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LEGAL INSTITUTIONS

THE COMPETENCY AND RESPONSIBILITY OF JURORS IN DECIDING CASES

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It would be a very narrow view to look upon the jury as a mere judicial institution; for however great its influence may be upon the decisions of the courts, it is still greater on the destinies of society at large.[1]

I. INTRODUCTION

In recent years, juries increasingly have been criticized as being ill-equipped to adequately decide the issues in the cases before them.[2] Numerous examples support the contention that a jury selected at random sometimes serves as an incompetent decisionmaker. In one civil commercial litigation matter, the trial was expected to last for approximately one year. The case involved extremely complex business issues—the pretrial discovery process alone produced more than 100,000 pages of depositions.[3] Before the conclusion of the case, the United States Court of Appeals for the Third Circuit, on an interlocutory appeal, held that the jury may not have been capable of understanding the issues, much less how to resolve them.[4]

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1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 282 (4th rev. trans. ed. 1948).

2 As noted in *Newsweek* magazine, "a growing number of legal scholars think the [jury] reforms would make for more reliable, accurate verdicts." Jacoby & Padgett, *Waking Up the Jury Box*, NEWSWEEK, Aug. 7, 1989, at 51. John F. Grady, Judge of the United States District Court for the Northern District of Illinois, stated, "[j]udges who try cases without a jury sure don't sit there and do nothing—they take notes and ask questions." *Id.* Wisconsin Circuit Court Judge Mark Frankel noted that "the jury is appointed to be the finder of facts, and yet attorneys don't always bring out everything they need to know." *Id.*

3 *See In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1073-74 (3d Cir. 1980) (suit included several financial issues, price comparisons, and expert testimony on accounting, marketing, and other technical matters).

4 *Id.* at 1089-90 (seventh amendment right to jury trial is not guaranteed when a particular lawsuit, because of its complexity, renders a jury unable to decide in a proper manner).

In the highly publicized criminal fraud, racketeering, and tax case of former automaker John DeLorean, the jury apparently misinterpreted the court's instructions regarding the need for jury unanimity.[5] Several jurors interpreted the court's instructions on hung juries to mean that if the jury did not unanimously agree on conviction, it was required to acquit the defendant.[6] Although the jury had not yet reached the necessary unanimous verdict—it was divided nine to three in favor of acquittal—it nevertheless acquitted DeLorean, believing that a verdict of not guilty was mandated.[7]

In 1973, a suit filed in Connecticut claimed that a large corporation had committed various antitrust and patent violations.[8] The plaintiff asked for damages of up to one and one-half billion dollars, and for the large corporation to be broken up into several component parts. The case involved difficult and complex issues, consequently taking approximately four years to reach trial.[9] The jury charged with resolving this tangled dispute had an average education of the tenth grade.[10]

These examples illustrate the wide variety of situations in which a jury will arguably fail to decide a case based on "the applicable legal principles and the evidence presented at trial."[11] The reoccurrence of jury failure in complex and lengthy civil litigation cases and in other contexts, such as understanding jury instructions, has created doubts about the efficacy of the jury as a competent decisionmaking body.

Two possible solutions have been proposed to minimize this problem of inaccurate or mistaken jury decisionmaking. The first limits the cases a jury may properly hear; the second calls for a more active jury role. The first approach suggests that in light of increasingly complex civil litigation, due process concerns for a fair resolution of the issues

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5 *See* Note, United States v. DeLorean: *The Case of the Confused Jury*, 1 DET. C.L. REV. 97 (1988).

6 *Id.* According to newspaper accounts and articles, several of the jurors misunderstood the court's jury instructions. One instruction, in particular, stated that "without unanimous agreement, you must find the defendant not guilty of count 1 (the RICO Act count)." Apparently, several of the jurors believed that based on this instruction, if they were not unanimous in agreeing on the defendant's guilt, then they were bound to acquit him. *See Jurors Felt Something Was Wrong*, Detroit News, Dec. 19, 1986, at A1, col. 1 [hereinafter *Jurors Felt Something Was Wrong*].

7 *See Complications in Message Lead to Tainted Verdict*, Detroit News, Dec. 18, 1986, at A1, col. 2; *see also* Note, *supra* note 5, at 97 n.3; FED. R. CRIM. P. 31(a) ("[t]he verdict shall be unanimous. It shall be returned by the jury to the judge in open court."). In the *DeLorean* case, the jury was not polled, and the confusion was not revealed until a later point in time. Pursuant to FED. R. CRIM. P. 31(d), a jury may be polled at either party's request or sua sponte by the court.

8 SCM Corp. v. Xerox Corp., 463 F. Supp. 983 (D. Conn. 1978).

9 *Id.* at 986 (case was filed July 31, 1973, jury trial began June 20, 1977). Fourteen months later (August 16, 1978) the jury was discharged after returning 54 verdicts. Evidence was presented during 215 days and the jury deliberated for 38 days. *See* Note, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 CONN. L. REV. 775 (1978).

10 Note, *supra* note 9, at 776 n.6.

11 *In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1088 (3d Cir. 1980).

override the seventh amendment[12] right to a jury trial. This approach would permit the elimination of juries in cases whose complexity or length are likely to undermine the ability of jurors to fairly decide the case.[13]

The second proposal takes an entirely different route. Under this approach, juries would become more active participants in the trial process through such techniques as notetaking and jury questioning.[14] This more active jury role is intended to provide juries with an authority commensurate with their responsibility for resolving issues at trial. Proponents contend that the active jury model would encourage juries to become more attentive and responsible through increased participation in the process.

This Article suggests that for two distinct reasons, the more active model of the American jury is the most appropriate method for minimizing inaccurate juror decisionmaking. The first reason involves a theory of jury responsibility, in which the jury is conceptualized as a democratic representative of the community through its verdicts. Based on this premise, for a jury to effectively convey the moral condemnation of the community in a criminal case and the range of viewpoints of the community in a civil case, the jury must be provided with tools such as notetaking and questioning by jurors to adequately and competently exercise its responsibility. Otherwise, paternalistic limitations on the jury during the trial—which are noticeably absent during the deliberation process—would continue to imply that the jury is unable to shoulder the responsibility of governing the decisionmaking process. Providing the jury with the opportunity for greater participation also would create an additional check on the balance of power between the judge and the attorneys at trial.

The second reason for expanding juror participation in the trial process is utilitarian. Numerous studies suggest that a more active jury likely will be perceived as, and will be in fact, a more effective decisionmaker.[15]

This Article is divided into six sections. Following this introduc-

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12 The seventh amendment states that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall otherwise be re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

13 *See generally* Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970) (dicta suggests that right to jury trial partly depends on "practical abilities of juries"); Comment, *The 5th Amendment Right to Due Process Prevails Over the 7th Amendment Right to Jury Trial in Complex Litigation*, 26 VILL. L. REV. 720 (1981).

14 *See* Sand & Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423 (1985); Note, *Questions to Witnesses and Note-Taking by the Jury as Aids in Understanding Complex Litigation*, 18 NEW ENG. L. REV. 687 (1983).

15 If the active model leads to a more accurate decisionmaking process, it may even be mandated by the due process clause of the Constitution. *See infra* note 104.

tion, Section II explains the inherent tension in the American jury system, and the resultant problems with jury decisionmaking. Section III explores the current dominant conception of the American jury, and why the tenets of the dominant model do not respond adequately to the problem. Section IV describes possible solutions that have been proposed to solve the problem. Section V advocates the adoption of a specific alternative, that of a more active role for the jury during the trial process. Section VI concludes that the active jury model offers a preferable direction for the future of the American jury system.

II. THE ROLE OF THE JURY AT TRIAL: THE UNDERLYING REASONS FOR INCOMPETENT DECISIONMAKING

Dissatisfaction with the American jury system probably can be attributed to causes that lie deeper than the failure of some juries to properly resolve the issues in particular cases. The real reason for a considerable amount of jury error may be traced to two primary conflicting expectations of the jury: (1) impartiality in composition; and (2) accurate juror decisionmaking. These expectations create an inherent paradox, sometimes leading almost inexorably to unacceptable, inaccurate jury decisions.

A. The Clean Slate and Cross-Section Impartiality Requirements

Although selecting a jury at random from the community may be justified as equitable and fair, the selection of juries is constrained by the Constitution. In particular, the sixth amendment requires a jury to be "impartial."[16] Courts have interpreted this limitation to mean that a jury must be derived from a cross-section of the community.[17] The jury "must be drawn from a source fairly representative of the community,"[18] and cannot be subject to the systematic exclusion of any "distinctive groups in the community."[19] While these basic requirements do not impose any limitations on who must actually serve on a jury—permitting individual exemptions, for example—the constraints still require that the jury be drawn from all segments of the community.[20] Consequently, juries are composed of people from every walk of life, color, creed, and, perhaps most importantly, every level of intelligence and education.[21]

The cross-section requirement may be justified on broader policy

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16 U.S. CONST. amend VI.

17 *See, e.g.*, Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946); Glasser v. United States, 315 U.S. 60, 86 (1942); Smith v. Texas, 311 U.S. 128 (1940).

18 Taylor v. Louisiana, 419 U.S. 522, 538 (1975).

19 Castaneda v. Partida, 430 U.S. 482, 509 (1977) (Powell, J., dissenting) (quoting *Taylor*, 419 U.S. at 538).

20 *See* Fay v. New York, 332 U.S. 261 (1947) (holding that jury drawn from special panel selected by administrative process is not violative of due process or equal protection clause).

