

# THE ARIZONA JURY REFORM PERMITTING CIVIL JURY TRIAL DISCUSSIONS: THE VIEWS OF TRIAL PARTICIPANTS, JUDGES, AND JURORS†

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*In 1995, the Arizona Supreme Court reformed the jury trial process by allowing civil jurors to discuss the evidence presented during trial prior to their formal deliberations. This Article examines and evaluates the theoretical, legal, and policy issues raised by this reform and presents the early results of a field experiment that tested the impact of trial discussions. Jurors, judges, attorneys, and litigants in civil jury trials in Arizona were questioned regarding their observations, experiences, and reactions during trial as well as what they perceived to be the benefits and drawback of juror discussions. The data revealed that the majority of judges and jurors support juror discussions during trial while attorneys and litigants are divided in their views of this reform. The study also revealed that experience with the reform appears to increase support for it. Although the impact of the reform on the jury decision making processes remains unclear, these early findings provide some insight into the effects of reforming the juror deliberation process.*

## INTRODUCTION

In 1995, the Supreme Court of Arizona approved a sweeping set of changes in the state's jury system. Many of these changes were designed to allow jurors to participate more actively in the

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fact-finding process. Perhaps the most controversial change was that civil jurors are now allowed to discuss the evidence amongst themselves as the trial progresses, rather than wait until the end of the trial as had been the regular practice. During these discussions, all jurors must be present in the deliberation room, and jurors are admonished to keep an open mind and avoid debating verdict options.

This Article has three aims: to present the theoretical, legal, and policy issues raised by the reform permitting juror discussions during trial; to describe a field experiment that we conducted, with the cooperation of the Arizona courts, that examines and evaluates this legal reform; and to present some of the early results of the field experiment about views of the reform. Although we do not yet know the impact of the reform on jury decision making processes, we do have data about how often jurors engage in trial discussions when they are permitted to do so and how judges, jurors, attorneys, and litigants view the reform.

### I. THEORETICAL, LEGAL, AND POLICY ISSUES RAISED BY JURY TRIAL DISCUSSIONS

The changes instituted by the Arizona courts are part of a broad, nationwide effort to reform and improve the jury system.<sup>1</sup> A set of controversial jury decisions, including hotly contested acquittals in the O.J. Simpson double-murder trial and the Rodney King beating trial, have led many Americans to question the extent to which racial and other prejudices infect jury verdicts.<sup>2</sup> Concerns about the jury's ability to comprehend and apply complex evidence and legal rules in complicated modern trials have encouraged some authors to argue for restricting the right to a civil jury or for limiting the kinds of evidence that juries may hear.<sup>3</sup>

At the same time, there is growing recognition that many traditional trial procedures contribute to the problems that juries face in comprehending evidence and applying the law to arrive at their

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1. See G. Thomas Munsterman & Paula L. Hannaford, *Reshaping the Bedrock of Democracy: American Jury Reform During the Last 30 Years*, JUDGES' J., Fall 1997, at 5, 5-7 (discussing recent jury reform initiatives).

2. See Valerie P. Hans & Jonathan D. Casper, *Trial by Jury, the Legitimacy of the Courts, and Crime Control*, in THE CRIME CONUNDRUM: ESSAYS ON CRIMINAL JUSTICE 93, 99-100 (Lawrence M. Friedman & George Fisher eds., 1997).

3. See generally Valerie P. Hans & Andrea J. Appel, *The Jury on Trial*, in HANDBOOK OF JURY RESEARCH (Walter F. Abbott & John Batt eds., forthcoming 1999).

verdicts.<sup>4</sup> In the idealized model of the adversary system, attorneys for each side develop the evidence and present it to a neutral and largely passive decision maker.<sup>5</sup> This is distinguished from an inquisitorial system in which the decision maker takes a more active role in the development of evidence.<sup>6</sup> A key assumption underlying the adversary system is that the neutrality of decision makers is enhanced when they are not actively involved in the evidence gathering and presentation.<sup>7</sup>

The notion of the jury as a largely passive decision making body has been challenged by research in cognitive and social psychology and in the expanding field of jury studies. That work shows that jurors are more aptly characterized as active decision makers.<sup>8</sup> Rather than the mythical blank slates who wait until the close of a trial to decide a verdict, jurors bring a host of attitudes and assumptions with them to the jury box and actively construct explanations for the evidence as they listen to it.<sup>9</sup> One recent law review article argues that, because jurors often discuss the evidence among themselves informally and are prone to make up their minds early in the trial, the traditional adversarial approach cannot succeed and should be supplanted by procedures that acknowledge juries' active approach to decision making.<sup>10</sup> In particular, jurors should be allowed to discuss the evidence during trial under carefully controlled circumstances.<sup>11</sup>

The Arizona jury reforms adopted in 1995 capitalized on the active approach that jurors take to their decision making task by encouraging note taking and question asking, permitting civil

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4. See, e.g., REID HASTIE ET AL., *INSIDE THE JURY* (1983); Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727 (1991); Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS., Autumn 1989, at 205, 205.

5. See STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 2-3 (1984) (explaining the importance of the neutrality and passivity of the decision maker in an adversary system).

6. See ELLEN HOCHSTEDLER STEURY & NANCY FRANK, *CRIMINAL COURT PROCESS* 94-96 (1996) (describing the history of the inquisitorial system).

7. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 7-40 (1988) (describing studies of adversarial versus inquisitorial procedures).

8. See, e.g., HASTIE ET AL., *supra* note 4, at 24; Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOC'Y REV. 513, 515-17, 557-58 (1992).

9. See, e.g., HASTIE ET AL., *supra* note 4; Vicki L. Smith, *How Jurors Make Decisions: The Value of Trial Innovations*, in *JURY TRIAL INNOVATIONS* 5, 9-12 (G. Thomas Munsterman et al. eds., 1997); B. Michael Dann, "Learning Lessons" and "Speaking Rights": *Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1242 (1993).

10. See Natasha K. Lakamp, Comment, *Deliberating Juror Predeliberation Discussions: Should California Follow the Arizona Model?*, 45 UCLA L. REV. 845, 853-55 (1998).

11. See *id.* at 855-61.

jurors to discuss the evidence among themselves during the trial, and providing for additional instruction by the judge and argument by the parties to deadlocked juries.<sup>12</sup>

Of all the reforms, permitting civil jurors to discuss the evidence among themselves during an ongoing trial has generated the most controversy.<sup>13</sup> Courts and scholars alike have recognized that some discussion among jurors during the trial probably occurs, and it is extremely difficult to control. Loftus and Leber estimated that over ten percent of the jurors they studied talked about the facts of the case with other jurors or their friends and family during the trial.<sup>14</sup> The problem is assumed to be worse in lengthy cases, particularly with sequestered juries.<sup>15</sup> Nevertheless, Arizona remains the only state with a permanent rule permitting its civil jurors to discuss the evidence during the trial.

## II. LEGAL ISSUES

Legal opinions about the practice of jurors discussing evidence during trial reflect a near consensus against it.<sup>16</sup> Consequently, the Arizona reform explicitly providing for juror discussions is considered to be a radical innovation in jury trial procedures. While courts are nearly unanimous in condemning the practice, a close reading of relevant decisions reveals a diverse set of justifications for the prohibition of juror discussions and a surprising amount of disagreement about the ultimate objective to be gained from prohibiting such discussions.<sup>17</sup> A review of existing judicial decisions demonstrates that judges do not always agree on an appropriate remedy when jurors discuss the case prematurely.<sup>18</sup> Indeed, the primary debate among appellate courts is whether an instruction

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12. See Arizona Supreme Court Orders, Nos. R-94-0031, R-92-0004 (1995).

13. See Janessa E. Shtabsky, Comment, *A More Active Jury: Has Arizona Set the Standard for Reform with its New Jury Rules?*, 28 ARIZ. ST. L.J. 1009, 1026-31 (1996).

