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ADEQUACY OF INSTRUCTIONS TO THE JURY: I*

Curtis Wright, Jr.†

IN view of frequent judicial complaints about "instructions by the acre," it may be appropriate to begin with a short justification for an article bearing a title which might appear to suggest an antithetical problem, that is, the existence of a question as to the *adequacy* of instructions to the jury. To this end one might repeat the assertion that the verdict of a jury which is not instructed as to the fundamental law of the case is "crackerbarrel justice."¹ If this is true, it certainly is also true that the mere number of instructions given is no guarantee of their adequacy. Furthermore, the general practice of submitting too many instructions has sometimes caused a reaction to an even less desirable extreme—the complete waiver of instructions (where permissible) by stipulation. In Missouri, for instance, that practice became so prevalent that the supreme court of that state had to work out an unusual solution, as will later appear. Finally, the very giving of such great numbers of instructions is often rooted in fear on the part of the trial judge that refusal of any correct and applicable request may be a violation of his Duty to Charge.

"Duty to Charge" is the rubric under which many of the cases considered herein may be found. For the purposes of this article, however, the phrase "adequacy of the charge" is more accurately descriptive. It has wider scope than the conventional "duty to charge," which, furthermore, has been found to have no fixed meaning, being used to signify anything from a semipoetic, unformed ideal to the rule of reversible error for failure to read all written requests which are correct and applicable. At its best the conventional phrase may indicate solicitude for thorough presentation of the issues and the law to the jury. At its worst it may simply be one of the many spikes in the abatis which was

* A dissertation submitted to the faculty of the University of Michigan Law School—in conjunction with previously published articles cited in notes 4 and 8 below—in partial fulfillment of the requirements for the S.J.D. degree.

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¹ Note, 23 MICH. L. REV. 276 at 278 (1925). See also Trusty, "The Value of Clear Instructions," 15 KAN. CITY L. REV. 9 (1947).

erected in the American trial court's path in the nineteenth century.²

The present article is the third of a series of articles on various aspects of the charge to the jury in civil cases.³ The first of the series⁴ treated the movement to rehabilitate the judicial function from the position to which it had been relegated in the majority of the states. In particular it considered results attained through concerted efforts of segments of the bench and bar under leadership such as that of the American Bar Association. The debasing of the judicial office was shown to have come about by means of a variety of legislative restraints which, it was argued, are now obsolete holdovers from colonial and pioneer times. Such restriction was based on the requirement that the charge be on "matters of law only." Thereafter there grew up what will here be called indirect restraints, such as the requirements that all instructions be in writing, that the charge be confined to a process whereby the court simply received written requests, marked each "given" or "refused," and read aloud to the jury all those marked "given" without alteration or modification. It became possible in some states to preserve error in instructions by a simple general objection. Then many of the southern and western states came to require that instructions precede arguments of counsel, thus leaving little chance for the court's words to make any impression on the jurors that they would carry to the juryroom.

That article found that in the past twenty-five years the states of Michigan, California, New Mexico and Maryland had been reclaimed and are now for the most part in substantial compliance with the recommendations of the section of Judicial Administration of the American Bar Association regarding trial practice,⁵ adopted by the House of Delegates in 1938.⁶ Some other phases of this struggle were also recounted, such as an abortive revival in Colorado, a brief interlude of partial reform in Illinois, and minor modifications of indirect restraints in certain other states.⁷

² Pound, "The Judicial Office in America," 10 *BOST. UNIV. L. REV.* 125 at 127 (1930).

³ A series in that all relate to Instructions and have been published in related order, although they have appeared in three different periodicals (notes 4 and 8 *infra*). Grateful acknowledgment is made of the direction and counsel supplied, in connection with the preparation of this entire series, by Professors William Wirt Blume, Charles W. Joiner, and John W. Reed of the faculty of the University of Michigan Law School.

⁴ Wright, "The Invasion of Jury: Temperature of the War," 27 *TEMPLE L.Q.* 137 (1953) (cited hereinafter without reference to title, author, or initial page).

⁵ Report of the Section of Judicial Administration, 63 *A.B.A. REP.* 522 at 523 (1938).

⁶ 63 *A.B.A. REP.* 154 (1938).

⁷ Utah, South Dakota, North Carolina, South Carolina. The term "indirect restraints," in the present connection, refers to restrictions such as the requirement that instructions be read verbatim from written requests, that instructions precede closing arguments of counsel, etc.

The second article⁸ analyzed the practice of some sixteen other states in an intermediate group⁹ in which the court is theoretically permitted or even encouraged to review the facts, so long as there is no comment on the evidence. It was found that three of these states were largely indistinguishable from the minority of states in which the judges have the "common law powers"—since the comment power is subject to scrutiny almost everywhere within the American version of that system.¹⁰ As to the rest of the intermediate group, however, it became clear that the summary is not used in practice. Any attempt to recapitulate the facts in the charge leaves a judgment on the jury verdict vulnerable to attack on the ground that the summary had involved comment. Another reason for disuse, in a number of the intermediate states, was the exclusive use of written instructions, which made a general charge designed to include a recapitulation of the evidence quite impracticable. One exception was North Carolina, where summary is mandatory—a requirement which makes for unceasing difficulties, and many reversals for comment.

On the basis of the described previous articles, and with the caveat that this broad generalization must be taken as qualified by the detailed discussion to be found in the cited articles, certain states will herein be taken as "unrestricted." That is, at least some degree of comment power, however closely scrutinized, is taken to exist in California, Connecticut, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, and Vermont.¹¹ As examples of the sort of qualification necessary, it is mentioned that the customary practice in New York is to stop with a statement of the barest outline of the facts. Even in this group, certain of the indirect restraints are nevertheless to be found here and there, such as the use of written instructions (subject to waiver) in California and New Mexico, and the giving of the charge prior to arguments of counsel in Maryland and New Mexico.

⁸ Wright, "Instructions to the Jury: Summary Without Comment," 1954 WASH. UNIV. L.Q. 177 (cited hereinafter without reference to title, author, or initial page).

⁹ Wyoming, Nevada, Kansas, Nebraska and Utah; Iowa, Ohio, Georgia and North Carolina; Delaware, Alabama and Tennessee; Wisconsin, Minnesota, (Maryland), Massachusetts and Maine.

¹⁰ The so-called common law power to comment on the evidence is currently believed by the writer to be found in its purest form in New Jersey and Connecticut, with Pennsylvania a close third. Other states in which the power exists (in descending order of the general freedom accorded the court) are Rhode Island, Michigan, Vermont, New Hampshire, Maine, Massachusetts, Maryland, Minnesota, New Mexico, New York and California.

¹¹ In addition to this alphabetical listing, one may also see, in note 10 supra, the writer's personal attempt to arrange these states in order of extent of the comment power, taking into consideration not only the theoretical power, but also the presence or absence of indirect restraints and estimated prevalence of the prerogative's actual exercise.

In combination with the earlier articles which emphasized particular aspects, the purpose here will be to show in general outline the methods of instructing the jury in all forty-eight states. As the map printed herein will indicate, that effort is pointed toward estimating the extent to which the several systems appear to promote (or discourage, as the case may be) adequacy of the charge.¹² The states are shown white, faint ruled, dark ruled, or black as their systems have seemed more or less functional in that respect. Such comparisons, it must be confessed, are purely personal and in no sense unbiased. To the contrary, the evaluations are very biased indeed, and amount in large part to an appraisal of the extent to which the state practices seem to conform to the American Bar Association's 1938 recommendations.¹³ Those recommendations (hereinafter referred to as "the minimum standards")¹⁴ represent certain standards which must be attained "if the administration of justice in America is to be responsive to the needs of our times."¹⁵

It may be of some interest to mention in passing that those minimum standards, and thus the present point of view, do not in all respects represent the prepossessions with which the writer commenced detailed study of this subject four years ago. While those standards seem increasingly necessary and basic the longer one examines them, they are in any event the inevitable yardstick, since there are no other standards. Law evolves, said Dean Pound, in the first instance from rules to principles.¹⁶ Then the development of concepts is its third stage, but standards are its highest development. In the present area, mere rules will be found in abundance, together with a fair share of principles and concepts. But the fulminating legislation of the nineteenth century in its present-day survivals, as well as the particularistic

¹² See map, p. 515.

¹³ See note 5 *supra*.

¹⁴ Of these recommendations, the two which are most important to this discussion are the Trial Practice recommendations numbered (1) and (2), which are as follows:

"(1) *Common Law Power of Judge Should be Restored*. That the common law concept of the function and authority of the trial judge be uniformly restored in the states which have departed therefrom.

"(2) *Duty of Judge to Charge Jury*. That after the evidence has been closed and counsel have concluded their arguments to the jury, the trial judge should instruct the jury orally as to the law of the case, and should have power to advise them as to the facts by summarizing and analyzing the evidence and commenting upon the weight and credibility of the evidence or upon any part of it, always leaving the final decision on questions of fact to the jury." 63 A.B.A. REP. 523 (1938).

¹⁵ Foreword by Arthur T. Vanderbilt to Reports of the Section of Judicial Administration, 63 A.B.A. REP. 517 (1938).

¹⁶ Pound, "The Administration Application of Legal Standards," 44 A.B.A. REP. 445 at 454 (1919); POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 101 (1922). See also POUND, APPELLATE PROCEDURE IN CIVIL CASES 227 (1941).

rules of decision, on the one hand, and the dicta of vague and unformed ideals on the other, can be ordered only by reference to standards.

Throughout the analysis which follows, the requirement that instructions be given in writing will at no time be overlooked. The resulting practice, under which the written instructions are read verbatim by the court and then handed to the jury, is believed to be at the root of many of the evils of the instructing system. The remedy is simply to restore the orality of the charge in accordance with trial practice standard (2), which provides, ". . . after . . . counsel have concluded their arguments to the jury, the trial judge should instruct the jury orally . . . and should have power to advise them as to the facts. . . ."¹⁷

In general, the movement toward improvement of the charge has been a straightforward attempt to restore the comment power. We may wonder if we have begun at the wrong end; it is possible that if the indirect restraints, the seemingly minor matters, were improved, the larger goals might then be accessible. It is indisputable that the obscurity of instructions results in large part from requirements that they be read verbatim from written requests. The additional requirement that they contain nothing "in the nature of comment" contributes its share to their meaninglessness. The primary factor making toward meaningfulness, on the other hand, is orality—*delivery*, with the repetition and emphasis necessary to convey meaning.¹⁸ The indispensability of oral instruction, it will be seen, runs through this study, and is given weight in the estimates of adequacy in analyses of the states' practices.

Forty percent of reversals on appeals are caused by faulty instructions, says an expert on instructions in one of the much-restricted jurisdictions.¹⁹ One might therefore question whether correctness of instructions should not claim precedence over the matter of adequacy. The answer to that query is best stated by suggesting several of the factors which led to the choice of the adequacy approach. In the first place, adequacy is a neglected subject,²⁰ whereas the very opposite is true as to the matter of correctness. The striving for correctness has already been carried to a fine point of analysis, as the opinions no less than the treatises show. Errors of commission, it seems, have been

¹⁷ See note 14 *supra*.

¹⁸ Chesnut, "Instructions to the Jury," 3 F.R.D. 113 (1942); Soper, "The Charge to the Jury," 1 F.R.D. 540 (1940).

¹⁹ Trusty, "The Value of Clear Instructions," 15 KAN. CITY L. REV. 9 (1947).

²⁰ A notable exception is the discussion in MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 314 (1952).

taken through all stages of the process of philosophical refinement, which begins with classification and analysis, and ends in casuistry. Many are the opinions that remind us that we have become too technical and refined in ferreting out defects in instructions which by bare possibility might have misled some jurymen.²¹

In another sense, however, adequacy includes the correctness problem in that an inadequacy is simply an error of omission rather than of commission. It is believed that discussion of errors of omission raise, although incidentally, the general outlines of the requirements of correctness. Furthermore, those contours are presented in the forms of exaggerations which make sharp some distinctions not otherwise recognizable. Finally, errors of omission open up less of the substantive law and make coverage of all states somewhat more manageable for both writer and reader.

