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Sense and Non-Sense: Jury Trial Communication

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> The Anglo-American jury is a remarkable political institution . . . [which] represents a deep commitment to the use of laymen in the administration of justice. . . . It opposes the cadre of professional, experienced judges with this transient, ever-changing, ever-inexperienced group of amateurs. The jury is thus by definition an exciting experiment in the conduct of serious human affairs, and it is not surprising that, virtually from its inception, it has been the subject of deep controversy, attracting at once the most extravagant praise and the most harsh criticism.[1]

For centuries jurists and scholars have debated the advantages and disadvantages of the jury system, the competence or incompetence of jurors as fact-finders and appliers of the law, and the uniformity or capriciousness of the "justice" that results from the system.[2] Recently the number of empirical studies on the jury system has been growing rapidly. Inquiries have been made into the competence of jurors,[3] the selection and management of ju-

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1. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 3, 4 (1966) [hereinafter cited as KALVEN & ZEISEL].

2. *Id.* at 7-9. The following is a short bibliographical sampling of the controversy: DEVLIN, TRIAL BY JUDGE 164 (1956); J. FRANK, LAW AND THE MODERN MIND 148 (1935); L. GREEN, JUDGES AND JURY (1930); E. LIVINGSTON, SYSTEMS OF PENAL LAW FOR THE STATE OF LOUISIANA AND FOR THE UNITED STATES OF AMERICA 10 (1873); G. WILLIAMS, THE PROOF OF GUILT (3d. ed. 1963); *Hearing Before the Subcomm. to Investigate the Adm'n of the Internal Security Act of the Senate Comm. on the Judiciary*, 84th Cong., 1st Sess. 63 (1955); Benson, *Can Our Judicial System Be Improved by the Elimination of Civil Jury Trials*, 15 FED'N INS. COUN. Q. 18 (1965); Brass, *Should Jury Trails be Abolished in Civil Cases?* 37 N.Y.S.B.J. 157 (1965); Curtis, *The Trial Judge and the Jury*, 5 VAND. L. REV. 150 (1952); Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055 (1964); Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910); Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253 (1920); Wigmore, *A Program on the Trial of a Jury Trial*, 12 J. AM. JUD. SOC'Y 166 (1929); Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281 (1952); Comment, *Abolition of the Civil Jury: Proposed Alternative*, 15 DEPAUL L. REV. 416 (1966).

3. *E.g.*, Dashiel, *Experimental Studies of the Influence of Social Situations*, in HANDBOOK OF SOCIAL PSYCHOLOGY 1097 (G. Murchinson ed. 1935); KALVEN & ZEISEL, *supra* note 1; R. SIMON, THE JURY AND THE DEFENSE OF INSANITY (1967) [hereinafter cited as

rors,[4] the effects of videotape on jurors,[5] how foremen are chosen,[6] jury decision-making dynamics,[7] juror bias caused by sex,

SIMON]; Erlanger, *Jury Research in America: Its Past and Future*, 4 L. & SOC'Y REV. 345 (1970); Hoffman & Brodley, *Jurors on Trial*, 17 MO. L. REV. 235 (1952); James, *Status and Competence of Jurors*, 64 AM. J. SOC. 563 (1959) [hereinafter cited as James]; Marston, *Studies in Testimony*, 15 J. CRIM. L.C. & P.S. 1 (1924); Redmont, *Psychological Tests for Selecting Jurors*, 5 U. KAN. L. REV. 391 (1957); Summers, *A Comparative Study of the Qualifications of State and Federal Jurors*, 34 WIS. B. BULL. 35 (Oct. 1961); Note, *Psychological Tests and Standards of Competence for Selecting Jurors*, 65 YALE L.J. 531 (1956).

4. *E.g.*, Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-69 (1970); Edling, *Obtaining Jurors*, 1 TEX. L. & LEG. 68 (1947); Lasdon, Waren & Madson, *Juror Management in a Metropolitan Court*, 57 JUDICATURE 402 (1974); Plutchik & Schwartz, *Jury Selection: Folklore or Science?*, 1 CRIM. L. BULL. No. 4 at 3 (1965); Vanderzell, *The Jury as a Community Cross-Section*, 19 W. POL. Q. 136 (1966); Wildman, *Selection and Examination of Jurors*, 5 DEPAUL L. REV. 32 (1955); Comment, *Class Discrimination in Selection of Jurors*, 5 CATH. U.L. REV. 157 (1955); Comment, *Jury—Pretrial Selection—Suggested Improvements*, 56 MICH. L. REV. 954 (1958); Note, *The Congress, the Court and Jury Selection*, 52 VA. L. REV. 1069 (1966); Note, *Fair Jury Selection Procedures*, 75 YALE L.J. 322 (1965).

5. *E.g.*, Miller & Siebert, *Effects of Video Taped Testimony on Information Processing and Decision-Making Jury Trials*, N.S.F. Progress Rep. 1 (March 1974); R. Forston, Courtroom Access—T.V.: Clarification and Recommendations, Nov. 1972 (paper presented to the Western Speech Comm. Ass'n Conv., Honolulu); G. Miller, D. Bender, T. Florence & H. Nicholson, Communication Variables in the Judicial Process, Dec. 1972 (paper presented before the Speech Comm. Ass'n Conv.); Miller, Bender, Florence & Nicholson, *Real Versus Reel: What's the Verdict?*, 24 J. COMM. 99 (Summer 1974); Miller, *Televised Trials; How Do Juries React?*, 58 JUDICATURE 242 (1974); *Symposium: The Use of Videotape in the Courtroom*, 1975 B.Y.U.L. REV. 327; *T.V. Cameras Used in Michigan Court*, N.Y. Times, Nov. 26, 1971, at 24, col. 1; *Use of Videotape Growing in Courtroom*, Chi. Tribune, July 18, 1974, § 4a, at 3, col. 1.

6. *E.g.*, R. Forston, The Foreman Myth, Apr. 1974 (paper presented to the Central States Speech Ass'n Conv., Milwaukee); R. Gordon, A Study in Forensic Psychology: Petit Jury Verdicts as a Function of the Number of Jury Members, 1968 (doctoral dissertation, University of Oklahoma) [hereinafter cited as Gordon]; C. Hawkins, Interaction and Coalition Realignments in Consensus-Seeking Groups: A Study of Experimental Jury Deliberation, 1960 (unpublished doctoral dissertation, University of Chicago) [hereinafter cited as Hawkins]; Bevan, Aldert, Loiseaux, Mayfield & Wright, *Jury Behavior as a Function of the Prestige of the Foreman and the Nature of His Leadership*, 7 J. PUB. L. 419 (1958).

7. T. Baker, A Dimension of Source Credibility Which Affects Jury Decision-Making in Personal Injury Cases, 1968 (unpublished masters thesis, Northern Illinois University); R. Fortson, Communication Process: A Method for Improving Judge-Lawyer-Juror Communication, Dec. 1974 (paper presented to the Speech Comm. Ass'n Conv., Chicago); R. Forston, The Decision-Making Process in the American Civil Jury: A Comparative Methodological Investigation, 1968 (doctoral dissertation, University of Minnesota) [hereinafter cited as Forston (1968)]; R. Forston, How the Jury Decides, (Continuing Legal Educ. Center, Drake Univ. 1970); Hawkins, supra note 6; J. Kessler, Techniques of Jury Research, Apr. 1974 (paper presented to Central States Speech Ass'n Conv., Chicago); Luck, Trial Jury Decision-Making Research: A Synthesis and Critique, 1970 (masters thesis, University of Georgia) [hereinafter cited as Luck]; Broeder, *The Importance of the Scapegoat in Jury Trial Cases: Some Preliminary Reflections*, 4 DUQUESNE L. REV. 513

personality, and attraction,[8] majority jury verdicts,[9] the import-

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8. *E.g.*, R. Kukla & J. Kessler, The Influence of Physical Attractiveness on Decisions of Simulated Jurors, Nov. 1973 (paper presented to the Speech Comm. Ass'n Conv., New York); C. Stephan, Sex Prejudice in Jury Simulation, 1973 (paper presented at the Am. Soc. Ass'n Conv., New York); C. Stephan & J. Tully, The Influence of Physical Attractiveness of a Plaintiff on the Decisions of Simulated Juries, 1973 (paper presented at No. Central Soc. Ass'n Conv., Cincinnati); G. White, Sex Bias in Experimental Juries, 1970 (doctoral dissertation, University of Maryland); Becker, Hildrum & Bateman, *The Influence of Jurors' Values on Their Verdicts: A Courts and Politics Experiment*, 46 SW. SOC. SCI. Q. 130 (1965); Broeder, *Occupational Expertise and Bias as Affecting Juror Behavior: A Preliminary Look*, 40 N.Y.U.L. REV. 1079 (1965); Broeder, *Plaintiff's Family Status as Affecting Juror Behavior: Some Tentative Insights*, 14 J. PUB. L. 131 (1965); Broeder, *Previous Jury Trial Service Affecting Juror Behavior*, 506 INS. L.J. 138 (1965); Friend & Vinson, *Leaning Over Backwards: Juror's Responses to Defendant's Attractiveness*, 24 J. COMMUNICATIONS 124 (Summer 1974); Hartshorne, *Jury Verdicts: A Study of Their Characteristics and Trends*, 35 A.B.A.J. 113 (1949); Hermann, *Occupations of Jurors as an Influence on Their Verdict*, 5 FORUM 150 (1970); Mitchell & Byrne, *The Defendant's Dilemma: Effects of Juror's Attitudes and Authoritarianism on Judicial Decisions*, 25 J. PERSON. & SOC. PSYCH. 123 (1973); Nagel & Weitzman, *Sex and the Unbiased Jury*, 78 CASE & COM. 28 (Mar.-Apr. 1973); Reed, *Jury Deliberations, Voting, and Verdict Trends*, 45 SW. SOC. SCI. Q. 361 (1965); Robinson, *Bias, Probability and Trial by Jury*, 15 AM. SOC. REV. 73 (1950); Stephan, *Selective Characteristics of Jurors and Litigants: Their Influences on Jurys' Verdicts, The Jury System: A Critical Overview*, 4 SAGE CRIM. JUSTICE SYS. ANNUALS 95 (1975).

