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THE CIVIL JURY IN THE UNITED STATES

JAY E. GRENIG*

ABSTRACT

This Article explores the evolution of the civil jury in the American judicial system. The origins of the civil jury are functionally linked to ancient origins, and are a direct descendent from the English jury system. The civil jury system is both similar and distinct from the criminal jury system, with the civil jury system being an adapted form of the criminal system. The Article explains the expansive and critical role the civil jury plays in the implementation and development of the law. Important to this discussion is an understanding of where the jury began in the American system, and in what regard the role of a jury has been expanded and reduced in both civil and criminal disputes.

Beyond a historical overview of the American civil jury system, this Article proposes possible improvements that can be made in regard to the civil jury system in America. These improvements include the use of notes for juries, improved access to technology, special verdict forms, and other means.

“The jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity and perjury.”¹

- Mark Twain

“[S]o long as a case has to be scrutinised by twelve honest men, defendant and plaintiff alike have a safeguard from arbitrary perversion of the law.”²

- Winston Churchill

* Jay E. Grenig, Professor of Law at Marquette University Law School. B.A. (1966), Willamette University; J.D. (1971), Hastings College of the Law, University of California. Professor Grenig is the co-author with Kevin O'Malley and the Honorable William Lee of WEST'S FEDERAL JURY PRACTICE AND INSTRUCTIONS (6th ed.). The section on jury instructions in this Article is adapted from that book.

1. MARK TWAIN, ROUGHING IT (1872), <http://www.twainquotes.com/Jury.html>. Dean Erwin Griswold would seem to agree with Mark Twain. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 5 (1966) (quoting 1962-63 HARVARD LAW SCHOOL DEAN'S REPORT 5-6: “Why should anyone think that 12 persons brought in from the street, selected in various ways, for their lack of general ability, should have any special capacity for deciding controversies between persons?”).

2. WINSTON S. CHURCHILL, A HISTORY OF THE ENGLISH SPEAKING PEOPLES: THE BIRTH OF BRITAIN 176 (1956).

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I. INTRODUCTION

The exact origins of the jury trial are unknown and subject to considerable debate.³ Some have suggested that the jury has its roots in ancient Greece and the laws of Solon,⁴ the system of *Judices* found in the twelve tables of Roman law, imported during the Roman Conquest of England,⁵ the practices of the Anglo-Saxons,⁶ or in the judicial system imposed by the Normans following the Battle of Hastings in 1066.⁷

Most civilizations, at one time or another, have permitted laypersons to decide disputes between litigants.⁸ However, many of these early so-called juries were not juries as we think of them in Anglo-American jurisprudence. The Anglo-American jury consists of members of the community who are summoned to find the truth of disputed facts. These jurors are distinct from judges or courts.⁹ While this Article examines the civil jury, consideration of the history of criminal juries is helpful because the modern civil jury descended from the old criminal jury through the action of trespass.¹⁰

II. HISTORY OF THE JURY

The jury system may have been brought to Rome by the Athenians and from there to England.¹¹ It is believed that at least as of the time of the Magna Carta, the predecessor to the right to a jury trial existed in some fashion.¹² This section examines the history of the “modern” jury in

3. Peter G. Keane, *The Jury—Some Thoughts, Historical and Personal*, 47 HASTINGS L. J. 1249, 1249 (1996).

4. See RICHARDSON R. LYNN, *JURY TRIAL LAW AND PRACTICE* 2 (1986).

5. *Id.*; LLOYD E. MOORE, *THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY* 3 (1973).

6. Forsyth asserts that trial by jury was unknown to the Anglo-Saxons. WILLIAM FORSYTH, *HISTORY OF TRIAL BY JURY* 45 (2d ed. 1875). He states that Anglo-Saxon jurors were no more than compurgators. *Id.* at 15. In a trial by compurgation or wager of law, the defendant took an oath of innocence and his “compurgators” would support him with an oath. Commonly, the defendant had to produce eleven compurgators, which, with his own oath, made twelve. See THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 115-16 (5th ed. 1956); JOHN GUINTEH, *THE JURY IN AMERICA* 6 (1988).

7. Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 392 (1996); Keane, *supra* note 3, at 1249.

8. CHARLES W. JOINER, *CIVIL JUSTICE AND THE JURY* 39 (1962).

9. FORSYTH, *supra* note 6, at 7; *but see* PLUCKNETT, *supra* note 6, at 107 (quoting Maitland that “a jury is a body of neighbours summoned by a public officer to answer questions upon oath”). While the jury is theoretically the fact finder, by ruling on the admissibility of evidence judges determine “which facts or alleged facts the jurors are allowed to hear.” GUINTEH, *supra* note 6, at 69-70.

10. PLUCKNETT, *supra* note 6, at 107.

11. See KEVIN F. O’MALLEY, JAY E. GRENIG & WILLIAM C. LEE, *FEDERAL JURY PRACTICE & PROCEDURE*, § 1:1, at 4 (6th ed. 2006).

12. See *e.g.*, Douglas G. Smith, *supra* note 7, at 279.

England and the United States beginning with the Norman conquest in 1066.

A. THE ENGLISH JURY

The jury, as we know it, was likely unknown in England before the Norman conquest in 1066.¹³ The modern jury dates from 1154-1189, during the reign of King Henry II (“Henry II”).¹⁴ In the Twelfth Century, Henry II gave “litigants in the royal courts a startling new procedure—trial by jury.”¹⁵ “Although he did not invent the jury, [Henry II] put it to a new purpose.”¹⁶ Prior to Henry II, juries had been used by the Crown as an administrative device.¹⁷ The king had the right to summon a body of men to bear witness under oath about the truth of any question concerning the royal interest.¹⁸ Henry II, on the other hand, turned to regular use of the jury in the courts.¹⁹

Because only the king had the right to summon a jury, Henry II restricted its use to those who sought justice before the royal judges, thus, strengthening royal power.²⁰ The jury replaced decision through oath,²¹ ordeal,²² or battle.²³ While trial by jury quickly gained favor, it did not completely eliminate trial by ordeal.²⁴

13. CHURCHILL, *supra* note 2, at 175; JOINER, *supra* note 8, at 39; *but see* MOORE, *supra* note 5, at 25-27 (suggesting that the jury originated with such Anglo-Saxon rulers as Aethelred I (866-871), Alfred the Great (871-899), and Aethelred II, the Unready (978-1013). There is also an example of a jury trial in a boundary dispute during the reign of Edward the Confessor (1024-1066)); *see also* Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS. L.J. 579, 582 (1993) (important precursors to the jury existed in England before the Conquest and likely played a significant part in inducing Englishmen to place their trust in the jury trial mechanisms proffered by the conquerors). On the other hand, Plucknett suggests that the tracking back of the jury to Anglo-Saxon institutions is motivated by idealised and patriotic reasons. PLUCKNETT, *supra* note 6, at 108. Forsyth asserts that Anglo-Saxon jurors “were nothing but compurgators.” FORSYTH, *supra* note 6, at 15.

14. CHURCHILL, *supra* note 2, at 175.

15. *Id.* at 217; *see also* MOORE, *supra* note 5, at 37-38; Douglas G. Smith, *supra* note 7, at 394.

16. CHURCHILL, *supra* note 2, at 175.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. Trial by oath could be resorted to after a defendant’s testimony was challenged or contradicted by the plaintiff or accuser. The defendant was required to repeat his denial under oath, according to an exact formula. Oath was piled upon oath and the slightest deviation resulted in the defendant’s losing his case. MOORE, *supra* note 5, at 28.

22. The ordeal was of three kinds: (1) the ordeal of hot iron, in which the accused took up and carried for a certain distance one pound of hot iron, (2) “the ordeal of hot water in which the accused had to take out of a pitcher of boiling water a stone hanging by a string at a depth equal to the length of his own hand,” and (3) the ordeal of the accursed morsel in which the accused person swallowed a piece of bread accompanied with a prayer that it might choke him if he were guilty.

There were various forms of the jury under Henry II.²⁵ The two basic types of juries were presenting or accusing juries and trying juries.²⁶ The accusing or presenting juries functioned in a manner similar to the modern grand jury and aided in the enforcement of criminal law.²⁷ Members of the presenting jury were put under oath and required to reveal whether there was any person accused or publicly known as a robber, murderer, or other criminal in their community.²⁸ The members of the jury presented to the judge the names of those suspected of crimes who were then taken at once to the ordeal of water.²⁹

Trying juries were used to decide civil disputes in assize³⁰ cases, such as disputes over the possession or ownership of land.³¹ After the ordeal by water became less common,³² trying juries were used to try criminal cases after indictment by a presenting jury.³³

FORSYTH, *supra* note 6, at 67-68. If the iron did not burn, the water scald, or the bread choke, it was a sign from Divine Providence that the accused was innocent. CHURCHILL, *supra* note 2, at 175; PLUCKNETT, *supra* note 6, at 113-14. In another form of ordeal, trial by water, the accused was plunged in a body of water, if the accused did not drown, this was seen as a sign of innocence. CHURCHILL, *supra* note 2, at 175; *see also* PLUCKNETT, *supra* note 6, at 114.

23. CHURCHILL, *supra* note 2, at 218. The trial by battle (sometimes referred to as the duel) was based on the theory that “the God of Battles will strengthen the arm of the righteous.” *Id.*; *see* MOORE, *supra* note 5, at 4-5 (trial by battle was considered a nobler mode of trial, with trial by jury being reserved for “the weak, the aged and women”). The prudent (including monasteries and other substantial landowners) took the precaution of “assisting the Almighty by retaining professional champions.” CHURCHILL, *supra* note 2, at 175. In civil cases, the battle was not fought between the parties themselves, but between their respective champions. PLUCKNETT, *supra* note 6, at 116. Trial by battle—at least in criminal appeals—existed in England until 1819. *Id.* at 117-18.

24. CHURCHILL, *supra* note 2, at 175.

25. *Id.* at 218-19.

26. GOLDWIN SMITH, A HISTORY OF ENGLAND 56 (2d ed. 1957). At times the judges “merely inquired of the presenting jury whether the prisoner was guilty.” PLUCKNETT, *supra* note 6, at 120.