Rules as to the necessities and manner of objections, however, are inseparable from discussion of any kind of error. Objections, in turn, are tied in with the widespread practice of presettlement of instructions. To a certain extent presettlement of instructions is a part of the system in force under the Federal Rules of Civil Procedure, and is used very generally outside of the New England states. The form which presettlement takes, however, may vary from the provision of the federal rule that "the court shall inform counsel of its proposed action upon [counsel's written] requests prior to their arguments to the jury . . ."²² to the ritual of the jurisdictions where the court may simply read such of the instructions, drafted by counsel, as it deems to be correct. The "three piles" system was graphically described by Chief Justice Cartwright of Illinois in 1916, being that of the sorting of perhaps a hundred requests into piles of those to be marked "given," "refused," or to be given further study.²³ At a presettlement conference—of course—court and counsel discuss to some extent the action proposed by the court as to the "three piles." Even as to these sometimes very friendly little confabs, however, the general rules of law as to the necessity for specific objections come to be somewhat blunted. To say the least, there is a strong feeling on the part of many that counsel should not be

²¹ Wolfe, J., dissenting in *State v. Thompson*, 110 Utah 113 at 134, 170 P. (2d) 153 (1946).

²² Fed. Rules Civ. Proc. 51, 28 U.S.C. (1952) following §2072.

²³ Cartwright, "Present But Taking No Part," 10 ILL. L. REV. 537 at 540 (1916). That Illinois system is, surprisingly to many lawyers of the Atlantic seaboard, not far from being typical or perhaps the "average" of the country taken as a whole—as to state court practices.

compelled to elect upon what grounds he finds fault with the proposed action of the judge. That is, he should not make such election until his motion for new trial after a verdict which displeases him.

It seems to be the law in a number of states that a general objection suffices to preserve error as to the giving or refusing of instructions. There are several arguments made in support of this rule. One seems to be that there is little to be gained by disputation if the judge has already decided to mark the instruction as "given." In jurisdictions like those of the south, where the settlement takes on more the character of rulings on points for charge and where the ruling on requests may take place in the courtroom (sometimes in the presence of the jurors), deference is paid to a common law tradition that pointing out the mistakes of His Honor is a "delicate and difficult task" and (contrary to the practice of Tidd and Chitty) counsel is not put to that embarrassment.²⁴ Another argument, being the one which has prevailed in Missouri, has been vigorously stated by an experienced member of that state's rules committee:

" . . . a rule, waiving prejudicial error unless specific objection or specific assignment is made, certainly is not in the interest of justice and is a step backward rather than forward. Review of prejudicial errors in instructions should not be foreclosed and justice denied on any theory of waiver."²⁵

On that subject, there is certainly a place for "the luxury of disagreement."²⁶ As to partial failure to instruct, on the other hand, there is diversity; the matter is somewhat less controversial. There seems to be a somewhat better chance to find common ground for discussion here, since the rule is very generally recognized that if error is to be predicated upon a failure to instruct (especially upon some particular matter), a showing is required that the omission was pointed out with sufficient clarity to have enabled the court to cure such deficiency before the jury retired. Such is doubtless the universal rule as to matters which are merely incidental, as to which a request for the desired instruction is usually a condition precedent to raising the point on appeal. Then at the other extreme there is a general recognition that some matters may be so basic and fundamental to a given cause that their non-inclusion cannot be waived by any nonfeasance of counsel.²⁷

²⁴ *Steinberg v. South Carolina Power Co.*, 165 S.C. 367, 163 S.E. 881 (1932).

²⁵ 1 CARR, MISSOURI CIVIL PROCEDURE, p. 271, n. 93.5 (1947; Supp. 1952).

²⁶ CLARK, CODE PLEADING, 2d ed., p. V (1947).

²⁷ *Fundamental error*: e.g., *Simonton v. James*, (5th Cir. 1954) 212 F. (2d) 174. Discussion of this doctrine recurs in state discussions to follow, see esp. Pa. and N.J.

Doubtless the problem of objections should be considered less in terms of whether a general objection suffices than from the standpoint of what kind of error may be preserved by a general objection. In the viewpoint of many, including the writer, only that which is basic and fundamental should be covered by a general objection. That last statement says very little, however, since no objection whatsoever is needed in order to enable review of basic error.²⁸ At this point, however, it should be mentioned that it is not within the scope of this paper to discuss appellate procedure as such. The sole concern here is with the adequacy of instructions from the standpoint of their (admittedly somewhat conjectural) enlightenment of the jury as weighed against the avoidance of new trials. Whether the new trial is granted by the trial court in response to a motion or is granted by an appellate court upon appeal from the denial of a motion for new trial is for present purposes only slightly more than incidental if the new trial is granted for error (especially error of omission) in the instructions. Thus references to "assignment of error," "taking exception," and the like, as they may crop up here and there in the present discussion, are not to be taken as referring to the technical requirements of appellate procedure.²⁹ The basic meaning of objection, as the term is herein used, will be telling the court of its supposed or alleged mistake in time to permit rectification, that is, in time for the court to avoid inadvertent error.³⁰

That general objections are no favorite of the law is a commonplace. Apart from the minority argument in favor of permitting general objections to "preserve error" as to the charge, and except for the doctrine of fundamental error, the traditional attitude of the law coincides with that stated in the very first volume of Arizona reports:

"Many trials under such a [general objection] system would practically never end. The effect of it would be to compel one party to fight in the dark, not knowing when his opponent intended to strike, while the other would be free to choose his weapons, and the time and place to use them. Such things may do in love or war, when all things are said to be fair; but life is too short to transact business on such a system in courts of justice."³¹

The reminder that trial must have finality and that life is short returns one to the minimum standards of trial practice.³² It must be

²⁸ By definition, fundamental error (basic error) will be noticed on review, even when not assigned as error. BLACK'S LAW DICTIONARY, 3d ed., p. 677 (1933).

²⁹ See, however, POUND, APPELLATE PROCEDURE IN CIVIL CASES 126-136 (1941).

³⁰ Fed. Rules Civ. Proc. 46, set out in text, p. 513.

³¹ Rush v. French, 1 Ariz. 99 at 123, 25 P. 816 (1874).

³² Report of the Section of Judicial Administration, 63 A.B.A. REP. 522 at 523 (1938).

remembered that they incorporate or adopt the federal rules of civil procedure as being the ideal or at least the standard of a simplified and modern practice adapted and further adaptable to the requirements of a changing and expanding economy. The most pertinent of those rules is, of course, rule 51:

“At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.”

Coupled also with that rule, for the purposes of the present discussion, is the more general provision of rule 46:

“Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.”

The acceptance or adaptation of the federal rules of civil procedure generally into the systems of the various states is easily the most striking development of recent years in the pattern of American state practice. Changes modeled after those rules are easily discernible in at least twenty-three of the states. On the other hand, it is equally noticeable that the trial rules which were just now cited, as well as the minimum standards of trial practice which are associated with those rules, have found less favor. For example, one may mark off on the map a solid block of states consisting of Colorado, Texas, New Mexico, Arizona, Nevada, Utah and Wyoming wherein some or all of the federal rules have been adopted. Yet, as will be seen, none of those states has accepted rule 51 without more or less drastic modification in the direction of the prior state practice. Next one notices that all those states have a number of characteristics in common. They are, for instance, young

states, sparsely populated, but fast-growing. The relative absence of metropolitan congestion is another common denominator and one which is believed to throw considerable light on reluctance to accept rule 51. Even were such not the case, however, it is firmly believed that no procedural study can afford to ignore the metropolitan court problem.³³ Docket congestion resulting from urban concentration is clearly the most pressing problem in judicial administration, and one which must not be slighted.³⁴

With those factors in mind, therefore, the analyses which follow as to the adequacy question are correlated (insofar as any significant relation appears) to dates of admission of the states, population density, rate of population increase, and the presence or absence of docket congestion. For the latter element figures have been used which were recently made available by the Institute of Judicial Administration in its 1954 *Calendar Status Study (Civil Cases)* as to state trial courts of general jurisdiction.³⁵ That survey developed "a comparative picture, on a state-by-state basis, of court congestion and trial delays." In particular it reveals the available information as to the number of months elapsing from "at issue" to trial in civil cases. The first such study was introduced by the following comment, which will be found enlightening to the later discussion:

"The nation-wide averages for the 97 courts represented in the study show an average time interval of 11.5 months from At Issue to trial of jury cases. . . . With respect to jury cases, there is a general over-all correlation between the size of population of the county area comprising the court's jurisdiction and the delay in reaching trial, although the range within each major population group is a wide one."³⁶

Few will gainsay that the law of procedure must seek to satisfy the aroused interest of American society in securing reasonably prompt

³³ See, e.g., VIRTUE, *SURVEY OF METROPOLITAN COURTS: DETROIT AREA* (1950). See also the American Bar Association Handbook, prepared by the Section of Judicial Administration, *THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE*, 3d ed., 90-94 (1952).

³⁴ "Legal Log Jam in Chicago," *LIFE* 127 (November 10, 1952). See also the series by Russell Porter which appeared in the *New York Times* during the week of Jan. 18, 1954 and the series by Frank H. Weir in the *Philadelphia Inquirer* commencing Feb. 17, 1954.

³⁵ Second Annual Calendar Status Study, Institute of Judicial Administration, 40 Washington Square South, New York City (June 30, 1954).

³⁶ The quotations are taken from the introduction by Dr. Sheldon D. Elliott, Director of the Institute of Judicial Administration, to the first of the Calendar status studies, published in 1953. The 1954 report, the figures of which are used herein, shows a delay of 11.1 months as opposed to the 1953 figure of 11.5—an improvement of 3.5%.