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10. *E.g.*, R. BRANSON, THE LAW OF INSTRUCTIONS TO JURIES IN CIVIL AND CRIMINAL CASES (1936); R. MCBRIDE, THE ART OF INSTRUCTING THE JURY (1969) [hereinafter cited as MCBRIDE]; F. Woleslagel, The 'Kiss' Principle of Jury Communication, July 1974 (address before the ABA Conv., Honolulu) [hereinafter cited as Woleslagel (1974)]; Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744 (1959); Forston, *Judges' Instructions: A Quantitative Analysis of Jurors' Listening Comprehension*, 18 TODAY'S SPEECH 34 (Fall 1970); Forston, *Justice, Jurors, and Judges' Instructions*, 12 JUDGES' J. 68 (1973) [hereinafter cited as Forston (1973)]; Hervey, *Jurors Look at Our Judges*, 18 OKLA. B. ASS'N J. 1508 (1947); Hunter, *Law in the Jury Room*, 2 OHIO ST. U.L.J. 1 (1935) [hereinafter cited as Hunter]; Kline & Jess, *supra* note 7 at 116; Meyer & Rosenberg, *Questions Juries Ask: Untapped Springs of Insight*, 55 JUDICATURE 105 (1971) [hereinafter cited as Meyer & Rosenberg]; O'Mara, *The Courts, Standard Jury Charges—Findings of Pilot Project*, 43 PA. B. ASS'N Q. 166 (1972); O'Reilly, *Why Some Juries Fail*, 41 D.C.B.J. 69 (1974) [hereinafter cited as O'Reilly]; Sigworth, *Arizona Uniform Jury Instructions*, 8 ARIZ. B.J. 9 (Spring 1973) [hereinafter cited as Sigworth]; Comment, *Study of the North Carolina Jury Charge: Present Practice and Future Proposals*, 6 WAKE FOREST INTRA. L. REV. 459 (1970) [hereinafter cited as *North Carolina Jury Charge*]; Comment, *On Instructing Deadlocked Juries*, 78 YALE L.J. 100 (1968); Forston, *Does the Jury Understand?—Usually Not*, Des Moines Sunday Register, May 21, 1972, § c, at 15.

11. *E.g.*, J. Ahern, Communication in Juries: A Study of Decision-Making in Different Sized Groups, Dec. 1971 (paper presented to the Speech Comm. Ass'n Conv., San Francisco); Gordon, *supra* note 6; J. Kessler, A Content Analytic Comparison of the Six and Twelve-Member Jury Decision-Making Processes, 1973 (doctoral dissertation, University of Michigan); Augelli, *Six-Member Juries in Civil Actions in the Federal Judicial System*, 3 SETON HALL L. REV. 281 (1972); Beiser & Varrin, *Six-Member Juries in the Federal Courts*, 58 JUDICATURE 424 (1975); Bond, *On Six-Person Juries*, 26 B. BULL. BOSTON 241 (1955); Cronin, *Six-Member Juries in District Courts*, 2 BOSTON B.J. 27 (Apr. 1958); Henchman, *The New South Wales Jury of Four Persons*, 33 AUSTRALIAN L.J. 235 (1959); Pabst, *Statistical Studies of the Costs of Six-Man Versus Twelve-Man Juries*, 14 WM. & MARY L. REV. 326 (1972); Pabst, *What Do Six-Member Juries Really Save?*, 57 JUDICATURE 6 (1973); Phillips, *A Jury of Six in All Cases*, 30 CONN. B.J. 354 (1956); Pinsley, *Number of Jurors Required*, 25 ILL. B.J. 114 (1936); Tamm, *The Five-Man Civil Jury: A Proposed Constitutional Amendment*, 51 GEO. L.J. 120 (1962); Thompson, *Six Will Do!*, 10 TRIAL, Nov.-Dec. 1974, at 12; Wiehl, *The Six-Man Jury*, 4 GONZAGA L. REV. 35 (1968); Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710 (1971); Zeisel, *Twelve is Just*, 10 TRIAL, Nov.-Dec. 1974, at 13 [hereinafter cited as Zeisel]; Zeisel & Diamond, *"Convincing Empirical Evidence" on the Six-Member Jury*, 41 U. CHI. L. REV. 281 (1974); Note, *The Effect of Jury Size on the Probability of Conviction: An Evaluation of William v. Florida*, 22 CASE W. RES. L. REV. 529 (1971); Note, *Constitutional Law—Jury of Less Than Twelve Men*, 10 NOTRE DAME LAW. 61 (1934); Note, *An Empirical Study of Six and Twelve Member Jury Decision-Making Processes*, 6 U. MICH. J.L. REFORM 712 (1973); Note, *Reducing the Size of Juries*, 5 U. MICH. J.L. REFORM 87 (1971); Note, *Six-Member and Twelve-Member Juries: An Empirical Study of Trial Results*, 6 U. MICH. J.L. REFORM 671 (1973); 15 CHI.-KENT L. REV. 65 (1936); 10 IND. L.J. 259 (1935); 42 J. AM. JUD. SOC'Y 136 (1958).

ance of voir dire.[12]

Unfortunately, this voluminous criticism and research has done little to improve the jury system. Most of the recent research has been designed, not to help jurors better perform their functions nor to improve the jury system, but rather to meet certain administrative needs of the judicial system. The contention of this article is that most of the research and criticism relating to the jury system is therefore misdirected. Because juries are likely to continue as a basic element in our system of justice,[13] both proponents and critics of the jury should be motivated to improve the system in order to obtain the best it has to offer.

The facet of the jury system perhaps most in need of improvement is the communication process in jury trials.[14] Effective

12. Brill, *Voir Dire—Examination of Jurors*, 29 Mo. L. Rev. 259 (1964); Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. Cal. L. Rev. 503 (1965); Busch, *Selecting the Jury*, 47 Ill. B.J. 238 (1958); Carr, *Voir Dire Examination of Jurors: An Appraisal by an Attorney*, 1963 U. Ill. L.F. 653; Crebs, *Voir Dire Examination of Jurors: An Appraisal by a Judge*, 1963 U. Ill. L.F. 644; Doherty, *Selection of Jury in a Criminal Case*, 2 Ill. Cont. Legal Educ. 103 (1964); Eddy, *Challenges to Jurors*, 229 L. Times 305 (1960); Elam, *Techniques of Jury Selection from Plaintiff's Viewpoint; From Defendant's Viewpoint*, A.B.A. Sec. Ins., Neg. & Comp. L. 354 (1965); Field, *Voir Dire Examinations—A Neglected Art*, 33 U. Mo. K.C.L. Rev. 171 (1965); Fried, Kaplin & Klein, *Juror Selection, An Analysis of Voir Dire, the Jury System: A Critical Overview*, 4 Sage Crim. Justice Sys. Annuals (1975); Hill, *Effective Techniques of Jury Selection and Jury Argument in Personal Injury Cases*, 21 Texas B.J. 221 (1958); Jones, *Peremptory Challenges—Should Rule 233 Be Changed?*, 45 Texas L. Rev. 80 (1966); Kaufman, *The Judges and Jurors: Recent Developments in Selection of Jurors and Fair Trial—Free Press*, 41 U. Colo. L. Rev. 179 (1969); Lay, *In a Fair Adversary System the Lawyer Should Conduct the Voir Dire Examination of the Jury*, 13 Judges' J. 63 (1974); Levit & Chernick, *Trial Judges Should Conduct Voir Dire Examination*, 13 Judges' J. 65 (1974); Levit, Nelson, Ball & Chernick, *Expediting Voir Dire: An Empirical Study*, 44 S. Cal. L. Rev. 916 (1971); Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?*, 39 Texas L. Rev. 545 (1961); Padawer-Singer, Singer & Singer, *Voir Dire by Two Lawyers: An Essential Safeguard*, 57 Judicature 386 (1974) [hereinafter cited as Padawer-Singer]; Rothblatt, *Techniques for Jury Selection*, 2 Crim. L. Bull. No. 4 at 14 (1966); Schulman, Shaver, Colman, Emrich & Christie, *Recipe for a Jury*, 7 Psych. Today 37 (1973); Shepherd, *Techniques of Jury Selection from Defendant's Viewpoint*, A.B.A. Sec. Ins., Neg. & Comp. L. 359 (1965); Urbom, *Picking a Jury and Referring to Evidence*, 46 Neb. L. Rev. 528 (1967); Comment, *Jurors' Knowledge of the Law: Voir Dire on Jury Instructions*, 7 Idaho L. Rev. 257 (1970); Note, *Peremptory Challenges and Change of Venue*, 27 U. Cin. L. Rev. 87 (1958); *Criminal Procedure—State Allowed Peremptory Challenge of Previously Accepted Juror After Defense Exhausted Peremptory Challenges*, 9 DePaul L. Rev. 275 (1960).

13. *See* Zeisel, *supra* note11.

14. Telephone interview with Maurice Rosenberg (Nash Professor of Law, Columbia Unviersity), Feb. 27, 1974. *See also* Nat'l Conf. of State Trial Judges, The State Trial Judges' Book 165 (2d ed. 1969) [hereinafter cited as The State Trial Judges' Book]; W. Probert, Law, Language and Communication (1972); Edises, *One-Way Communications: Achille's Heel of The Jury System*, 13 Judges' J. 78 (1974) [hereinafter cited as Edises]; Hacker, *Who Killed Harry Gleason?*, 234 Atlantic Monthly 52 (Dec. 1974) [hereinafter cited as Hacker]; Rosenberg, *Devising Procedures That Are Civil to Promote*

communication between the judge, lawyers, witnesses, and jury is critical to the proper functioning of the system. It is self-evident that if the communication process is not effective—if jurors are unsure about the evidence, unclear on the meaning of the law, confused by legal jargon, bewildered by trial procedure, or uncertain of the role they are to play—the jury cannot be expected to perform its function intelligently.

The studies reported in this article indicate that such a condition of pervasive confusion does in fact exist among jurors in the present jury system and is largely a result of poor communication. Jurors often improperly find the facts because the concept of legal evidence is seldom adequately communicated to them. They often improperly apply the law because they are unable to comprehend the jury instructions. They often fail to rationally consider legal arguments because they have difficulty understanding legal jargon. Also, time is often wasted in the deliberation room because the jury does not fully understand its function.

The purpose of this article is to point out some of the jury trial practices which "do not make sense" in light of current communication theory and research and which adversely affect a jury's performance. Toward that end, the article first discusses two empirical studies which illustrate the juror confusion resulting from the present system of trial communication. The article then suggests six areas in which jury trial communication could be improved in order to alleviate such juror confusion: the wording of jury instructions, the timing of jury instructions, juror orientation, two-way communication, note taking, and juror selection.

I. The Problem: Non-sense Communication In Jury Trials

A. Empirical Research I: Confusion in the Deliberation Process[15]

The primary purpose of the first study considered was to analyze three jury simulation techniques in order to estimate their relative usefulness for further research into the decision-making processes in civil jury deliberations. The emphasis of the study, therefore, was on the manner in which jurors process information, organize their deliberations, and arrive at verdicts. A

Justice That Is Civilized, 69 Mich. L. Rev. 797, 817 (1971); Rosenberg, *New Challenges and Responses In Resolving Civil Disputes*, 1972 Law & Soc. Ord. 359, 368.

