

Making Jury Trials More Truthful*

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"Justice is truth in action."

— Benjamin Disraeli¹

INTRODUCTION

In the American trial, there is illusion and there is reality. One pervasive illusion is that of an adversary system optimally suited to the discovery of truth. In reality, the adversariness of our trial proceeding is just as likely to hide or corrupt the truth. If the adversarial trial is optimally suited to anything, it is fomenting hostility and rancor.²

Another prominent illusion suffuses our image of the jury. The historical view is of juries protecting us against both government overreaching and law administered without benefit of the

¹ JOHN BARTLETT, FAMILIAR QUOTATIONS 502 (Justin Kaplan ed., 16th ed. 1992).

² Few things are more embarrassing than the genealogy of one's most cherished ideas. The adversarial system's genealogy suggests that it is used to satisfy primeval urges. As Roscoe Pound, eminent jurist and one of the early critics of the adversary system, observed: "[American adversary procedure] is probably only a survival of the days when a lawsuit was a fight between two clans . . ." Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, in 35 F.R.D. 273, 281 (1964). In the view of some, the ancestry of the modern American trial is trial by battle (brought to England as part of the legacy of William the Conqueror) and individual or group acts of vengeance (dating back to Anglo-Saxon England). The truth of a controversy was arrived at when armed bravos hired by the respective litigants fought each other until the skull of one was smashed or he "cried craven" before the sun went down. See WILLIAM FORSYTH, THE HISTORY OF LAWYERS 298-301 (1875) (giving example of trial by combat and later civil trial with formalities of combat); 2 SIR FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 630-31 (1895) (describing trial by battle). *But cf.* Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 719 (1983) (asserting that medieval methods were not adversarial, though procedural forms contributed to modern adversarial process).

Popular belief has it that psychological benefits inhere in the "battle atmosphere" of adversary litigation, particularly in civil suits. Barry B. Boyer, *Alternatives to Administrative Trial-Type Hearings For Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111, 148 (1972). The adversary system may sublimate more direct forms of hostile aggression. Famed lawyer, legal scholar and iconoclast Charles Curtis so argued in his book *It's Your Law*.

The law takes the position that we ought to be satisfied if the parties are; and it believes that the best way to get that done is to *encourage them to fight it out*, and dissolve their differences in dissension. We are still a combative people, not yet so civilized and sophisticated as to forget that *combat is one way to justice*.

CHARLES P. CURTIS, *IT'S YOUR LAW* 4 (1954) (emphases added).

common person's judgment and sense of fairness. The grim reality is as ignoble as the illusion is high-minded. Juries are shamelessly but routinely manipulated by trial attorneys.³ Moreover, juries are captives of an antiquated and Byzantine procedural mechanism that keeps them ignorant of much relevant evidence and restricts their ability to independently investigate the facts.⁴

Operating separately, the adversary system or the jury trial might be more conducive to the development of truth. Together, they can combine to deliver a witch's brew of injustice. Trials are markedly different without juries. Appearing before nonjury tribunals (e.g., bench trials, appellate courts and administrative hearings), attorneys are notoriously less histrionic and more straightforward in their presentations. Attorney courtroom behavior before a jury noticeably changes, and with it the whole texture of the trial.⁵

Alternatively, the non-adversarial tribunal with a jury factfinder would likely seek the truth more effectively. Freed of the current restrictions on independent jury inquiry, the jury could actively investigate the truth rather than passively view it through the attorneys' partisan prism. If the evidence were presented by court-appointed neutral investigators whose compensation was performance based, the quality of even a passive jury's search for truth would arguably exceed that in an adversarial trial.⁶

³ Commenting on the juror's receptivity to lawyer suasion, Marcus Gleisser observed:

[The lawyer] knows that each juror is influenced by his own background, training, and heredity; that the listener, as in all audiences, can be led about by his emotions and prejudices. So the lawyer hits these hard. He puts aside his professional desire for objectivity in justice and instead attempts to capitalize upon the whimsical excesses that juries are known for. These very emotions which a lawyer tries to grasp firmly are a major obstacle in the way of a jury sincerely seeking to find the facts about a case before it.

MARCUS GLEISSER, JURIES AND JUSTICE 253-54 (1968).

⁴ See discussion *infra* Parts I.B.3 (discussing exclusionary rules) and II.C (discussing limits on jury factfinding).

⁵ "So it is that the experienced lawyer . . . passes lightly over facts he would have stressed before a judge alone, and instead puts his emphasis on the dramatic aspects of his case. Here is where the orator takes over and leaves the lawyer behind . . ." GLEISSER, *supra* note 3, at 253.

⁶ See discussion *infra* Parts III (comparing inquisitorial and adversarial systems) and IV.E.1 (discussing judicial questioning).

None of the trial's functions are more central to its legitimacy than the search for truth.⁷ For if the trial does not effectively develop the facts and comprehensibly present them to the factfinder, trial justice is serendipitous. Truth can be sought in various ways. Some believe that we can intuit it through introspection; others contend that we can know it from divine revelation. The most widely-accepted truth seeking model in Western civilization is, however, the scientific method.⁸ The scientific method paradigm, which contemplates a dispassionate inquiry by a neutral third party or parties, is most notably used in continental European countries. The procedural mechanism for truth seeking in the American trial, however, is the highly partisan adversary system.⁹

Our trial procedure and its governing ethos need to be critically reevaluated. Too often lost in the quotidian hubbub of adversarial jury trials are the overarching goals of our court system: truth and justice. Substantive justice refers to the appropriate allocation of rights and duties, whereas procedural justice refers to the presumed fairness of our trials. Depending upon one's perspective, it is either its great strength or its great failing that the American trial system frames trial justice solely in terms of procedure. Attorneys and judges will concede that the fairness of trial procedure is no guarantee of its truth-finding capacity.

In investigating the trial goals of truth and justice through the lens of the adversary system, key questions surface: How well does the system work to achieve either goal? What could we learn from the inquisitorial system? To what extent do the "truth" and "justice" of adversarial trial procedure conform to common notions of truth and justice? Lastly, do the ethics of

⁷ See *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966) (noting that unlike Fifth Amendment privilege against self-incrimination, purpose of trial is to determine truth).

⁸ See M.H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95, 98-99 (1986) (chronicling evolution of scientific method into acceptance in Western civilization).

⁹ Given the preeminent role of the attorneys in developing the evidence in the adversary system trial, it is described as client-centered. Because the judge is primarily responsible for developing the evidentiary facts in the inquisitorial system trial, it is said to be court-centered.

trial advocacy promote or frustrate the realization of truth and justice?

This Article first reviews the untoward implications for jury trial truth-seeking resulting from exclusive use of adversarial procedure. Part I discusses the adversarial trial's search for the truth: the underlying theory; impediments to truth seeking; truth-corrupting devices used by attorneys; and the impact of adversarial ethics. Part II looks at how our procedural rules actually compound the already considerable inherent factfinding limitations of all-lay juries. Part III compares the relative strengths and weaknesses of the adversary and inquisitorial systems in the search for truth. Having delineated the major problems of jury factfinding in the context of an adversary system, the Article moves on to consider ameliorative change. Part IV proposes specific responsive reforms — some sourced in the inquisitorial system — to make jury trials more truthful, i.e., more effective in the search for truth. In this regard it presents the pertinent findings of three large-scale surveys on responses to various trial reform proposals. Two assess judicial attitudes; one assesses juror attitudes. The first, conducted by the Harris organization in 1988, is a nationwide poll of 1,000 federal and state trial judges. The second, conducted by the author in 1994, surveyed over 300 California trial and appellate judges. The third, also conducted by the author over a six month period during 1987-1988, polled over 3800 jurors who had just completed jury service.

I. ADVERSARIAL TRUTH-SEEKING

A. *The Theory of Adversarial Truth-Seeking*

Arguably, the most compelling claim supporting the adversary system of trial court dispute resolution is that it is the best judicial system for truth-finding.¹⁰ Given the importance of adequate and reliable factual evidence to an informed decision, the validity of this "truth claim" is essential to justify the adversary system.

¹⁰ In the context of a trial, truth is found by presenting relevant facts and impeaching spurious claims of the opposition. The U.S. Supreme Court has stated that "[t]he basic purpose of the trial is the determination of truth." *Tehan*, 382 U.S. at 416.

The belief that truth is the product of conflicting views may have its roots in the classic dialectic. Plato's dialogues and the scholastic disputation are thought to be historical analogues of the adversary system. Plato believed that truth emerges only in dialogue: "By conversing many times and by long, familiar intercourse for the matter's sake, a light is kindled in a flash, as by a flying spark."¹¹ The similarity of scholastic disputation rules to the rules of trial procedure is apparent: "To every *disputatio legitima* there belongs question, answer, thesis, agreement, negation, argument, proof and concluding formulation of the result."¹²

Closer scrutiny reveals the superficiality of the trial-dialectic analogy. In a dialectic the presumed objective of both sides is to find the truth through logical argumentation. Conversely, the objective in an adversarial trial is victory.¹³ Whatever the philosophical roots of the adversary system in Platonic and scholastic dialogue, their nexus is severed by common courtroom practices. When two biased accounts of the facts are presented, will they cancel out, leaving the truth (as assumed in dialectic theory), or will they pile up in confusion? The latter scenario seems more likely.¹⁴ Moreover, dialogue cannot yield truth when the participants lie or engage in the equivalent of lying, for this is antithetical to the truth-seeking purpose of dialogue. That trial lawyers lie and otherwise distort the truth has been a rallying point for adversary system critics. Typical is federal judge Jerome Frank's¹⁵ assessment that cases are decided more on the "pre-

¹¹ JOSEF PIEPER, *GUIDE TO THOMAS AQUINAS* 78 (Richard Winston & Clara Winston trans., 1962) (quoting Plato, Seventh Letter, 341 c).

¹² 2 MARTIN GRABMANN, *SCHOLASTISCHE METHODE* 20 (quoting Magister Radulfus). "This theory is . . . very similar to Sir Karl Popper's theory of scientific rationality, that the way to get at truth is a wholehearted dialectic of conjecture and refutation." David Luban, *Calming the Hearsed Horse: A Philosophical Research Program for Legal Ethics*, 40 MD. L. REV. 451, 468 (1981).

¹³ "In short," says Frank, "the lawyer aims at victory, at winning the fight, not at aiding the court to discover the facts." JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 85 (1949).

¹⁴ Luban, *supra* note 12, at 469.

¹⁵ Judge Frank is a one-time chairman of the SEC and the most oft-quoted critic of the adversary system. *See, e.g.*, Roberta S. Karmel, *Limitations on SEC Rule-Making*, N.Y. L.J., Aug. 16, 1990, at 3 (noting Judge Frank was former SEC chairman); Rita Simon, *The American Jury: Keep It or Replace It?*, WASH. TIMES, Oct. 16, 1995, at A19 (noting Judge Frank's criticisms of adversary system).

ponderance of the perjury” than the preponderance of the evidence.¹⁶

A common explanation of the basis for the truth claim is that truth emerges from the clash of opposing arguments. “When two men argue, as unfairly as possible, it is certain that no important consideration will altogether escape notice.”¹⁷ Frank called this the “Fight Theory” of trial procedure, derived from the view of the trial as a substitute for battle.¹⁸ Frank concludes: “To treat a lawsuit as, above all, a fight surely cannot be the best way to discover facts. Improvement in factfinding will necessitate some considerable diminution of the martial spirit in litigation.”¹⁹

¹⁶ FRANK, *supra* note 13, at 85. The practice is hardly new. In *The Attic Nights*, Second century A.D. Latin author Aulus Gellius quotes Titus Castricius: “It is the orator’s [or trial lawyer’s] privilege to make statements that are untrue, daring, crafty, deceptive, and sophistical, provided they have some semblance of truth and can by any artifice be made to insinuate themselves into the minds of the persons who are to be influenced.” 1 AULUS GELLIUS, *THE ATTIC NIGHTS* 33 (John C. Rolfe trans., 1927). For a descriptive taxonomy of trial lawyer duplicity, see Richard H. Underwood, *Adversary Ethics: More Dirty Tricks*, 6 AM. J. TRIAL ADVOC. 265 (1982) (cataloguing unethical attorney trial tactics and suggesting curative measures).

¹⁷ FRANK, *supra* note 13, at 80 (quoting nineteenth century English historian and essayist Lord Thomas Macaulay).

¹⁸ In his eloquent critique, *Courts On Trial*, Frank contrasts the Fight Theory with the “Truth Theory,” a trial system designed to yield the truth about the facts of a suit. He challenges those who would equate the two. His premise is simple: “[T]he partisanship of the opposing lawyers blocks the uncovering of vital evidence or leads to a presentation of vital testimony in a way that distorts it.” *Id.* at 81.

¹⁹ *Id.* at 102. Other critics disparage the high level of endorsement the Fight Theory has achieved. New York Judge Marvin Frankel, a leader in the movement to give truth a greater value in trials, concedes that “[d]ecisions of the Supreme Court give repeated voice to this concept . . . that ‘partisan advocacy on both sides,’ according to rules often countenancing partial truths and concealment, will best assure the discovery of truth in the end.” MARVIN E. FRANKEL, *PARTISAN JUSTICE* 12 (1978) (citing *Herring v. New York*, 422 U.S. 853, 862 (1975)). Like Frank before him, Frankel was shocked by this wanton leap of logic:

We are not so much as slightly rocked in this assumption by the fact that other seekers after truth have not emulated us. . . . [W]e . . . would fear for our lives if physicians, disagreeing about the cause of our chest pains, sought to resolve the issue by our forms of interrogation, badgering, and other forensics. But for the defendant whose life is at stake — and for the public concerned whether the defendant is a homicidal menace — this is thought to be the most perfect form of inquiry. We live, at any rate, as if we believe this.

Id.

Commenting on the implausibility of the Fight Theory, Thurman Arnold writes:

Opponents of the Fight Theory point to two unalloyed verities: First, party control dictates that the sole source of the truth comes from evidence offered by the parties through their attorneys;²⁰ second, under the mandate of zealous advocacy, the attorney's professional goal, legal obligation and financial interest lie with the realization of his client's success.²¹ If the truth

Bitter partisanship in opposite directions is supposed to bring out the truth. Of course no rational human being would apply such a theory to his own affairs [M]utual exaggeration of opposing claims violate[s] the whole theory of rational, scientific investigation. Yet in spite of this most obvious fact, the ordinary teacher of law will insist (1) that combat makes for clarity, (2) that heated arguments bring out the truth, and (3) that anyone who doesn't believe this is a loose thinker.

THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 185 (1962).

²⁰ Judges rarely exercise their authority to question witnesses or call their own witnesses. See discussion *infra* Parts IV.E.1 and IV.E.2.

²¹ In any adversarial proceeding, the attorney is part thespian, part psychologist and part orator. During the 1987 congressional Iran-contra hearings, Senate majority counsel Arthur Liman chided witness Oliver North for repeatedly conferring with his (North's) counsel, Brendan Sullivan, before answering Liman's questions. In what became a celebrated reproach of Liman, Sullivan sharply retorted, "I am not a potted plant here." See *Iran-Contra Lesson: Hill Inquiries Not Perry Mason Affairs*, *LEGAL TIMES*, June 27, 1988, at 24 (discussing use of counsel in Iran-Contra hearings); *Washington Talk: Briefing: Potted Plants Galore*, *N.Y. TIMES*, Mar. 17, 1988, at B6 (quoting Brendan V. Sullivan, attorney for Oliver North, during the Iran-Contra Senate committee hearings in 1987). Indeed not. More than any other characteristic, zealous advocacy of his client's interest in any adversary proceeding defines the attorney's role and performance. Zealous advocacy translates to aggressive trial tactics. Be they base and pandering appeals to the emotions of the factfinder(s), repeated diversionary objections, or attacks on the testimony of a hostile witness known (by the interrogating attorney) to be telling the truth, trial tactics are geared to victory, not to the discovery of truth. British political leader Lord Brougham's frequently quoted words in the trial of Queen Caroline are often cited as the essential encapsulation of the advocate's courtroom role:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.

DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 189 (1973) (quoting 2 *TRIAL OF QUEEN CAROLINE* 8 (J. Nightingale ed., 1821)).

Further investigation of the circumstances surrounding Brougham's statement gives us pause to reconsider the applications of zealous advocacy. The statement was made in Brougham's 1820 defense of Queen Caroline against King George IV's charge of adultery.

is incompatible with this objective, then the attorney must do all she can — within decidedly vague ethical constraints — to hide or distort the truth.²² Nevertheless, attorney control over the quantity and quality of evidence is the signature of the adversarial trial.

A second theory underlying the truth claim involves motivation. Adversary system defenders contend that partisan advocates will be more diligent in seeking and producing favorable evidence than their neutral inquisitorial system counterparts.²³ But in empirical studies, those acting as adversary system attorneys generally did not differ in their diligence from those acting as inquisitorial system attorneys, except when the original distribution of facts was unfavorable to one party.²⁴ Nor was the claim that the adversary system results in more facts being presented to the factfinder substantiated.²⁵

It is, however, simply too facile to blame the deficiencies of courtroom truth seeking on particular overzealous, unethical, or incompetent attorneys. Criticism of the system is more appropriate. Charles Curtis, although an outspoken defender of the adversary system, conceded that “the administration of justice is no more designed to elicit the truth than the scientific approach is designed to extract justice from the atom.”²⁶

The next subsection discusses various systemic impediments to truth-seeking via the trial process. Some impediments, such as

Years later, Brougham revealed that he used the statement as a tacit threat to reveal the King's secret marriage to a Catholic. If made public knowledge, this information would have cost the King his crown. *Id.* at 188.

²² In *Partisan Justice*, Frankel decries the essential incongruity between the adversary trial and the discovery of truth: “[T]he contest by its very nature is not one in which the objective of either side, or of both together, is to expose ‘the truth, the whole truth, and nothing but the truth.’” FRANKEL, *supra* note 19, at 14.

Roscoe Pound said manipulation of testimony illustrates how attorneys distort litigation. The adversary system, Pound observed, turns witnesses into partisans, prevents the court from restraining witness-bullying, and generally impairs the functioning of a witness. Pound, *supra* note 2, at 281-82. Hence the relevant evidence which is not excluded is often presented to the jury in incomplete or distorted form. And whether by statute or court practice, jurors are usually prevented from asking questions to fill in the gaps.

²³ TED FINMAN, *CIVIL LITIGATION AND PROFESSIONAL RESPONSIBILITY* 7-8 (1966).

²⁴ See E. Allan Lind, *The Exercise of Information Influence in Legal Advocacy*, 5 J. APPLIED SOC. PSYCHOL. 127, 142 (1975) (discussing results of one such study).

²⁵ See JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 37 (1975) (discussing results of one such study).

²⁶ Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 12 (1951).

trial values which compete with the truth and the use of partisan expert witnesses, are functions of the adversary system. Other impediments, like the far reaching use of exclusionary rules, are borne of a historic distrust of juries.²⁷

B. Impediments to Truth Seeking

1. Trial Truth is Unknowable

Both quantitative and qualitative truth seeking impediments of the adversary system appear in everyday trial practice. The quantitative impediments consist of those factors that narrow the quantity and scope of evidence introduced at trial. They include all rules that allow for the intentional exclusion of relevant evidence.

Under the party control feature of the adversary system, attorneys control the development of trial evidence. In accord with their duty of zealous advocacy, attorneys will not submit unfavorable facts, albeit relevant ones, to the decision maker. Attorneys might also keep relevant evidence from the decision maker due to a reluctance of the parties to exchange information. Furthermore, the information limiting nature of "yes" or "no" witness responses when there is no opportunity for the passive jurors to ask clarifying questions may keep relevant evidence from the factfinder. As a result, the factual basis for the decision may be incomplete.

Qualitative impediments arise because zealous advocacy taints evidence presentation. In a sense, all evidence introduced in a party-controlled adversarial proceeding must, to some extent, be suspect. Evidence admitted in the adversarial trial is not perforce pristine because attorneys rarely present evidence in a dispassionate manner. They constantly strive to influence evidence-processing by the factfinder. The attorney presents her evidence as part of a packaged story containing various degrees and shades of truth. There was no illusion in Frankel's mind about

²⁷ Ironically, these rules also apply in bench trials. See Charles W. Ehrhardt, *The Conflict Concerning Expert Witnesses and Legal Conclusions*, 92 W. VA. L. REV. 645, 662-63 (1990) (explaining dangers of relaxed admissibility requirements for bench trials).

the attorney's commitment to full disclosure. "It is the rare case," he said, "in which either side yearns to have the witnesses, or anyone, give *the whole truth*."²⁸

Some commentators despair of finding truth through trial procedure. Legal ethicist Geoffrey Hazard believes truth, in the scientific sense of pure factfinding, is unattainable in a trial. Once in trial, the parties have already conceded that which can be proven objectively. What remains, he concludes, is hopelessly ambiguous, corrupted by decision maker bias and attorney distortion.²⁹ Hazard's point is well taken. Legal facts are different from facts in other disciplines. In law, findings of fact are usually not empirically verifiable, nor do they necessarily correspond to something real; they are either simply the factfinder's findings, or assumed from the jury's general verdict.³⁰

Much "factfinding" is not really a determination of facts, but is rather evaluative judgment. Even if the facts are known with certainty, what constitutes "negligence" or "criminal intent" is ultimately a subjective determination. The subjectivity of factfinding makes it misleading to think of the trial as a pristine search for truth. Though that may be the goal of the system as articulated in the purple prose of the appellate courts, it is not necessarily the goal of the litigants. Truth is incidental to their prepotent objective, victory, for which their zealous advocates strive. Of this objective, legal scholar and psychologist James Marshall writes:

²⁸ Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1038 (1975).

²⁹ GEOFFREY HAZARD, *ETHICS IN THE PRACTICE OF THE LAW* 122 (1978).

³⁰ See PHILIP SHUCHMAN, *PROBLEMS OF KNOWLEDGE IN LEGAL SCHOLARSHIP* 8, 15, 16, 57 (1979) (asserting that there is often very little basis to assume that reported appellate case is reliable account of facts that lead to lawsuit). Substantial difficulties inhere in ascertaining the truth in an adversarial trial. Indeed, these differences led philosopher Max Radin to conclude that the accurate determination of facts is a permanent, insoluble problem of the law. "Events are unique," he observed, "and no imagined or imitative reconstruction will precisely reproduce them." Max Radin, *The Permanent Problems of the Law*, in THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK COMMITTEE ON POST-ADMISSION LEGAL EDUCATION, *JURISPRUDENCE IN ACTION* 415, 419 (1953). Nevertheless, proponents claim that the adversary system is the best method to find the truth. See, e.g., SHUCHMAN, *supra* at 50-51, 56-60 (presenting argument on merits of adversarial system). Yet it is surely a suboptimal means because the individuals controlling trial procedure — the attorneys — subordinate truth-seeking to winning.

Testimony is constantly dissected and contradicted and reshaped toward partisan ends. That is the essence of a trial; it is not a scientific or philosophical quest for some absolute truth, but a bitter proceeding in which evidence is cut into small pieces, distorted, analyzed, challenged by the opposition, and reconstructed imperfectly in summation.³¹

2. Truth and Nontruth Values

Various values incompatible with truth-seeking obtain in the adversarial trial: individual dignity, privacy, freedom from unreasonable state regulation and the presumption of innocence in criminal cases are a few.³² Chief among the incompatible non-

³¹ JAMES MARSHALL, *LAW AND PSYCHOLOGY IN CONFLICT* 148 (2d ed. 1980).