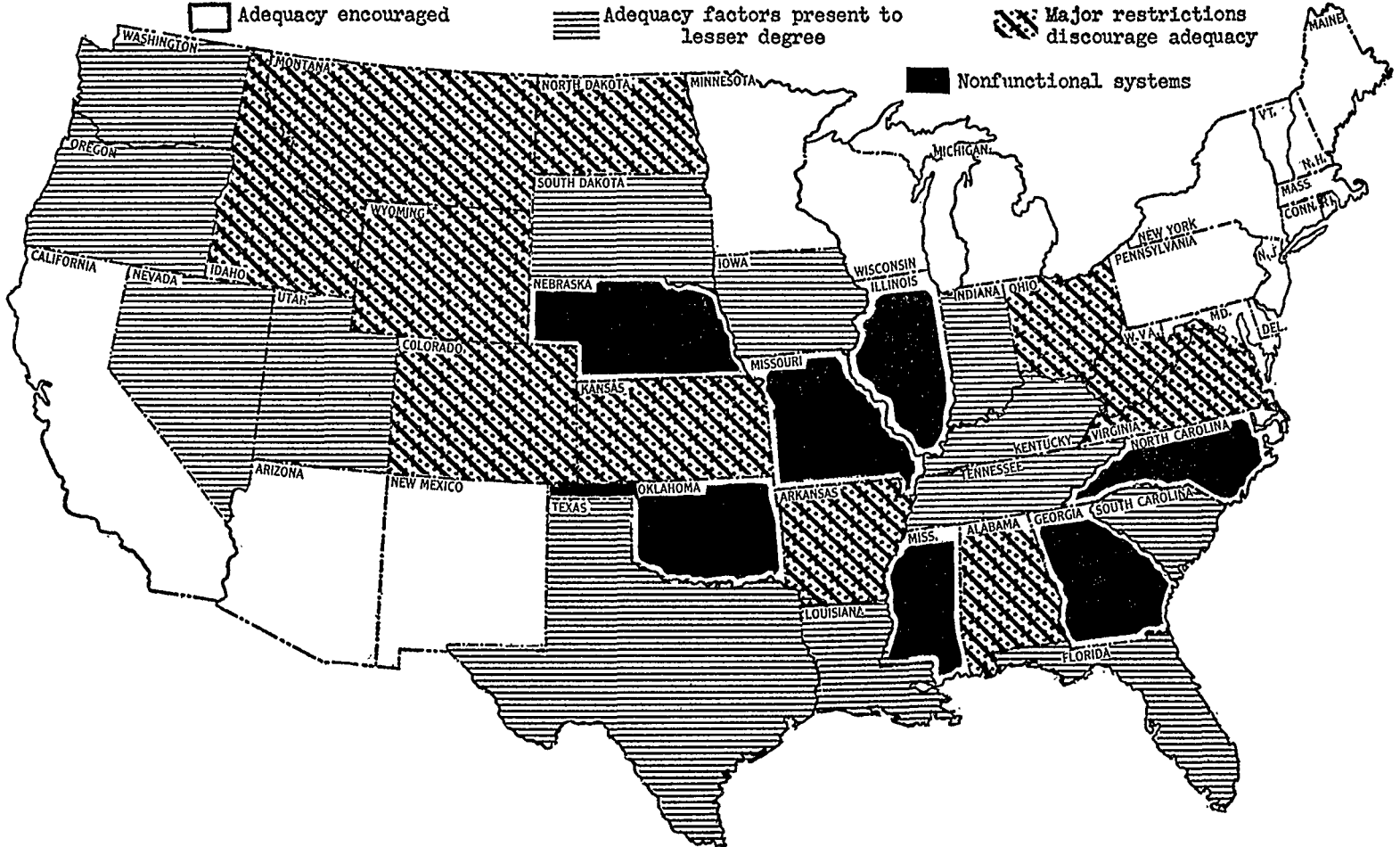
RELATIVE DEGREES TO WHICH STATE SYSTEMS ENCOURAGE ADEQUACY OF THE CHARGE TO THE JURY

☐ Adequacy encouraged

▨ Adequacy factors present to lesser degree

▩ Major restrictions discourage adequacy

■ Nonfunctional systems



adjudication of civil disputes at a price within reach. If the study of procedural reform is to be directed toward satisfying that interest, it has no alternative to taking the functional or instrumental approach.

In that direction, "the minimum standards" have no claim to idealistic perfection. They are purely utilitarian and seek only to solve the most urgent of the immediate practical problems which stand in the way of the administration of justice.³⁷ As to the federal rules, and their tendency to facilitate prompt adjudication, it has been said: "In many . . . states the federal rules are kindergarten stuff as compared to the complex local practices. . . ."³⁸

What nicer thing could be said of a procedure—a pure facility or instrument—than that it is simple and readily understandable? Then why did Wyoming, for instance, balk at adoption of rule 51? The reports, it is to be seen, came back from there that the lawyers objected to "trying to force federal procedure on the state"; they felt that the "present system is good enough," and that change would "disturb state judicial precedent." As to the minimum standards it was said that many were not applicable—that they apply only to overcrowded, metropolitan centers of population.³⁹

In the following discussion of the facts as to adequacy of instructions to the jury the states will be considered in groups which range from the newest and least densely populated back to the older and most crowded. After a number of experiments, it was found that the grouping of states by federal circuits, arranged in the inverse order of federal circuits, showed the most significant contrasts and comparisons. It will be seen that the circuit groups are not ideal, but at least they show how the new grades off into systems which retain more of the pioneer restrictions in the central circuits, and how the latter in turn fade off into the colonial practice which retains very much indeed of the common law. Thus the state groups commence with the six states of the mountains and plains in the Tenth Circuit, followed by the west coast states in the Ninth, and so on.

³⁷ VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* xxi (1949).

³⁸ Christopher in 32 N.C.L. REV. 261 at 262 (1954) reviewing VANDERBILT, *CASES AND OTHER MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION* (1954).

³⁹ Kennedy, "The Wyoming Practice and Procedure Act," 2 Wyo. L.J. 11 at 13 (1947).

TENTH CIRCUIT STATES

Oklahoma, Kansas, Colorado, Wyoming, Utah, New Mexico

In this the youngest and most sparsely populated group of states, it does not take more than six months to get to trial (herein taken as "par") from the time a jury case is at issue, except in certain counties of Kansas, Wyoming and Utah. The longest such delay is in Wichita, Kansas, where 8.8 months is needed. (This interval will herein be called docket time.⁴⁰) All are code states, yet procedure is now regulated by supreme court rules in Colorado, Utah and New Mexico and, to lesser extent, in Wyoming.⁴¹

Instructions precede final arguments of counsel in every one of these states, and written instructions are the rule.⁴² Insofar as waiver is permissible and seems to be used to any extent, such fact will be mentioned in connection with the particular states. The court neither summarizes nor comments in any of these states except New Mexico. Although strictly forbidden in Oklahoma and Colorado, summary or recapitulation of the evidence is doubly impracticable in these states, since it must be given in writing and must avoid any tinge of comment.⁴³

Oklahoma. Upon turning to the map printed herein, which seeks to compare adequacy-of-the-charge factors in the various states, one finds Oklahoma shown in black. It is considered a trouble spot in view of the frequency of reversals on instructions and constant recurrence of the statement that "the trial court failed to give instructions to the jury

⁴⁰ All figures of this kind are from the 1954 Calendar Status Study, note 35 supra. In Cheyenne, Wyoming, the docket time (in jury cases, of course) is 7 months. In Salt Lake City it is 8 months.

⁴¹ Since each circuit group will be prefaced by some reference to code adoptions, it is mentioned that of the references most frequently cited herein, the following contain collections of information as to such enactments: CLARK, CODE PLEADING, 2d ed., 24 (1947); CLARK, CASES ON MODERN PLEADING 22, n. 13 (1952); MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 54 (1952); VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 91-145 (in connection with Rule-Making) (1949). Hereinafter such listings will not be repeated. As to the regulation of procedure by supreme court rules, discussion and annotation will be deferred to the individual state discussions unless some preliminary point is to be made.

⁴² Insofar as these matters of mechanics are not discussed in the separate state discussions which follow, it may be understood that there has been no change in the states' practices in these respects as tabulated and illustrated in VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 231-233 (1949), and discussed in MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 310-315 (1952).

⁴³ See generally the predecessor articles cited in notes 4 and 8 supra.

on applicable fundamental law of the case and the cause must be reversed. . . ."⁴⁴

The duty of the court seems to have been set sky high, although there are few references to any corresponding duty of counsel. There seems to be little enforcement of any requirements as to objections.⁴⁵

Kansas. With some hesitancy Kansas was placed with Wyoming and Colorado in the dark-ruled or unsatisfactory group. Here it is first necessary to point out that these estimates have nothing to do with criminal procedure, where the duty to charge is ordinarily higher than on the civil side for fairly obvious reasons.⁴⁶ In Kansas, for instance, the responsibility of the court for completeness of the criminal charge is markedly higher than that for the civil.⁴⁷

This state is rather borderline, in that the balance of responsibility between court and counsel is not unreasonable as to adequacy of the charge.⁴⁸ In practice the system does not seem to cause difficulties as to reversals on instructions to the degree seen in the neighboring states.⁴⁹ On the other hand, there is complete absence of the majority of features taken here to promote adequacy except the permissive use of oral instruction.

Colorado. Instructions in Colorado are given entirely in writing, without deviation from the form in which submitted by counsel.⁵⁰ While the duty of the court as to adequacy of the charge is low, the power and accompanying freedom from responsibility is high.⁵¹ In

⁴⁴ *Union Transp. Co. v. Mitchell*, 203 Okla. 247, 219 P. (2d) 1015 (1950); *Evlo Refining & Marketing Co. v. Moore*, 192 Okla. 576, 137 P. (2d) 911 (1943); *Beams v. Young*, 92 Okla. 294 at 295, 222 P. 952 (1923). Cases collected Okla. Stat. Ann. (1937) tit. 12, §577.

⁴⁵ *Taylor v. Hayes*, (Okla. 1953) 261 P. (2d) 599; *Thompson v. Galion Iron Works*, 201 Okla. 182, 203 P. (2d) 438 (1949); *Petty v. Frank*, 194 Okla. 382, 151 P. (2d) 926 (1943); *Riser v. Herr*, 187 Okla. 211, 102 P. (2d) 178 (1940).

⁴⁶ For challenge to validity of this distinction, however, see note 23 MICH. L. REV. 276 at 278 (1925).

⁴⁷ *State v. Fouts*, 169 Kan. 686, 221 P. (2d) 841 (1950); *Baker v. West. Cas. & Sur. Co.*, 164 Kan. 376, 190 P. (2d) 850 (1948).

⁴⁸ *Sams v. Commercial Standard Ins. Co.*, 157 Kan. 278, 139 P. (2d) 859 (1943); *Hamilton v. A.T. & S.F. R. Co.*, 95 Kan. 353 at 357, 148 P. 648 (1915); *Douglass v. Geiler*, 32 Kan. 499 at 501, 4 P. 1039 (1884).

⁴⁹ 1954 WASH. UNIV. L.Q. 186-187, specifically, n. 69. Contrast the situations revealed herein as to Oklahoma, Missouri, or Nebraska.

⁵⁰ See 27 TEMPLE L.Q. at 151-153, nn. 82-88 (1953). 1 Colo. Rev. Stat. (1953) Rules of Civil Procedure, rule 51. See also rule 46.

⁵¹ Under the 1941 "restoration" of prior practice, rule 51 (effective April 6, 1941) leaves the Colorado practice seen in the following earlier cases unchanged: *Gilligan v. Blakesley*, 93 Colo. 370, 26 P. (2d) 808 (1933); *Blanchard v. People*, 74 Colo. 431, 222 P. 649 (1924).

general the system is modeled after those of Illinois and Missouri, and its worst fault is that there is an absence of features designed to make the instructions useful to the jury.

Wyoming. Although the population of Wyoming has grown at about the national average, the state total is less than that of Toledo, Ohio. The 1953 report of eleven months docket delay in Laramie County (Cheyenne) has been reduced to seven months as of the 1954 report. It is nevertheless noticeable in view of the opinions quoted earlier to the effect that the present procedure seems good enough to the practitioners there.⁵² As to the court's responsibility for completeness of instructions, it is low but not nonexistent.⁵³ General exceptions suffice.⁵⁴ The code provisions govern, being taken from Ohio's version of the Field Code, and inspection thereof will show that there is room for improvement.⁵⁵

Utah. This state's version of federal rule 51 is largely prior state code practice, but in other respects Utah is rated high in the surveys as to degree of compliance with the minimum standards and has adopted many of the federal rules.⁵⁶ State-by-state adoption of the federal rules is in large part a process of borrowing the experience of neighboring states. The nearby state of Colorado had an unfortunate experience in 1930 when it attempted to make an abrupt change to the federal-style rule.⁵⁷ The writer had accordingly assumed that the Colorado experience in adopting a new system before the time was ripe had discouraged change in Utah—especially since there was evidence that the Colorado viewpoint had been disseminated in Utah.⁵⁸ More recently, however, one who participated in the Utah rule-making process has indicated to the writer a differing opinion: that the rejection of the change to the giving of instructions *after* closing arguments of counsel persuaded the committee that it would be fruitless to press for change of a more drastic nature. That is, it was at least premature to consider that

⁵² Note 39 *supra*.

⁵³ *State v. Catellier*, 63 Wyo. 123 at 173, 179 P. (2d) 203 (1947); *Chicago & N.W. Ry. v. Ott*, 33 Wyo. 200 at 218, 237 P. 238 (1925). See discussion of earlier cases in 1954 WASH. UNIV. L.Q. 185, esp. nn. 52, 53.