15. This research was funded by the Margaret H. and James E. Kelly Foundation, Inc., and the Tozer Foundations, Inc.

serendipitous by-product was the discovery of the difficulty jurors had in the deliberation process as a result of confusion and misunderstanding of various legal concepts, trial procedures, and jury instructions. These latter findings are the primary focus of this article.

1. Procedures

a. Jury trial simulation. The sixteen juries studied each participated in one of the three different types of simulation: six were "fact sheet" juries (the jurors were provided with a summary sheet of important facts and issues and with written jury instructions), six were "audio trial" juries (the jurors listened to a detailed audio recording of an edited trial), and four were "live trial" juries (the jurors participated in an actual live trial situation). The simulation sessions were held in realistic settings utilizing a courtroom, bailiff, and jury room. In the live trial settings, an actual judge, attorneys, and witnesses were used as well.

All juries deliberated on the same essential set of facts taken from an actual trial involving an automobile-pedestrian accident. All subjects were regular county jurors from the Minneapolis and Chicago areas who had been randomly selected from a larger jury panel. Each twelve member jury's deliberation was videotaped. Although the jurors were aware that they were being taped, the equipment was inconspicuously placed, and procedures were developed to desensitize the jurors to the cameras.

b. Analysis techniques. The recordings of the deliberations were quantitatively analyzed through a content analysis form developed as a part of this study: the Civil Jury Deliberation (CJD) Process Analysis. The CJD Processs Analysis is a specially designed computer assisted content analysis technique for recording and quantifying each juror's comments as well as collectively recording the process in which the jury reaches its decision. This technique permits an empiricist to view the complex jury decision-making process through an analytical approach which uses three to six time phases, four general categories of comments (substantive, procedural, disruptive, and immaterial), twenty sub-categories, and three directional value judgements (positive, negative, and neutral).[16] By the use of recordings and transcripts,

16. The Civil Jury Deliberation Process Analysis used the following breakdown for quantitatively analyzing the jurors' deliberation:

SUBSTANTIVE (TASK)

(1) Credibility of witnesses (directional value judgments + o -);

(2) Credibility of attorneys (directional value judgments + o -);

(3) Determination of plaintiff's liability claim and defendant's defenses (directional value judgments + o -);
(4) Determination of the extent of plaintiff's losses, injuries, and suffering (directional value judgments + o -);
(5) Discussion regarding the amount of the award:
  a. Discussion of award as a total sum rather than itemizing costs,
  b. Itemization of damages,
    (1) Property damages
    (2) Loss of wages
    (3) Medical costs
    (4) Suffering
    (5) Permanent injuries
    (6) Other (specify)
(6) References about judge's instructions, rules or clarification; and definitions of legal terms;
(7) Comments about lack of evidence, missing facts, or experimental conditions;
PROCEDURAL (TASK)
(8) Selection of foreman;
(9) Procedural planning;
(10) Voting on liability, negligence, or related issues leading to liability determination;
(11) Voting for an award or related issues leading to the amount of the award;
DISRUPTIVE (NON-TASK)
(12) Disruptive;
IMMATERIAL (NON-TASK)
(13) Discussion of trial and nontrial functionaries' reputations and/or personalities, (directional value judgements + o -);
(14) Discussion of insurance or the party's ability to pay or absorb a financial amount, (directional value judgments + o -);
(15) References to attorneys' fees;
(16-17) Special immaterial categories (which are defined as prominent immaterial issues) arise from various individual trials' (directional value judgment + o -);
(18) Other miscellaneous immaterial comments;
(19) Social-emotional interaction and joking;
(20) Consideration of the spirit of law and the pragmatic necessity for comparative negligence.

Substantive content related to the verdict (task) in a *direct way* and often contributed direct insights which led to some change in the group's perception of the verdict. Content which clearly seemed to pertain to one of the seven substantive categories was easily identified as substantive content. For example, a statement such as "The blonde witness was probably in the best position to see the color of the traffic light" was classified as category 1 (witness credibility) of the substantive aggregated category.

Procedural content related to the (task) verdict in an *indirect way*; such a contribution was not meant to provide a change in the direction of the verdict. Procedural comments were statements about the group's operation (e.g., "What should we discuss next?"—category 9). All voting processes were classified as procedural.

The *disruptive* category was used when the jury no longer functioned as a unit but broke into *sub-group discussions* for prolonged periods of time (over seven seconds).

Immaterial content was non-task comment which was contrary to the rules of law as stated in the judge's instructions or which was clearly non-task oriented such as a social facilitation comment to another member (e.g., "That certainly is a pretty dress you have on today,"—category 19).

For a comparison of another kind of content analysis of jury deliberations see R. Simon, *Trial by Jury: A Critical Assessment*, in APPLIED SOCIOLOGY: OPPORTUNITIES AND PROBLEMS 297 (S. Miller & A. Gouldner eds. 1965).

an investigator codes each juror's comments in the above terms and measures the length of each statement in seconds.[17] This numerical data can be analyzed with various statistical manipulations.

In addition to the quantitative analysis, repeated observations of the videotaped jury deliberations and information obtained from questionnaires completed by each juror permitted an extensive qualitative case study analysis of each jury.[18]

2. Results and discussion

a. Quantitative analysis. The distribution of the typical jury's communication, as measured in time and converted into a percentage of the total deliberation time, was most frequently found in eleven sub-categories as shown in Table 1.

TABLE 1

Distribution of Mean Percentages of
Jury Deliberation Time for Various Categories

Category	Description	Percentage
1	Witness Credibility Discussion	8.5
2	Attorneys: Discussion	0.8
3	Determination of Liability	57.1
4	Determination of Plaintiff's Losses & Injuries	1.5
6	Jury Instructions	9.5
7	Lack of Evidence in Trial	2.5
9	Procedural Planning (Voting)	5.6
14	Comments about Insurance	0.7
15	Comments about Attorney's fees	0.4
18	Other Misc. Immaterial Comments	1.0
19	Social-Emotional Interaction (Jurors)	0.2

As can be seen from categories 1, 3, and 4, two-thirds of the typical jury's time was spent trying to evaluate and determine the facts of the case, while almost another 10 percent of the jury's time was spent applying the rules of law as presented in the jury instructions (category 6).

The deliberation time spent on jury instructions (category 6) warrants closer scrutiny. Some juries were given only oral instruc-

17. The final inter-coder reliability agreement on the category system was 95.0 percent, and the agreement for directional value judgments was 81.2 percent.

18. See text accompanying notes 20-24 *infra*. Detailed case study analysis of the sixteen juries is available in Forston (1968), *supra* note 7, at 172.

tions, while other juries received both oral and written instructions. Those juries that received only oral instructions, spent but 6 percent of their time attempting to understand and apply rules of law. In contrast, those that received written instructions spent more than twice as much time (14 percent) applying the law. While this difference in time expended attempting to apply jury instructions is itself significant, the merits of the written charges over the oral charges were even more dramatically revealed by the subsequent qualitative analysis which is reported below.

Immaterial comments about insurance, attorney fees, and so forth (categories 14, 15, and 18) account for 2.1 percent of the deliberation time. The study revealed that when immaterial statements were made, other jurors usually interrupted in order to point out that consideration of immaterial matters constituted improper deliberation. This was particularly common in juries which had written instructions.

Discussion about a lack of evidence (category 7) often consisted of jurors expressing a desire to have been allowed to ask "obvious questions" during the trial. This concern was also made manifest by a desire to have the deliberating jury ask the judge for more information or clarification. However, only one jury decided to ask a formal question. Most jurors were discouraged from asking questions because judges had the reputation of refusing to respond.[19]

b. Qualitative analysis. Qualitative analysis of the juries' performances revealed that the juries that had been provided with written copies of instructions for each juror were more efficient and exhibited higher quality deliberations. Jurors with written instructions made fewer explicit comments about confusion, spent less time inappropriately applying the law, wasted less time trying to ascertain the meaning of the instructions, and concentrated more on relevant facts and proper application of the law. Also, jurors provided with written charges exhibited more confidence that they had reached the best decision.

Additionally, qualitative analysis revealed numerous instances of individual juror's misunderstanding, as well as entire jury confusion, over legal terminology, trial procedures, jury instructions, and jury room procedures. For instance, one-third of the juries studied had difficulty understanding and applying the doctrine of contributory negligence. This difficulty was illustrated by

19. A jury's reluctance to return to a judge for help is a common problem according to KALVEN & ZEISEL, *supra* note 1, at 510, and *North Carolina Jury Charge*, *supra* note 10, at 461.

the phrasing of questions upon which jurors voted. One foreman, for example, asked the jury to respond to the following question: "Who was at fault—the car, the plaintiff, or question mark (undecided)?" Some jurors were asked to choose between the following options: "defendant guilty" or "defendant not guilty." None of these problem questions voted on by the juries demonstrates a proper understanding of contributory negligence. Most juries finally seemed to work out the confusion over contributory negligence, but some deliberated erroneously about this concept for nearly an hour. Again, those juries with written instructions were consistently able to resolve confusion more quickly than those that only heard oral instructions.

Instances of confusion over abstract legal phrases and jury instructions were numerous. The application of concepts such as proximate cause, preponderance of evidence, contributory negligence, and how monetary damages should be determined were frequent sources of misunderstandings. The significance of this confusion is partly illustrated by the fact that, while confrontations between individual jurors might be expected when the jury is discussing issues or values involved in a case, this study revealed that a substantial amount of juror confrontation was the direct result of trying to understand or apply legal terms or procedures which were confusing.[20]

Confusion also resulted from seemingly clear instructions describing deliberation procedures. In three juries the jurors were asked to vote by secret ballot and to make a letter "P" for plaintiff or a letter "D" for defendant. Some jurors printed "D" because they thought the defendant was guilty and should pay damages; others printed "D" because they thought the defendant was not liable and deserved to win the case. In one jury when the

20. Excerpts from the jury deliberations illustrate some of the confusion and confrontation.

A juror talking to the foreman about contributory negligence:

Juror: "We are not attorneys, and you're talking like an attorney to me. I don't understand what you're talking about really. [Pause] Do You?"

Foreman: "Are you talking about me?"

Juror: [Pointing his finger at the foreman] "Yes! I don't understand this. This is legal terms; it isn't everyday terms. I'm trying to learn something."

Another jury was having problems understanding and following the judge's instructions. This jury had been supplied with only one copy of written instruction. The foreman was planning to read again from the instructions, when a juror stopped him to say: "You have already read them to me ten times, and I already have them crushed into my mind."

Note that the last noted example may also indicate a problem with providing only one copy of the written instructions rather than enough copies for all jurors. In juries which had written copies for all jurors, this kind of confrontation never occurred.

secret ballots were being tallied, a juror said: "Well, I meant the opposite with my 'D' so put it in the 'P' pile."