³² Some of these non-truth values are readily apparent, others are not. The obfuscation of pattern jury instructions, for instance, may be by design. That is, they may be dictated by a policy decision. Studies show that more comprehensible revised instructions (a) lead to fewer guilty convictions, and (b) may broaden the jury's awareness of their discretion to disobey the law. Wallace Loh, *The Evidence and Trial Procedure: The Law, Social Policy and Psychological Research*, in *THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE* 13, 29-31 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985). Imagine how different the jury trial would operate if clarity were the preeminent value of the instructions. Judges would give lectures on the apt law before or after the instructions, with question and answer opportunities, instead of giving all the legal instructions at the end of the trial, with no opportunity for juror questions.

In criminal cases, the Constitution erects specific impediments to the search for truth. Hence the Fourth Amendment right to freedom from unreasonable government search excludes much relevant evidence at trial. And the Fifth Amendment privilege against self-incrimination cuts off the most fruitful source of evidence in a criminal case. In this light, the criminal trial is not a true search for truth, but a test of the prosecutor's proof.

Another example of a non-truth value is litigant satisfaction, an operative goal of the American trial. To achieve this end, we have party, rather than court, control of the trial. See E. Allan Lind, *The Psychology of Courtroom Procedure*, in *THE PSYCHOLOGY OF THE COURTROOM* 13, 19 (Norbert L. Kerr & Robert M. Bray, eds., 1982) (concluding that empirical studies suggest party control feature of adversary system contributes most to perception of fairness and thus to litigant satisfaction); Laurens Walker et al., *The Relations Between Procedural and Distributive Justice*, 65 VA. L. REV. 1401, 1416 (1979) (asserting that litigation model that assigns high degree of control over process to litigants will be preferred and perceived as more fair). But party control permits a host of attorney devices to distort and dissemble the truth.

Striving for internal consistency, legal scholars have sought either to reconcile the incompatible goals of adversarial procedure, or to establish their priorities. In response to Frankel's charge that truth is accorded too low a priority in the system, former Hofstra Law School dean Monroe Freedman counters that the trial is not an abstract search for the truth. See Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060, 1063 (1975) (arguing that adversarial system is concerned with more than search for truth). He points to the Fourth, Fifth and Sixth Amendments, plus language from U.S.

truth values is party controlled procedure. Party control grants attorneys great license in representing their clients. In the process, truth is all too often sacrificed at the altar of legal victory, profoundly corrupting the reliability of the adversary system as a vehicle for truth.³³

Frankel challenges the legal profession to hold the adversarial process up to the light of reality and ask, as a search for truth, how does it measure up against the procedures in other fields and in other countries?

Despite our untested statements of self-congratulation, we know that others searching after facts — in history, geography, medicine, whatever — do not emulate our adversary system. We know that most countries of the world seek justice

Supreme Court decisions, to support his contention that truth often must be subordinated to more “fundamental ideals.” *Id.* at 1065. Frankel’s proposal to establish truth as the overriding goal of the adversary system, says Freedman, would violate these constitutional limitations. *Id.* at 1066. Freedman accuses Frankel of engaging in the very kind of tactics he decries:

One suspects that in minimizing his advertence to that critical [constitutional] aspect of the problem, the umpireal judge was backsliding into a bit of lawyerly adversariness. For if we ask . . . just how strongly arguable is the case for the “more fundamental ideals,” we will find either that we are being asked to sacrifice those ideals in some substantial measure . . . or that Judge Frankel’s measure is wholly impractical, because regard for those ideals precludes a single-minded search for truth.

Id.

But Frankel is not proposing the abrogation of constitutional rights if their exercise may result in hiding the truth. Rather, he suggests we reevaluate the priorities given to truth and nontruth values in trial in order to produce a more just result. Frankel, *supra* note 28, at 1032. It is noteworthy that Freedman only refers to constitutional language and Supreme Court dicta suggesting the permissible sacrifice of truth in criminal cases. In so doing, he ignores the multifarious ways in which the adversary system facilitates the frustration of truth in *civil* cases (where the constitutional protections of the Fourth, Fifth and Sixth Amendments do not obtain). Yet criminal and civil cases are the two faces of the same adversary system. Freedman applies his touchstone to only one, but generalizes to all trials. Perhaps it is he who is doing the backsliding.

³³ Frankel decried the low value truth is accorded under the adversary system. To the practicing trial attorney, says Frankel, it is but a nominal goal:

Employed by interested parties, the process often achieves truth only as a convenience, a by-product, or an accidental approximation. The business of the advocate, simply stated, is to win if possible without violating the law. . . . His is not the search for truth as such. . . . [T]he truth and victory are mutually incompatible for some considerable percentage of the attorneys trying cases at any given time.

Frankel, *supra* note 28, at 1037.

by different routes. What is much more to the point, we know that many of the rules and devices of adversary litigation as we conduct it are not geared for, but are often aptly suited to defeat, the development of the truth.³⁴

3. Exclusionary Rules

At the beginning of the Watergate trial, Judge John Sirica reportedly announced his intent to relax the rules of evidence "in the interest of finding the truth."³⁵ Sirica's candor indicated an ongoing problem. Exclusionary rules inhibit truth-seeking because their implementation excludes relevant evidence from consideration by the jury. For example, judges can exclude otherwise probative evidence if they feel its admission would prejudice, confuse or mislead the jury.³⁶ Evincing distrust of jury competence,³⁷ judges now occasionally use this power to exclude expert testimony in technical and complex cases. Exclusionary rules flagrantly contradict the fundamental belief that lay jurors are competent to hear and decide upon *all* evidence.³⁸

Exclusionary rules blindfold jurors to relevant evidence in a variety of civil cases.³⁹ Fearing wrongful inferences, courts inten-

³⁴ *Id.* at 1036.

³⁵ See generally JOHN SIRICA, TO SET THE RECORD STRAIGHT (1979) (setting forth judge's impression of Watergate trial).

³⁶ See, e.g., FED. R. EVID. 403 (setting forth federal rule allowing exclusion of relevant evidence when risk of undue prejudice on jury substantially outweighs its probative value); CAL. EVID. CODE § 352 (West 1995) (California equivalent of FED. R. EVID. 403).

³⁷ Evidence scholar McCormick wrote that "[t]he great body of the law of evidence consists of rules that operate to exclude relevant evidence" from the jury. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE, § 53, at 121 (Edward W. Cleary ed., 2d ed. 1972).

³⁸ See *infra* notes 47-49 and accompanying text (discussing anachronistic view that jurors are incapable of properly weighing hearsay evidence).

³⁹ Distortions produced by the combination of blindfolding the jury and erroneous assumptions can also arise in criminal cases. Illustrative is the situation in capital punishment cases. Here the jury is often not informed of available alternative sentences if the capital defendant is not sentenced to death, specifically life imprisonment without chance of parole. In excluding this information, the judge assumes that the issue of whether and when the defendant will be released if not executed does not influence the jury. In fact, ample evidence exists that jurors do consider the safety of the community in this circumstance. Shari Seidman Diamond et al., *Blindfolding the Jury*, LAW AND CONTEMP. PROBS., Autumn 1989, at 247, 255. Ignored by the above assumption is the real possibility that jurors may be biased to opt for the death penalty when unaware of the community protection afforded by an alternative sentence.

tionally deny jurors access to certain evidence concerning the existence of a defendant's insurance coverage,⁴⁰ the identity of the party paying attorney's fees,⁴¹ the taxability of damage awards,⁴² the treble damages feature in antitrust cases,⁴³ and settlement offers and settlements of the other parties claims.⁴⁴ But the blindfolding is often based on erroneous assumptions about how such information would influence juror behavior. For example, jurors may not be told that a civil defendant carries liability insurance out of concern that the presumed deep pockets of the insurance company will lead jurors to inflate damage awards.⁴⁵ If, however, the defendant is *not* insured, but (as is often the case) it is the jurors' *expectation* that she is insured, the defendant will have to pay an excessive amount.⁴⁶

Large amounts of relevant evidence are also excluded under the hearsay rule. Hearsay statements may be unreliable, but their total exclusion is a draconian measure. Decisive information may be withheld, vitiating the search for truth and any semblance of an informed verdict.

The primary impetus for the perpetuation of the hearsay rule today could be judicial distrust of juror capabilities. Judges remain skeptical of the lay juror's ability to assign the proper weight to hearsay testimony — even with cautionary instructions

⁴⁰ See, e.g., FED. R. EVID. 411 (denying jurors information about defendant's liability insurance on issue of wrongful or negligent conduct).

⁴¹ See, e.g., *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842, 860 (1st Cir. 1985) (citing *Pollock & Riley, Inc. v. Pearl Brewing Co.*, 498 F.2d 1240, 1243 (5th Cir. 1974), finding it generally inadvisable to inform jury of attorney's fees).

⁴² See, e.g., *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 496 (1980) (finding that juries may assume taxation occurs and increase award to fully compensate plaintiff).

⁴³ See, e.g., *CVD, Inc.*, 769 F.2d at 860 (citing *Pollock & Riley, Inc. v. Pearl Brewing Co.*, 498 F.2d 1240, 1243 (5th Cir. 1974), finding it generally inadvisable to inform jury of treble damage feature in antitrust cases, for fear jury would reduce award to account for trebling).

⁴⁴ See, e.g., FED. R. EVID. 408 (making compromise evidence inadmissible as to liability).

⁴⁵ FED. R. EVID. 411; see Annotation, *Admissibility of Evidence, and Propriety and Effect of Questions, Statements, Comments, etc., Tending to Show that Defendant in Personal Injury or Death Action Carries Liability Insurance*, 4 A.L.R.2d 761, 765 (1949) (stating that general rule against liability insurance evidence exists partly for fear that juries would bring in verdicts on insufficient evidence, or would bring in verdict larger than if jury believed defendant would pay).

⁴⁶ See JOHN GUNTHER, *THE JURY IN AMERICA* 98 (1988) (reporting Roscoe Pound American Trial Lawyers Foundation survey, where more than half of 286 jurors surveyed in civil trials thought that defendant carried insurance).

from the judge. When, during the sixteenth century, witness testimony supplanted personal knowledge as the basis for jury decisions, the inherent dangers of hearsay became clear. In 1603, the treason trial of Sir Walter Raleigh reified this concern. The prosecutors introduced two damaging pieces of hearsay evidence. Raleigh strenuously objected: “[I]f witnesses are to speak by relation of one another, by this means you may have any man’s life in a week; and I may be massacred by mere hearsay”⁴⁷ Raleigh was correct. He was convicted and executed on the disputed hearsay. Thereafter, “upper class English judges” were ever-wary of the incompetence of “lower class . . . jurors” to properly distinguish between direct and hearsay evidence.⁴⁸

The presumption of juror incompetence undergirding the hearsay exclusion is anachronistic. It persists without reference to the fact that present-day jurors are far more educated and sophisticated than their predecessors. In the mid-nineteenth century, when the rules of evidence solidified in the United States, the number of students graduating from high school was less than two percent. A century later, that number increased thirty-fivefold.⁴⁹ This should give pause to those perpetuating the hearsay rule. Nevertheless, attorneys and judges have long tended to resist changes in procedural rules. Moreover, the societal pressure to keep improving substantive law is absent with regard to procedural law.⁵⁰

⁴⁷ 9 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 216 (3d ed. 1926).

⁴⁸ Jack B. Weinstein, *Alternatives to Present Hearsay Rules*, in 44 F.R.D. 375, 377 (1968). In his five volume *Rationale of Judicial Evidence*, Jeremy Bentham deprecated the implied assumption that jurors were incapable of properly weighing hearsay evidence. He wrote:

[T]he system of exclusion . . . is . . . precipitate and indefensible: You conclude they will be deceived by it: why so hasty in your conclusions? To know whether they have or have not been deceived by it, depends altogether upon yourself. What? can you not so much as stay to hear their verdict? . . . Apply, where as yet there is no disease, a remedy, and a remedy worse than the disease?

3 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 539 (Garland Publ’g, Inc. 1978) (1827).

⁴⁹ Jack Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 COLUM. L. REV. 223, 225 n.11 (1966) (citing U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, DIGEST OF EDUCATIONAL STATISTICS 56 (table 37), 76 (table 74) (1964) (3,535% increase in number of high school graduates between 1869-70 school year and 1962-63 school year)).

⁵⁰ As evidence expert Edmund Morgan pointed out, “our adversary system makes en-

Just as long-held behavioral assumptions behind exclusionary rules can be flawed, so too can exceptions to those rules. The hearsay rule has numerous exceptions. Yet little research has been done to test their validity. One of the hearsay exceptions, for instance, applies to statements made during emotional arousal — the “spontaneous exclamation” rule.⁵¹ A statement made under this condition is admissible even though the person being quoted is not in court to be cross-examined by counsel and viewed by the jury. The underlying assumption is that people tell the truth under emotional stress. Little psychological evidence supports this. Moreover, the spontaneous exclamation rule ignores evidence that emotional stress tends to impair the accuracy of perception and recall.⁵²

Jury factfinding under the adversary system is as much the product of evidence *not* heard as of evidence which is. As suggested above, much of the impetus for exclusionary rules traces to distrust of juror judgment. Renowned evidence scholar Edmund Morgan thought that exclusionary rules presume a jury composed of “a group of low-grade morons.”⁵³ As a result, the exclusionary rules, writes Frank, can “limit, absurdly, the courtroom quest for the truth. The result, often, is a gravely false picture of the actual fact.”⁵⁴

tirely impracticable the process of competent procedural reform by judicial decision in contested cases.” Edmund M. Morgan, *Practical Difficulties Impeding Reform in the Law of Evidence*, 14 VAND. L. REV. 725 (1961).

⁵¹ See FED. R. EVID. 803(2) (providing hearsay exception for statements relating to startling events or conditions); see also, e.g., CAL. EVID. CODE § 1240 (West 1995) (providing spontaneous statement exception to state’s hearsay rule). The term “spontaneous exclamation” has been used as a synonym for the excited utterance exception. 6 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* 191 n.1 (Chadbourn rev. 1976); Stanley A. Goldman, *Distorted Vision: Spontaneous Exclamations as a “Firmly Rooted” Exception to the Hearsay Rule*, 23 LOY. L.A. L. REV. 453, 457 (1990). See generally 6 WIGMORE, *supra*, §§ 1745-64 (Chadbourn rev. 1976) (chapter entitled “Spontaneous Exclamations (Res Gestae)”).

⁵² Amiram Elwork et al., *The Trial: A Research Review*, in *THE TRIAL PROCESS* 1, 42 (Bruce Dennis Sales ed., 1981).

⁵³ EDMUND M. MORGAN, *SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION* 105 (1956).

⁵⁴ FRANK, *supra* note 13, at 123. John Maguire, one of the foremost scholars of American evidence law, cautions us against the false assumption that all evidence in a trial which is relevant and probative will be admitted for consideration:

[T]he real truth is that courts and legislatures, most particularly in these United States, have over the years made up many rules for excluding from trials a great deal of relevant evidence. Operating these rules has kept judges and

However compelling in the abstract, the rationale for each exclusionary rule must still be vetted individually. Prominent federal judge Jack Weinstein admonished:

The incremental erosion of the truth-finding capability of triers in general is, to be sure, relatively small as each such rule of exclusion is created. But the truth-finding criterion for rules of evidence is so important that even minor mandatory distortions need to be viewed very critically. It is necessary to constantly bear in mind Wigmore's warning that only the clearest and most over-riding necessity warrants interfering with the fact-finding ability of the courts because of extrinsic social policy.⁵⁵

4. Expert Evidence

A spirited debate surrounds the use and misuse of expert evidence. Untoward results follow when expert evidence in complex cases is presented in adversarial fashion: Expert witnesses are manipulated for partisan purposes, some relevant scientific findings are never introduced, and unwarranted conclusions are not distinguished from valid research.⁵⁶

lawyers and law professors so fully occupied that they have not yet satisfactorily explored the important questions of evidential cogency. They have been too busy deciding what should be kept out to make, much less teach, systematic appraisal of what they let in. So . . . evidence has to do with exclusion rather than evaluation.

Karl H. Kunert, *Some Observations on the Origin and Structure of Evidence Rules Under the Common Law System and the Civil Law System of "Free Proof" in the German Code of Civil Procedure*, 16 BUFF. L. REV. 122, 127 (1966) (quoting MAGUIRE, EVIDENCE — COMMON SENSE AND COMMON LAW 10 (1947)).

John Wigmore, the dean of evidence scholars, sounds perhaps the harshest criticism of the exclusionary rules. Analogous to Pound's disparaging characterization of the adversary system as "[t]he sporting theory of justice," Pound, *supra* note 2, at 281, Wigmore says the exclusionary rules "serve not as needful tools for helping the truth at trials but as game rules for setting aside the verdict." 1 WIGMORE, *supra* note 51, § 8c, at 631 (Tillers rev. 1983).

⁵⁵ Weinstein, *supra* note 49, at 237.

⁵⁶ Will technological advances improve trial truth-seeking? Even with the advent of more accurate factfinding techniques, the adversarial process will continue to subvert the truth by subordinating it to competing values. Peter Sperlich, who writes on the use of scientific evidence, says: "The adversary system maximizes the opportunities to obscure the facts, coopt the experts, and propagandize the judge. . . . The greatest single obstacle to complete and accurate scientific information . . . is the adversary system." Peter W. Sperlich, *Scientific Evidence in the Courts: The Disutility of Adversary Proceedings*, 66 JUDICATURE

Forensic scientists have special grievances over the adversary system. They say it is not a dependable method of arriving at factual truth in litigation. The more complex and technical the subject matter, the less well suited the adversary system is to full and accurate communication of findings. Attorneys present evidence in fragments, separated by substantial intervals. Furthermore, they do not necessarily follow a logical or sequential order of presentation. Additionally, incomprehensible bench instructions frequently fail to remedy the confusion. Consequently, adversarial trials rarely resolve contradictions empirically.

But the most basic problem is that adversarial procedure assigns sole responsibility for conducting the inquiry to the functionaries who may be least interested in exposing the relevant scientific evidence. The attorney will want to omit and distort any evidence not presenting his client's case in the best possible light. When expert witnesses are pushed into advocacy roles, attorneys corrupt the value of their expertise. Attention is too often focused on the personal characteristics of expert witnesses instead of the quality of their evidence.

Scientists incorrectly assume that the law values truth as highly as does science. They do not appreciate that trials are policy-driven as well as evidence-driven. The secondary status of truth cannot be understood without recognition of the political nature of trial procedure.⁵⁷ In a 1987 book compiling papers and comments presented at a conference on social research and the courts, the participants reached a consensus on these points:

- a. Law and social science serve disparate ends. Case disposition, not truth-seeking, is the primary function of the courts.⁵⁸
- b. Scientists serving as expert witnesses must expect to be used (and misused) for partisan purposes.⁵⁹

472, 474-75 (1982).

⁵⁷ Peter W. Sperlich, *The Evidence on Evidence: Science and Law in Conflict and Cooperation*, in *THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE*, *supra* note 32, 325, 343-46.

⁵⁸ *THE USE/NONUSE/MISUSE OF APPLIED SOCIAL RESEARCH IN THE COURTS* 37-38, 79, 158, 176 (Michael J. Saks & Charles H. Baron eds., 1980).

⁵⁹ *Id.* at 12, 152-53.

- c. The adversary system is not a reliable means of bringing all the relevant scientific data to the adjudicator's attention or for separating valid research from unwarranted conclusions.⁶⁰

Similar problems occur in all learned disciplines whose members are requested to offer expert testimony. Factfinders, especially juries, place great significance on expert testimony. But critical cognate issues remain unresolved. For instance, courts have not definitively explained what constitutes "expertise." Nor have they promulgated any clear, uniform standards on what is a valid, reliable expert opinion. In the landmark 1923 case of *Frye v. United States*,⁶¹ the appellate court established the rule to be applied in the federal courts: only expert testimony which was "generally accepted" as valid among other experts in the field would be admitted. But when the Federal Rules of Evidence were codified in 1975, they made no mention of *Frye*.⁶² In *Daubert v. Merrell Dow Pharmaceuticals Inc.*,⁶³ a 1993 case involving birth defects alleged to have been caused by use of the prenatal drug Bendectin, the U.S. Supreme Court resolved the apparent inconsistency of standards. The Court held that the flexible rules of evidence superseded the *Frye* standard, giving judges wider latitude to admit expert testimony.⁶⁴ As a result, almost any practitioner's view, no matter how iconoclastic, may be welcome if reached via the scientific method.

Two factors undoubtedly compound the expert witness problem: First, social scientists generally shirk the responsibility to expose the limits of their own expertise. Second, expert testimony is today almost always confined to those experts hired by the parties — often to the detriment of the factfinder.⁶⁵ "Indeed,"

⁶⁰ *Id.* at 34, 37, 100.

⁶¹ 293 F. 1013 (D.C. Cir. 1923).

⁶² FED. R. EVID. 702.

⁶³ 509 U.S. 579 (1993).

⁶⁴ *Id.* at 589.

⁶⁵ Consider, for example, the O.J. Simpson criminal trial, *People v. Simpson*, No. BA097211 (Cal. Super. Ct. L.A. County 1995), where a sorry but increasingly common courtroom tableau was etched. Jurors became stupefied by the sharply competing testimonies of opposing experts. Juror attention visibly waned. What was supposed to be educative was instead combative and confounding.

Why do we abide this "battle of the experts?" The answer is clear. We are captive to the notion that every aspect of a just trial must be an adversarial one. We will sacrifice the

writes psychology professor Stephen Golding, "one is sometimes (cynically) led to believe that better expertise (which, by definition, is more neutral and therefore may not advance a proponent's view of the facts) may be at the bottom of the adversarial agenda."⁶⁶

C. *Truth-Corrupting Devices*

As noted earlier, some believe the Platonic dialectic to be the prototype for the adversary system's approach to truth-finding.⁶⁷ This analogue would be more credible if the sole or major responsibility of trial counsel was to seek the truth objectively, as did the participants of the dialectic. No such duty burdens the attorney. In fact, attorney trial tactics are the single greatest source of truth distortion and dissimulation in the adversary system. Bentham undoubtedly had this in mind when he penned the following critique:

Were we to go over the history of tribunals, and select all the rules of practice which have been established to the prejudice of truth, to the ruin of innocence and honest right, the picture would be a most melancholy one. . . . [L]awyers, . . . contemplating every judicial operation as a source of gain, have labored to multiply unjust suits, unjust defenses, delays, incidents, [and] expenses. . . . [L]egal fictions, nullities, superfluous forms, privileged lies have covered the field of law. . . . Lawyers have put themselves beyond the reach of attack, by wrapping themselves up in mystery, and have even

courtroom search for truth to this belief.

Powerful financial incentives induce expert witnesses to satisfy their respective parties by slanting their opinions. This exaggerates differences, minimizes consensus, and profoundly confuses jurors. Prolonged interrogation of expert witnesses usually finds the jurors more perplexed than informed, more weary than focussed.

Bored, confused or both, jurors frequently give mind to the wrong things. Too often they attend to the personal characteristics of expert witnesses instead of the quality of their testimony. Jurors are easily enthralled by the expert who is the most superficially persuasive or charming rather than the most authoritative.

Adversarial misuse of expert testimony exacerbates the situation. Overzealous attorneys routinely manipulate their witnesses for partisan purposes. It should not shock us, therefore, to learn that attorneys often knowingly elicit dubious and unsubstantiated views from their experts.

⁶⁶ Stephen L. Golding, *Increasing the Reliability, Validity and Relevance of Psychological Expert Evidence*, 16 LAW & HUM. BEHAV. 253, 255 (1992).

⁶⁷ See discussion *supra* Part I.A (arguing that Platonic dialect's belief that truth emerges only in dialogue parallels adversarial trial approach).

tried to extract a title to glory from this very obscurity, which, like the shade of a machineel tree, diffuses poison all around.⁶⁸

The attorney's overriding allegiance is to the client, not to the truth. In pursuing the role of zealous advocate, it remains unclear to what lengths the attorney may go in distorting or hiding the truth. This is not to suggest that there are no formal limitations on attorney behavior under the adversary system. There are.⁶⁹ The problem is that they are generally vague or rarely enforced. Hence the scope of attorney tricks is really limited more by the abundant fecundity of attorney imagination than by clear and enforced restrictions. A complete taxonomy of attorney trial duplicity would daunt the most ambitious writer. But some of the common attorney artifices bear mention.

