

CHAPTER EIGHT

What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors

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RECENT DEBATE ABOUT the civil jury centers on three primary questions: first, is the jury competent to understand complex testimony and judicial instructions? Second, is the jury biased in its evaluation of testimony and application of relevant legal standards? Finally, is the civil jury an expensive and unnecessary fixture justified in the American legal system only by tradition and constitutional mandate?¹ These questions have stimulated assessments of the jury as a decisionmaker, with a particular emphasis on its ability to comprehend and recall testimony and legal instructions, and on its reactions to particular types of defendants.²

Although research on the civil jury is still quite limited, particularly when compared with research on the criminal jury, most researchers who have studied decisionmaking by the civil jury have been impressed by the jury's performance.³ That does not mean that all civil or criminal jury verdicts meet with universal approval; moreover, some juries do reach verdicts that appear contrary to the evidence. But such outcomes are to be expected from any human decisionmaker dealing with a complex judgmental task, and no research has demonstrated that the average judge is a better factfinder than the average jury.⁴ In addition, as Herbert Jacob and others have suggested, the jury verdicts of disinterested amateurs

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may have a legitimacy that the decision of a single judge does not possess.⁵

In this paper I take a somewhat different approach to the analysis of jury performance. Rather than focusing solely on verdicts, I look at what citizens have told researchers about their experiences as jurors. Although relatively few studies have collected systematic information on juror reactions to courthouse and courtroom experiences, a comparison of juror surveys with studies of jury performance suggests several possible ways to improve jury service and jury decisionmaking.

Part one outlines the reasons why discussions about the performance of the civil jury and its future should take into consideration what jurors have to say about their experiences. Part two provides an overview of juror expectations and reactions to the experience of being a juror. Part three explores what we know about the factors that account for juror reactions. Part four focuses on the reactions of the trial jury, assessing the extent to which the demands placed on jurors conflict or are consistent with jurors' actual abilities and describing potential opportunities for improving both the experience of serving as a juror and jurors' performance. Finally, part five proposes two general strategies for enhancing the experience of jury service for the substantial number of citizens called for jury duty.

Why Care What Jurors Think?

Why, in considering the future of the civil jury, should anyone be concerned not only with the verdicts that jurors produce but also with juror reactions to their experience? The most obvious reason is that jury service is an involuntary obligation imposed by the government on citizens. To justify that imposition, a legal system should be required to maximize the usefulness of its citizens' contributions and minimize the negative experiences that may accompany the obligation. Thus, negative juror reactions are appropriate cause for concern. But there are, in addition to this normative reason for considering juror reactions, three more pragmatic justifications.

First, jurors who have negative experiences in court are likely to make every effort to avoid service in the future and will undoubtedly share their unfavorable impressions with friends and neighbors. Despite its power to require citizens to serve on juries, in practice the ability of the legal system to maximize representativeness in its jury pool depends on

its ability to elicit cooperation from the jurors themselves. For example, the shift in many jurisdictions to systems that require jurors to serve only one day unless they are chosen for trial ("one day/one trial" systems) eases the burden of jury service and apparently also increases the diversity of jurors reporting for jury duty.⁶

Second, the impressions left by jury service can have crucial implications for citizen support for the legal system. Scholars studying the jury identify a political role for jury verdicts in legitimating governmental resolution of conflict.⁷ These scholars generally ignore the direct role that jury service can play in promoting or reducing support for the legal system from the jurors themselves. Jury duty represents for many citizens their first and only direct contact with the legal system. Reporting for jury service provides the opportunity either to confirm the negative impression many have about the court system or to arrive at a more favorable one. Jury duty can thus create fallout that extends beyond satisfaction with the jury itself.

And third, many of the sources of juror dissatisfaction point to remediable flaws in the justice system. Jurors are generally conscientious in their efforts to perform an extraordinarily challenging task, and their complaints and observations provide important signals that, if responded to, can enhance the performance of future juries.

Anticipating and Reacting to Jury Service

De Tocqueville saw jury service as an unparalleled opportunity for citizen education, and many people look forward to the experience. When a jury summons arrives, some are curious and intrigued by the possibility of serving as jurors; others, however, are not enthusiastic about the prospect of jury duty. Some are merely reluctant to put aside their usual activities. Some expect jury duty to be a waste of time, since they believe they will never avoid rejection by all parties. Many are apprehensive about their ability to perform adequately as jurors.⁸ What happens to these reluctant trial participants? John Richert studied the reactions of New Jersey jurors after they received their jury summonses. Nearly half of them wrote letters to the court asking to be excused. Yet many jurors ended up serving despite this initial reluctance: only 25 percent of those who requested an excuse were granted one.⁹

The prospective jurors Richert studied in 1974–75 were summoned for four weeks of jury service. Most jurisdictions today have shorter

terms that appear to have reduced unwillingness to serve.¹⁰ But even when jury terms are significantly shorter, some people who ultimately serve as jurors report that they were not eager to serve when first contacted by the court. The Roscoe Pound Foundation surveyed 286 jurors who served in thirty-eight civil trials in Philadelphia. Twelve of the trials occurred in federal court, where the term was two weeks; the remaining twenty-six trials took place in a state court using the one day/one trial system. Jurors were asked, "When you were first notified to report for jury service, were you looking forward to it or wanting to get out of it?"¹¹ Thirty-eight percent of the federal jurors and 42 percent of the state jurors reported that they had initially wanted to get out of jury duty. Although this number may be inflated because the forced-choice format of the question did not permit jurors to give a neutral response, the result suggests that, even among citizens who ultimately serve as jurors, a substantial number do not initially welcome a jury summons.¹²

What kind of jurors do these reluctant trial participants make? No study has yet evaluated whether jurors who initially express a desire to avoid jury service perform differently from those more willing to serve, although some critics have suggested that jurors may retaliate—for example, by failing to pay attention in court or participating only superficially in deliberations—if they are forced to render involuntary service.¹³ Concern about this possibility might be greater were it not for evidence that the experience of becoming a juror modifies initially negative attitudes. By the end of their service, the vast majority of jurors, even those who never serve in trials, have favorable attitudes toward jury service and confidence in the jury system. In a survey by Janet T. Munsterman and her colleagues of 8,468 jurors in sixteen federal and state courts, a substantial majority of respondents reported having favorable attitudes toward jury duty after serving. And according to the jurors, this positive attitude was in part a result of their experiences during jury duty; 63 percent said their impression of jury service was more favorable after serving than before.¹⁴ Of course, the credibility of such retrospective reports depends on jurors' ability and willingness to remember and report accurately how they felt before jury service. Unfortunately, only the study by James L. Allen has measured juror satisfaction both before and after jury service. It found no change, possibly because satisfaction with the prospect of jury service among the particular group of jurors studied was unusually high at the beginning of their term (23.2 on a 29-point scale).¹⁵

Both this study and the only other "before and after" survey of juror

reaction did reveal another important positive shift in juror attitudes. The jurors Allen studied became more positive in their assessments of the justice and equity of the legal system following jury service. Similarly, Paula Consolini found that following jury service, jurors were more likely to report that the U.S. jury system is working well and more likely to see the courts as fair.¹⁶ Moreover, Joyce E. Tsongas, Barry F. Anderson, and Arthur D. Monson found in a postservice survey that 76 percent of the jurors had a more favorable impression of the court system after jury duty. In addition, 81 percent agreed that if they were involved in a trial, they would feel confident having their case tried by a jury.¹⁷

The positive reaction of jurors to the court system following jury service is particularly striking in view of the relatively negative reactions of citizens who come into contact with courts in other ways. Reviewing surveys of such reactions, Austin Sarat reports that "support for the courts is eroded by experience with or knowledge about them."¹⁸ Similarly, a national survey found that citizens who had some experience with state or local courts were more likely to see a need for substantial court reform than those who reported no court experience.¹⁹ Thus, if jury service fosters citizen support for the court system, in planning for the future it is worth understanding how jury experience achieves this legitimizing effect—and why it sometimes fails.