21 *See* Forum, *Affective and Cognitive Jurors*, 18 TRIAL 92 (1982); *see also* Note, *supra* note 9, at

grounds. To exclude any group or part of society from eligibility is contrary to the "democratic ideals" of trial by jury.[22] Under these ideals, "recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system."[23]

A natural corollary to the cross-section impartiality requirement is that jurors are not supposed to possess the training or experience necessary to capably deal with issues requiring specialized knowledge, such as complex commercial questions. The underlying premise is that the jury comes to the court as a clean slate—and becomes filled with only that information entered into evidence.

In essence, "[t]he juror is to register the evidence, as it is given, on the tablets of his memory, and not otherwise."[24] Jurors with education or experience in the subject matter of a law suit may be considered prejudiced about the case and not impartial. Knowledgeable potential jurors thus are more likely to be dismissed from the jury than those people who possess no special awareness about the case or its subject matter. The irony of this approach is clear: though intended to promote justice through equity and fairness, the cross-section requirement and the clean slate paradigm serve to decrease the competency of the jurors entrusted with deciding a case.

B. The Accuracy Requirement

The accuracy requirement in juror decisionmaking is mandated for several reasons. In the criminal context, defendants' lives and liberty depend on jury determinations. The degree to which society cares about the accuracy of juror decisions in criminal cases is reflected in the requirement that there must be proof beyond a reasonable doubt for every element of a crime before a jury can render a guilty verdict.[25] In civil cases, millions—and sometimes billions—of dollars depend upon the jury verdict. If juries resolve disputes inaccurately, individuals and companies could be erroneously rendered insolvent or left destitute, creating an

779 (table one charts widely varying backgrounds of jurors for *SCM Corp. v. Xerox Corp.*, 463 F. Supp. 983 (D. Conn. 1983)).

22 Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946).

23 *Id.*

24 Cheek v. State, 35 Ind. 492, 495 (1871) (reasoning that jurors should not take notes because they would be too apt to rely only upon those facts in their imperfect notes). As one commentator noted, "[m]any state courts and all federal courts have long prohibited jurors from taking notes." Flango, *Would Jurors Do a Better Job If They Could Take Notes?*, 63 JUDICATURE 436, 437 (1980). Flango suggests that the origin of the prohibition on notetaking may have been derived from the fact that notetaking favors literate jurors over illiterate ones and thus permits those literate jurors to have a disproportionate influence on jury decisionmaking. *Id.*

25 *See, e.g., In re* Winship, 397 U.S. 358 (1970) (due process requires proof beyond a reasonable doubt in criminal cases).

adverse impact on numerous individuals and firms in addition to the parties to the litigation.

Along a different vein, accurate juror decisionmaking is a predicate to a public perception of fair decisionmaking. Inaccurately determined facts, misunderstood jury instructions, and other jury errors erode the perception that the litigants to a lawsuit truly received their day in court.[26]

This perception of fairness is as important to the proceedings as is actual fairness. A system perceived as inaccurate undermines the public's confidence in the jury to reach fair—and accurate—results. The rules of evidence and other procedures governing the trial process illustrate the importance of the accuracy requirement to the proper functioning of the trial system. Evidence that may lead to inaccurate decisions because it creates irrational prejudice or misleads the jury is excluded from the jury's consideration.[27] Various procedural rules, ranging from those constitutionally imposed—such as the right to a speedy trial[28]—to the mode and order of presentation of evidence,[29] also serve to enhance the accuracy of juror decisionmaking.[30]

C. The Conflict

The cross-section and accuracy requirements provide laudable parameters for maximizing the smooth and effective functioning of the jury system. These constraints, however, conflict with one another.

The purpose of the cross-section requirement is "to guard against the exercise of arbitrary power"[31] that would occur "if the jury pool is made up of only segments of the population or if large, distinctive groups are excluded from the pool."[32] Yet, while the cross-section requirement ensures that the jury is representative of the community and has the full moral weight of the community behind it, if juries were composed of specially qualified individuals or groups—for example, those selected on

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26 Society entrusts the jury with the responsibility of dispensing "justice" in resolving conflicts. Justice requires fair procedures, if not fair results.

27 *See* FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

28 U.S. CONST. amend. VI.

29 *See* FED. R. EVID. 611(a) ("[t]he Court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth").

30 *See* Barker v. Wingo, 407 U.S. 514 (1972); Smith v. Hooey, 393 U.S. 374 (1969) (state must make diligent, good faith effort to bring criminal cases to trial). Another example of ensuring accuracy is the prevention of prejudicial pretrial publicity. *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333 (1966).

31 Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

32 *Id.*

different grounds, such as intelligence—a jury decision arguably would be more accurate. The cross-section impartiality requirement thus appears to sacrifice the competence of the individual decisionmaker for representative, group decisionmaking. The two requirements are counterpoised in such a way that advancing one appears to directly restrain the other.

An example illustrates this trade-off. In a factually complex computer fraud criminal conspiracy case, a complete understanding of the issues may be predicated on understanding how computers operate. A jury selected from a cross-section of the community, however, may have an average level of education less than that of a high school graduate.[33] This level of education may impede a clear understanding of the underlying computer principles, thereby interfering with a fully accurate resolution of the criminal issues. It thus can be expected that an average jury likely will be less capable in deciding issues about which it knows very little than a jury selected on the basis of intelligence or relevant experience in dealing with the subject matter of the trial.[34]

A corollary to the impartiality requirement—that jurors not be influenced by pretrial publicity[35] or any other information that would prejudice their decision—further erodes the accuracy requirement. The desire to seek objective decisionmakers and to minimize the taint of biased jurors who "know too much" has led to a preference for jurors who are generally less informed, both about the subject matter of the case and about other facts that would make them better jurors by way of experience or education. This problem was aptly illustrated by the jury selection process in the perjury trial of Colonel Oliver North.[36] Jurors were selected on the basis of not having heard about North and the "Iran-Contra Affair," which resulted in the exclusion of the large majority of potentially qualified jurors.[37]

The net result of adherence to the constitutional requirement of impartiality often has been the subjugation of the accuracy goal. As cases grow increasingly complex, the effects of this subjugation become even more apparent.

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33 *E.g.*, SCM Corp. v. Xerox Corp., 463 F. Supp. 983 (D. Conn. 1978) (complex commercial litigation in which the jurors had an average educational level of tenth grade).

34 Elwork, Alfini & Sales, *Toward Understandable Jury Instructions*, 65 JUDICATURE 432, 440 (1982) (study examining comprehensibility of jury instructions concluded that jurors with higher educational level were more likely to answer questions correctly).

35 *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333 (1966).

36 United States v. North, 713 F. Supp. 1444 (D.D.C. 1989).

37 The jury was chosen from a venire of 235 prospective jurors. Each juror was required to complete a 13 page questionnaire. One hundred fifty six prospective jurors, who stated in responses to certain specific questions that they had heard or read North's testimony publicized by Congress, were automatically excused. *Id.* at 1444-45.

D. The Effects of the Conflict: Some Examples

One type of case in which juries have appeared to function deficiently is the complex civil lawsuit.[38] In such a case, the complexity of the issues may prevent the jury from fully understanding the applicable rules and principles of law.[39] Another type of case in which juries arguably perform poorly is the excessively lengthy case. For example, in *In re Japanese Electronics Products Antitrust Litigation*,[40] the pretrial discovery alone took nine years to complete, and involved millions of documents and more than 100,000 pages of depositions.[41] A trial in a case of this kind may exceed one year, testing the stamina and memory of the most resilient juror. Even the brightest of jurors would be hard pressed to accurately memorize and process the information brought forth at such a trial, particularly if such a case were as lengthy and complex as the pretrial process.

Jurors also have been unable to follow the instructions given to them by the court. Several studies have suggested that jurors do not understand either the specific words used in the instructions or the overall meaning, disabling the jurors from adequately applying those instructions to the evidence in a case.[42] In the trial of former automaker John DeLorean, mentioned previously,[43] it was alleged that the jury did not understand the judge's instructions regarding how the jury should proceed in the event of disagreement.[44] In some cases, jurors not only misunderstand the instructions, but ignore them completely.[45] Jurors may sometimes decide cases based on obscure or unimportant points of evidence, effectively ignoring the arguments of counsel, as well as the spirit of the jury instructions. The net result of a jury deciding the case on such a basis is often an irrational verdict.[46]

In light of the conflicting principles underlying the system and the many illustrations of deficient juror decisionmaking, it appears that the average modern jury in some cases is not fully competent to accurately

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[38] Not everyone agrees, however, that juries have been unable to deal with complex or difficult issues. Patrick B. Higginbotham, a Judge on the United States District Court for the Northern District of Texas, observed that "[a]part from the occasional situation in which a judge possesses unique training, however, the assumption that a jury collectively has less ability to comprehend complex material than does a single judge is an unjustified conclusion." Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 53 (1977).

[39] Note, *Constitutional Law—In re* Japanese Electronic Products Antitrust Litigation—*Denial of Jury Trial in Complex Litigation*, 59 N.C.L. REV. 1263 (1981).

[40] 631 F.2d 1069 (3d Cir. 1980).

[41] *Id.* at 1073.

[42] *See, e.g.*, Elwork, Alfini & Sales, *supra* note 34.

[43] *See supra* notes 5-7 and accompanying text.

[44] *See Panel Failed to Understand Instructions From Judge*, Detroit News, Dec. 18, 1986, at A1, col. 4.

[45] *See Jurors Felt Something Was Wrong*, *supra* note 6, at A1, col. 1.

[46] *But see In re* United States Fin. Sec. Litig., 609 F.2d 411 (9th Cir. 1979) (finding no complexity exception to right to jury trial), *cert. denied*, 446 U.S. 929 (1980).

make the important decisions entrusted to it. The potential impact of such deficient juror decisionmaking is far-reaching. If jurors are unable to follow even the simplest of jury instructions, for example, how can they decide such weighty questions as a person's guilt or innocence, or the complex fate of a multi-million dollar company?