14. See Elizabeth F. Loftus & Douglas Leber, *Do Jurors Talk?*, TRIAL, Jan. 1986, at 59, 60.

15. See Raymond T. DeMeo, Comment, *Containing the Irrepressible: Judicial Responses to the Problem of Pre-Deliberation Discussion Among Jurors*, 18 CONN. L. REV. 127, 127 (1985). In the O.J. Simpson trial, prosecutor Marcia Clark assumed that the sequestered jurors' conjugal and family visits included discussions of the trial. See MARCIA CLARK WITH TERESA CARPENTER, WITHOUT A DOUBT 444 (1997). Clark writes: "Keep in mind that all of this was going on in open court. The jurors weren't present, but the proceedings were being broadcast, so their families could hear and see it all. I shuddered to think what information they were imparting to their sequestered loved ones during visiting hours. . . ." *Id.*

16. See *infra* notes 22-52 and accompanying text.

17. See *infra* notes 22-36 and accompanying text.

18. See *infra* notes 37-43 and accompanying text.

permitting juror discussions is reversible or merely harmless error.<sup>19</sup> It should be noted that most of the published opinions are in criminal cases, although the issue of the appropriateness of juror discussions during trial has arisen in civil cases from time to time.<sup>20</sup>

*Winebrenner v. United States*,<sup>21</sup> one of the first cases to address the question of juror trial discussions, reviews six of the most common justifications for the prohibition.<sup>22</sup> Two of these involve beliefs about juror behavior. The first focuses on the effect that the sequence of evidence at trial has on juror decision making.<sup>23</sup> "If . . . jurors . . . discuss the case among themselves," wrote the *Winebrenner* court, "they are giving premature consideration to the evidence."<sup>24</sup> Because the prosecution (or plaintiff in civil cases) presents its case first, premature consideration of the evidence was believed to be necessarily prejudicial to the defendant.<sup>25</sup> Having formed an initial opinion about the prosecution's case, the court stated: "[The juror's] inclination thereafter would be to give special attention to such testimony as to his mind strengthened, confirmed or vindicated the views which he had already expressed to his fellow jurors. . . ."<sup>26</sup>

The *Winebrenner* court continued, quoting Chief Justice Marshall: "'[The juror] will listen with more favor to that testimony which confirms, than to that which would change his opinion; it is not to be expected that he will weigh evidence or argument as fairly as a man whose judgment is not made up in the case.'"<sup>27</sup>

The *Winebrenner* court warned that the act of discussing the case tended to fix jurors' opinions permanently, making them unlikely

19. Compare, e.g., *Winebrenner v. United States*, 147 F.2d 322, 327-29 (8th Cir. 1945) (reversible error), *State v. Washington*, 438 A.2d 1144, 1148-49 (Conn. 1980) (reversible error), *People v. Monroe*, 270 N.W.2d 655, 657 (Mich. 1978) (reversible error), and *Commonwealth v. Kerpan*, 498 A.2d 829, 832 (Pa. 1985) (reversible error), with *Wilson v. State*, 242 A.2d 194, 198-99 (Md. 1968) (harmless error).

20. Cf., e.g., *Hunt v. Methodist Hosp.*, 485 N.W.2d 737, 742-45 (Neb. 1992) (discussing the impropriety of pre-submission juror discussions).

21. 147 F.2d 322 (8th Cir. 1945).

22. See *id.* 327-29. *Winebrenner* involved an appeal by multiple defendants convicted of conspiracy to commit fraud in the procurement of government contracts. See *id.* at 323. During the trial, the judge instructed the jury that although they could not discuss the case with others, they could discuss it among themselves. See *id.* at 326. After ruling on an objection by the defendants' counsel, the court later clarified its instruction: "The result that is sought to be accomplished is that you not discuss the case before you to such an extent that you form definite, fixed ideas that would prevent you from changing after you had heard all of the evidence in the case." *Id.* at 327.

23. See *id.* at 328.

24. *Id.*

25. See *id.*

26. *Id.*

27. *Id.* (quoting *United States v. Burr*, 25 F. Cas. 49, 50 (C. C. D. Va. 1807) (No. 14,692g) (Marshall, C.J.)).

to change their minds even if evidence presented later in the trial would warrant it: “[H]ad there been no discussion and no expression of tentative opinion, he would not be confronted with embarrassment before his fellow jurors should he change the tentative opinion which he might entertain from hearing evidence.”<sup>28</sup>

Two of the justifications offered by the *Winebrenner* court, and echoed in many later decisions, reflect a judicial belief in the immutability of trial procedures.<sup>29</sup> Indeed, the *Winebrenner* court emphasized the importance of procedural regularity in jury trials.<sup>30</sup> One aspect of procedural regularity is the timing of jury instructions, which historically are given after the presentation of all of the evidence and closing arguments by counsel.<sup>31</sup> The court explained:

[I]t must be borne in mind that the jurors are unschooled and inexperienced as to their duties in a criminal case, and they are not instructed as to those duties until all the evidence has been received. . . . Without admonition their course is uncharted. Thus, it is not until the final submission of the case that the jurors are told that a defendant is under the law presumed to be innocent and not guilty and that that presumption attends him throughout the trial, so that it is incumbent upon the Government to prove the guilt of the defendant beyond a reasonable doubt.<sup>32</sup>

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28. *Id.*

29. *See infra* notes 30–33 and accompanying text.

30. “[The trial court’s obligation to preserve the accused’s right to a trial by jury] . . . is not to be discharged as a mere matter of rote, but . . . with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof. . . .” *Winebrenner*, 147 F.2d at 328–29 (quoting *Patton v. United States*, 281 U.S. 276, 312–13(1930)).

A Pennsylvania court that followed the reasoning in *Winebrenner* was even stronger in its condemnation of modifications to jury trial procedures. In *Commonwealth v. Kerpan*, 498 A.2d 829 (Pa. 1985), the court held that the trial judge’s “experimental” instruction that jurors could discuss questions with one another, and if no satisfactory answers were provided, could submit them to the court, was reversible error. *See id.* at 831. Indeed, the court found that the defense attorney’s consent to the instruction constituted ineffective assistance of counsel. *See id.* at 832. “Agreements that precede conviction can often prove watery reeds, and departures from the beaten paths into areas of ‘experiment’ are fraught with dangers.” *Id.*

31. *See generally* William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 583–85 (1990) (discussing both final instructions and the legal authority and practical and theoretical justifications for preinstructions). For fuller discussion of preinstructions, see Munsterman et al., *JURY TRIAL INNOVATIONS* 151–53 (1997).

32. *Winebrenner*, 147 F.2d at 327–28.

Another aspect of procedural regularity is the requirement that the jury only undertakes its deliberations as a collective body, rather than in smaller groups of individual jurors:

This admonition . . . permitted groups or coteries within the jury, including the alternate juror, to discuss the case during the many weeks the Government was introducing evidence . . . defendants were entitled to have the case considered not by divisions or coteries of jurors, which might include the alternate juror, but by the entire jury.<sup>33</sup>

The court's last two justifications for prohibiting juror discussions are actually the legal conclusions that arise from the first four. The court held that an admonition permitting juror discussions prior to deliberations unconstitutionally violated the defendant's Fifth Amendment right to due process<sup>34</sup> and Sixth Amendment right to an impartial jury.<sup>35</sup> The *Winebrenner* court concluded that permitting juror discussions has the practical effect of shifting the burden of proof from the prosecution to the defendant in violation of the defendant's due process rights.<sup>36</sup>

Later courts would echo many of the same underlying justifications for prohibiting juror discussions, although not all of them would reach the same conclusions about the constitutionality (or lack thereof) of judicial instructions permitting jurors to discuss the evidence during the trial. In *Wilson v. State*,<sup>37</sup> for example, the

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33. *Id.* at 329.