27. SMITH, *supra* note 26, at 56.

28. *Id.*

29. *Id.* Ordeal by water could be either ordeal of hot water or ordeal of cold water. The ordeal of hot water required the accused in a criminal case to dip his or her hand in a kettle of boiling water and retrieve a stone. The hand was examined three days later to see whether it was healing or festering. In the ordeal of hot water, the accused in a criminal case was thrown into a pond or river. If the accused floated to the surface without any action of swimming, the accused was deemed guilty. If the suspect sank, the suspect was pulled out and declared innocent. *See* Trisha Olson, *Of Enchantment: The Passing of the Ordeals and the Rise of the Jury Trial*, 50 SYRACUSE L. REV. 109, 118 (2000).

30. An “assize” was in the nature of a royal ordinance classifying judicial actions. *Id.* at 57.

31. *Id.*

32. The decline in trial by ordeal has been traced back to 1215, the date of the fourth Lateran Council at Rome that prohibited priests from taking further part in ordeals. SMITH, *supra* note 26, at 58.

33. *Id.* at 59. Because all the property of a person convicted by a jury was forfeited to the king, many refused to submit to the jury. *Id.* To persuade persons to consent to be tried by jury, weights and stones were loaded on them and they were frequently given no food. *Id.* Many died

All forms of juries under Henry II had one essential characteristic—the jurors were both witness and judges as to facts.³⁴ The jurors returned a verdict based on what they knew, what they were told before trial, and what they were told during trial.³⁵ Jurors were not picked for their impartiality, but instead, because they were the men most likely to know the truth.³⁶ The modern jury that knows nothing about the case until it is proved in court was still to come.³⁷ By the mid-1500s, in almost all cases, there was a complete separation of witnesses from the jury.³⁸

To avoid delay and expense, the parties might agree on a *jury de circumstantibus*—a jury of bystanders.³⁹ The few jurors who knew the truth of the matter would tell their tale to the bystanders, and then everyone on the jury would deliver their verdict.⁴⁰

In time, the jurors with local knowledge would cease to be jurors at all and become witnesses, giving their evidence in open court to a jury entirely composed of bystanders.⁴¹ However, the old ideas did not pass quietly. Even under the Tudor kings,⁴² jurors might be tried for perjury if they gave a wrongful verdict.⁴³ Later, judges fined and imprisoned juries that returned verdicts the judges thought to be incorrect.⁴⁴

The practice of punishing juries for incorrect verdicts ended in 1670 in the *Bushell's Case*.⁴⁵ When the jurors refused to find William Penn guilty

of this treatment, called *peine forte et dure*, but, because they died not having been convicted of any crime, their families inherited their property. *Id.*

34. CHURCHILL, *supra* note 2, at 219; *see* Keane, *supra* note 3, at 1251 (the early jury was a group of neighbors who came together and pooled their collective knowledge about a dispute to reach an agreement on the proper resolution); Roger W. Kirst, *The Jury's Historic Domain in Complex Cases*, 58 WASH. L. REV. 1, 14 (1982) (body that eventually became the jury began as a group of local residents who knew at least some of the facts of the dispute before the trial); *see also* DONALD K. ROSS, *THE CIVIL JURY SYSTEM: AN ESSENTIAL OF JUSTICE* 16 (1971) (jurors are chosen for their open minds; their newness to the situation leaves them open to legitimate persuasion).

35. Kirst, *supra* note 34, at 14; *see* MOORE, *supra* note 5, at 37 (it was usual for jurors to inform themselves about the dispute before appearing in court).

36. CHURCHILL, *supra* note 2, at 176.

37. *Id.*

38. Landsman, *supra* note 13, at 586.

39. CHURCHILL, *supra* note 2, at 176.

40. *Id.*

41. *Id.*; LYNN, *supra* note 4, at 2.

42. Circa 1485-1603. *See House of Tudor*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/House-of-Tudor> (last visited Mar. 18, 2017).

43. CHURCHILL, *supra* note 2, at 176; *see* LYNN, *supra* note 4, at 2 n.10 (“If the judge thought that the jury verdict was erroneous, jurors were subject to *attaint*, a procedure in which the parties and original jury were tried by a larger jury. If the *attaint* jury returned a different verdict, the first jury was convicted and punished for perjury.”).

44. LYNN, *supra* note 4, at 2.

45. 1 Vaug. 135 (1670), reprinted in 124 ENG. REPT. 1006 (1912). *See* LYNN, *supra* note 4, at 3; *see also* MOORE, *supra* note 5, at 83-86; PLUCKNETT, *supra* note 6, at 134; GODFREY D.

of holding an illegal Quaker meeting in London, the jurors were fined and imprisoned until they could pay the fine.⁴⁶ Bushell, the foreman of the jury, obtained a writ of habeas corpus from Justice Vaughan.⁴⁷ Justice Vaughan's opinion established the principle that jurors have the right to give their verdict according to their convictions.⁴⁸ Of course, the common law form of pleadings narrowed the issues in dispute so that English juries were frequently faced with only a few points.⁴⁹

From 1190 until 1870, English law recognized the danger in allowing members of a minority community to be tried entirely by majority jurors.⁵⁰ In cases involving minorities, juries were impaneled consisting half of natives and half of foreigners.⁵¹ Such a jury was referred to as a jury *de medietate linguae*.⁵² The right to a jury *de medietate linguae* was available in America for aliens involved in legal proceedings at least between 1647 and 1911.⁵³

The concept of the mixed jury originated in the treatment of Jews in medieval England.⁵⁴ The English viewed the Jews as aliens in race, religion, and culture because they were darker-skinned and spoke a mysterious and foreign language.⁵⁵ Separate Jewish tribunals were used to settle civil disputes between Jews.⁵⁶ When a Jew was involved in a dispute with a Christian, the king had a substantial financial interest because, if the Christian prevailed, the property that would otherwise belong to a Jew (and thereby to the king, because Jews were viewed as the king's property) would be lost to the king.⁵⁷ In 1190, there were mass riots and violence

LEHMAN, WE THE JURY: THE IMPACT OF JURORS ON OUR BASIC FREEDOMS 35-72 (1997); GUINThER, *supra* note 6, at 1, 24-27 (examining descriptions of the proceedings in *Bushell*). *Bushell* is spelled "Bushel" in several sources. See, e.g., PLUCKNETT, *supra* note 6, at 134; GUINThER, *supra* note 6, at 1, 24-27. However, 1 Vaug. 135, the original source, spells it "Bushell."

46. MOORE, *supra* note 5, at 86.

47. *Id.*

48. *Id.*

49. See FORSYTH, *supra* note 6, at 147.

50. Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury de Medietate Linguae: A History and a Proposal for Change*, 74 B.U. L. REV. 777, 781 (1994).

51. *Id.* at 791; see also Douglas G. Smith, *supra* note 7, at 404.

52. Ramirez, *supra* note 50, at 791; see BLACK'S LAW DICTIONARY 430 (6th ed. 1990), defining *medietate linguae* to mean "of the half tongue."

53. Douglas G. Smith, *supra* note 7, at 437 (In 1682, Puritans in the Plymouth Colony added Native Americans to the jury in a criminal case relating to a Native American.).

54. Ramirez, *supra* note 50, at 783. Forsyth states that the first mention of the jury *de medietate linguae* is in the reign of Edward I. FORSYTH, *supra* note 6, at 189.

55. Ramirez, *supra* note 50, at 783.

56. *Id.* at 784.

57. *Id.*

against Jews.⁵⁸ To protect his own property, King Richard I enacted a charter that gave Jews, when suing Christians, the right to a half-Jewish jury.⁵⁹

With the expulsion of the Jews in 1290, foreign merchants from Italy and Germany became the financial agents of the king.⁶⁰ In 1303, King Edward I provided by charter that foreign merchants living in England should, in all cases in which they were involved, except capital cases, be entitled to a jury trial consisting of six foreign merchants residing in the city or town and six other good and lawful men of the place where the trial was to be held.⁶¹ In 1353, the statute was reaffirmed with the additional provision that, when both merchants were foreign, the jury would be entirely foreign.⁶²

When this protection was abrogated during the reign of Henry V,⁶³ foreign merchants responded by refusing to do business in England.⁶⁴ As a result, in 1429, a new statute was passed reaffirming the right of all aliens to a jury *de medietate linguae*.⁶⁵ The Naturalization Act of 1870 abolished an alien's right to a mixed jury, although Parliament permitted aliens to serve on juries.⁶⁶

In 1933, Parliament passed an act⁶⁷ having the effect of requiring the virtual elimination of civil jury trials.⁶⁸ Since about 1939, the great majority of civil cases have been tried without a jury.⁶⁹

B. THE ORIGINS OF THE AMERICAN JURY

The right to trial by jury is a fundamental and favored aspect of American jurisprudence.⁷⁰ “Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should

58. *Id.*

59. *Id.*

60. *Id.*

61. MOORE, *supra* note 5, at 58; FORSYTH, *supra* note 6, at 190.

62. MOORE, *supra* note 5, at 58; FORSYTH, *supra* note 6, at 190.

63. Circa 1414. See *Henry V*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/biography/Henry-V-king-of-England> (last visited Mar. 18, 2017).

64. Ramirez, *supra* note 50, at 785.

65. *Id.* at 786.

66. *Id.*

67. MOORE, *supra* note 5, at 128 (citing *The Statutes Revised*, 1933, ch. 36).

68. See ROSS, *supra* note 34, at 7; GUNTHER, *supra* note 6, at 34.

69. MOORE, *supra* note 5, at 129.

70. See 1 O'MALLEY, GRENIG & LEE, *supra* note 11, § 7:6.

be scrutinized with the utmost care.”⁷¹ This section examines the historical bases of American juries.

1. *Early American Juries*

Jury trials came to America with English colonists.⁷² The Virginia Charter of 1606, providing that the colonists would maintain all the rights of the English, has been read as guaranteeing the right to a jury trial.⁷³ The Massachusetts Bay Colony was the first of the American colonies to introduce the jury trial in 1628.⁷⁴

In 1765, the First Congress of the American Colonies⁷⁵ adopted a resolution declaring “[t]hat trial by jury is the inherent and invaluable right of every British subject of these colonies.”⁷⁶ The First Continental Congress, in 1774, declared that “the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.”⁷⁷ The Declaration of Independence criticized the “English practice of transporting colonists accused of treason to England for trial. . .” and also accused King George of depriving them of “the benefit of being known by those who prosecuted and tried [them]. . . .”⁷⁸

2. *The Seventh Amendment*

Although Article III of the U.S. Constitution guarantees a right to a jury trial in criminal cases, the Constitution did not originally contain a correlative right in civil cases.⁷⁹ During the Constitutional Convention,

71. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

72. *Duncan v. Louisiana*, 391 U.S. 145, 152 (1968).