III. THE DOMINANT MODEL OF THE AMERICAN JURY SYSTEM AND ITS FLAWED RESPONSE TO THE CONFLICT

In *Duncan v. Louisiana*,[47] the United States Supreme Court stated that "trial by jury is fundamental to the American scheme of justice."[48] In accordance with this assessment, it is considered the exclusive province of the jury to decide issues of fact based on the evidence presented at trial, and then to apply the applicable legal principles to that evidence.[49]

Under this dominant model of the American jury, jurors are expected to silently examine and listen carefully to all of the evidence, and then to evaluate that evidence during the deliberation phase of the trial. During the evidentiary phase of the trial, in particular, jurors are expected to be passive observers.[50]

Although jurors are expected to be completely passive under the dominant model, they are not without guidance in deliberating on the evidence. Expert witnesses are routinely permitted to assist jurors "to understand the evidence or to determine a fact in issue."[51] The instructions given to the jury at the conclusion of a trial explain in some detail what the law is and how the jury is to apply that law to the particular facts of the case. The attorneys in the case also assist the jurors by helping to focus the issues through cross-examination of witnesses, opening statements, and closing arguments.

The dominant model deals with the jury system's conflicting requirements—accuracy and impartiality—essentially through evasion. A primary avoidance technique is to shield the jury's decisionmaking process from public scrutiny by requiring jury deliberations to take place in complete secrecy. This minimizes the number of defective decisions exposed to the public. Instead of revealing misunderstandings about the evidence, instructions, or other aspects of the trial, the entire reasoning process is safeguarded. This insulates the results from many avenues of attack.

The dominant system further insulates and protects the jury's deci-

47 391 U.S. 145 (1968).

48 *Id.* at 154.

49 *Cf.* FED. R. EVID. 104(b) (giving judges authority to decide some preliminary questions of fact).

50 *See* Wiehl, *After 200 Years, the Silent Juror Learns to Talk*, N.Y. Times, July 7, 1989, at B5, col. 3 ("for more than 200 years, the American jury has been a passive audience in the courtroom, breaking its silence only to deliver a verdict").

51 FED. R. EVID. 702.

sionmaking process by requiring only that the jury reach a general verdict, in which there is no explanation of how its conclusions have been reached. In effect, the jury is viewed as a "black box"[52]—input is fed into it on a difficult question, and a clearly defined, concrete conclusion in the form of a verdict is produced. Under this "black box" approach, the dominant system effectively shields the jury's reasoning processes from the public eye. Most cases also require that a jury use its intuition or common-sense in assessing whether a legal standard has been met,[53] leading to "individualizing the application of law."[54] The "black box" approach thus serves to focus attention on the outcome of a case, and not on how that outcome was reached. This protects both the jurors and the results, unless the verdict clearly conflicts with the evidence upon which it is based.

The dominant system further promotes the secrecy of the jury process through restrictions which prohibit jurors from discussing the evidence or the case with anyone during the process, and sometimes even after it has been completed. Although this secrecy requirement promotes the appearance of neutral jurors who do not prejudge the case, it also permits misunderstandings or other types of deficient jury functioning. For example, it is rare that prejudice in the deliberation process is detected and exposed. Even when a charge of prejudice is investigated and jurors are asked to disclose their thoughts and opinions, the disclosures occur only after a potential misunderstanding or error has occurred.

The most significant form of disclosure that regularly occurs is jury polling to determine if each individual juror concurs with the jury's verdict. But a jury poll is not always performed, and when it is, it only asks for the jurors' conclusions, not their rationales. When jurors cannot agree, the court and the attorneys are not permitted to inquire as to the basis of the disagreement or about the circumstances, such as the numerical split of the jury.

The dominant system deals with the inaccuracy of juror decisionmaking through post-verdict motions that provide the court with some discretion to alter or overturn the verdict.[55] These tools are not used freely by courts, because the jury is expected to be the fact finder and not merely an advisory body. Moreover, these tools do not actually prevent inaccurate juror decisionmaking, but merely serve to correct inequitable

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52 Judge Patrick Higginbotham has defined "black box decisions" as "the difficult decisions that remain arbitrary in a sense that they can only be based on the specific equities of each individual case and cannot convincingly be explained on wholly logical or rational grounds." Higginbotham, *supra* note 38, at 56.

53 This intangible process is also protected. Roscoe Pound suggested that under this particular view of the law, "the process involves not merely logic but intuition; as the cause was not to be fitted to the rule, but the rule to the cause." 4 R. POUND, JURISPRUDENCE § 115, at 20 (1959).

54 *Id.*

55 *See, e.g.*, FED. R. CRIM. P. 29(c). These motions include requests for judgments of acquittal, directed verdicts, new trials, and judgments notwithstanding the verdict.

or legally insupportable results after the fact. Perhaps most importantly, the processes by which a defective decision is reached remain uncorrected even with the existence of these safeguards.

Other than the appellate process and the limited procedural avenues for overturning jury verdicts, scrutiny of the jury verdict is disfavored in the dominant system.[56] The dominant model's avoidance approach is thus inadequate in dealing with defective jury decisionmaking. The secrecy of the deliberations may protect the jury, but it does not at all promote accurate and effective decisionmaking. Instead, the process simply ignores the potential for jury error until it is too late. The increasing number of publicized errors in the jury deliberation process only fuels the call for change.

IV. PROPOSALS TO IMPROVE JURY FUNCTIONING

There are essentially two types of proposals to improve jury functioning within the trial process. One set of proposals would limit the types of cases in which a jury is required. This set suggests that the seventh amendment requirement of a jury in civil cases is not applicable when the issues are so complex that a jury may not be able to decide the case on a proper basis. The other set of proposals takes the contrary approach, suggesting an expanded jury role during the trial process so the jury can become more actively involved in the trial proceedings.

A. The Complexity Exception

The seventh amendment states in pertinent part that "in suits at common law . . . the right of trial by jury shall be preserved."[57] Proponents of the complexity exception claim that the amendment implicitly exempts complex cases from its reach.[58] The rationales for this implied exclusion appear to be two-fold: part historical; and part utilitarian.

The historical rationale favors preservation of "the jury right as it

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[56] *See, e.g.*, McDonald v. Pless, 238 U.S. 264 (1915), which notes that if there were a contrary view:

> all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts that might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.

Id. at 267; *see also* FED. R. EVID. 606(b) (prohibiting a juror from testifying "as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict").

[57] U.S. CONST. amend. VII.

[58] *See* Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970); Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 67 (S.D.N.Y. 1978); *In re* Boise Cascade Sec. Litig., 420 F. Supp. 99, 104 (W.D. Wash. 1976); *see also* Note, *supra* note 14.

existed in English common law as of 1791."[59] This interpretation of the seventh amendment depends on the practice of an earlier era and not just on the strict intent of the framers of the amendment.[60]

Prior to the passage of the seventh amendment, a case was not removed from a jury simply because the jury would be unable to decide the matter before it.[61] This changed somewhat in the 1800s, when courts removed juries in cases involving an accounting in equity, due to the difficulty of having a jury decide such cases.[62] Yet during the nineteenth century, the Supreme Court interpreted the seventh amendment as guaranteeing a jury trial in almost all kinds of suits, including "a suit based on a statutorily created cause of action, that falls within the federal courts' jurisdiction over suits at law as opposed to suits in equity or admiralty."[63] When the seventh amendment was ratified in 1791, factual questions, even with regard to equitable issues, were tried before juries.[64] Yet advocates of the complexity exception still disagree, suggesting that "courts should exercise their traditional equity power, uninfected by the seventh amendment, to dispense, in their discretion, with juries in complex cases."[65]

The historical argument underlying the complexity exception, however, is clouded by the uncertainty of the prevailing English law in 1791. The division between law and equity, and the subsequent division be-

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[59] Note, *supra* note 9, at 787 (quoting Baltimore & Carsliha Line, Inc. v. Redman, 295 U.S. 654, 657 (1935)); *see also* Arnold, *A Historical Inquiry Into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980). This article was commissioned by counsel for the plaintiffs in *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. 889 (E.D. Pa. 1979). According to Arnold, the seventh amendment complexity exception is not supported by practices "contemporaneous with the adoption of the 7th Amendment in 1791." *Id.* at 830. For further support, see Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43 (1980).

[60] "The right to trial by jury . . . has no enduring meaning apart from historical form." Williams v. Florida, 399 U.S. 78, 125 (1970) (Harlan, J., dissenting in part, concurring in result).

[61] *See* Arnold, *supra* note 59, at 838 ("But it is nevertheless clear that no case of that period yet printed indicates a willingness on the part of the chancellor to assume jurisdiction because of a matter's alleged unsuitability for trial before a jury.").

[62] *See id*; *see also* President of the Farmer's and Mechanics' Bank v. Polk, 1 Del. Ch. 167 (1821), where the court reasoned that:

> [i]s this such a case that the party should be decreed to account? Upon that point I have no doubt. These transactions are so complicated, so long and intricate, that it is impossible for a jury to examine them with accuracy. They will require time, assiduous attention, and minute investigation, and are involved in so much confusion and difficulty that no other tribunal, by reason of the forms and proceeding of the courts of law, can afford the plaintiff a remedy.

Id. at 175-76.

[63] *In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1078 (3d Cir. 1980) (court notes that previously, the Supreme Court "has never relied on this static view of history to confine the seventh amendment guarantee to causes of action recognized by the common law of 1791").

[64] *See* Arnold, *supra* note 59, at 836; *see also* Parker v. Simpson, 180 Mass. 334, 349-50, 62 N.E. 401, 406-07 (1902).

