example, one of Annie King Phillips' suggestions is that jurors be allowed to discuss the case with each other before the trial is over.⁵⁶ This innovation is being tried in Arizona, and the Arizona Supreme Court has authorized a random-assignment experiment to test its effects. In this issue, Professor Hans and her colleagues report the first preliminary results of that experiment.⁵⁷ Among all the proposed innovations, the importance of this commitment to well-designed empirical research to discover the consequences of these changes should not be underestimated. It is an exciting time for juries, with an explosion of interest, a lively collaboration of scholars and practitioners, comprehensive proposals for change, actual implementation of some of these proposals, and high-quality scientific study of their effects.

56. See Phillips, *supra* note 53.

57. See Hans et al., *supra* note 19.