One of the conclusions of this study, based on both quantitative and qualitative analysis, was that jury instructions, when understood, have considerable influence on the decision-making of juries. The use of jury instructions as a basis for his reasoning universally enhanced the cogency of a juror's argument. Significantly, no jury disregarded a juror's argument supported by the rules of law as explained in the jury instructions in favor of another juror's argument which was incompatible with those instructions.[21]

The study also tested the hypothesis that the pre-deliberation preferences of individual jurors (as obtained by questionnaires administered after the deliberations)[22] accurately indicate the direction of the final jury verdict. This hypothesis proved to be a good predictor for the direction of jury verdicts for more than 86 percent of the juries.[23] Other studies corroborate this conclusion and afford further insight by revealing that the vast majority of jurors reach a fairly definite decision before all the evidence has been presented in the trial.[24] These collective preferences typically predetermine the final verdict.

B. Empirical Research II: Misunderstanding of Jury Instructions

The second series of research projects to be considered in this article focused on jurors' comprehension and application of jury instructions. The descriptive research questions for investigating the problem of juror confusion were:

(1) What percentage of the jury instructions do individual jurors retain and comprehend?

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21. This finding on the influence of jury instructions is supported by the conclusions of Kline & Jess, *supra* note 7, at 116, but is at odds with the survey information collected by the *University of Chicago Jury Project*, as reported in KALVEN & ZEISEL, *supra* note 1, and Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 751 (1959).

22. The questionnaire on pre-deliberation preference and other information was not administered to the jurors before the deliberation in order to avoid possible contamination of the jury deliberation.

23. This percentage figure is based on the combined results of studies of twenty-two juries (sixteen juries from the original study and six juries from a later follow-up study).

24. *See, e.g.*, James, *supra* note 3, at 569; KALVEN & ZEISEL, *supra* note 1, at 487; SIMON, *supra* note 3, at 117; Stone, *A Primary Effect in Decision-Making by Jurors*, 19 J. COMMUNICATIONS 239 (Sept. 1969); Weld & Danzig, *supra* note 7; Weld & Roff, *supra* note 7; Blade, *Professor* [Harry Kalven]: *Juries Often Decide Early*, Minneapolis Star, July 29, 1967, § A, at 9. Compare the above cited studies with the following which is tangentially related but has some findings which are in disagreement: Lawson, *The Law of Primacy in the Criminal Courtroom*, 77 J. SOC. PSYCH. 121 (1969).

(2) What percentage of the jury instructions do face-to-face deliberating juries retain and comprehend?

1. Procedures

Two sets of jury instructions were obtained from the Polk County District Court in Des Moines, Iowa: instructions for a civil personal injury case and instructions for a criminal murder case. A total of 114 experienced Polk County jurors participated in this study on their last day of jury service. The group was divided into two smaller groups of 54 and 60 jurors. One group of jurors participated in the civil case and the other participated in the criminal case. The jurors were never told that their comprehension of jury instructions would be tested.

An investigator gave the jurors of each large group detailed background information pertaining to the case to which they were assigned so that the jurors could relate the jury instructions to a concrete factual situation. Next, the investigator read the appropriate set of jury instructions to each of the groups. Immediately after the reading of the instructions, a multiple choice retention-comprehension test based on the instructions was administered to each individual juror. Each test consisted of fifteen multiple choice questions. Each question had five possible answers, thus establishing a guess chance of 20 percent.

Following the test, the jurors were randomly divided into face-to-face deliberating panels of six jurors. Each jury was given the same test that the jurors had individually taken, and assigned the task of reaching a unanimous group decision on each of the fifteen questions.

This testing of the jurors' comprehension of judicial instructions was conducted under almost ideal conditions: the jurors were experienced (nearing the end of a three-week term); the instructions were short (both sets were approximately 20 minutes in length); the instructions involved relatively ordinary issues rather than complex issues; the experimental research took place during the morning, while the jurors should have been mentally alert; and the comprehension test measured immediate rather than delayed comprehension.

An earlier study using identical research procedures was conducted for comparative purposes using 106 Drake University and Grandview College students as jurors.

2. Results and discussion

The results of the two studies of juror comprehension are revealed in Table 2.

TABLE 2

Individual Jurors' and Deliberating Juries' Mean Percent of Compensation for Civil, Criminal and Combined, Jury Instructions

	Civil Instructions		Criminal Instructions		Combined Instructions	
	Individual Jurors (Percent)	Deliberating Juries (Percent)	Individual Jurors (Percent)	Deliberating Juries (Percent)	Individual Jurors (Percent)	Deliberating Juries (Percent)
County Jurors	46.0	60.1	53.1[25]	63.3	49.9	61.8
Students	71.3	80.6	59.8	82.9	67.1	81.5

As indicated by the table, the deliberating juries scored 10 to 14 percentage points above the mean of individual jurors. This improved performance is probably attributable to an "assembly effect" resulting from the face-to-face interaction.[26]

Mean comprehension levels achieved by the county jurors should be viewed as more valid indicators of an actual jury situation than the student comprehension levels. This is because the former represent more closely the demographic characteristics which would be present in any actual jury. The student data were included for the comparative purpose of showing the effects of higher education on the understanding of jury instructions and trial procedure. One implication that might be drawn from the substantially higher student scores on the comprehension test is that systematically excusing our better educated citizens from jury duty makes an important difference in the ability of the jury to perform its expected function.[27]

Analysis of the individual jurors' understanding of the jury instructions shows that some parts of the instructions were more confusing than others. For example, 85 percent of the jurors missed at least one question on what constitutes evidence and 37

25. The Sigworth study, described in the text accompanying notes 29-32 *infra*, examined criminal jury instructions only, but came to an amazingly similar juror comprehension level of 52.1 percent.

26. The "assembly effect" occurs when a group of persons is able to achieve collectively something which could not have been achieved by one person working alone. For a discussion of the "assembly effect" see B. COLLINS & H. GUETZKOW, A SOCIAL PSYCHOLOGY OF GROUP PROCESS FOR DECISION-MAKING 58 (1964).

27. This writer has no explanation for the differences in percentages between civil and criminal cases, except for the fact that one set of instructions may have been more complex than the other. One would not, however, ordinarily expect one kind of instruction to be inherently more complex than another; a larger sample of cases will have to be investigated before a conclusion can be reached.

percent missed two out of the three questions about evidence. Also, nearly three-fourths of the jurors could not choose the correct response to the question pertaining to proximate cause.

Similar results were obtained from analysis of the juries' performances. Even under the favorable conditions of immediate recall and group interaction, 86 percent of the criminal juries were unable to respond accurately to what is proof of guilt, and over one-half of the civil juries did not correctly answer the question on proximate cause. The most shocking discovery was that four-fifths of the juries missed one or more of the three questions on evidence. Since juries are expected to weigh the relevant evidence presented and ignore both immaterial and illegitimate sources of information, the confusion over what is and what is not evidence may be grounds for serious concern, especially where pre-trial publicity is involved.

3. Related studies

The results of the above-described study are similar to those reached in certain other empirical studies. One such study found that up to 85 percent of the jurors tested could not choose correct definitions of the following terms:[28]

Inference	Included Offense
Impeach	Criminal Intent
Stipulate	Specific Intent
Voir Dire	Material Allegation
Proximate Cause	Preponderance of Evidence
Circumstantial	Conflictive
Probative	

A second study presented legal concepts and other words commonly found in instructions to jurors and empirically tested their understanding of the terms. Some of the results obtained give rise to concern. For instance, while 58 percent of the jurors tested selected the correct meaning of "speculate," 28 percent thought that the word meant either to examine or conclude.[29] This simple example suggests that it would be unwise for a judge to instruct jurors "not to speculate."

By way of further example, the same study demonstrated that while two-thirds of the jurors understood what "presumed to

28. This study is reported in O'Reilly, *supra* note 10, at 73.

29. H. Sigworth & F. Henze, Jurors' Comprehension of Jury Instructions in Southern Arizona, appendix C, at 3 (1973) (unpublished report) [hereinafter cited as Sigworth & Henze].

be innocent" meant, and only two percent reported that the defendant must in any way prove his own innocence, fully one-third of the jurors tested agreed that "when the state has finished presenting its evidence, you must wait to see if the defendant can prove he is innocent." Similarly, although three-quarters of the jurors correctly understood that they must come to a unanimous verdict, 20 percent thought that a non-unanimous verdict was sufficient for a not-guilty verdict. Still other studies have found that jurors frequently have an intellectual understanding of a legal term or procedure but are unable to apply it.[30]

It is significant to note that two of the studies described in this section reach the conclusion that prior jury deliberation experience helped improve jurors' understanding of instructions by 5 to 10 percent.[31] One study found the most dramatic improvement (almost 20 percent) among jurors who had taken the same test before.[32] This last noted rate of improvement is encouraging because it indicates that after repeated exposure jurors are willing to listen more carefully to instructions and information in order to clarify points.

II. Possible Solutions: Six Areas for Improving Communication in Jury Trials

The studies described above reveal a sustantial amount of confusion in the jury deliberation process which can largely be attributed to a failure on the part of courts to communicate effectively with jurors. It is self-evident that this confusion cannot help but interfere with the proper functioning of the jury. If the jury is to be preserved as a basic part of our system of justice, it is essential that attention be directed toward improving the effectiveness of communication in trials. The following sections of this article present suggestions for improving trial communication. These suggestions relate to the wording of jury instructions, the timing of jury instructions, juror orientation, two-way communication, note-taking, and juror selection.

A. The Wording of Jury Instructions

1. The problem of legalese

Jury instructions are intended to delineate the issues involved in a case, and to inform the jury of the applicable rules of

30. *See, e.g.*, Hunter, *supra* note 10.
31. O'Reilly, *supra* note 10, at 74; Sigworth, *supra* note 10, at 23.
32. Sigworth, *supra* note 10, at 23.

law. The above studies, however, demonstrate that typical instructions do not adequately achieve these goals.[33] Instead they often leave the jurors confused over such fundamental legal concepts as the meaning of evidence or negligence. Much of this misunderstanding can be traced to the legal jargon used in the instructions which, although technically correct, is largely meaningless to a jury of laymen.

The literature is rich with those who complain of the legalese used in trials.[34] The opinions of these critics are strongly supported by the studies described above. In fact, all jury studies to date, but for a single exception,[35] reach the conclusion that legalese in trials, particularly as contained in jury instructions, is neither adequately understood nor properly applied by jurors.

In addition, jurors themselves are asking for better instructions. In one study,[36] 80 percent of the jurors surveyed found substantial room for improvement in jury instructions. Almost three-fourths of those jurors specifically recommended the judge give less complicated instructions and that the jurors be given the opportunity to ask clarifying questions before retiring to the jury room.[37]

The challenging solution to this widely recognized problem is to draft substantively correct instructions which are sufficiently clear and understandable that lay jurors can apply them in the deliberation process. This solution is complicated by the fact that jury instructions must be able to pass the scrutiny of an appellate court and be found technically accurate. Such accuracy

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33. See text accompanying notes 20 and 25-32 *supra*.