Explaining Juror Reactions

Juror surveys have done a fair job documenting the generally positive attitude of jurors following jury duty. They have been less successful in explaining *why* a majority of jurors come away feeling positive about jury service and the court system, while some jurors are disappointed or remain unimpressed.

Traditionally, one of the primary dissatisfactions voiced by jurors is that their time has been wasted. Surveys of juror response and personal testimonials written by jurors for the popular press reveal the deep indignation of citizens who arrive at a courthouse prepared to be jurors, wait to be called, and never see a courtroom or a litigant.²⁰ Modern juror management has done much to reduce the waiting time involved in jury service. Many courts have shifted to one day/one trial systems, or allow jurors serving longer terms to call in to see whether they are likely to be needed. At thirteen of the sixteen courts Munsterman and her colleagues studied, a majority of the jurors reported spending less than half their

time waiting. At those three courts where jurors said they waited more than half the time, jurors spent an average of only 1.70 days in the courthouse (the average for the remaining thirteen courts was 3.45 days in court). Even when waiting occupied a substantial portion of the time spent on jury duty, it rarely amounted to the weeks of idleness that used to be common.²¹

In a broader examination of the determinants of juror satisfaction, the same researchers investigated the potential role played by structural variables (for example, fees, length of term), experiences (lost days of work, service as a trial juror), and preservice expectations. They found few items that accounted for much variation. The factor most strongly related to the satisfaction of the jurors was their perception of the way in which they were processed—and it accounted for only 1/2 of 1 percent of the variability in satisfaction ratings.²²

One explanation for the generally positive shift in jurors' attitudes after serving is that jurors who actually sit through a trial and deliberate (trial jurors) are more likely than nontrial jurors to say their impression of jury duty improved with service. The Munsterman research found that 72 percent of trial jurors reported becoming more favorable toward jury service, while 55 percent of nontrial jurors became more favorable.²³ Contrary to popular belief, there is no evidence that trial and nontrial jurors differ in ways that might be related to their satisfaction with jury duty. The more likely reason for the difference in satisfaction reported by trial and nontrial jurors is that something in the trial experience itself promotes juror satisfaction.

The simplest explanation for the more favorable reaction of trial jurors to jury service is that participation stimulates a commitment to specific jury and its verdict that is powerful enough to include the system as a whole. The influence of participation on satisfaction is well established. Early studies of group participation during World War II, for example, show the effect of participation on behavior. During meat rationing, Kurt Lewin attempted to encourage homemakers to purchase less popular meats such as liver and kidneys.²⁴ A nondirective discussion proved far more effective in encouraging the purchase of the specialty meats than a lecture format. Later research showed that participative decisionmaking facilitates both behavioral change and increases in satisfaction.²⁵ A "halo effect" from participation, however, cannot account for the textured reaction of jurors. Although jurors come away from the experience with a generally favorable attitude, they are not uncritical about some aspects of the jury system and court activity. As a review of the evidence

indicates, jurors respond positively to some aspects of their experience but express frustration and disappointment with others. While little research has attempted directly to assess the connection between variations in trial procedures and juror satisfaction, we do have some data on juror reactions to various aspects of the trial process.

The Experience of Being a Trial Juror

Because the vast majority of jurors are motivated to do a good job, they often express dissatisfaction when they feel that some aspect of the trial or court procedure has impaired their ability to perform adequately. Thus, many juror reactions to experiences at trial suggest areas for potential changes in trial procedures that could not only increase juror satisfaction, but may also enhance juror performance. Nonetheless, we cannot depend entirely on juror assessments of what is difficult and what is helpful. Like other decisionmakers, jurors do not always know why they behave as they do and may not recognize when their performance is impaired. For this reason, we need to compare what jurors say helps and hurts their jury performance with what we know from other sources about how they actually perform.

Jury Selection

The process of jury selection is a potentially daunting experience for jurors. During the voir dire, or jury selection process, they are called upon to describe themselves and their private beliefs before a courtroom of strangers so that the attorneys and the judge can decide if they should be seated on the jury.²⁶ As a result, jurors may be reluctant to disclose attributes they believe are undesirable.²⁷ Do jurors resent the voir dire process, perceiving the occasion as an inappropriate invasion of their privacy? Juror surveys suggest that most jurors accept voir dire as a necessary part of jury selection, although some resent the intrusion. Forty percent of the jurors surveyed by Tsongas and her colleagues thought that jury selection took too long,²⁸ and 20 percent thought that the questions focused too much on private or personal matters.²⁹ The voir dire examination for jurors in the Tsongas research was generally conducted by judges and may have been less intense than the typical attorney-conducted examination.³⁰ Consolini, however, obtained a com-

parable result from jurors in state courts hearing criminal cases, where attorneys examined the jurors. Two-thirds of these jurors expressed neutral or positive attitudes toward the questioning.³¹ Similarly, when jurors in New Mexico were asked if the questioning of prospective jurors was too personal, about right, or not personal enough, over 80 percent said the questioning was about right, and more found it too impersonal than found it too personal.³²

One explanation for this generally accepting attitude toward intrusive public questioning is that jurors both expect it and understand its purpose.³³ Jurors are not as well prepared for some other aspects of the trial process (for example, recesses during the trial) and often see no reasonable explanation for them. The result is that unexpected and unexplained aspects of the trial may cause unnecessary juror frustration and resentment and in turn impair jury performance.

Presentation of Evidence

The presentation of evidence is also an area that greatly concerns jurors.

REPETITION AND REDUNDANCY. Jurors sometimes complain about the repetition and redundancy of trial testimony.³⁴ Although Federal Rule of Evidence 403 attempts to protect against excessive repetition by authorizing the judge to exclude evidence to prevent "undue delay, waste of time, and needless presentation of cumulative evidence,"³⁵ some redundancy probably is unavoidable and may even be desirable. The presentation of evidence during a trial violates normal rules of story presentation that require the story to unfold in chronological order. In a trial, this order is sacrificed to meet the constraints imposed by the courtroom setting. Witnesses may testify in the rough order selected by the attorney to fit the presentation of one side of the case, but limitations imposed by scheduling needs, time constraints, witness availability, and a constantly changing script often alter the sequence. Such an out-of-order presentation of evidence makes it more difficult for jurors to form a coherent picture of what actually transpired.³⁶ Although the alert juror may become impatient with redundancy, repetition can facilitate comprehension and recall, potentially improving juror performance. While further research is needed to evaluate the trade-offs between the benefits of repetition and the attention losses induced by boredom, it may be possible to reduce juror frustration with repetition by explaining why it occurs and why the legal system tolerates it.