34. *See id.* at 327. Later courts would replace the reference to the Due Process Clause of the Fifth Amendment with that of the Fourteenth Amendment. *See, e.g.,* *Holland v. State*, 587 So. 2d 848, 873 (Miss. 1991).

35. *See Winebrenner*, 147 F.2d at 327. Civil cases implicate the Seventh Amendment, rather than the Sixth Amendment, guarantee of an impartial jury. *See, e.g.,* *Hunt v. Methodist Hosp.*, 485 N.W.2d 737, 743 (Neb. 1992).

36. *See Winebrenner*, 147 F.2d at 328. The court continued:

Under the court's admonition . . . , [a juror's opinion] of necessity could result from a discussion of only a part of the evidence, the evidence not having all been submitted. Such an opinion once formed could only be removed, if at all, by evidence. This in effect shifted the burden of proof and placed upon the defendants the burden of changing by evidence the opinion thus formed.

*Id.*

37. 242 A.2d 194 (Md. 1968) (convicting defendant of manslaughter, but acquitting defendant of murder). The court stated:

We do not agree that it necessarily follows that an accused is denied a fair trial and due process of law because of the absence of an admonition not to discuss the case

court disagreed with the *Winebrenner* decision: “[T]he refusal of the trial judge to admonish the jury not to discuss the case among themselves in the jury room or even the possibility that they did discuss it does not present a matter of constitutional dimension.”<sup>38</sup>

Focusing instead on the objectives of the admonition prohibiting juror discussions, the *Wilson* court found that the purpose was “to avoid any outside influences and to cause the jury’s final verdict to be based solely on the evidence and on the whole of the evidence presented in court . . . .”<sup>39</sup> Similarly, the court in *United States v. Meester*<sup>40</sup> held that the trial judge’s instruction that jurors could “chit-chat” about the case was not plain error requiring reversal because the instruction included a lengthy admonition that jurors should not reach a decision.<sup>41</sup> And in *Meggs v. Fair*,<sup>42</sup> the court opined in dicta that “the judge’s admonition to the jury members not to commit themselves until ‘you hear all the evidence and hear arguments and then my instructions’ minimized any danger to the defendant.”<sup>43</sup>

Cases in which the trial judge instructed the jurors that they might discuss the case prior to deliberation are not the only occasions that this issue has been raised on appeal. In some instances, judges have failed to give an instruction prohibiting juror discussions.<sup>44</sup> In other cases, the jurors have discussed the case despite an admonition that they should not.<sup>45</sup> For both of these types of cases, the predominant question for appellate courts is whether the trial judge conducted a sufficient inquiry about the nature and scope of the jurors’ discussions to determine whether they were prejudicial to the defendant. For example, in *United States v. Klee*,<sup>46</sup> jurors engaged in discussion despite being instructed not to do so.<sup>47</sup> The court held that the test of whether a new trial was warranted by this

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before its final submission to them or because they are told, in effect, that they may so discuss it.

*Id.* at 198.

38. *Id.* at 199.

39. *Id.* at 198 (quoting *Midgett v. State*, 164 A.2d 526, 533 (Md. 1960)).

40. 762 F.2d 867 (11th Cir. 1985).

41. *See id.* at 880–81.

42. 621 F.2d 460 (1st Cir. 1980).

43. *Id.* at 464 (holding that the defendant’s failure to object to the admonition at trial barred the appellate court from considering the matter).

44. *See, e.g.*, *United States v. Nelson*, 102 F.3d 1344, 1347 (4th Cir. 1996).

45. *See, e.g.*, *United States v. Resko*, 3 F.3d 684, 686 (3d Cir. 1993); *United States v. Klee*, 494 F.2d 394, 395–96 (9th Cir. 1974); *Holland v. State*, 587 So. 2d 848, 872–74 (Miss. 1991).

46. 494 F.2d 394 (9th Cir. 1974).

47. *See id.* at 395.



juror misconduct was whether the defendant had been prejudiced to the extent that he did not receive a fair trial.<sup>48</sup>

These cases indicate that the trial judge has an obligation to conduct some inquiry into the prejudicial effect of juror misconduct. Thus, in *Holland v. State*,<sup>49</sup> the court ruled that the trial judge's curative instruction that the jurors refrain from further deliberations until after they had heard evidence and instructions concerning sentencing was insufficient to overcome the prejudice inherent in the jury's premature deliberations.<sup>50</sup> A cursory inquiry generally will not survive appellate scrutiny.<sup>51</sup>

As is the case for all juror misconduct cases, the decisions of the appellate courts reflect the tension between upholding the integrity of trial procedures and respecting the finality of jury verdicts. Typically, only those violations that prejudice the defendant's right to an impartial jury and a fair trial will require a new trial; inconsequential lapses by the jury will be held harmless.<sup>52</sup>

An interesting facet of these cases is the tension between the appellate courts' insistence on procedural regularity and the practical experience of the trial judges concerning jury behavior and decision making. In all of the post-*Winebrenner* cases, the judges who favored juror discussions struggled to formulate an admonition that would survive appellate scrutiny. In many cases, the appellate courts ruled that instructions permitting juror discussions were *harmless* error, particularly if the judge included in the admonition a strong caution against forming opinions about the ultimate issues to be decided by the jury.<sup>53</sup> Nevertheless, appellate

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48. See *id.* at 396 (noting that "not every incident of juror misconduct requires a new trial").

49. 587 So. 2d 848 (Miss. 1991).

50. See *id.* at 874. After finding the defendant guilty in a capital murder trial, but before hearing evidence for the sentencing phase, the jury sent a note to the judge saying: "We, the jury, sentence Gerald James Holland to death." *Id.* at 872.

51. See, for example, *United States v. Resko*, 3 F.3d 684, 691 (3d Cir. 1993), in which the jury disregarded the judge's admonition concerning juror discussions. In a written survey, the judge asked each juror whether the juror had discussed the case with other jurors and, if so, if the juror had formed an opinion about the guilt or non-guilt of the defendant. See *id.* at 688.

52. In *United States v. Abrams*, 137 F.3d 704 (2d Cir. 1998), for example, the trial judge—who had forgotten to instruct the jury that they should not engage in premature discussions—refused a request by defendant's counsel to conduct an inquiry about the nature and scope of juror discussions. See *id.* at 705–06. The court held that this was not an abuse of discretion given that any discussions that would have taken place could only have involved superficial aspects of the case. See *id.* at 708. After lunch on the first day of trial, a juror sent a note to the judge asking him to instruct the jury not to discuss the case. See *id.* at 705. The only evidence presented that morning, after opening statements by the attorneys, was foundational testimony by an IRS agent concerning that agency's methods of reviewing tax bills. See *id.*

53. See, e.g., *United States v. Meester*, 762 F.2d 867, 880 (11th Cir. 1985).

courts generally rule that such admonitions constitute error—and therein lies a fundamental difference of perspective between appellate and trial judges.<sup>54</sup> Note, for example, the colloquy between the trial judge and the defendant's counsel in *United States v. Abrams*.<sup>55</sup>

The Court: The jury may be of the mind to think they can discuss this case during the trial. I thought I told them they can't.

Mr. Aronwald: I think you did. I think you told them that when you excused them Tuesday night. I think you said they are not permitted to discuss the case.

The Court: I meant discuss it with outsiders. Normally, I tell the jury, as part of my general instructions, that they are not to discuss it even among themselves. There is nothing improper in the jury's discussing the case among themselves before they reach deliberations. There is nothing ipso facto wrong with it. It is just not a good idea, and I tell the jury not to do it. . . . I don't know that there is anything wrong with the jury's discussing the case.<sup>56</sup>

Perhaps the most forceful argument for permitting juror discussions was made by the trial judge in *United States v. Wexler*<sup>57</sup> who focused first on the assumptions underlying the standard admonition and then on the benefits that might be realized by permitting such discussions.<sup>58</sup> Citing the arguments made in *Commonwealth v. Kerpan*,<sup>59</sup> Judge Ditter first disputed the assumption that permitting jurors to discuss evidence will necessarily be prejudicial to the defendant.<sup>60</sup> He stated:

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54. Not all appellate judges concur on this question. In *Winebrenner*, for example, Judge Woodrough, in a strong dissent, found the majority decision to be highly impractical: "No normal honest Americans ever worked together in a common inquiry for any length of time with their mouths sealed up like automatons or oysters. The unnatural conduct of the single juror who never said a word except 'That's the way I'm votin,' [draws] natural suspicion." *Winebrenner v. United States*, 147 F.2d 322, 330 (8th Cir. 1945) (Woodrough, J., dissenting).