34. John H. Holloway, while Executive Director of the Oregon State Bar Association, spoke of lawyers using "high sounding phrases, managing to say in fifty words what could have been said in seven." F. WOLESLAGEL, JURY 76 (1972) [hereinafter cited as WOLESLAGEL (1972)]. Justice Benjamin Cardozo often referred to legal writing as being "so overloaded with all its possible qualifications that it will tumble down of its own weight." R. FLESCH, THE ART OF READABLE WRITING 111 (1949). Charles Joiner has argued:

> One of the weaknesses of jury decision-making lies in the instructions on the law given the jury at the close of a case. . . . On the whole, judges have done a very poor job of instructing. Some of them ramble on interminably, using legal language not easily understood by the jury, which not uncommonly fails to grasp some significant question of law as a result. If better verdicts are to be had, attention must be given to the instructional process.

C. JOINER, CIVIL JUSTICE AND THE JURY 83 (1962).

35. Moffat, *As Jurors See a Lawsuit*, 24 ORE. L. REV. 199 (1945). Moffat's study has a serious defect in that he asked only attitude questions, which were too general to be of any specific help regarding understanding of the instructions. No attempt was made to test the effectiveness with which the jurors tried to apply the law.

36. O'Reilly, *supra* note 10. For a description of this study, see the text accompanying notes 31 & 32 *supra*.

37. O'Reilly, *supra* note 10, at 73-74.

is most difficult to achieve without using legal terms of art which have precise meaning to members of the legal profession. Unfortunately these same terms are very confusing to the vast majority of lay jurors.[38] As stated in the California Jury Instructions:

> It has been bruited that instructions are written in English that is too good, too highbrow; they ought to be written in the language of the street. . . . No one, for us at least, ever has taken one of our instructions and translated it into the language of the street still correctly stating the law.[39]

2. Pattern instructions

One possible means of improvement lies in the area of uniform or pattern jury instructions. Thirty states have adopted their use in civil trials, and drafting projects are planned or underway in ten others.[40] Some federal court judges are also making use of standard instruction guides.[41]

The pattern instruction movement constitutes a giant step toward making instructions more understandable to laymen. For example, the Arizona Jury Instruction Project empirically tested drafts of that state's patterned instructions to discover vocabulary and legal concepts which were confusing to jurors. The most

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38. Judge Robert McBride described the dilemma a trial judge faces in trying to communicate with jurors and with appellate courts:

> The oral delivery of instructions justifies resorting to the best and most effective use of language available. Every instruction is a test of the skill and art of the judge, a test which is not graded in points or personal success, but by justice between the parties.
>
> Instructions must meet still another test. They must be approved for technical accuracy by the reviewing court. This additional test discourages the preparation of instructions for effective oral use in the courtroom. It frightens new judges to the point that the necessity for comprehension by the jurors is ignored.
>
> How well a judge succeeds in conveying his message to twelve captive listeners may determine the verdict. There is no opportunity to rehearse, edit or improve the immediate product. There is no examination of the jurors to find out if the message was effective. The success of any instruction to a jury is not reflected in its brilliance or in its eloquence but by a fair and just verdict.
>
> . . . .
>
> Ordinary language requires all the skill of a master of the law and the ingenuity of a professional author. We must keep in mind the limited time at the judge's disposal and the tremendous gap he must bridge to bring the specific law to the jury. Certainly it must be accurate, but if it fails to bridge the gap it might as well not be given. Comprehension of the jury and not approval by the reviewing court is the first objective.

R. McBride, The Art of Instructing the Jury 180, 191 (1969).

39. California Jury Instructions: 44 Civil (4th ed.).

40. J. Alfini, Pattern Jury Instructions Report No. 6, American Judicature Society 4 (1972) [hereinafter cited as Alfini].

41. *Id.* at 39; Woleslagel (1972), *supra* note 34, at 80; Meyer, *Pattern Instructions Perfected*, 55 Trial Judges' J. 1 (1966); Meyer & Rosenberg, *supra* note 10, at 105.

frequent problem areas of the instructions were redrafted to avoid troublesome vocabulary. The redrafted instructions were tested again for juror comprehension; the results were encouraging.[42]

Other states have also used resourceful and imaginative methods in an endeavor to improve their jury instructions. Montana has employed a communication specialist on the drafting committee.[43] Oregon has also utilized a speech communcation specialist to assay the juror's comprehension of instructions by using systematic, post-verdict interviews and experiments with simulated juries.[44]

On the other hand, judges should not assume that all instructions taken from a uniform or pattern jury instruction guide book are necessarily understandable to jurors or contain the best phrasing with which to instruct a jury.[45] Some recent pattern instructions were used in several jury instruction studies,[46] including those described above which indicated a serious need for clearer instructions. In addition, judges need to avoid using the pattern jury guide books in a "cut and paste" manner with no system, transitions, or logical arrangement for jurors to readily understand.[47]

3. Written instructions

Another means of improving the jury's ability to understand and apply jury instructions is to provide the jury with written copies of their instructions for use during deliberation. Approximately twenty states use written instructions, but only sixteen permit them to be taken into the jury room.[48] Many federal and state courts do not allow written instructions at all. And yet, as the research reported above has indicated,[49] the advantages of using written instructions are dramatic. In the first study, those juries supplied with written instructions spent more than twice as much deliberation time specifically applying the rules of law as did the juries that only heard oral instructions. A by-product

42. Sigworth, *supra* note 10, at 9.

43. Meyer & Rosenberg, *supra* note 10, at 106.

44. *Id.*

45. *See* McBride, *supra* note 10, at 183; Woleslagel (1972), *supra* note 34, at 80-81.

46. Pattern instructions were used in all the studies by O'Reilly, Sigworth, Forston and O'Mara.

47. *See* Alfini, *supra* note 40, at 13-16; McBride, *supra* note 10, at 183.

48. Maloney, *Should Jurors Have Written Instructions?*, 6 Trial Judges' J. 18 (1967) [hereinafter cited as Maloney]. *See also* Cunningham, *Should Instructions Go Into the Jury Room?*, 33 Cal. S.B.J. 278 (1958); Comment, *The Jury Instruction Process—Apathy or Aggressive Reform?*, 49 Marq. L. Rev. 137 (1965).

49. *See* text accompanying notes 19 and 20 *supra*.

of this application was a more efficient and higher quality deliberation process. Furthermore, the jurors using written charges exhibited more confidence that they had reached the best decision. Similarly, another study, not reported herein, found that allowing written instructions in the jury room results in a 12 percent improvement in juror comprehension.[50] Moreover, many jurors want written instructions before them—more than 45 percent of the jurors surveyed in two studies strongly recommended that instructions be submitted in written form.[51]

Although no research has concluded that oral instructions are in any way superior to written instructions, many trial judges oppose giving written instructions to jurors. One study reports that objecting judges said it would require more work and involve delay for the judge to first deliver instructions orally and then wait for them to be typed.[52] Of course, no such problem would be encountered if the judge simply read a previously prepared set of written instructions to the jury and then supplied them with copies. As recognized in *The State Trial Judges' Book*, such a practice would likely result in the use of more complete, cohesive, understandable, and unrepetitive instruction.[53]

Other judges argue that if written charges are used, the jury will read only a portion of what is given them in writing, and then give that portion undue emphasis. However, this risk seems no greater than the risk that jurors will remember only a part of an oral charge and give the remembered part undue emphasis.[54] Finally, the fear that written instructions will give an advantage to literate jurors, or those with good eyesight, can be allayed by making the instructions available to the jury in the form of tape recordings or video tape.[55] A corollary to this last noted concern is that when written instructions are used, each juror should be given a copy to avoid the danger that the person with the only copy of the instructions will dominate the deliberation.[56]

B. The Timing of Jury Instructions

1. The "rules at the end of the game" problem

Typically, a judge instructs a jury orally for ten minutes to

50. Sigworth & Henze, *supra* note 29, at 7.

51. Maloney, *supra* note 48, at 18; O'Reilly, *supra* note 10, at 74.

52. Maloney, *supra* note 48, at 18.

53. THE STATE TRIAL JUDGES' BOOK, *supra* note 14, at 159-60.

54. *Id.*

55. *See* Katz, *Reinstructing the Jury by Tape Recording*, 41 J. AM. JUD. SOC'Y 148 (1958); Meyer & Rosenberg, *supra* note 10, at 107.

56. *See* note 20 *supra*; Forston (1973), *supra* note 10, at 69.

two hours[57] after all the evidence and closing arguments have been presented. The instructions generally define what is and what is not evidence, point out the central issues, present the applicable law, and describe the function of the jury. Thus, it is not until the last minutes of the trial that the jury is told the "rules of the game."[58] The problem was well stated by the Honorable E. Barrett Prettyman, formerly of the United States Court of Appeals for the District of Columbia:

> [I]t makes no sense to have a juror listen to days of testimony only then to be told that he and his confreres are the sole judges of the facts, that the accused is presumed to be innocent, that the government must prove guilt beyond a reasonable doubt, etc. What manner of mind can go back over a stream of conflicting statements of alleged facts, recall the intonations, the demeanor, or even the existence of the witnesses, and retrospectively fit all these recollections into a pattern of evaluation and judgment given him for the first time after the events? The human mind cannot do so. It is not a magnetized tape from which recorded speech can be repeated at chosen speed and volume. The fact of the matter is that this order of procedure makes much of the trial of a lawsuit mere mumbo jumbo. It sounds all right to the professional technicians who are the judge and the lawyers. It reads all right to the professional technicians who are the court of appeals. But to the laymen sitting in the box, restricted to listening, the whole thing is a fog.[59]

It is hardly surprising that juries often have questions regarding what constitutes evidence, what the legal issues are, and how the law relates to the facts of the case.

The argument for changing the timing of instructions is even more compelling in light of research indicating that jurors are unable to suspend their decisions until the end of the trial.[60] Clearly, if jurors make their decision as the evidence is being presented, as some research indicates they do, a charge at the end of a long trial comes too late to have much effect.

2. *Opening and closing jury instructions*

Discussion about the timing of instructions has focused on

57. For example, in the "Harrisburg Seven" trial in 1972, the jury was given two hours of instruction by the judge.

58. Prettyman, *Jury Instructions—First or Last?*, 46 A.B.A.J. 1066 (1960).

59. *Id.* Others have expressed concerns similar to Judge Prettyman's regarding the timing of jury instructions. *See, e.g.*, J. FRANK, COURTS ON TRIAL, 117 (1949); Hacker, *supra* note 14, at 56; *North Carolina Jury Charge*, *supra* note 10, at 462; WOLESLAGEL (1972) *supra* note 34, at 57.