OMISSIONS AND LIMITATIONS. As jurors listen to the testimony in a trial, they try to evaluate the credibility of the witnesses and develop a story consistent with the evidence.³⁷ The rules of evidence are designed to focus the jury's attention on relevant evidence and to exclude from consideration information that is irrelevant or carries more prejudicial than probative weight. Jurors are expected to attend passively only to what is in the testimony and exhibits, not to speculate on gaps or omissions, and to ignore any limitations in the completeness of the information presented.

Yet studies of jury behavior reveal that jurors are not passive. In fact, they are active information processors who bring expectations and preconceptions with them to the jury box, filling in missing blanks and using their prior knowledge about the world to draw inferences from the evidence they receive at trial.³⁸ The testimony they hear may in fact appear incomplete, containing curious references to persons involved in the matter at issue who never appear as witnesses. Although jurors are instructed to base their decisions only on the evidence presented in court, it can be difficult for them to avoid speculating about matters they view as omissions or limitations. Fifty-one percent of the jurors surveyed in the Pound study said they wondered why certain people who were mentioned during the trial didn't testify. One-fourth (27 percent) said they "held it against the side that didn't call certain people to testify who might have added important information."³⁹ In another survey, 75 percent of the jurors said they thought that some evidence ruled inadmissible on legal grounds should have been allowed in order to help the jury make a decision.⁴⁰

Although the rules of evidence require the exclusion of some information that attorneys might wish to put before the jury, ignoring the potential effects of juror assumptions and speculations can introduce into the decisionmaking process some of the very distortions that the rules of evidence seek to avoid. Thus, jurors may erroneously assume that one of the parties in a trial is insured, or they may mistakenly believe that they understand how interrogatories will be used.⁴¹ If they are incorrect in their assumptions, a wild card is introduced into the decisionmaking process, leaving the court with no opportunity to influence the way the jury uses that misinformation. Judge Schwarzer has argued that the courts should "level" with jurors as much as possible. As an example of what can happen when jurors are misinformed, he describes what a juror told him after an antitrust case in which the court, following the recent trend, did not tell the jurors that their damage award

would automatically be tripled under the antitrust statute. The juror had heard from his law student daughter that the jury's damage award would be quadrupled, not tripled, by the court.⁴² Because the court never mentioned the tripling provision to the jury, the court lost the opportunity to describe it accurately, explain its purposes, and provide guidance on how that information was to be treated.

A recent simulation by Jonathan Casper and I tested the effects of providing jurors with various types of information about trebling in an antitrust price-fixing case.⁴³ The results indicated that a simple instruction and admonition will not suffice to inform jurors about automatic trebling and at the same time induce them not to drop their award to avoid a plaintiff windfall. Jurors who were also told about the reasons for the statutory trebling provision, however, gave awards that were almost identical to the awards given by jurors who had no knowledge or misinformation about the trebling provision. Thus, treating the jurors as collaborators rather than as passive receivers avoided the possibility that uncontrolled sources of information could infect the decisionmaking process and provided a means of inducing the jurors not to subvert the intent of the statute.

How shall we know when jurors are concerned about the nature of the evidence they receive? Although research can uncover some of the recurring issues and experiment with methods of control, many issues will be case specific. One potential way to detect juror concerns that need to be addressed is to allow jurors to submit questions during the trial. Heuer and Penrod have shown, in a study of civil and criminal jury trials, that allowing jurors to ask questions produces none of the disruptions that some critics predicted would occur if questions were permitted.⁴⁴ In the thirty-three trials in which questions were permitted, jurors submitted eighty-eight questions to the judge (2.7 per trial). Fifteen of the questions were objected to by one of the parties; the remainder were asked. The result was that these jurors were more satisfied with the questioning of the witnesses, less inclined to feel that witnesses needed more thorough questioning, and more satisfied that the jury had received sufficient information to reach a responsible verdict than jurors who were not allowed to ask questions. Although the study did not find that jurors assigned to trials in which questions were permitted had less difficulty reaching verdicts or were more satisfied with the trial itself, it appears that allowing questions did offer a reasonable way to monitor their concerns. Jurors, it seems, generally favor the idea.⁴⁵

EXPERTS. Experts appear as witnesses in a growing number of trials involving a wide variety of issues, including antitrust violations, trademark infringements, deceptive advertising, race and gender discrimination in employment, medical malpractice, and products liability.⁴⁶ One concern raised about expert testimony in jury trials is whether jurors, impressed by an expert's credentials, will uncritically accept or give too much weight to the expert's message. Do jurors ascribe, as one court has suggested, a "mystical infallibility" to scientific evidence?⁴⁷

In examining juror reaction to expert testimony, it is worth remembering Richard Lempert's admonition that any assessments of jury performance should be informed by comparisons with judicial performance.⁴⁸ While little systematic evidence is available on judicial reactions to expert testimony, some of what does exist raises the same concerns that are raised about jury reactions.⁴⁹ Moreover, as work by Bermant and his colleagues has shown, attorneys tend to present more complex evidence when a judge rather than a jury is the factfinder; thus, jurors may face a less difficult task than the lone judge.⁵⁰ Faced with technical and scientific testimony, judges as well as jurors are generally novices.

Juror surveys reveal that jurors generally find expert testimony useful. Two-thirds of the criminal court jurors in the Grisham-Lawless survey said that expert testimony usually or always helped them reach a decision.⁵¹ And nearly three-fourths of the jurors in the Tsongas survey agreed that the testimony of expert witnesses helped them understand the facts.⁵² Since experts are permitted to testify only if the court finds they are in a position to assist the trier of fact, these survey responses do not indicate whether jurors are inordinately receptive to expert testimony. Some additional data, however, provide evidence that jurors anticipate that expert testimony will have to be closely scrutinized, since impartial testimony cannot be expected from a "hired gun" put on the stand by a party in the case.

In our antitrust study, the jurors heard testimony from two experts, one testifying for the plaintiff and one for the defendant. Before the simulated trial, however, the jurors answered some background questions, including items that assessed their expectations about expert testimony. The jurors on average anticipated that the experts would be competent, but also expected them to be somewhat biased, giving testimony that would favor the side that paid them.⁵³ These expectations were significant predictors of juror reactions to the experts in the case. Those who anticipated greater competence from the experts gave higher ratings of

expertise to both experts ($r = .20$ and $r = .15$, $p < .001$). Similarly, jurors who expected most experts to favor the side that paid them tended to rate both experts in the case as less trustworthy ($r = .14$ and $r = .16$, $p < .001$).