55. 137 F.3d 704 (2d Cir. 1998).

56. *Id.* at 706.

57. 657 F. Supp. 966 (E.D. Pa. 1987), *rev'd on other grounds*, *United States v. Wexler*, 838 F.2d 88 (3d Cir. 1988).

58. *See id.* at 968–70.

59. 498 A.2d 829 (Pa. 1985).

60. *Wexler*, 657 F. Supp. at 968.

[T]he order in which the evidence is presented . . . is no more a reason for prohibiting jury discussion than it is for encouraging it. It assumes that discussion will inevitably lead a juror to an opinion but that the absence of discussion will mean that no juror will reach an opinion on anything. This is an unvarnished non-sequitor which needs only to be stated to be exposed.<sup>61</sup>

The judge also disputed the assumption that jurors who express an opinion are less likely to change their minds than jurors who remain silent:

[This assumption] has the ring of pop psychology but is based upon an assumption which is, to my knowledge untested and, to my mind, unbelievable. . . . I believe that the vast majority of jurors are concerned, responsible, conscientious citizens who take most seriously the job at hand. I find it difficult to believe that as a group they are more interested in justifying their own loosely formed notions than in doing justice.<sup>62</sup>

The judge then articulated two primary reasons for permitting juror discussions in this case. First, Judge Ditter stated his belief that his instructions to the jury would be sufficient to overcome the objections traditionally raised by juror discussions.<sup>63</sup> Second, he emphasized that discussions would enhance juror attention, comprehension, and ability to recall evidence, thus improving juror performance:

The duty of a juror involves complex thought processes: assimilating and comprehending the evidence, determining credibility issues, recalling the evidence, putting it all into context and relative degrees of reliability, participating in discussions, and making informed decisions. Jurors need all the help they can get and their only source of untainted information and assistance is from those who share with them the responsibility for making the ultimate decisions.<sup>64</sup>

There was also a third reason that Judge Ditter permitted the jury to discuss the case:

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61. *Id.* Judge Ditter also noted that the defendant did not present any testimony in the case, making the sequence of evidence argument academic. *See id.* at 968 n.3.

62. *Id.* at 968.

63. *See id.* at 969.

64. *Id.*

[O]ne of the jurors asked if they could discuss matters among themselves. This suggested to me that he was thinking, a trait that I believed should be encouraged. Had I said no, I would have been unable to explain why—because I could not then, nor can I now, think of any valid reason to preclude such discussion and a simple no would have left the jurors with the distinct feeling that the ways of the law are mysterious indeed . . . . [T]o tell them they are not to discuss the matter runs contrary to what they would normally be expected to do. I strongly believe that . . . this instruction . . . is the one thing judges tell jurors that they are most likely to ignore. . . . I firmly believe that jurors are more likely to do that which makes sense than to follow a command which is never explained because it is completely unexplainable.<sup>65</sup>

Right or wrong, Judge Ditter is in the minority among trial and appellate judges in published opinions concerning juror trial discussions.<sup>66</sup> Most of the published opinions take a more disapproving tone, warning of potential negative consequences such as prejudice and bias, even if they conclude that allowing juror discussions is harmless error.<sup>67</sup> Although it overturned Wexler's conviction on other grounds, the Third Circuit took strong exception to Judge Ditter's endorsement of trial discussions: "While the trial court believed that such discussion would enhance 'assimilation, comprehension, and recollection,' . . . we believe that the firmly-rooted prohibition against premature jury discussion is well-founded. An instruction that permits the jurors to discuss the evidence before conclusion of the case is erroneous."<sup>68</sup>

### III. POTENTIAL BENEFITS OF JURY DISCUSSIONS DURING TRIAL

Judge Ditter was among the first proponents of the current jury reform movement. Had he been a member of the Arizona bench, we suspect that he would have felt quite at home on the Arizona Supreme Court's Committee on the More Effective Use of Juries. In its final report, the committee describes a number of possible

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65. *Id.* at 969–70.

66. *See supra* notes 13–20 and accompanying text.

67. *See supra* notes 13–65 and accompanying text.

68. *Wexler*, 838 F.2d at 92 n.3 (quoting *Wexler*, 657 F. Supp. at 969).

benefits to allowing jurors to discuss the evidence during the trial,<sup>69</sup> including improving jury comprehension,<sup>70</sup> asking questions and sharing impressions on a timely basis,<sup>71</sup> testing individual jurors' tentative and preliminary judgments against the group's knowledge,<sup>72</sup> and reducing the formation of divisive cliques or forbidden conversations among jurors.<sup>73</sup>

Analysis of the role of deliberation in jury trials suggests that the advantages that deliberation brings to jury fact-finding could also be produced by trial discussions.<sup>74</sup> In fact, the benefits could be even more pronounced if the opportunity to exchange questions and views of the evidence is permitted earlier in the trial.<sup>75</sup> In an article entitled *Are Twelve Heads Better than One?*, Professor Phoebe Ellsworth responds affirmatively to the question posed in the title with evidence that jury deliberation has a significant and positive influence on jury competence.<sup>76</sup> During deliberation, jurors with erroneous or idiosyncratic views of the evidence must defend their views and are forced to confront the fact that others on the jury take different approaches to the evidence.<sup>77</sup> One function of jury deliberation is the correction of factual misstatements and errors made by individual jurors.<sup>78</sup> Thus, the opportunity to discuss the case with other jurors plays a major role in promoting the competence and integrity of the decision.<sup>79</sup>

The National Center for State Courts' report, *Jury Trial Innovations*, summarizes a number of potential advantages of trial discussions.<sup>80</sup> Drawing on psychological research and legal commentary, it lists the following possible benefits of allowing jurors to discuss the evidence during trial:

1. Juror discussions about the evidence can improve juror comprehension by permitting jurors to sift through and mentally organize the evidence into a coherent picture over the course of the trial.

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69. See JURORS: THE POWER OF TWELVE: REPORT OF THE ARIZONA SUPREME COURT COMMITTEE ON MORE EFFECTIVE USE OF JURIES 96-99 (1994) [hereinafter JURORS: THE POWER OF TWELVE].

70. See *id.* at 98.

71. See *id.*

72. See *id.*

73. See *id.*

74. See *infra* notes 76-81 and accompanying text.

75. See *infra* notes 76-81 and accompanying text.

76. See Ellsworth, *supra* note 4, at 205-08.

77. See *id.* at 206.

78. See *id.* at 217.

79. See *id.* at 223.

80. See MUNSTERMAN, ET AL., JURY TRIAL INNOVATIONS, *supra* note 31.

2. Juror discussions about the evidence may improve juror recollection of evidence and testimony by emphasizing and clarifying important points during the course of the trial.
3. Juror discussions about the evidence may increase juror satisfaction by permitting an outlet for jurors to express their impressions of the case before retiring for deliberations.
4. Jurors discussions about the evidence may promote greater cohesion among the jurors, reducing the amount of time needed for deliberations.
5. Jurors find it difficult to adhere to admonitions about not discussing evidence. Permission to engage in such discussions bridges the gap between the court's admonitions and jurors' activities.<sup>81</sup>

#### IV. POTENTIAL DRAWBACKS OF JURY DISCUSSIONS DURING TRIAL

Our survey of legal cases provides several justifications for prohibiting juror discussions during trial. As we saw, a prime concern in allowing trial discussions in criminal trials is that they may unfairly benefit the prosecution, which presents its case first.<sup>82</sup> It is thought that jurors' expression of initial opinions during the presentation of the prosecution's case will have the effect of shifting the burden of proof to the defendant.<sup>83</sup> In a civil lawsuit, the advantage would accrue to the plaintiff who presents his or her case first.<sup>84</sup> The *Jury Trial Innovations* report details the full range of concerns about the procedure, including the possibility of premature decision making:

1. Juror discussions of the evidence facilitate or encourage the formation or expression of premature judgments about an evidentiary issue or the result of the case.
2. An aggressive, overpowering juror might dominate discussions and have undue influence on the views of others.