⁵⁴ *Wallace v. Skinner*, 15 Wyo. 233, 88 P. 221 (1907).

⁵⁵ Wyo. Stat. Ann. (1945) §3-2408.

⁵⁶ Elliott, "Judicial Administration," 1953 ANNUAL SURVEY OF AMERICAN LAW 814.

⁵⁷ *Kolkman v. People*, 89 Colo. 8, 300 P. 575 (1931). See 27 TEMPLE L.Q. 151 for discussion of this debacle.

⁵⁸ See, e.g., remarks by a draftsman of Utah rules, 24 IDAHO S.B.A. PROCEEDINGS 36 (1950); 27 TEMPLE L.Q. 152 (1953).

feature which is implicit, although not express, in rule 51, the judicial power to give an unrestricted summing up. If Utah was influenced by the Colorado experience, said the speaker, the influence was an unconscious one.

More related to the present question is the circumstance that the court is held to at least a median responsibility for instructions, while objections of counsel must be specific.⁵⁹ The general pattern of procedure is progressive and tips the scales to justify Utah's inclusion in the faint-ruled rating.

New Mexico. While New Mexico spells the comment power out in terms in its version of rule 51, it has nevertheless adapted that rule to provide that instruction precede argument.⁶⁰ Instructions must furthermore be written, although waiver of that requirement is permissible. It is likely that the written instructions serve a special purpose in this somewhat bilingual area.⁶¹ Notice should also be taken of the 28 percent population increase and the fact that the docket time is nevertheless not over the par of six months. This state, one of the ten smallest in terms of population, is of special interest in that it may be considered a laboratory for study of federal rule adaptation to state practice.⁶² New Mexico has pioneered in making the rule in question control criminal as well as civil procedure.⁶³

The trouble spot in this group is the one state which is losing population, Oklahoma. The two states which have made the best adaptations, however, Utah and New Mexico, have population increases of almost twice the 15 percent national average. That circumstance suggests a tentative hypothesis that the factor of growth bears relation to progressiveness in procedure. At least, this seems tentatively plausible

⁵⁹ *Startin v. Madsen*, (Utah 1951) 237 P. (2d) 834 at 836; *Fowler v. Medical Arts Bldg.*, 112 Utah 367 at 377, 188 P. (2d) 711 (1948).

⁶⁰ Rules of the District Courts of the State of New Mexico Adopted May 23, 1949, Effective Dec. 31, 1949: Rule 51; N.M. Stat. Ann. (1953) §21-1-1(51). The original form of this rule was enabled per N.M. Laws (1933) c. 84 and adopted eff. July 1, 1934. See generally *State v. Ochoa*, 41 N.M. 589, 72 P. (2d) 609 (1937); 27 TEMPLE L.Q. 147.

⁶¹ *Leonardo v. Terr. of New Mexico*, 1 N.M. 291 (1859).

⁶² The Per Curiam foreword to the Pamphlet Edition of the Rules commences: "Adhering to its established policy of promulgating rules of civil procedure for district courts of New Mexico which conform, as nearly as practicable, to Rules of Civil Procedure for District Courts of the United States, the following rules are adopted." (West Pub. Co. 1949).

⁶³ N.M. Stat. Ann. (1953) §41-11-10 to §41-11-16, "now included in the Rules of Practice for the Dist. Cts., Rule 51." *Frei v. Brownlee*, 56 N.M. 677, 248 P. (2d) 671 (1952); *Lujan v. McCuiston*, 55 N.M. 275, 232 P. (2d) 478 (1951); *State v. Trujillo*, 54 N.M. 307, 224 P. (2d) 151 (1950).

in the case of these young states which have not yet become "set in their ways." In this group the growing states, which are the ones which have turned to rule-making and the federal rules, seem to be the ones most ready and able to adapt.

NINTH CIRCUIT STATES

Idaho, Montana, Washington, Oregon, California, Arizona, Nevada

The average "age" of these states is eleven years greater than that of the preceding group. The average rank in population is only slightly higher—but the extremes as to density of population are great, since California is second in population rank of the states whereas Nevada is 48th.⁶⁴ Docket delay is now over par only in California and Oregon. The average of the population increase between the 1940 and 1950 census in these seven states is a surprising 35 percent.

All are code states, although Arizona and Nevada have achieved full rule-making and have adapted the federal rules. In Idaho and Washington, procedure is regulated by rules, and there is some rule-making in California.

Instructions are given at the approved time except in Washington, Idaho and Montana.⁶⁵ Instructions are usually written except in Oregon. The court does not have the common law power of comment, and does not summarize, anywhere except California.

Idaho. The Idaho statute (now made rule of court) is a constellation of separate provisions taken from here and there.⁶⁶ There is little burden on the court as to adequacy of instructions, whereas counsel must ask for instructions, even to such fundamentals as the measure of

⁶⁴ "Age" averages refer simply to average date of admission to statehood. Population data is based on the 1950 figures of the United States Bureau of the Census. Figures as to percent of population increase are based on tables in current almanacs or *Statistics of the States* as set out in the familiar *LAWYER'S DIARY* (West 1953).

⁶⁵ "Approved time" herein means after closing arguments of counsel, in accordance with the minimum standards of trial practice (2). In Idaho, instructions are given before closing arguments in civil (but not criminal) cases. In Nevada, instructions preceded argument until adoption of the 1953 rules.

⁶⁶ Idaho Code Ann. (1947) §§10-206(4),(6),(7), 10-207, 10-208, 10-213. See Comparative Legislation Note, Idaho Code Ann. showing the Calif., Mont., N.D., and Utah influences. By order of Idaho Supreme Court, March 19, 1951, these sections have been made rules of practice for the courts of Idaho. The writer was advised by an Idaho lawyer in August 1954 that the exact status of these rules had not at that time been defined (from the bar's standpoint, i.e.).

damages, if the jury is to be instructed. Counsel apparently need not give reasons for objections to the giving or refusing of instructions.⁶⁷

Montana. The Montana code is less involved, being a pure pre-settlement system like that of Colorado.⁶⁸ The statute is of the type whereby the court is to instruct on such matters as it "thinks necessary."⁶⁹ The statute calls for specific objections. The cases have held that failure to submit a request does not bar the right to object to failure to instruct on a matter, so long as the jury has not retired and the circumstances justify.⁷⁰

Responsibility between court and counsel is thus not especially unbalanced, but one notes that there are none of the approved features of mechanics present, and no plus factors making for adequacy of instruction. Mere equilibrium between the duties of court and counsel is not enough. In any event, extreme restrictiveness as to anything bordering on comment, added to the other features, makes the dark-ruled classification justifiable.⁷¹

Washington. It is superficially difficult to justify showing Washington faint-ruled, since most of the undesirable features of the Idaho and Montana mechanics are present here.⁷² It must be considered, however, that despite 37 percent growth the dockets are practically current, rule-making is in progress and a sort of retooling in the direction of the federal rules is afoot.⁷³ No change as to the rules concerning instructions has as yet appeared, however. Recent decisions have pronounced some very salutary rules which tend to make the best of a system which basically leans toward ineffective instruction. For instance, the discretion of the trial court was clearly honored in August of 1953;⁷⁴ the distinctions between misdirection and nondirection were

⁶⁷ *Ryska v. Anderson*, 70 Idaho 207, 214 P. (2d) 874 (1950); *Pittman v. Sather*, 68 Idaho 29, 188 P. (2d) 600 (1947); *Dawson v. Salt Lake Hdw. Co.*, 64 Idaho 666, 136 P. (2d) 733 (1943); *Owen v. Taylor*, 62 Idaho 408, 114 P. (2d) 258 (1941); *Boomer v. Isley*, 49 Idaho 666, 290 P. 405 (1930).

⁶⁸ Mont. Rev. Code (1947) §93-5101(5).

⁶⁹ *Id.*, §93-5101(6).

⁷⁰ *Whitney v. Northwest Greyhound Lines, Inc.*, 125 Mont. 528, 242 P. (2d) 257 (1952). VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 230, n. 11 (1949).

⁷¹ *Murray v. Butte*, 51 Mont. 258, 151 P. 1051 (1915); *McShane v. Kenkle*, 18 Mont. 208, 44 P. 979 (1896).

⁷² I.e., written instructions given before closing arguments; summary and comment forbidden.

⁷³ See Rules of the Superior Courts, esp. rule 8, published as vol. 34a of Washington reports, second series (1951). See VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 126, n. 135 (1949) for the background of this development.

⁷⁴ *Adkisson v. Seattle*, 42 Wash. (2d) 676, 258 P. (2d) 461 (1953).

well restated in the recent *Kegeles's* case;⁷⁵ and the rule that an incorrect request may nevertheless suffice to raise a duty to charge on the part of the court is seen in cases from time to time.⁷⁶ This latter rule, herein called the sufficient-to-suggest principle, was well displayed in an interpretation of federal rule 51 by the Court of Appeals for the District of Columbia Circuit in 1951.⁷⁷

The provision of the Washington constitution, being of the Tennessee type, restricts the charge to "law," but it nevertheless requires the court to declare the law.⁷⁸ It has been held in Washington to state a duty of the court to instruct on basic matters regardless of request, but has not been given any such unreasonable interpretation that requires instruction on "all the law" *sua sponte*.⁷⁹

Oregon. Following California in this respect, Oregon has a code provision which lists the basic matters upon which the court must instruct in a proper case.⁸⁰ An interesting application is seen in a 1944 malpractice action where the plaintiff simply filed a request for "usual statutory instructions." Denying the efficacy of that dragnet request, the supreme court said:

"The trial judge, no matter how competent and learned he may be, is not as a rule clairvoyant. He is not expected to divine counsel's unexpressed thoughts about the law nor to speculate upon the meaning of a cryptic request for instruction such as that under consideration. . . . A practice which would permit error to be predicated upon the refusal of such a request, or some portion of it, could well prove a trap both for the court and the opposing party."⁸¹

The extent to which some of the best features of the traditional common law charge, such as orality, are sought to be maintained in a rather restrictive background are described in some detail in a readily accessible address by Justice Rossman of the Oregon Supreme Court.⁸²

⁷⁵ *Heitfeld v. Benevolent and Protective Order of Keglers*, 36 Wash. (2d) 685, 220 P. (2d) 655 (1950).

⁷⁶ *Kennett v. Yates*, 41 Wash. (2d) 558, 250 P. (2d) 962 (1952).

⁷⁷ *Montgomery v. Virginia Stage Lines, Inc.*, (D.C. Cir. 1951) 191 F. (2d) 770.

⁷⁸ WASH. CONSR., art. IV, §16. *Burgin v. Universal Credit Co.*, 2 Wash. (2d) 364, 98 P. (2d) 291 (1940); *State v. Walters*, 7 Wash. 246, 34 P. 938 (1893); MORGAN, THE LAW OF EVIDENCE 14 (1927).

⁷⁹ *Thompson v. Seattle*, 42 Wash. (2d) 53, 253 P. (2d) 625 (1953); *Groeschell v. Washington Chocolate Co.*, 128 Wash. 589, 224 P. 19 (1924); *Hiscock v. Phinney*, 81 Wash. 117, 142 P. 461 (1914).

⁸⁰ Ore. Rev. Stat. (1953) §17.210 (1) through (7).

⁸¹ *Hotelling v. Walther*, 174 Ore. 381 at 388, 148 P. (2d) 933 (1944).

⁸² Rossman, "The Judge-Jury Relationship in the State Courts," 3 F.R.D. 98 (1942).

California. Judges in California were given freedom by constitutional and statutory changes which commenced in 1934.⁸³ Apart from the statutory changes, heretofore described as to Oregon, the basic duty to charge is kept low, but counsel is given a reasonable share of responsibility.⁸⁴ Despite a 53 percent population increase, the dockets are not hopelessly bogged down, although there is a lag of almost a year in Los Angeles and San Diego.