The jurors in our study also revealed a critical attitude when it came to evaluating the positions advocated by the experts. The jurors were asked to determine the damages caused by a price-fixing conspiracy. They were told that an earlier trial had found the defendants liable for price fixing and that the jury's task in this case was to decide on damages. The two experts who presented damage estimates provided the central testimony in the case, and the jurors had to decide how to weigh that testimony. One expert presented a complex statistical model based on the past pricing experienced by the plaintiff, while the other expert presented a more homely and concrete damage model based on a comparison of prices experienced by another company in a market not affected by price fixing.

Half the jurors heard the plaintiff's expert present the statistical model and the defense expert present the concrete model. For the remaining jurors, the damage models were reversed: the plaintiff's expert presented the concrete model and the defense expert presented the statistical model. If the complex statistical model had overwhelmed the jurors, as Lawrence Tribe might have predicted,⁵⁴ we would have found higher awards when the plaintiff's expert presented the statistical model. Instead, we found no difference and this result apparently occurred because jurors were influenced by both the perceived expertise and the clarity of the statistical expert. The statistical expert was rated higher on expertise but lower on clarity. The expert's perceived lack of clarity, rather than impressing and overwhelming the jurors, made them less likely to find his testimony persuasive.⁵⁵

On the assumption that the adversary process distorts the expert testimony presented at trial,⁵⁶ some have advocated the use of court-appointed experts to alleviate the pressures that are believed to produce distortion.⁵⁷ Concern has been expressed, however, that jurors who are appropriately skeptical of expert testimony presented in an adversarial context might uncritically accept the testimony of a court-appointed expert.⁵⁸ Empirical research examining jury reaction to court-appointed experts is sparse, but recent work by Nancy Brekke and her colleagues finds that jurors may attend less to testimony given by a nonadversarial expert than to testimony given by an adversarial expert; no evidence

suggests that jurors give greater weight to nonadversarial expert testimony.⁵⁹

Complex and difficult testimony taxes any decisionmaker, and it is not clear that juries face a unique challenge in deciding how to weigh expert testimony. In some important respects, however, experts do have special qualities that jurors may not recognize. For example, only experts are regularly permitted to express their opinions under the rules of evidence, and this latitude dramatically affects their presentations. Nonetheless, researchers have not assessed whether jurors approach the testimony of experts differently than they do the testimony of other witnesses. Attorneys generally remind jurors that experts are paid to testify, but no researcher has investigated the impact of such reminders on jurors' evaluations of expert testimony. Finally, although jury researchers have conducted a number of studies testing juror reactions to expert testimony, no specific attention has been given to ways of enhancing the critical skills of jurors in assessing it. With the increasing use of experts in civil litigation, we need to learn more about assisting the jury in evaluating such testimony.

EXHIBITS. Jurors report that the exhibits commonly used in civil trials are often very useful. Eighty-three percent of the jurors surveyed in the Pound study said that an exhibit helped them to reach a decision. Three-quarters of those who reported having some exhibits in the jury room said that at least one was important.⁶⁰ In the Federal Judicial Center's study of jurors in protracted trials, 11 percent of the jurors who were asked how the attorneys could make a similar case easier to understand suggested using more visual aids.⁶¹

A jury can, however, be left adrift in a sea of exhibits if too many are used, their significance is not clearly explained, or they are not organized so the jurors can make use of them. In one of the complex cases studied by the Litigation Section of the American Bar Association, jurors were faced with 291 mostly undated exhibits randomly placed in boxes, with no indication as to author or intended recipient. After struggling to locate and identify documents, the jurors became exasperated and in the end made very little use of the exhibits.⁶² If attorney discretion cannot be relied upon to keep the flow of paper to a manageable level, it is up to the judge to step in. Suggestions for the future of the civil jury, at least in long and complex trials, should include finding acceptable ways for judges to ensure that exhibits given to jurors are reasonably organized and that the volume of paper sent back to the jury room is not excessive.

Judicial Instructions and Guidance on Standards

A telling inconsistency emerges from jury surveys in which jurors are asked about judicial instructions. Jurors in one survey were asked to indicate whether they had understood most of the law in the judge's charge, part of it, or not very much of it. Eighty-seven percent said they had understood most of it, while less than 1 percent said they did not understand much of it.⁶³ Similarly, in a second survey, 81 percent of the jurors agreed that they found the judge's instructions easy to understand.⁶⁴ Even in protracted civil trials in which the instructions are likely to be most taxing, 70 percent of jurors rated the instructions they received as easy to understand.⁶⁵ Yet when the jurors in one of these same surveys were asked about the understanding of their *fellow* jurors, 45 percent indicated that they thought fellow jurors did not understand the instructions.⁶⁶

Respondents in surveys typically report more socially desirable characteristics about themselves than they do about others, but particular aspects of the jury experience may amplify the gap between jurors' self-reported understanding and their perceptions of understanding by others. Judicial instructions contain a mixture of unfamiliar legal concepts (such as proximate cause) and apparently familiar words that take on special meanings in a legal context (such as consideration). Even jurors who realize they are having difficulty understanding the meaning of the unfamiliar phrases may nonetheless be unaware that they are confused about the familiar words. During deliberations, jurors have an opportunity to learn how others have interpreted the instructions; if there is a disagreement, a juror may conclude that the other jurors are the ones who have misunderstood.

The extensive literature on juror comprehension of instructions reveals that jurors do indeed have difficulty understanding many of the instructions in current use.⁶⁷ In many cases, the difficulty appears to lie not in conceptual barriers to understanding but in the way the instructions are written. Efforts to revise and clarify instructions to make them more comprehensible appear to hold some promise for reducing juror confusion.⁶⁸ A few states have systematically modified their jury instructions in response to concerns about comprehensibility (for example, Pennsylvania, Alaska, Arizona, Florida). Moreover, a recent decision by the California Supreme Court suggests that some courts may be receptive to challenges that confusing legal terminology can have a prejudicial effect on the

rights of litigation. The court disapproved the traditional California Pattern Jury Instruction on proximate cause⁶⁹ commonly used in cases of negligence to specify the causal connection that must be shown between the defendant's action and a plaintiff's injury. The court reached its decision based in part on evidence that the instruction was confusing to jurors. Relying on the 1979 research by Robert P. Charrow and Veda R. Charrow, the court concluded that the instruction was grammatically confusing and conceptually misleading and banned its further use in favor of a clearer "substantial factor" instruction.⁷⁰

Much of the previous work on jury instructions has focused on concepts used in criminal proceedings, so that little research is available on the comprehensibility of civil jury instructions. Even if courts are receptive to efforts aimed at improving juror comprehension of instructions, reform will require developing empirical evidence that shows not only how well jurors understand current instructions but how changes will enhance that comprehension.