73. See *Landsman*, *supra* note 13, at 592.

74. Douglas G. Smith, *supra* note 7, at 422 n. 174 (listing the dates for the commencement of the right to jury trials in the various colonies); see also *Landsman*, *supra* note 13, at 592.

75. The First Congress was also referred to as the “Stamp Act Congress.” It consisted of nine colonies. Michael H. Glasser, Comment, *Letting the Supermajority Rule: Nonunanimous Jury Verdicts in Criminal Trials*, 24 FLA. ST. U. L. REV. 659, 662 n.24 (1997).

76. 1 O’MALLEY, GRENIG & LEE, *supra* note 11, § 1.1, at 6 (6th ed. 2006) (citing *Duncan*, 391 U.S. at 152).

77. *Duncan*, 391 U.S. at 152 (quoting SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 270, 288 (Richard Perry, ed., 1959)). See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 871 (1994) (“The framers’ enthusiastic support for the jury stemmed in large measure from the role that juries had played in resisting English authority before the Revolution.”).

78. Kenneth B. Nunn, *When Juries Meet the Press: Rethinking the Jury’s Representative Function in Highly Publicized Cases*, 22 HASTINGS CONST. L. Q. 405, 412-13 (1995).

79. 1 O’MALLEY, GRENIG & LEE, *supra* note 11, § 1.1, at 6-7; LYNN, *supra* note 4, at 7.

nothing was said about the right to a civil jury trial until the final week.⁸⁰ On September 1, 1787, Delegate Hugh Williamson observed that no provision was yet made for juries in civil cases.⁸¹ Another delegate opposed the inclusion of a provision for civil juries, observing that it was not possible to differentiate equity cases from those in which juries are proper.⁸² That delegate was also concerned that the constitution of juries varied across different states.⁸³ After a discussion, the delegates decided not to include a right to a jury trial in civil cases.⁸⁴

Some have suggested that claims about drafting difficulty was disingenuous.⁸⁵ Instead, they contend there was a growing belief that the jury should play only a modest part in the governance of post-revolutionary America.⁸⁶ The absence of a guarantee of civil jury trials became one of the principal arguments against ratification of the Constitution.⁸⁷ “At least seven of the states ratifying the Constitution called for [an] immediate amendment to secure the right to jury trial in civil cases.”⁸⁸ The lack of a guarantee to a civil jury trial “was a chief impetus in the push for a Bill of Rights.”⁸⁹

“The Seventh Amendment became effective in 1791 after its ratification by Virginia.”⁹⁰ It has been suggested that “the best reading of the [Jury Trial Clause] is probably . . . if a state court entertaining a given common-law case would use a civil jury, a federal court hearing the same case . . . must follow—must ‘preserve’—that state-law jury right.”⁹¹ “The forum state’s law is to determine what constitutes a ‘common law case’ for

80. Stanton D. Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICH. L. REV. 407, 410 (1999).

81. *Id.*

82. *Id.* (quoting JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, 616-30 (Adrienne Koch, ed., 1987)).

83. *Id.* at 411.

84. *Id.*

85. Landsman, *supra* note 13, at 598.

86. *Id.* Among the apparent concerns was the perception that jury decisions were frequently anti-creditor.

87. *Parsons v. Bedford*, 28 U.S. 433, 446 (1830); Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 NW. U. L. REV. 144, 157 (1996).

88. Landsman, *supra* note 13, at 600.

89. LYNN, *supra* note 4, at 7.

90. *Id.* The Seventh Amendment provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

91. Krauss, *supra* note 80, at 408.

these purposes.”⁹² Because the Seventh Amendment does not apply to the states,⁹³ there is no constitutional requirement that states provide for juries in civil cases.⁹⁴

The United States Supreme Court has held that the intent of the creators was to preserve the right of jury trial that existed under the English common law when the Seventh Amendment was adopted.⁹⁵ The Court has taken this to mean that there can be no right to jury trial under the Seventh Amendment unless “we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was.”⁹⁶

Interpretation of the Seventh Amendment’s guarantee of the right to a jury trial is guided by historical analysis comprising two principal inquiries. The Court first asks whether it is “dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was.”⁹⁷ Next, the Court asks “whether the particular trial decision must fall to the jury to preserve the substance of the common law right.”⁹⁸ Put another way, the law-equity test⁹⁹ defines whether a jury is available and the judge-jury test¹⁰⁰ defines the role of the jury if one is available.¹⁰¹

3. *The American Jury as Judge of Legal and Factual Questions— Verdicts of Conscience*

It has been said that juries are supposed to take the law from the judge, who gives the law in the form of instructions.¹⁰² Nullification occurs when the jury deliberately ignores the jury instructions.¹⁰³ It is practically

92. *Id.*

93. *Alexander v. Virginia*, 413 U.S. 836, 836 (1973).

94. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 719 (1999); *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974).

95. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. at 708 (“[S]uits at common law’ include not merely suits that the *common* law recognized among its old and settled proceedings, but [also] suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized and equitable remedies were administered.”).

96. *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996).

97. *Id.*; *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. at 708; *but see Landsman, supra* note 13, at 579 (criticizing the courts’ “simplistic historical test that turns on whether a challenged jury regulation was part of English common law practice in 1791”).

98. *Markman*, 517 U.S. at 376.

99. *See, e.g., Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

100. *See, e.g., Parklane Hosiery Co. Inc. v. Shore*, 439 U.S. 322 (1979).

101. *Markman*, 517 U.S. at 377; *see Kirst, supra* note 34, at 12.

102. *See California v. Dillon*, 668 P.2d 697, 726 (1983).

103. *Id.* at 730 (Kingsley, J., concurring); *see Kirst, supra* note 34, at 10-12 for a discussion of jury nullification; GUNTHER, *supra* note 6, at 220 (noting that the term “conscience verdict” may be a more apt description).

impossible to detect or control jury nullification when a general verdict is rendered.¹⁰⁴

The 1735 trial of John Peter Zenger,¹⁰⁵ cases involving Vietnam anti-war protestors,¹⁰⁶ and cases involving anti-abortion protestors¹⁰⁷ could be examples of jury nullification.¹⁰⁸ While proponents of jury nullification sometimes characterize it as a means of preventing political oppression,¹⁰⁹ at times, jury nullification itself has shocked the conscience.¹¹⁰ One jury nullification advocacy group estimates that three to four percent of all jury trials involve nullification.¹¹¹

The jury in Norman England did not have the power to actually decide questions of law.¹¹² As a general rule, “juries in England possessed the power to judge issues of fact, but not of law.”¹¹³ It was thought that certainty in the law was better achieved by leaving legal questions to the judge. However, “English juries could and did disregard the instructions of judges, though they had no official authority to do so.”¹¹⁴

104. Douglas G. Smith, *supra* note 7, at 416; PLUCKNETT, *supra* note 6, at 125 (noting that a jury was considered as no more rational “than the ordeals which it replaced, and just as one did not question the judgments of God as shown by the ordeal, so the verdict of a jury was equally inscrutable.”); see FED. R. CIV. P. 50 (noting in civil cases, unlike criminal cases, the judge has considerable power to review the jury’s verdict).

105. See, e.g., LEHMAN, *supra* note 45, at 152-74 (explaining that the jury acquitted Zenger, who was defended by the foremost lawyer in the colonies, Andrew Hamilton, of criminally libeling the Royal Governor of New York. Hamilton urged the jury to disobey the instructions of the court and to determine for themselves whether the laws of England made it a crime to punish truthful criticism of government); ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 75 (1994) (noting that “the acquittal rested on a principled claim about freedom of the press and the right to print truthful criticism of government”).

106. GUNTHER, *supra* note 6, at 222-23; *but see* United States v. Simpson, 460 F.2d 515, 519 (9th Cir. 1972) (court upheld district’s court’s refusal to instruct jurors that they could acquit the defendant regardless of whether he had violated the law, because the jurors already knew they could return a conscience verdict without an instruction); *compare* United States v. Anderson, 356 F. Supp. 1311 (D.N.J. 1973); Alan Schefflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51, 53 (1980) (noting that the jury were instructed that “if you find that the overreaching participation by Government agents or informers in the activities as you have heard them here was so fundamentally unfair to be offensive to the basic standards of decency, and shocking to the universal sense of justice, then you may acquit. . .”).

107. See ABRAMSON, *supra* note 105, at 57-59.

108. GUNTHER, *supra* note 6, at 222-23.

109. LYNN, *supra* note 4, at 3.

110. ABRAMSON, *supra* note 105, at 61-62 (explaining that in the 1950s and 1960s all-white juries repeatedly acquitted murderers of African-Americans despite overwhelming evidence).

111. Clay S. Conrad, *Doing Your Best as a Trial Juror: Surviving Voir Dire*, FULLY INFORMED JURY ASS’N, http://fija.org/docs/BR_YYYY_surviving_voir_dire.pdf (last visited Mar. 18, 2017).

112. MOORE, *supra* note 5, at 40.

113. Douglas G. Smith, *supra* note 7, at 415.

114. *Id.*; Alschuler & Deiss, *supra* note 77, at 903.

The jury in the colonial legal system decided “legal as well as factual questions because of the fear that courts would become instruments of political oppression.”¹¹⁵ “In America, following the Revolution, however, the authority of American juries to resolve legal issues was frequently confirmed by constitutions, statutes, and judicial decisions.”¹¹⁶ “In some colonies, American judges did not always give jury instructions.”¹¹⁷ But where instructions were given, the jury was bound to follow them.¹¹⁸ “In the early Nineteenth Century, judges [orally] *explained* the law to jurors.”¹¹⁹

At one point, early in the 1770s, John Adams wrote that juries should follow the judge’s explanation of the law, except in cases involving “fundamental principles” of liberty, in which it was not only the juror’s “right, but his duty . . . to find the verdict according to his own best understanding, judgment, and conscience, *though in direct opposition to the direction of the court.*”¹²⁰ Less than thirty years later, when he was President of the United States, Adams was instrumental in securing the enactment of the repressive Alien and Sedition Laws.¹²¹ However, even those laws expressly provided that the jury has “a right to determine the law and the fact . . . as in other cases.”¹²² When juries refused to convict, the Alien and Sedition Laws became unenforceable.¹²³

In the Eighteenth Century, Massachusetts juries were traditionally free to “disregard judicial instructions concerning the law and to return general verdicts conflicting with established doctrine.”¹²⁴ This would seem to be consistent with the authority American juries were often granted to resolve issues of law as well as fact.¹²⁵ The power of juries to decide questions of

115. LYNN, *supra* note 4, at 3; see ABRAMSON, *supra* note 105, at 73-75; but see SAMUEL ELIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 200-01 (1965) (British soldiers accused of Murder in the “Boston Massacre” and defended by John Adams were acquitted of murder by the colonial jury).