[65] Kirkham, *Complex Civil Litigations - Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 209 (1976).

tween jury and nonjury cases, was simply not clear in the English common law.[66] In fact, at the time the seventh amendment was adopted, the framers themselves were sharply divided and unclear on the proper scope and nature of the role of civil juries at trial.[67] Although such a right to a jury in a civil case was proposed during the Constitutional Convention, it did not pass.[68]

The second rationale underlying the complexity exception is utilitarian. Since juries will be inaccurate decisionmakers in some cases, such as in extremely complex litigation, it would be unfair to the litigants to permit jurors to decide these cases.[69] Advocates of the utilitarian approach believe that "irrational" verdicts are not sufficiently prevented by existing jury safeguards such as judgments notwithstanding the verdict or directed verdicts.[70] The utilitarian rationale suggests that due process requirements must override the jury trial mandate when a civil case would not be fairly heard if tried to a jury.[71]

Supporters of the complexity exception suggest that it has been endorsed by the United States Supreme Court. The primary basis for this contention is rooted in a footnote in *Ross v. Bernhard*,[72] involving a stockholder's derivative suit. The Supreme Court held that:

> where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying legal issues as incidental to the equitable ones or by a court trial of a

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66 "At no time in history was the line dividing equity from law altogether—or even largely—the product of a rational choice between issues which were better suited to court or to jury trial." James, *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 661 (1963).

67 *See* Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 291-92, 294-95 (1966); Higginbotham, *supra* note 38, at 48 n.4; Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 55-56 (1923).

68 The proposal was made as part of the article III guarantee of jury trials in criminal cases. *See* Henderson, *supra* note 67, at 293-94. During the colonial era, however, several acts were passed expanding the types of civil cases involving trial by jury. *See* Arnold, *supra* note 59, which details these statutes:

> [d]uring the colonial period acts were passed granting certain kinds of specific equitable powers to law courts: in 1693, jurisdiction to chancer bonds was given; in 1698 and 1735, power to relieve against forfeiture by mortgagors was granted; and in 1713 and 1719 jurisdiction was conferred over redemption of lands after sale under an execution. In all these cases trial was by jury . . . .

Id. at 836.

69 *See In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1087 (3d Cir. 1980) ("Denial of a jury trial may be necessary to minimize the risks of erroneous decisions.").

70 *Id.* (reversing the district court, which had concluded that these tools would effectively control inaccurate jury decisionmaking).

71 *See id.* ("The district court presumed that its ability to ensure a verdict that is rational in the foregoing sense provides all of the elements of due process that a litigant may demand from the procedures of civil litigation. We disagree. The specific elements of due process that call for denial of jury trial in excessively complex cases are not provided."); *see also infra* note 104.

72 396 U.S. 531 (1970).

common issue existing between the claims.[73]

The Court in *Ross* tacitly approved taking into account the ability of jurors in the determination of whether an issue is jury triable:

> [a]s our cases indicate, the 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, *the practical abilities and limitations of juries*. Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply.[74]

The Supreme Court thus indicated that whether an issue is jury triable depends on practical as well as historical and constitutional considerations.

This practical component of the complexity rationale utilizes due process not only to allow the removal of an issue from a jury, but also to even require removal when necessary to "ensure that the verdict rests on the applicable legal principles and the evidence presented at trial."[75] The United States Court of Appeals for the Third Circuit in *In re Japanese Electronic Products Antitrust Litigation*[76] explicitly adopted this due process "trump" principle, in which the necessity of a fair decisionmaking process overrides the seventh amendment guarantee of a jury. In that case, the court first defined the term "complex":

> [a] suit is too complex for a jury when circumstances render the jury unable to decide in a proper manner. The law presumes that a jury will find facts and reach a verdict by rational means. It does not contemplate scientific precision but does contemplate a resolution of each issue on the basis of a fair and reasonable assessment of the evidence and a fair and reasonable application of the relevant legal rules.[77]

The court refused to rely on an historical basis for the exception, rejecting the suggestion that a complex suit should be removed from a jury simply because a Chancellor in 1791 would have considered the suit subject to removal from law to equity.[78] The court instead relied upon due process concerns to support a complexity exception:

> If judicial decisions are not based on factual determinations bearing some reliable degree of accuracy, legal remedies will not be applied consistently with the purposes of the laws. There is a danger that jury verdicts will be erratic and completely unpredictable, which would be inconsistent with evenhanded justice. Finally, unless the jury can understand the evidence

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73 *Id.* at 537-38; *see also* Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962).

74 *Ross*, 396 U.S. at 538 n.10 (emphasis added).

75 *In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1087-88 (3d Cir. 1980).

76 *Id.*

77 *Id.* at 1079.

78 The court noted that:

> [i]n essence the argument is a deduction of the likely reaction of the English chancellor to a hypothetical complex suit filed at law in 1791. The principal bases for the deduction are the chancellor's attitudes toward juries and his concern for justice and efficiency .... We choose not to pioneer in this use of history.

Id. at 1083.

> and the legal rules sufficiently to rest its decision on them, the objective of most rules of evidence and procedure in promoting a fair trial will be lost entirely.[79]

The court further explained that when a jury is "unable to perform its decisionmaking task with a reasonable understanding of the evidence and legal rules, it undermines the ability of a district court to render basic justice."[80] The court cautioned that while "a denial of jury trial in excessively complex cases remains necessary,"[81] the complexity exception would only arise when "the complexity of a suit is so great that it renders the suit beyond the ability of the jury to decide by rational means with a reasonable understanding of the evidence and applicable legal rules."[82] The court concluded that in such cases, the due process interest in a fair and accurate decisionmaking process outweighs the right to a jury trial guaranteed by the seventh amendment.

B. A More Active Jury

Other courts, instead of diminishing the role of juries, have adopted an approach that increases juror participation in the trial process. Participation techniques have included notetaking, juror questions directed to the court or to witnesses, and audio-visual assistance in reviewing trial evidence, as well as legal rules and principles.[83] Special training for the jury on how to do its job, particularly in resolving disputes and avoiding deadlocks, also has been proposed.[84] Other tools include videotaping testimony and offering the jury a written transcript of the jury instructions in addition to the usual oral reading of those instructions by the court. Some courts also have permitted jurors to question the court about the law and the legal instructions that they are to follow.[85]

Most, if not all, of these novel procedures are considered to fall within the existing rules of procedure and evidence. While the rules have been used to authorize these techniques, courts are forced to rely on a broad interpretation of these rules to support this approach.[86] Questions

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79 *Id.* at 1084.

80 *Id.*

81 *Id.* at 1088.

82 *Id.*

83 *See, e.g.*, Sand & Reiss, *supra* note 14 (discussing experiments used by a Committee on Juries appointed in 1982 by Chief Judge Wilfred Feinberg of the United States Court of Appeals for the Second Circuit to determine how to improve juries throughout federal courts of the Second Circuit) (citing *Proceedings of the Judicial Conference of the Second Circuit*, 97 F.R.D. 545 (1982)).

Other suggestions to improve jury functioning include mapping out for the jury a structure for analyzing the issues, a so-called "logic tree." *Id.*

84 Strawn & Munstermen, *Helping Juries Handle Complex Cases*, 65 JUDICATURE 444, 446-47 (1982); *see also* Note, *supra* note 14, at 669.

85 Strawn & Munstermen, *supra* note 84, at 446-47.

86 *See, e.g.*, United States v. Callahan, 588 F.2d 1078, 1086 (5th Cir.) ("There is nothing improper about the practice of allowing occasional questions from jurors to be asked from witnesses."), *cert. denied*, 444 U.S. 826 (1979).

submitted by jurors to witnesses, for example, generally are asked through the judge. Courts that have considered the question of whether a judge may properly forward juror questions have concluded that it is permissible pursuant to Rule 614(b) of the Federal Rules of Evidence, which permits the court to call and interrogate witnesses.[87] Since the court must approve the questions put by the jurors, the interrogation of the witness still would be done by the court.

Precedent supporting a more active jury model exists in another area of the criminal justice system, namely the grand jury. In the grand jury process, jurors routinely are permitted to ask questions of witnesses to assist in determining whether an indictment should be returned against a criminal defendant.[88] While a prosecutor is present in the grand jury to facilitate and otherwise carry out the questioning, jurors generally are permitted to ask whatever questions they deem appropriate, without any apparent impediment to the effective functioning of the system.

Several jurisdictions have experimented with an active jury model. For example, the model was adopted on a limited basis by the United States Court of Appeals for the Second Circuit in 1983.[89] Chief Judge Feinberg set up a committee which authorized participating district court judges in the Southern District of New York to undertake jury experiments utilizing various novel procedures, including:

> [p]reinstructing the jury through a preliminary charge prior to the presentation of the evidence; . . . . Advising jurors that they may seek to have questions asked of any witness at the conclusion of that witness's examination; . . . . Affirmatively advising jurors that they may take notes; . . . . Furnishing the jury with a post-delivery written copy of the charge, which the jury may take into the jury room for use during deliberations; and tape recording the court's charge and furnishing the jury with the tape and a player for use during deliberations.[90]

A wide variety of jury experiments testing the active model have not been performed. This may be attributable to the considerable resistance to this approach that still exists in many jurisdictions.

V. The Case for an Active Jury

The debate about whether juries should be active or passive during a trial—or whether juries should be the fact finders at all—will likely become more acute as the complexity and length of trials increase and the media, among others, more carefully scrutinizes the evidence in high profile cases. The enhanced pressure on and attention paid to the current

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87 *See, e.g.*, DeBenedetto v. Goodyear Tire & Rubber Co., 754 F.2d 512 (4th Cir. 1985).