Complex and unfamiliar language, awkward linguistic structure, and convoluted sentences are not the only aspects of instructions that seem designed to defeat the most diligent juror. In many jurisdictions, jurors retire to the jury room without a written copy of what the judge has told them about the law they are expected to apply. Surveys indicate that jurors given written copies of instructions find them very useful,⁷¹ although in their experimental work on the impact of written instructions, Larry Heuer and Steven Penrod found that written instructions had no effect on either juror satisfaction or performance.⁷² Since the primary objection to written instructions is logistic,⁷³ and judges willing to try giving jurors a written copy of the charge have found it feasible, this low-cost mechanism for offering assistance to the jury deserves consideration.

A more controversial effort to aid the jury involves preinstruction, or instructing the jury on the law prior to as well as after the evidence is presented. Although the jurors studied by Heuer and Penrod appeared to like preinstruction, and judges expressed less surprise at jury verdicts when it was used,⁷⁴ Reid Hastie has suggested that the potential virtues of preinstruction are also potential dangers.⁷⁵ By giving the jurors a legal framework for the evidence, preinstruction may induce jurors prematurely to decide the case and engage in a hypothesis-confirming search.⁷⁶ To ensure that preinstruction does not impair some aspects of jury functioning in the course of facilitating others, research is needed specifically to assess its effects on the timing of judgments and the resistance of those judgments to countervailing evidence introduced late in the trial.⁷⁷

In civil cases, jurors report that determining damages is more difficult for them than is deciding on liability. They find the guidance that is given to them on how to compute damages to be minimal and agree with legal analysts that the law itself provides precious little guidance for assessing damages.⁷⁸ Here the jurors are pointing not to a potential instruction problem, but to a possible legal problem. Because of the absence of legal standards in this area, providing jurors with further guidance would require legal changes rather than just adjustments in jury instructions. One reason the law may be unclear, of course, is that it is difficult to identify appropriate standards for such damages as "pain and suffering" or "loss of consortium" that will be applicable across cases (or indeed in any particular case). With no realistic external standard, it may be appropriate to ask a group of laypersons to place monetary value on these intangibles.

Thus, although jurors generally express satisfaction with the judicial instructions they are given, their performance indicates that instructions often fail to guide the jury. There is room for improvement as well as the need for research to guide changes.

Deliberations

The conventional wisdom from research on the jury in criminal cases is that deliberations have little impact on outcomes and that the majority viewpoint before deliberations begin generally becomes the jury's verdict.⁷⁹ Recent research on the civil jury suggests that deliberations may play a more important role in civil litigation. Thirty percent of jurors questioned in the Pound survey, for example, reported that the verdict reached by the jury was not the one favored by a majority at the start of deliberations.⁸⁰ Deliberations may play a larger role in civil cases in part because a variety of viewpoints and extensive avenues for compromise are available when damages are involved; an initial majority may exist only on the issue of liability.⁸¹

Jurors questioned about deliberations generally report that their fellow jurors were extremely conscientious,⁸² and helped them to remember what occurred during the trial. Simulation studies find the same patterns. For example, Phoebe Ellsworth found that mistakes in factual statements tended to be corrected during deliberations and that jurors who deliberated performed better on comprehension measures than those who did not.⁸³ Moreover, although a foreperson is selected quickly and apparently casually, this selection is not random. There is some evidence that, in

addition to preferring males with managerial or professional backgrounds, jurors select colleagues whose skills mesh with case characteristics or volunteer themselves if they have the attributes. For example, if a juror has taken a statistics course he or she had an increased likelihood of being chosen as foreperson in a price-fixing case that required the jury to set damages based in part on statistical evidence.⁸⁴

If jurors are satisfied with deliberations and with each other, that does not mean that deliberations are easy or always harmonious. In particular, there is usually some ambiguity about how to organize matters at the beginning of deliberations. Some juries begin by discussing the evidence; others take an initial straw vote, either open or secret. Hastie and his colleagues called the first type of jury "evidence-driven" and the second type "verdict-driven."⁸⁵ They found that discussion was more thorough in evidence-driven juries; as a result, some have suggested that juries be encouraged to discuss the evidence before taking any votes.⁸⁶ Although the suggestion is plausible, the Hastie juries chose their own method of deliberation. Before recommending that courts impose delays in voting, it would be advisable to see the results of experimental research that gauge jury response to an assigned method of deliberation. The more general point is that, if deliberations generally end up producing full debate, we should be hesitant about recommending directives on how deliberations should be structured.

Facilitating Jury Performance and Enhancing the Benefits of Jury Service

From the juror's point of view, the civil jury is functioning well. The positive response of trial jurors is most clearly revealed in a study by the Federal Judicial Center that questioned jurors who served in trials lasting more than twenty days. Willingness to serve again was high: 85 percent who served in long trials (compared with 93 percent who served in short trials) said they would be willing to serve again.⁸⁷ And even a majority of those not selected for a trial leave jury service with a favorable view. Yet there is still room—and opportunity—for improvement.

A Collaborative Approach

While jurors come away from jury service generally pleased with the experience and impressed by the jury system, they also report sources

of dissatisfaction and frustration. Juror surveys reveal that there is a pattern to juror criticism. First, jurors are dissatisfied when they do not feel they are being treated with respect. Thus, higher rates of dissatisfaction are not associated with the actual length of the trial; they emerge when a trial lasts much longer than expected.⁸⁸ Although the jury is asked to make the ultimate decision, jurors themselves are often treated as passive and compliant subjects who need only absorb the evidence and law presented in the courtroom and produce a verdict. When they are given no explanations for their treatment and no warnings about what is to come, their dignity and sense of fairness suffer. And because jurors are not passive, they may search for and find inaccurate answers to their questions or develop legally unacceptable solutions.

A collaborative model for juror treatment can address most of these problems. Such a model acknowledges that jurors are active and responsive and views them as partners of the litigants, attorneys, and court personnel in the production of trial verdicts. Collaborating with the jurors means providing full disclosure when research indicates that doing so will not be detrimental, giving warnings and explanations when delays or exclusions are inevitable, and furnishing opportunities for jurors to voice their concerns. These strategies offer the promise of minimizing juror frustrations and maximizing juror performance.

An Educational Opportunity

Numerous studies have shown that most Americans lack basic knowledge about the workings of the judicial system.⁸⁹ Jury service provides an opportunity to at least partially improve this situation. De Tocqueville called the jury "one of the most effective means of popular education at society's disposal."⁹⁰ Moreover, it is an educational opportunity that currently touches a significant portion of the population as a growing number of citizens are called for jury duty. Some 45 percent of Americans aged eighteen and over say they have been called, up from 35 percent in 1984; 17 percent of adults say they have served as jurors through an entire trial.⁹¹

Jurors appear to agree that the jury experience provides an opportunity for learning. The majority (68 percent) of both trial and nontrial jurors surveyed by Consolini reported that they learned something positive or factual while on jury duty.⁹² Although it is not clear precisely what jurors learn, they say they learn more about state and local courts from jury duty than from any other source. Citizens without jury experience

report that the media is their major source of information.⁹³ Since television is one of the public's major sources of information about the courts, and fictionalized television accounts are often false, jury experience offers a powerful opportunity to correct misinformation.⁹⁴

As we think about the future of the civil jury, we need to know what jurors learn about civil justice and the legal system in the course of their service. Armed with information about what the courts teach and fail to teach jurors, we can begin to identify the educational paths not yet taken.