116. Alschuler & Deiss, *supra* note 77, at 903 (stating that, in the pre-Revolution Zenger trial, Andrew Hamilton declared that juries “have the right to . . . determine both the law and the fact.”).

117. *Id.* at 904; Douglas G. Smith, *supra* note 7, at 441.

118. Douglas G. Smith, *supra* note 7, at 442.

119. Lawrence M. Friedman, *Some Notes on the Civil Jury in Historical Perspective*, 48 *DEPAUL L. REV.* 201, 206 (1998) (emphasis added).

120. GUNTHER, *supra* note 6, at 221 (citing JOHN ADAMS, *WORKS* 253-55 (1850) (emphasis added); see ABRAMSON, *supra* note 105, at 23-24, 30-31 (describing jury nullification in Massachusetts)).

121. *Id.*

122. Ch. 75, 1 Stat. 597 (1798).

123. GUNTHER, *supra* note 6, at 221.

124. Landsman, *supra* note 13, at 602.

125. Douglas G. Smith, *supra* note 7, at 447; see, e.g., *Georgia v. Brailsford*, 3 U.S. 1 (1794) (In which Chief Justice Jay, in one of the few jury trials before the Supreme Court, instructed the

law was curtailed in federal courts, in 1895, when the Supreme Court held that in federal courts “it is the duty of juries in criminal cases to take the law from the court.”¹²⁶ The constitutions of several states¹²⁷ still provide that jurors shall judge questions of law as well as questions of fact, although judicial decisions have virtually eliminated this power.¹²⁸

“The continuing viability of jury nullification is the subject of some debate.”¹²⁹ In 1895, the Supreme Court rejected the right of criminal juries to judge the law.¹³⁰ Jury instructions in California, for example, inform jurors that it is their “duty to follow the law” and that they must apply the law of the case.¹³¹ Nonetheless, whether obvious or hidden, nullification is a timely strategy that jurors use to bring the law into line with their consciences and will probably exist as long as we have juries.¹³²

C. A JURY OF TWELVE

Swedish mythology says, “Odin ordained twelve Asagods to adjudge all causes in the metropolis of Asgard.”¹³³ Scandinavian juries were traditionally composed of twelve jurors, although the Norwegian assembly of the people had thirty-six.¹³⁴ Even the Russians used a jury of twelve men in certain criminal cases.¹³⁵ In Scania, the jury started with fifteen

jury that the courts are the best judges of the law, but that the jury nevertheless had a right to determine the law as well as the fact in controversy.).

126. *Sparf v. United States*, 156 U.S. 51, 102 (1895) (a criminal case).

127. Georgia, Indiana, and Maryland.

128. Douglas G. Smith, *supra* note 7, at 453.

129. Compare ABRAMSON, *supra* note 105, at 85-95 (describing the decline of jury nullification), with LEHMAN, *supra* note 45, at 352-53 (asserting that “the jury has an ‘unreviewable and irreversible power. . . to acquit in disregard of the instruction on the law’”); see I O’MALLEY, GREINIG & LEE, *supra* note 11, § 5.16 (“[a]lthough the jury has the power to nullify, it is not a right of the defendant”).

130. *Sparf*, 156 U.S. at 185; but see *Duncan*, 391 U.S. at 156 (Justice White appeared to support conscience verdicts when he wrote that a jury is an “inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. . . . The deep commitment of the Nation to the right of jury trial . . . as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.”); see also *Local 36 Int’l Fishermen & Allied Workers of America v. United States*, 177 F.2d 320, 339 (1979) (“The jury has always exercised the pardoning power, notwithstanding the law, which is their actual prerogative.”).

131. CALIFORNIA JURY INSTRUCTIONS: CIVIL BAJI 1.00 (2007 rev.); see *Noll v. Lee*, 34 Cal.Rptr. 223, 227 (1963) (explaining that jurors are “bound by the law as given them by the court”).

132. ABRAMSON, *supra* note 105, at 95.

133. MOORE, *supra* note 5, at 4.

134. *Id.* at 5.

135. *Id.* at 8 (suggesting that this tribunal may be derived from Scandinavian sources).

nominated men, and the defendant could challenge three of the fifteen men.¹³⁶

Many distinguished authorities trace the modern day jury back to the Franks.¹³⁷ For example, author William Forsyth states that in the jury's infancy in England, the number of jurors seems to have fluctuated with convenience or local custom requirements.¹³⁸ Lord Devlin, a British jurist, suggests that, because twelve was the number traditionally used in the wager of law or compurgation,¹³⁹ twelve is the customary number of jurors on a jury.¹⁴⁰ Through the reign of King John, however, twelve was not invariably the number of jurors.¹⁴¹ A 1682 guide to jurors indicates that juries are twelve by analogy to the Prophets the Apostles, the Discoverers, and the Stones.¹⁴²

It appears to have been well-established in America that a jury is composed of twelve jurors.¹⁴³ For example, juries in colonial Virginia courts were generally composed of twelve men, although records show that some were composed of thirteen, fourteen, or twenty-four men.¹⁴⁴ However, a 1645 Connecticut regulation authorized judges to impanel either six or twelve-person juries.¹⁴⁵ And in Massachusetts, when twelve persons were not available, juries of six were allowed in certain civil cases.¹⁴⁶

Until the 1970s, it was assumed that trial by jury required the unanimous verdict of twelve jurors.¹⁴⁷ In 1970, the Supreme Court

136. FORSYTH, *supra* note 6, at 24.

137. PLUCKNETT, *supra* note 6, at 109 (citing H. Brunner, *Entstehung der Schwurgerichte* (1872) and C.H. Haskins, *Norman Institutions* (1918)).

138. FORSYTH, *supra* note 6, at 108.

139. *See* PLUCKNETT, *supra* note 6, at 115-16.

140. MOORE, *supra* note 5, at 41 (citing SIR PATRICK DEVLIN, *TRIAL BY JURY* 159 (1966)).

141. *Id.* (stating that numbers of jurors ranging from six to sixty-six have been found). At least one trying jury consisted of eighty-four persons. PLUCKNETT, *supra* note 6, at 120.

142. MOORE, *supra* note 5, at 41; *see also* I COKE, *THE FIRST PART OF THE INSTITUTE OF THE LAWS OF ENGLAND: A COMMENTARY UPON LITTLETON* 155a (1823) ("And it seemeth to me, that the law in this case delighteth herselfe in the number of 12; for there must not onely be 12 jurors for the tryall of matters of fact, but 12 judges of ancient time for tryall of matters of law in the Exchequer Chamber. Also for matters of state there were in ancient time twelve Counsellors of State. He that wageth his law must have eleven others with him, which thinke he says true. And that number of twelve is much respected in holy writ, as 12 apostles, 12 stones, 12 tribes, etc.").

143. Douglas G. Smith, *supra* note 7, at 426.

144. Harold M. Hyman & Catherine M. Tarrant, *Aspects of American Trial Jury History*, in *4 THE JURY SYSTEM IN AMERICA* 23, 26 (1975).

145. Douglas G. Smith, *supra* note 7, at 428.

146. *Id.*

147. LYNN, *supra* note 4, at 3; *see* Landsman, *supra* note 13, at 586 (in mid-fourteenth century England, jury verdicts were required to be unanimous).

approved verdicts by six-person, unanimous juries.¹⁴⁸ The “empirical studies” relied upon by the Supreme Court in these decisions have been criticized by some scholars.¹⁴⁹

III. IMPROVING THE EFFECTIVENESS OF TRIAL BY JURY

“The jury will continue to be an essential part of the American system of justice for the foreseeable future.”¹⁵⁰ Nonetheless, there are a number of steps that can be taken “to increase juror understanding and the effectiveness of the jury system.”¹⁵¹ This section suggests possible steps that can be taken to improve the effectiveness of trial by jury.¹⁵²

A. “JUROR NOTEBOOKS”¹⁵³

In appropriate cases, judges should distribute[,] or permit the parties to distribute[, to each juror notebooks containing] the court’s preliminary instructions, selected exhibits that [have been] ruled admissible, stipulations, and other material not subject to dispute such as photographs, curricula vitae of experts, glossaries, and chronologies.¹⁵⁴ [T]he court should require jurors to sign their notebooks and . . . should collect them at the end of each day of trial until the jurors retire to deliberate.¹⁵⁵

The notebooks can be returned to the jurors when they resume further deliberations, if any.

148. *Williams v. Florida*, 399 U.S. 78, 86 (1970) (state may constitutionally use a jury of six members in a criminal case); *Colgrove v. Battin*, 413 U.S. 149, 152 (1973) (extending the holding of *Williams v. Florida* to civil cases and upholding a local rule authorizing a six-member jury in civil cases); see also FED. R. CIV. P. 48 (“The court shall seat a jury of not fewer than six and not more than twelve members and all members shall participate in the verdict unless excused from service by the court pursuant to Rule 47(c).”).

149. See DAVID A. VOLLRATH & JAMES H. DAVIS, *Jury Size and Decision Role*, in THE JURY: ITS ROLE IN AMERICAN SOCIETY 73, 74-77 (Rita J. Simon, ed., 1980); see, Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 34 (1993) (“I would remind you that efficiency, although it is a value, is not the only value that we expect out of our government. In fact, the Framers deliberately constructed a system that would not be completely efficient. They did not trust government, and the jury is one of the institutions designed to put a check on it.”).

150. Jay E. Grenig, *The Civil Jury in America: Improving the Jury’s Understanding of a Case*, 24 AM. J. TRIAL ADVOC. 93, 93 (2000) [hereinafter *Grenig’s Civil Jury*].

151. *Id.* (citing 4 KEVIN O’MALLEY, JAY GREINIG & WILLIAM LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 100.01 (5th ed. 2000)).

152. *Id.*

153. *Id.*

154. *Id.* at 93-94 (citing A.B.A., CIV. TRIAL PRAC. §§ 3-4 (1998) [hereinafter ABA]; MANUAL FOR COMPLEX LITIG. §§ 22.32, 22.42 (3d ed. 1995) [hereinafter Manual]).