1. Witness Coaching

A standard practice in the United States is for attorneys to interview their witnesses in preparation for giving testimony.⁷⁰ The practice is known by a variety of sobriquets — rehearsing, horseshedding, prepping and sandpapering — but the most common is coaching. Both the Model Rules of Professional Conduct (MRPC)⁷¹ and its predecessor, the Code of Professional Responsibility proscribe any attorney inducement of

⁶⁸ M. DUMONT, A TREATISE ON JUDICIAL EVIDENCE EXTRACTED FROM THE MANUSCRIPTS OF JEREMY BENTHAM, ESQ. 37 (1981).

⁶⁹ Comment 1 to the Model Rules of Professional Conduct Rule 3.4 states, in part: "Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics . . . and the like." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4 cmt. 1 (1995).

⁷⁰ This is contrary to the practice in inquisitorial system countries and in England, where barristers (trial attorneys) take no part in the preparation of witnesses for trial.

⁷¹ Rule 1.2(d) says, in part: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . ." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1995). Rule 3.4 says, in part: "[A] lawyer shall not . . . (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law . . ." *Id.* Rule 3.4.

false testimony.⁷² Yet courts casually accept, and even condone coaching.⁷³

The dangers of coaching are substantial; an attorney who knows the testimony of all friendly witnesses can orchestrate a common story that can better "avoid the pitfalls of contradiction and refutation by judicious fabrication."⁷⁴ In the course of coaching their witnesses, attorneys suggest "better" answers which, if not in clear contravention of the witness' original intended answer, subtly but effectively shade, dissemble or distort the truth. An objecting opposing attorney can expect little, if any, help from the trial judge.⁷⁵

Attorney coaching is not confined to pretrial preparation. Asking leading questions on direct examination (of a friendly witness) is improper because this practice essentially coaches a witness while on the stand. And it will be so ruled if objected to by opposing counsel. Attorneys know this. Yet knowing objection to it will be sustained, experienced trial attorneys still deliberately ask leading questions because the desired answer is then known to the witness. After the objection, the witness can then answer a non-leading question in the desired manner.⁷⁶

⁷² Disciplinary Rule 7-102 (A) provides: "(A) In his representation of a client, a lawyer shall not: . . . (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1979).

⁷³ Language from a North Carolina case is illustrative:

It is not improper for an attorney to prepare his witness for trial . . . and to go over before trial the attorney's questions and the witness' answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner that he can. Such preparation is the mark of a good trial lawyer . . . and is to be commended because it provides a more efficient administration of justice and saves court time.

State v. McCormick, 259 S.E.2d 880, 882 (N.C. 1979).

⁷⁴ *In re Stroh*, 644 P.2d 1161, 1165 (Wash. 1982).

⁷⁵ Wigmore states:

[The right to prepare witnesses] may be abused, and often is, but to prevent abuse by any definite rule seems impracticable. It would seem, therefore, that nothing short of an actual fraudulent conference could properly be taken notice of; there is no specific rule of behavior capable of being substituted for the proof of such facts.

3 WIGMORE, *supra* note 51, § 788 (Chadbourn rev. 1970).

⁷⁶ Consider this exchange from a reported case during direct examination of a witness:

Additional strategic considerations militate in favor of asking impermissible leading questions. Repeated objections to them by opposing counsel may incur the jury's resentment and leave the impression that the objecting attorney is trying to hide the truth. Even when the objection is sustained, cautionary instructions from the judge to the jury are often ineffective, and sometimes counterproductive.⁷⁷

2. Cross-Examination

Trial attorneys use cross-examination to distort the truth in various ways. Most prominently, the adversary system allows attorneys to destroy the credibility of hostile witnesses with impunity by employing tactics which would be of questionable morality in any other context. System defenders fondly quote Wigmore's comment that cross-examination is the "greatest legal engine ever invented for the discovery of truth."⁷⁸ But they neglect to mention that Wigmore also referred to the witness stand as "the

Question:	Directing your attention back to July, 1966, did you buy some virgin metal, virgin nickel from anyone in July 1966?
Answer:	Yes sir, I did.
Question:	Did you buy approximately eleven hundred ninety-nine pounds of metal back at that time?
Answer:	I did.
Defense:	I object to leading. He should know how much he bought.
The Court:	I sustain the objection.
Defense:	I ask that the jury be instructed.
The Court:	The jury is instructed they are not to consider the question for any purpose. I sustained the objection.
Question:	Do you recall how much of this virgin nickel you bought back in July of 1966?
Answer:	I bought eleven hundred ninety-nine pounds.
Defense:	I objected after the leading question was asked of him and he turned around and asked how much. As important as that is to this case, I object to that being bought into evidence. He put words in his mouth and then asked him again.
The Court:	That's overruled.

Lawrence v. State, 457 S.W.2d 561, 562 (Tex Crim. App. 1970).

⁷⁷ See Thomas R. Caretta & Richard L. Moreland, *The Direct and Indirect Effects of Inadmissible Evidence*, 13 J. APPLIED SOC. PSYCHOL. 291, 308 (1983) (summarizing results of authors' experiment); William C. Thompson et al., *Inadmissible Evidence and Juror Verdicts*, 40 J. PERSONALITY & SOC. PSYCHOL. 453, 460-61 (1981) (discussing results of authors' experiment).

⁷⁸ 5 WIGMORE, *supra* note 51, § 1367, at 32 (Chadbourn rev. 1974).

slaughterhouse of reputations.”⁷⁹ During cross-examination, attorneys employ a plethora of nasty and dirty tricks. Interrogated witnesses are to be pitied, for cross-examination questions “are loaded with unsupported insinuations of improper motives, negligence, incompetence, perjury or, worse, suspicion of guilt of the crime for which the defendant is on trial.”⁸⁰

Crafty cross-examiners use more than the content of their questions to impeach a witness’ credibility. Also influential with jurors is attorney behavior accompanying the question or its answer. Arched eyebrows and dropped jaw, for example, evince disbelief and disdain for the testimony of the hostile witness. The cross-examiner utilizing this tactic “wants to know if you have ever been in state prison, and takes your denial with the air of a man who thinks you ought to have been there.”⁸¹

Cross-examiners commonly introduce improper matters to the attention of the factfinder through innuendo. Attorneys circumvent the rules, for example, by inserting personal opinions into their questions. A California appellate court describes one popular method for doing so: “These ‘did you know that’ questions designed not to obtain information or test adverse testimony but to afford cross-examining counsel a device by which his own unsupported statements can reach the ears of the jury and be accepted by them as proof have been repeatedly condemned.”⁸²

Another rank artifice exploits the myth of perfect witness recall. While questioning hostile witnesses, attorneys commonly engage in this kind of repartee: “When did this happen? Oh, you *think* it was February. You’re saying you’re unsure? So your testimony then is that you don’t recall?” The clear purpose is to make the opposing witness say, “I don’t remember” as many times as possible.⁸³

⁷⁹ 3A *id.* § 983, at 841 (Chadbourn rev. 1970).

⁸⁰ *Commonwealth v. Rooney*, 313 N.E.2d 105, 112 (Mass. 1974).

⁸¹ FRANCIS L. WELLMAN, *THE ART OF CROSS-EXAMINATION* 195 (4th ed. 1936).

⁸² *People ex rel. Department of Public Works v. Lillard*, 33 Cal. Rptr. 189, 196 (Cal. Ct. App. 1963).

⁸³ Lewis Lake urges: “No matter how clear, how logical, how concise, or how honest a witness may be or make his testimony appear, there is always some way, if you are ingenious enough, to cast suspicion on it, to weaken its effect.” LEWIS W. LAKE, *HOW TO CROSS-EXAMINE WITNESSES SUCCESSFULLY* 3 (1957).

One of the more insidious tools in the cross-examiner's arsenal is the presumptuous cross-examination question. This question implies a serious charge against the witness for which the attorney has little or no proof. "Isn't it true that you have accused men of rape before?" is one example. Another, "What do you do to liven things up at a party?" implies extrovertedness. Although the implication is unsubstantiated, the innuendos contained within presumptuous questions are particularly effective against expert witnesses. A recent mock jury study found that merely posing these questions severely diminished the expert's credibility, even when the witness denied the allegation and his attorney's objection to the charge was sustained.⁸⁴ This study clearly indicates that the presumptuous cross-examination question is a dirty trick which can sway jurors' evaluations of a witness' credibility.

Explanations for the effectiveness of this tactic vary. Communications research suggests people believe that when a speaker offers a premise, she has an evidentiary basis for it.⁸⁵ With their pristine mind sets, lay jurors conceivably assume that the derogatory premise of an attorney's question is supported by information. Another explanation lies in the possible confusion of jurors as to the sources of their information. The longer the trial, the less likely jurors will be able to distinguish information suggested by the attorney's presumptuous question from that imparted by the witness' answer.⁸⁶

And what of the ethical rules governing this tactic? The MRPC specifically forbids allusion to "any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence."⁸⁷ Although we expect attorneys to adhere to the rules of evidence and confine their strategies to the ethical boundaries of the rules, they often bend the rules and stretch the strategies.⁸⁸ Further, practice indicates that judges do not enforce the MRPC standard. Instead, their lax de-

⁸⁴ Saul M. Kassin et al., *Dirty Tricks of Cross-Examination: The Influence of Conjectural Evidence on the Jury*, 14 LAW & HUM. BEHAV. 373 (1990).

⁸⁵ Robert Hopper, *The Taken-for-Granted*, 7 HUM. COMM. RES., 195, 197 (1981).

⁸⁶ Kassin et al., *supra* note 84, at 382.

⁸⁷ MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(e) (1989).

⁸⁸ See generally TRIAL ETHICS (Richard H. Underwood & William H. Fortune eds., 1988 & Supp. 1995) (discussing united role of ethical rules on attorney conduct).

mand is merely that attorneys have a "good faith belief" in the veracity of the assertions contained within their cross-examination questions.⁸⁹

3. Dumb Shows

A distinct type of attorney deception is disruptive advocacy. Sometimes referred to as "dumb shows," this category consists of indecorous behavior intended to distract or mislead the jury. Some of the tactics include raising an objection simply to interfere with the adversary's opening or summation; interrupting the witness solely for the sake of interruption; dropping books and paraphernalia on the floor to distract the jury; making unsubtle remarks or gestures in the hallway near the jurors during recess; and positioning exhibits not admitted into evidence so that jurors will see them.⁹⁰

Do such dirty tricks pay? Owing to a lack of meaningful regulation and sanctions, they often do. The MRPC specifically outlaws only some. Others are only actionable under general prohibitions against disruptive conduct or against disregarding court rules or orders.⁹¹ Their inclusion in law school curricula and

⁸⁹ Cf., e.g., *United States v. Brown*, 519 F.2d 1368, 1370 (6th Cir. 1975) (holding as reversible error United States Attorney's use of cross-examination to put before jury prejudicial allegation for which Attorney had no evidence).

⁹⁰ Abraham Ordovery, *The Lawyer as Liar*, 2 AM. J. TRIAL ADVOC. 305, 314 (1979). A novel subterfuge was attributed to the legendary Clarence Darrow: "A nearly invisible wire is inserted into a cigar so that when the cigar is smoked everyone's attention will be focused on the ash, which magically does not fall." James McElhaney, *Dealing With Dirty Tricks*, LITIG., Winter 1981, at 45, 46. An even more distracting dumb show sure to elicit jury sympathy is having the defendant's small child crawl to the attorney during his closing argument. A trial attorney describes the ploy this way:

If the kid's a crawler, the best time to let him loose is during final argument. Imagine that little tyke crawling right up to you (make sure he comes to you and not the DA or, worse yet, the judge; a smear of Gerber's peaches around the cuff worked for me) while you're saying, "Don't strike down this good man, father to little Jimmy. Why, Jimmy!" Pick the child up and give him to Daddy. If the DA objects and gets them separated, so much the better. Moses himself couldn't part a father and son without earning disfavor in the eyes of the jury. Babies are true miracles of life; they've saved many a father years of long-distance parenting. If your client's childless, rent a kid for trial.

John Wilkes, *Life in the Fast Lane: The Adversary Ethics of an Ex-Lawyer*, CRIM. DEF., Mar.-Apr. 1980, at 11, 12.

⁹¹ MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(c), (e) (1995).

practitioner seminars indicates their welcome status within the profession.⁹²

4. Summation

No other part of the adversarial trial spotlights the attorney's persuasive skills more than the closing argument, or "summation." Not unexpectedly, attorneys view their summation prerogatives broadly. Traditionally, attorneys have a certain rhetorical license in "summing up." Just as certainly, they repeatedly abuse it. A long-time mischievous practice of attorneys is to insert inadmissible comments during closing arguments. Common devices include injecting irrelevant and inflammatory matter, arguing based on facts not in the record, asserting personal opinions or beliefs, and vilifying witnesses or opposing counsel. The following federal appellate court opinion illustrates the last abuse:

In his closing argument, defense counsel characterized plaintiffs' attorney as a "slick attorney from Chicago." . . . Defense counsel claimed that plaintiffs' counsel "manufactured" evidence, had a "wild imagination," and was not worthy of the jury's trust. He further stated that plaintiffs' counsel was the "captain of (the) ship" who was "piloting" the testimony of plaintiffs' expert witness. In addition, defense counsel compared the relationship between plaintiffs' counsel and his expert witness to that existing between the "Cisco Kid and Poncho" and "Matt Dillon and Chester."⁹³

D. Adversarial Ethics

Dirty tricks pale in comparison with a more profound truth-corrupting attorney behavior. In measuring the reliability of the adversary system as a truth-seeking process, the foremost inquiries are whether attorneys (a) can ethically lie and (b) do lie (or otherwise affirmatively suppress the truth). Answering the latter and easier query first, attorneys unquestionably lie and affirmatively suppress the truth. Indeed we have come to accept, and even expect, a certain amount of attorney lying and decep-

⁹² Abraham P. Ordovery, *Why "Dirty Tricks" are Taught at Emory*, NAT'L L.J., June 14, 1982, at 14.

⁹³ Cecil v. Gibson, 346 N.E.2d 448, 449 (Ill. App. Ct. 1976).

tion.⁹⁴ This is especially so if we include nondisclosure of a relevant fact and building upon the perjurious testimony of a client or friendly witness as forms of lying and deception.⁹⁵

Unresolved and more troublesome to the profession than whether lawyers *do* lie is whether, in pursuance of their duties, lawyers *can permissibly* lie, suborn perjury or build upon their clients' perjurious testimony. In one of the earlier articles on advocacy ethics, former Harvard law dean Charles Curtis⁹⁶ says

⁹⁴ For an expansive discussion on this, see Philip Shuchman, *The Question of Lawyers' Deceit*, 53 CONN. B.J. 101, 106 (1979) (indicating that both lawyers and lay persons recognize that truthfulness of attorney's statements are not to be taken seriously).

⁹⁵ The literature is rife with jeremiads of attorney lying and deception. "For years we have 'winked, blinked, and nodded' at blatant, if not outrageous, lying and deception in pleading, negotiating, investigating, testifying, and bargaining," complains one law professor. Richard K. Burke, "Truth in Lawyering: An Essay on Lying and Deceit in the Practice of Law," 38 ARK. L. REV. 1, 2 (1984). Samuel D. Thurman, another long-time "toiler in this vineyard" complains, "For too long, deception has been rationalized as a necessary adjunct to the adversary system." Samuel D. Thurman, *Limits to the Adversary System: Interests That Outweigh Confidentiality*, 5 J. LEGAL PROF. 5, 19 (1980). Echoing Pound's "sporting theory of justice" theme, a trial judge offers his impressions of how attorneys' stories change as the trial progresses:

The sporting lawyer's concern is whether the story is convincing, whether it adequately meets the opposing story, not whether it is true or false. Thus it is not at all unusual to hear a courtroom story unfold like a novel, changing as the trial proceeds. Sometimes the story becomes clearer, sometimes fuzzier, sometimes contradicted as it is orchestrated by the lawyer-maestros. As one side crafts a story, the other side expresses outrage at the opponent's fiction and responds by fictionalizing its own story. The story is not as dismaying as the attorney's acquiescence in it. In this sort of liar's paradise, truth ceases to be a Heideggerian revelation; instead, trial evidence becomes a progressive sedimentation, with new layers of lies overlaying the original ones.

R. J. Gerber, *Victory vs. Truth: The Adversary System and its Ethics*, 19 ARIZ. ST. L. J. 3, 19 (1987).

In her popular book, *Lying*, Sissela Bok limns the ambivalence within the legal profession regarding attorney lying. Contrasting common beliefs with those held within the profession, she writes:

Can it be argued that such lies are so common by now that they form an accepted practice that everyone knows about — much like a game of bargaining in a bazaar? . . . The fact is that, even though lawyers may know about such a practice, it is not publicly known, especially to jurors, much less consented to.

SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 163-64 (1978).

⁹⁶ Charles P. Curtis received his A.B. and LL.B. degrees from Harvard University. He joined the Massachusetts Bar in 1919 and became a partner to the Boston firm of Choate, Hall and Stewart in 1932. Among his published works are *The Trial Judge as Jury*, 5 VAND. L. REV. 150 (1952); *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951); *A Better Theory of Legal*

that the attorney's duty to her client extends to lying and presenting arguments the attorney doesn't personally believe.⁹⁷ Former Hofstra law dean Monroe Freedman⁹⁸ asserts that occasions arise when the criminal defense attorney may properly present perjured testimony.⁹⁹ Opponents, led by Frankel, disagree. They say that the attorney not only should not lie, but that the attorney has an obligation to come forward with facts or law adverse to his client's case.¹⁰⁰

None of this is to suggest that attorney lying and deceit are not condemned by the rules of the profession. Rule 8.4 of the MRPC would appear to prohibit — by act, omission or acquiescence — lying or deception.¹⁰¹ More specifically, attorneys cannot offer evidence known to be false¹⁰² nor knowingly make false statements of material fact or law to the tribunal.¹⁰³ The MRPC also forbids the advocacy equivalent of passive fraud: Counsel must come forward and disclose adverse material facts or legal authority.¹⁰⁴ Judges occasionally sanction attorneys under the Federal Rules of Civil Procedure for not disclosing adverse authority.¹⁰⁵ Even if the attorney innocently presents false

Interpretation, 3 VAND. L. REV. 407 (1950); and LIONS UNDER THE THRONE (1947).

⁹⁷ Curtis, *supra* note 26, at 9.

⁹⁸ Monroe Freedman is the Harvard Lichtenstein Distinguished Professor of Legal Ethics at the Hofstra University School of Law. He received A.B., LL.B. and LL.M. degrees from Harvard University. He has been called the "nation's most prominent and ardent defender of strict confidentiality." Mary C. Daly, *To Betray Once? To Betray Twice?: Reflections on Confidentiality, a Guilty Client, an Innocent Condemned Man, and an Ethics-Seeking Defense Counsel*, 29 LOY. L.A. L. REV. 1611, 1625 (1996). Freedman is the author of *Atticus Finch — Right and Wrong*, 45 ALA. L. REV. 473 (1994); *UNDERSTANDING LAWYERS' ETHICS* (1990); *Law in the 21st Century*, 60 FORDHAM L. REV. 503 (1991); *LAWYER'S ETHICS IN AN ADVERSARY SYSTEM* (1975); and *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions* 64 MICH. L. REV. 1469 (1966).

⁹⁹ MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 31, 34 (1975).

¹⁰⁰ See *supra* notes 18-19 and accompanying text (arguing for change from adversary system, which conceals truth, to system which would give greater value to truth).

¹⁰¹ MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4 (1995) states:

It is professional misconduct for a lawyer to . . .

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice.

Id.

¹⁰² *Id.* Rule 3.3(a)(4).

¹⁰³ *Id.* Rule 3.3(a)(1).

¹⁰⁴ *Id.* Rule 3.3(a)(2), (a)(3).

¹⁰⁵ FED. R. CIV. P. 11. However, such sanctions are rare in the absence of an egregious

evidence, later discovery of its falsity requires “reasonable remedial measures,” including the attorney’s withdrawal from the case or, if necessary, disclosure to the court.¹⁰⁶

In at least one instance, however, the MRPC significantly qualifies the attorney’s duty to the truth. Assume the criminal defendant refuses to be dissuaded from perjurious testimony. The MRPC is ambivalent as to the attorney’s proper response, as seen from the Comments to Rule 3.3:

If withdrawal [of the perjurer’s attorney] will not remedy the situation or is impossible, the advocate should make disclosure to the court. . . . However, the definition of the lawyer’s ethical duty may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, *even if the counsel knows the testimony will be false*. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.¹⁰⁷

The murkiness of the MRPC’s ethical waters extends beyond the attorney’s role. Assume, as the MRPC dictates, the criminal defense attorney enlightens the court as to her client’s intended perjury. According to the MRPC’s Comments, the court’s discretion is to inform the jury, order a mistrial, or do nothing.¹⁰⁸ What is remarkable is that the third option *involves the court in perjury*.¹⁰⁹

An anecdote of the famed evidence expert Samuel Williston epitomizes the profession’s attitude toward the attorney’s duty of

omission of clearly controlling cases.

¹⁰⁶ MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4), (b) (1995).

¹⁰⁷ *Id.*, Rule 3.3 cmts. 11-12 (emphasis added).

¹⁰⁸ *Id.*, Rule 3.3 cmt. 11.

¹⁰⁹ Even the U.S. Supreme Court is ambivalent on the issue. In *Nix v. Whiteside* 475 U.S. 157 (1986), the Court divided sharply on the attorney’s proper role in the face of criminal client perjury. *Id.* at 157; *id.* at 176 (Brennan, J., concurring); *id.* at 177 (Blackmun, J., concurring); *id.* (Stevens, J., concurring). The concurring justices did not view the case as appropriate for resolving the “thorny problem” of client perjury. *Id.* at 177-78 (Blackmun, J., concurring). Justice William Brennan, for example, in his concurring opinion, warned: “[L]et there be no mistake: the Court’s essay regarding what constitutes the correct response to a criminal client’s suggestion that he will perjure himself is pure discourse without force of law. . . . Lawyers, judges, bar associations, students, and others should understand that the problem has not been ‘decided.’” *Id.* at 177 (Brennan, J., concurring).

candor to the court. Recounting an experience he had while representing a client, he recalls:

In the course of his remarks the Chief Justice stated as one reason for his decision a supposed fact which I knew to be unfounded. I had in front of me a letter that showed his error. Though I have no doubt of the propriety of my behavior in keeping silent, I was somewhat uncomfortable at the time.¹¹⁰

Curtis endorsed Williston's behavior because "[a] lawyer is required to be disingenuous. He is required to make statements as well as arguments which he does not believe in."¹¹¹ Others in the profession have more ambivalence but come to the same conclusion. If an attorney knows the judge or opposing counsel is laboring under a misimpression not of the attorney's doing, the conventional wisdom is that silence is permissible, subject to the constraint against assisting another in committing a crime or fraud, and subject to MRPC Rule 3.3(a)(4) on the use of evidence later discovered to be false.¹¹²

Similar MRPC equivocation regarding the attorney's obligation of disclosure is found in the section on "Transactions With Persons Other Than Clients." The Rules seem to impose disclosure requirements comparable to those owed to the court,¹¹³ but then appear to rescind it all with the proviso, "unless disclosure is prohibited by Rule 1.6."¹¹⁴ Rule 1.6 outlines the attorney's rather broad obligations of confidentiality to the client, and thus to nondisclosure.