Arizona. This state, which grew 50 percent between the 1940 and 1950 census, reports its dockets current. Arizona was the first of the states to adopt the federal rules, which became effective in 1940.⁸⁵ The judge does not have the common law powers, however, and the constitution has a provision that assumption of the risk and contributory negligence are always for the jury.⁸⁶

Arizona is most notable in that it is the first, and almost the only state to change the time of instruction from before argument back to the approved order, once the "southwest style" had become entrenched.⁸⁷ Furthermore, prior to the 1940 rules, the cases showed reversals for failure to instruct despite request or objection—and it was evident that counsel was not being required to carry its share of the load.⁸⁸ The provisions of rule 51 ameliorate that problem.

Nevada. A state with a 45 percent population increase, Nevada adopted the federal rules effective January 1, 1953.⁸⁹ It is significant

⁸³ CAL. CONST., art. VI, §19, as amended, Nov. 6, 1934. For details see 27 *TEMPLE L.Q.* 145-147.

⁸⁴ Cal. Code Civ. Proc. (Deering, 1953) §2061. *State Rubbish Collectors Assn. v. Siliznoff*, 38 Cal. (2d) 330 at 340, 240 P. (2d) 282 (1952); *Fortier Transp. Co. v. Union Packing Co.*, 96 Cal. App. (2d) 748 at 756, 216 P. (2d) 470 (1950).

⁸⁵ Sunderland, "Arizona's New Rules of Civil Procedure Effect Conformity with Federal Rules," 23 *J. AM. JUD. SOC.* 215 (1940); Lockwood, "Arizona Uses Federal Court Practice as Model," 26 *A.B.A.J.* 413 (1940). *Burney v. Lee*, 59 *Ariz.* 360, 129 P. (2d) 308 (1942).

⁸⁶ *ARIZ. CONST.*, art. 6, §12 and art. 18, §5. *Security Benefit Assn. v. Small*, 34 *Ariz.* 458 at 467, 272 P. 647 (1928); *Pearson & Dickerson, Inc. v. Harrington*, 60 *Ariz.* 354 at 364, 137 P. (2d) 381 (1943); *Herron v. So. Pac. Co.*, 283 *U.S.* 91, 53 *S.Ct.* 383 (1931).

⁸⁷ See *RULES OF THE SUPREME COURT AND RULES OF CIVIL PROCEDURE FOR THE SUPERIOR COURTS OF ARIZONA* [corrected] effective April 1, 1950 (Bobbs-Merrill Co. 1950). Rule 51 therein appears to be federal rule 51 almost verbatim. See Compiler's Notes therein to the effect that it supersedes *Ariz. Code* §§21-1017 and following, which provided that instructions precede the argument. Note that of the other states which have to some extent adopted federal rule 51, there is none (except Arizona) other than Nevada (see *infra*) which has made even a partial step toward changing the order of trial in this respect.

⁸⁸ *Under present law: Schmerfeld v. Hendry*, 74 *Ariz.* 159, 245 P. (2d) 420 (1952); *Valley Transportation System v. Reinartz*, 67 *Ariz.* 380, 197 P. (2d) 269 (1948). *Under prior law: Southwest Cotton Co. v. Ryan*, 22 *Ariz.* 520, 199 P. 124 (1921); *Curry v. Windsor*, 22 *Ariz.* 108, 194 P. 958 (1921).

⁸⁹ *Nev. Rules Civ. Proc.*, as adopted by the Nevada Supreme Court. See generally 1954 *WASH. UNIV. L.Q.* 186, nn. 59-64.

that the time of instruction has been allowed to stand as in the federal rule, i.e., after arguments. That makes a change as to the prior Nevada practice although a compromise proviso has been inserted permitting counsel to require, by specific request, that the charge precede arguments.⁹⁰

While these seven states demonstrate what Millar has called the "disfigurements which common law jury trial has undergone,"⁹¹ a trend toward reconstruction is clearly apparent in the fastest-growing five of this group of seven states.⁹²

EIGHTH CIRCUIT STATES

Missouri, Nebraska, Iowa, Minnesota, Arkansas, North Dakota, South Dakota

The growth of population factor is not of special significance as to this group, since all seven are in that respect substantially below the national average.⁹³ Two states, at opposite ends of this block, North Dakota and Arkansas, have actually registered net losses.⁹⁴ In many respects these truly central states are representative or average, of course. For instance, the geographical center of the country lies near the junction of three of its states; the average date of admission of this group is 1865, and the average population rank of the states is twenty-eighth.

Considerable spread as to degrees of success in coping with the adequacy problem is exhibited on the appended map. The trouble spots, Missouri and Nebraska, will be considered first since they afford a significant contrast. First, however, some overall similarities may be collected. Docket delay seems to be localized to certain centers in three of these states, Kansas City and St. Louis in Missouri, Minne-

⁹⁰ The inserted proviso in rule 51 is shown in italics in the following passage: ". . . but the court shall instruct the jury after the arguments are completed; *provided, if either party demand it the court must settle and give the instructions to the jury before the argument begins, but this shall not prevent the giving of further instructions which may become necessary by reason of the argument. . . .*"

⁹¹ MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 314 (1952).

⁹² I.e., Washington, Oregon, California, Arizona and Nevada—of which group the average increase of population from 1940 to 1950 was 45%. The average of the population increase in the two states in which substantial progress is not discerned, Idaho and Montana, is 9%—being 6% less than the national average of 15%.

⁹³ Average of this 7-state group is 2%, whereas national increase 1940-1950 is 15%.

⁹⁴ N.D., -3.5%; Ark., -2.0%.

apolis and St. Paul in Minnesota, and Fargo, North Dakota.⁹⁵ These are all code states, although rule-making as to procedure (more or less subject to the legislature) has become functional in Missouri, Iowa, Minnesota, and South Dakota.

Written instructions are contemplated almost everywhere, except (to an extent) Arkansas and Minnesota. The latter is also the only state in which there is not a strict ban on comment on the evidence. Instructions in civil cases come at the approved time, after argument, in the majority, but precede in Missouri, Arkansas and South Dakota. Presettlement of instructions is certainly the rule in Iowa, Missouri, and the Dakotas and is used to some extent in the other three. Apart from Iowa and Minnesota the general practice is to read the accepted requests in no particular order. Iowa and Minnesota encourage the court to weave requests into an organized series. Differences begin when one compares Missouri and Nebraska, for instance.

Missouri. When a complaint was made that the trial court had not given sufficient instruction in a case arising a half-century ago, the Missouri Supreme Court answered (in a literary style which many will recognize):

"It has not hitherto been allowed to the *nisi prius* judge—a *puisne* judge—to have been so successful in 'mastering the lawless science of our law' . . . that he has the whole body of the law at his fingers' ends, so to speak, for instantaneous and automatic application, *ex mero motu*, without having his attention directed by counsel to some specific legal principle. . . . Only appellate courts . . . are so endowed, and even this . . . should be . . . taken *cum grano salis*."⁹⁶

As late as 1912 the second edition of *Thompson on Trials* was making a similar assertion in the form of a flat statement that no court has any enforceable duty to charge on any point not suggested by counsel.⁹⁷ Such statement was not true in general at that time;⁹⁸ the treatise cited for the most part only early cases, carried forward from the earlier edition of the 1880's.⁹⁹ Those cases were from the states

⁹⁵ St. Louis, 9 months; Kansas City, 24 months; Minneapolis, 12 months; St. Paul, 10 months; Cass County, N.D. (Fargo), 7 months.

⁹⁶ Lamm, J., speaking for the court in *Bragg v. Metropolitan Street Ry.*, 192 Mo. 331 at 345, 91 S.W. 527 (1905).

⁹⁷ 2 THOMPSON ON TRIALS, 2d ed., §2338 (1912).

⁹⁸ The opposite rule, high *sua sponte* duty, had gained a strong foothold by the 1880's, as may be apparent from the discussions of Iowa and Nebraska to follow.

⁹⁹ The first edition of THOMPSON ON TRIALS was 1889. The second (note 97 *supra*) cites (apart from Missouri cases): *Coates v. Sangston*, 5 Md. 121 (1853); *Haupt v. Pohl-*

that followed this laissez-faire doctrine, such as Virginia, Illinois, and Missouri, but the rule had meanwhile changed elsewhere. At any rate, however, such was the Missouri rule for perhaps thirty years after the colorful words just quoted were spoken.¹⁰⁰ Currently, a local know-how book says with commendable restraint:

“Under Missouri practice the parties have the duty of preparing instructions in civil cases. These are of extreme importance and there are many, many reversals because of errors in instructions. . . .”¹⁰¹

Counsel finally hit upon the expedient, to avert such reversals, of privately agreeing to submit no instructions. By 1934 it became necessary, in the view of the Missouri Supreme Court, to call a halt to that widespread custom, and it posted a warning that counsel would thereafter be required by the trial court to submit instructions as condition precedent to the submission of their case to the jury.¹⁰² The rule now current is that non-direction raises a prima facie presumption of error; it constitutes reversible error if the facts are so complicated as to warrant an instruction and if prejudice results to a party.¹⁰³

From the foregoing, and in conjunction with the rule stated earlier that a general objection suffices here, it is apparent that balance has not been struck as to the duties of court and counsel. Missouri has gone forward in many respects as to procedure and is famous for its pioneering plan for judicial selection.¹⁰⁴ The fact remains, however, that the present sanctions as to instructions could not produce much more than a token showing of instruction were counsel minded to keep instructions to a minimum.

Nebraska. This state has gone to the other extreme, and enforces an unreasonably high-duty rule—such as that exhibited in the earlier

mann, 16 Abb. Pr. (N.Y.) 301 at 307 (1863); *Taylor v. Barnett*, 39 Colo. 469, 90 P. 74 (1907). See also §2341, which enlarges the rule that specific instructions must be asked for by assimilating the present question to the latter.

¹⁰⁰ I.e., from the opinion of Judge Lamm, note 96 supra, down to the Dorman case in 1934, note 102 infra.

¹⁰¹ 1 VOLZ, et al., *MISSOURI PRACTICE* §1582, p. 761 (1953). Instructions to the Jury is the title of a course given at the University of Kansas City School of Law, incidentally.

¹⁰² *Dorman v. East St. Louis Ry. Co.*, 335 Mo. 1082 at 1086, 75 S.W. (2d) 854 (1934). See also 1954 WASH. UNIV. L.Q. 180-182.

¹⁰³ *Yerger v. Smith*, 338 Mo. 140, 89 S.W. (2d) 66 (1935); *Arnold v. May Dept. Stores*, 337 Mo. 727 at 739, 85 S.W. (2d) 748 (1935); *Sherman Investment Co. v. Sheehan*, (Mo. App. 1947) 199 S.W. (2d) 922, 927. Note, 1 Mo. L. REV. 208 (1936).

¹⁰⁴ “The [judicial selection] plan approved by the American Bar Association has been adopted only in *Missouri*.” VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* 5 (1949).

discussion of Oklahoma. It is black on the map simply because there are entirely too many preventable appeals on the score of inadequate instruction. Yet the court's duty is stated unequivocally:

"We have often said, and it needs no citation of authority, that it is the duty of the court to instruct the jury upon the issues presented by the pleadings and evidence whether requested to do so or not."¹⁰⁵

Why is it necessary for the supreme court to repeat and repeat that formula? One answer is that it is provided by statute that "exception to the giving or refusal of instructions may be without any stated reason therefor."¹⁰⁶ Another is that in 1948 it was held that a shotgun assignment of error to a group of twenty-four instructions suffices to raise error as to each.¹⁰⁷ While the latter decision, which simply confirmed an existing practice, goes only to errors of commission, it cumulates the evidence that the duty of the trial court is in no sense balanced by a reciprocal duty on the part of counsel. The result, which may be seen for oneself by paging through a few volumes of the reports, is inevitable.