60. *See* text accompanying notes 22-24 *supra*. *See also* Luck, *supra* note 7, at 90.

two alternatives: providing instruction at the end of the trial or both at the beginning and the end of the trial. No one seriously suggests omitting final instructions. Final instructions provide an essential summary of the issues and the applicable law and are most appropriate just prior to jury deliberation, as they leave the most important concepts of the case fresh in jurors' minds. However, note that providing additional instruction at the beginning of the trial would sacrifice none of the benefits of closing instructions, but would add the benefit of explaining the responsibilities and functions of the jurors at the outset. Opening instruction could also give the jurors a basic understanding of the trial which is about to be presented. The importance of this practice is clear when one realizes that few jurors have served before and most are unfamiliar with, or have distorted expectations as to, jury trial proceedings.[61]

3. Continuing jury instructions

A third alternative, the option of giving "continuing instructions" at various stages of the trial, on a "need to know" basis, coupled with a final summarizing charge,[62] should also be given consideration. Such a practice would best enable the jury to apply the instructions to the relevant facts of the case and would be much more effective than requiring jurors to try, over long hours of testimony, to determine how a particular instruction is relevant.

Judge George R. Triplett of Elkins, West Virginia, has suggested four stages of a trial at which continuing instructions might be introduced to aid the jury: orientation instructions prior to the voir dire examination; admonitions, descriptions, and definitions prior to opening arguments; admonitions at each recess and adjournment; and the final charge at the close of the trial.[63]

Not all types of instructions would be appropriate for preliminary or continuing instructions. For example, no instruction that pertains to evidence not yet presented in the case should be given by way of preliminary or continuing instruction.[64] However, most jurists and commentators recognize that cautionary instructions,

61. Geller, *Experience and Reflections of a Trial Judge*, 21 N.Y. COUNTY A.B. BULL. 118 (1963) [hereinafter cited as Geller].

62. *See* Richards, *Preliminary Jury Instructions*, 11 JUDGES' J. 33 (1972).

63. Triplett, *Meaningful Jury Instructions at Various Stages of Trial*, 13 JUDGES' J. 37 (1974) [hereinafter cited as Triplett]. *See also* Geller, *supra* note 61, at 118; McKenzie, *The Judge—A Mere Referee?*, 6 TRIAL JUDGES' J. 4 (1967) [hereinafter cited as McKenzie].

64. *See* Triplett, *supra* note 63, at 38.

matters concerning witness credibility, and definitions of terms are proper subjects of instruction to the jury before evidence is heard.[65] Similarly, when evidence is admitted for a limited purpose, the judge should make that fact clear to the jury then and not wait until the final charge to do so.[66] Also, many confusing trial procedures such as the use of the hypothetical question or the functions of depositions and interrogatories, should be explained at the time they are introduced.[67] Such explanations would definitely help jurors to understand trial procedures and legal terms and concepts—three areas of much juror confusion.

C. *Juror Orientation*

1. *The problem of confusion over trial procedures*

Closely allied to the need for improving the substance of jury instructions is the need to provide juror orientation. Much of the confusion which can be alleviated by improved instructions may be further clarified by providing good quality juror orientation. Inadequate orientation often leads to misunderstandings regarding trial procedures,[68] frustration over trial delays,[69] and confusion when jurors are confronted with the legalese used throughout the trial and in the jury instructions.[70] These three sources of confusion and frustration can be dealt with by adopting the philosophy that the first requirement for a quality jury trial is meaningful juror orientation.

The need for orientation is generally well accepted, as indicated by the following statement from *The State Trial Judges' Book* recognizing the value of jury orientation:

> [The judge] should . . . be alert to ways in which the jury can be made a more effective instrument in the administration of justice.
>
> . . . .
>
> . . . The trial judge should remember that jurors come to court without preparation, without orientation, without knowledge of law or its procedures, unfamiliar with court atmosphere,

65. *See* Musser, *Instructing the Jury—Pattern Instructions*, 9 AM. JUR. TRIALS 923, 939-40 (1967).

66. *Id.*

67. *See* McKenzie, *supra* note 63, at 5.

68. Forston (1973), *supra* note 10, at 18; Forston (1968), *supra* note 7, at 67.

69. *See* Connelly, *Jury Duty—The Juror's View*, 55 JUDICATURE 118 (1971); *Irate Woman Says Jurors Herded Like Animals*, Des Moines Tribune, April 15, 1974, at 2, col. 1; *The Jilted Jurors*, Wall Street J., Dec. 14, 1972, at 16, col. 1.

70. *See* note 10 *supra*.

> demeanor or decorum, and unacquainted with the precise manner of their selection or the specific purpose of this intrusion upon their time.
>
> . . . .
>
> . . . He [the judge] should attempt to enrich the knowledge of jurors, to the end that they will better understand the system and workings of our courts and will be prepared to assume and discharge . . . the important duties assigned to them.[71]

2. *Survey research: The Pre-Service Juror Orientation Project*

In the autumn of 1974, a Pre-Service Juror Orientation Project was conducted which utilized a stratified random sampling questionnaire to survey the use of various jury orientation training procedures.[72] The random stratified sampling covered large and small districts in every state of the country. Of the 250 questionnaires mailed, 156 were completed and returned. This data permitted analysis of 131 different judicial districts representing all fifty states. Notably, all districts reported that jurors received some kind of orientation training. Table 3 shows which of five kinds of training—letters, oral remarks, handbooks, film, instructions—are most frequently given.

TABLE 3

Types of Juror Orientation Training and Percentage of Use

Type	Number of Districts	Per Cent of Total
Orientation Letter	4	3.0
Oral Remarks (Judge)	108	82.4
Juror's Handbook	84	64.1
Film	9	6.9
Jury Instructions	131	100.0

The following is a brief discussion of four commonly used orientation tools:[73]

a. Letters. Although many jurors receive a personal letter notifying them of their call to jury duty, only 3 percent of such

71. THE STATE TRIAL JUDGES' BOOK, *supra* note 14, at 98-99. *See also* Helwig, *The American Jury System: A Time For Reexamination*, 55 JUDICATURE 96, 99 (1971); O'Connor, *The Right to Trial by an Ignorant Jury*, 3 TRIAL JUDGES' J. 3, 6 (1964); *Those Erroneous Images*, Salt Lake Tribune, March 16, 1975, § A, at 16, col. 1.

72. This project was funded by the Drake University Research Council (1974).

73. Discussion of the fifth type of orientation training covered by the Pre-Service Juror Orientation Project survey, jury instructions, has been omitted because of the extensive discussion of this topic elsewhere in the article.

letters serve an orientation function. Some of the reported orientation letters are too vague to be classified as meaningful training.

b. Oral orientation. The large majority of judges present some pre-service message to jurors which they call training. The length (see Table 4) and quality of these messages vary considerably.

TABLE 4

Length and Percentage of Total Judges' Oral Presentation: Orientation Training of Jurors

Time in Minutes	Number of Districts	Per Cent of Total
5 or less	26	19.8
15	54	41.2
30	33	25.2
45	13	9.9
60	4	3.1
75	1	0.8
Total	131	100.0

In analyzing the quality of sample oral presentations, the Pre-Service Juror Orientation Project found that much of the time is spent presenting three kinds of information:

(1) The historical background of the jury system and its purpose, often beginning with the thirteenth century and proceeding to the present.

(2) Patriotic messages about the duty of all eligible citizens to serve their country, delivered as persuasive appeals to keep jurors from asking to be excused from jury service.

(3) Information regarding administrative matters, such as fees, telephoning, and parking, eating, and restroom facilities.

Those who believe that the above kinds of information constitute true orientation are self-deceived. In fact, the main purpose such remarks serve is the social function of welcoming the jurors. Such remarks are also intended to serve a persuasive function in that they attempt to deter as many jurors as possible from asking to be excused from jury duty. In practice, very little of such initial oral orientation provides meaningful information which will help jurors to better understand the various stages of a trial, legal terminology, or jury room deliberation procedures.[74]

74. Interviews and discussions conducted by the author at the National College of the State Judiciary, Reno, Nevada, July 28-Aug. 2, 1974, at the Kansas Pattern Jury Instruc-

A judge could spend his oral orientation time more meaningfully by assigning a jury commissioner the responsibility of announcing and explaining administrative details, as well as giving information about the importance of jury service and how jurors are called for duty. If patriotic and historical messages are kept brief, a judge could spend much more of his time helping jurors become acquainted with their role and trial procedures. Another simple means of improving oral orientation sessions would be to extend them to include the giving of certain instructions which would apply to any case, such as the meaning of evidence, burden of proof, and the function of the jury.[75]

c. Handbooks. Both the National Conference of Rural Justice and the American Bar Association's Project on Standards for Criminal Justice take the position that juror orientation is desirable and that tightly drawn juror handbooks are preferred to extemporaneous oral instructions.[76] Perhaps reflective of this position is the fact that almost two-thirds of all judicial districts use a juror's handbook in their training procedures (see Table 3). These booklets vary considerably as to content, but the majority cover at least the following subjects: the importance of jury service, the jury panel selection process, the history of the jury system, the types of cases (civil and criminal), the stages of a trial, and expected jury behavior. Many manuals also include a juror's creed or oath, definitions of some legal terms, and general information about juror compensation.

But handbooks, to be of any value, must be read by jurors, and some doubt exists as to the extent to which handbooks are in fact studied. The author found as part of a survey that less than 10 percent of the jurors had read any portion of the juror's manual after one week of service.[77] However, evidence exists which indicates that if handbooks are mailed to jurors prior to service, and if jurors are strongly encouraged by letter to read the manuals, the percentage of handbooks read increases to 75 percent or more.[78]

d. Films. As Table 3, above, illustrates, orientation films

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tions Committee Meeting, Oct. 14-15, 1974, and at the American Academy of Judicial Education Conference, Des Moines, Iowa, Dec. 4-6, 1974; WOLESLAGEL (1972), *supra* note 34, at 48.

75. *See* O'Reilly, *supra* note 10, at 69.

76. ABA, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE 327 (1974); Standards Relating to Trial by Jury (ABA Project on Minimum Standards for Criminal Justice) 86 (1968); Woleslagel (1974), *supra* note 10.

77. Forston (1973), *supra* note 10, at 69.

78. *See* Woleslagel (1974), *supra* note 10.

are one of the least frequently utilized orientation tools. The Pre-Service Orientation Project found that less than 7 percent of all judicial districts utilize training films.

The content of the four films used by the responding districts vary in their specificity and in their attempts to illuminate the complex trial process and abstract legal language. The quality of films available is called into question by the fact that almost 20 percent of the trial judges who responded to the questionnaire volunteered, without the use of prompting questions, that they were dissatisfied with existing training films. In general, the judges complained that the films were either outdated or far too general. Since the above information was volunteered and not specifically requested, general dissatisfaction with existing training films is probably far more substantial than might be indicated by the 20 percent of respondents who mentioned this problem.