88 *See, e.g.*, People v. Polk, 21 Ill. 2d 594, 174 N.E.2d 393 (1961); State v. Iosue, 220 Minn. 203, 19 N.W.2d 735 (1945). *See generally* 38 Am. Jur. 2d *Grand Jury* § 27 (1968).

89 Sand & Reiss, *supra* note 14.

90 *Id.* at 424.

jury system may force a change in the role of the jury.[91]

This Article advocates the adoption of a jury model which differs from the current dominant form. The Article supports a less restricted, more active jury. Two distinct reasons provide the basis for this proposal: (1) a more active jury role fulfills a jurisprudential conceptualization of the jury as a responsible decisionmaker; and (2) a more active jury is more likely to be an accurate decisionmaker.

A. The Jury as a Responsible Decisionmaker

It long has been believed that juries chosen from a random sampling of the community serve as representatives of that community in resolving factual disputes at trial. This representative function "is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."[92] The tradition of the jury as the voice of the community is embodied in the cross-section "impartiality" requirement of the sixth amendment, which further commits the responsibility of juries to the community at large for the decisions they reach.

The view that law requires the individual application of rules to specific circumstances lends itself to representative decisionmaking. The jury, equipped with a community's values, is readily capable of resolving disputes by "individualizing the . . . law."[93] This is a task that judges, for example, are "ill-equipped to handle,"[94] because the "[a]pplication of law process involves not merely logic but intuition; that the cause would not be fitted to the rule, but the rule to the cause."[95]

Yet, the jury offers the judicial process more than just a contemporaneous expression of the community's values. On a grander scale, the jury serves as the mechanism for prescribing a special form of "public law." The jury is invested with the responsibility of representing "[i]ndividuals, groups, organizations of every type—all with varying activities, interests, desires, impulses, obligations, intelligence, powers, and other characteristics which condition the social order."[96]

The significance of jury decisions and the centrality of those decisions to the judicial system forces recognition of the jury as an essential political institution. In this context, trust in the jury and confidence in

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91 P. DiPERNA, JURIES ON TRIAL (1984).

92 Smith v. Texas, 311 U.S. 128, 130 (1940) (holding that the conviction of a black defendant in a county in which intentional and systematic exclusion of blacks from grand jury service occurred solely based on race violates the equal protection clause).

93 4 R. POUND, *supra* note 53, § 116, at 25.

94 Higginbotham, *supra* note 38, at 56.

95 4 R. POUND, *supra* note 53, § 115, at 20.

96 Higginbotham, *supra* note 38, at 58 (quoting in part from Green, *Tort Law—Public Law in Disguise*, 38 TEX. L. REV. 1, 2 (1959), *reprinted in* L. GREEN, THE LITIGATION PROCESS IN TORT LAW 115-16 (1977)).

its decisionmaking become all the more important. As de Tocqueville pointed out, "[i]t would be a very narrow view to look upon a jury as a mere judicial institution. . . . The jury is, above all a political institution, and it must be regarded in this light in order to be duly appreciated."[97] Thus, removal of a jury from the trial process creates democratic concerns that must be balanced against the fairness and efficiency concerns expressed through the due process clause and the complexity exception.

These democratic concerns provide the cornerstone of the representative composition of the jury. In the words of Judge Irving Kaufman of the United States Court of Appeals for the Second Circuit:

> [t]here can be no universal respect for law unless all Americans feel that it is their law—that they have a stake in making it work. When large classes of people are denied a role in the legal process—even if that denial is wholly unintentional or inadvertent—there is bound to be a sense of alienation from the legal quarter.[98]

The importance of the jury in legitimizing the process by which justice is dispensed was eloquently discussed by Judge Gibbons in his dissenting opinion in *In re Japanese Electronic Products Antitrust Litigation*:

> in the process of gaining public acceptance for the imposition of sanctions, the role of the jury is highly significant. The jury is a sort of ad hoc parliament convened from the citizenry at large to lend respectability and authority to the process. . . . Any erosion of citizen participation in the sanctioning system is in the long run likely, in my view, to result in a reduction in the moral authority that supports the process.[99]

A more active jury model maintains this democratic tradition of citizen participation. Furthermore, if an active jury model improves the accuracy of the decisionmaking process and enhances the credibility of the jury, it also strengthens the conceptual legitimacy of the verdict. Similarly, even if the active model improves only the perception of the jury as an able decisionmaker, it still would enhance public confidence in the decisionmaking process.

In addition to its representative role within a democratic system, the jury serves "as a check upon the judge's power in each case."[100] This limitation on the judicial branch enhances the tripartite division of government set forth in the Constitution. The jury, as well as the judges who review lower court decisions on appeal, prevent the trial judge from becoming the equivalent of a benevolent despot. It is precisely this symbolism associated with the jury's role that is so significant to the legitimacy of a trial by jury. In essence, according the jury a greater voice during trial reallocates the division of power, providing a symbolic and perhaps even an actual check on the court. The symbolism of juror par-

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97 A. DE TOCQUEVILLE, *supra* note 1, at 282.

98 Kaufman, *A Fair Jury—The Essence of Justice*, 51 J. EDUC. 88, 91 (1967).

99 631 F.2d 1069, 1093 (3d Cir. 1980) (Gibbons, J., dissenting).

100 Higginbotham, *supra* note 38, at 58.

ticipation strengthens the conceptualization of the jury as the representative of the people.

An expanded jury role reallocates the symbolic division of power in at least one other significant respect. Lawyers usually are afforded primary control over the evidence offered at trial, the strategy by which the case is tried, and the questions asked of the witnesses. Attorneys also are given the opportunity to persuade the jury through direct argument as well as evidence. As one law professor notes, "[t]here is growing restlessness with a system that gives trial lawyers so much power over the questions that are asked in court, sometimes at the price of the truth."[101] A more active jury tends to oppose this considerable power of the trial lawyer. Since jurors are the ones entrusted with the responsibility of resolving the issues, it appears logical to at least permit the jury to supplement—within the framework of limitations prescribed by the process, such as the rules of evidence—the questioning of witnesses. This supplementary power of calling and interrogating witnesses is already within the court's domain,[102] enabling the judge who desires to do so to properly assist the jury. The "self-help" power to counteract attorneys simply would be shared in such situations between the judge and jury.

Other considerations associated with a theory of jury responsibility also favor the more active jury model. Since counsel are not the decisionmakers and the judge is not charged with deciding most facts in a jury case,[103] the value of self-determination suggests that the jury should have at least some say in how it exercises its decisionmaking responsibility. The perspective of judge, jury, or counsel may differ, consequently requiring in some instances that the jury's view be heard, if not pursued. If nothing else, the recognition of jury participation may prove cathartic, and may further instill in the jury an understanding of the importance of its responsibility.

Unfortunately, the many trial restrictions in the current system seem to diminish the importance of the jury's role. Indeed, whether trial restrictions are imposed for paternalistic or judicial economy reasons, a by-product is a negative public perception of the jury's capability. One inference drawn from these restrictions (which render the jury totally passive) is that the jury may be entrusted with the responsibility to decide important matters, but not how to define the parameters of the decisionmaking process itself.

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101 *See* Wiehl, *supra* note 50, at B5, col. 1 (statement of Professor David Wilkins, Assistant Professor of Law at Harvard Law School). Professor Wilkins added, "[i]ncreasingly, judges have been interrupting lawyers to interrogate witnesses from the bench, and in much the same way, jurors' questions chip away at the trial lawyer's domination of the courtroom interrogation." *Id.*

102 *See* FED. R. EVID. 614. Also note the various equivalent state rules, *e.g.*, FLA. EVID. CODE § 90.615(1)-(2) (West Supp. 1990).

103 The judge does make some preliminary factual determinations, such as whether a confession is voluntary or whether a co-conspirator's statement meets the requirements of FED. R. EVID. 801(d)(2)(E). *See* FED. R. EVID. 104(b).

Any lack of training which would prepare jurors to play an active role can be overcome, and is not a valid reason to prohibit active jury involvement. This is especially true since the symbolism of participation in and of itself is often a significant feature of the active model. If the ultimate responsibility for the outcome of a case lies with the jury, the responsibility should be complemented by a corollary predicate freedom of the jury to have some input, albeit regulated, into deciding what information is necessary for the jury to resolve relevant issues.[104]

B. Improving Efficiency

1. *Educational Theory.*—An active jury model also is supported by educational studies on learning and performance, which suggest that active learners are more effective than passive ones. Some studies about the learning process focus on how students learn. Since jurors are effectively the "students" of the case they are trying, these studies are instructive.

Studies of the learning process have shown that active participation by students enhances learning.[105] One study concerning the effect of allowing students to review materials they later were asked to recall found that the ability to review was a definite advantage.[106] The author concluded that students who take notes and then review them have a retention advantage over students who do not engage in similar reviews.[107]

Numerous studies have elaborated more directly on the value of notetaking. These studies support the correlation between notetaking

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104 The theory of juror responsibility which underlies an active jury model also can be viewed as mandated by the due process clause. That clause essentially requires fairness in the trial process. The current dominant model of the jury arguably permits the jury to misperceive the evidence, misunderstand the judge's instructions, and operate under false assumptions while deliberating, as long as they do not publicly complain about or otherwise reveal their misapplications. This nonfeasance is equivalent to misfeasance insofar as it draws an unfair line which allows "quiet juries" to reach improper verdicts. It is this acceptance of inaccurate decisionmaking that would be rectified by the application of due process constraints. Due process protection would avoid erroneous jury decisionmaking. To illustrate, "[n]otes sent by the jury to the judge may be perfectly innocuous but it is obviously wrong that they should not be disclosed to the defendant and his counsel so that, if they think the jury are proceeding on some mistaken basis, an appropriate submission may be made." Smith, *Case and Comment:* R. v. Flack, 1985 CRIM. L. REV. 113, 160.