Iowa. An almost similar situation existed in Iowa prior to 1944. Reference to the Iowa cases can be quite misleading in that respect, in that reversal after reversal on instructions are readily found.¹⁰⁸ If one does not observe the dates and note that the very great bulk of those cases are under prior law, he may form the incorrect impression formerly held by the writer.¹⁰⁹ Further study shows, however, that the 1944 rules make the very best of a restricted system of instructing.¹¹⁰ Objections of counsel to the court's draft instructions must be specific and timely.¹¹¹ The comments of the Rules Advisory Committee are more revealing than anything the writer could say:

¹⁰⁵ *Borcherding v. Eklund*, 156 Neb. 196 at 207, 55 N.W. (2d) 643 (1952); *York Park Bldg. Assn. v. Barnes*, 39 Neb. 834, 58 N.W. 440 (1894); *Sandwich Mfg. Co. v. Shiley*, 15 Neb. 109, 17 N.W. 267 (1883). See generally 1954 WASH. UNIV. L.Q. 187.

¹⁰⁶ Neb. Rev. Stat. (1943) §25-1114.

¹⁰⁷ *Klause v. Neb. State Board of Agriculture*, 150 Neb. 466, 35 N.W. (2d) 104 (1948), noted in 28 NEB. L. REV. 452 (1949).

¹⁰⁸ E.g., *Gardner v. Johnson*, 231 Iowa 1233, 3 N.W. (2d) 606 (1942), and so on back to *Owen v. Owen*, 22 Iowa 270 (1867).

¹⁰⁹ 1954 WASH. UNIV. L.Q. 189-190, esp. nn. 85 and 86.

¹¹⁰ Dean Mason Ladd, of the University of Iowa College of Law wrote: "While a good deal of objection can be urged to the type of instructions we give, actually the process may work fairly well. . . . In my own experience . . . I felt that much depended on the trial judge as to their effectiveness. . . ." Letter dated September 1, 1954.

¹¹¹ Rule 196, 58 Iowa Code Ann. (1951) Rules of Civil Procedure. See *Nicols v. Kirchner*, 241 Iowa 99, 40 N.W. (2d) 13, and cases collected therein. For contrast, notice

“ . . . It was the tendency of all lawyers heretofore to refrain from calling the attention of the court to any errors in instructions until such questions were raised on a motion for a new trial. As a result of this many cases were reversed in the Supreme Court due to errors in instructions, which errors would have been cured in the lower court had the same been called to the attention of the lower court.”

“This Rule aims to restore Instructions to their proper function: to enlighten the jury as to the law which they are to apply to the facts; and not to trap a hurried and harried trial judge. If counsel cannot see anything wrong with the court’s final draft, when he reads it, a jury is not likely to be misled by it.”¹¹²

Minnesota. The adoption of the Federal Rules in 1952 made no drastic change as to the matter at hand, in Minnesota.¹¹³ It has long been the rule that although “afterthought is better than none at all,”¹¹⁴ it takes an omission on a more-than-ordinary matter to make it mandatory upon the court to initiate an instruction not requested.¹¹⁵ Furthermore, counsel must make their objections pointed, and in due time. Thus—“Those who have business before the court have a right to expect that their affairs will be disposed of promptly and pursuant to law which treats one as it does another.”¹¹⁶

Arkansas. Although Arkansas belongs under Missouri, discussion was postponed in order to present the Missouri-Nebraska contrast. In

Thordson v. McKeighan, 235 Iowa 409, 16 N.W. (2d) 607 (1944), being one of the last cases under the code, and before July 4, 1943 the effective date of the rules which superseded the code as to procedure generally, and specifically Iowa Code (1939) §§11491-5.

¹¹² COOK, IOWA RULES OF CIVIL PROCEDURE, rev. ed. (1951). The first quoted paragraph is from Advisory Committee Comment to Rule 196, p. 358; the second paragraph is from Author’s Comment, p. 359.

¹¹³ Minn. Rules of Civ. Proc. for the District Cts., eff. Jan. 1, 1952. Professor David W. Louisell of the University of Minnesota Law School wrote: “I do not think the adoption of Rule 51 has changed the practice or the attitude of lawyers toward instructing juries appreciably. Perhaps, however, since the new Rules there is more tendency to use the special verdict, or interrogatories to accompany general verdict, which tends to change instructions somewhat. . . .” Letter dated September 11, 1953.

¹¹⁴ “. . . no exceptions were taken, nor was any suggestion made of any error in the court’s charge. Not until the motion for new trial was made was the sentence mentioned thought to be erroneous. It was then bodily lifted out of its context in the hope that even an afterthought is better than none at all.” *Timm v. Schneider*, 203 Minn. 1 at 8, 279 N.W. 754 (1938).

¹¹⁵ *Chapman v. Dorsey*, 235 Minn. 25, 49 N.W. (2d) 4 (1951); *Foster v. Bock*, 229 Minn. 428 at 432, 39 N.W. (2d) 862 (1949). See MASON’S DUNNELL MINN. DIG., 3d ed., §375 (1953) for other cases.

¹¹⁶ *Timm v. Schneider*, 203 Minn. 1 at 8, 279 N.W. 754 (1938). Generally as to Minnesota, see 1954 WASH. UNIV. L.Q. 200-201.

Arkansas instructions are a privilege; counsel must request them.¹¹⁷ On the other hand, objections must not be blind.¹¹⁸ The threshold of fundamental error is rather high.¹¹⁹ The system contains much of Illinois and Missouri philosophy as to instructions, but has some ameliorations which may come from Tennessee.¹²⁰

North Dakota; South Dakota. Presettlement of instructions is the characteristic of the Dakotas.¹²¹ North Dakota is only now coming around to rule-making, however, although South Dakota made a considerable change under new rules in 1939.¹²²

In North Dakota the judicial duty has run the gamut from a stringent duty like that seen in Nebraska to something more in the Missouri direction since. In general, power of the court is low, and responsibility of counsel is not high.¹²³ The attitude of the reviewing courts has been one of considerable technicality as was recently shown in a rather comprehensive law review note which collected many North Dakota cases.¹²⁴

In South Dakota there was a plethora of cases on instructions prior to 1939, but since the inception of the new rules in that year, a decrease is apparent.¹²⁵ The change is of the order of that hitherto seen in Iowa

¹¹⁷ *Kyles v. State*, 143 Ark. 419 at 421, 220 S.W. 458 (1920); *Hutcheson v. Clapp*, 216 Ark. 517 at 524, 226 S.W. (2d) 546 (1950). Ark. Stat. Ann. (1947) §27-1727.

¹¹⁸ *Peterson v. Jackson*, 193 Ark. 880 at 883, 103 S.W. (2d) 640 (1937).

¹¹⁹ Failure to charge the jury as to the crime of manslaughter and the difference between that crime and murder held not reversible error in the absence of proper request: *Martin v. State*, 189 Ark. 408, 72 S.W. (2d) 539 (1934); *McCuiston v. State*, 213 Ark. 879, 213 S.W. (2d) 619 (1948).

¹²⁰ E.g., *Crain v. St. Louis R. Co.*, 206 Ark. 465 at 469, 176 S.W. (2d) 145 (1943). See generally, Leflar, "Minimum Standards of Judicial Administration—Arkansas," 5 ARK. L. REV. 1 at 7 (1950); note, 5 ARK. L. REV. 88 (1950).

¹²¹ See Curry, "Instructions to Jury—Groundwork for Review," 1952 WIS. L. REV. 750 at 755, in which the presettlement plan of the Dakotas is commended.

¹²² *As to North Dakota*: VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 120 (1949); N.D. LAWS (1953) c. 201 amends N.D. Rev. Code (1943) §27-0211: "Notice of Intention to Promulgate Rule." *As to South Dakota*: 27 TEMPLE L.Q. 155 esp. nn. 101-103 (1953).

¹²³ *Remington v. Geiszler*, 30 N.D. 346 at 348, 152 N.W. 661 (1915); *Redahl v. Stevens*, 64 N.D. 154, 250 N.W. 534 (1933); *Mann v. Policyholders' Nat. Life Ins. Co.*, 78 N.D. 724, 51 N.W. (2d) 853 (1952).

¹²⁴ Note, 27 N.D. L. REV. 199 (1951).

¹²⁵ *Under prior law*: *Wilson v. Commercial Union Ins. Co.*, 15 S.D. 322, 89 N.W. 649 (1902); *Hustad v. International Oil Co.*, 52 N.D. 343, 202 N.W. 814 (1925). For prevalence of such cases see 5 CALLAHAN'S SOUTH DAKOTA DIGEST, TRIAL, §118 and following.

Under Supreme Court Rule 146 of 1939, S.D. Code (1939) §33.1317; *Kirkegaard v. Sioux Falls*, 69 S.D. 214, 8 N.W. (2d) 862 (1943); ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 458 (1947).

and is made against the background of a statute borrowed from Illinois.¹²⁶ Errors not pointed out are waived under the new rules. The sterilized instructions under this particular system are not necessarily very informative, but the calamity of new trial is often averted.

This large circuit reveals the extremes resulting from nineteenth century devices to restrict the trial court. It has been said that the great task of reform as to instructions is to save jury trial from its friends. It was on these plains (and not entirely in North Carolina where restriction started) that jury trial met almost mortal injury at the hands of its inimical friends.¹²⁷ One is reminded of little Abner, and his reply when asked if he really was going to shoot his pappy: "Better me than someone who doesn't love him."

SEVENTH CIRCUIT STATES

Wisconsin, Illinois, Indiana

These are all middle-aged states, so to speak, and all are growing at about the national average rate. Each has a peculiar pattern of distribution as to population, having a few rather congested centers, with the rest of the particular state consisting of not overpopulated agricultural areas. Indiana has a scattering of good-sized manufacturing centers, however—more like Ohio. Illinois has a tremendous contrast between overcrowded, docket-congested Chicago and the unhurried downstate courts. The dockets picture is thus what might be expected. Chicago, Milwaukee, and one of the larger Indiana centers range—in that order—from delays of 36 months, 24 months, and then 8 months in South Bend, Indiana to practically current dockets away from those cities. Indiana and Wisconsin are old-line code states, but all now have some judicial rule-making. In Wisconsin and Illinois rule-making is ancillary to legislation or subject to it; Indiana has full supervisory rule-making on the part of the supreme court, although its rules incorporate non-conflicting procedural statutes.

Instructions follow closing arguments in these three states. Written instructions are mandatory in Wisconsin and Illinois. Requests must be given verbatim if accepted in both these states. Illinois judges confine themselves to reading accepted requests. Today it is probably safe to say that the word *charge* has a somewhat unfamiliar sound to lawyers

¹²⁶ Peart v. Chicago, M. & St. P. Ry. Co., 8 S.D. 634, 67 N.W. 837 (1896); St. Croix Lumber Co. v. Pennington, 2 Dak. 467, 11 N.W. 497 (1881).

¹²⁷ 27 TEMPLE L.Q. 140, nn. 17, 18; POUND, THE SPIRIT OF THE COMMON LAW 112 (1921).

of the Seventh Circuit and west thereof. In none of these states does the court summarize or comment, although he is theoretically empowered to do so in Wisconsin.¹²⁸

Wisconsin. There is an apocryphal story of an early judge who said: "I will instruct you in one word: Go!" The court in the well known case of *Stuckey v. Fritsche* was considerably more polite, simply saying, "I have no charge to give you gentlemen."¹²⁹ The Supreme Court of Wisconsin held that there was no judicial duty to instruct in the absence of request, and such interpretation of the statute has been frequent since.¹³⁰

The matter is now somewhat moot, since special verdicts require or permit no instruction on the law, and Wisconsin uses such almost exclusively in civil cases.¹³¹ The difficulty of special verdicts is the framing of questions, and even under the streamlined Wisconsin statutory variety, there is some difficulty.¹³² One wonders whether the special verdict has any possible connection with the 24-month delay in the Milwaukee dockets.