Little controversy attends other instances where attorneys routinely distort and dissemble the truth. General agreement exists, for instance, that a criminal defense attorney may cross-examine a hostile witness known to be telling the truth in order to attack the witness' credibility.¹¹⁵ Former U.S. Supreme Court

¹¹⁰ SAMUEL WILLISTON, *LIFE AND LAW: AN AUTOBIOGRAPHY* 271-72 (1940).

¹¹¹ Curtis, *supra* note 26, at 9.

¹¹² STEPHEN GILLERS & NORMAN DORSEN, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 506 (2d ed. 1989).

¹¹³ Compare MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1(b) (1995) (discussing duty to disclose material fact to third party where necessary to avoid "assisting a criminal or fraudulent act by a client") with *id.* Rule 3.3(a)(2) (discussing similar duty toward tribunal).

¹¹⁴ *Id.* Rule 4.1(b).

¹¹⁵ ANTHONY G. AMSTERDAM, *TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES* § 370, at 2-327 (2d ed. 1972); FREEDMAN, *supra* note 99, at 79-80; David G. Bress, *Professional Ethics*

Justice Byron White's defense of the practice has often been quoted:

If [criminal defense counsel] can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. . . . [M]ore often than not, defense counsel will impeach [the prosecution's witness] if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness he thinks is lying.¹¹⁶

Many counsel in civil cases undoubtedly take the same liberties as criminal defense counsel. The prosecutor's duty to "confess error" has yet to be imposed in civil litigation. That duty, which has a constitutional dimension, follows from an intentional pro-defense skewing inapplicable to civil cases.

Two conclusions arise in view of the mixed signals from the Supreme Court, the MRPC and prominent legal scholars. First, the assertions of Freedman and others that attorneys can occasionally present perjured testimony and otherwise dissimulate the truth remain unrepudiated. Second, we cannot expect meaningful movement toward trial practices dedicated to the search for truth.¹¹⁷

Given all the exclusionary exceptions and conflicting values moderating the trial as a truth-seeking exercise, defining the trial's function defies facility. Theorists posit different models or images of the trial. One is that of a rational, rule-governed event involving the parties in a collective search for the truth. Exponents of this image claim the primary function of the trial is to ascertain truth via a dialectic. But, as noted earlier, adversarial advocacy departs from the classical view of the dialectic

in *Criminal Trials: A View of Defense Counsel's Responsibility*, 64 MICH. L. REV. 1493, 1494 (1966); Warren E. Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 AM. CRIM. L.Q. 11, 14-15 (1966).

¹¹⁶ *United States v. Wade*, 388 U.S. 218, 257-58 (1967) (White, J., dissenting in part and concurring in part).

¹¹⁷ Thomas L. Steffen, *Truth as Second Fiddle: Reevaluating the Place of Truth in the Adversarial Trial Ensemble*, 1988 UTAH L. REV. 799, 817.

Professional self regulation for the benefit of the common good is laudable but rare. Unlike its would-be reformers, the litigation bar is well organized and powerful. Because the litigation bar is predominantly self-policing and self-serving, the impetus for more truthful trials probably needs to come from outside, in the form of brightly demarcated rules and guidelines. Even these will be to no avail, however, absent consequential sanctions for their breach and a judiciary willing to enforce the sanctions.

because the latter is an objective exercise.¹¹⁸ Biased presentation of evidence renders the dialectic ideal elusive, if not impossible to achieve. Further, this image incorrectly assumes that witnesses accurately and objectively recount events. Studies belie both assumptions.¹¹⁹ Therefore, this image of the trial does not mirror reality.

From the problem of biased presentation of evidence emerges a second image of the trial. It is compatible with the first in its reliance on the assumption that the primary function of the trial is to seek the truth. Acknowledging biased presentation of evidence, it casts the trial as a test of credibility. However, there are no universally agreed-upon means of credibility testing. Those commonly employed — the physical appearance and behaviors of witnesses — have been shown unreliable. This renders doubtful the validity of both the first and second images of the trial.¹²⁰

A third and more realistic image of the trial is that of a conflict-resolving ritual. This view's proponents say trial outcome is less important than the shared perception that the legal system provides efficient conflict resolution. Critics of this view do not gainsay its validity. In their view, however, operation of the courts pursuant to this image legitimizes and perpetuates the present power structure to the detriment of just conflict resolution.¹²¹

Let us recapitulate. Truth-finding is perhaps the most popular justification of the adversary system. Yet the notion that trial by combat, whether by weapons or words, will reliably yield the truth is both counterintuitive¹²² and empirically contradicted.¹²³ Attorneys acting well within their legal and

¹¹⁸ See *supra* notes 11-14 and accompanying text (pointing out that dialectic's objective is truth through logical argumentation, whereas adversarial trial's objective is victory).

¹¹⁹ Gerald R. Miller & F. Joseph Boster, *Three Images of the Trial: Their Implications for Psychological Research*, in *PSYCHOLOGY IN THE LEGAL PROCESS* 19, 23, 24, 28 (Bruce Dennis Sales ed., 1977).

¹²⁰ *Id.* at 33, 34.

¹²¹ *Id.* at 34.

¹²² DAVID LUBAN, *LAWYERS AND JUSTICE* 70 (1988). More likely a system employing independent investigators, whose compensation is directly tied to their effectiveness, would produce a greater approximation of the unadulterated truth. Severing the search for truth from the attorney's need to win is the key feature.

¹²³ See, e.g., E. Allan Lind et al., *Discovery and Presentation of Evidence in Adversary and*

ethical bounds can block or distort the presentation of truthful evidence and otherwise corrupt the trial process. In return, they are rewarded and admired by members of the bench and bar alike.¹²⁴

II. JURY FACTFINDING

Although referred to as the “finder of fact,” the jury more specifically chooses from competing versions of the facts presented by the opposing attorneys. The jury does not independently develop the facts. Essentially, it is the passive recipient of information. Within this context, jurors are subject to certain intrinsic limitations. The current jury selection process magnifies these limitations. Long-standing but ill-advised procedural constraints further hamstring the jury.

A. *Intrinsic Limitations*

Several limitations on the factfinding ability of the jury are intrinsic in nature. These include its difficulty in dealing with complex subject matter, difficulty in dealing with expert testimony, lack of impartiality, and preconceived erroneous assumptions regarding witness behavior.

The belief grows that a lay body is inadequate to serve the factfinding role of the jury. Typical is the criticism of historian Carl Becker: “Trial by jury, as a method of determining facts, is antiquated and inherently absurd — so much so that no lawyer, judge, scholar, prescription-clerk, cook, or mechanic in a garage would ever think for a moment of employing that method for determining the facts in any situation that concerned him.”¹²⁵ Much research supports this charge, indicating that jurors lack

Nonadversary Proceedings, 71 MICH. L. REV. 1129, 1140-43 (1973) (presenting empirical evidence that adversarial trial is less effective than inquisitorial trial at finding truth).

¹²⁴ For example, the wildly successful Gerry Spence is a hero of the litigation bar. In his lectures and articles, Spence advocates putting as much improper but favorable evidence as possible before the jury by asking improper questions. He reasons that this will sufficiently prejudice the jury to decide favorably despite the facts and law. *See, e.g.*, Gerry Spence, *Questioning the Adverse Witness*, LITIG., Winter 1984, at 13 (presenting mock trial and explaining how to conduct cross-examination of witness).

¹²⁵ FRANK, *supra* note 13, at 124 (quoting historian Carl Becker).

adequate memories for recalling trial testimony¹²⁶ and have difficulty making decisions based on statistical or probabilistic information.¹²⁷

Most of the criticism focuses on civil cases, especially complex litigation. It is here that jurors most commonly confront the lengthy, complicated and highly technical fact situations.¹²⁸ A basic assumption of the law has been that the jury can understand the case presented to it.¹²⁹ When the subject matter of litigation is perceptibly beyond the ken of the jury, some litigants have sought to circumvent a jury trial in order to attain the "fair and reasonable assessment of the evidence" presumed by the law.¹³⁰ But these litigants faced a constitutional impediment in the Seventh Amendment's grant of a right to jury trial in "suits at common law."¹³¹ Hence any attempt to avoid a jury trial in such suits would seem to require a constitutional gloss which permits a complexity exception to the Seventh Amendment. Some federal courts have so interpreted the Constitution.¹³² Each relied on a footnote in the U.S. Supreme Court's

¹²⁶ See MOLLY SELVIN & LARRY PICUS, *THE DEBATE OVER JURY PERFORMANCE: OBSERVATIONS FROM A RECENT ASBESTOS CASE 45* (1987) (finding that juries remember generalizations from trial and "reconstruct" details from generalizations).

¹²⁷ See *id.* at 45-46.

¹²⁸ In their book on jury performance, Selvin and Picus explain some of the reasons why jury performance in these cases is suspect:

Psychological theory indicates that when presented with complex information on a great number of facts, individuals generally perceive one or a few generalizations that summarize and provide meaning for the information rather than the specific details. As a result, memory is "reconstructive"; people recall the general impression of an event or the information presented along with some of the details.

Id. at 45.

¹²⁹ In a case involving complex application of the antitrust law, the Third Circuit Court of Appeals said that "[t]he 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." *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1079 (3d Cir. 1980).

¹³⁰ See *supra* note 129 (quoting *In re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069, 1079 (3d Cir. 1980), for proposition that law expects "fair and reasonable assessment" of evidence and not scientific precision).

¹³¹ U.S. CONST. amend VII; *Japanese Elec. Prods.*, 631 F.2d at 1086.

¹³² See, e.g., *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59, 70 (S.D.N.Y. 1978) (holding that extreme complexity of issues of liability, variety of parties' relationships, and length of trial, warranted finding that trial was beyond practical abilities and limitations of jury); *In re Boise Cascade Sec. Litig.*, 420 F. Supp. 99, 104 (W.D. Wash. 1976) (holding that,

decision in *Ross v. Bernhard*.¹³³ In *Ross*, the Court said that “the legal nature of an issue is determined [in part by] *the practical abilities and limitations of juries*.”¹³⁴ The *Ross* footnote suggests that when a case is too complex to be amenable to jury resolution, there is no remedy at common law. Therefore, the only trial remedy is in equity, where there is no right to jury trial.¹³⁵

The Third Circuit took another tack in granting a motion to strike a demand for jury trial. Rather than looking to the Seventh Amendment, it relied upon the Due Process Clause of the Fifth Amendment, guaranteeing the right to a fair trial.¹³⁶ This right is violated, said the court, when the complexity of the case exceeds the jurors’ powers of comprehension. Where they ostensibly clash, the court found “the most reasonable accommodation between the requirements of the Fifth and Seventh Amendments to be a denial of jury trial.”¹³⁷ This argument thus circumvents the need to find a complexity exception inherent in the Seventh Amendment.

As we progress scientifically and technologically, more and more litigated issues will be of far greater complexity than that

because of complexity of issues and length of trial, jury representing cross section of community could not be obtained). *But see In re United States Fin. Sec. Litig.*, 609 F.2d 411, 427-31 (9th Cir. 1979) (rejecting complexity exception to Seventh Amendment right to jury trial in civil cases), *rev’g* 75 F.R.D. 702 (S.D. Cal. 1977).

¹³³ 396 U.S. 531 (1970).

¹³⁴ *Id.* at 538 n.10 (emphasis added).

¹³⁵ Language from Alexander Hamilton in the *Federalist Papers* buttresses this interpretation:

[T]he circumstances that constitute cases proper for courts of equity are in many instances so . . . intricate that they are incompatible with the genius of trials by jury. They require often such long and critical investigation as would be impracticable to men called occasionally from their occupations, and obliged to decide before they were permitted to return to them. The simplicity and expedition which form the distinguishing characters of [the jury] mode of trial require, that the matter to be decided should be reduced to some single and obvious point; while the litigations usual in chancery [equity] frequently comprehend a long train of minute and independent particulars. . . . [T]he attempt to extend the jurisdiction of the courts of law to matters of equity . . . will tend gradually to change the nature of the courts of law, and to undermine the trial by jury, by introducing questions too complicated for a decision in that mode.

THE FEDERALIST NO. 83 (Alexander Hamilton).

¹³⁶ *Japanese Elec. Prods.*, 631 F.2d at 1084-86.

¹³⁷ *Id.* at 1086.

contemplated by the drafters of the Constitution in 1791. The complexity of litigation reflects that of modernity. In complex modern cases, juries are demonstrably ill-equipped as factfinders. Antitrust, high-technology patent, securities, products liability, environmental, and medical malpractice litigation are but a sampling of areas where it is increasingly clear that the apotheosized lay jury is a malfunctioning anachronism.¹³⁸

An especially perplexing task for lay jurors is to assimilate and select in some rational manner from the competing testimonies of expert witnesses. Because of the jury's ignorance and naivete, this task creates obvious potential for corruption of jury decision making. An advantage lies with the party whose expert has the most persuasive forensic skills rather than the most authoritative and meritorious testimony.¹³⁹

Controverting the model of jury factfinding which claims that jurors are impartial is the argument that they are naturally biased. For example, the juror's national or ethnic origin may influence his decision.¹⁴⁰ Ethnic origin and juror bias can be a particularly troublesome mix in civil rights cases.¹⁴¹ Other examples of natural juror bias abound. Anthropologist William O'Barr has studied extensively the impact of witness speech patterns and appearance on jurors. O'Barr and his colleagues found that jurors tend to make decisions about witness credibili-

¹³⁸ See, e.g., Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process — The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15, 16 (1990) (finding that although "the jury has become part of the national folklore," concerns remain "regarding decision-making by amateurs"). Only a minority of responses in a California judicial survey reacted positively to the idea of specially qualified juries in complex cases. Franklin Strier, *The California Judiciary on Trial Reform: A Survey*, 1 J. PAC. SOUTHWEST ACAD. LEGAL STUD. BUS. 63, 75 (1995).

¹³⁹ Studies show that juries attach great weight to expert testimony. Allan Raitz et al., *Determining Damages: The Influence of Expert Testimony on Jurors' Decision Making*, 14 LAW & HUM. BEHAV. 385, 393-95 (1990) (discussing influence of expert testimony on jurors' damages calculations).

¹⁴⁰ The University of Chicago Jury Project found such bias in criminal cases: "Persons with German and British backgrounds were more likely to favor the government whereas Negroes and persons of Slavic and Italian descent were more likely to vote for acquittal." Dale Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 748 (1959).

¹⁴¹ Consider the court's observation in *Lawton v. Nightingale*, 345 F. Supp. 683 (N.D. Ohio 1972): "If a jury could be resorted to in actions brought under [42 U.S.C. § 1983], the very evil the statute is designed to prevent would often be attained. The person seeking to vindicate an unpopular right could never succeed before a jury drawn from a populace mainly opposed to his views." *Id.* at 684.

ty based on their style of speech, clothing, occupation and social status — notwithstanding the lack of any actual correlation.¹⁴² For criminal cases, jurors tend to assume the defendant's guilt if she has a criminal record or has been charged with multiple offenses.¹⁴³

Certain juror beliefs may also hamper the jury's truth-finding ability. Beliefs traditionally affecting jury decisions and decision making are frequently based on erroneous and archaic assumptions. For instance, jurors place more weight on eyewitness testimony than perhaps any other form of evidence. Yet eyewitness accounts are notoriously unreliable.¹⁴⁴

B. Jury Selection

Current jury selection procedure exacerbates the truth seeking limitations inherent to a lay jury. Modernly, "abysmal ignorance constitutes a condition precedent in the qualification of jurors."¹⁴⁵ A writer who advocates abolition of the jury in civil cases observes of the jury selection process:

[Trial procedure] not only permits, but encourages the exclusion of jurors possessing the slightest knowledge of the facts he is supposedly summoned to determine. Thus, that which specifically qualified one to act as a juror at the inception of the system now specifically disqualifies him. This evolution has been termed progress.¹⁴⁶

¹⁴² WILLIAM M. O'BARR, *LINGUISTIC EVIDENCE: LANGUAGE, POWER, & STRATEGY IN THE COURTROOM* (1982); see also John Conley et al., *The Power of Language: Presentational Style in the Courtroom*, 1978 DUKE L.J. 1375, 1379 (listing four speech patterns that can affect listener's impression of speaker); Albert Mehrabian & Martin Williams, *Nonverbal Concomitants of Perceived and Intended Persuasiveness*, 13 J. PERSONALITY & SOC. PSYCHOL. 37, 37-38 (1969) (discussing past studies analyzing import of non-verbal cues); Norman Miller et al., *Speed of Speech and Persuasion*, 34 J. PERSONALITY & SOC. PSYCHOL. 615, 615-17 (1976) (discussing studies of impact of linguistic and non-verbal cues).

¹⁴³ A.N. Doob & H.M. Kirshenbaum, *Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act Upon an Accused*, 15 CRIM. L.Q. 88, 93-96 (1972); Sarah Tanford & Steven Penrod, *Biases in Trials Involving Defendants Charged with Multiple Offenses*, 12 J. APPLIED SOC. PSYCHOL. 453, 474-78 (1982); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37, 43-47 (1985).

¹⁴⁴ ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* 179 (1979); Robert Buckhout, *Eyewitness Testimony*, SCI. AM., Dec. 1974, at 23, 23-31.

¹⁴⁵ Bruce Rashkow, Comment, *Abolition of the Civil Jury: Proposed Alternatives*, 15 DEPAUL L. REV. 416, 419 (1966).

¹⁴⁶ *Id.* at 418. As illustration, consider again the jury of the O.J. Simpson criminal trial,

The jury selection process practically assures suboptimal juries. First, hardship exemptions routinely granted to highly skilled professionals and other well-educated prospective jurors dilute the quality of the jury pool. Then, attorney peremptory challenges further impoverish the remainder by eliminating able prospective jurors whom an attorney feels would be too influential with other jurors.¹⁴⁷ All too often the peremptory challenge is used to select a favorably incompetent jury rather than eliminate potential jurors whose prejudice escaped the sieve of the challenge for cause.¹⁴⁸

C. Imposed Limitations

Compounding intrinsic factfinding limitations are numerous strictures imposed by traditional court procedure. Some are imposed directly, such as the widespread prohibition of juror note-taking and question-asking. Others impact jurors more indirectly but with as much consequence. Jurors can hardly be blamed for factfinding incompetence when the trial process is so culpable: Attorneys offer evidence in no apparent logical order; exhibits are introduced without reference to their relevance; evidentiary items are left in abeyance with nexuses furnished days later, if at all; and witnesses rarely have the opportunity to offer straightforward narratives before disrupting objections by opposing counsel. Without the ability to ask clarifying questions, this procedural morass presents sizable cognitive impediments to jury factfinding.

supra note 65. During its empaneling, Judge Lance Ito excused all veniremen who had read a newspaper during the jury selection process. The education level of the resulting jury was decidedly — and predictably — low. None of the jurors read the newspaper regularly. Post-verdict interviews suggest many of the jurors were ill-equipped to understand the complex DNA evidence that was the linchpin of the prosecution's case. Most said they derived their information from tabloid TV. Mark Miller & Donna Foote, *How the Jury Saw It*, NEWSWEEK, Oct. 16, 1995, at 37, 39.

¹⁴⁷ Instructively, England has banned peremptory challenges in the few types of cases where there still are civil juries — defamation, malicious prosecution and false imprisonment. STEPHEN J. ADLER, *THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM* 223-24 (1994) (discussing complete elimination of peremptory challenges in England and near elimination of juries in all civil cases).

¹⁴⁸ Of this practice, jury expert Richard Lempert writes: "The tactical desire to gain a jury that can be fooled deserves no legal respect." Richard Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 181, 229 (Robert E. Litan ed., 1993).

When there is neither an eyewitness nor dispositive physical evidence, the final decision devolves to juror determination of which side's testimony is more credible. In this exercise, jurors presumably look to truth-seeking guidelines prescribed or suggested by the judge, some of which are highly questionable. For example, judges commonly urge jurors to observe additional things about the witnesses beyond the abstract content of their testimonies.¹⁴⁹ These supplemental factors include the character and motivation of the witnesses, the plausibility and internal consistency of their stories and, most importantly, the demeanor accompanying their testimonies. From these perceptions, it is believed, the falsity of the liar's testimony and the truth of the honest witness's story will be revealed.

But such judicial guidelines are hardly foolproof and, in some instances, outright unreliable. Illustrative is the consistency criterion just mentioned. "Unfortunately," comments lawyer and clinical psychologist Rex Beaber, "the data clearly indicates that honest people are often inconsistent, often telling varying versions of their truthful story, and commonly remember slightly different details depending on the circumstances. Indeed, honest people often make verifiable mistakes about unimportant details."¹⁵⁰

As to the judicial guideline referring jurors to witness demeanor,¹⁵¹ those behavioral indices are useless in the hands of untrained observers. Some behaviors are more telling than others. Notwithstanding the old adage that "the eyes are the window to the soul," vocal stress and lower body language reveal more.¹⁵² In this regard, an interesting irony attends the jury's

¹⁴⁹ See, e.g., 1 HON. EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 15.01 (4th ed. 1992) (providing sample jury instructions in criminal case, recommending jurors consider circumstances of witness's testimony, witness's intelligence, motive to lie, state of mind, appearance, manner, ability to observe, and relation to party in case, whether witness will be affected by verdict, and whether witness's testimony is supported or contradicted by other evidence); 3 *id.* § 73.01 (listing similar considerations in civil case).

¹⁵⁰ Rex Beaber, *Truth Duels Rarely Have Clear Winners*, L.A. DAILY J., October 18, 1991, at 6.

¹⁵¹ See 1 DEVITT ET AL., *supra* note 149, § 15.01 (instructing jurors to examine witness's appearance and demeanor).

¹⁵² Paul Ekman & Wallace V. Friesen, *Nonverbal Leakage and Clues to Deception*, 32 PSYCHIATRY 88, 94, 98-99 (explaining study indicating face is most common, but also most controllable, non-verbal indicator; hands and feet also leak information); see also Miron

factfinding environment. The most revealing nonverbal behavior, lower body language, is usually hidden from the jury's view by the witness stand.¹⁵³

1. Asking Questions

Nothing inhibits factfinding more than an inability to independently investigate. In a trial, the primary means of investigation — witness interrogation — is typically denied the jury. One might be led to believe, therefore, that the occasional allowance of juror questions is a new trend. Yet Blackstone tells us that juror interrogation was permitted in English courts in the eighteenth century.¹⁵⁴ American trial records show that a few nineteenth century courts allowed juror questions, with the practice becoming formalized in the United States in the 1970s. To date, no court has ruled interrogation by jurors unconstitutional.¹⁵⁵ Nevertheless, jurors rarely get to question a witness. Hardly any courts will affirmatively offer this prerogative to the jury, and judges still generally reject the occasional request by a jury seeking this power on its own initiative.¹⁵⁶

On the rare occasions when juror questions are permitted, a proposed question must first be approved by the judge and the attorneys. Tactically, this can pose a Hobson's choice to the attorney who wishes to object to a juror's question: Either risk offending the juror or allow the introduction of incompetent

Zuckerman et al., *Verbal and Nonverbal Communication of Deception*, 14 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 1, 5, 21 (1981) (explaining studies indicating people not fully aware of tone of voice; voice is "leaky channel;" people more ready to believe body/voice cues than facial cues).

¹⁵³ See Ekman & Friesen, *supra* note 152, at 88-106; see also Zuckerman et al., *supra* note 152, at 27 (confirming findings of Ekman and Friesen).

¹⁵⁴ 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *373; see also Lisa M. Harms, Comment, *The Questioning of Witnesses by Jurors*, 27 *AM. U. L. REV.* 127 (1977) (detailing history of jury questions).

¹⁵⁵ Michael Wolff, Comment, *Juror Questions: A Survey of Theory and Use*, 55 *MO. L. REV.* 817, 819 (1990).