Notes

1. See, for example, "Is the Jury Competent?" in Neil D. Vidmar, ed., *Law and Contemporary Problems*, vol. 52 (Autumn 1989); Audrey Chin and Mark A. Peterson, *Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials* (Santa Monica: Rand Corporation, 1985); and George L. Priest, "The Role of the Civil Jury in a System of Private Litigation," *University of Chicago Legal Forum*, vol. 1990, pp. 161–200.

2. See, for example, Valerie P. Hans and M. David Ermann, "Responses to Corporate Versus Individual Wrongdoing," *Law and Human Behavior*, vol. 13 (June 1989), pp. 151–66; and Valerie P. Hans and William S. Lofquist, "Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate," *Law & Society Review*, vol. 26, no. 1 (1992), pp. 85–115.

3. For reviews of research on jury comprehension and performance, see Joe S. Cecil, Valerie P. Hans, and Elizabeth C. Wiggins, "Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials," *American University Law Review*, vol. 40 (Winter 1991), pp. 727–74; and Robert J. MacCoun, *Getting Inside the Black Box: Toward a Better Understanding of Civil Jury Behavior* (Santa Monica: Rand Corporation, 1987).

4. See Shari S. Diamond, "Order in the Court: Consistency in Criminal-Court Decisions," in C. James Scheirer and Barbara L. Hammonds, eds., *Psychology and the Law: The Master Lecture Series*, vol. 2 (Washington: American Psychological Association, 1983), pp. 123–46. Table 1 presents examples of interjudge inconsistency in complex human judgments for a variety of judgment tasks ranging from physical diagnosis by physicians to the evaluation of job applicants by interviewers.

5. Herbert Jacob, *Justice in America: Courts, Lawyers, and the Judicial Process* (Little, Brown, 1965), p. 157. See also Theodore L. Becker, *Comparative Judicial Politics: The Political Functioning of Courts* (Rand McNally, 1970), pp. 320–26. Becker discusses evidence for the frequently presented propositions that "jury service, as a method of direct citizen participation in the governmental process, engenders a sense of efficacy among the citizenry," (the efficacy hypothesis) and that "when a case is controversial the citizenry is more likely to accept the verdict of a jury than of a judge alone" (the legitimacy hypothesis). Becker finds little convincing evidence for or against the efficacy hypothesis and only slight support for the legitimacy hypothesis.

6. Jurors selected for a trial serve until the trial ends. David E. Kasunic, "One Day/One Trial: A Major Improvement in the Jury System," *Judicature* vol. 67 (August 1983), pp. 78–86.

7. See, for example, James P. Levine, *Juries and Politics* (Brooks/Cole, 1992).

8. Holly G. VanLeuven asked trial jurors if they felt apprehensive, duty-bound, positive, neutral, or negative when they first received a summons for jury duty. Forty-

four percent said they were apprehensive. VanLeuven, "In Decision: An Analysis of Some Social Dynamics in the Decision-Making Process of the Jury," unpublished manuscript, 1975.

9. John P. Richert, "Jurors' Attitudes toward Jury Service," *The Justice System Journal*, vol. 2 (Spring 1977), pp. 233-45.

10. William R. Pabst, Jr., G. Thomas Munsterman, and Chester H. Mount, "The Value of Jury Duty: Serving Is Believing," *Judicature*, vol. 61 (June-July 1977), pp. 38-42.

11. John Guinther, *The Jury in America* (Facts on File Publications, 1988), p. 305.

12. In two other studies jurors were asked at the end of jury duty if they had requested an excuse or asked to have their jury duty delayed. In Paula M. Consolini's study of jurors at three courts in California, 7 percent of the jurors said they had requested an excuse; an additional 32 percent said they had either asked for a delay or received one earlier. Consolini, "Learning by Doing Justice: Jury Service and Political Attitudes," Ph.D. dissertation, University of California, Berkeley, 1992. In a national survey of jurors in sixteen courts, Janet T. Munsterman and others found that 15 percent of jurors had asked to be excused, and an additional 20 percent had sought a deferral. Munsterman and others, *The Relationship of Juror Fees and Terms of Service to Jury System Performance* (Arlington, Va.: National Center for State Courts, March 1991), p. 29.

13. Richert, "Jurors' Attitudes," p. 244.

14. Munsterman and others, *Jury System Performance*, appendix C. The percentage of jurors agreeing varied from 72 percent to 90 percent. The percentage of jurors who said their impression of jury service improved varied from 58 percent to 86 percent. Caroline K. Simon found that jurors serving in civil court reported becoming more favorable to jury service, while jurors in criminal court showed no net change in their attitudes. Simon, "The Juror in New York City: Attitudes and Experiences," *American Bar Association Journal*, vol. 61 (February 1975), pp. 207-11. When William R. Pabst, Jr., G. Thomas Munsterman, and Chester H. Mount, asked jurors in twenty-eight state and federal courts, "After having served, what is your impression of jury duty?" more than two-thirds said they had either become more favorable or stayed favorable. Pabst, Munsterman, and Mount, "The Myth of the Unwilling Juror," *Judicature*, vol. 60 (November 1976), pp. 164-72.

15. James L. Allen, "Attitude Change Following Jury Duty," *Justice System Journal*, vol. 2 (Spring 1977), pp. 246-57.

16. Consolini, "Learning by Doing Justice," p. 155, table 5.4.

17. Joyce E. Tsongas, Barry F. Anderson, and Arthur D. Monson, "The Ninth Circuit Courts: A View from the Jury Box," unpublished manuscript, 1986.

18. Austin Sarat, "Studying American Legal Culture: An Assessment of Survey Evidence," *Law & Society Review*, vol. 11 (Winter 1977), pp. 427-88; especially p. 439.

19. Six percent of those in one survey (13 percent of those who reported some court experience) said they had served as jurors. The report does not indicate how the jurors felt about the need for court reform, but among those with court experience, jurors were least likely to report an unfavorable reaction to their court experience. Theodore J. Fetter, ed., *State Courts: A Blueprint for the Future* (Williamsburg, Va.: National Center for State Courts, 1978), p. 24, table II.3.

20. See, for example, Ellen W. Egger, "Jurors Also Serve, but Mostly They Sit and Wait," *Washington Post*, Sept. 19, 1985, p. DC2.

21. Munsterman and others, *Jury System Performance*, p. D-6.

22. *Ibid.*, pp. 28-37, especially pp. 30-31. This index gauged juror reaction to the manner in which the court processed jurors between arrival and going to court, as well as to the processes of selecting jurors to serve on a particular case and determining which days the juror would be called in to appear.