Another example involves a jury which is having difficulty during the presentation of evidence. If a jury is having problems in the case, it may contravene due process for the system not to allow that jury an outlet in which to express its concerns, and, correlatively, for the criminal defendant, whose life and liberty depends on the outcome, not to be made aware of such problems or concerns to be able to deal with them accordingly.

105 *See, e.g.*, Fisher & Harris, *Effect of Note Taking and Review on Recall*, 65 J. EDUC. PSYCHOLOGY 321, 325 (1973) ("[i]n conclusion, the findings of this study indicate that in a typical college lecture setting, the taking of notes of good quality and the subsequent review of these notes are associated with more efficient recall").

106 Howe, *Note Taking Strategy, Review, and Long-Term Retention of Verbal Information*, 63 J. EDUC. RES. 285 (1970).

107 *Id.* Similarly, jurors who take and review notes will have an advantage over jurors who do not take notes.

and an improvement in the encoding component of memory as well as in the recall of stored information. One researcher stated that "notetaking is related to academic achievement in both its process and product functions."[108] This researcher also suggested that the exercise of notetaking in itself is helpful to the learning process because "it increases attention during the lecture and facilitates encoding of lecture ideas into long term memory."[109] Notetaking can serve as an encoding device by permitting the actor to record "whatever subjective associations, inferences and interpretations" that occur to him while listening.[110] Another study found that an individual is "more likely to remember what she records than assertions produced by others."[111]

Of those researchers who have studied the effects of notetaking, an overwhelming number have concluded that it improves not only memory and recall, but also the performance of the notetakers.[112] These researchers thus have concluded that a process which permits notetakers to review their notes increases their achievement level.[113] These studies also have found that the type of notes taken correlates with the level of increase in academic achievement.[114] That is, some types of notetaking are more effective than others. The researchers suggest that the more notes that are taken, the higher the achievement level.[115] Several studies even indicate that "efficient notes which use fewer words to express an idea are often negatively related to achievement."[116] In addition, preferable notetaking involves distinguishing between important and unimportant information.[117] In light of the significance attached to the way in which notes are taken, researchers suggest that formal instruction in notetaking

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108 Kiewra, *Notetaking and Review: The Research and Its Implications*, 16 INSTRUCTIONAL SCI. 233, 234 (1987).

109 *Id.*

110 *Id.*; *see also* Carter & Van Matre, *Note Taking Versus Note Having*, 67 J. EDUC. PSYCHOLOGY 900, 903 (1975) (data gives "strong support to the conclusion that note taking facilitates academic performance by providing a means for preserving for later review information from the lecture"); Di Vesta & Gray, *Listening and Note Taking*, 63 J. EDUC. PSYCHOLOGY 8 (1972); Fisher & Harris, *supra* note 105, at 324 ("[t]he results of the present study appear to indicate that note taking serves . . . [as] an encoding function").

111 *See* Kay, *Learning and Retaining Verbal Material*, XLIV BRIT. J. PSYCHOLOGY 81-100 (1955); *see also* G. ALLPORT & L. POSTMAN, THE PSYCHOLOGY OF RUMOR (1947); F. BARTLETT, REMEMBERING (1932).

112 Papers that summarize the research showed "35 studies favoring the process of notetaking, 23 indicating on [sic, no] significant differences in average performance between those who do or do not record notes, and just three studies purporting that the activity of notetaking is dysfunctional relative to listening only." Kiewra, *supra* note 108, at 234.

113 *Id.* (citing studies reported by Hartley and Kiewra).

114 *Id.* at 235.

115 *Id.* ("Research, however, indicates that notes containing more ideas and more words . . . are related to higher achievement.").

116 *Id.* (citations omitted).

117 *Id.* at 235-36.

would further improve performance.[118]

Other relationships between notetaking and achievement have been discovered: "[i]t is apparent that organized presentations facilitate notetaking and recall, notetaking encourages organization, and that organization during notetaking increases achievement."[119] Perhaps most significantly, researchers have concluded that notetakers pay greater attention to the proceedings,[120] reaffirming a "premise firmly rooted in the notetaking literature."[121]

The implications of these studies are directly applicable to the education of jurors at trial. If the research implications are true, the least effective performance will be turned in by jurors who only listen to the evidence and do not take any notes at all.[122] Jurors who are able to take notes but not review them would yield an improved performance because of what has been called the "process function,"[123] which causes an increase in "attention during a lecture and facilitates encoding of lecture ideas into long-term memory."[124] The most accurate juries, however, would be those that take effective notes—after receiving some formal training in the purpose and methodology of effective notetaking—and also review those notes either prior to, or during the deliberation stage of the trial.[125] Thus, a juror who sits passively listening to hours of testimony is simply not as effective as a juror who is able to take notes and then review them.

Studies of methods other than notetaking also suggest that increasing the active participation of the student enhances the learning process. One significant learning methodology involves permitting students to ask questions. If students are able to ask a teacher questions, the questions inform the teacher as to what the students do or do not understand. This permits the teacher to elaborate on or further explain the concepts not fully communicated to the students.

The same is true for the communication between juries and attorneys. If jurors are permitted to ask questions, albeit through the court,

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118 *Id.* at 244-45.

119 *Id.* at 237.

120 *Id.* at 238 ("Although greater attention is often credited for the performance differences favoring note-takers over those who only listen to a lecture, the level or degree of attention allocated during notetaking is probably a more sensitive indicant of potential recall and achievement than is attention alone."); *see also* Carter & Van Matre, *supra* note 110 ("some investigators have found that taking notes while listening to a lecture is facilitative . . . while others have failed to find this effect").

121 Kiewra, *supra* note 108, at 238.

122 *See generally* Carter & Van Matre, *supra* note 110; Di Vesta & Gray, *supra* note 110; Kiewra, *supra* note 108.

123 Kiewra, *supra* note 108, at 234.

124 *Id.*

125 *See generally id.* at 233-34, 242-43; Carter & Van Matre, *supra* note 110, at 900-01, 903; Di Vesta & Gray, *supra* note 110, at 12-14; Kiewra & Benton, *The Relationship Between Information-Processing Ability and Notetaking*, 13 J. CONTEMP. EDUC. PSYCHOLOGY 33 (1988).

this will inform the court and the lawyers as to the parts of the case the jurors do not understand. After listening to questions by the jury, the attorneys could modify their trial strategy accordingly and the court could similarly tailor jury instructions to maximize their effectiveness. As several commentators have noted, "[if] we are ever to learn what the jury understands and does not understand about the law and the issues in the case, it will only be from listening to jurors as they ask questions."[126]

The value of providing the attorneys in a case with feedback through such techniques as jury questioning of witnesses was recognized by the United States Court of Appeals for the Fifth Circuit in *United States v. Callahan*.[127] The court stated that "[t]rials exist to develop truth. It may sometimes be that counsel are so familiar with a case that they fail to see problems that would naturally bother a juror who is presented with the facts for the first time."[128]

The enhanced channels of communication provided by the active jury model offer benefits similar to those found in the oral argument process. During oral arguments, the appellate judges—who may be seen in this analogue as the equivalent of the jury—ask questions of the attorneys to better understand the claims and contentions being advanced. By virtue of the questions they ask, the judges are informing counsel about the concerns the judges have with counsel's position. The utilization of juror questioning during trial is similar. As one commentator has noted, an advocate's job is "to make them [the jurors] understand, and if he has not achieved that objective, he has failed, not the jury."[129]

2. *Jury Experiments.*—In addition to the analogy between educational studies involving students and the jury trial process, numerous experiments with actual or simulated juries also support the active jury model. One of the most significant of these studies was conducted by the Federal Courts Committee of the Philadelphia Bar Association beginning in 1983. The experiment involved notetaking in thirty civil and nine criminal trials.[130] Of the 326 jurors in those cases, 228 or seventy percent took notes.[131] The Committee created special notetaking instructions for the particular judges who participated in the experiment.[132] At the con-

126 Strawn & Munstermen, *supra* note 84, at 447.

127 588 F.2d 1078 (5th Cir.), *cert. denied*, 444 U.S. 826 (1979).

128 *Id.* at 1086.

129 Goldstein, *Nothing is Too Complex*, 71 A.B.A. J. 39, 40 (1985); *cf.* Zoeller, *Beyond a Jury's Ability*, 71 A.B.A. J. 39, 39 (1985) ("the constitutional guarantee of due process requires that cases too complex for a jury to understand and decide rationally must be tried without a jury.").

130 B. Walter-Goldberg, Note Taking by Jurors in the Federal Courts: A Research Project Sponsored by the Philadelphia Bar Association 3 (Ph.D. dissertation, June 1985) (on file with the *Northwestern University Law Review*).

131 *Id.* at 4.

132 *Id.* at 4, 5. The judges who participated included Judge James D. Giles, Clarence Newcomer, Thomas O'Neill, Jr., Louis H. Pollak, and Norma L. Shapiro. *Id.* at 4.

clusion of the study, a special researcher evaluated the results gathered from the project. Certain guidelines governed the test trials. For example, the notetaking in each of the test cases was entirely optional.[133] Other special procedures also were utilized:

> [n]ote pads and pencils or pens were distributed to the jurors in the jury box or jury room by the courtroom deputy clerks just prior to the opening statements of counsel. Various techniques were used to secure the privacy of each juror's notes. Most of the deputy clerks gave the jurors envelopes in which to keep their note pads whenever they were not using them. . . . At the conclusion of the trial, the judge again instructed the jury on the proper use of their notes.[134]

The greatest proportion of notetaking occurred during the testimony of witnesses, not during arguments and presentations by the lawyers. Overall, the jurors compiled an average of 4.7 pages of notes in a four day trial.[135]

The results of the study, based on questionnaires filled out by the jurors, favored notetaking.[136] Most of those jurors who took notes concluded that being permitted to do so was helpful.[137] These jurors stated that they would do it again in others cases if given the opportunity.[138] In addition, almost half of those jurors who took notes stated that the notetaking had an effect on the decisions they made in the case.[139] The study further found that notetaking did not distract jurors and that the notes themselves did not appear to be unduly prejudicial to the fact finding process.[140]

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133 *Id.* at 4.