¹⁵⁶ See Harms, *supra* note 154, at 132 (finding that judges almost uniformly discourage juror questioning). According to Wolff, most courts affirmatively offer juror questioning only in the setting of pre-trial instructions, and judges may discourage jurors from exercising this function. Wolff, *supra* note 155, at 842. Among courts that do not discourage jury interrogation, many courts allow jury questioning only at the juror's initiative: i.e., the court provides no pre-trial instruction on jury questioning. *Id.* at 845-46.

but damaging evidence via the response to the question. In the latter event, the only protection is the vigilance of the judge, who cannot be presumed to catch all inadmissible testimony given in response to a juror question.¹⁵⁷ Indeed, the potential for profoundly upsetting courtroom protocol inheres in juror questions: They may result in surprises and destroy the attorney's strategy; they might become a nuisance to the judge; and the jury might draw the wrong inferences if an attorney successfully objects to a juror's question. Another key concern over jury interrogation is that it can undermine juror impartiality. In questioning, the juror may become an advocate. Interrogating jurors may develop biases which threaten the integrity of the trial.¹⁵⁸

2. Note-Taking

Another substantial limitation imposed on juror factfinding is the prohibition on taking notes. Curiously, neither the judge nor attorneys are expected to recall the proceedings without the benefit of notes. Not so the untrained lay juror. In the federal courts, no general policy or law addresses note-taking specifically; the issue is entirely within the discretion of the trial judge. But a source in the Administrative Office of the Courts estimates that ninety percent of the federal judges do not allow it.¹⁵⁹ State court practice varies widely. Some states specifically disallow note-taking, usually by case law.¹⁶⁰ Others permit it by statute, although not all of these states permit the jurors to take their notes into the jury room.¹⁶¹ Most states leave it to the discretion of the trial judge. In many such states the trial judge's failure to inform the jury has effectively denied them the note-taking option. Without being so informed, jurors may be unaware of the possibility or afraid to ask.

The note-taking ban probably stems from the time when illiteracy was common. Courts then may have feared the few literate

¹⁵⁷ Wolff, *supra* note 155, at 827.

¹⁵⁸ *Id.* at 829-30.

¹⁵⁹ *Notetaking by Jurors*, CENTER FOR JURY STUD. NEWSL., May 1979, at 4.

¹⁶⁰ *Id.*

¹⁶¹ SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL* 128 (1988).

jurors would exert disproportionate influence on the others.¹⁶² Despite widespread literacy in America today, a similar concern perversely endures. Opponents feel that while most jurors can take notes, few do, and those who do will emerge as leaders imposing their will on the others. The more skilled the note-taker, the argument goes, the more power wielded during deliberations.¹⁶³

A second objection voiced about note-taking is that it distracts jurors. Jurors may devote too much attention to their notes and miss important points or fail to notice witness demeanor. Alternatively, note-taking by some jurors may distract other jurors or the attorneys.

A third concern is that juror notes will be inaccurate or biased. Once in the jury room, both note-taking and nonnote-taking jurors may rely too heavily on the notes taken to the exclusion and detriment of their recall, producing a distorted view of the case.

3. Seeing a Transcript or Videotape of the Testimony

The note-taking restriction forces jurors to rely unnecessarily on their recall. Courts constrain this reliance by denying jurors the opportunity to see a transcript of the testimony. Although the jury may request the opportunity to review specific testimony, most courts will respond simply by having the court clerk reread the requested testimony rather than providing a written transcript. Unfortunately, merely rereading voluminous amounts of testimony is largely ineffective.

With the advent of videotaped testimony a superior tool for jury factfinding and deliberation becomes available. California is presently experimenting with videotape as a substitute record of the trial, replacing stenographer notes.¹⁶⁴ However, review of the videotape is apparently reserved for the attorneys and judge;

¹⁶² Victor Flango, *Would Jurors Do a Better Job If They Could Take Notes?* 63 JUDICATURE 436 (1980).

¹⁶³ *Fischer v. Fischer*, 142 N.W.2d 857, 863 (Wis. 1966) *overruled by In re Stromsted's Estate*, 299 N.W.2d 226 (Wis. 1980); *Notetaking by Jurors*, *supra* note 159, at 4.

¹⁶⁴ *See California Court Reporters Ass'n v. Judicial Council of Cal.*, 46 Cal. Rptr. 2d 44, 45 (Ct. App. 1995) (discussing California Rules of Court implementing electronic recording of superior court proceedings, despite lack of statutory authorization).

jurors cannot avail themselves of it.¹⁶⁵ It remains to be seen whether courts will continue to prohibit juror viewing of requested testimony from videotaped trials. To do so makes little economic sense. Rereading requires a transcript from the tape, which presumably would defeat the cost savings of the videotape. But customs, especially legal customs, obdurately resist change. If the past is indicative, neither transcribed nor videotaped testimony will be available to the jury *in toto* any time soon.

4. Separating and Sequencing Issues

The continuous, unitary trial is also a major imposed obstacle to effective jury factfinding. We litigate everything at once. All the evidence on all the potential issues — no matter how lengthy, complicated, technical or scientific — is heard in one nonsegmented continuous trial.¹⁶⁶ Evidence presented by one side, often in disjointed segments, is separated by long delays from evidence on the same subject presented by opposing counsel. The resulting hodgepodge confounds the logical ordering of evidence necessary to systematic consideration of findings on specific issues. As a result, juror recall and comprehension is stretched and jurors tend to apply evidence on emotional issues, such as damages, to less emotional issues, such as causation or liability.¹⁶⁷

5. Interim Discussions

Traditional trial procedure forbids jurors from engaging in discussions about the trial before final deliberations, no matter how lengthy or difficult the evidence.¹⁶⁸ Two *a priori* concerns

¹⁶⁵ William Vogeler, *The Court of the Unblinking Eye*, L.A. DAILY J., July 7, 1991, at 1.

¹⁶⁶ Common exceptions occur in those criminal cases where determination of guilt and sentence are separated, and in civil cases where liability and damages are separated.

¹⁶⁷ See Irwin A. Horowitz & Kenneth S. Bordens, *An Experimental Investigation of Procedural Issues in Complex Tort Trials*, LAW & HUM. BEHAV., June 1990, at 269, 271 (advocating bifurcation or trifurcation of complex issues to facilitate comprehension, recall, and decision-making); cf. DEBORAH R. HENSLER ET AL., ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS 42 (1985) (discussing case in Texas where jury awarded damages equally to all plaintiffs apparently based on expected probability that all plaintiffs would become as sick as disabled plaintiff).

¹⁶⁸ See LILLIAN B. HARDWICK & B. LEE WARE, JUROR MISCONDUCT: LAW AND LITIGATION § 7.04 (1990) (discussing how courts habitually include in juror instructions admonition

underlie this restriction. One is premature formation of juror positions. The other is giving early testimony disproportionate attention or credibility.

At the heart of the restriction is the traditional model of the passive juror whose mind is a cipher. This mythological being encodes and stores evidence, refraining from discussing the evidence while suspending all judgment until final deliberations.¹⁶⁹ The model is cheerfully indifferent — if not openly hostile — to certain realities.¹⁷⁰ As the trial lengthens or becomes more provocative, natural pressures on jurors to discuss the case amongst themselves mount. Studies suggest that many jurors succumb.¹⁷¹ Nevertheless, the ban remains largely intact despite the lack of empirical justification.

As we have seen, partisan advocacy and trial by jury are cornerstones of the factfinding process in the American trial. Neither feature obtains in the inquisitorial system. The two systems are next compared and contrasted with regard to the theory and practice each follows in seeking courtroom truth. Proposals for selective adoption of inquisitorial practices are presented in Part IV.

not to discuss case before deliberations begin).

¹⁶⁹ LAWRENCE S. WRIGHTSMAN, *PSYCHOLOGY AND THE LEGAL SYSTEM* 288-89 (2d ed. 1987).

¹⁷⁰ As one Arizona judge commented: "No research-based support can be found for this [passive juror] model in social science, legal, or political science literature. To the contrary, all of the studies are critical of this idealized picture, claiming that its assumptions are contradicted by accepted psychological and educational truths and by empirical data." The Honorable B. Michael Dann, "*Learning Lessons*" and "*Speaking Rights*": *Creating Educated and Democratic Juries*, 68 *IND. L.J.* 1229, 1241 (1993).

¹⁷¹ See Thomas L. Grisham & Stephen F. Lawless, Note, *Jurors Judge Justice: A Survey of Criminal Jurors*, 3 *N.M. L. REV.* 352, 358 (1973) (listing response to survey of criminal trial jurors; 44% believed that fellow jurors discussed case with others); Elizabeth F. Loftus & Douglas Leber, *Do Jurors Talk?*, *TRIAL*, Jan. 1986, at 59-60 (discussing two surveys to obtain sensitive information from jurors without violating privacy; in one survey, 10.3% of jurors admitted to discussing case with others before deliberations began; in other survey, estimated 11% of jurors admitted discussing case with others before deliberations began).

III. COMPARING THE INQUISITORIAL AND ADVERSARY SYSTEMS¹⁷²

Adversary system defenders acknowledge the truth-seeking flaws of the adversary system, but maintain the lack of a better alternative. Yet there clearly is one. The inquisitorial system of trial procedure presents a fertile model for emulation which can be adopted on an eclectic basis. This section discusses the inquisitorial system, predominant not only in continental Europe but much of Asia, Africa and Latin America as well. It reveals how nonadversarial factfinding can work in an adjudicative process so that the unique benefits of adjudication — constitutional protections and development of the law — are preserved. Several of the reforms proposed in the next section derive from the inquisitorial system.

In contrast to the adversary system, and its focus on victory,¹⁷³ the inquisitorial system seeks truth through a state inquest.¹⁷⁴ Theoretically, the inquisitorial system trial is a vehicle for the enforcement of state policies.¹⁷⁵ As the state's representative in an inquisitorial system trial, the presiding judge "controls the court's investigation, calls witnesses and establishes the scope of the inquiry. The attorney's courtroom role is limited primarily to proposing additional questions for the judge to ask."¹⁷⁶

Adversary system proponents find inherent fault with the role of the judge in inquisitorial system trial procedure. By such pervasive involvement in the case, they argue, the judge cannot hope to maintain her impartiality: The greater the participation in the case, the greater the likelihood of developing an uncon-

¹⁷² For a discussion of the inquisitorial system as a model for selective adoption of particular trial practices see Franklin Strier, *What Can the American Adversary System Learn From an Inquisitorial System of Justice?* 76 JUDICATURE 109, 109-11 (1992).

¹⁷³ See discussion *supra* Part I.A (comparing adversarial system and its focus on victory with dialectic and its focus on truth).

¹⁷⁴ FRANKLIN D. STRIER & EDITH GREENE, *THE ADVERSARY SYSTEM: AN ANNOTATED BIBLIOGRAPHY* 3 (1990).

¹⁷⁵ See, e.g., William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1, 7 (1992) (pointing out that inquisitorial system places burden of seeking truth on judge and establishes few evidentiary restrictions that might deny judge important factual information).

¹⁷⁶ STRIER & GREENE, *supra* note 174, at 3.

scious bias.¹⁷⁷ Proponents of the inquisitorial system concede this possibility, believing the risk of judicial bias is worth denying attorneys control over the proceedings.¹⁷⁸

“Which system is better?” is an expectable but largely unanswerable question. That is because the question itself begets another question, “Better at what?” Each system pursues its own set of values, not all of which are given the same priorities.¹⁷⁹ The disparate roles of the judge and attorney under the two systems reflect the relative value each places on truth-seeking. Under the inquisitorial system, the judge continues to search the facts until satisfied that she is well informed enough to render a correct decision. Under the adversary system, the partisan attorneys introduce only as much evidence as will help their cases.

Each system has advantages and disadvantages with respect to factfinding. Adversary system proponents contend that self-interested attorneys are better motivated than the neutral judge at finding evidence. Without financial or professional motivations, this argument goes, a judge does not have the same incentive as an attorney to probe deeply into the facts.¹⁸⁰ Inquisitorial system proponents counter that irrespective of the *quantity* of evidence produced in an adversary system trial, its *quality* is tainted by the self-serving manner in which it is chosen and presented.¹⁸¹

Three specific arguments collectively rebut the claim that a neutral judge will lack the partisan attorney’s factfinding diligence. First, empirical studies support this contention only as to the attorney who finds the facts to be decidedly unfavorable.¹⁸² Second, an inquisitorial system judge cannot refuse, without stated reasons, to investigate party-nominated proofs, so little

¹⁷⁷ *Id.* at 3-4.

¹⁷⁸ *Id.* at 4.

¹⁷⁹ Of course, one could say they both seek “justice” as their first priority. But that begs the question because justice is often defined tautologically: Justice results from adherence to prescribed trial procedure; the procedures are used because they are just.

¹⁸⁰ See THIBAUT & WALKER, *supra* note 25, at 38-39 (summarizing study indicating that court-centered attorneys stop searching for facts when they feel their judgment is correct; client-centered attorneys continue investigating facts until they feel they have sufficient facts to hope to win difficult cases).

¹⁸¹ *Cf.* FRANK, *supra* note 13, at 85 (analogizing lawyer’s means of pursuing goal of victory to throwing pepper in surgeon’s face during surgery).

¹⁸² Lind, *supra* note 24, at 141-42.

relevant evidence is excluded.¹⁸³ Finally, the inquisitorial system contains judicial performance incentives which are absent from the adversary system.¹⁸⁴ In contrast with American judges, continental judges are chosen after rigorous examination and specially trained for career appointments. The judiciary is a prestigious, well-paying career sustained not by political appointment or election, but by meritocracy. Advancement depends, in part, on factfinding efficacy.¹⁸⁵

As opposed to the adversary system, the inquisitorial system trial is remarkably unencumbered in its search for truth. To begin with, there is no American-style all-lay jury. Instead, a single judge, a panel of judges, or a mixed panel of lay and professional judges decide cases.¹⁸⁶ (On the last, the mix is expected to have a broadening impact on the professional judges' perspectives.) Further, the absence of a jury removes the need for almost all exclusionary evidence rules. Hearsay evidence, for example, can be admitted and the court must judge its value. The same applies to opinions, character evidence, and evidence of prior convictions. All must be admitted unless better evidence is available.¹⁸⁷

Another key distinction is the court's obligation to ascertain the truth for itself. No such obligation exists in American courts. State inquiry into the relevant facts is the dominant characteristic of the inquisitorial system proceeding. In contrast, nontruth values suffuse adversary system trials.¹⁸⁸

Under any system, state resources give the prosecution a clear advantage in criminal trials. To counteract this, the adversarial trial erects special evidentiary barriers¹⁸⁹ which cloud the truth

¹⁸³ See, e.g., Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMP. L. REV. 317, 342 (1995) (discussing how, in German courts, attorneys can make oral requests of proof; judge can ignore request only in limited circumstances and generally must hear evidence).

¹⁸⁴ See, e.g., JOHN H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 60 (1977) (explaining that promotion to higher courts in Germany is dependent on judge's performance).

¹⁸⁵ *Id.*

¹⁸⁶ See discussion *infra* Part IV.C.3.

¹⁸⁷ Under the German system of "free proof," for example, almost all facts and inferences from facts must be set out in detail. See generally Kunert, *supra* note 54, at 122.

¹⁸⁸ See discussion *supra* Part I.B.2.

¹⁸⁹ Most notably, the Supreme Court has interpreted the Fifth Amendment right not to

and protect criminal defendants.¹⁹⁰ Because of this disparity of underlying systemic values, comparative law expert Mirjan Damaška concludes that the two trial processes cannot readily be compared.¹⁹¹

University of North Carolina researchers John Thibaut and Laurens Walker nevertheless made extensive comparisons of the two systems.¹⁹² They concluded that an autocratic procedure which delegates both process and decision control to a disinterested third party (i.e., a model mirrored in the inquisitorial system) is optimal for determining the truth. Evidence is presented more accurately by disinterested third parties than by adversarial processes.¹⁹³ Such a procedure “increases the likelihood of obtaining the relevant information, reduces the strain of assimilating and tracking information, and minimizes the risk of failing to reach the correct solution.”¹⁹⁴

testify and the prosecution's standard of proof beyond a reasonable doubt as such barriers. See *Carter v. Kentucky*, 450 U.S. 288, 299 (1980) (quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1963), for proposition that privilege against self-incrimination is partly derived from sense of fair play requiring government to shoulder entire burden in its fight with defendant); Stephen A. Saltzburg, *Criminal Procedure in the 1960s: A Reality Check*, 42 *DRAKE L. REV.* 179, 201 (1993) (pointing out that Fifth Amendment privilege against self-incrimination is designed as barrier to gathering of evidence and may disable government from convicting factually guilty people).

¹⁹⁰ Important differences bear out the easier burden of the continental prosecutor. The continental defendant does not have the right to refuse to take the stand to be questioned, but can refuse to answer all questions generally or particular questions. Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 *U. PA. L. REV.* 506, 527 (1973). Yet that right is rarely exercised for fear that, in this context, the inference of guilt is more pronounced and unavoidable — notwithstanding the formal rule that the trier of fact cannot draw unfavorable inferences from the exercise of the right. *Id.* Nor do continental courts require unanimity for conviction, preferring just a majority, often just a bare majority, of the mixed lay-professional panel. *Id.* at 537. There is, however, a continental analogue to the common law standard of guilt beyond a reasonable doubt: Factual doubts should be resolved in favor of the defendant. *Id.* at 537, 540-44.

¹⁹¹ MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 88 (1986).

¹⁹² THIBAUT & WALKER, *supra* note 25, at 22-27.

¹⁹³ Lind et al., *supra* note 123, at 1140-43.

¹⁹⁴ John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 *CAL. L. REV.* 541, 548 (1978). Notwithstanding this conclusion, they claim that the adversary system is preferable for most lawsuits. *Id.* at 566. They reason as follows: In the average lawsuit, matters of distributive justice are more important and hotly contested than issues of fact. Once the basis of the conflict is one of justice rather than truth, the adversary process is optimal because assigning maximum process control to the disputants is most likely to result in distributive justice. *Id.* One must accept many propositions before subscribing to this theory, not the least of which is a workable disjuncture between truth and justice.

In contrast, intractable problems lurk in the adversarial factfinding model. Somewhat like an infant's diet, information flow to the jury factfinders in an adversarial trial is first selectively limited, then that which is allowed through is carefully sanitized in the attorney's strainer. These limitations occur because one or both of the opposing attorneys may want to keep relevant information from the factfinder. The hearsay rule and other evidentiary exclusions enable the attorneys to effectuate this information blockade. And unlike the narrative style of testimony in the inquisitorial system, the adversary system often constrains testimony through narrow "yes" or "no" type responses. Consequently, the factual basis for the ultimate decision is frequently incomplete.

Another unfavorable aspect of the adversarial trial is its tendency to corrupt witness testimony. Coaching may unconsciously fill gaps in a witness's memory that correspond with the coaching lawyer's expectations and theses.¹⁹⁵ Further distortion lies in cross-examination tactics, which can easily obfuscate otherwise clear information.¹⁹⁶

The inquisitorial system avoids these problems. The court's investigatory duty extends to all relevant facts. Inasmuch as information gathering is the province of the state, there are no difficulties in exchanging information between parties. Hearsay and other grounds for inadmissibility generally do not apply. Finally, the state's neutrality precludes coaching of friendly witnesses or abuse of cross-examined witnesses.¹⁹⁷

One consideration strongly indicates the innate factfinding weakness of the adversary system: Adversarial procedure is rarely used for other (nontrial) types of investigations in the United States. We usually appoint an individual or board to conduct the inquiry instead of having two competing versions presented to a judge. Gordon Tullock writes: "Altogether, it does not seem likely that the adversary system would long survive if individuals were permitted to choose their own procedural rules."¹⁹⁸

¹⁹⁵ See discussion *supra* Part I.C.1.

¹⁹⁶ See discussion *supra* Part I.C.2.

¹⁹⁷ Mirjan Damaška, *Presentation Of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1093-94 (1975).

¹⁹⁸ GORDON TULLOCK, *THE LOGIC OF THE LAW* 93 (1971).

Candid supporters of adversarial procedure concede the shortcomings of the system but say, "If you want adversarial safeguards, you are stuck with adversarial excesses."¹⁹⁹ This is an erroneous, all-or-nothing contention.²⁰⁰ As the continental experience demonstrates, eliminating party control during factfinding leaves adversarial safeguards substantially intact but without the problems attending witness-coaching and other forms of partisanship. In Germany, for example, witnesses are called and questioned by the judge. During evidence-taking, attorneys reserve the right to nominate additional witnesses, suggest additional questions and submit closing arguments. In the periods between evidence-taking hearings, attorneys suggest further proof, discuss and distinguish precedent, interpret statutes, and develop adversarial positions on the significance of the evidence.²⁰¹ In this manner, partisan advocacy is preserved while factfinding control shifts to the judge.

Adherents of the inquisitorial system claim that evidence produced by neutral investigation results in more reliable factfinding. We have more to learn from psychology and the other social sciences before we can confirm or reject this conclusion. More certain is that the two systems employ antithetical cognitive roles for their factfinders: The active inquiry by the neutral inquisitorial judge versus the passive role of the adversary system's judge and jury. The entire factual basis for the adversary trial factfinder's decision is presented by biased advocates. With virtually no involvement in investigating, developing, or clarifying the evidence, the adversarial factfinder is little more than an audience. Nowhere but the adversarial trial does this curious and ungainly role anomaly obtain.

The distribution of resources invested in a trial suggests the relative reliability of trial factfinding. According to Tullock, a lawsuit finds the court and one side seeking the correct result.²⁰² The other side seeks the incorrect result.²⁰³ Since the court's share of the factfinding (independent investigation) is

¹⁹⁹ John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 841 (1985).

²⁰⁰ *Id.*

²⁰¹ *Id.* at 835.

²⁰² Gordon Tullock, *On the Efficient Organization of Trials*, 28 KYKLOS 745, 756 (1975).

²⁰³ *Id.*

far greater under the inquisitorial system, a correspondingly higher share of the total resources invested in the case are applied to reaching the correct conclusion. Therefore, a higher degree of accuracy should be expected. Conversely, the parties control most of the resources invested in the adversarial suit. As a result, the side seeking to mislead contributes a great deal of the resources spent in the adversarial trial.²⁰⁴

We can also compare systems by the level of decision maker bias. American critics of the inquisitorial system argue that the judge's involvement in the case makes it difficult for her to evaluate the evidence fairly.²⁰⁵ Although the inquisitorial judge's familiarity with the case (through the dossier) enables effective interrogation, legal theorist Lon Fuller contends that the same familiarity may lead to the formation of a tentative hypothesis before trial and more receptivity to information confirming that hypothesis.²⁰⁶ By contrast, the adversarial model decision maker should be able to suspend judgment longer.

Inquisitorial procedure advocates maintain that their system satisfies Fuller's concerns. Necessary safeguards prevent judicial prejudice. For example, the German system addresses this issue in criminal cases by dividing the initial investigation and final adjudication between prosecutor and court, respectively.²⁰⁷

²⁰⁴ *Id.* Tullock explains:

Assume, for example, that in the average American court case 45 percent of the total resources are invested by each side and 10 percent by the government in providing the actual decision-making apparatus. This would mean that 55 percent of the resources used in the court are *aimed* at achieving the correct result, and 45 percent at reaching an incorrect result. Under the inquisitorial system, assume that 90 percent of the resources are put up by the government which hires a competent board of judges (who then carry on an essentially independent investigation) and only 5 percent by each of the parties. Under these circumstances, 95 percent of the resources are contributed by people who are attempting to reach the correct conclusion, and only 5 percent by the saboteur. Normally, we would anticipate a higher degree of accuracy with the second type than with the first.

Id.