23. Ibid., p. 35.
24. Kurt Lewin, "Studies in Group Decision," in Dorwin Cartwright and Alvin Zander, eds., *Group Dynamics: Research and Theory* (Evanston, Ill.: Row, Peterson and Co., 1953), pp. 287-301.
25. See, for example, Edward E. Lawler III and J. Richard Hackman, "Impact of Employee Participation in the Development of Pay Incentive Plans: A Field Experiment," *Journal of Applied Psychology*, vol. 53, no. 6 (1969), pp. 467-71.
26. In a study of the effects of voir dire on jury decisions, jurors who were excused as a result of peremptory challenge were retained to constitute a shadow jury. These alternate jurors consistently referred to themselves as the rejects and expressed the view that they had "failed" voir dire. This experiment is reported in Hans Zeisel and Shari Seidman Diamond, "The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court," *Stanford Law Review*, vol. 30 (February 1978), pp. 491-531.
27. Dale W. Broeder, "Voir Dire Examinations: An Empirical Study," *Southern California Law Review*, vol. 38, no. 4 (1965), pp. 503-28.
28. Some courts take a similar view and have introduced pre-trial questionnaires designed to reduce the number of questions that must be asked during voir dire.
29. Tsongas and others, "The Ninth Circuit Courts," p. 16.
30. But note that there is also evidence that jurors are less inclined to disclose to the higher-status judges than they are to attorneys. Thus, the experience of being questioned by an attorney may be less threatening to jurors. Susan E. Jones, "Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor," *Law and Human Behavior*, vol. 11 (June 1987), pp. 131-46.
31. Consolini, "Learning by Doing Justice," p. 256.
32. Thomas L. Grisham and Stephen F. Lawless found that 6 percent of potential jurors said the questions asked by the attorneys were too personal; 11 percent said they were not personal enough (p. 354). Grisham and Lawless, "Jurors Judge Justice: A Survey of Criminal Jurors," *New Mexico Law Review*, vol. 3 (May 1973), pp. 352-63.
33. It is unclear whether jurors respond similarly to voir dire in civil and criminal cases. The Consolini and Grisham-Lawless surveys questioned jurors who served in criminal cases. In the Tsongas survey, 40 percent of the jurors had served only in civil cases, but the study did not report whether juror evaluations differed by type of case.
34. See, for example, Joe S. Cecil, E. Allan Lind, and Gordon Bermant, *Jury Service in Lengthy Civil Trials* (Washington: Federal Judicial Center, 1987), pp. 30-31; and Guinther, *Jury in America*, p. 313.
35. *Landis v. North American Co.*, 299 US 248, 254 (1936).
36. Nancy Pennington and Reid Hastie, "Explanation-based Decision Making: Effects of Memory Structure on Judgment," *Journal of Experimental Psychology: Learning, Memory, and Cognition*, vol. 14 (July 1988), pp. 521-33.
37. Reid Hastie, Steven D. Penrod, and Nancy Pennington, *Inside the Jury* (Harvard University Press, 1983); and Nancy Pennington and Reid Hastie, "Evidence Evaluation in Complex Decision Making," *Journal of Personality and Social Psychology*, vol. 51 (August 1986), pp. 242-58.
38. See Shari Seidman Diamond, Jonathan D. Casper, and Lynne Ostergren, "Blind-folding the Jury: Is the Jury Competent?" *Law and Contemporary Problems*, vol. 52 (Autumn 1989), pp. 247-67.
39. Guinther, *Jury in America*, p. 313.
40. Grisham and Lawless, "Jurors Judge Justice," p. 356.
41. According to Guinther, 54 percent of the jurors said they thought that the defendant carried insurance; 60 percent of the jurors who sat on a jury that awarded damages to the plaintiff said they discussed whether some of the plaintiff's losses were already covered by

insurance; and 95 percent of jurors on cases that used interrogatories said they understood how their answers would be used. Guinther, *Jury in America*, pp. 299, 330, and 324 respectively.

42. William W. Schwarzer, "Reforming Jury Trials," *University of Chicago Legal Forum*, vol. 1990 (1990), pp. 119-46, especially p. 134. See also chapter 12 in this volume.

43. See Shari Seidman Diamond and Jonathan D. Casper, "Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury," *Law & Society Review*, vol. 26, no. 3 (1992), pp. 513-63.

44. Larry Heuer and Steven Penrod, "Increasing Jurors' Participation in Trials: A Field Experiment with Jury Notetaking and Question Asking," *Law and Human Behavior*, vol. 12 (September 1988), pp. 231-61.

45. Guinther found that 80 percent of the jurors said they would have liked to question some of the witnesses themselves, either directly or by having the judge ask the questions for them. Guinther, *Jury in America*, p. 310.

46. Neil Vidmar, "Assessing the Impact of Statistical Evidence, A Social Science Perspective," in Stephen E. Fienberg, ed., *The Evolving Role of Statistical Assessments as Evidence in the Courts* (Springer-Verlag, 1989), pp. 279-319; and Michael J. Saks and Richard Van Duizend, *The Use of Scientific Evidence in Litigation*, (Williamsburg, Va.: National Center for State Courts, 1983).

47. *U.S. v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974).

48. Richard O. Lempert, "Civil Juries and Complex Cases: Let's Not Rush to Judgment," *Michigan Law Review*, vol. 80 (November 1981), pp. 68-132.

49. See Vidmar, "Assessing the Impact of Statistical Evidence," p. 300.

50. Gordon Bermant and others, *Protracted Civil Trials: View From the Bench and Bar* (Washington: Federal Judicial Center, 1981).

51. Grisham and Lawless, "Jurors Judge Justice," p. 358.

52. Tsongas and others, "The Ninth Circuit Courts," p. 19.

53. 4.55 on a 7-point scale on which 1 = strongly agree most expert witnesses in court cases are highly competent and 7 = strongly disagree, and 3.08 on a 7-point scale on which 1 = strongly agree that most expert witnesses in court cases will give testimony that favors the side that paid them to come to court. Diamond and Casper, "Blindfolding the Jury to Verdict Consequences."

54. Laurence H. Tribe, "Trial by Mathematics: Precision and Ritual in the Legal Process," *Harvard Law Review*, vol. 84 (April 1971), pp. 1329-93.

55. The Special Committee on Jury Comprehension of the American Bar Association's Section of Litigation studied four complex cases, observing the alternates deliberate and interviewing the trial jurors, attorneys, and the judge. The authors of the Committee Report concluded that jurors were not unduly influenced by the expert testimony presented in these cases. In one case, the jurors rejected the testimony of an expert they found confusing; one of the attorneys confessed that he was also unable to follow this expert's testimony (p. 41). See Chairman Daniel H. Margolis and others, *Jury Comprehension in Complex Cases: Report of the Special Committee of the ABA Section on Litigation* (Chicago: The Committee, 1990).

56. See, for example, Michael J. Saks and Roselle L. Wissler, "Legal and Psychological Bases of Expert Testimony: Surveys of the Law and of Jurors," *Behavioral Sciences and the Law*, vol. 2 (Fall 1984), pp. 435-49.

57. See, for example, Theodore I. Botter, "The Court-Appointed Impartial Expert," in Melvin D. Kraft, ed., *Using Experts in Civil Cases* (Practicing Law Institute, 1977), pp. 53-85.