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81. *Id.* at 139.

82. *See supra* notes 22–28 and accompanying text.

83. *See supra* notes 22–28 and accompanying text.

84. *See supra* notes 22–28 and accompanying text.

3. Allowing juror discussions prior to deliberations may detract from the ideal of the juror as a neutral decision maker.
4. The quality of deliberations may decline as jurors become more familiar with each other's views.
5. Sanctioned and structured discussions might produce a narrower and more confined set of final deliberations.
6. Juror stress might increase because of the conflicts produced by prior discussions.<sup>85</sup>

In Arizona, civil jurors are specifically admonished to refrain from making up their minds until all of the evidence and legal instructions have been presented.<sup>86</sup> Furthermore, judges instruct jurors to limit their trial discussions to the evidence.<sup>87</sup> However, the effectiveness of the admonition is unknown. If jurors express their views about who should win the case early on, it might make it more difficult to change their minds later.<sup>88</sup> Public statements of opinion encourage commitment to that opinion.<sup>89</sup> Another potential problem is that trial discussions could lead jurors to adopt the same shared biases about the evidence, which would be difficult to overcome during final deliberations. In testimony before the Judiciary Committee of the California State Senate, which was considering jury reform, psychologist Robert MacCoun observed:

[P]sychologists do not consider "active information processing" to be an unequivocally good thing. These cognitive

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85. MUNSTERMAN, *supra* note 31, at 139-40.

86. A proposed preliminary instruction recommended by the Arizona Supreme Court Committee on More Effective Use of Juries includes the following admonition:

During the trial you may talk with each other about the evidence, but only privately in the jury room during recesses when all jurors are present. However, do not make up your minds about guilt or innocence [who should win the case] until you have heard *all* the evidence, my instructions of law, arguments of counsel and your deliberations have begun. Unless I tell you otherwise, do not discuss the case with anyone other than another juror.

JURORS: THE POWER OF TWELVE, *supra* note 69, at app. G-1.

87. *See id.*

88. *See* SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 202-04 (1988).

89. *See id.* at 204; *see also supra* notes 22-28 and accompanying text.

processes facilitate *selective* recall rather than total recall, and can make us form a *biased* impression of the evidence.

A strength of the jury is that deliberation provides an opportunity for individual biases to “cancel each other out.” The danger of formal discussions *during* trial is that jurors will prematurely adopt the same *shared* biases before hearing all the evidence, undermining some of the benefits of post-trial deliberation.<sup>90</sup>

In sum, those who support allowing jurors to discuss the evidence during the trial believe that it may enhance juror comprehension, memory, and group decision making, since jurors are allowed to discuss and debate the evidence in a timely fashion. Critics are concerned that jurors allowed to discuss the case before deliberation may weigh early evidence more heavily, or may make up their minds prematurely.

## V. THE ARIZONA JURY REFORM

After carefully weighing the pluses and minuses of allowing jurors to discuss the evidence during the trial, the Arizona Supreme Court’s Committee on More Effective Use of Juries recommended that the practice be incorporated into Arizona civil jury trials.<sup>91</sup> When the Arizona Supreme Court approved the use of trial discussions in civil jury trials in the *Arizona Rule of Civil Procedure* 39(f), Arizona became the first jurisdiction that expressly permits civil jurors to discuss evidence during the trial.<sup>92</sup>

Both the potential benefits *and* the potential drawbacks of this technique make it one worth examining with care. If trial discussions improve the jury’s ability to comprehend and apply complex testimony and law, that addresses some of the most serious criticisms of the contemporary jury system. Yet, if it causes premature opinion formation, regularly advantaging the plaintiff or the state at the expense of the defendant, it may undermine the impartiality of our adversary legal system.

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90. Robert MacCoun, *IMPROVING JURY COMPREHENSION IN CRIMINAL AND CIVIL TRIALS 2* (RAND Testimony Series No. CT-136, July 1995). MacCoun went on to urge the Judiciary Committee that, if it was interested in recommending the use of juror trial discussions in California, it test their impact experimentally before widespread adoption. *See id.*

91. *See JURORS: THE POWER OF TWELVE, supra* note 69, at 96–99.

92. *See ARIZ. R. CIV. P.* 39(f).



So far, these imputed benefits and harms are only hypothetical. To date, there has been no systematic study of this reform. It is not known whether or how the practice of contemporaneous discussion affects decision making, or even what transpires during the talks that jurors have with one another as the trial proceeds.

## VI. THE ARIZONA TRIAL DISCUSSIONS PROJECT: METHODOLOGY

We recently completed data collection in a field experiment that tested the impact of trial discussions. The procedure and materials of the study were specifically calculated to address both the potential benefits and the drawbacks of trial discussions.<sup>93</sup> To permit an experimental test of the reform, the Arizona Supreme Court issued an administrative order allowing trial judges in civil trials to depart from normal practice and instruct jurors in some trials that they may not discuss the evidence until final deliberations.<sup>94</sup>

In the study, approximately 100 civil jury trials were randomly assigned to an experimental "trial discussions" condition, whereas an equal number of civil jury trials were randomly assigned to a control "no discussions" condition. Jurors were instructed by the trial judge that they could (or could not) engage in trial discussions depending on the condition to which their case had been randomly assigned. For both conditions, questionnaires were distributed to jurors, judges, attorneys, and litigants, and a case data form that asked for information about the case was included in the package for judges. Judges in Maricopa, Pima, Mohave, and Yavapai County Superior Courts participated in the study.

The questionnaires asked trial participants about their observations and experiences throughout the trial, judgments about the weight of the evidence, and reactions to the jury verdict. Jurors in the experimental condition were also asked additional questions about any discussions they had during the trial. To ensure that our methodology was appropriate and the data collection procedures were logistically possible, we conducted a pretest of the study in February 1997 for twelve cases in the Maricopa County Superior

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93. Members of the project's Advisory Committee made many valuable suggestions about the design and execution of the study. The Advisory Committee includes: Hon. B. Michael Dann (Maricopa County Superior Court), Shari Seidman Diamond (American Bar Foundation and University of Illinois at Chicago), Hon. Judith McConnell (San Diego County Superior Court), Hon. Judith E. Retchin (D.C. Superior Court), G. Marc Whitehead (McDermott, Will, & Emery), and Elizabeth Wiggins (Federal Judicial Center).

94. See Arizona Supreme Court Administrative Order No. 97-1 (1997).

Court. We also interviewed a dozen Arizona civil jurors from the pretest cases to obtain qualitative information about how jurors reacted to the opportunity to engage in trial discussions.

We are in the midst of data analysis now. We plan to compare the participants in the control and experimental groups to determine whether and how the opportunity to discuss the evidence during the trial affects jury decision making. We have included specific questions about the point at which jurors started leaning toward one side or another and at which they made up their minds about who should win the case; questions about the usefulness of the trial discussions for understanding law and evidence in the case; questions designed to test for primacy and recency effects; and other items about the individual and group decision process. By comparing jury and judge questionnaires, we should be able to determine whether the reform brings jury verdicts more (or less) in agreement with the judge's assessment of the weight of the evidence.