155. *Grenig’s Civil Jury*, *supra*, note 150, at 94 (citing ABA, *supra* note 154, § 3).

B. “PRELIMINARY AND INTERIM INSTRUCTIONS”¹⁵⁶

A court should give the jury preliminary instructions at the beginning of the trial, describing “the jury’s role, explain[ing] trial procedures, set[ting] forth the issues in dispute, and include the relevant basic legal principles.”¹⁵⁷ In addition, courts should consider giving interim instructions in complex or lengthy cases to improve juror understanding of the evidence during the trial.”¹⁵⁸ Properly used, these instructions will assist the jurors in understanding the case.

C. “SPECIAL VERDICT FORMS”¹⁵⁹

“Judges should consider using special verdict forms tailored to the issues in cases of appropriate complexity.”¹⁶⁰ Each juror should be provided with “a copy of the form for use during deliberations.”¹⁶¹ “[W]here it will assist the jurors, . . . a copy of the verdict form [should be given] to each juror during closing arguments and final instructions.”¹⁶²

D. “JUROR QUESTIONS”¹⁶³

Where “it will assist the jury to understand the evidence” or to “determin[e] a fact in issue,” “jurors should be allowed to submit written questions for witnesses.”¹⁶⁴ However, jurors should be cautioned that

156. *Id.*

157. *Id.* at 94 (citing ABA, *supra* note 154, § 15; SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 144 (1988) (urging the use of preliminary instructions in order to provide jurors with a legal framework before they hear the evidence and arguments); William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 583-84 (1990)). See GUNTHER, *supra* note 6, at 70-74 for a discussion of the history of judges instructing juries.

158. *Grenig’s Civil Jury*, *supra*, note 150, at 94 (citing Douglas G. Smith, *supra* note 7, at 479). It may be impossible to draft jury instructions that will satisfy everyone. See, e.g., Kassin & WRIGHTSMAN, *supra* note 157, at 141 (claiming that the attorney for Erin Fleming in a law suit involving the estate of Groucho Marx asked the jury to throw out the verdict because the jury had failed to understand the meaning of “love.”).

159. *Grenig’s Civil Jury*, *supra*, note 150, at 94.

160. *Id.* (citing *Walker v. N. M. & S. Pac. Rail Co.*, 165 U.S. 593 (1897) (approving use of special verdicts); ABA, *supra* note 154, § 20; FORSYTH, *supra* note 6, at 248 (indicating that when trial by jury in civil cases was introduced into Scotland in 1815 it became necessary to frame distinct issues in the shape of questions to be submitted to the jury); Douglas G. Smith, *supra* note 7, at 485); see FED. R. CIV. P. 49.

161. *Grenig’s Civil Jury*, *supra*, note 150, at 94 (citing ABA, *supra* note 154, § 20).

162. *Id.* at 94-95.

163. *Id.* at 95.

164. *Id.* (citing *United States v. Callahan*, 588 F.2d 1078, 1086 (5th Cir. 1979) (stating that there is nothing improper about allowing jurors to ask questions to be answered by witnesses); ABA, *supra* note 154, § 9; GUNTHER, *supra* note 6, at 68 (questioning the accuracy of the phrase jury nullification); 1 O’MALLEY, GRENIG & LEE, *supra* note 11, § 5.18; 4 O’MALLEY, GRENIG & LEE, *supra* note 151, § 101.15; Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28

questions are to be reserved “for important points only.”¹⁶⁵ It should be explained that “the sole purpose of [the] questions is to clarify testimony” and that jurors are not to argue with witnesses.¹⁶⁶ “The court should also [tell] the jurors that [there are some questions that] will not be asked and [that jurors] are to draw no inference” if a question is not asked.¹⁶⁷ It may even “be proper to allow jurors to question the judge concerning the law and legal instructions they are to apply to the facts.”¹⁶⁸

E. “JUROR NOTE TAKING”¹⁶⁹

Jurors should be allowed to take notes for use in their deliberations.¹⁷⁰

Note taking may aid in juror recollection of the evidence and focus the jurors’ attention on the trial proceedings. Prior to permitting jurors to take notes, the court should give an appropriate cautionary instruction to the jury. The court should collect all juror notes at the end of each trial day until the jury retires to deliberate[, and then] all juror notes [should be collected and destroyed] at the end of the trial. . . .¹⁷¹

F. “USE OF MASTERS”¹⁷²

The task of jurors may be made easier in complicated cases by the use of “court-appointed masters” “to provid[e] the jury with simple language interpretations of the facts.”¹⁷³ “The master’s findings [upon the issues submitted] are admissible as evidence of the matters found and may be read

U.C. DAVIS L. REV. 1169, 1185 (1995); Larry Heuer & Steven D. Penrod, *Increasing Juror Participation Through Note Taking and Question Asking*, 79 JUDICATURE 256, 259-61 (1996); Steven D. Penrod & Larry Heuer, *Tweaking Commonsense: Assessing Aids to Jury Decision Making*, 3 PSYCHOL. PUB. POL’Y & L. 259, 271-80 (1997); Douglas G. Smith, *supra* note 7, at 496-97).

165. *Id.* (quoting ABA, *supra* note 154, § 9).

166. *Id.* (citing ABA, *supra* note 154, § 9).

167. *Grenig’s Civil Jury*, *supra*, note 150, at 95 (citing ABA, *supra* note 154, § 9).

168. *Id.* (citing Douglas G. Smith, *supra* note 7, at 498).

169. *Id.*

170. *Id.* (citing ABA, *supra* note 154, § 6; MANUAL, *supra* note 154, §§ 22.42, 41.63; Heuer & Penrod, *Increasing Juror Participation Through Note Taking and Question Asking*, *supra* note 164, at 258-59; Penrod & Heuer, *Tweaking Commonsense: Assessing Aids to Jury Decision Making*, *supra* note 164, at 263-71; Douglas G. Smith, *supra* note 7, at 500; *see also* GUNTHER, *supra* note 6, at 68-69; *see* 1 O’MALLEY, GRENIG & LEE, *supra* note 11, §§ 5.11, 10.03, 10.04; 4 O’MALLEY, GRENIG & LEE, *supra* note 151, §§ 101.13, 101.14).

171. *Id.* at 96 (citing ABA, *supra* note 154, §§ 6, 7).

172. *Id.*

173. *Grenig’s Civil Jury*, *supra*, note 150, at 96 (citing GUNTHER, *supra* note 6, at 215; *see generally* FED. R. CIV. P. 53 (allowing the court to appoint a special master); 4 JAY E. GRENIG, WEST’S FEDERAL FORMS: DISTRICT COURT (CIVIL) §§ 4361, 4381 (3d ed. 2005) (discussing the role of court appointed masters)).

to the jury, subject to the ruling of the court upon any objections.”¹⁷⁴ However, in some cases, “the master’s report may confuse rather than ease the jurors’ job” as the report provides the jurors with more information to be considered.¹⁷⁵

G. “COURTROOM TECHNOLOGY”¹⁷⁶

[Jurors are accustomed to living with technology,] including videotape and computers.¹⁷⁷ All too often, courtroom technology is limited to microphones and, in some cases, videotape.¹⁷⁸ [C]ourts should be receptive to the use of technology in the presentation of evidence.¹⁷⁹ [M]any exhibits, including photographs and documents, such as medical records and x-rays, [can be presented using computer technology] far more effectively than old-fashioned methods.¹⁸⁰ Computer animation aids perception.¹⁸¹ [CD-ROMs can be used to] store and retrieve audio and video information.¹⁸² Technology can aid the analysis and interpretation of facts [as well as] foster visual perception.¹⁸³

H. “JURY SELECTION”¹⁸⁴

Attention should be given to increasing the efficiency and effectiveness of jury voir dire.¹⁸⁵ In the trial of the British soldiers accused of murder, following the so-called “Boston Massacre,” the twelve jurors were picked in one morning, although Boston was

174. *Id.* at 96 (citing FED. R. CIV. P. 53(e)(3)).

175. *Id.* (citing GUNTHER, *supra* note 6, at 215).

176. *Id.*

177. *Id.* (citing MANUAL, *supra* note 154, § 34.1, at 394).

178. *Id.*

179. *Grenig’s Civil Jury*, *supra* note 150, at 96 (citing ABA, *supra* note 154, at 54; MANUAL, *supra* note 154, §§ 34.1-34.4).

180. *Id.* at 96-97.

181. *Id.* at 97.

182. *Id.*

183. *Id.* at 97 (citing MANUAL, *supra* note 154, § 34.1)

184. *Id.*

185. *Grenig’s Civil Jury*, *supra*, note 150, at 97 (citing 1 O’MALLEY, GRENIG & LEE, *supra* note 11, § 4.07, at 129; *see also* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 2482, at 113 (1995) (stating that, unfortunately, counsel too often regard voir dire as an opportunity to obtain a jury sympathetic to their position)); Robert J. Hirsch et al., *Attorney Voir Dire and Arizona’s Jury Reform Package*, ARIZ. ATTY. 24 (Apr. 1996).

then a center of anti-British sentiment.¹⁸⁶ Today, voir dire can take far longer.¹⁸⁷

The trial judge should [be permitted to] conduct an initial voir dire examination [before] questions by counsel for a reasonable period of time.¹⁸⁸ No matter how the voir dire examination is conducted, [its purpose] is not to make an advance favorable portrayal of the case of one side or the other, but rather to ensure the parties a trial by an impartial jury.¹⁸⁹

The search for impartial jurors should not result in the “elimination of all persons who are normally attentive to and knowledgeable about the happenings around them.”¹⁹⁰ Impartiality should not be confused with ignorance. A predisposition against considering the facts, not pretrial information, undermines impartiality.¹⁹¹

I. “JURY INSTRUCTIONS”

[The purpose of c]ivil jury instructions [is] to inform jurors of the legal principles they must apply when deciding a case.¹⁹² Instructions [can] inform jurors of their role in the trial process.¹⁹³ In addition, . . . instructions help jurors focus on their duties and responsibilities, the parties’ factual contentions, and the parties’

186. *Grenig’s Civil Jury*, *supra*, note 150, at 97 (citing Joseph W. Cotchett, *Commencement Address to the Hastings Class of 1999*, HASTINGS COMMUNITY 11 (Winter 1999). That jury acquitted six of the soldiers of murder and convicted two with a sentence to have their hands branded and then be set free.).