58. Lacking the adversarial signal that systematic processing is required, jurors might assume that the court-appointed expert's conclusions can be trusted without detailed evaluation.

59. Nancy J. Brekke and others, "Of Juries and Court-Appointed Experts: The Impact of Nonadversarial versus Adversarial Expert Testimony," *Law and Human Behavior*, vol. 15 (October 1991), pp. 451-75.

60. Guinther, *Jury in America*, pp. 295, 302.

61. Market Facts, Inc., *Final Report of an Evaluation of Jurors' Trial Experience*, unpublished report to Federal Judicial Center, Washington, 1981.

62. ABA Litigation Section, *Jury Comprehension in Complex Cases*, p. 31.

63. Guinther, *Jury in America*, p. 296.

64. Tsongas, Anderson, and Monson, "The Ninth Circuit Courts," p. 9.

65. Market Facts, Inc., *Evaluation of Jurors' Trial Experience*, table 17. In contrast, 90 percent of the jurors in short trials said the instructions were easy to understand.

66. Tsongas, Anderson, and Monson, "The Ninth Circuit Courts," p. 9.

67. See, for example, Amiram Elwork, Bruce D. Sales, and James J. Alfani, "Juridic Decisions: In Ignorance of the Law or in Light of It?" *Law and Human Behavior*, vol. 1, no. 2 (1977), pp. 163-89. Alan Raifman, Spencer M. Gusick, and Phoebe C. Ellsworth, "Real Jurors' Understanding of the Law in Real Cases," *Law and Human Behavior*, vol. 16 (December 1992), pp. 539-54; and Joseph O'Mara and Rolf von Eckartsberg, "Proposed Standard Jury Instructions—Evaluation of Usage and Understanding," *Pennsylvania Bar Association Quarterly*, vol. 48 (October 1977), pp. 542-56.

68. See, for instance, Lawrence J. Severance and Elizabeth F. Loftus, "Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions," *Law & Society Review*, vol. 17, no. 1 (1982), pp. 153-97; and Robert P. Charrow and Veda R. Charrow, "Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions," *Columbia Law Review*, vol. 79 (November 1979), pp. 1306-1374.

69. *Mitchell v. Gonzales*, 819 P.2d 872 (Ca. 1991) Proximate cause is variously interpreted as meaning cause-in-fact.

70. That is, whether the defendant's conduct was a substantial factor in bringing about the injury. Note that "legal cause" was rejected as an alternative based on evidence from the Charrow and Charrow study that a number of jurors would interpret it as meaning the opposite of an "illegal cause."

71. See, for example, Market Facts, Inc., *Evaluation of Jurors' Trial Experience*, p. 30. Ninety-eight percent of the jurors who received written copies of the instructions said they were helpful; 73 percent said they were very helpful; 76 percent of the jurors agreed that judges should always give jurors written instructions to use during deliberation. Tsongas, Anderson, and Monson, "The Ninth Circuit Courts," p. 9.

72. Note, however, that the performance measure may not have been sensitive to the advantages of a written instruction. The measure tested comprehension of general instructions, selected so that it could be used across different trials. See Larry Heuer and Steven D. Penrod, "Instructing Jurors: A Field Experiment with Written and Preliminary Instructions," *Law and Human Behavior*, vol. 13 (December 1989), pp. 409-30.

73. An additional objection occasionally raised is that jurors given a written copy of the instructions will focus on a part of the instruction as opposed to the entire instruction. See Leonard B. Sand and Steven Alan Reiss, "A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit," *New York University Law Review*, vol. 60 (June 1985), pp. 423-97. No evidence has been found to support this contention, but no research has addressed this issue.

74. Heuer and Penrod, "Instructing Jurors," p. 426.

75. Reid Hastie, "Final Report to the National Institute for Law Enforcement and Criminal Justice," Northwestern University, 1983.

76. See, for example, Mark Snyder and William B. Swann, Jr., "Hypothesis Testing Processes in Social Interaction," *Journal of Personality and Social Psychology*, vol. 36 (November 1978), pp. 1202-12.

77. Work on preinstruction in criminal cases suggests that fears about overpowering preinstructions may be largely unfounded. Vicki L. Smith, "Prototypes in the Courtroom: Law Representations of Legal Concepts," *Journal of Personality and Social Psychology*, vol. 61 (December 1991), pp. 857-72. Smith found no effect of preinstruction on jurors' naive representations of crime categories.

78. Harry J. Kalven, Jr., "The Jury, The Law, and the Personal Injury Damage Award," *Ohio State Law Journal*, vol. 19, no. 1 (1958), pp. 158-78.

79. Harry Kalven, Jr., and Hans Zeisel, *The American Jury* (Little, Brown, 1966). For a discussion of social decision schemes that model this transformation process, see, for example, Garold Stasser, Norbert L. Kerr, and Robert M. Bray, "The Social Psychology of Jury Deliberations: Structure, Process, and Product," in Norbert L. Kerr and Robert M. Bray, eds., *The Psychology of the Courtroom* (Academic Press, 1982), pp. 221-56.

80. Guinther, *Jury in America*, p. 326.

81. Diamond and Casper, "Blindfolding the Jury to Verdict Consequences."

82. Tsongas and others, "The Ninth Circuit Jurors," p. 20. Some 82 percent rated fellow jurors as serious about serving as jurors, while 76 percent said they received help.

83. Phoebe C. Ellsworth, "Are Twelve Heads Better Than One?" *Law and Contemporary Problems*, vol. 52 (Autumn 1989), pp. 205-24.

84. Diamond and Casper, "Blindfolding the Jury to Verdict Consequences."

85. Hastie and others, *Inside the Jury*, pp. 163-64.

86. Guinther, *Jury in America*, p. 85.

87. This difference was not statistically significant. Cecil and others, *Jury Service in Lengthy Civil Trials*, p. 23.

88. *Ibid.*, p. 25.

89. See, for example, Yankelovich, Skelly, and White, "Highlights of a National Survey of the General Public, Judges, Lawyers, and Community Leaders," in Theodore J. Fetter, ed., *State Courts: A Blueprint for the Future* (Williamsburg, Va.: National Center for State Courts, 1978), pp. 5-69.

90. *Democracy in America*, trans. George Lawrence (Doubleday, 1969), p. 275.

91. Research & Forecasts, Inc., "The Defense Research Institute's Report on Jury Service in the United States," unpublished manuscript, 1990.

92. Consolini, "Learning by Doing Justice," p. 123. Consolini found some increases in knowledge about due process principles among jurors who served in criminal court.

93. Thirteen percent of respondents with court experience obtained it from serving as a juror, while 8 percent of respondents with court experience said they learned most about court from their jury service. Thus 61 percent (8/13) of jurors reported that jury service was their most important source of information about courts. Fetter, *State Courts*, pp. 19, 21.

94. The new Courtroom Television Network, carried nationwide on cable, may also serve this function. It broadcasts substantial portions of actual trials, providing a new and potentially powerful educational source. Bill Carter, "TV in the Courtroom: 2 Plans to Capture Real Trials' Drama," *New York Times*, June 19, 1991, C11.