²⁰⁵ See, e.g., Lon L. Fuller, *The Adversary System*, in *TALKS ON AMERICAN LAW* 34, 43-44 (Harold Berman ed., 2d ed. 1971) (arguing that in absence of adversarial presentations, deciding officials tend to reach decisions early and adhere to their conclusions in face of later developing considerations to contrary).

²⁰⁶ *Id.*

²⁰⁷ LANGBEIN, *supra* note 184, at 150-51.

Moreover, the constant input of the inquisitorial system attorneys inhibits, at least to some degree, the premature formulation of opinion.

The influence of attorney performance on case outcome has long been the subject of conflicting views and heated discussion among theorists and practitioners. One related point, however, is less debatable: The adversary system's presumption that opposing counsel will be of roughly equal competence is patently ludicrous. No mechanism of the adversary system is designed to match attorneys of comparable skill or litigants of comparable resources. Nor is there any device to equalize a mismatch in opposing attorney skills.²⁰⁸ Inquisitorial procedure, on the other hand, lessens the advantages of superior forensic skills possessed or dirtier tricks utilized by one side's attorney. This is critical. Diluting the impact of disparate attorney skills in large measure frees inquisitorial system decisions from that which has little or nothing to do with the merits of the case.²⁰⁹

Consider: ours is a country whose legal system, above all, honors equality of treatment, or as it is sometimes characterized, equal justice. Yet we have adopted a trial mechanism which, more than any other, skews trial outcomes in favor of the side with the better attorney. And in the freest of all free market

²⁰⁸ This is of no mean significance. In the adversarial trial, juror "factfinders" do not find facts in the traditional investigative sense. They are instead passive recipients of information and signals — only some of which are relevant evidence — from the attorneys. Thus the influence of attorney strategy and skill on trial outcomes cannot and should not be understated. In my 1988 survey of Los Angeles jurors (discussed in Part IV, *infra*), over one-half of the survey respondents left the jury experience believing that disparate attorney skills can affect the outcome of a case. And over one-third felt that the difference in attorney courtroom skills probably affected the verdict in the actual case they served on. Franklin Delano Strier, *Through the Jurors' Eyes*, A.B.A. J., Oct. 1988, at 78, 80.

²⁰⁹ Under the adversary system, says Tullock:

[T]he greater importance of the lawyers means that the relative excellence of those hired by the two parties is of much greater importance Since a case in which two lawyers are of exactly equal ability must be very rare, it would seem that the inaccuracy introduced by this factor alone would more than offset the possible inaccuracy resulting from giving the judge the dominant role.

A further advantage of the inquisitorial system is a reduction of the importance of courtroom strategy. . . . [T]he smaller the role played by the lawyers, the more likely it is that the outcome will be in accord with the facts.

TULLOCK, *supra* note 198, at 92.

economies, wealth commands the best legal representation. Consequently, equal justice through the court system is but a chimera, an ennobling standard whose correspondence with reality is barely discernible.

This is certainly not what most American litigants want or deserve. “[T]he American legal system,” observed University of Chicago Law Professor Alschuler, “probably makes the kind of justice that a defendant receives more dependent on the quality of the lawyer he is able to hire than any other legal system in the world.”²¹⁰ Alschuler’s conclusion is a disturbing commentary on American trial justice.

Trial flexibility is another inquisitorial advantage. As discussed earlier, the adversarial parties litigate all issues in one continuous proceeding.²¹¹ Conversely, inquisitorial trials are noncontinuous and issue-separated: The court need only consider at any given time evidence related to the specific issues under inquiry. This is far less onerous to attorneys, who can offer additional proof on other issues during later stages of the trial.

Witness testimony dominates evidence; it is the warp and woof of the trial. The inquisitorial system trial is much friendlier to witnesses than its adversary counterpart. They can begin their testimonies with uninterrupted narratives. No such freedom is afforded the adversary system witness, whose testimony must commonly endure a plethora of scattershot strategic disruptions by opposing counsel. A witness’s testimony, otherwise impeccable, may be remembered by the decision maker for a single flawed response which the opposing attorney attacked like a ravenous piranha and mercilessly belabored.

A final advantage of the inquisitorial system issues from its broader view of the role of the courts. If, as Alexis de Tocqueville observed, every important issue in America is eventually litigated,²¹² we must compare the two systems in their respective facilities for engaged discourse and debate over pivotal

²¹⁰ Albert Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 1005 (1983).

²¹¹ See discussion *supra* Part II.C.4 (arguing that requiring jurors to decide on all issues in case at one time is obstacle to factfinding).

²¹² See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (“There is hardly a political question in the United States which does not sooner or later turn into a judicial one.”).

social problems. In this role, Robert Bellah, Richard Madsen, William Sullivan, Ann Swidler, and Steven Tipton found American courts grievously lacking. In *The Good Society*, they inferentially suggest a process far more descriptive of the inquisitorial system:

Because the courts sustain debate about fundamental principles of how Americans live their lives in common, they are an arena where we can address central social questions But the courts as an institutional system have grave weaknesses in this regard: they have no independent fact-gathering ability . . . and they respond to the adversaries in cases brought before them rather than framing a debate about what is best for the common good.²¹³

Are the courts rather than the legislatures the appropriate fora for these broad-gauged debates? Hardly. But the legislatures have evinced a reluctance bordering on pusillanimity to tackle thorny and intractable public problems.²¹⁴ So it is that many basic governmental responsibilities and related discourse devolve from the legislatures to the courts. While this state of affairs obtains, it is a purely academic issue whether or not courts are the proper vehicles for the realization of governmental policies. To the extent our courts have this de facto responsibility thrust upon them, they should have the facility to hear broader and more dispassionate views than they currently do. (Rarely, for example, is every potentially affected interest represented in a trial.) In this regard, the inquisitorial system trial is clearly superior — in design and experience.

IV. PROPOSED REFORMS

Truth-seeking need not be a casualty of the adversary system. The search for truth can be enhanced by various common sense measures, proposed below. But even the most compelling reform proposals need champions. For trial reform, these would be primarily judges. Accordingly, I surveyed most of the California

²¹³ ROBERT N. BELLAH ET AL., *THE GOOD SOCIETY* 130 (1991).

²¹⁴ For instance, courts have had to order allocation of funds for court operations and prisons. *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1449 (9th Cir. 1989) (requiring prison to upgrade facility by providing bed for petitioner); *Inmates of Allegheny County Jail v. Wecht*, 565 F. Supp. 1278, 1286 (W.D. Pa. 1983) (stating that court had previously ordered prison to construct and maintain law library in jail).

judiciary in 1994 (hereinafter the California judicial survey) as to their attitudes toward several of these proposals. The findings indicate that the judiciary may be more receptive to procedural trial reform than might be popularly believed. Further, although only California judges were surveyed, the size of the survey population and the breadth of attitudes amongst the California judiciary strongly suggest that the findings may be generalizable to the national judiciary.²¹⁵

Although judicial support is critical to the acceptance and implementation of trial reform, the perspectives of jurors are a key complement. For it is ultimately the jurors who must implement many of the reform proposals in their factfinding role. In this regard, reference will be made to pertinent findings of a survey of Los Angeles jurors (hereinafter the Los Angeles survey) which I conducted in 1987-88. This survey polled over 3800 individuals upon completion of their jury service as to their views on various aspects of their trial experience.

A. *Juror Cognitive Aids*

Judges can take effective measures to empower juries and enhance their competence. The first step reacts to existing constraints on juror performance: Extricate jurors from all unnecessary and unnatural restrictions on their factfinding and decision making. Thus all categorical bans on juror note-taking, question asking, and interim discussions should be replaced by privileges to engage in those activities subject to the guidelines provided by the court. The next step is proactive. Empirical studies and logical analyses suggest further enhancement of jury performance by adopting various additional cognitive aids. Both reactive and proactive measures are discussed below.

1. Note-Taking

Studies assessed the effects of juror note-taking²¹⁶ on actual²¹⁷ and mock²¹⁸ juries. The bases for opponents'

²¹⁵ All California Superior (trial) Court and appellate judges were sent questionnaires containing closed and open-ended questions. Thirty-seven percent responded. For a full discussion of the survey, see Strier, *supra* note 138.

²¹⁶ Flango, *supra* note 162, at 437-43.

²¹⁷ Leonard Sand & Steven Reiss, *A Report on Seven Experiments Conducted by District Court*

concerns²¹⁹ failed to materialize. Moreover, jurors reported increased satisfaction.²²⁰

Every argument against juror note-taking is either refutable or addresses a potential drawback which can easily be rectified. Experiments indicated that note-taking engaged jurors, allowing them to feel more involved with the trial and therefore more satisfied with trial procedure.²²¹ Most importantly, note-taking aided juror recall.²²² Further, attorneys and judges responded positively to it.²²³ The same empirical findings do not support the concern that note-takers will exert undue influence.²²⁴ The nonuse of note-taking precludes a potentially inestimable advantage to the trial process: substantially improved factfinding.²²⁵

Courts which continue to deny this aid to jurors or fail to advise jurors of a note-taking privilege confound the opportunity for improved jury performance. At the least, the empirically-proven satisfaction that jurors experience from note-taking merits consideration. As long as jurors cannot avail themselves of transcripts of the testimony, every juror should be allowed to take notes and should explicitly be informed of the privilege.

Judges in the Second Circuit, 60 N.Y.U. L. REV. 423, 424 (1985); see also COMMITTEE ON IMPROVING JURY COMMUNICATIONS, WISCONSIN JUDICIAL COUNCIL, FINAL REPORT 1, 5-6 (1985) (discussing experiments designed to evaluate advantages and disadvantages of juror note-taking).

²¹⁸ Larry Heuer & Steven Penrod, *Increasing Jurors' Participation In Trials: A Field Experiment with Jury Notetaking and Question Asking*, 12 LAW & HUM. BEHAV. 231, 244-51 (1988).

²¹⁹ See discussion *supra* Part II.C.2 (detailing opponents concerns regarding juror note-taking).

²²⁰ Heuer & Penrod, *supra* note 218, at 233, 252.

²²¹ *Id.* at 246; David L. Rosenhan et al., *Notetaking Can Aid Juror Recall*, 18 LAW & HUM. BEHAV. 53, 54 (1994); cf. Larry Heuer & Steven Penrod, *Juror Notetaking and Question Asking During Trials: A National Field Experiment*, 18 LAW & HUM. BEHAV. 121, 123-27 (1994).

²²² Rosenhan et al., *supra* note 221, at 59-60.

²²³ Heuer & Penrod, *supra* note 218, at 248-49.

²²⁴ Heuer & Penrod, *supra* note 221, at 138. Even if note-takers did exert disproportionate influence, it is unclear why this is an inferior or undesirable means for group leaders to emerge. Put differently, why is jury domination by forceful speakers better than domination by good note-takers?

²²⁵ Research indicates that note-taking improves the overall performance of the note-taker. See Kenneth A. Kiewra, *Notetaking and Review: The Research and Its Implications*, 16 INSTRUCTIONAL SCI. 233, 233-34 (1987).

2. Question Asking

Another constraint which, on balance, is insupportable is the prohibition of juror questions. Juror questioning is rarely permitted. The opposition to juror questions was discussed earlier.²²⁶ Studies have not confirmed any of the stated concerns.²²⁷ From the juror's perspective, the potential truth-seeking advantages of juror interrogation are obvious: Responses to juror questions can increase the information upon which the jury decides by fleshing out neglected evidence, clarifying the evidence and law, and identifying areas of misunderstanding.²²⁸ Furthermore, by involving jurors in the trial process, the ability to ask questions may increase their attention to and interest in the case.²²⁹ Attorneys can benefit by restructuring their evidence presentation to improve juror understanding. Additionally, juror questions may flag juror biases to the judge and attorneys. This allows for correction before jury deliberation, when it is too late.²³⁰

The issue is not whether jurors should be allowed to ask questions. They should. Rather, the issue is how best to implement this factfinding tool with the proper precautions. At the outset of the trial, jurors should be advised of their right to ask questions. If at the end of a witness' testimony a juror has a question, the juror can submit to the judge a note containing the question. This avoids the problem of an improper question reaching the ears of the other jurors. If neither the judge nor counsel objects to the question, it can be put to the witness. If an objection is registered, the judge may revise or reject the question. In some instances, the judge may forestall the question if subsequent evidence is likely to answer it; if the question is not answered by subsequent evidence, the juror may reiterate the question later. Judges should also moderate the juror disappointment and potential prejudice which may result from a rejected question by explaining why certain questions cannot be voiced.²³¹ In sum, the absence of insurmountable objections

²²⁶ See discussion *supra* Part II.C.1 (discussing opposition to juror questioning).

²²⁷ Heuer & Penrod, *supra* note 218, at 232-36; Heuer & Penrod, *supra* note 221, at 123-24.

²²⁸ Heuer & Penrod, *supra* note 221, at 142.

²²⁹ Wolff, *supra* note 155, at 821-25.

²³⁰ See *id.* at 824.

²³¹ See Stephen A. Saltzburg, *Improving the Quality of Jury Decisionmaking*, in VERDICT:

and the lost opportunity for improved jury factfinding compel adoption of what should be an intuitively obvious practice. Over sixty percent of the responding California judges surveyed approved of allowing jurors to ask questions.²³² In the Los Angeles survey, jurors were asked what changes would make the evidence "clearer to and more effectively judged by the jury." The most frequently selected suggestion was to allow the jurors to ask questions subject to the judge's approval.²³³

3. Transcript or Videotape of the Testimony

Another practice ripe for change is that of restricting juror review of the evidence. Testimony in lengthy trials can easily exceed the ineluctable limits of human recall. This is particularly evident in some of the civil megatrials.²³⁴ Courts could permit jurors to review the evidence in a comprehensible manner by providing access to a transcript of the testimony and copies of all other evidence of record.²³⁵ Included would be summaries, depositions, and other documents. The court could facilitate their retrieval by establishing a filing and indexing system.²³⁶

Videotaped testimony could complement or replace transcripts, allowing jurors to also review witness behavior and other nonverbal evidence. Besides being more realistic, videotape is infinitely more interesting for jurors than dry transcripts. Barring use of videotaped testimony denies two possible benefits: It pre-

ASSESSING THE CIVIL JURY SYSTEM, *supra* note 148, at 341, 360 (discussing techniques to help jurors better understand evidence).

²³² Strier, *supra* note 138, at 66-67.

²³³ Strier, *supra* note 208, at 80.

²³⁴ For example, the paperwork at the pretrial stage of *In re United States Financial Securities Litigation* reached 150,000 pages in depositions and over five million documents, roughly equal to the height of a three story building. *In re United States Fin. Sec. Litig.*, 75 F.R.D. 702, 707 (S.D. Cal. 1977) *rev'd*, 609 F.2d 411 (9th Cir. 1979).

²³⁵ See *SCM Corp. v. Xerox Corp.*, 77 F.R.D. 10, 15 (D. Conn. 1977) (pretrial ruling) (suggesting that access to entire transcript of proceedings would aid jury's fact finding in complex cases, just as access to entire transcript aids attorneys at trial); see also UNIF. R. CRIM. P. 53(d) (allowing court to permit jury to re-examine testimony and exhibits when reasonable).

²³⁶ James R. Withrow & David L. Suggs, *Procedures for Improving Jury Trials of Complex Litigation*, 25 ANTITRUST BULL. 493, 510 (1980). A substantial minority of the California judicial survey respondents would permit jurors to examine written transcripts (30%) or videotapes (39%) in some or all cases. Strier, *supra* note 138, at 75.

cludes potentially significant enhancement of jury factfinding and it eliminates the opportunity to substantially foreshorten the trial for the jury.

Videotaped testimony could replace the live trial. A prerecorded, videotaped trial would curtail the attorney practice of asking questions or posing objections known to be of doubtful validity but intended solely for effect.²³⁷ Ohio judge James McCrystal, who presided over the first prerecorded videotaped trial, and James Young, Director of the Ohio Legal Center Institute, identified twenty-one additional advantages to this use of videotape.²³⁸ Those that specifically facilitate jury functioning are as follows:

- a. The trial flows without interruptions from objections, bench conferences, delays for witnesses, counsel's pauses, client conferences and chamber retreats.
- b. Utilization of juror time is maximized.
- c. The time required for a given trial is shortened considerably.
- d. The trial can be scheduled, with certainty, for a specific day.
- e. There is no need to recess for the preparation of jury instructions.
- f. Videotape facilitates testimony on location.
- g. Elimination of live trial impediments gives the jury a comprehensive related view of the entirety of the case.
- h. Extrajudicial judge influence through reactions to witnesses and comments to counsel is reduced.
- i. The court need no longer resort to the fiction that a juror can disregard what he has heard in accordance with the judge's instructions.²³⁹

4. Issue Separation

An inquisitorial system procedure with great potential for simplifying American jury factfinding is the noncontinuous, issue-separated trial. In an issue-separated trial, the court focuses initially on the issue most likely to be dispositive. Both sides

²³⁷ Marvin Frankel, *From Private Fights Toward Public Justice*, 51 N.Y.U. L. REV. 516, 534 (1976).

²³⁸ James McCrystal & James Young, *Pre-Recorded Videotape Trials — An Ohio Innovation*, 39 BROOK. L. REV. 560, 563-64 (1973).

²³⁹ *Id.*

present their evidence on that issue. The litigation of other issues may be obviated. For instance, in a toxic product liability suit, the court could begin by considering only evidence on causation. If issue-separation is combined with special verdict use, a finding of no causation would end the suit. Issues of liability and damages need never be litigated.²⁴⁰ When used in the United States, issue-separated trials are typically bifurcated into liability first; then, if necessary, damages. Issue-separated trials offer these potential benefits:

- a. Great economies of time and expense are made possible. In the 1988 Harris survey of federal and state trial judges, the judges overwhelmingly supported the principle and practice of bifurcation.²⁴¹ Judges who used it reported expedited settlements and trial process, reduced transaction costs, and improved fairness of outcome.²⁴² An earlier study of personal injury cases also reflects the considerable potential economy of issue separation.²⁴³
- b. "Separation of issues could greatly facilitate juror comprehension, recall and decision making."²⁴⁴ By enabling the jury to focus on one issue at a time, evidence becomes more orderly and understandable to the jurors. Even if the jurors must eventually consider all the issues, mitigating the confusion which attends processing evidence on multiple issues greatly simplifies the jurors' cognitive task. The longer and more complex the trial, the greater the potential benefits of issue separation. From 1968 to 1988, the percentage of civil trials in federal court which took no more than one day decreased by fifty percent, while the number of trials lasting ten or more days almost quintupled.²⁴⁵ As longer

²⁴⁰ There is always the possibility that an appellate court would reverse and remand, necessitating trial of the issues not presented to the jury. The relatively low likelihood of this, however, should not preclude terminating deliberations once the jury has made a dispositive decision.

²⁴¹ Louis Harris & Associates, *Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases*, 69 B.U. L. REV. 731, 743 (1989).

²⁴² *Id.*

²⁴³ See Hans Zeisel & Thomas Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606, 1610 (1963) (stating that only 15% of issue-separated trials ran full course as opposed to 78% of traditional single trials).

²⁴⁴ Horowitz & Bordens, *supra* note 167, at 271; see also HENSLER ET AL., *supra* note 167, at 122-23 (discussing methods of changing mass tort litigation system).

²⁴⁵ Stephen J. Adler, *Can Juries Do Justice to Complex Suits?*, WALL ST. J., Dec. 21, 1989, at

trials become more commonplace, the need for such issue-separated trials grows.

- c. Separation of issues reduces juror tendency to apply evidence on emotional issues such as damages to less emotional issues such as causation or liability.²⁴⁶
- d. When opposing experts testify on specific issues, the bases for their differences can be crystallized for the benefit of the jurors. After their testimonies, the experts would respond to questions from the judge, attorneys or jurors. This back-and-forth questioning would create in essence a confrontation of experts with expectable salutary effects on juror comprehension.²⁴⁷

Although American judges generally have the power to order issue-separated trials,²⁴⁸ they rarely exercise it.²⁴⁹ However, a distinct trend in judicial administration is toward more pretrial management, which includes eliminating and narrowing the scope of issues and corresponding discovery.²⁵⁰ Use of issue-separated trials to limit discovery is a logical extension of this trend. Over sixty percent of the California judicial survey respondents favored greater use of issue separation.²⁵¹

5. Interim Discussions

Several reasons militate against the restriction on preliminary juror discussions. First, during lengthy or complex trials, discussions allow jurors to correct misconceptions and handle information in a far more normal process. Jury comprehension of the evidence could be improved through the proven advantages of

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²⁴⁶ Horowitz & Bordens, *supra* note 167, at 271.

²⁴⁷ William Schwarzer, *Reforming Jury Trials*, in 132 F.R.D. 575, 595 (1990).

²⁴⁸ See, e.g., FED. R. CIV. P. 42(b) (providing example of judges' power to order issue-separated trials); CAL. CIV. PROC. CODE § 583.161(c) (Deering Supp. 1996) (same); COLO. REV. STAT. ANN. § 16-8-104 (West 1990) (same); DEL. CODE ANN. tit. 11, § 4209(b)(1)(1995) (same); FLA. STAT. ANN. § 921.141(1) (West 1996) (same); KAN. CIV. PROC. CODE ANN. § 60-242(b) (West 1994) (same); LA. CODE CIV. PROC. ANN. art. 593.1(c) (West Supp. 1996) (same); MO. ANN. STAT. § 510.180(2) (West 1952) (same); N.C. GEN. STAT. § 1A-1, Rule 42(b) (1995) (same); OKLA. STAT. ANN. tit. 12, § 2018(D) (West 1993) (same); VA. CODE ANN. § 8.01-267.6 (Michie Supp. 1996) (same).

²⁴⁹ Louis Harris & Associates, *supra* note 241, at 734. Earlier research found a 20% savings in jury trials for personal injury by separating liability and damages into separate trials. Zeisel & Callahan, *supra* note 243, at 1606, 1619.

²⁵⁰ Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 393 (1982).

²⁵¹ Strier, *supra* note 138, at 68.

group communication and sharing of knowledge.²⁵² This could also reinforce memory retention.²⁵³ Moreover, questions or thoughts that jurors might otherwise have forgotten would be shared on a timely basis.²⁵⁴

With respect to the concern that interim discussions would induce premature formation of juror positions, much research suggests jurors individually reach verdict decisions before deliberations anyway.²⁵⁵ Predeliberation discussions may mitigate this tendency. If jurors hear differing views of the evidence they may consider the case more thoughtfully and open-mindedly.²⁵⁶

Finally, discussions alleviate juror stress. Psychiatrists conducting post-verdict sessions in cases involving difficult decisions or heinous testimony (primarily in murder trials) conclude that prohibiting discussion of this evidence greatly contributes to stress and post-verdict trauma.²⁵⁷ In any long or complex trial, opines Judge William Schwarzer, "it defies reason to expect jurors, who may be confused, troubled, and perhaps overwhelmed by the unaccustomed responsibility, not to share their concerns and look to their colleagues for help and mutual support."²⁵⁸

The ban on interim juror discussions implements unverified and inaccurate assumptions about human behavior. It reflects judges' and attorneys' historic and paternalistic distrust of juries.

²⁵² See, e.g., ARTHUR AUSTIN, *COMPLEX LITIGATION CONFRONTS THE JURY SYSTEM: A CASE STUDY* 104 (1984) (providing representative discussion of benefits of jury discussions).

²⁵³ *Id.* at 103-04.

²⁵⁴ *Id.* at 104.

²⁵⁵ See, e.g., REID HASTIE ET AL., *INSIDE THE JURY* 24 (1983) (discussing various jury simulation experiments).

²⁵⁶ Schwarzer, *supra* note 247, at 594. William Schwarzer writes:

That such discussions may influence the views of some jurors before the trial is over is not objectionable, since *any tentative opinion so formed must still stand the test of full debate among the entire jury during the deliberations*. In any event, the lonely juror who, unable to talk to the others, remains confused during the trial is not likely to be an effective participant during the verdict deliberations.