187. *Id.* (citing *Hicks v. Mickelson*, 835 F.2d 721, 726 (8th Cir. 1987) (stating that “participation by counsel in voir dire process frequently results in undue expenditure of time in the jury selection process”)).

188. *Id.* (citing *Hicks*, 835 F.2d at 722 (allowing each party only fifteen minutes for voir dire examination of jury panel upheld, declaring that voir dire examination by the court is the most efficient and effective way to assure an impartial jury); ABA, *supra* note 154, § 1).

189. *Id.* (citing 1 O’MALLEY, GREINIG & LEE, *supra* note 11, § 4.07, at 129; *see also* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE: CIVIL* § 2482, at 113 (1995) (stating that unfortunately, counsel too often regard voir dire as an opportunity to obtain a jury sympathetic to their position)); Hirsch et al., *supra* note 185, at 25 (noting that “the biggest abuse of attorney *voir dire* is the attempt by attorneys to obtain a commitment from the jurors”).

190. *Grenig’s Civil Jury*, *supra*, note 150, at 97 (citing ABRAMSON, *supra* note 105, at 21. Abramson goes on to discuss a number of prominent cases in which the parties went to great effort to excluded jurors who had heard of the dispute. *Id.* at 21-22.).

191. *Id.* at 97-98 (citing ABRAMSON, *supra* note 105, at 43).

192. *Id.* at 98.

193. *Id.* (citing David P. Bancroft, *Jury Instructions, Communications, Juror Substitutions and Special/Partial Verdicts: Selected Topics-The Principal Law*, in *THE JURY 1987: TECHNIQUES FOR THE TRIAL LAWYER* 611, 621 (1987)).

theories of the case.¹⁹⁴ Instructions may be given before and during the evidence, as well at the close of evidence.¹⁹⁵

Jurors cannot be expected to render a proper verdict if the jury instructions are unintelligible.¹⁹⁶ The trial judge must instruct the jurors fully and correctly on the applicable law of the case. A party is entitled to a specific instruction on its theory of the case if there is evidence to support it, and if a proper request for the instruction has been made under Rule 51 [of the Federal Rules of Civil Procedure].¹⁹⁷

The jury instructions must be written and organized so that the jurors will understand them.¹⁹⁸ The instructions must guide, direct, and assist the jurors toward an intelligent understanding of the legal and factual issues involved in their search for truth. Although the judge must instruct the jury on the controlling issues, federal courts do not generally favor abstract charges.¹⁹⁹

Despite the importance of providing jurors with understandable jury instructions, numerous studies have discussed the extent to which jurors misunderstand the applicable law.²⁰⁰ The importance

194. *Id.* (citing Bancroft, *supra* note 193, at 621); Michael J. Farrell, *Communications in the Courtroom: Jury Instructions*, 85 W. VA. L. REV. 5, 21-27 (1982).

195. *Grenig's Civil Jury*, *supra*, note 150, at 98.

196. *Id.* (citing MANUAL, *supra* note 154, § 22.431; 1 O'MALLEY, GREINIG & LEE, *supra* note 11, § 7, at 511 (offering an in-depth discussion of techniques for drafting understandable jury instructions). See generally Christopher N. May, *What Do We Do Now?: Helping Juries Apply the Instructions*, 28 LOY. L.A. L. REV. 869 (1998); Elizabeth G. Thornburg, *The Power and the Process: Instructions and the Civil Jury*, 66 FORDHAM L. REV. 1837 (1998)).

197. *Id.* (citing Gray v. Bicknell, 86 F.3d 1472, 1485 (8th Cir. 1996). Compare WRIGHT & MILLER, *supra* note 185, § 2556 (providing that the trial judge must instruct the jury properly on controlling issues in case, even though there has been no request for an instruction or the requested instruction is defective), with Rivera v. Todo Bayamon, 174 F.R.D. 247, 249-50 (D.P.R. 1997) (finding that the defendants' failure to request instructions cautioning jury against making a prejudiced decision as result of the plaintiff's panic attack at end of closing arguments did not make it inappropriate to grant new trial based on panic attack)).

198. *Id.* at 99 (citing Tyler v. Dowell, Inc., 274 F.2d 890, 897 (10th Cir. 1960), *cert. denied*, 363 U.S. 812 (1960) (instructions ought to be stated in logical sequence and in the common speech . . . if they are to serve their traditional and constitutional purpose); ABA, *supra* note 154, § 15 (stating that "instructions should be readily understood by lay persons of average education and sophistication"); see also Michael Higgins, *Not So Plain English*, 84 A.B.A. J. 40 (June 1998)).

199. *Id.* (citing WRIGHT & MILLER, *supra* note 185, § 2556).

200. *Id.* (citing Hope V. Samborn, *Changing the Jury Tool Box*, A.B.A. J. 22 (Dec. 1997) (citing studies); Peter M. Tiersma, *Reforming the Language of Jury Instructions*, 22 HOFSTRA L. REV. 37, 46-52 (1993); Jamison Wilcox, *The Craft of Drafting Plain-Language Jury Instructions: A Study of a Sample Pattern Instruction on Obscenity*, 59 TEMP. L. Q. 1159, 1160-61 (1986); Christopher N. May, *What We Do Now?: Helping Juries Apply the Instructions*, 28 LOY. L.A. L. REV. 869, 872 n.14 (1995); see also Skidmore v. Baltimore & Ohio R.R., 167 F.2d 54, 64 (2d Cir. 1948), *cert. denied*, 335 U.S. 816 (1948) (Frank, J.) (finding often the judge must state rules to

of understandable jury instructions has been stressed by Judge William Schwarzer:

Prevailing practices of instructing juries are often so archaic and unrealistic that even in relatively simple cases what the jurors hear is little more than legal mumbo jumbo to them. Responsibility for the shortcomings of present practices must be shared by lawyers, trial courts, and appellate courts—lawyers for submitting self-serving, excessively long and argumentative instructions, trial judges for adhering to archaic practices out of fear of being reversed, and appellate courts for elevating legal abstractions over juror understanding.²⁰¹

Difficulties with jury instructions can be mitigated in a number of ways:

(1) Jurors can be given pretrial instructions on the substantive law.²⁰²

(2) Jurors can be given notebooks containing court's preliminary instructions; selected admitted exhibits; parties' stipulations; photographs of parties; witnesses; or exhibits; curricula vitae of experts; lists or seating charts identifying attorneys and clients; a short statement of the parties' claims; lists or indices of admitted exhibits; glossaries; chronologies and timelines; and the court's final instructions.²⁰³

(3) Jury instructions can be repeated.²⁰⁴

(4) Jurors can be allowed to take notes on the judge's instructions.²⁰⁵

jury with such niceties that many lawyers do not comprehend them, and it is impossible that jury can)).

201. *Grenig's Civil Jury*, *supra*, note 150, at 99 (quoting William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731, 732 (1981)).

202. *Id.* at 100 (citing John C. Lowe, *Making Complex Litigation Clear*, 33 TRIAL 46, 48 (1997) (instructing jurors after the parties finish presenting evidence is too late to help the jurors know what to look for as the evidence is presented)).

203. *Id.* (citing ABA, *supra* note 154, § 3; *e.g.*, *Consorti v. Armstrong World Indus.*, 72 F.3d 1003, 1008 (2d Cir. 1995); *United States v. Rana*, 944 F.2d 123, 126 (3d Cir. 1991), *cert. denied*, 502 U.S. 1077 (1992); *United States v. Plitt S. Theaters, Inc.*, 671 F. Supp. 1095, 1096 (W.D.N.C. 1987); *see also* MANUAL, *supra* note 154, §§ 22.32, 22.42); HOWARD ROSS CABOT & CHRISTOPHER S. COLEMAN, HEY, CALIFORNIA, LISTEN UP, CALIFORNIA LAWYER 23 (July 1999)).

204. *Grenig's Civil Jury*, *supra*, note 150, at 100.

205. *Id.* (citing Lowe, *supra* note 202, at 49 (stating that jurors should be permitted to take notes on court's preliminary jury instructions); ABA, *supra* note 154, § 6; MANUAL, *supra* note 154, § 22.42; Heuer & Penrod, *Increasing Juror Participation in Trials Through Note Taking and*

- (5) Jurors can be given written copies of the jury instructions.²⁰⁶
- (6) Judges can be permitted to answer jurors' questions about the instructions.²⁰⁷
- (7) Jury instructions can be written to simplify the language and increase jurors' understanding of the law.²⁰⁸
- (8) The instructions should inform the jury of how the law applies to the particular case, instead of merely reciting the applicable statute.²⁰⁹
- (9) Instructions can be given before closing arguments, while the judge has the jurors' attention and counsel can use the instructions in their closing arguments.²¹⁰

1. "*Written Copies of Instructions for Jurors*"²¹¹

Jurors [could] be given written copies of their instructions, as long as the judge instructs the jury that they must consider the written instructions in their entirety.²¹²

Question Asking, *supra* note 164, at 261; J. Alexander. Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 84-85 (1990)).

206. *Id.* (citing *United States v. Calabrese*, 645 F.2d 1379, 1388 (10th Cir. 1981), *cert. denied*, 451 U.S. 1018, and *cert. denied*, 454 U.S. 831 (1981) (giving jury a copy of instructions is desirable in complex cases, but practice is within sound discretion of trial judge); *United States v. Standard Oil Co.*, 316 F.2d 884, 896 (7th Cir. 1963) (stating that, as litigation grows increasingly complex, jury often may be helped in deliberations by having copy of the instructions before it); *Copeland v. United States*, 152 F.2d 769, 770 (D.C. Cir. 1945) (stating that it is frequently desirable for instructions that have been reduced to writing to be read and handed over to the jury); ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS: CIVIL CASES, xi (1990) (stating that the experience of increasing number of district judges in the submission of written instructions to jury has been good and practice is recommended); *Lowe*, *supra* note 202, at 49 (stating that jurors need instructions in writing to facilitate their deliberations); *MANUAL*, *supra* note 154, § 22.434 (stating that "[m]ost judges provide jurors with copies of the instructions for use during deliberations"); *see also* *ABA*, *supra* note 154, § 15. *But see* *MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT* 1, 16 (1998) (general instructions given at outset of trial should not be sent in writing to jury room). *See generally Propriety and Prejudicial Effect of Sending Written Instructions with Retiring Jury in Civil Case*, 91 A.L.R. Fed. 3d 336 (1979); *Sonja Larson, Taking and Use of Trial Notes by Jury*, 36 A.L.R. Fed. 5th 255 (1996)). *See, e.g., Doane v. Jacobson*, 244 F.2d 710, 711 (1st Cir. 1957) (nothing in Federal Rules of Civil Procedure forbids submitting written copy of instructions to jury)).