3. Improving juror orientation

The issue today is not whether to provide juror orientation—providing such training is universally recognized as being desirable. The crucial issue is what quality of orientation should be provided. At present, the quality of orientation training provided nationally is generally not high and should be improved. The following are two suggested ways by which significant improvements in orientation quality might be obtained.

First, there is a need to coordinate the various training procedures into a single orientation program designed to help jurors better understand and perform their function. One innovative way to accomplish this would be to produce an orientation film designed to be used in conjunction with a thorough, but readable, juror handbook. Such a film should contain excerpts from trials designed to show the jurors what to expect during the trial. The handbook should teach the jurors about trial procedure, stages of the trial, legal vocabulary, and other confusing items that they will surely encounter. Both the handbook and the film could be tested to determine the extent to which they successfully instruct laymen in general trial procedure and legal concepts. The handbook, along with an orientation letter, should be mailed ten days to two weeks in advance of the day a juror first reports for duty in order to encourage prior study of the book. Additionally, the judge, in his pre-service oral remarks, should stress the importance of becoming familiar with the material in the book.

Another training method which might prove to be worth developing for jurors who must spend long periods waiting, would

be a series of compact listening comprehension training sessions. These materials can be specifically designed to improve the jurors' ability to listen and understand information presented in trial settings. A program of this type could consist of a series of brief cassette tapes played to the jury when time permits. A pilot study which the author conducted indicated the potential such a program promises for improving juror comprehension. In that study, a short listening comprehension course (with no special emphasis on legal materials) improved the comprehension of jury instructions by 15 percent.[79]

If courts will be innovative enough to implement practices such as those suggested, they will soon find they have jurors with a much better understanding of the legal process and who are better able to intelligently perform their function.

D. Two-Way Communication

1. The problem of "linear-one-way" communication

Empirical study has revealed a fourth area of weakness in the jury system—a failure to achieve two-way communication. Much of the confusion in the jury room results from the fact that jurors are not allowed to ask clarifying questions, either as to matters of evidence or as to points of law. And, as the studies have further indicated, once the jurors are in the deliberating room they are extremely reluctant to send a question to the judge. The result is that the jurors make their decision without having their questions answered—without having all the information they feel is important.[80]

Acknowledging the validity of these findings, it is clear that jury trials, as traditionally conducted, are classic examples of a "linear-one-way" communication process. The linear-one-way communication process occurs when person A transmits a message to person B without allowing B to respond to A. A wealth of empirical, theoretical, and practical evidence shows that in such communicative situations messages invariably become distorted.[81] Distortion occurs principally through leveling, sharpen-

79. Forston (1973), *supra* note 10, at 69.

80. *See* text accompanying note 19 *supra*.

81. *See, e.g.*, G. ALLPORT & L. POSTMAN, THE PSYCHOLOGY OF RUMOR (1947); D. BARNLUND, INTERPERSONAL COMMUNICATION: SURVEY AND STUDIES 229 (1968); F. BARTLETT, REMEMBERING (1932); D. BERLO, THE PROCESS OF COMMUNICATION 111 (1960); J. KELTNER, INTERPERSONAL SPEECH-COMMUNICATION 84 (1970); K. SERENO & C. MORTENSEN, FOUNDATIONS OF COMMUNICATION THEORY (1970); Carmichael, Hogan & Walter, *An Experimental Study of the Effect of Language on the Reproduction of Visually Perceived Form*, 15 J.

ing, assimilation, and secondarily, through exaggeration, condensation, and conventionalization.[82] As messages become longer and more complex under one-way communication, the communication is received less accurately and with more frustration and hostility.

Two-way communication or circular response, on the other hand, incorporates the crucially important component of "feedback."[83] Feedback encourages the sender to rectify unclear messages and to supply missing information without which the communication may be incomplete or confusing. Experiments have demonstrated with consistency that the accuracy of information transferred by two-way communication far exceeds the accuracy of information passed by one-way communication. Moreover, two-way communication increases both sender and receiver confidence, generates less frustration, and promotes more willingness to decide and act on the basis of information.[84]

The findings of two-way communication research have important implications for traditional jury trial procedures. One expert, who has done research in this area, discusses three implications:

> 1. However clear a witness or lawyer may be in his own mind about the information he seeks to communicate to the jury, it follows from the very nature of one-way communication that except in the case of very simple messages the information as received is bound to be distorted;
>
> 2. Gaps or omissions in the evidence, even though highly relevant to a proper determination of the issues, cannot be remedied under conditions of one-way communication; and
>
> 3. The jury's seeming lack of power to seek corrective or

EXP. PSYCH. 73 (1932); Gibson, *The Reproduction of Visually Perceived Forms*, 12 J. EXP. PSYCH. 1 (1929); Leavitt & Mueller, *Some Effects of Feedback on Communication*, 4 HUMAN RELATIONS 401 (1951); Powers, Clark & McFarland, *A General Feedback Theory of Human Behavior*, 11 PERCEPTUAL AND MOTOR SKILLS 71 (1960); Stolz & Tannenbaum, *Effects of Feedback on Oral Encoding Behavior*, 6 LANG. AND SPEECH 218 (1963); Tustin, *Feedback*, 187 SCI. AM. 48 (1952).

82. *Leveling* is a process of systematically omitting details of the communication which do not conform to the stereotypes about the persons sending the message. *Sharpening* stresses the details that remain in the familiar pattern, and is partly a result of the leveling process; since fewer details remain, those left are more prominent. *Assimilation* adapts the message to the most available frames of reference. *Condensation* reduces the message to a few easily remembered details. *Conventionalization* removes unfamiliar elements from the message, such as strange words, subtle shadings of meaning, and so on.

83. *See* Haney, *A Comparative Study of Unilateral and Bilateral Communication*, 7 ACA. OF MANAGEMENT J. 128 (1964) [hereinafter cited as Haney].

84. Edises, *supra* note 14, at 78; Haney, *supra* note 83, at 132.

> supplementary information encourages speculation about matters which are without adequate factual basis or otherwise inappropriate for jury consideration. Questioning by the jurors during the course of the trial would tend to pinpoint such areas of improper speculation and enable the trial judge to neutralize the effects by appropriate admonition.[85]

Thus, if the function of the jury is truly a fact-finding one, the jury should have the right to question witnesses, attorneys, and the judge regarding issues in the case. Similarly, if the jury is expected to apply the law with any degree of intelligence, it should have the right to ask questions of the judge to ascertain the meaning of the law it is trying to apply. Only through such two-way communication can this essential information be accurately transferred from the trial participants to the jurors.

2. Appropriateness of two-way communication in jury trials

While some courts do encourage questioning by jurors,[86] more frequently courts criticize the practice.[87] One objection raised in opposition to allowing questions by jurors is that two-way communication will lengthen trials and thus further retard the functioning of our overburdened trial courts. While it is true that two-way communication tends to take more time, the additional time typically should be minimal. If the questioning takes more time, it may well be the result of a complex or poorly presented case. On the other hand, clarifications of proof, and the consequent enlightenment of the jurors resulting from feedback, will probably shorten the deliberation period. As discussed previously, much needless deliberation time is caused by the confusion and ambiguity inherent in one-way communication.[88] Accordingly, the result of allowing juror questions might in fact prove to be shorter and more accurate, rather than longer, trials.

The primary reservation about permitting juror questions, however, is that such questions might interfere with the orderly conduct of the trial. This concern is an important criticism and is regarded as valid by both friend and foe of the practice. The problem is that since jurors are not trained in the law, there is a great likelihood that they will ask improper questions. This prob-

85. Edises, *supra* note 14. *See also* Hacker, *supra* note 14.

86. Annot., 31 A.L.R.3d 872, 878 and cases cited at 879 (1970). It is interesting to note that in English courts jurors are permitted to ask questions throughout the course of the trial. *See* Hacker, *supra* note 14, at 55. Moreover, coroner's juries in the United States are allowed to pose questions. *See* Edises, *supra* note 14, at 79.

87. Annot., 31 A.L.R.3d 872, 880 and cases cited at 881 (1970).

88. *See* text accompanying note 20 *supra*.

lem is compounded by the fact that attorneys are reluctant to object to questions by jurors for fear of prejudicing the jury against their case.

These potential problems need not necessarily create chaos. Modifications of the rules can be devised which will enable jurors to pose their questions in an orderly manner. An example of such possible modification is incorporated in the following recommendation:

> The jurors can be told at the commencement of the trial that they have the right to propound questions to each witness just before his dismissal from the stand. The requirement that questions be in writing and handed to the judge will tend to avoid possible indiscretions by the questioning juror. The judge can rule on the propriety of the questions and, if necessary, rephrase them to meet evidentiary requirements. Objections by counsel can be dealt with privately by summoning the attorneys to the bench or to chambers, thus preventing an objecting lawyer from being put 'on the spot' with the juror who proposed the question. Requests to counsel for clarification or amplification of evidence can likewise be screened for appropriateness by the trial judge.[89]

Judge Robert Jones of Portland, Oregon, reports that for more than fifteen years he has followed procedures similar to those outlined above. He indicates that jurors' questions serve a valuable function as immediate feedback to the lawyers and to himself, as the judge, regarding how clearly the case is being presented.[90] Similarly, Judge Frederick Woleslagel of Lyons, Kansas, occasionally invites the trial attorneys to present pertinent juror questions and follow-up questions to the appropriate witnesses.[91] In light of communication theory and research, it seems clear that other courts should follow the lead of judges such as these.

E. Note-Taking

1. The problem of recall

A fifth means of lessening juror confusion is to allow jurors to take notes during the delivery of trial testimony. Note-taking has much to offer as a means of improving communication, for only through some type of written record can a juror be expected

89. Edises, *supra* note 14, at 79.

90. R. Jones, "Judge-Jury Relations" Course at the National College of the State Judiciary, Reno, Nevada (June 23-July 5, 1974).

91. Woleslagel (1974), *supra* note 10.

to remember in any detail all the testimony presented in the course of a lengthy or complex case.[92] One commentator described the situation this way:

> Jurors are not allowed to take notes. This rule prevails no matter how long the trial, or complicated the testimony, or ambiguous the law. Our case was relatively short, but it still added up to forty hours of unrelieved listening, the equivalent of a semester's worth of lectures. Imagine not taking a single note during a college course and then being expected to do justice to a final exam.[93]

2. *Appropriateness of note-taking to jury trials*

Despite the existence of the above described situation, numerous objections have been raised against allowing note-taking by jurors. Some argue it would give undue advantage to the literate over the illiterate, or to the person who takes copious notes over the person who doodles. The answer to that objection is that the present system gives advantage to the person who purports to have the better memory, or who has the more domineering personality—under no system would all jurors have equal influence. Other critics argue that jurors would miss parts of the testimony while involved in the act of writing; but this seems less serious than the danger that a juror will simply forget even greater amounts of testimony under the present practice because he is not allowed to make a written reminder for himself.