134 *Id.* at 4-5.

135 *Id.* at 16.

136 *Id.* The juror questionnaire asked many different questions of the jurors, including whether the jurors found the case easy, medium, or difficult to decide; whether notetaking by other jurors distracted a juror; whether the juror would like to serve on a jury again in the near future; whether the juror would take notes the next time she served; whether a juror would recommend notetaking to other prospective jurors; what was the most important factor in the juror's decisionmaking process; whether the notetakers led the discussions in the jury room; whether the notes taken by other jurors were accurate; whether the foreperson was influential during the deliberation process; and whether jurors who took notes discussed those notes during the deliberations. *Id.* at 28 app. A (Juror Questionnaire).

137 *Id.* at 15.

138 *Id.* at 11 (if permitted, 89% of those jurors who took notes would do so again the next time they served as jurors).

139 *Id.* at 15 (43% of the jurors who took notes believed that it had an effect on their decision).

140 *Id.* at 10. Other conclusions included:

> [j]urors were not distracted by fellow jurors taking notes . . . jurors stated that notes taken were accurate . . . jurors who opted to take notes would do so the next time they serve as jurors . . . jurors who took notes would recommend it to their friends . . . jurors who took notes felt that they had an advantage . . . notes were most helpful in remembering the facts of the case . . . jurors who did not take notes reported that notetakers did not lead discussions in the jury room . . . . The judges reported that notetaking presented no problems for the judicial system, and almost all considered it to be helpful to jurors. Two of the judges in the study now offer jurors the option of taking notes as a regular practice.

Id. at 10-17.

In another experiment conducted by the Committee on Juries of the Judicial Council of the Second Circuit, federal district courts in New York and Vermont conducted twenty-six criminal and civil trials in which jurors were permitted to question the witnesses.[141] The jurors were instructed after opening statements that they would be allowed to ask questions, but that "prime responsibility for presenting evidence rests with counsel and that they should exercise this opportunity sparingly and only if they believe that their questions will not or cannot be answered by other witnesses likely to be called."[142] The questions were submitted in writing to the court, and were asked only at the end of each witness' testimony.[143]

The results showed a trend towards few juror questions. In nine of the twenty-six trials, jurors asked no questions at all. In one case, jurors posed only one question. In three trials, two questions were posed, and in nine trials, several questions were posed. Two cases did not conform with the general juror tendency to ask a minimal number of questions.[144] In one case, forty questions were posed, and fifty-six questions were offered in another.[145] One implication from this overall data is that jurors generally did not abuse the privilege of asking questions, and in fact exercised this prerogative judiciously.

In another study of the perceptions of actual jurors, a professor at California State University at Dominguez Hills surveyed approximately 3,800 individuals on jury duty.[146] In the survey, jurors were asked their opinions about the disparate skills of opposing attorneys,[147] and how the process could be changed to "make the evidence 'clearer to, and more effectively judged by the jury.' "[148] The most frequent juror response favored allowing jurors to ask questions of the parties, with court approval.[149]

Even one of the least supportive recent studies of the effects of a more active jury did not yield negative results. In experimental research conducted by professors Larry Heuer and Steven Penrod, both psychologists, two juror participation procedures—notetaking and the direct

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141 *Report of Committee on Juries of the Judicial Council of the Second Circuit* 55-58 (1984), *excerpt reprinted in* 73 ILL. B.J. 155 (1984).

142 *Id.*

143 *Id.*

144 In two other trials, the judges did not report on whether the jurors asked any questions. *Id.*

145 *Id.* However, in some of the cases, many of the questions were irrelevant.

146 Strier, *Through the Jurors' Eyes*, 74 A.B.A. J. 78 (1988).

147 *Id.* at 80 ("About two-fifths thought that the difference in attorney skills was anywhere from 'partly' to 'completely' responsible for a wrong decision by the jury they sat on regarding the verdict, size of the award, or length of sentence.").

148 *Id.*

149 *Id.*

questioning of witnesses—were studied.[150] In that experiment, thirty-four civil and thirty-three criminal trials in Wisconsin Circuit Courts were randomly assigned one, both, or neither of those procedures.[151] After the trials ended, the authors provided jurors, judges, and lawyers with questionnaires evaluating the two procedures.[152] The authors concluded that notetaking did not serve to assist the memory of jurors, but neither did it detract from jury functioning nor distract the jury.[153] The authors noted that the jurors' satisfaction increased when they were allowed to take notes.[154]

The study further concluded that juror questioning of witnesses did not tend to elicit significant issues at trial. Yet, the trial did not become slow or cumbersome either, and juror questions did not cause the lawyers' strategy in the case to change.[155] Furthermore, the authors found that allowing questioning allayed juror concerns and offered the lawyers feedback about how the jury perceived the case.[156] Thus, while an increase in actual trial effectiveness was not borne out by the study, it did appear that the perception of jurors about the process had improved. After being permitted to ask questions, jurors were more confident and satisfied with the trial, without any apparent harmful side effects.

Furthermore, even though the study concluded that notetaking did not enhance the memory of jurors, this does not mean that the notetaking was not useful. Studies have found that the exercise of notetaking, in itself, facilitates the encoding of facts into long term memory.[157] Such memory elaboration occurs because notetaking increases the jurors' involvement in the trial, thereby promoting the encoding process.[158] Thus, a lack of enhanced memory alone may not be dispositive of whether notetaking would be useful to jurors.[159]

In another experiment currently in progress, Professors Penrod and Heuer are supervising a study of active jury participation in more than 500 trials in at least thirty states.[160] Although no firm conclusions have been reached to date, Penrod and Heuer[161] anticipate that a more active jury will not only facilitate communication between the jury and the law-

150 Heuer & Penrod, *Increasing Jurors' Participation in Trials: A Field Experiment with Jury Notetaking and Question Asking*, 12 L. & HUM. BEHAV. 231 (1988).

151 *Id.* at 242.

152 *Id.* at 240-42 (questionnaires were completed by 550 jurors, 95 attorneys and 63 judges).

153 *Id.* at 245-46, 248, 257-58.

154 *Id.* at 252-53.

155 *Id.* at 254-55.

156 *Id.* at 254.

157 *See supra* notes 106-23 and accompanying text.

158 *See generally* DiVesta & Gray, *supra* note 110; Fisher & Harris, *supra* note 105.

159 *See* Di Vesta & Gray, *supra* note 110; Fisher & Harris, *supra* note 105.

160 *See* Wiehl, *supra* note 50, at B5, col. 3.

161 Professor Lawrence Heuer teaches at Northwestern University, and Professor Penrod at the University of Minnesota Law School.

yers and judges, but also will tend to improve the jurors' attention at trial.[162] Professor Heuer commented that "[i]t's valuable for a lawyer to know what the jurors are thinking as the trial unfolds, and for a judge to receive an early warning if the jury is hung up on an irrelevant tangent . . . ."[163]

Active jury techniques such as those used in the studies thus can guide judges and attorneys in maximizing the value of their instructions and questions, respectively. Because the communication channels used to enhance and assess jury understanding become more important in difficult cases, the effectiveness of the active jury model increases in those cases. Thus, it is not surprising that in the experiment performed in the Southern District of New York, the study concluded that "juror questioning of witnesses would be most useful in complex cases."[164]

3. *Adoption of the Active Jury Model By Individual Judges.*—Many individual judges have embraced the more active jury model in some form. One judge who regularly follows the model is Judge Mark Frankel of the Dane County Circuit Court in Wisconsin. Judge Frankel permits juror questioning in some cases, depending upon whether he believes it is appropriate in the particular case after discussing the matter with counsel.[165] The procedure used by Judge Frankel in "roughly 90 percent" of his criminal and civil jury cases is to "allow jurors to ask questions of all witnesses called to testify."[166] In a small percentage of cases, he is less likely to permit questions because of the type of evidence offered, such as videotaped depositions; with such evidence he permits only written questions which are reviewed with counsel outside the hearing of the jury.[167]

Permitted questions are then put to the witnesses by Judge Frankel, and only at the end of each witness' testimony.[168] Judge Frankel also permits lawyers to ask additional questions to clarify the matters raised by the jurors' questions.[169] Furthermore, the jury is instructed at the beginning of the case regarding the ground rules for this questioning.[170]

Judge Frankel has found that the average number of questions asked in each case is between three and seven.[171] He found that these questions

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162 Wiehl, *supra* note 50, at B5, col. 3.

163 *Id.*

164 Sand & Reiss, *supra* note 14, at 444. Additionally, jurors who were allowed to take notes during the trial generally were in favor of the procedure, indicating that the notes served as a useful memory aid. *Id.* at 450.

165 *Judge Frankel on Jurors Questioning Witnesses*, 60 WIS. B. BULL. 23, 23 (1987).