Illinois. Some of Illinois' difficulties have been twice told in this very series.¹³³ The present system contemplates the mere reading of accepted requests of counsel.¹³⁴ Judicial functions are strongly repressed, and counsel's responsibility is low. For instance, specific defects

¹²⁸ "Minimum Standards of Judicial Administration in Wisconsin," 1952 WIS. B. BUL. 17, 19; Hoyt, "The Judge's Power to Comment on the Testimony in His Charge to the Jury," 11 MARQ. L. REV. 67 at 72 (1927); 1954 WASH. UNIV. L.Q. 199.

¹²⁹ 77 Wis. 329, 46 N.W. 59 (1890).

¹³⁰ *Jorgenson v. Hillestad*, 250 Wis. 592, 27 N.W. (2d) 709 (1947); *Patterson v. Edgerton Sand & Gravel Co.*, 227 Wis. 11, 277 N.W. 636 (1938). BRYANT, WISCONSIN PLEADING & PRACTICE, 3d ed., §33.70 (1954). But see *Benedict v. Berg*, 229 Wis. 1, 281 N.W. 650 (1938); *Jenks v. Hetzel*, 231 Wis. 243 at 247, 285 N.W. 737 (1939).

¹³¹ Preface to 1 REID, BRANSON INSTRUCTIONS TO JURIES, 3d ed., iii (1936): "The use of special verdicts in civil cases has been fast developing, and in some states, notably Wisconsin, the use is almost universal in civil cases." For strictures against the giving of general instructions in special verdicts cases see *Marshall, J.*, for the court in *Byington v. Merrill*, 112 Wis. 211, 88 N.W. 26 (1901).

¹³² *Rosenberry*, "Recent Progress in Judicial Procedure and Administration in Wisconsin," 45 A.B.A. REP. 372 (1920); MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 320 (1952); Wis. Stat. (1951) §270.28.

¹³³ 27 TEMPLE L.Q. 153 (1953); 1954 WASH. UNIV. L.Q. 184, esp. n. 49.

¹³⁴ Ill. Rev. Stat. (1953) c. 110, §191: "(1) The court shall give instructions to the jury only in writing and only as to the law of the case. When instructions are asked which the judge cannot give, he shall, on the margin thereof, write the word 'refused', and such as he approves he shall write on the margin thereof the word 'given', and he shall in no case, after instructions are given, clarify, modify or in any manner explain the same to the jury, otherwise than in writing.

in instructions need only be pointed out in the motion for new trial—as in the former Iowa practice heretofore described in the words of the Advisory Committee member.¹³⁵ Every so often a case refers to the right of a trial court to instruct of its own motion, but there is no legal reason why the court should (and several practical reasons why it should not).¹³⁶

A modification very much like that of Iowa's 1944 rules was made by the initial version of section 67 of the 1933 Civil Practice Act, but the legislature scrapped the newfangled arrangement in favor of a return to prior law within eighteen months.¹³⁷ There remain in the books the numerous cases decided during that 18-month interim indicating the extent to which objections to instructions are urged as afterthoughts—since the short-lived section required that objections be pointed out at a time and in a manner which would permit them to serve to avoid error in the trial.¹³⁸

Indiana. Early Indiana cases lead a non-Hoosier to suspect there to be quiddities and quillies in the development of its instructing process which might repay further investigation.¹³⁹ It is at least clear that by the 1880's some modicum of general instruction was essential regardless of special requests.¹⁴⁰ In that respect the system seemed to look eastward toward Ohio rather than toward the neighboring state of Illinois to the west. Adoption of a court rule as to instructions in

¹³⁵ But see Rall, "Proposed Revision of Civil Practice Act Now Available," 36 *CH. BAR REC.* 29 at 31 (1954): ". . . Under proposed section 67 . . . counsel will be required to object specifically to erroneous instructions before the jury argument."

¹³⁶ *Power*: Muller v. Equitable Life Assur. Soc., 293 Ill. App. 555, 13 N.E. (2d) 96 (1938); Chicago v. Moore, 139 Ill. 201 at 205, 28 N.E. 1071 (1891); cases collected in 3 *NICHOLLS, ILLINOIS CIVIL PRACTICE* §3584 (1941). *Low duty*: Osgood v. Skinner, 111 Ill. App. 606, affd. 211 Ill. 229, 71 N.E. 869 (1904); E. B. Conover & Co. v. B. & O. S.W.R. Co., 212 Ill. App. 29 (1918); *NICHOLLS*, supra, §3586.

¹³⁷ Ill. Laws (1935) p. 1071, eff. July 1, 1935, amended G.P.A. §67 which was enacted Ill. Laws (1933) p. 784, approved June 23, 1933. Present form as cited note 134 supra.

¹³⁸ These "interim cases" may be seen scattered through vols. 359 through 361 of the Illinois Reports from *People v. Wynkoop*, 359 Ill. 124 at 131, 194 N.E. 276 (1935), to *People v. D'Andrea*, 361 Ill. 526 at 535, 198 N.E. 698 (1935). In the Ill. App. Reports they run from *Randall Dairy Co. v. Pevely Dairy Co.*, 278 Ill. App. 350 (1935) to *Thiel v. Material Service Corp.*, 283 Ill. App. 46 (1935). See *McCASKILL, ILLINOIS CIVIL PRACTICE* Acr 182 (1936 Supp.): "Decisions under the repealed section are cited without comment for such informational value as they may have."

¹³⁹ *Welch v. Watts*, 9 Ind. 115 at 116 (1857); *Provines v. Heaston*, 67 Ind. 482 at 484 (1879); *Davis v. Reamer*, 105 Ind. 318 at 323, 4 N.E. 857 (1886); *Pittsburgh, C.C. & St. L. R. Co. v. Lightheiser*, 168 Ind. 438, 78 N.E. 1033 (1906). More detailed discussion will be offered in a forthcoming issue of the *Indiana Law Journal*.

¹⁴⁰ *Binford v. Johnston*, 82 Ind. 426 at 433 (1882); *Woolery v. Louisville, N.A. & C. R. Co.*, 107 Ind. 381 at 386, 8 N.E. 226 (1886); 3 *LOWE, WORKS' INDIANA PRACTICE* §55.2 (1950).

1940, however, seems to have refurbished the existent doctrine as to respective responsibility of court and parties as to adequacy.¹⁴¹

Decisions since adoption of Indiana's rule 51-like rule show that counsel must not have been in the general habit of cooperating with the trial court by pointing out defects or omissions in instructions. Time after time the reviewing courts have had to invoke the new rule as to requests-or-objections. Perhaps the leading interpretation is *Allman v. Malsbury* in which the court said:

"As the rule now stands, the attorneys must share with the court the burden of correctly instructing the jury. If the fault in an instruction is so slight or so chimerical that a person trained in law . . . cannot, in the period of time given for an examination thereof, perceive anything detrimental . . . then certainly the . . . jury . . . should not be . . . misled [thereby]."¹⁴²

In the next year it was said:

"The rule may seem harsh, but when consideration is given to the method of settling the instructions, the apparent harshness vanishes. The rule places a burden on the objector to point out to the court the specific reason for the refusal or modification requested . . . and [all hands have] the same opportunity. . . ."¹⁴³

Many more good reasons for the rule, and for maintaining a rather strict and literal compliance therewith are to be found in the cases.¹⁴⁴ It must be remembered, however, that the trial judge's duty is pretty well relegated to passing upon instructions, and not much duty upon the court is enforceable. The system contemplates attorney-instruction, however, so it seems only reasonable that attorney (party) responsibility should be high. The extremes of Missouri and Illinois on the one hand, and of Nebraska and Oklahoma on the other, are thus avoided in this Indiana solution. This result resembles that of Iowa, and is what may be expected under new rules in Kentucky.

Adequacy of the charge seems an almost insoluble problem in some states like these, where it is not customary to think in terms of much power of the court in connection with the charge (or *instructions*, one

¹⁴¹ Ind. Ann. Stat. (Burns, 1946 Repl.) vol. 2, pt. 1, p. 5, rule 1-7. The cited rule 1-7 is similar to the federal rule regarding the necessity for requests and objections.

¹⁴² 224 Ind. 177 at 201, 65 N.E. (2d) 106 (1946).

¹⁴³ *McCague v. N.Y., C. & St. L. R. Co.*, 225 Ind. 83 at 87, 71 N.E. (2d) 569 (1947).

¹⁴⁴ *Keeshin Motor Express Co. v. Sowers*, 221 Ind. 440, 48 N.E. (2d) 459 (1943); *Beatty v. McClellan*, 121 Ind. App. 242, 96 N.E. (2d) 675 (1951).

should say here). In the circuit generally it is customary to render the acceptable requests without modification, and the stultified result is quite what one would expect. Wisconsin took the special verdict escape. Illinois' premature revision of 1933 must have been ahead of its time; its failure set the state practice back to that of 1847 as to instructions.¹⁴⁵ Indiana is following the federal rule pattern of Michigan, and, as will be seen, Indiana in turn is being followed in this respect by Kentucky.

SIXTH CIRCUIT STATES

Michigan, Ohio, Kentucky, Tennessee

These states are senior members of the national family, although Michigan, admitted in 1837 as the 26th state, is by far the youngest member of this group. Incidentally, this youngest state—with a population increase of 21 percent—is the fastest growing. Kentucky, admitted in 1792 as the 15th state, is the oldest, and its growth in the ten-year period was only 6 percent. In general the population increase of this group is about in line with the national average increase. The metropolitan congestion problem is in fact present in all, but Michigan and Kentucky dockets are in good shape, and only one center in Kentucky (Knoxville—Knox County) is running behind. Ohio, with its scattered medium-large cities, shows a very ragged situation, with Cleveland, Columbus, and Akron dockets in particular from eighteen to fourteen months behind.

Only two of these states, Ohio and Kentucky, followed the mid-nineteenth-century code movement. At present, Ohio and Tennessee have little judicial rule-making. Michigan, to the contrary, has considerable, although it is interwoven with statute. In Kentucky there has been a recent activation of the rule-making power, which will be described.

Speaking always here only as to this present group, in Kentucky alone does instruction precede the arguments—apart from the Ohio system of giving special instructions before (and general instructions after) the closing addresses of counsel. Oral general charges are contemplated in Michigan and Ohio, are permissive in Kentucky and

¹⁴⁵ “. . . the legislature of 1846 passed a law requiring all instructions to the jury to be given in writing, and that there should be no exceptions or explanations but such as should be given in writing also. Whether this will be an improvement of the law remains to be seen. . . .” FORD, *A HISTORY OF ILLINOIS . . . TO 1847*, p. 85 (1854).

Tennessee (and very generally used in the latter by custom). Comment is forbidden everywhere except Michigan, and there is no custom of summarizing elsewhere, although such review is theoretically possible in Ohio and Tennessee.¹⁴⁶ In none of these states is the absolute and unqualified duty to charge fully *ex sua motu* found (as in Nebraska, i.e.) although the trial judge's duty to charge is high in Michigan. The other extreme, that of Missouri where the court has no function other than the transmission of correct and applicable requests, is not found anywhere here, on the other hand. Generally, these systems, in this group lying east of the Ohio and Mississippi rivers, might be called eastern as opposed to western in style.