## VII. THE ARIZONA TRIAL DISCUSSIONS PROJECT: EARLY RESULTS

Some early results about the views that judges, jurors, attorneys, and litigants hold about the Rule 39(f) reform are already available. Analysis of these views is important because serious reservations about the reform by trial participants and by those who engage in trial discussions would be cause for concern. Judges who participated in the study have had several years of experience with the reform and are in a good position to report on apparent benefits and problems that may be obvious outside the jury room. The views of attorneys and especially litigants are worthy of analysis because a court reform that creates concerns among the parties in litigation might be seen as violating the important principle of procedural justice. In addition, the jurors themselves have the most information about the practical effects of the reform and how it may have benefited or interfered with their decision making. Finally, we present here data from juror questionnaires about how often the jurors who were permitted to engage in discussions did so.

*A. Views of Judges, Litigants, and Attorneys About Trial Discussions*

Overall, the majority of judges and jurors support the rule permitting jurors to discuss the evidence during trial and see a number of benefits to the reform. Attorneys and litigants are divided in their views of the reform. Table 1 presents comparisons for several questions tapping views of the reform on the part of judges, litigants, and attorneys.<sup>95</sup>

*B. The Views of Judges*

When questioned about permitting jurors to discuss the evidence during trial, judges were the most enthusiastic group. From our total group of approximately 190 valid cases, we received judicial questionnaires from 167 trials, representing forty Arizona judges. At the time of the study, the reform had been in place in civil trials for approximately two-and-a-half years, so most judges responding to the survey were likely to have presided over civil jury trials in which jurors were permitted to discuss the evidence during the trial. About three-quarters (twenty-nine of forty judges) indicated that they supported the reform, five (13 percent) said they were neutral, and six (15 percent) opposed the reform.<sup>96</sup>

Judicial estimates about how the reform affects jury decision making are in line with this overall support. Approximately three-quarters of the judges agree that juror discussions help jurors understand the evidence, and 30 percent believe that jurors who engage in these discussions prejudge the evidence. Furthermore, these views are all highly and significantly correlated with one another such that the judges who believe that trial discussions improve juror comprehension and disagree that they encourage premature decision making are most supportive of the reform.<sup>97</sup>

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95. See *infra* tbl.1.

96. Judges sometimes differed in their ratings of support for the reform from trial to trial. Therefore, for Table 1, in calculating support and in assessing the beliefs about the impact of the reform, we employed the modal (most common) response for each judge and used the mean value when there were multiple modes for a particular judge.

97. We examined the relationships among judicial views using two methods. First, we undertook correlational analyses in which we examined the strength and direction of the relationships between judicial support and other views using responses in all 167 cases. In these analyses, we found that judicial support for the reform is significantly and positively related to beliefs that it improves juror comprehension ( $r = .78, p < .0001$ ) and significantly and negatively related to views that it encourages premature decisions ( $r = -.66, p < .0001$ ).

*C. Attorney and Litigant Views*

When compared to judges, attorneys and litigants are more negative about the reform. One caveat about the attorney and litigant data is that the response rates for these two groups were much lower than for judges and jurors whose participation rates exceeded 85 percent. Attorneys contributed questionnaires in about half of the cases in the sample, and litigants responded in approximately a third of the trials. It is quite possible that support or opposition to the reform could have affected attorneys' and litigants' willingness to respond.

Among those who did respond, about half of each group think that trial discussions improve juror understanding of the evidence, but a similar percentage think that trial discussions might also encourage premature decision making. About half say they feel, or would feel, comfortable having jurors engage in trial discussions. Forty-seven percent of the litigants and 51 percent of the attorneys support the reform. As with the judges, attorneys' views about the reform and support for it are highly correlated; the strongest supporters are those who perceive more benefits and fewer drawbacks.<sup>98</sup>

Many of the major concerns about the reform pertain to the supposed advantages it brings to the state (in criminal trials) or to the plaintiff (in civil trials) who presents the case first.<sup>99</sup> It is very interesting to note, therefore, that there are no observable differences between attorneys who represent defendants and attorneys who represent plaintiffs in their support for or opposition to the reform.<sup>100</sup> For instance, 32 percent of plaintiff attorneys and 33 percent of defense attorneys state that they are opposed to the re-

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Beliefs in the benefit to juror comprehension are also significantly and negatively related to views about its drawback in encouraging premature decisions ( $r = -.49, p < .0001$ ).

Second, to control statistically for the fact that judges made multiple responses in different trials, we confirmed the above relationships through an analysis of variance using support for the reform as the dependent variable, the judge's identity as a random factor, and the other views (about encouraging premature decision making and improving understanding) as covariates. Similar results were obtained; both sets of beliefs were significantly related to support for the reform. In addition, the identity of the judge was related to support for the reform.

98. Attorneys' support for the reform is significantly and positively related to comfort with it ( $r = .93, p < .0001$ ) and beliefs that it improves jury comprehension ( $r = .86, p < .0001$ ). Support is significantly and negatively related to views that trial discussions encourage premature decision making ( $r = -.72, p < .0001$ ). All of these dimensions are significantly intercorrelated as well.

99. See *Winebrenner v. United States*, 147 F.2d 322, 328 (8th Cir. 1945), discussed *supra* notes 25–27 and accompanying text.

100.  $t(197) < 1, ns$ .

form. There are no significant differences between plaintiff and defense attorneys in their views about whether trial discussions improve jury comprehension or encourage premature decisions, and neither group expresses greater comfort with the rule.

There were two characteristics of attorneys that were related to their support for trial discussions. Both plaintiff and defense attorneys who reported more jury trial experience were less supportive of the reform.<sup>101</sup> Attorneys who said they had tried more than 100 jury cases were the most negative, with approximately two-thirds of that group opposing the rule. In addition, plaintiff attorneys with a higher proportion of their work devoted to Arizona civil practice were more likely to support the reform; there was no such relationship for defense attorneys.<sup>102</sup>

As with the judges and attorneys, litigants who believed that trial discussions improved juror comprehension felt that it did not encourage premature discussion, and those who were comfortable with having jurors discuss the evidence during trial were more likely to support Rule 39(f).<sup>103</sup> There was an effect for litigant income, with wealthier litigants expressing less support for the reform;<sup>104</sup> these litigants were less likely to believe that allowing jurors to discuss the evidence would improve the quality of their decision making.<sup>105</sup>

The figures just presented include participants from all trials, including both those in which jurors were allowed to discuss the evidence during trial and those in which they were not due to the random assignment. The support of judges and attorneys for Rule 39(f) was not affected by the assignment of cases to experimental or control conditions, probably because they had already had some experience with the reform independent of the assigned condition. However, it did have an impact on the views of litigants. Comparing the responses of litigants in cases with and without trial discussions reveals that there is more support for trial discussions if they are allowed in the case at hand. Litigants whose cases were randomly assigned to permit juror discussions are more likely than litigants in the control group to support the reform.<sup>106</sup>

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101.  $r = -.24$  for plaintiff attorneys and  $r = -.23$  for defense attorneys, both  $p$ 's  $< .03$ .

102.  $r = .23$ ,  $p = .03$  for plaintiff attorneys;  $r = .09$ ,  $ns$  for defense attorneys.

103. The correlations with Rule 39(f) support were all strong and statistically significant:  $r = .85$  for comfort;  $.81$  for beliefs that it improves jury comprehension; and  $-.50$  for the view that it encourages premature decision making. All  $p$ -values are  $< .0001$ .

104.  $r = -.28$ ,  $p = .009$ .

105.  $r = -.33$ ,  $p = .001$ .

106.  $t(102) = -2.56$ ,  $p = .01$ . The average rating of litigants whose cases were randomly assigned to the control group was 3.55, compared to a mean of 4.69 for the litigants whose juries were permitted to discuss the evidence during trial.