Some safeguards on note-taking are of course desirable because there concededly are dangers involved. Judge Elvin J. Brown of Norman, Oklahoma, suggests three worthwhile precautions which should be observed:

> First, all jurors should have equal opportunity although none should be required to take notes against their will. The trial judge should be prepared to distribute pencil and pad to each juror to guarantee equality of opportunity, even though some may only use them on which to doodle.
>
> Second, jurors should be assured of the confidentiality of their notes. The subject matter of their notes should only be

92. An historical survey of juror note taking and a detailed discussion of the arguments pro and con are beyond the scope of this paper. For a general discussion of this topic, see Buzard, *Jury Note-Taking in Criminal Trials*, 42 J. CRIM. L.C. & P.S. 490 (1951); Petroff, *The Practice of Jury Note Taking—Misconduct, Right or Privilege?*, 18 OKLA. L. REV. 125 (1965); Comment, *More About Jurors and Note Taking*, 103 BAR BULL. OF BOSTON 6 (1935); 11 S. CAR. L.Q. 397 (1959); 34 TEX. L. REV. 1100 (1956); Note, *The Problem of Note-Taking by Jurors*, 18 U. PITT. L. REV. 800 (1957).

93. Hacker, *supra* note 14, at 55.

> revealed in the privacy of the deliberations of the jury, and only then when the juror with notes elects to disclose them.
>
> Third, the jurors should be admonished to be as tolerant of the notes of another as they should be of another's independent recollection of the proceedings. After all, there's no magic in note taking. The percentage of reversible error in cases tried by a judge will probably run about the same for the cases in which he takes notes as those in which he doesn't.[94]

While the vast majority of federal and state jurisdictions allow trial judges to permit jurors to take notes, few judges have exercised this discretion.[95] If jurors are expected to remember and consider all the relevant facts in deliberation, steps should be taken to reverse this situation.

F. Juror Selection

The final suggestion for improving the jury system lies in the area of juror selection. Ordinarily the criteria by which certain jurors are selected and others are excluded from service are not regarded as part of the communication process. However, the personal abilities and qualifications that a listener brings to a communication process have a great influence on the quality of the communication. This phenomenon was illustrated by the fact that the well-educated jurors in one study described above scored much higher on the jury instruction comprehension tests than did the broader sample of jurors.[96] While it may be contended that the college student jurors were simply better at taking tests, an equally valid inference is that well-educated jurors understand legal concepts better and are able to apply them more intelligently.

1. The problem of juror selection

a. Exemption from jury service. Two prime factors affect the demographic characteristics of citizens who serve on juries. The first is exemption from jury service. Over the years jury trials have become increasingly longer. Also, jury terms are fairly long, averaging between two and four weeks, with some rural areas requiring jurors to be on call for three months or longer. Due to the time commitment involved, the vast majority of citizens

94. Brown, *Note Taking by Jurors*, 10 JUDGES' J. 27 (1971).

95. *Id.*

96. *See* Table 2, *supra*. *See also* Broeder, *Occupational Expertise and Bias as Affecting Juror Behavior: A Preliminary Look*, 40 N.Y.U.L. REV. 1079 (1965); James, *supra* note 3, at 565.

initially contacted for jury service ask to be excused for personal or work hardships, and most of these requests are honored. Those excused include large numbers of managerial, executive, and professional people, and those with higher incomes and college educations.[97] Moreover, each state has an exemption statute which officially excuses dozens of occupational categories.[98] Hence, the elderly, unemployed, and mature housewives with grown children dominate the basic jury pool.

b. Exclusion by voir dire. The second factor with affects jury make-up is the selection process exercised during the voir dire examination. One study found that voir dire screening eliminates a large proportion of the following classes of jurors: Roman Catholics; managerial, executive, and professional people; persons in the highest paid and the most prestigious job categories; and those with college degrees.[99] Thus, legal rules, instead of being shaped to ameliorate the effects of the jury's weaknesses, seem to have been almost purposefully designed to augment them.[100] As described above, the typical jury selection process provides an excellent example of the steps the law has taken to impede the jury's successful performance of its fact-finding function. As one critic has said:

> The body of law governing the selection of jurors, rather than recognizing and attempting to reduce the affects of the juror's inexperience in handling legal matters, has instead exempted from service many of the groups who might best be expected to overcome this handicap.[101]

We must be certain that those who find facts as jurors have the capacity to think, to understand problems, and to apply the law. Systematic exemption of those citizens who may have the

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97. *See* Douty, *How People Stay Off Juries*, POTOMAC, Jan. 28, 1968, at 20-22, 26-27.

98. The Illinois exemption statute is thypical:

> The following persons shall be exempt from serving as jurors, to-wit: The Governor, Lieutenant Governor, Secretary of State, State Comptroller, Treasurer, Superintendent of Public Instruction, Attorney General, members of the General Assembly during their term of office, all judges of courts, all clerks of courts, sheriffs, coroners, practicing physicians, Christian Science practitioners, Christian Science readers, postmasters, practicing attorneys, all officers of the United States, officiating ministers of the gospel, members of religious communities, mayors of cities, policemen, active members of the Fire Department and all persons actively employed upon the editorial or mechanical staffs and departments of any newspaper of general circulation printed and published in this state.

ILL. REV. STAT. ch. 78, § 4 (Supp. 1973).

99. Padawer-Singer, *supra* note 12, at 388.

100. Broeder, *The Function of the Jury: Facts or Fictions?*, 21 U. CHI. L. REV. 386, 390 (1954) [hereinafter cited as Broeder].

101. *Id.*

best credentials is disgraceful and perhaps an unconstitutional denial of the right to trial by a jury of one's peers.[102]

2. *Improving the juror selection process*

a. Encouraging service. Procedures could easily be developed to help make the jury pool a more accurate cross-section of the community. The basic philosophy that needs to be followed is that of doing as much as is reasonably feasible to facilitate a juror's performance of his duty. Economic conditions and other annoying frustrations must not be allowed to keep citizens from being willing to serve.

Shorter required jury terms are a prerequisite of implementing such a philosophy. A short two-week term would encourage service by many who now ask to be excused. In the same vein, too many judges and jury commissioners make jury service an either-or proposition: either you serve now or you are excused. Other viable options exist. For example, a prospective juror could have his service postponed to a more convenient time. Or a list of dates might be made available from which a citizen could select the most convenient time for him to serve. In the case of special hardships, where even two weeks may be too long, a juror might be asked to serve on one case, or for a few days, or for one week, and then be excused for the remainder of the term.

A second means of lessening the unfavorable impact of jury service would be to provide jurors with better facilities during their waiting periods. If businessmen and professionals had access to a telephone, typewriter, table, and dictating equipment, much of the hardship arising from jury service would be reduced. Some cities furnish jurors with free street parking or free parking in municipal lots. Thoughtfulness toward those who must serve certainly encourages jury service from more individuals and reduces requests for early release from duty.

Another reform which is needed is the payment of juror fees which are more commensurate with the financial sacrifices incurred by jurors. A higher fee structure is essential in order to obtain a more accurate cross-section of the community on jury panels.[103]

b. The voir dire screening process. The fact that capable

102. *See* C. JOINER, CIVIL JUSTICE AND THE JURY 78 (1962); Winick, *The Psychology of Juries,* LEGAL AND CRIMINAL PSYCH. 96 (H. Toch ed. 1961).

103. ABA, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE 327 (1974); Standards Relating to Trial by Jury (ABA Project on Minimum Standards for Criminal Justice) 89 (1968).

jurors are screened out during voir dire examination is not as easily corrected. It will be necessary for trial attorneys and judges to recognize and deal with the inconsistency of criticising the jury for its inability to understand and evaluate facts and the law, while at the same time dismissing those potential jurors who are the most qualified.

It has been said that the least informed jurors are often sought by those whose cases are weak and who wish to pull the wool over uninformed eyes.[104] It has also been argued that the most capable jurors are likely to have too much influence with other jurors and, therefore, should be challenged.[105] But as mentioned above, influence is relative; every jury has those who are most influential. Nothing can insure a group of jurors with equal influence among themselves.[106] If an attorney and his client are seeking a fair jury, they will probably desire that the most, rather than the least, informed individuals participate as jurors.[107]

A case for judge-conducted voir dire may be made based on the hypothesis that it would, to some limited extent, reduce the screening out of the more qualified citizens as jurors. Even if such a change were made, however, lawyers could still affect the composition of a jury through their use of peremptory challenges. The propriety of using peremptory challenges for the purpose of excusing those who are most experienced is at least questionable, if not unethical, and some believe these challenges should be abolished.[108] Some reformers have recommended use of special or "blue ribbon" juries in order to obtain more jurors from upper socio-economic backgrounds than normally serve.[109] The "blue ribbon" method of selecting jurors was employed in federal jury trials until the latter part of the 1960's but is no longer permitted because of racial inequities.[110] Although such "blue ribbon" selection techniques may not be allowed, the legal profession should not allow the jury selection process to be so distorted as to, in effect, prohibit our most capable citizens from contributing their abilities to the justice system.

104. WOLESLAGEL (1972), *supra* note 34, at 58-60.

105. Broeder, *supra* note 100, at 391.

106. J. FRANK, COURTS ON TRIAL 188 (1949).

107. Forston (1968), *supra* note 7, at 81; Blade, *Professor: Juries Often Decide Early*, Minneapolis Star, July 29, 1967, § A at 9.

108. Broeder, *supra* note 100 at 391.

109. *See, e.g.*, Baker, *In Defense of the "Blue Ribbon" Jury*, 35 IOWA L. REV. 409 (1950).

110. WOLESLAGEL (1972), *supra* note 34, at 25.

III. Conclusion

This article has attempted to demonstrate that problems of communication are present in the jury system and are severely impairing the functioning of jurors. In addition, certain possible solutions to those problems were suggested. Yet, while this review of communication problems and possible solutions may encourage some judges to experiment with the ideas presented, others will demand more conclusive empirical evidence on the effects that the proposed communication procedures will have on jury deliberations and final verdicts. Such requests are valid; unfortunately, little data has been assembled. Therefore, perhaps the most important function this article can serve is to help the legal profession recognize that the issues discussed herein are vital enough to warrant major attention by researchers and funding agencies.

Even though problems are present in the jury system, they can be largely resolved by changing the conditions under which jurors must labor. These changes will occur if trial courts are willing to try new ideas, if appellate courts are willing to support trial courts in their controlled experiments with new communication processes, and if funding is made available to support the proper administrative management of the changes and to empirically evaluate their effects.