207. *Grenig's Civil Jury*, *supra* note 150, at 101.

208. *Id.* (citing *ABA*, *supra* note 154, § 15; *CAROLYN G. ROBBINS, JURY INSTRUCTIONS: PLAINER IS BETTER*, 32 TRIAL 32, (Apr. 1996); *Tiersma*, *supra* note 200, at 72-73; *Wilcox*, *supra* note 200, at 1161; *cf. United States v. Russo*, 110 F.3d 948, 953-54 (2d Cir. 1997) (holding, in criminal case, that the decision whether to submit written instructions to jury properly lies within the discretion of the district court)).

209. *Id.*

210. *Id.* (citing FED. R. CIV. P. 51 advisory committee's notes to 1987 amendment).

211. *Id.*

212. *Id.* (citing *ABA*, *supra* note 154, § 9; *Douglas G. Smith*, *supra* note 7, at 476-77; *Haupt v. United States*, 330 U.S. 631, 643 (1947) (holding that submitting a copy of the charge to the

Judges follow different practices with respect to jury instructions.²¹³ Some judges send a full set of written instructions into the jury room after they have been read in open court.²¹⁴ Other judges also provide jurors with written copies of the instructions to follow as they listen to the judge give the instructions.²¹⁵ [In addition, s]ome courts have experimented by providing jurors with a tape recording of their instructions for use during deliberations.²¹⁶

The Ninth Circuit has approved the practice of providing written copies of instructions.²¹⁷ [While condemning the practice, the Fifth Circuit will find no error absent prejudice] in providing jurors with written copies of the instructions. . . .²¹⁸ [And, t]he Eleventh Circuit has approved sending a tape-recorded copy of the charge into the jury room.²¹⁹

2. “Rule 51 of the Federal Rules of Civil Procedure”²²⁰

Rule 51 of the Federal Rules of Civil Procedure describes the methods for requesting, giving, and objecting to jury instructions

jury did not constitute “unfairness or irregularity”); *see* *Hopt v. People*, 104 U.S. 631 (1881) (suggesting the approval of a Utah statute requiring the charge to be reduced to writing); *see also* KASSIN & LAWRENCE, *supra* note 157, at 146-47 (describing studies showing that jurors who had access to written material understood the legal terms and substantive law better than those not provided with that material); Schwarzer, *Reforming Jury Trials*, *supra* note 157, at 585-87 (availability of charge in jury room is almost always certain to assist jury in arriving at an informed verdict while reducing need to send questions to the judge and have parts of the charge reread). *Compare* *United States v. McCall*, 592 F.2d 1066, 1068 (9th Cir.) *cert. denied*, 441 U.S. 936 (1979) (approving the practice of providing written copies of instructions), *with* *United States v. Perez*, 648 F.2d 219, 222 (5th Cir.) *cert. denied*, 454 U.S. 970 (1981) (condemning the practice of providing written copies of instructions while finding no error absent prejudice in providing the jurors with written copies of instructions)).

213. *Grenig’s Civil Jury*, *supra* note 150, at 102.

214. *Id.* (citing 8TH CIR. CIVIL JURY INSTR. XI (1998)).

215. *Id.*; 1 O’MALLEY, GRENIG & LEE, *supra* note 11, § 7:6; *see* Schwarzer, *Reforming Jury Trials*, *supra* note 157 at, 584-85.

216. *Grenig’s Civil Jury*, *supra* note 150, at 102 (citing MANUAL, *supra* note 154, § 22.434, at 153 n.427); *see* *United States v. Watson*, 669 F.2d 1374, 1384-86 (11th Cir. 1982)).

217. *Grenig’s Civil Jury*, *supra* note 150, at 102 (citing *McKenzie v. Rislely*, 842 F.2d 1525, 1530 n.3 (9th Cir. 1988) (en banc), *cert. denied sub nom.* *McKenzie v. McCormick*, 488 U.S. 901 (1988)).

218. *Id.* (citing *United States v. Perez*, 648 F.2d 219, 222 (5th Cir. 1981), *cert. denied*, 454 U.S. 1055 (1981)).

219. *Id.* (citing *United States v. Henes*, 729 F.2d 1302, 1316 n. 13 (11th Cir. 1984), *cert. denied sub nom.* *Caldwell v. United States*, 469 U.S. 1110 (1985); *United States v. Watson*, 669 F.2d 1374, 1384-86 (11th Cir. 1982)).

220. *Id.*

in civil actions.²²¹ The trial judge must instruct the jury properly on the controlling issues in the case, even though there has been no request for an instruction or the requested instruction is defective.²²²

Rule 51 provides as follows:

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.²²³

The particular form of a jury instruction generally is within the trial court's discretion.²²⁴ No [particular] form [need be used] so long as the charge as a whole conveys [to the jury] a clear and correct understanding of the applicable law²²⁵ without confusing or misleading the jury.²²⁶

Care should be taken to ensure that instructions correctly state the law in a form that will be understandable to the jury.²²⁷

The court should direct counsel to submit proposed instructions at the final pretrial conference.²²⁸ Before delivering any instructions

221. *Id.* (citing WRIGHT & MILLER, *supra* note 185, §§ 2551-58; 4 MARY B. COOK & JAY E. GREINIG, *supra* note 173, §§ 4221-4260); 3B JAY E. GREINIG, WEST'S FEDERAL FORMS—DISTRICT COURTS CIVIL ch. 34 (2016).

222. *Grenig's Civil Jury*, *supra* note 150, at 102; 3B JAY E. GREINIG, WEST'S FEDERAL FORMS—DISTRICT COURTS CIVIL § 34:6 (2016).

223. *Grenig's Civil Jury*, *supra* note 150, at 102 (quoting FED. R. CIV. P. 51).

224. *Id.* (citing *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 419-20 (2d Cir. 1999); *Arkwright Mut. Ins. Co. v. Grwinner Oil, Inc.*, 125 F.3d 1176, 1180 (8th Cir. 1997); *Gillming v. Simmons Indus.*, 91 F.3d 1168, 1171-72 (8th Cir. 1996); *Sengoku Works, Ltd. v. RMC Int'l, Ltd.*, 96 F.3d 1217, 1221-22 (9th Cir. 1996), *cert. denied*, 521 U.S. 1103 (1997); *Hoechst Celanese Corp. v. BP Chemicals Ltd.*, 78 F.3d 1575, 1581 (Fed. Cir. 1996), *cert. denied*, 519 U.S. 911 (1996)).

225. *Id.* (citing *Image Tech. Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1213 (9th Cir. 1997); *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1543 (11th Cir. 1996)).

226. *Id.* at 102-03 (citing *Image Tech. Services, Inc.*, 125 F.3d at 1213; *Toroise v. Community Bank of Homestead*, 116 F.3d 860, 868 (11th Cir. 1997); U.S. District Court for the Northern District of California, Guidelines for Preparation of jury Instructions (instructions must be written and organized so they will be understood by jurors)).

227. *Grenig's Civil Jury*, *supra* note 150, at 106.

to the jury, the judge should inform counsel of the content of the instructions the judge intends to deliver. . . . [Counsel should be provided with a copy of the instructions, permitted to argue] the proposed instructions, [and] make a record of any objections.²²⁹ Where counsel cannot agree on instructions, . . . each party [should be required] to submit proposed instructions and objections to the opponent's instructions.²³⁰

3. "Crafting Jury Instructions"²³¹

The jury should be instructed "on every material issue."²³² Although the instructions need not be phrased in terms of the specific facts of the particular case, . . . courts have shown a preference for instructions that relate the law to the evidence presented by the parties."²³³ Substantive instructions should be tailored to the case, avoiding "generalized pattern instructions."²³⁴ "Instructions phrased in the language of appellate opinions should be explained with reference to the facts and parties in the case."²³⁵ "[I]t may be helpful to use illustrations familiar to the jurors."²³⁶

In drafting jury instructions, the following should be considered:

- (1) Instructions should be accurate statements of the law.
- (2) Instructions should be as brief and concise as practicable.
- (3) The average [high school student] should be able to understand the instructions.²³⁷
- (4) Each instruction should be objective and free of argument.
- (5) Whenever possible, instructions should use the parties' names rather than legal terms, such as plaintiff, defendant, bailee, licensor, assignee, or franchisee.
- (6) The use of technical or obscure legal phrases should be avoided.²³⁸

228. *Id.* at 103 (citing MANUAL, *supra* note 154, § 22.431).

229. *Id.* (citing ABA, *supra* note 154, § 15).

230. *Id.* (citing ABA, *supra* note 154, § 15).

231. *Id.*

232. *Id.* (citing *Gillentine v. McKeanad*, 426 F.2d 717, 724 n. 24 (1st Cir. 1970)).

233. *Grenig's Civil Jury*, *supra* note 150, at 103-04 (citing *Turlington v. Phillips Petroleum Co.*, 795 F.2d 434, 443 (5th Cir. 1986)).

234. *Id.* at 104 (citing MANUAL, *supra* note 154, § 22.431).

235. *Id.* (citing MANUAL, *supra* note 154, § 22.431).

236. *Id.* (citing MANUAL, *supra* note 154, § 22.431).

237. *Id.* (citing ABA, *supra* note 154, § 15(e)(i)).

238. *Id.* (citing *WRIGHT & MILLER*, *supra* note 185, § 2556; *Nelson v. Green Ford, Inc.*, 788 F.2d 205, 209 (4th Cir. 1986); *Hagelthorn v. Kenncott Corp.*, 710 F.2d 76, 85 (2d Cir. 1983)).

(7) The instructions should be arranged and delivered in a logical and coherent fashion.²³⁹

(8) Jurors should not receive instructions on issues they do not need to decide.²⁴⁰

It is insufficient for an instruction to merely repeat statutory language unless the meaning and application of the statutory language to the facts are clear without any explanation.²⁴¹ Additionally, taking quotations from appellate court opinions that were never intended to be used as jury instructions and making these part of the instructions is generally not helpful.²⁴² One court has explained:

It has always been the law governing jury trials in federal courts that “no court is bound to give instructions in the form and language in which they are asked. If those given sufficiently cover the case and are correct, the judgment will not be disturbed, whatever those may have been which were refused.” . . . Indeed, we know as a practical matter that most requested instructions are colored with the advocate’s view of his client’s cause, and cannot fairly be given in the requested language. . . . “Once the judge has made an accurate and correct charge, the extent of its amplifications must rest largely in his discretion.”