Researchers Larry Heuer and Steven Penrod, in a study of another jury reform, found a similar pattern in which exposure to a reform increases support for it.<sup>107</sup> In their study of an experiment allowing jurors to ask questions of witnesses, Heuer and Penrod report that before participating in a trial in which jurors were permitted to ask questions, attorneys were negative<sup>108</sup> and judges were undecided<sup>109</sup> about the practice.<sup>110</sup> After they had participated in such a trial, however, both judges and attorneys became more positive, with judges moving up to a moderate endorsement of the procedure<sup>111</sup> and attorneys moving closer to a neutral zone.<sup>112</sup> Note also the similar pattern that, when it comes to at least these two instances of jury reform, attorneys tend to be more critical than judges in their evaluations of the reforms.

#### *D. Jurors' Views of and Experiences with Trial Discussions*

Questionnaires completed by jurors who decided civil cases provide a limited quantitative look at how jurors described trial discussions. Half of the jurors were randomly assigned to cases in which they were permitted by the judge to discuss the evidence, and the analyses in this section are limited to this group of jurors. Of the 686 jurors who were permitted to discuss the evidence, approximately 70 percent report that their jury had at least one discussion about the evidence during the trial. That means that 30 percent of the jurors who had the legal right to discuss the evidence during trial reportedly did not do so.

Among the jurors in the experimental condition, jurors who report actually discussing evidence during the trial are much more positive about the reform than jurors who report no discussions.<sup>113</sup>

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107. See Larry Heuer & Steven Penrod, *Increasing Juror Participation in Trials Through Note Taking and Question Asking*, 79 JUDICATURE 256, 259 (1996).

108. Median response of 6.3 on a 9-point scale, where 1 = strongly agree with permitting juror questions and 9 = strongly disagree with permitting questions. See *id.* at 261.

109. Median response of 4.5. See *id.*

110. See *id.*

111. Median = 3.7. See *id.*

112. Median = 4.9. See *id.*

113. To do this analysis, we limited the cases to those in which we were able to confirm that the judge had followed the experimental assignment and had instructed jurors that they either should or should not discuss the evidence during trial. Then, for each jury in the experimental condition, we calculated the mean rating of support for the reform. Comparing the experimental juries who reported discussing the evidence during trial with those who said they engaged in no discussions, we found that those who actually engaged in trial discussions were much more favorable about them. The mean rating of support for juries

That is the same pattern found with litigants, in which experience with the reform appears to increase support for it. However, there is another possible explanation for why jurors who experienced trial discussions are more positive. Jurors who were more negative about the reform might have declined to engage in jury discussions precisely because of their opposition.

### *E. Jurors' Views of the Benefits of Trial Discussions*

Tables 2 and 3 indicate the responses of jurors who engaged in trial discussions to a variety of questions that asked them about the potential benefits and drawbacks of trial discussions.<sup>114</sup> As Table 2 indicates, jurors expressed highly favorable views of trial discussions, saying that trial evidence was remembered very accurately during these discussions, and the discussions helped them understand the evidence in the case. The jurors overwhelmingly agree that all jurors' points of view were considered in the trial discussions, disagreeing that the trial discussions were dominated by one or two jurors.

Consistent with these survey data and the Arizona Supreme Court Committee on the Effective Use of Juries, the jurors we interviewed concurred that a prime benefit of trial discussions is that jurors can compare notes and questions about the evidence in a timely fashion. A juror in a case in which there was moderate use of trial discussions thought that the following:

[Discussions] were helpful to the standpoint that in most cases most of the questions you were thinking about yourself anyway and this way it was out in the open and you didn't have to do it on your own . . . You have immediate questions all the time and it certainly answers them right now and you don't have to feel like you're alone, there are . . . other people there too.<sup>115</sup>

Views about the benefits of trial discussions are strongly linked to support for them. The most powerful predictor of a juror's

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that engaged in no discussions was 4.49, while the mean rating of support for juries that did discuss was 5.63,  $t(82) = -5.75, p < .0001$ .

114. See *infra* tbls. 2, 3.

115. Videotaped interview by Valerie Hans & Paula Hannaford with Juror 4, in Phoenix, Ariz. (Mar. 7, 1997). Additional information regarding this interview may be found on file with the authors.

support for the reform is the view that trial discussions improve jury comprehension. Jurors who say that trial discussions improve jury comprehension are highly likely to support the reform.<sup>116</sup> Those who agree that the discussion of evidence was very accurate, that trial discussions helped resolve confusion, and that all jurors' views were considered are also more likely to endorse the reform.<sup>117</sup> In addition, jurors who participated a fair amount and saw themselves as influential in the jury discussions were more favorable to the reform.<sup>118</sup>

#### *F. Jurors' Views of the Drawbacks of Trial Discussions*

Tables 2 and 3 illustrate that, although most jurors are very favorable about the opportunity to engage in trial discussions and see considerable benefits to it, a minority appears to have some reservations. First, approximately 30 percent of the juries given the opportunity to discuss choose not to do so. The juror interviews done during the pretest phase of the project provided us with some possible reasons why jurors might not discuss the trial evidence even if permitted to do so.<sup>119</sup> Most significant are logistical problems. The jurors we interviewed said that there are difficulties in attempting to get all jurors together at the same time, as required by Rule 39(f). In addition, some jurors we interviewed reported their initial surprise and uncertainty about whether or not it is really legal to discuss the evidence during trial.<sup>120</sup>

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116. The correlation is .63,  $p < .0001$ , accounting for forty percent of the variation in support for trial discussions. To control statistically for the fact that jurors participated together and were not completely independent, we undertook additional analyses of variance in which the support for trial discussions was the dependent variable, the jury on which a participant had served was a random factor, and the participant's view of the value of trial discussions in improving jury comprehension was a covariate. This secondary analysis confirmed the strong relationship between reports that it improved jury comprehension and support for the reform.

117. Correlations range from .12 to .22, all modest size but statistically significant at  $p < .05$ . Analyses of variance with each of the listed factors as covariates and the jury as a random factor confirmed the significant relationships described in the text.

118. Again, both correlational analyses ( $r$ 's = .12 and .15 for participation and perceived influence, respectively, both  $p$ 's  $< .008$ ) and analysis of variance confirmed the positive relationship between participation, perceived influence, and support for trial discussions.

119. See Valerie P. Hans et al., *Letting Jurors Talk: An Analysis of the Arizona Jury Reform Permitting Pre-Deliberation Discussion by Civil Jurors* (June 1997) (unpublished) (on file with the authors). This paper was presented at the annual meeting of the Law & Society Association, St. Louis, MO.

120. After learning this information during the pretest, we crafted a suggested instructions for judges that further clarified for civil jurors that they are now able to discuss the



Consider some of the following quotes from jurors we interviewed:

I was shocked. . . . I thought, did I hear her right? I still didn't believe it. Even when we got to the room, I still wasn't sure.<sup>121</sup>

I was just a little bit surprised. I still felt a little bit uncomfortable because of prior knowledge that you're not supposed to talk about things ahead of time.<sup>122</sup>

I guess I didn't believe it at first that we could do it but it turned out to be a positive thing, I think.<sup>123</sup>

Some of us were still sort of afraid to discuss things. Even though it was said we were still wondering what we could talk about and what we couldn't. There were a few people who had been on juries before, but of course the new reforms though, but they didn't want to do something that might make it unfair or unethical.<sup>124</sup>

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evidence during the trial, despite the fact that they may have thought such discussions were prohibited based on prior experience or information. The suggested instruction read as follows:

You jurors may discuss the evidence during the trial, but only among yourselves and only in the jury room when all of you are present. Despite what you have heard about or experienced in other trials, where jurors cannot discuss the evidence among themselves during the trial, that rule has been changed in Arizona to permit jurors to talk with each other about the evidence during trials in civil cases like this one. The kinds of things you may discuss include the witnesses, their testimony and exhibits. However, you must be very careful not to discuss or make up your minds about the final outcome, or who should win the case, until you have heard everything—all the evidence, the final instructions of law, and the attorneys' arguments—and your deliberations have begun. Obviously, it would be unfair and unwise to decide the case until you have heard everything.