166 *Id.*

167 *Id.* Judge Frankel also may curtail juror questioning if significant evidence has been suppressed. *Id.*

168 *Id.*

169 *Id.* If the attorneys conduct extensive additional questioning, Judge Frankel asks the jurors if they have any further questions. *Id.*

170 *Id.* Judge Frankel makes it clear that the jurors are not permitted to ask oral questions. *Id.*

171 *Id.* at 24. The number of questions in any given trial ranged from zero to twenty. *Id.*

require approximately two to three additional minutes for each witness questioned.[172] Some of the questions submitted to him are not permissible under the applicable evidence rules and are consequently not allowed.[173] The judge believes in the efficacy of permitting jurors to ask questions because "[j]urors appear more attentive in those trials where they have been allowed to ask questions."[174] He added:

> [i]n several cases jurors have asked decisive questions overlooked by trial counsel. Although I can't prove it, I assume less time is taken by the jury in deliberation speculating on what the answer to unasked questions might be. Frequently, lawyers who objected to the procedure at the start of the trial have become quite enthusiastic about the procedure after they have seen it in operation.[175]

Another judge who regularly uses the more active jury model is Chief Administrative Judge Daniel T.K. Hurley of the Fifteenth Judicial Circuit Court in Palm Beach County, Florida. Judge Hurley allows jurors to submit written questions to the court, and then confers with the attorneys about the propriety of those questions outside of the hearing of the jury.[176] During the trial, Judge Hurley also acquaints the jury with their responsibilities and rights as jurors under the active model.[177]

Another judge in Palm Beach County, Florida, James R. Stewart, Jr., Administrative Judge of the Family Law Division, has adopted an even more active jury model. Judge Stewart allows jurors to put oral questions directly to the witnesses. He does not let a witness answer until he rules on the question, which he does immediately. Judge Stewart then explains to the jurors why the witness will or will not be allowed to answer the question.[178] In addition to permitting notetaking and juror questioning, he has prepared standard instructions on notetaking and questioning.[179]

According to Judge Stewart, these procedures are administrable and efficacious.[180] His conclusions are corroborated by the fact that he has used these techniques for approximately twenty years with success. He believes that some judges still are reluctant to allow notetaking and wit-

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172 *Id.*

173 *Id.* Judge Frankel noted that the attorneys in a case rarely object to juror questions *Id.*

174 *Id.* In addition, Judge Frankel stated that "approximately fifteen to twenty Wisconsin trial court judges now allow jurors to ask questions in a variety of cases . . . . Case law reveals that appellate courts in almost 20 other states allow jurors to ask questions of witnesses in the discretion of the trial judge." *Id.*

175 *Id.*

176 Interview with Daniel T.K. Hurley, Chief Administrative Judge of the Fifteenth Judicial Circuit, Palm Beach County, Florida (Aug. 16, 1989).

177 Judge Hurley tells jurors that they have an absolute right to take notes and to ask questions. *Id.*

178 Interview with James R. Stewart, Jr., Administrative Judge of the Family Law Division, Fifteenth Judicial Circuit, Palm Beach County, Florida (Aug. 16, 1989).

179 *Id.*

180 *Id.*

ness questioning because these procedures deviate from tradition and accepted practice.[181] He suggests, however, that notetaking and witness questioning are gradually becoming a more widely accepted trial practice.[182]

C. *The Limitations of Judicial Economy and Prejudice*

Perhaps the greatest impediment to increasing the role of jurors in the trial process is the potential increase in trial time and prejudice that may occur from accommodating an active jury. The specter of additional time allotted for juror questioning raises two issues: whether the amount of time spent training jurors to become effective, active participants is justifiable; and whether the benefits of the extra time incurred outweigh the costs.

The judges that have experimented with permitting jurors to ask questions, take notes, or otherwise play a more active role in the system generally have not reported a significant increase in the length of trials.[183] Techniques exist, moreover, to minimize undue delays in trials that embrace an active jury model. One technique limiting potential increases in trial time simply involves enforcing the applicable rules of evidence. When the jury engages in such activities as questioning, enforcing those rules that require evidence to be relevant and not unfairly prejudicial can facilitate an orderly and efficient trial.[184] Another potentially successful technique is to instruct the jury on the rationale for limiting the form and substance of active jury participation. Expressly informing juries about the purposes of active jury techniques and about the limitations imposed by the court—such as permitting jurors to submit questions in writing only at the end of attorney questioning—should deter juries from abusing the process.

In addition to potentially increasing the length of the trials, active juries which ask questions and take notes may require both the court and counsel to modify various court procedures and rules, and may increase the risk of prejudice. A jury that asks questions or takes notes, for example, may lose its impartiality by emphasizing the parts of the evidence about which the jury was allowed to ask questions. The possibility of active jurors prejudging the testimony also may create difficulties in

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181 *Id.* Judge Stewart added that many judges are surprised to learn that the American Bar Association standards encourage judges to instruct jurors regarding their right to take notes and question witnesses. *See* STANDARDS RELATING TO JUROR USE AND MANAGEMENT Standard 16 (A.B.A. Judicial Admin. Div. 1983).

182 *Id.*

183 *See, e.g.*, Root, *Judge Will Allow Questions by Jurors*, Pittsburgh Press, Sept. 6, 1984 (copy on file at Northwestern University Law Review) ("Trial Judge Henry R. Smith, Jr. of the Allegheny County court system stated, 'I talked to one judge in Lebanon County, and he saw no increase in the length of his trials—no significant delay problems at all.' ").

184 *See, e.g.*, FED. R. EVID. 401, 402, 403.

the judicial administration of a case. For example, if jurors are permitted to ask questions, how can attorneys effectively object? As one lawyer who was appealing a verdict in which jurors were permitted to ask questions noted, "American juries are supposed to hear the evidence rather than join the inquisition."[185] That same lawyer added that "[a]s soon as we let jurors ask questions, the juror is no longer a fact finder, but a second prosecutor or defender."[186]

These fears were expressed by the United States Court of Appeals for the Fourth Circuit in *DeBenedetto v. Goodyear Tire & Rubber Company*,[187] a products liability case. There, the trial court permitted jurors to ask questions of the witnesses. On appeal, the Fourth Circuit Court of Appeals expressed a clear dislike for the practice, but found that it did not constitute reversible error.[188] The court stated:

> we do not agree that such questions are analogous to or even comparable to questioning of witnesses by the judge . . . who is trained in the law and instructed to "see that justice is done" . . . . [m]embers of the jury . . . are untutored in the law, and instructed to sit as a neutral fact-finding body. Thus, we believe that juror questioning and questioning by the trial judge are clearly and properly distinguishable, although both forms of questioning are matters within the trial court's discretion. . . . [w]e believe that the practice of juror questioning is fraught with dangers which can undermine the orderly progress of the trial to verdict. Our judicial system is founded upon the presence of a body constituted as a neutral fact-finder to discern the truth from the positions presented by the adverse parties. The law of evidence has as its purpose the provision of a set of rules by which only relevant and admissible evidence is put before that neutral fact-finder. Individuals not trained in the law cannot be expected to know and understand what is legally relevant, and perhaps more importantly, what is legally admissible.[189]

The court concluded that "[s]ince jurors generally are not trained in the law, the potential risk that a juror's question will be improper or prejudicial is simply greater than a trial court should take, absent such compelling circumstances as will justify the exercise of that judicial discretion set out above."[190] The Fourth Circuit thus revealed a view of juror objectivity firmly tied to juror passivity. The potential danger of biased and nonobjective jurors, coupled with the disruption of order and procedures, appeared to lie at the heart of the Fourth Circuit's objection to greater jury participation.

The "gloom and doom" sentiments expressed by the Fourth Circuit are valid concerns. Potential problems can be controlled, however, short

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185 *See* Wiehl, *supra* note 50, at B5, col. 2.

186 *Id.* at B5, col. 3.

187 754 F.2d 512 (4th Cir. 1985).

188 *Id.* at 513.

189 *Id.* at 516.

190 *Id.*

of the complete elimination of the active model. Judges still retain final control over the trial process and all of the procedures that govern it.[191] Thus, if a clear and orderly set of procedures is created to control juror participation, such as requiring questions to be submitted through the court, many of the Fourth Circuit's fears should be allayed.[192] Moreover, the rules of evidence which prohibit the introduction of unduly prejudicial evidence still would apply.[193] Finally, studies have not shown that treating the jury as an equal would undermine any of the orderly processes at trial or result in prejudiced, predisposed juries. Indeed, the majority of the studies performed suggest that the major impact of the active jury model is a more effective jury.[194] Thus, if courts or legislatures responsibly control more active juries, the fears of Armageddon should prove unfounded.

The real reason underlying the fears concerning the active jury model may not so much involve the dangerousness of the jury as the redistribution of power that would result if the trial process embraced the active model. Under the current system, the entire power to present a case lies with the attorneys. Permitting juries to ask questions and take notes presents a new dimension at trial, sapping some of the perceived power of attorneys to either persuade juries or to govern the presentation of the case. A similar displacement of judicial power also may contribute to the reluctance of courts to adopt such procedures. Thus, it may not be the change in procedures or the potential harm to the litigants that form the basis of the objections, but the reallocation of power at trial resulting from such procedures.

VI. CONCLUSION

The increasing lack of satisfaction with the way jurors are exercising their duties justifies the exploration of alternative conceptualizations of the jury. First, an active, less restricted jury is a preferable alternative for two salient reasons. First, an active jury model would fulfill the conceptual role of the jury as an important democratic participant in the American trial process. Second, encouraging a more active jury will increase the effectiveness of the jury. For these reasons, the complexity exception to the seventh amendment, if it exists at all, should be minimized, and jurors should be encouraged, within the constraints of time and reason, to participate actively in the trial process.

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191 *See* FED. R. EVID. 611.

192 *See also supra* notes 47-56 and accompanying text (noting that passive jury model also harms the judicial system through increased level of inaccuracies).

193 *See* FED. R. EVID. 403.

194 *See supra* notes 130-64 and accompanying text.