But even so, jury trials in federal courts are conducted as at common law when the Constitution was adopted, under which the judge is the governor of the trial with the inescapable duty to fully and correctly instruct the jury on the applicable law of the case, and to guide, direct and assist them toward an intelligent understanding of the legal and factual issues involved in their search for the truth. . . . This duty is not fulfilled by mere abstract statements of the factual issues and the law applicable thereto. The instructions ought to be stated in logical sequence and in the

239. *Grenig’s Civil Jury*, *supra* note 150, at 104 (citing *Texas & Pac. Ry. v. Jones*, 298 F.2d 188, 191 (5th Cir. 1962)).

240. *Id.*

241. *Id.* (citing *WRIGHT & MILLER*, *supra* note 185, § 2556; *Structural Rubber Prods. Co. v. Park Rubber Co.*, 749 F.2d 707, 723 (Fed. Cir. 1984)).

242. *Id.* at 104-05 (citing *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 468 n. 1 (10th Cir. 1990), *cert. denied*, 498 U.S. 898 (1992); *Turlington v. Phillips Petroleum Co.*, 795 F.2d 434, 444 (5th Cir. 1986); *Kent v. Smith*, 404 F.2d 241, 244 (2d Cir. 1968)); *Justice v. Dennis*, 793 F.2d 573, 576 (4th Cir. 1986).

common speech of man if they are to serve their traditional and constitutional purpose in our system of jurisprudence.²⁴³

“Local rules should be consulted with respect to the required format for instructions.”²⁴⁴ “For example, [proposed jury instructions should comply with] the following requirements”:

(1) The instructions “must be in plain language, concise, and free of argument.”²⁴⁵ (2) Each instruction should “cover only one subject that shall be indicated on a caption.”²⁴⁶ (3) Each instruction should “disclose the identity of the submitting party.”²⁴⁷ (4) Each instruction should “state each instruction on a separate page.”²⁴⁸ (5) Each instruction should “set forth any citations to authorities supporting it.”²⁴⁹ (6) “Pages must be consecutively numbered.”²⁵⁰

4. “Using Model Instructions”

Model jury instructions can be helpful in preparing the charg[ing documents].²⁵¹ [However, jury instructions should not be used as] a substitute for the individual research and drafting that may be required in a particular case.²⁵² Adaptation or modification may be necessary to fit a particular case or changing laws.²⁵³

Very few pattern instructions are intended to be copied verbatim. . . . [Instead, t]hey are principally intended as an aid to the preparation of an appropriate instruction in the particular case. What is sauce for the goose is not always sauce for the gander. Each case has its own peculiar facts, and formalized instructions must be tailored to the facts and issues.²⁵⁴

In drafting pattern instructions, the committees have attempted “to use simple, commonplace words while accurately stating the law.”²⁵⁵

243. *Grenig’s Civil Jury*, *supra* note 150, at 105 (citing *Tyler v. Dowell, Inc.*, 274 F.2d 890, 897 (10th Cir. 1960), *cert. denied*, 363 U.S. 812 (1960) (citations omitted)).

244. *Id.* (quoting N.D. Cal. R. 245-3).

245. *Id.* (quoting N.D. Cal. R. 245-3).

246. *Id.* (quoting N.D. Cal. R. 245-3).

247. *Id.* (quoting N.D. Cal. R. 245-3).

248. *Id.* (quoting N.D. Cal. R. 245-3).

249. *Grenig’s Civil Jury*, *supra* note 150, at 105 (quoting N.D. Cal. R. 245-3).

250. *Id.* (quoting N.D. Cal. R. 245-3).

251. *Id.* at 106.

252. *Id.*

253. *Id.* (citing *Bancroft*, *supra* note 193, at 621).

254. *Id.* (citing Edward J. DEVITT, TEN PRACTICAL SUGGESTIONS ABOUT FEDERAL JURY INSTRUCTIONS, 38 F. R. D. 75, 77 (D. Colo. 1965)).

255. *Grenig’s Civil Jury*, *supra* note 150, at 106.

Unnecessary words have not been used. “The instructions generally use short sentences and try to avoid negative forms.”²⁵⁶ “Where appropriate, definitions of terms used” are given.²⁵⁷

Because language that is meaningful to those with a legal education is often lost upon others, [the] verbatim adoption of language from appellate opinions to formulate instructions should generally be avoided. Every attempt should be made to craft the instructions in language [non-lawyers] will readily comprehend. Short sentences and the active voice should be used wherever possible; unnecessary words or phrases should be omitted.²⁵⁸

5. “*Instructions at the Beginning, During, and at the Conclusion of Trial*”²⁵⁹

Developments during the trial may create the need for additional instructions. A judge should consider giving instructions at any point in the trial where they might be helpful to the jury. . . .²⁶⁰ These instructions may include an explanation of applicable legal principles that may be helpful when given at the time the issue arises and instructions limiting the purpose for which evidence is admitted.²⁶¹

Final instructions are generally submitted to the court in connection with the final pretrial conference, [and may be given] before or after closing arguments, or [both].²⁶² Most judges provide jurors with copies of the instructions for use during deliberations.²⁶³ Some judges record the oral charge and send the tape into the jury room for reference.²⁶⁴

IV. CONCLUSION

During the 1970s, attacks on the civil jury became commonplace.²⁶⁵ [F]ormer Chief Justice Warren Burger

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* (citing MANUAL, *supra* note 154, § 22.433, at 152) (referencing the importance in using interim instructions to focus jury on what it must decide and how decisions are reached)).

261. *Grenig’s Civil Jury*, *supra* note 150, at 106-07 (citing MANUAL, *supra* note 154, § 22.433, at 152).

262. *Id.* at 107 (citing FED. R. CIV. P. 51(a)).

263. *Id.* (citing MANUAL, *supra* note 154, § 22.434, at 153).

264. *Id.* (citing MANUAL, *supra* note 154, § 22.434, at 154).

265. *Id.* (citing GUINTEHER, *supra* note 6, at xiv).

[expressed] “doubts about the capabilities of juries.”²⁶⁶ He urged that there be stringent limitations in the access to our courts and to juries.²⁶⁷ More recently, arbitration clauses imposed by credit card companies, health care providers, and investment advisors have also limited access to trial by jury.²⁶⁸

While the jury system may not be the essence of efficiency, there does not appear to be a more satisfactory alternative. The jury system is a cornerstone of American freedom and an important safeguard to a free society.²⁶⁹ [It] is a direct consequence of the sovereignty of the people and a bulwark of protection for the individual.²⁷⁰ The jury is an essential part of Abraham Lincoln’s “government of the people, by the people, for the people.”²⁷¹ Not only is a trial before a jury of one’s peers [a primary technique] for finding the truth [in our democracy],²⁷² the jury also serves to communicate the spirit of the law to the minds of all the citizens and the spirit of the people to the governors.²⁷³

The importance of the jury system has been aptly summarized by G.K. Chesterton:²⁷⁴

Our [civilization] has decided, and very justly decided that determining the guilt or innocence of men is a thing too important

266. *Id.* (quoting *Duncan*, 391 U.S. at 156-57 (citing JEROME FRANK, COURTS ON TRIAL (1949) (describing juries as the premier example of irrationality in the law)); see WARREN C. BURGER, TESTIMONIAL DINNER FOR SUPREME COURT CHIEF JUSTICE BELL (Nov. 14, 1970); ROSS, *supra* note 34, at 5; see also GUNTHER, *supra* note 6, at xiv.

267. *Grenig’s Civil Jury*, *supra* note 150, at 107 (citing GUNTHER, *supra* note 6, at xiv); *Duncan*, 391 U.S. at 156-57.

268. *Grenig’s Civil Jury*, *supra* note 150, at 107 (citing JAY E. GREINIG, ALTERNATIVE DISPUTE RESOLUTION §§ 10.41, 15.50, 15.72, 16.10-16.15 (2d ed. 1997)). Compare *Badie v. Bank of America*, 79 Cal.Rptr. 273 (1998) (failure of bank customers to close or stop using credit accounts immediately after receiving “bill stuffer” containing arbitration provision did not waive right to jury trial), with *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (stating that contract terms shipped with a computer in box are binding on a customer if not returned within the allowed time).

269. *Id.* at 107-08 (citing *National Health to Usurp No-Fault?*, 7 TRIAL 53 (Mar./Apr. 1971) (quoting retired Justice Tom C. Clark) [hereinafter Clark]).

270. *Id.* at 108 (citing ROSS, *supra* note 34, at 18; *National Health to Usurp No-Fault?*, 7 TRIAL 53 (Mar./Apr. 1971)).

271. *Id.* (quoting Abraham Lincoln, *Address Delivered at the Dedication of the Cemetery at Gettysburg*, (Nov. 19, 1863), <http://www.d.umn.edu/~rmaclin/gettysburg-address.html>)).

272. *Id.* (citing Irving R. Kaufman, *A Fair Jury—The Essence of Justice*, 51 JUDICATURE 88, 92 (1967)).

273. *Id.* (citing ROSS, *supra* note 34, at 18).

274. A noted English writer, poet, philosopher, dramatist, journalist, orator, lay theologian, biographer, and literary and art critic. See Dale Ahlquist, *Who is this Guy and Why Haven’t I Heard of Him?*, THE AMERICAN CHESTERTON SOCIETY, <http://www.chesterton.org/who-is-this-guy/> (last visited Mar. 19, 2107).

to be trusted to trained men. If it wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things I felt in a jury box. When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done that is really serious, it collects twelve of the ordinary men standing about. The same thing was done, if I remember right, by the Founder of Christianity.²⁷⁵

Juries may not always get it “right,” but the right to a jury trial is a central part of our system of self-government. Maintenance of the jury is of such importance and occupies so firm a place in our history and jurisprudence, any curtailment of the right to a jury trial should be scrutinized with extreme care.²⁷⁶

275. *Grenig’s Civil Jury*, *supra* note 150, at 108 (quoting Gilbert K. Chesterton, *The Twelve Men*, DAILY NEWS (London), reprinted in TREMENDOUS TRIFLES 86-87 (1909)). This document is available at <http://www.gutenberg.org/files/8092/8092-h/8092-h.htm>.

276. *Grenig’s Civil Jury*, *supra* note 150, at 108 (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)).