Suggested Jury Instructions (unpublished) (on file with the authors).

121. Videotaped interview by Valerie Hans & Paula Hannaford with Juror 1, in Phoenix, Ariz. (Mar. 7, 1997). Additional information regarding this interview may be found on file with the authors.

122. Videotaped interview by Valerie Hans & Paula Hannaford with Juror 2, in Phoenix, Ariz. (Mar. 7, 1997). Additional information regarding this interview may be found on file with the authors.

123. Audiotaped telephone interview by Valerie Hans & Paula Hannaford with Juror 12 (Mar. 26, 1997). Additional information regarding this interview may be found on file with the authors.

124. Audiotaped telephone interview by Paula Hannaford with Juror 9 (Mar 25, 1997). Additional information regarding this interview may be found on file with the authors.

In addition to the logistical problems and jurors' own hesitancy, there is some evidence that a minority of jurors are worried that extensive discussions might encourage premature decision making or improper influence. In the field study, about a quarter of the jurors who engaged in at least one discussion agree that "trial discussions encourage jurors to make up their minds early on, before all the evidence and the law is presented." This figure is much lower than the litigants and attorneys, although it is close to that of the judges. Nevertheless, it is still a substantial minority. Not surprisingly, jurors who believe that trial discussions encourage premature decision making are less likely to support the reform.<sup>125</sup> Jurors who reported more conflict on their jury were also less enamored with the reform.<sup>126</sup>

Jurors we interviewed occasionally reflected concerns about the potential for prejudice or inappropriate influence. For example, one juror said she was uncomfortable discussing the case before all the evidence was in, thinking that "it's better to think about it independently and then pool your impressions."<sup>127</sup> Another juror we interviewed observed:

I think I had this strong feeling that if I talked about it a lot before all the facts were in I might get some biases; once you've said something you kind of feel that you've made a proclamation that you have to stand behind. If you haven't said anything it's easier to change your mind. I think most of us there seemed to have that same feeling. We'll talk about it when we get all the facts.<sup>128</sup>

Thus, at least some jurors show reluctance to engage in trial discussions because of the concern that they, or others, might prejudice the case.

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125. The relationship between support for trial discussions and belief that they encourage premature decision making is  $-.22$ ,  $p < .0001$ . Analysis of variance confirmed the statistical significance of the relationship while controlling for the fact that the jurors were not independent.

126. The relationship is statistically significant ( $r = -.11$ ,  $p = .006$ ). Analysis of variance confirmed the pattern.

127. Videotaped interview by Valerie Hans & Paula Hannaford with Juror 5, in Phoenix, Ariz. (Mar. 8, 1997). Additional information regarding this interview may be found on file with the authors.

128. Videotaped interview by Valerie Hans & Paula Hannaford with Juror 7, in Phoenix, Ariz. (Mar. 8, 1997). Additional information regarding this interview may be found on file with the authors.

## CONCLUSION

The data provide some early evidence about the extent to which jurors engage in trial discussions and their perceived benefits and drawbacks. Jurors themselves are quite enthusiastic about the reform and claim that it has positive effects. At least by jurors' own reports, discussing the evidence during the trial assists them in understanding and remembering the evidence, although a minority of jurors express some reservations about the reform. Judges also are relatively positive about the reform. Attorneys and litigants were among the most negative, with about half of each group opposing the reform.

The more active approach to jury decision making that is discussed here is echoed in recent calls for educational reform. For example, the Boyer Commission on Educating Undergraduates in the Research University recently issued a report arguing that the traditional lecture method of college teaching should be revamped and replaced by more active learning approaches.<sup>129</sup> The report draws on studies showing that group problem-based learning can be a superior method of transmitting information to students and training them to solve complex real world problems.<sup>130</sup> It is interesting to observe that the institution of the jury already incorporates key elements of this ideal educational device in that it consists of a group of citizens who work together to resolve an important social and political question. Revising the traditions of the adversary system that curtail the jurors' ability to question witnesses and discuss evidence among themselves in a timely fashion during the trial would bring the jury even closer to the Boyer Commission's ideal educational model. Yet, would it create bias or tip the scales of justice? It remains to be seen whether the presumed benefits or drawbacks of jury trial discussions are substantiated by the findings of the field experiment.<sup>131</sup>

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129. See THE BOYER COMMISSION ON EDUCATING UNDERGRADUATES IN THE RESEARCH UNIVERSITY, *REINVENTING UNDERGRADUATE EDUCATION: A BLUEPRINT FOR AMERICA'S RESEARCH UNIVERSITIES* 15-16 (1996); see also Dann, *supra* note 9, at 1244-46 (arguing that courtrooms should learn from the model of classrooms, which actively encourage interaction and information exchange, and allow jurors to take a more active role in the proceedings).

130. See Deborah E. Allen, et al., *The Power of Problem-Based Learning in Teaching Introductory Science Courses*, in *BRINGING PROBLEM-BASED LEARNING TO HIGHER EDUCATION: THEORY AND PRACTICE* 43, 44-45 (LuAnn Wilkerson & Wim H. Gijsselaers eds., 1996).

131. Our project is the first attempt to measure the effect of trial discussions. A second project, also funded by the State Justice Institute, is now underway. Researchers Shari Diamond and Neil Vidmar are assisting in the development of that project, which will take place in the Pima County (Arizona) Superior Court. This project, which involves videotap-

We plan to address that question in later publications. Although the readers of our work may discuss these early findings among themselves in the meantime, they are admonished to keep an open mind.

TABLE 1  
THE VIEWS OF JUDGES, LITIGANTS, AND  
ATTORNEYS ABOUT TRIAL DISCUSSIONS

ITEM	JUDGES (N=40)	LITIGANTS (N=112)	ATTORNEYS (N=202)
Trial discussions improve juror understanding of evidence (% agreeing)	78%	61%	51%
Trial discussions encourage jurors to make up their minds early on, before all the evidence and the law is presented (% agreeing)	30%	52%	55%
Support reform (% supporting)	73%	47%	51%
Feel comfortable with jurors engaging in trial discussions (% agreeing)	—	51%	51%

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ing civil jury trials, including all trial discussions and deliberations, is designed to provide more precise information on the substance and dynamics of juror discussions.

**TABLE 2**  
**JURORS' VIEWS OF BENEFITS AND DRAWBACKS OF TRIAL DISCUSSIONS [MEAN RESPONSE, JURORS WHO WERE RANDOMLY ASSIGNED TO TRIAL DISCUSSIONS AND ENGAGED IN AT LEAST ONE DISCUSSION (N=479)]**

How accurately was the trial evidence remembered during trial discussions? (1=not at all accurately; 7=very accurately)	5.76
How helpful were these discussions for resolving confusion about the testimony or evidence presented during the trial? (1=not at all helpful; 7=very helpful)	5.63
How thoroughly were all jurors' points of view considered during these discussions? (1=not at all thoroughly; 7=very thoroughly)	5.90
How concerned were you about inappropriately influencing or being influenced by the opinions of the other jurors by engaging in trial discussions? (1=not at all concerned; 7=very concerned)	2.70
To what extent would you say that one or two jurors dominated these discussions? (1=not at all; 7=very much)	3.53

**TABLE 3**  
**VIEWS ABOUT TRIAL DISCUSSIONS OF JURORS WHO WERE RANDOMLY ASSIGNED TO TRIAL DISCUSSIONS AND ENGAGED IN AT LEAST ONE DISCUSSION (N=479)**

ITEM	
Trial discussions improve juror understanding of evidence (% agreeing)	81%
Trial discussions encourage jurors to make up their minds early on, before all the evidence and the law is presented (% agreeing)	26%
Support reform (% supporting)	77%
Felt comfortable engaging in trial discussions (% agreeing)	83%