Id.

²⁵⁷ Theodore B. Feldman & Roger A. Bell, *Crisis Debriefing of a Jury After a Murder Trial*, 42 *HOSP. & COMMUNITY PSYCHIATRY* 79, 81 (1991).

²⁵⁸ Schwarzer, *supra* note 247, at 593-94.

Although the ban promotes the *appearance* of juror neutrality,²⁵⁹ it may do so at the expense of a more competent and stress-free jury.

This is an area ripe for experimentation by behavioralists. If the concerns underlying the ban are empirically validated, it should be retained. Alternatively, the judge could allow some preliminary deliberations after admonishing jurors to withhold judgment until all the evidence was heard. Conversely, if the presumption is wrong, jurors, litigants, and the trial system all stand to gain by eliminating the ban on juror interim discussions.

6. Pre-Instruction²⁶⁰

Jurors reach a verdict by applying the dispositive law to the facts as they believe them to be. The law is typically withheld from them, however, until after they hear all the evidence. The objective is to keep them open to all information. Instead, this imposed ignorance denies them the capacity to discriminate the key factual issues from the mass of information they receive. Essentially, the rules of the game are unknown to them until the game is over. Envision attempting to be the scorekeeper of an athletic contest without knowing what acts receive points or

²⁵⁹ Steven Friedland, *The Competency and Responsibility of Jurors Deciding Cases*, 85 NW. U. L. REV. 190, 199 (1990).

²⁶⁰ The need to simplify the final instructions and the importance of providing them in written form to the jurors are beyond the scope of this Article. However, much has been written about both proposals. See, e.g., COMMITTEE ON IMPROVING JURY COMMUNICATIONS, WISCONSIN JUDICIAL COUNCIL, *supra* note 217, at 5 (discussing effects of providing juries with preliminary instructions); AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 12-21 (1982) (arguing for providing written jury instructions in simple language, and changing timing of presentation); Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or In Light of It?*, 1 LAW & HUM. BEHAV. 163, 165-69 (1977) (arguing that simplifying vocabulary, grammar, and organization of jury instructions improves jury comprehension); Robert F. Forston, *Sense and Non-Sense: Jury Trial Communications*, 1975 B.Y.U. L. REV. 601, 616-36 (1975) (arguing for seven changes in jury trials: clarifying wording in jury instructions; providing written instructions; changing timing of jury instructions; providing improved juror orientation; encouraging two-way communication; encouraging greater note-taking; and modifying jury selection process); Leonard B. Sand & Steven Alan Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423, 424 (1985) (listing seven experiments conducted by New York courts including giving written instructions).

penalties until after the conclusion of the game. An already difficult task thus becomes harder.

Giving the jurors a preliminary version of the instructions before (in addition to after) the evidence is heard can rectify this problem. Judge Schwarzer calls these instructions "the logical corollar[ies] to the lawyers' opening statements."²⁶¹ Studies consistently show that preinstructing jurors would greatly facilitate various aspects of jury performance, such as integration of law and facts.²⁶²

Research also indicates that the vast majority of jurors cannot suspend their decision until the end of the trial.²⁶³ A concern was that preinstruction would further predispose the jurors to prejudge. But a recent study found to the contrary: Preinstructed jurors were more likely to *defer* judgment.²⁶⁴

The best way to accomplish preinstruction without prejudice to either party is to require attorneys to submit proposed instructions to the court at the outset of the trial. So informed, the judge can apprise the jury of the basic uncontested legal doctrines involved. Despite the favorable empirical findings of behavioral science, courts have yet to adopt this sensible reform. However, an overwhelming majority of the California Judicial survey respondents favored providing jurors with oral preinstruction.²⁶⁵

²⁶¹ Schwarzer, *supra* note 247, at 583.

²⁶² Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, LAW & CONTEMP. PROBS., Autumn 1989, at 205, 220.

²⁶³ Forston, *supra* note 260, at 612.

²⁶⁴ VICKI LYN SMITH, THE PSYCHOLOGICAL AND LEGAL IMPLICATIONS OF PRETRIAL INSTRUCTION IN THE LAW 150 (1987).

²⁶⁵ Strier, *supra* note 138, at 65.

In somewhat surprising contrast with the results of this question, where 80% answered affirmatively ("Always" or "Sometimes") to jurors *hearing* preinstructions, when asked in the next question if jurors should be allowed to *see* preinstructions, only 23% answered affirmatively. Additionally noteworthy about the responses to the latter question is that it is the only one showing a significant disparity between trial and appellate judges. While only 21% of the trial judges said they would (always or sometimes) allow jurors to see preinstructions, a majority (52%) of the appellate justices answered affirmatively. Further research may ascertain the cause(s) of this disparity.

Id. at 66.

7. Supplemental Aids

A connatural measure to help jurors review evidence is to provide them with a notebook of all exhibits. When witnesses are being examined as to documents, the jurors frequently have no idea of the nature of the document or its contents. Providing exhibit notebooks allows jurors both to better follow the related testimony and to have a copy of the exhibit during deliberations.²⁶⁶ Further assistance should be supplied in complex cases. Providing jurors with decision trees or algorithms in such cases might immeasurably facilitate their deliberations.²⁶⁷ Similarly, jurors would undoubtedly welcome assistance in cases with numerous witnesses. For each witness, the court could supply jurors with identifying biographical information, plus a summary of the witness's testimony.

B. More Evidence to the Factfinder

Judges can and should allow more information to reach the jury. To this end, exclusionary rules should be reevaluated to ascertain whether their premises remain cogent. Legal or court rules denying jurors access to relevant information are often based on untested assumptions about the jury's true cognitive abilities and decision making processes.²⁶⁸ Given the value our society places on scientific information, the law's obduracy in this regard is anomalous.

The blindfolding rules should also be reevaluated. They too are based on untested assumptions about how jurors make decisions.²⁶⁹ In addition to their questionable bases, blindfolding rules perpetuate juror ignorance and are destructive to fair and informed verdicts. Consider, for example, the probable effect on jury damages awards of the rule prohibiting jurors from being

²⁶⁶ H. Lee Sarokin & G. Thomas Munsterman, *Recent Innovations in Civil Jury Trial Procedures*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra* note 148, at 378, 388.

²⁶⁷ MANUAL FOR COMPLEX LITIGATION, SECOND § 22.433 (Sam C. Pointer, Jr. et al. eds., 1986); David U. Strawn & G. Thomas Munsterman, *Helping Juries Handle Complex Cases*, 65 JUDICATURE 444, 445 (1982).

²⁶⁸ Lisa Eichhorn, Note, *Social Science Findings and the Jury's Ability to Disregard Evidence Under the Federal Rules of Evidence*, 52 LAW & CONTEMP. PROBS., Autumn 1989, at 341, 344-49; Diamond et al., *supra* note 39, at 250-52.

²⁶⁹ Diamond et al., *supra* note 39, at 267.

apprised of the final settlement offers of the parties. Unpredictable jury damages awards have become a *bete noire* of civil litigation and a putative cause of lost American competitiveness in the international market.²⁷⁰ If jurors were apprised of final offers, it is not a giant leap of logic to infer that jury awards would become more predictable, inducing more settlements and lower transaction costs. On these goals, there should be harmony.

A constant tug and pull characterizes the relationship between the social sciences and the law. Economic vested interests in the status quo induce attorney conservatism on the one hand. On the other, social scientists urge the courts to modify established trial procedure to comport with the ever-expanding body of behavioral research. Typical is one social science researcher's admonition: "[D]ecisions about blindfolding would be better informed by systematic empirical evidence than by the untested behavioral assumptions that have traditionally undergirded decisions about whether to deny jurors information."²⁷¹

Clearly, the need for consistency and predictability in trial procedure militates against quick change. By the same token, some responsiveness is necessary when unequivocal and consistent findings of jury behavior patterns contradict the assumptions behind trial procedure. In their book, *Inside the Jury*, Reed Hastie, Steven Penrod and Nancy Pennington weigh the opposing arguments regarding the historical resistance of procedural law toward change. They recommend a balanced view: relax the barriers, but with due caution.²⁷²

²⁷⁰ See, e.g., PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 3 (1991) (outlining 50 specific changes to be made in civil justice system). The recent survey found that: (a) 47% of U.S. manufacturers withdrew products from the market; (b) 25% of U.S. manufacturers discontinued some form of product research due to potential liability concerns; and (c) approximately 15% of U.S. companies laid off workers as a direct result of products liability experience. *Id.*

²⁷¹ Diamond et al., *supra* note 39, at 249.

²⁷² HASTIE ET AL. *supra* note 255 at 239-40.

Legal institutions are conservative. They exhibit great resistance to new findings and new procedures. Resistance is greatest when new concepts challenge traditional assumptions or methods. Modern behavioral science creates many such threats to fundamental assumptions. New conceptions of motivation and preference replace the concept of free will; new empirical methods for determining truth challenge traditional rational analysis and trial procedures; and new trial

Regarding the admission of evidence, the German method of “free proof” is instructive. Under this approach, the court must admit virtually all relevant information until satisfied of the truth or falsity of a propounded position. When evidence is questionable or potentially prejudicial, the court accords it a commensurately low weight rather than excluding it.²⁷³ German courts, therefore, do not exclude hearsay — the kind of information individuals, businesses and governments use daily to make decisions.

One variation of the German approach would be to admit heretofore excluded evidence but with an instruction to the jury to disregard it or use it for a limited purpose. Studies show, however, that such an instruction is usually ignored.²⁷⁴ A more promising alternative is for the judge to *suggest* to jurors that they ignore the evidence, coupled with an explanation of the rationale for the suggestion.²⁷⁵ This has a threefold advantage. First, it precludes the exclusion of evidence from corrupting jury decision making. Second, it treats the jury with respect for its judgment, a respect consonant with the paradigm of rational jury decision making. Third, by explaining why certain evidence should not be considered, judges are less likely to induce jurors to feel resentment toward the judicial system, as the procedure appears less arbitrary.²⁷⁶

Given the questionable bases for some of the major exclusionary rules, it would be a salutary exercise to review the

tactics extend the adversarial competition to jury selection and beyond. However, the conservatism of legal institutions is sensible. . . . Uncritical acceptance of social science findings and theories is a mistake. . . .

In many instances the adversarial system shields the legal process of determining truth from the influence of equivocal or weak scientific procedures, such as clinical analysis of insanity or polygraphic lie detection. However, the acceptance of unequivocal, valid scientific results is also frustratingly slow. . . . [L]egal scholars, practitioners, and policy makers should be more open to the findings of behavioral science. Just as with the laws of society, those who ignore the laws of science will be controlled by those who understand them.

Id.

²⁷³ See DAMAŠKA, *supra* note 191, at 55 (stating that admitted evidence is subject to appeals for “factual error”).

²⁷⁴ See Diamond et al., *supra* note 39, at 262 (discussing study in which questionable evidence did have an effect on jury behavior).

²⁷⁵ Eichhorn, *supra* note 268, at 353.

²⁷⁶ *Id.*

antediluvian assumptions upon which each is based. In conducting the review, two key questions to pose are these: Are the assumptions validated by research? If not, do the continental courts provide a reasonable alternative? For example, the presumed juror incompetence regarding hearsay defies empirical verification. Bentham called on judicial rulemakers to test whether hearsay actually deceived jurors.²⁷⁷ Until recently, no researchers embraced his challenge. But new research findings raise doubts about the validity of the presumption. Research subjects properly discounted hearsay testimony.²⁷⁸ These results strongly favor eliminating or modifying the hearsay exclusion.

We should consider adopting Bentham's proposed liberalization of the rule: Hearsay should be excluded only when more direct proof is available.²⁷⁹ Bentham's proposal was actually incorporated into the Model Code of Evidence,²⁸⁰ and has scholarly as well as empirical support. Alschuler decries our retention of the hearsay rule: "[T]he common law's system of proof remains essentially intact — a circumstance that may reflect the self-interest of lawyers and their deep attachment to the familiar, for rules of evidence make only a little more sense today than they did in 1800."²⁸¹

Unlike American courts, continental courts make no automatic exclusion of the fruits of an illegal search.²⁸² Our exclusionary rule is one intended as a police control mechanism, not a bar of unreliable evidence. In implementing it, our system does not weigh the loss of probative evidence against the extent of official lawlessness. Continental courts choose a more moderate path by weighing the seriousness of the offense against the

²⁷⁷ 3 BENTHAM, *supra* note 48, at 539.

²⁷⁸ See Stephan Landsman & Richard Rakos, *Research Essay: A Preliminary Empirical Inquiry Concerning the Prohibition of Hearsay Evidence in American Courts*, 15 LAW & PSYCHOL. REV. 72-77 (1991) (describing study undertaken to test whether hearsay evidence can be properly discounted by jurors); Peter Miene et al., *The Evaluation of Hearsay Evidence: A Social Psychological Approach*, in INDIVIDUAL AND GROUP DECISION MAKING 151, 161 (N. John Castellan, Jr. ed., 1993) (citing authors' study indicating that mock juror subjects were not influenced in their verdict by hearsay evidence).

²⁷⁹ 3 BENTHAM, *supra* note 48, at 407-10.

²⁸⁰ MODEL EVID. CODE 503(a) (1942).

²⁸¹ Alschuler, *supra* note 210, at 1020-21.

²⁸² *Id.* at 992-93.

strength of the police's suspicion.²⁸³ The continental practice presents a model for emulation.

The adoption of foreign rules inducing criminal defendants to make pretrial statements and to testify at trial would increase the amount of relevant evidence viewed by the factfinder. Our rules discourage the defendant's statements, thereby precluding evidence from the most important witness. The continental and English practices supply two desirable alternatives to our rules. After a Miranda-type warning, the continental criminal defendant's refusal to speak is made known to the court, although the continental court is not supposed to draw an inference of guilt from the defendant's silence.²⁸⁴ English procedure induces the defendant's testimony by providing that if the defendant testifies, it will usually not open the defendant's testimony to impeachment by evidence of prior convictions.²⁸⁵ In the search for truth, it is usually better to hear defendants' testimonies than to hear of their prior convictions. This is especially so given the historic difficulty jurors have in applying the apposite evidentiary rule: consider prior convictions only as to the defendant's credibility, not his culpability for the crime charged.²⁸⁶

C. Jury Composition

A distinct but compatible approach to enhancing jury factfinding competence is to improve the quality of juries. Several means are available. One is to eliminate the many hardship

²⁸³ *Id.* at 977-78.

²⁸⁴ See Damaška, *supra* note 190, at 527 (discussing how continental defendants must testify although they can refuse to answer some or all questions, but generally do not remain silent for fear unfavorable inference will be drawn).

²⁸⁵ In England, however, the judge may invite the jury to give less weight to an account the defendant gives for the first time at trial, and to give special weight to prosecution evidence that the defendant failed to answer questions before; i.e., jurors can draw adverse inferences from the defendant's silence. While the proscription against adverse inferences applies in continental courts, there is no principle analogous to the Anglo-American privilege not to take the stand. Thus the defendant intent on exercising the privilege to remain silent might have to do so in the face of detailed questions concerning a criminal accusation. This would appear unnatural and incriminating whatever the legal rules. See Alschuler, *supra* note 210, at 976 n.220. As with the English practice, this also acts as a disincentive to silence.

²⁸⁶ FED. R. EVID. 404(b).

exemptions from jury duty routinely afforded professionals and other well-educated individuals in half the states.²⁸⁷ Fewer professional exemptions would fortify and diversify juries. States can do much to soften the economic hardship of jury service upon which the exemptions are based. (Greater use of the issue-separated trial and prerecorded videotaped testimony could also decrease jury service time, and with it, the basis for the hardship exemption.) They could limit the term of service, pay more, or require employers to pay employees the first few days of jury duty.²⁸⁸ A logical complement would be more rigorous enforcement of jury summonses. Stepped-up and consistent enforcement of penalties for ignoring jury summonses is necessary to combat the jury scofflaw culture. The national no-show rate is about fifty-five percent.²⁸⁹

Once the quality of the jury pool is enhanced by minimizing hardship exemptions, several additional measures would improve the factfinding competence of the final panels by upgrading their composition. Specifically, we could eliminate peremptory challenges and consider specially qualified juries and mixed courts. These proposals are discussed below.

1. Peremptory Challenges

The negative impact of peremptory challenges on the quality of juries and jury factfinding was discussed earlier.²⁹⁰ Eliminating peremptory challenges would rectify this problem. It would also ameliorate the effects of disparity in the jury selection skills of opposing attorneys.²⁹¹

²⁸⁷ ADLER, *supra* note 147, at 219.

²⁸⁸ Massachusetts, Colorado and Connecticut require employers to pay jurors for the first three days of service, and then the court pays \$50 per day. See CALIFORNIA STATE SENATE JUDICIARY COMMITTEE, REPORT ON JURY REFORM 10 (1995).

²⁸⁹ ADLER, *supra* note 147, at 220.

²⁹⁰ See *supra* notes 147-48 and accompanying text (discussing peremptory challenges used to select incompetent juries).

²⁹¹ Disparities in the attorneys' jury selection skills probably skew the composition of the final jury. A study attempting to gauge the effect of peremptory challenges found considerable variability of performance among attorneys. The study's authors claim that "[l]awyers apparently do win some of their cases . . . during or at least with the help of voir dire, . . . thereby frustrating the law's expectation that the adversary allocation of challenges will benefit both sides equally." Hans Zeisel & Shari Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491,

2. Special Juries

Factfinding in jury trials can also be improved where most needed by using either specially qualified jurors or expert factfinders who report to the jury. In complex litigation, for example, the jury could be limited to individuals with superior potential for comprehending the evidence and instructions. We could authorize the judge or the parties to select from the venire those with the most relevant experience or education, subject only to challenges for cause. Or the judge could be authorized to establish minimum standards, e.g., a college degree, for service on the case.²⁹²

519, 529 (1978).

The most recent voir dire controversy surrounds the use of so-called "scientific" or "systematic" jury selection. Systematic jury selection began in 1971 with the successful defense of a group of Vietnam War protesters. Federal prosecutors selected the trial site because it was a politically conservative area. The defense counsel surveyed over 1,000 local residents. Based on the results, they fashioned demographic profiles of individuals most likely to be sympathetic or unsympathetic to the defendants. Armed with this data, the defense selected its jury. Despite the investment of considerable time and money by the prosecution, it ended with a hung jury. See generally SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL* 57 (1988) (discussing Harrisburg Seven trial). Thereafter, systematic jury selection mushroomed into a multimillion dollar industry.

Notwithstanding the ostensible successes of systematic jury selection, we cannot categorically assume its efficacy. But theory and research strongly suggest its superiority over traditional jury selection methodology. Intuition and stereotypical attitudes dominate the latter. Typical are Clarence Darrow's recommendations for jury shopping:

I try to get a jury with little education but much human emotion. The Irish are always the best jurymen for the defense. I don't want a Scotchman, for he has too little human feeling; I don't want a Scandinavian, for he has too strong a respect for law as law. In general, I don't want a religious person, for he believes in sin and punishment.

H. SUTHERLAND & D.R. CRESSEY, *PRINCIPLES OF CRIMINOLOGY* 431 (8th ed. 1970).

On the other hand, the social science approach has clear advantages. It is more case-specific; it uses multiple rating factors which must agree before inferences are drawn; and the systematic approach constitutes a team effort, with the correlated benefits of consultation and feedback.

However, systematic jury selection raises issues of fairness. Specialized jury research is an advantage affordable only by the wealthy, undermining the very foundation of a fair trial. The resulting competitive disadvantages of poorer litigants may have a chilling effect on the exercise of their constitutional rights.

²⁹² See Dan Drazen, *The Case for Special Juries in Toxic Tort Litigation*, 72 *JUDICATURE* 292, 295-98 (1989) (discussing whether toxic tort litigation is too complex for lay jurors); Peter Huber, *Junk Science and the Jury*, 1990 *U. CHI. LEGAL F.* 273, 301-02 (discussing removal of scientific decisions from jurors to reduce junk science verdicts); William V. Luneberg & Mark A. Nordenberg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for*

Alternatively, greater use could be made of court-appointed special masters for factfinding in complex civil cases. Some have even suggested establishment of a "science court."²⁹³ Actually a board of scientists, the science court would be used for certain kinds of scientific factfinding. Expert case managers from each side of a controversy would argue their positions before a three-member board. The board would supplement, not replace, the jury. The board's report would be made to the court.²⁹⁴

The objection to special masters or any specially selected external expert body is that it removes factfinding from the jury. The specially qualified jury addresses that objection; even specially qualified jurors would retain the random process by which the venire is selected. Such random selection is intended to provide a representative cross-section of the community in the venire. No jury selection statute or court decision prohibits modification from the venire so selected.²⁹⁵

But is this expertise necessary in complex cases? A majority of judges in the Harris survey thought so. They reached these agreements regarding complex civil cases:

- a. A serious study should be made of alternatives to jury trial.²⁹⁶
- b. Jurors need more guidance than they usually get.²⁹⁷
- c. It is difficult for jurors with differing educational levels to be effective.²⁹⁸
- d. *Trial before a panel of experts would be preferable to jury trial.*²⁹⁹

Coping With the Complexities of Modern Civil Litigation, 67 VA. L. REV. 887, 899-916 (1981) (discussing the use of special juries in complex civil cases).

²⁹³ Howard T. Markey, *A Forum for Technocracy: A Report on the Science Court Proposal*, 60 JUDICATURE 365, 365-71 (1977).

²⁹⁴ *Id.* at 367.

²⁹⁵ The constitutional issues which will arise as to the allowable range of judicial action under the Sixth and Seventh Amendments are beyond the scope of this Article. For federal cases, the cross-sectional requirement is in the Jury Selection and Service Act of 1968, Pub. L. No. 90-274, 82 Stat. 53 (1968) (codified at 28 U.S.C. §§ 1861-74). In 1975, the Supreme Court extended the cross-sectional requirement to state juries in *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975).

²⁹⁶ Louis Harris & Associates, *supra* note 241, at 746.

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 747.

²⁹⁹ *Id.* at 747-48. A substantial minority of the federal judges (42%) and state judges (34%) felt that in complex cases there should be a minimum level of juror education to avoid those who cannot understand the case. *Id.* at 747.

Using specially qualified juries or factfinding bodies will undoubtedly strike some as tantamount to defiling a sacrosanct American icon. Yet a great deal of distrust of the jury coexists with its veneration. This is an explainable paradox. Jury popularity surged in the colonies, where the jury was regarded as a check on the authority of royal English judges. The notion of the jury as a redoubt against an arbitrary and overreaching government persists, despite the advent of representative government and all the other protections we enjoy under the Constitution. Even so, we shore up its presumed shortcomings with numerous "fixes": excluding relevant evidence that the jury cannot be trusted to accurately process and immunizing the jury from any obligation to account for its decisions. Indeed, if juries were required to explain their decisions, they might quickly lose their legitimacy and support.³⁰⁰

3. Mixed Court

The problems of the jury are many. But its underlying premise, lay participation in the administration of trial justice, need not be abandoned. A number of inquisitorial system countries employ a variant of the jury called a mixed court. In continental Europe, it is felt that factfinding is too important to entrust to a *fully* lay jury;³⁰¹ thus lay and professional judges sit together as a single panel in cases of serious crimes and certain civil disputes.³⁰²

The mixed court holds many potential benefits for use in the United States. One is speedier trials. Inquisitorial trials are considerably shorter than their adversarial counterparts.³⁰³ The rea-

³⁰⁰ Judge Learned Hand mused that we "trust [jurors] so reverently as we do, and still to surround them with restrictions which if they have any rational validity whatever, depend upon distrust." Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, in 3 LECTURES ON LEGAL TOPICS 89, 101 (1926).