Michigan. Since every factor deemed to make for adequacy of the charge is here to be found, Michigan is shown white on the map. There is nevertheless considerable difficulty with the court's duty to initiate instructions, regardless of counsel's nonfeasance, as to basic issues and fundamental matters. Such may be seen in cases from *Barton v. Gray*¹⁴⁷ in 1885 down through *Brown v. Nichols* decided late in 1953.¹⁴⁸ The cases are not frequent enough, especially since the inception of Court Rule 37, section 9 (like rule 51), to indicate any great threat to the finality of judgments.¹⁴⁹ A 1950 case, for that matter, invoked the court rule in a case where there had been no charge on the driver's duty to be able to stop within the clear distance ahead. Counsel for the plaintiff was held to have waived such instruction by failure to request.¹⁵⁰ The latter result is believed salutary, since enforcement of an overly high duty on the part of the court seems a self-limiting process, as is demonstrated in the experiences of Florida and Connecticut which will be recited in due course. On the other hand, it is well to have a rule, as here, that does not lift the threshold of fundamental error too high.

Ohio. Adequate descriptions of Ohio's double-header system of instructions are not hard to find.¹⁵¹ It is also possible to find recent

¹⁴⁶ *Mich.*: 27 *TEMPLE L.Q.* 143 (1953); *Ohio*: 1954 *WASH. UNIV. L.Q.* 190; *Tenn.*: id. at 196.

¹⁴⁷ 57 *Mich.* 622, 24 *N.W.* 638 (1885).

¹⁴⁸ 337 *Mich.* 684, 60 *N.W.* (2d) 907 (1953).

¹⁴⁹ Rule 37, §9; *Mich. Court Rules* 1931, 1933, 1935; SEARL, *MICH. COURT RULES ANN.*, 4th ed., (1933) p. 252 and (Cum. Supp. 1948) p. 73. Reversal for failure to instruct on contributory negligence: *Jorgensen v. Howland*, 325 *Mich.* 440 at 447, 38 *N.W.* (2d) 906 (1949).

¹⁵⁰ *Linendoll v. Te Paske*, 327 *Mich.* 129 at 136, 41 *N.W.* (2d) 345 (1950).

¹⁵¹ Shibley, "Special Instructions on Law by Counsel Before Argument," 11 *OHIO ST. L.J.* 321 (1950). 1 FESS, *INSTRUCTIONS TO JURIES IN OHIO*, cc. 4 & 5 (1952). *Monroe v. Root*, 54 *Ohio St.* 523, 44 *N.E.* 234 (1896).

discussions of the adequacy problem in several accessible places.¹⁵² As to the special requests which are read to the jury before argument, the court has a mandatory duty to give all which are correct and applicable.¹⁵³ There is no margin for error here. As to the forgotten men, the jurors, it is doubtful whether these special instructions go far toward adequacy of enlightenment, as the system has become one of great technicality.¹⁵⁴

There is a perhaps laudably high duty-to-charge placed upon the court as to the general charge which follows arguments.¹⁵⁵ Counsel are by no means excused from all responsibility, however. The principles applied seem to approach the so-called sufficient-to-suggest rule which will be discussed more particularly under Kentucky.¹⁵⁶ At any rate, there is a great twilight zone as to what matters are so sufficiently fundamental as to permit the basing of later complaint upon a prior general objection. The cited cases and local literature show the adequacy problem to remain as yet unsolved under this system.

Kentucky. Instructions cases may be found in the Kentucky reports as early as 1808,¹⁵⁷ and frequent references in legal articles are seen as to the fact that this state was in the path of the first wave of an early American reaction induced by fear of judicial domination.¹⁵⁸ Survival of that attitude was shown in 1929 when a Kentucky trial lawyer spoke up in meeting in the following fashion:

"I have practiced . . . forty-four years. . . . My experience is that nearly all of those judges exercise more power than they should and my judge is the best of the whole lot. Why you hardly know that he is in court. He just sits on the bench or *down*

¹⁵² Shibley, note 151 supra; note, 11 OHIO ST. L.J. 383-393 (1950).

¹⁵³ *Used Car Co. v. Hemperly*, 120 Ohio St. 400, 166 N.E. 364 (1929).

¹⁵⁴ *American Steel Packing Co. v. Conkle*, 86 Ohio St. 117 at 123, 99 N.E. 89 (1912); *Leonardi v. Habermann Provision Co.*, 143 Ohio St. 623, 56 N.E. (2d) 232 (1944); *Deckant v. Cleveland*, 155 Ohio St. 498, 99 N.E. (2d) 609 (1951).

¹⁵⁵ Judge Fess prefaces his treatise on instructions (note 151 supra) with quotations from cases as to the judicial duty to charge, citing *Baltimore & Ohio R. Co. v. Lockwood*, 72 Ohio St. 586 at 590, 74 N.E. 1071 (1905); *Simko v. Miller*, 133 Ohio St. 345, 13 N.E. (2d) 914 (1938). He then observes, "The *bête noir* of the trial judge is the charging of the jury."

¹⁵⁶ *Roberts v. Fargo*, 93 Ohio App. 400, 113 N.E. (2d) 678 (1952); *King v. Ohio Nat. Bank of Columbus*, 62 Ohio App. 266, 23 N.E. (2d) 847 (1939); 1 FESS, INSTRUCTIONS TO JURIES IN OHIO §5.1 (1952).

¹⁵⁷ *Owings & Co. v. Trotter and Scott*, 4 Ky. 157 (1808). Court may of its own motion instruct the jury upon law: *Clarke v. Baker*, 30 Ky. 194 (1832).

¹⁵⁸ Johnson, "Province of the Judge in Jury Trials," 12 J. AM. JUD. SOC. 76 (1928), 14 MASS. L.Q. No. 1, p. 48 (1928); 7 TENN. L. REV. 107 (1929); Hogan, "The Strangled Judge," 22 Vr. S.B.A. 13 (1929).

among the lawyers and says 'overruled' or 'sustained'. That is the way a judge ought to do. A judge has no business dominating a court."¹⁵⁹

It was natural that difficulty should arise in a system that jealously scrutinizes judicial utterances for anything bordering on comment. Instruction which leaned too far away from comment became so vague that it tended to make the jury judges of both law and facts. The dilemma is demonstrated by recurrent admissions in the cases that "the line of demarcation between a specific or concrete instruction, and one which violates the rule of undue prominence, cannot be definitely declared."¹⁶⁰

The basic attitude toward the judicial duty derived from that which will be seen in Virginia. It is rooted in the viewpoint that there is in the first instance no judicial duty to initiate instruction—that the duty is rather that of responding to the requests of counsel.¹⁶¹ It was inevitably found that such was an insufficient guarantee of adequate instruction, and there developed what has heretofore been mentioned as the sufficient-to-suggest rule. That rule was thus stated by the United States Supreme Court in 1916:

"In Kentucky if instructions are offered upon any issue respecting which the jury should be instructed and they are incorrect in form or substance, it is the duty of a trial court to prepare or direct the preparation of a proper instruction upon the point in place of the defective ones."¹⁶²

The question of interpretation in this rule is that of how far from the mark may a request be and yet serve to "suggest." The main principle seems to be that the request may be farther from the bull's-eye in criminal cases than in civil, when it is to serve to put the court on notice. Apart from that distinction, however, each case must stand upon its own facts.¹⁶³ Again, it follows from the low initial duty that

¹⁵⁹ "Let Lawyers Conduct the Court," in *Side Lights on Jury Trial*, 13 J. AM. JUD. Soc. 124 (1929).

¹⁶⁰ *Louisville v. Cope*, 296 Ky. 207, 176 S.W. (2d) 390 (1943). *West Kentucky Coal Co. v. Davis*, 138 Ky. 667, 128 S.W. 1074 (1910); *C., N.O. & T.P.R. Co. v. Hill's Admr.*, (Ky. 1905) 89 S.W. 523.

¹⁶¹ *Jones v. Saunders*, 284 Ky. 571, 145 S.W. (2d) 514 (1940); STANLEY, *INSTRUCTIONS TO JURIES IN KENTUCKY* §13 (1948 Supp.).

¹⁶² *C. & O. R. Co. v. De Atley*, 241 U.S. 310 at 316, 36 S.Ct. 64 (1916). Other cases collected in note, 22 COL. L. REV. 162 (1922), esp. *Louisville & N. R. Co. v. Craft*, 192 Ky. 314, 233 S.W. 741 (1921).

¹⁶³ *Thomas v. Commonwealth*, 146 Ky. 790, 143 S.W. 409 (1912). See STANLEY, *INSTRUCTIONS TO JURIES IN KENTUCKY*, §6 (1948 Supp.). The note in 22 COL. L. REV. 162 (1922), disapproves this Kentucky rule by reason of its vagueness.

if counsel submit their own instructions, and no objection is offered, the court may give them as submitted.¹⁶⁴ The latter doctrine was obfuscated by lack of agreement as to the nature of the exception necessary to preserve the question for review, as shown by a recent Kentucky law review note.¹⁶⁵ It is therefore a relief to see that a modification of rule 51 became effective in Kentucky in July of 1953.¹⁶⁶

It will be seen that Kentucky has made a considerable change in the second sentence of that rule, which in its version reads: "the court shall give or refuse the instructions and shall give the jury written instructions before the commencement of the argument to the jury."¹⁶⁷

Despite the specific retention of some disapproved features of prior practice, it seems likely that the new rule should make for a clearer balance of responsibility for the charge. The words "shall give," for instance, as disjoined from "give and refuse," may raise the duty of the court commensurably with the increased responsibility of counsel for the pointing out of error.

Tennessee. Apart from basic or unusual matters, as to which there is a judicial duty to initiate instruction, the Tennessee position seems to be in the middle of the road. Mere meagerness, without positive error, is no cause for the disturbance of a jury verdict.¹⁶⁸ There is nevertheless little encouragement for counsel to "bank" on omissions not timely called to the court's attention. The entire spirit of the arrangement that requests follow the general charge are insurance that the court will give a general charge on the main issues and contentions.¹⁶⁹ The practical burden on the judge is great, however, since a deluge of requests after the principal charge must truly cause him to be hurried and harried. It is interesting to see that Tennessee dockets

¹⁶⁴ Discussed in STANLEY, INSTRUCTIONS TO JURIES IN KENTUCKY §13 (1948 Supp.).

¹⁶⁵ 38 KY. L. REV. 630 (1950).

¹⁶⁶ Ky. Rules of Civ. Proc., eff. July 1, 1953. Sec. 317 of CIVIL CODE OF KENTUCKY is now superseded by rule 51. As to the new rules generally see 17 KY. S.B.J. 78 at 125 (1953).

¹⁶⁷ The second sentence of Federal Rules Civ. Proc., rule 51, reads: "The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed."

¹⁶⁸ *Mariner v. Smith*, 66 Tenn. 423 at 426 (1874); *Citizens Street Ry. v. Burke*, 98 Tenn. 650 at 653, 40 S.W. 1085 (1897); *Howell v. Acc. & Cas. Ins. Co.*, 32 Tenn. App. 83, 221 S.W. (2d) 901 (1949).

¹⁶⁹ Tenn. Code Ann. (Williams, 1934) §§8809 and 8810 (civil); *id.*, §§11749-11751 (criminal). Requests need not be heeded if submitted before close of the principal charge: *Railway Companies v. Foster*, 88 Tenn. 671 at 673, 13 S.W. 694 (1890). See 1954 WASH. UNIV. L.Q. 196-198, esp. n. 142, being description by Prof. Forrest W. Lacey (of the law faculty of the University of Tennessee) of this procedure in action.

are so nearly current in the light of increasing population and this essentially cumbersome arrangement.

In this group the two states in which real change and improvement are seen are the two in which there has been a substantial development of the rule-making power—Michigan and Kentucky. Since the Michigan dockets are in healthy shape, it is apparent that its general procedural system is geared to a point which permits enforcement of a rather high judicial duty to charge. The fact that some Kentucky dockets are congested, plus its recent adoption of the federal rules, may mean that it is seeking faster and more efficient methods. The cumbersome Ohio method shows a need for consideration there of the same sort of improvement. As to Tennessee, the fact that the trial judges are in fact allowed considerable discretion as to management of the details of trial may be the factor which permits a somewhat inconvenient, although otherwise commendable system, to keep pace with the times.

To be concluded.