³⁰¹ See Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 491 (1975) (explaining continental misgivings regarding participation of lay people in administration of justice).

³⁰² See *id.* at 492-93 (explaining use of mixed bench of professional and lay judges in criminal trials).

³⁰³ Cf. THE NATIONAL CENTER FOR STATE COURTS, ON TRIAL: THE LENGTH OF CIVIL AND CRIMINAL TRIALS 8-10 (1988) (presenting data that in American adversary system non-jury trials are shorter than jury trials).

son is clear. Jury selection in the United States usually takes more time than do entire trials elsewhere in the world.³⁰⁴ If we adopted the mixed court, time consuming jury selection would be unnecessary for the professional component of the court. Also obviated would be elaborate jury instructions.

Use of the mixed court would expand the scope of admissible evidence. Because it is assumed that the professional judges will caution their lay counterparts against wrongful inferences and other misuses of evidence, far less relevant evidence need be excluded. During deliberations, the professional judges can also advise the lay judges against consideration of extra-legal factors. Courts would enjoy a corollary saving of time otherwise spent arguing about exclusions.

Mixed courts also issue written, reasoned opinions explaining their findings of fact and law. This requirement is absent under our general verdict system. If the written statements of findings were required by American courts, two consequences would follow: First, it would expose court judgments to deeper-reaching appellate review.³⁰⁵ A second consequence is more controversial. It would greatly restrict, if not virtually eliminate, jury nullification of the law.

Those opposing an American experiment with the mixed court may fear that professional judges will dominate their lay counterparts. Experience has not validated this concern. The authors of an extensive study of the German mixed court in criminal cases concluded that lay judges “exercise independent judgment . . . and do serve a societal purpose comparable to that of American juries — namely, injecting the values, experiences, and judgments of the lay community into the adjudication process.”³⁰⁶

Not the least of its virtues is that the mixed court’s lay judges fully participate in criminal sentencing which, except for capital cases, is relatively rare in common law countries. This practice comes closer to serving our policy of lay participation in the

³⁰⁴ Alschuler, *supra* note 210, at 999.

³⁰⁵ John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?* 1981 AM. B. FOUND. RES. J. 195, 203.

³⁰⁶ Gerhard Casper & Hans Zeisel, *Lay Judges in German Criminal Courts*, 1 J. LEGAL STUD. 189-91 (1972). *But cf.* Damaška, *supra* note 301, at 493 (stating that studies suggest limited influence of lay judges on decision making in mixed panels).

administration of justice. In 1977, former American Bar Association president Justin Stanley suggested experimenting with the continental mixed court.³⁰⁷ The time may be ripe to take up the cudgel for this reform. Roughly one-third of the California judicial survey respondents said they would be willing to experiment with the mixed court.³⁰⁸

D. Jury Deliberations and Decision Making

1. A Suggested Deliberations Model

One suggestion to improve the jury's truth seeking efficacy which could easily be imparted (during juror orientation or during the judge's instructions) is the ideal method of deliberations. Contemplate the situation jurors confront when they first begin jury deliberations. Twelve people who have never met before the trial are sequestered in a room. Most have no comparable experience at group decision making. Nevertheless, they must collectively decide on matters often complex and weighty; sometimes on life or death. For this task — possibly the most consequential of their lives — they receive absolutely no guidance from the vast majority of courts.

Yet there is clearly an optimal model for jury deliberations; one that conduces the type of deliberations contemplated by the legal paradigm. Jury researcher Reid Hastie found that jurors tend to adopt either of two distinct deliberation structuring models or styles. One is "evidence-driven," the other "verdict-driven."³⁰⁹ Hastie found that evidence-driven juries begin their deliberations with general discussions about the case.³¹⁰ They tend to engage each other cooperatively and open-mindedly about accepting new points of view regarding the evidence.³¹¹ The process is more inquisitorial than adversarial in appearance. Balloting functions mainly to confirm agreements already reached informally.³¹²

³⁰⁷ Justin Stanley, *The Resolution of Minor Disputes and the Seventh Amendment*, 60 MARQ. L. REV. 963 (1977).

³⁰⁸ Strier, *supra* note 138, at 75.

³⁰⁹ HASTIE ET AL., *supra* note 255, at 163-65.

³¹⁰ *Id.* at 163.

³¹¹ *Id.*

³¹² *Id.* at 163-64.

In stark contrast, the verdict-driven jury begins with a vote — usually by open ballot.³¹³ This profoundly affects the dynamics of deliberation. Having taken a position, jurors become more close-minded and militant in their arguments. The search for truth suffers accordingly. Battle lines are drawn and the deliberations become distinctly adversarial. Jurors act like advocates instead of impartial factfinders, referring only to the evidence that supports their chosen verdict. Evidence analysis and deliberation time shrink decidedly. There is less discussion of the applicable law.³¹⁴ In addition to rigidifying positions, early ballots tend to deter jurors with nonassertive personalities from contributing.³¹⁵

Thus an adversarial setting is suboptimal for jury deliberations as well as dispute resolution. Indeed, the weakness of adversarial, verdict-driven deliberations is a metaphor for the deficiencies of the adversary system. Some courts recognize this and have placards in their jury rooms advising the panel to discuss the evidence before voting.³¹⁶ But this is a rare exception to the customary hands-off approach to deliberations. Ever fearful of being viewed as interfering with the jury, judges typically remain silent. Given the virtues of the evidence-driven model, this should change. The justice system would not fall from a mere *suggestion* to the jurors that they defer their initial vote until they have had the opportunity to discuss the issues without commitment to a position.³¹⁷

³¹³ *Id.* at 163.

³¹⁴ *Id.* at 165.

³¹⁵ See Charles H. Hawkins, *Interaction Rate of Jurors Aligned in Factions*, 27 AM. SOC. REV. 689, 689-91 (1962) (implying that early balloting may lead to factions, lessening discussion). Secret ballots would lessen the coercion. However, there is no agreement on how often juries employ the secret ballot. Moreover, the secret ballot tends to be abandoned when there is continuing disagreement. *Id.*

³¹⁶ GUNTHER, *supra* note 46, at 85.

³¹⁷ A requirement that jurors hear fully what every one of their fellow jurors had to say before taking a vote would be preferable. This would include proposed questions to the court. Any breach of this protocol would be grounds for dismissal. England adopted a comparable rule in 1967.

2. Special Verdict Forms

A direct way for judges to control jury incompetence, particularly in complex cases, is to make more use of special verdict forms. Either the special verdict or the general verdict plus interrogatories would reveal some obvious errors in jury factfinding and deliberation.³¹⁸ Using the special verdict, the jury makes specific findings of fact to which the judge applies the law in rendering a verdict. This has clear advantages. By allowing the judge to monitor the jury, its inconsistent findings and consideration of irrelevant factors become conspicuous. It is therefore more scientific than the commonly used general verdict and would lead to fewer appellate reversals. It also saves time. Judges are relieved of delivering lengthy and complex instructions on legal doctrine. Similarly obviated is the need for the jury to ponder the meaning and application of legal jargon and concepts. Instead, the jury confines itself to that for which it is better suited: resolution of factual issues.

We can reasonably expect the jury to perform creditably if we limit it to such jobs as determining whether the plaintiff purchased the defendant's product and used it as specified. It is an entirely different prospect if we add to that task a crash course on products liability law. The more legally complicated the case, the more improbable becomes instant juror mastery in applying the law.

Perhaps the most judicious alternative to the general verdict is another special verdict form: the general verdict plus interrogatories. Under this procedure, the judge requests responses to specific questions to see whether the verdict rendered by the jury is consistent with its findings of fact. If not, the judge has several remedies. Federal rules permit the judge to order a new trial, return the case to the jury for further consideration, or enter a verdict consistent with the specific answers, even if contrary to the jury's verdict.³¹⁹

In a recent survey of 160 actual trials in thirty-three states, the use of the special verdict was found consistently beneficial.³²⁰

³¹⁸ Both are authorized under FED. R. CIV. P. 49.

³¹⁹ FED. R. CIV. P. 49(b).

³²⁰ Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and*

When special verdict forms were used, the jurors reported feeling more informed, better satisfied, and more confident that their verdict reflected a proper understanding of the judge's instructions.³²¹ Furthermore, the jurors found special verdict forms most helpful in dealing with large quantities of information.³²² The California judicial survey respondents also favored special verdict forms. Sixty-four percent thought courts should make greater use of them.³²³

E. Judicial Controls

1. Judicial Questioning

Several potential advantages flow from judicial questioning of witnesses. Jurors gain the benefit of informative and clarifying responses to questions not asked by the attorneys. Judicial questioning also reduces the influence of lawyer theatrics and dirty tricks; it tempers the skewing effect which occurs when the advocacy skills of opposing counsel are decisively mismatched. In many inquisitorial system countries, a common justification given for increasing the authority of the judge is the need to equalize the parties.³²⁴ In the Los Angeles survey, two-fifths of the respondents perceived that a mismatch in opposing attorney skills was anywhere from "partly" to "completely" responsible for a "wrong" decision by the jury with respect to the verdict or size of the award.³²⁵ The most common suggestion to counteract the effects of mismatched attorney skills was to "allow the judge to ask supplemental questions."³²⁶

To gain the benefits of independent judicial questioning during trial, we need not replace purely adversarial evidence-gathering with the judge-dominated model of the inquisitorial system. An acceptable middle ground is the scheme employed during our voir dire, where questioning is frequently shared by judge

Its Effects, 18 LAW & HUM. BEHAV. 29, 50 (1994).

³²¹ *Id.*

³²² *Id.*

³²³ Strier, *supra* note 138, at 69.

³²⁴ Neil Brooks, *The Judge and the Adversary System*, in THE CANADIAN JUDICIARY 89, 110-11 (Allen M. Linden ed., 1976).

³²⁵ Strier, *supra* note 208, at 80.

³²⁶ *Id.*

and attorneys.³²⁷ The voir dire model of shared control can be adapted to evidence gathering. That is, the judge might conduct the initial interrogation, after which the attorneys would be free to probe for additional details. But the judge could always ask supplemental questions which an incompetent or marginally competent attorney neglects to pose. The occasional need for this judicial "safety net" escapes few who are familiar with adversary system trials. Sixty-one percent of the California judicial survey respondents favored judicial questioning when attorneys failed to pose important questions.³²⁸

The evidence-taking scheme proposed here substantially mitigates attorney-dictated trial justice by permitting questions from three distinct sources — judges, attorneys and jurors — instead of one. In a case with a twelve-person jury, this means questions could come from fifteen people (twelve jurors, two attorneys and the judge) instead of just the two attorneys. Anything more than an occasional question from the trial judge, however, may be perceived as a dangerous deviation from current trial procedure (and a commensurate threat to the attorneys' prerogatives).

Let us then address the paramount expressed reservation: *When judges make such a radical departure from their traditionally passive role, will they not lose their impartiality?* The notion that third party adjudicators must remain near-totally passive in order to retain their impartiality is peculiar to current American trial theory. Foreign trial systems and domestic ADR mechanisms clearly refute the passive judge thesis. American common law trials as recently as the late eighteenth century were characterized by an active trial judge. In fact, the judge's role was more analogous to that of the modern inquisitorial system judge than that of its adversary system counterpart. The erosion of the trial judge's role roughly corresponds with the expansion of the

³²⁷ According to figures compiled in 1980 by the National Center for State Courts, the breakdown was as follows: In criminal cases, 19 states gave the attorneys primary control subject to judicial control only for abuse; 12 states gave the judge unfettered control; and 19 states divided control between judge and attorneys. In civil cases, 21 states had attorney-controlled voir dire, 17 gave complete control to the judge and 12 used mixed control. John Riley, *Voir Dire Debate Escalates Over Lawyers' Participation*, NAT'L L.J., Dec. 24, 1984, at 1, 23-24.

³²⁸ Strier, *supra* note 138, at 72-73.

attorney's activities and has nothing to do with perceived unfairness.³²⁹ In an inquisitorial trial, it is unheard-of for the judge to refrain from asking questions out of fear of self-corruption. No scientific findings suggest that inquiry intended merely to clarify induces a fatal loss of discipline. The same conclusion follows in jury trials. As the Harris survey judges suggest, jurors need judicial guidance in factfinding, particularly in complex trials.

If either attorney objected to the judge's enhanced evidence-taking responsibility, one or more neutral investigators appointed by the court and approved by the attorneys could review the available evidence and conduct the court's questioning during the trial.³³⁰ Here again, the inquisitorial model is instructive. Many continental cases have a three judge panel, but only the presiding judge conducts the investigation. This dilutes the effect of any bias the presiding judge may acquire by virtue of having an investigative role.

2. Court-Called Expert Witnesses

No question exists as to the judge's authority to call expert witnesses. According to an advisory committee note to the Federal Rules of Evidence, "The inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned."³³¹ Because they are called and paid by the court, such witnesses are neutral; a feature of inestimable value in a testifying expert.

Neutral expert testimony would counteract many of the problems posed by the testimonies of partisan experts.³³² Although American judges could make greater use of court-appointed experts, they rarely exercise their prerogative to do so.³³³ A

³²⁹ John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 274-77 (1978).

³³⁰ Likewise, if the judge believed greater involvement would compromise her neutrality, the judge could order the court's interrogation be done by the neutral investigator.

³³¹ FED. R. EVID. 706 (advisory committee note). Judges should select acknowledged experts holding views representative of the scientific community.

³³² See discussion *supra* Part I.B.4 (discussing problems with partisan expert testimony).

³³³ THE EVOLVING ROLE OF STATISTICAL ASSESSMENTS AS EVIDENCE IN THE COURTS 26-34 (S. Feinberg ed., 1989); T. WILLGING, COURT-APPOINTED EXPERTS 1-4 (Federal Judicial Center, 1986).

continuing curiosity is why they do not. We can speculate generally that this reluctance is at least partly due to the judiciary's traditional concern for retaining the appearance of impartiality and the cognate fear of unduly influencing the jury.

The main concern is that court-appointed experts would be too influential. That is, jurors may give more weight to the testimony of a court-appointed expert than an expert hired by one of the parties by dint of the fact that the former is chosen by the court. If so, there may be a corollary lowering of juror motivation to analyze the content of the partisan expert's testimony. Yet none of these concerns were confirmed in a recent study.³³⁴

If judges exercised their authority to call expert witnesses, jurors could be spared the exasperation of the notorious "battle of the experts." The impartiality and competence of the court-appointed expert would assist the jury in reaching an informed verdict. This impartiality would foster settlements by tempering the tendency of expert witnesses to slant their testimonies. To satisfy the concern that court-appointed experts would be too influential, judges could admonish jurors not to presume court endorsement of the court-appointed expert's testimony.

Here again, the inquisitorial system practice is educative. Continental courts rely almost exclusively on court-called experts. The written opinion of the court's expert is circulated to the attorneys. Their responsive comments may lead the court either to get the opinion of a second expert or hold a hearing where the attorneys can interrogate the first expert. Witness expertise is thereby kept impartial, but the opportunity for attorney confrontation and rebuttal is maintained to protect against error or caprice.³³⁵ In complex civil cases, a majority of the Harris survey judges favored the use of neutral expert witnesses in addition to those called by the parties.³³⁶ Fifty-six percent of the California judicial survey respondents also favored greater use of neutral expert witnesses.³³⁷

³³⁴ Nancy J. Brekke et al., *Of Juries and Court-Appointed Experts: The Impact of Nonadversarial Versus Adversarial Expert Testimony*, 15 LAW & HUM. BEHAV. 451, 468-69 (1991).

³³⁵ Langbein, *supra* note 199, at 835-39.

³³⁶ Louis Harris & Associates, *supra* note 241, at 775.

³³⁷ Strier, *supra* note 138, at 74.

3. Limits on Witness Coaching

Perhaps no other practice of the adversarial trial impairs the search for truth more than witness coaching. It would betray great naivete to deny that attorneys routinely rehearse and stage the testimonies of their witnesses. Some of the dangers of coaching have already been mentioned: Attorneys can suggest “better” answers that insidiously corrupt the truth and attorneys can orchestrate a common story among the client and all friendly witnesses.³³⁸ Rehearsed testimony profoundly affects jurors by inappropriately enhancing the coached witness’s credibility. Noted forensic psychologist Elizabeth Loftus writes that the more a witness is rehearsed, the more confident and detailed she becomes in her recollections.³³⁹ And the more confidence displayed by the witness, the more accurate juries treat her testimony as being, notwithstanding the absence of any relationship between confidence and accuracy.³⁴⁰

A related phenomenon occurs with regard to *consistency* of recollection. Rehearsing begets consistent recollection. The more potential witnesses are questioned and rehearsed on a past event, the more they dredge up details — often inaccurately — to fill in the blank spots of their memory. They “remember” details which reinforce their general recollection. The resulting consistency of recollection also unduly influences jurors. Contrary to popular belief, studies show that witnesses who change their initial recollection are generally *more* accurate than those who do not.³⁴¹

³³⁸ The adversarial palliative to witness-coaching — cross-examination — is often nugatory. Even proponents of the adversary system concede that cross-examination may be inadequate to undo the effects of coaching. See, e.g., Stephan Landsman, *Reforming the Adversary Procedure: A Proposal Concerning the Psychology of Memory and the Testimony of Disinterested Witnesses*, 45 U. PITT. L. REV. 547, 570-71 (1984). Moreover, cross-examination may be the source of fresh distortion.

³³⁹ Elizabeth Loftus, *The Truth, the Whole Truth and Nothing but the Truth?*, L.A. TIMES, August 25, 1995, at B9.

³⁴⁰ Gary L. Wells & Donna M. Murray *Eyewitness Confidence*, in EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 155, 159-65 (Gary L. Wells & Elizabeth F. Loftus eds., 1984); Kenneth Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything from Their Relationship?* 4 LAW & HUM. BEHAV. 243, 257-58 (1980).

³⁴¹ James Marshall et al., *Effects of Kind of Question and Atmosphere of Interrogation on Accuracy and Completeness of Testimony*, 84 HARV. L. REV. 1620, 1637 (1971).

Unlike other aspects of the system which impair the courtroom search for truth, identifying the coaching problem does not suggest a viable solution. The English and inquisitorial trial systems reveal a virtual absence of coaching, but neither presents an importable model. In England, the barrister who tries the case does not meet with clients or witnesses before the trial. Under inquisitorial system procedure, attorneys and witnesses rarely meet before the trial; if they do, the court assigns a low probative value to their testimony. In the United States, eliminating pretrial contact between attorney and witnesses, including the client, is not only impractical but probably violative of a client's right to effective assistance of counsel.

A more moderate proposal, however, addresses some of the aforementioned problems of witness coaching without impinging upon attorney-client relationships. In the eyes of jurors, a party's testimony is immeasurably reinforced by corroborating witnesses, particularly disinterested witnesses. Therefore, reasonable limitations on pretrial indoctrination of disinterested witnesses would bear directly on the trial attorney's coaching scheme without violating the sanctity of the attorney-client relationship. Specifically, all attorney contacts with any disinterested potential witness could be recorded, with opportunity provided for opposing counsel to be present. Such a limited restriction on coaching would logically conduce a more truthful trial.

4. Limits on Interrogation

Once in trial, attorneys with weak cases often attempt to compensate by inundating the court with marginally relevant or uncontested evidence. Sometimes referred to as "siege litigation," this practice prolongs litigation, needlessly confusing and tiring jurors while limiting court access for more meritorious claims. Seeking attorney self-restraint would be folly. Only judicial intervention can rectify the problem.³⁴²

³⁴² As the U.S. District Court for the Eastern District of Kentucky observed, "If [attorneys] believe [they] can win cases by proliferating the evidence of the favorable, but relatively uncontested matters so that the weaker aspects of the case will be camouflaged, it is asking too much of our fallen nature to expect [them] voluntarily to do otherwise." Howard Cabot, *Judges Can Break the Siege Through Rule 611*, L.A. DAILY J., Sept. 12, 1991, at 7.

We can reduce trial delay and simplify jury factfinding by having the court set apt limits on the number of witnesses and the time spent on their interrogation. Courts experimenting with this have had little difficulty in obtaining compliance. Limiting the number of expert witnesses is especially useful. Interrogation limits comport with the objectives of the Civil Justice Reform Act of 1990 in the federal courts.³⁴³ Authority for this kind of judicial intervention is also found in Rule 611 of the Federal Rules of Evidence and similar state rules.³⁴⁴ It provides that “[t]he court *shall* exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as . . . (2) to avoid needless consumption of time”³⁴⁵ The word “shall” arguably connotes a duty to set appropriate time limits to trials. More generally, Rule 403 sanctions the exclusion of relevant evidence to avoid “undue delay, waste of time, or needless presentation of cumulative evidence.”³⁴⁶ Similar authority is found in state rules. Under the California Evidence Code, for example, the judge can “exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . necessitate undue consumption of time.”³⁴⁷

Given the potential benefits, judges should not shy from exercising their authority. By setting apt time limits, judges force attorneys to prioritize their evidence. The results: cases become simpler; jury factfinding becomes more tolerable; and court backlog is eased. A rule like 611 is, as Justice Holmes once commented, a mere concession to the shortness of life.³⁴⁸

5. Summarizing and Commenting Upon the Evidence

In England, judges comment upon the evidence and summarize the issues and facts after the final arguments by the attorneys. Judges also suggest the proper inferences for the jury to

³⁴³ 28 U.S.C. §§ 471-75 (1994).

³⁴⁴ Howard Cabot, *Breaking the Siege: Protecting the System Through Rule 611*, ARIZ. ATTORNEY, May 1991, at 18.

³⁴⁵ FED. R. EVID. 611(a) (emphasis added).

³⁴⁶ FED. R. EVID. 403.

³⁴⁷ CAL. EVID. CODE § 352 (West 1995).

³⁴⁸ See Cabot, *supra* note 342, at 7 (pointing out that human nature necessitates judicial limitations on quantity of evidence permitted).

draw.³⁴⁹ The presiding judge in the inquisitorial court also summarizes the evidence in the dossier before deliberations.³⁵⁰ American judges generally do not summarize or comment upon the evidence, despite comparable authority in the federal courts and many state courts.³⁵¹ Yet such commentary affords the opportunity to rescue the case from the false gloss of powerful advocates. Moreover, it is particularly helpful to jurors in long and complex cases. Judge Schwarzer advocates judicial commenting whenever explanation of complex evidence will ensure its fair consideration.³⁵² Schwarzer's only admonition is that the judge does it in a way that does not improperly influence the jury.³⁵³

The judge's evidence summary and commentary is most usefully given with the instructions. If so, the judge must carefully distinguish for the jurors evidence interpretation from legal instructions. Jurors are sworn to follow the latter, whereas they are free to draw their own conclusions regarding the differing evidentiary analyses of the judge and attorneys.

CONCLUSION

The substantial truth-seeking deficiencies of current trial procedure represent a failure of the essential purpose of the trial. Nevertheless, growing public awareness of these problems impels the movement for reform. Consequently, trial procedure policymakers may soon arrive at a crossroads. They can shed their traditional reticence toward change and adopt or experiment with thoughtful and worthwhile remedial reforms. If they do not, they may invite overreactive, blunderbuss reforms spurred purely by transient public sentiment or political expedience.

³⁴⁹ See Jack B. Weinstein, *The Power and Duty of Federal Judges to Marshal and Comment on the Evidence in Jury Trials and Some Suggestions on Charging Juries*, in 118 F.R.D. 161, 161-63 (1988) (discussing English Common Law tradition allowing judges to summarize evidence and comment on its weight to jury, and arguing that American federal judges will never adopt similar habits).

³⁵⁰ Langbein, *supra* note 199, at 828.

³⁵¹ See Weinstein, *supra* note 349, at 161 (discussing the possibility of judicial summaries in greater detail).

³⁵² Schwarzer, *supra* note 247, at 585.

³⁵³ *Id.*